February 1994

Question 4

Fidelity Development Company (Fidelity) recently opened a large fifteen-story office building. Since it opened, brick masonry on the building has developed cracks, and some bricks have fallen to the sidewalk below. The defective masonry poses a danger to pedestrians. The cause of the cracks was negligence by brick masons in preparing the mortar. The rest of the building is structurally sound, although it is very unsightly.

Fidelity had contracted with Bildco to build the multimillion-dollar building. Bildco was the general contractor which, using due care in its selection process, contracted with Mason, an independent entity, to do the masonry work. The preparation of the mortar and the laying of the bricks was done by Mason's employees, who were using Mason's equipment. Mason also employed a head mason who told the other employees what to do. Bildco had a project supervisor who was constantly on the site and who monitored the masonry work. When Bildco's supervisor made suggestions concerning such things as bricklaying procedures to Mason's head mason, those suggestions were routinely followed.

It will cost $300,000 to repair the masonry so that the bricks will not fall and another $200,000 to remedy the unsightliness.

On what theory or theories, if any, may Fidelity sue Bildco and Mason and what damages should it recover from each? Discuss.

ANSWER A TO QUESTION 4

1. Fidelity v. Bildco

a. Breach of Contract. Fidelity (F) has a contract with Bildco (B) pursuant to which B promised to build the multimillion dollar building, presumably in return for F's promise to pay "multimillions" of dollars. The facts do not suggest any contract formation problems, that is, there appears to be offer and acceptance, consideration on both sides, and F appears to be fully ready to perform and indeed may already have paid the contract price. Moreover, where one party's performance takes longer than the other's, the longer performance, in the absence of contrary provisions, ordinarily is due first. Thus B owes (or owed) a duty of performance.

The Breach. In a contract between owner (F) and builder (B), the builder owes a duty of substantially complete performance. Although the terms of the contract are not stated, F has a strong argument that B breached this duty, because the building, in addition to being unsightly, poses a danger from falling bricks to pedestrians. Although B may argue that Mason (M) rather than B caused the defect, F has a sound argument that fault is irrelevant to F's contract claim. Therefore, B has breached and F is entitled to damages. (Bildco may have a separate claim against M per breach of the masonry contract, contractual indemnity [if that contract so provides], or negligence, but the issue here is F's claim vs. B.)

Damages. Where a builder breaches a construction contract, the owner's damages may be either cost of repair or diminution in-value of the building. Cost of repair is reasonable unless the cost would be unreasonably high compared to the diminution in value. Cost of repair may be derived, for example, where it would involve ripping out pipes or other infrastructure but the installed pipes, although nonconforming, are essentially sound. Here, cost of repair appears to be the proper remedy. The total cost ($300k to prevent falling, $200k to repair unsightliness) appears relatively small compared to the overall cost of the building, which we are told is "multimillions."

Repair of Bricks. At a minimum, F should be able to recover the $300k to prevent bricks from falling; because that amount is slight compared to diminution in value of the building. If a brick were to fall on a pedestrian, F would face enormous tort liability, well in excess of $300k. The value of the building arguably is diminished now by that risk, even though no pedestrian has been hit.

Unsightliness. F faced a heavier burden as to the $200k for unsightliness. If that is not required, the building would still be structurally sound. B may be able to argue either that the repair is unnecessary or that F should only recover diminution in value if that is lower. We don't know what diminution in value is, but in light of the size (Large, 15-story) and overall cost, the diminution may exceed cost of repair. Therefore, F is entitled to cost of repair.

Diminution in Value. F probably cannot recover diminution in value if it exceeds cost of repair. F has a duty to mitigate danger and may fully do so for $500k.

Consequential Damages. The facts do not disclose any, but if reasonably foreseeable under Beavendale recoverable.

b. Negligence. In order to prevail on negligence, F must show that B (1) owed F a duty of care, (2) breached that duty, (3) the breach actually (in fact) and proximately (legally) caused danger, and (4) the amount of damages. F may attempt to avert both direct primary liability against B for its own actions and respondent superior liability based on M's conduct.

Respondeat Superior for M's Conduct. Respondeat superior is typically available to hold an employer liable when an employee breaches his duty of care while acting in the scope of his employment. The theory is not available, however, when the negligent person is an independent contractor, unless the defendant had an absolute duty to make safe (such as an innkeeper or common carrier). Here, there does not appear to be such a duty on the part of B, and therefore B probably cannot be liable for M's conduct on a respondeat superior theory.

B's Direct Liability. Notwithstanding the foregoing, B can be liable for its own actions if F was reasonably within the care of risk. Here, B owed a general duty of care to F, because B was building for F, and F was clearly within the care of persons who would be injured.

B's Selection of M. B owed a duty to F to select subcontractors with due care. The facts state that B did use due care. Therefore, no liability based on selection.

B's Supervision of M. A party who undertakes to act must do so with due care. A party who supervises must do so with due care. Here, B was supervising M though B's superior, who monitored and made suggestions covering the masonry work. The facts state that the cause of the cracks was negligence by M's masons in preparing the mortar. It is unclear whether B's supervisor, for whose conduct B would be responsible through respondeat superior, suggested the procedure in question or failed to notice that it was improper. In either event, there is at least a fact question as to whether B negligently supervised.

Causation. F must show cause in fact and proximate cause. B will argue M's masons caused the harm. This is a fact question, as discussed above, because it is not clear whether B or M was responsible. (See below.)

Danger. The measure of damages is to make F whole. Here, it would appear the cost of repair (both elements -- $500,000) is reasonably ascertainable and reasonable. Normally tort and contract damages would not include lost profits when readily provable. Here the building has no past history, therefore lost rentals from delay would be hard to prove.

2. Fidelity v. Mason (M)

a. Negligence. The same elements as above apply.

Duty to F. As an on-site subcontractor working on a building for F, it appears that F, under either the Cardozo (reasonably foreseeable) or Andrews view, was within the zone of risk from negligent brick laying.

Break. The facts state M's mason's negligently caused the faulty bricks. M may argue it followed B's "suggestions," but M still had an independent duty to act

reasonably.

Correction. See above. If two concurrent courses (B's supervision, M's mixing), both B and M liable if their conduct was a substantial factor. If alternate courses, the burden shifts to B and M; each must show freedom from negligence. Here, M was negligent.

Damages. Same as B.

Joint/Several. If B and M are joint tort-feasors because each was negligent, they are both fully liable to F for the full amount. They may seek contractual indemnity from each other or contribution (based on equal shares [50/50 here] or relative fault, depending on the jurisdiction). Here, M seems relatively more at fault, since it should have followed the procedures of a reasonable mason (and it, not B, was the mason).

b. Third Party Beneficiary. F may be able to argue it was the intended third party beneficiary (TPB) of the masonry contract between M and B. A TPB relationship arises where the contract implies that the benefit of one party's (the promisors) performance will run to a person not a party to the contract (here, F). In order to be a TPB, the person claiming must be clearly ascertainable from the contract, i.e., must be an intended and not merely incidental beneficiary.

Here, M's promise to do masonry work clearly is for the ultimate benefit of F, whose existence is obvious from the F/B contract. Therefore as TPB, F can sue M for breach of the masonry contract. Here, it appears that M breached by not providing bricks reasonably fit for use. Therefore, B has an action for reasonable cost of completion, and F is a TPB and may assert that claim. The danger analysis would be contract danger, as discussed above, although the cost of repair may be quite high in relation to the total amount of the masonry contract.

3. Other Theories

It does not appear that F has a claim based on breach if an express or implied warranty in sale of goods. Although bricks generally are goods, the overall transaction involved a service--building a building. Nor does that qualify as ultrahazardous, so there is no strict liability.

2. Fidelity v. Mason (M)

a. Negligence. The same elements as above apply.

Duty to F. As an on-site subcontractor working on a building for F, it appears that F, under either the Cardozo (reasonably foreseeable) or Andrews view, was within the zone of risk from negligent brick laying.

Break. The facts state M's mason's negligently caused the faulty bricks. M may argue it followed B's "suggestions," but M still had an independent duty to act reasonably.

Correction. See above. If two concurrent courses (B's supervision, M's mixing), both B and M liable if their conduct was a substantial factor. If alternate courses, the burden shifts to B and M; each must show freedom from negligence. Here, M was negligent.

Damages. Same as B.

Joint/Several. If B and M are joint tort-feasors because each was negligent, they are both fully liable to F for the full amount. They may seek contractual indemnity from each other or contribution (based on equal shares [50/50 here] or relative fault, depending on the jurisdiction). Here, M seems relatively more at fault, since it should have followed the procedures of a reasonable mason (and it, not B, was the mason).

b. Third Party Beneficiary. F may be able to argue it was the intended third party beneficiary (TPB) of the masonry contract between M and B. A TPB relationship arises where the contract implies that the benefit of one party's (the promisors) performance will run to a person not a party to the contract (here, F). In order to be a TPB, the person claiming must be clearly ascertainable from the contract, i.e., must be an intended and not merely incidental beneficiary.

Here, M's promise to do masonry work clearly is for the ultimate benefit of F, whose existence is obvious from the F/B contract. Therefore as TPB, F can sue M for breach of the masonry contract. Here, it appears that M breached by not providing bricks reasonably fit for use. Therefore, B has an action for reasonable cost of completion, and F is a TPB and may assert that claim. The danger analysis would be contract danger, as discussed above, although the cost of repair may be quite high in relation to the total amount of the masonry contract.

3. Other Theories

It does not appear that F has a claim based on breach if an express or implied warranty in sale of goods. Although bricks generally are goods, the overall transaction involved a service--building a building. Nor does that qualify as ultrahazardous, so there is no strict liability.

ANSWER B TO QUESTION 4

Fidelity may sue Mason for breach of contract. The first issue that arises is lack of privity. There is no contract between Fidelity and Mason. Mason's contract is with Bildco. The general rule is that one may not sue for breach of a contract to which there is not a party. In this case, however, Fidelity is an identified, intended third-party beneficiary of the Mason-Bildco contract. Mason was a subcontractor on the job and presumably knew that Bildco, the general contractor, had contracted to complete the building for Fidelity. As third-party beneficiary in this situation Fidelity would be able to hold Mason responsible for performance of its contract.

Fidelity should be able to recover as damages from Mason the $300,000 cost of repairing the masonry. In addition, Fidelity may be able to recover damages for the unsightliness as consequential damages, assuming the unsightliness is caused entirely by the cracks in the masonry and the fallen brick. The rule in Hadley. Baxendale is that a nonbreaching party may recover as damages caused by the other party's breach any damages that flow foreseeably from the breach. The connection between the breach and the damages may not be too tenuous. In this case, a subcontractor such as Mason could undoubtedly expect that a breach of building contract would cause damages such as this.

Fidelity could sue Mason for negligence. Mason owed Fidelity a duty of reasonable care in its work. Fidelity was a foreseeable plaintiff because the building was Fidelity's property. The facts state that Mason was negligent. Mason's negligence was the cause in fact and proximate cause of the damages to the Fidelity's property. Fidelity is entitled to damages proximately caused by Mason.

Fidelity can sue Bildco on a theory of vicarious liability. Mason was negligent in its work. The general rule is that a master can be sued for the torts of its servant if the tortious act was committed in the scope of the servant's employment. Here the masonry work was clearly within the scope of Mason's employment.

The issue then becomes whether Mason was an employee or independent contractor. If Mason is an independent contractor, Bildco will not be liable on the basis of vicarious liability. The determinative element is control. An independent contractor is not controlled by the employer and is therefore not an employee. Bildco would argue that Mason is an independent contractor because it is a separate entity, had its own equipment and employees and provided independent supervision. Mason employed a head mason who directed the other employees.

Fidelity could argue that Bildco's project supervisor controlled the Mason employees because he was constantly on the site and made suggestions concerning bricklaying which the head mason regularly followed. The fact that these were suggestions and not direct orders, however, indicates Fidelity's position. Due to the fact that Mason was independent in most respects from Bildco, and controlled its own actions, a court would most likely not find Bildco vicariously liable for Mason's actions.

Bildco could be sued for direct negligence. Even though Bildco exercised due care in the selection of Mason, Bildco's supervision of mason was arguably negligent. The issue would be whether Bildco's breach of its duty to supervise Mason's work was an actual and proximate cause of the damage to Fidelity's property. The rule is that unless the damages are actually and proximately caused by the tort-feasor's negligence, there can be no recovery.

Here, Mason's work constitutes an additional cause of the damage. It cannot be determined whether Mason or Bildco were individually responsible or in what proportion each was responsible. In cases like this, the proper procedure would be to shift the burden of proof to Bildco and Mason and let them sort out their respective proportions of liability. Each would be liable for the full amount of damages, $500,000.

Fidelity could sue Bildco for breach of contract. An issue that would likely be raised by Bildco is whether the defective masonry work is substantial enough to place Bildco in breach. For there to be a breach, there must be non-performance of a material part of the contract. In this case, the contract was for a multi-million dollar building. If the building cost $100 million dollars and only a small part of the building is affected by the cracked masonry, it is unlikely that this would rise to the level of breach.

If the faulty masonry does not constitute a breach, Fidelity could argue that the masonry part of the contract is severable and recover the contract price in that part of the contract.

Fidelity could recover as a measure of damages from Bildco, the cost of completion of the masonry work, $500,000.

Assuming there was a breach of contract by Bildco Fidelity could recover lost profits as well. The rule is that lost profits can be recovered providing they are not too speculative.

July 1979

QUESTION NO. 14

In 1965 Paul retired and bought a home adjoining a quarry owned by Denco. Denco employs 28 people and its quarrying business is the principal industry in this rural community. Periodically Denco sets off dynamite charges which are necessary to the continued operation of the quarry. The blasting, while a minor annoyance to Paul, did not cause any damage to his property prior to 1976.

In 1972, Paul's legs were injured, and he became disabled; as continuing therapy for his legs, Paul's doctor recommended that Paul have a pool installed. Paul did so, at a cost of $7,000. Paul used the pool daily and swimming remains a necessary part of his program of therapy. The market value of Paul's property before the pool was installed was $80,000; thereafter, until June 1, 1976, it was $86,000.

Blasting on June 1, 1976, caused a series of cracks to appear in the walls of the pool, and the pool could no longer be used. The jurisdiction imposes strict liability for all damage caused by blasting.

The anticipated useful life of the pool was 35 years. The cost of reconstructing the pool today so that it would be as good as new is $10,000, but there is no assurance that future blasting by Denco will not again damage the pool. The value of Paul's property as it now stands with the damaged pool is $75,000. The cost of filling the pool with dirt and landscaping the area would be $1,500.

Discuss the following:

(1) Should an injunction issue in favor of Paul against Denco to stop future blasting?

(2) What damages, if any, could Paul recover if an injunction did not issue'? (3) What damage, if any, could Paul recover if an injunction did issue?

Answer A to Question 14

In determining whether Paul should get an injunction the first issue is whether Denco's blasting constitutes a nuisance so that there may be a basis for the injunction.

A nuisance is any activity that deprives one of the use an enjoyment of ones property. Blasting has been held to sometimes be a nuisance and in this case we see that the blasting has prevented Paul from enjoying his property because he is unable to swim.

Because an injunction to abate a nuisance is an equitable action courts require that plaintiff prove that he has no adequate remedy at law. Here Paul could sue for damages to the pool and recover enough to construct a
new pool but since there is no assurance that the blasting will stop that could be a futile action. Thus Paul's remedy at law is inadequate.

The next issue is whether Paul has a sufficient property right to be protected by an injunction.

While modern courts seldom require that one have a property right to be protected before an injunction may issue, the traditional view has been that such a property right is required. Here the very purpose of the requested relief is to enable Paul to enjoy his property and so the requirement is met.

The next issue is whether an injunction would be feasible to enforce.

The rule is that equity will not analyze complex actions to determine if its orders are being complied with. But where a negative injunction is issued there is no problem with feasibility so that here if Denco is enjoined all that needs be done is to see if the blasting is terminated and if it isn't then Denco will be held in contempt. Thus an injunction would be feasible.

The next issue is whether the balancing of equities favors Denco or Paul.

Under the minority view the equities are not balanced. If a nuisance is shown then an injunction will automatically issue. Equities are not balanced because if the equities are in favor of the person creating the nuisance an the refusal to issue an injunction is the equivalent of giving that party the power of eminent domain. Thus under this minority view Paul would be entitled to an injunction.

The majority view balances the equities because it is possible that even if a tortfeasor commits a nuisance it might be that that party or others would suffer too great a loss to justify granting equitable relief to Plaintiff.

Apply the majority rule to the facts of this case we first note that Paul "came to the nuisance". That is, Paul moved near the quarry and thus had notice of its operations before he moved into his house and before he built his pool. However it has been held that moving to a nuisance is not a defense to an injunction or damages such that here it is of no consequence.

On the other hand Paul needs his swimming pool for therapeutic purposes. Its not as if he wants a pool for mere leisure time activity. He has a serious need based upon sound medical reasons, Thus there are important equities in his favor.

As for Denco, since it is a quarry an injunction that prevented it from blasting would probably put it entirely out of business. That is a heavy blow for defendant to take and so Denco has equities in favor of disallowing the injunction.

When we examine the impact that the injunction would have on the community we can see that the overall balance will be in Denco's favor. First Denco employs 28 people and the facts state that its business is "the principal industry" in the community. Thus because of the economic dislocation that would befall the area the injunction should not issue under the majority rule.

If the injunction does not issue the effect will be that Denco will have taken by quasi eminent domain part of Paul's property. Since Paul can no longer use the property for a pool he would recover the difference in value between the value of the property with the pool $86,000 less the value of the property with the damaged pool which is $75,000. He should also recover the $1,500 needed to fill the pool and to landscape.

If the injunction does issue then Denco will be liable for the damages it has caused Paul which would be $10,000 to construct the new pool less the depreciation on the prior pool.

Answer B to Question 14 Is D liable to P in tort?

P will allege in his seeking of an injunction, that the tort involved is nuisance, i.e. that D by his dynamiting, has unreasonably interfered with P reasonable use and enjoyment of his land. The facts suggest that D's activities did in fact cause the cracks in P's pool -- at least to a substantial certainty. Further, it is likely that such damage is reasonably foreseeable to D, in that P is a foreseeable P and that the cracks are a foreseeable damage to P from D's activity.

This jurisdiction will hold D directly liable for these damages. Further, one will find that P will state that his pool is a reasonable use of his property (discussed further below).

To get injunctive relief, P must show that his legal remedy is inadequate. Here, the strongest argument is that D activity has once caused damage to P's property, and that even if restored to whole by money damages for this, D will continue the blasting and will likely cause the same injury to P. To avoid a multiplicity of suits (i.e. P have to sue for $ damages each time), injunctive relief would be superior by prohibiting the cause of P's injury. Further, money damages here will essentially remove the pool -- D will pay P for the loss of the pool. But P needs the pool for important health reasons and may be irreparably injured if he doesn't have it. It would seem that the legal remedy for damages would not be adequate for the remedy P seeks to have an undamaged swimming pool.

The decree itself would be relatively easy for the court to issue. The court merely enjoins D from further blasting, a prohibitory or negative injunction.

The traditional requirement of a property interest is present; even if it were not, modern courts tend to permit injunctive relief even for strictly non property but protectable interests.

The court in issuing an injunction in this cause may balance the equities. Although the court may have initially balanced in determining P's claim for nuisance, i.e. his reasonable use and enjoyment, here the courts may wish to balance each party's herein to the other's benefit. Here injunction would give P his pool, but may drive D out of business, i.e. that blasting is the only way (or only economical) way to do a quarry. Further, the result of not blasting if to close down D will have serious economic ripples in this community. On the other hand, P is reasonable in using his land for a pool -- or will the court note that P was fully aware of the blasting activity of D before P put in his pool. P's "coming of the nuisance" may be regarded as placing too much burden on D.

Note that some often courts will not balance where the D action is intentional. D's blasting is clearly intentional. However, I believe that balancing occurs often in this type case.

D may argue that P is guilty of laches for having waited. But although P "waited" in the sense of delay in complaining about the blasting from the time he moved in, it was only recently that he had the pool and the resulting damage.

Note: I originally characterized the tort as nuisance; conceivably one could argue trespass -- the air waves set in motion by D's blasting entered P's land and did damage. This doesn't necessary change the analysis above, although might make the chance for balancing less.

2) If the injunction does not issue, P will get the loss in value in his property -- i.e. compensate him for his not being able to use his land with a pool. Probably, here D would have to pay to fill in the pool and then pay the difference between what the place was worth with a pool and what is now worth without the pool. This would compensate P for his loss. Such a payment is a one time payment, based on current values (with the pool and without) and that is to pay P for his long term not having a pool.

3) If the injunction did issue, D still would have to pay to put P where he was before the cracking, i.e. the $10,000 actual damages to repair the pool. This is the proper measure of the actual damages caused by D; that it exceeds the cost of the pool originally is not material to D making P whole.

Fall 1978

QUESTION NO. 4

Seller owned a house and lot which he listed for sale with Broker. Almost immediately thereafter, a storm caused a tree to fall on the house, damaging the roof. The estimated cost of repair was $5,000.

At Broker's suggestion, Seller propped up the roof and concealed the damage under a new roof covering, at a cost of only $600. The roof was left in a weakened condition.

Subsequently, Broker negotiated a sale of Seller's property to Buyer for $60,000. The sale contract provided that the property was sold "as is" and that "no representations or warranties other than those contained herein" have been made by either party. The contract contained no reference to the damaged roof. At no time during negotiations or thereafter did Broker or Seller mention the roof, except that Broker pointed to the new roof covering as one of the good features of the house.

Buyer could have detected the damage to the roof by crawling through a hatch into the space under the roof, but it did not occur to him to do so.

Seller was paid by Buyer, Broker received his commission for the sale, and Buyer now has title to and possession of the property.

Two months after the sale, the roof collapsed due to its weakened condition.

Buyer has replaced the roof at a cost of $7,500. This is $2,500 more than it would have cost to repair the roof properly when it was first damaged. The fair market value of the repaired property is $65,000.

To what relief, if any, is Buyer entitled: (1) Against Seller? Discuss.

(2) Against Broker? Discuss.

Answer A to Question 4

Both Broker and Seller are acting in concert when they agree to conceal the damage. Although Broker is not normally liable for acts of his principal, here they are not acting in a principal agent relationship but are acting as joint participants. Both know that the house will be sold with a concealed condition which is material to the value of the house.

At common law there was no duty for only failure to disclose defects in a house. (Some courts yes, if it could not be discovered by a reasonable inspection.) However, active concealment was actionable. Here the damage occurred and was purposefully only repaired to the extent that it could not be seen. The roof was still in weakened condition and both parties know that $600 did not repair $5000 worth of damage.

Also half-truths are actionable, i.e., what is said is true yet the reference to be drawn is false. Here there was a new roof but it was there only to conceal a great deal of damage. This statement by broker would also be imputed to his principal the Seller. He was probably authorized to "speak" of the house. But Seller would also be liable for this statement absent a vicarious method arising from agency, in that it was definitely foreseeable on Seller's part that such a statement would be made by Broker. The roof was new and would be a selling point and also Seller knew that they were both concealing the damage.

The written contract says "as is" and "no warranties" were made. The parole evidence rule would not prevent Broker's statement from being admitted even though it contradicts the writing. Parole evidence is allowed to show fraud - either of active concealment in reference to "as is" and as to Broker's statement about the roof as it was a half-truth.

The buyer here probably relied on Broker's statement to be the truth and he probably also justifiably relied on the appearance of the house. Both seller and broker intended to induce this reliance in order to make a sale of $60,000.

Since fraud is an intentional tort the fact that Buyer was perhaps negligent in not inspecting would be no defense. Although it is even doubtful that he was negligent as a reasonable inspection probably would not include crawling through attic and here apparently there was only a small space to crawl through.

As both Seller and Broker were joint tortfeasers in the fraud action they would be jointly and severally liable for all the proved damages.

If a fraud action is brought for damages the states are split on the proper measure.

Some use the act of pocket measure which is the difference between what he received and what he paid for it. Here he paid $60,000 and the property was worth 57,500 and he would recover the difference 2,500.

Others use the benefit of the bargain and he would receive the difference to know what it was represented to be less what it was worth. Here he gets the difference and cost of repair.

Under both theories he may sue for punitive damages as their fraud was willful but those damages must bear some relationship to the actual damages.

Buyer might **also** have elected to rescind the contract of purchase for the fraud if the amount of damage was material and here it was since $7,500 is a big percentage of the price.

However, if he now rescinded he probably could not get his cost of repair as he has a duty to avoid or mitigate damages unless he can show it was necessary to repair to protect the house from further damage.

Seller and Broker could also argue that 7500 to repair exceeded the amount necessary to repair, i.e., 5000. This is 50% higher. But there is no evidence to show which estimate was closer. Also Buyer is entitled to expect a reasonable amount even though it may exceed the best price by someone else.

Damages are limited by proximate cause in tort and these definitely arose from the fraudulent concealment.

If buyer did not sue in tort but expressly on the contract then his damages are based on Hadley v. Baxendale, i.e., foreseeable damages arising from the contract plus any consequentials that were foreseeable. He would get the difference between contract price and fair market value on date of breach. Here the costs of repairs were definitely foreseeable.

However, if he seeks a contractual recovery, he can only get the parties to the contract and Broker was not a party nor did he sign the deed or contract.

Answer B to Question 4

(1.) Relief against Seller

Buyer has several theories of relief against

Seller. Fraudulent Misrepresentation:

To establish this tort Buyer must prove scienter, misrepresentation of a material fact, actual reliance and damage.

Seller knowingly concealed a defect. Although failure to disclose a defect is often not enough to establish fraud, active concealment is a sufficient misrepresentation. Since this was done knowingly and with the intent to mislead a prospective buyer, scienter is established.

The fact that the Broker Seller's agent pointed to the new roof as a "good feature" was also a misrepresentation, here an actual false statement since the roof was not a good feature since it only covered up a dangerous defect. This goes beyond mere puffing.

The fact misrepresented was material, important to any buyer's decision to buy a house. Since a roof is vital to keep out the elements, its condition was important to Buyer, thus material.

Buyer apparently relied on this misrepresentation. Seller cannot successfully disclaim this misrepresentation by the "as is" clause or the clause relating to representations. These clauses are insufficient to relieve a party of fraudulent misrepresentations, especially when the fraud is active concealment. Such concealment is not clearly covered by a "no representations" clause so liability for it will not be affected by the disclaimers. This is especially true when later conduct of the parties is inconsistent with the disclaimer - as where Broker pointed out the roof as a good feature.

Buyer was damaged by his reliance since the roof collapsed and had to be repaired. This possible remedies are as follows:

Damages:

The majority view is that a defrauded buyer of real property is entitled only to out-of-pocket losses, i.e., fair market value of the property less amount paid. Buyer paid $60,000. Fair market value after the repair was $65,000. The repair should have cost $5000 if done before collapse. Thus, arguably fair market value equalled cost or $60,000, leaving Buyer with no damage.

However, since the defect was concealed, and thus it was likely that it would not be repaired right away, fair market value should include the cost of a subsequent repair discounted by the possibility that an early repair might be made. Since this possibility is almost 0, since most persons would not crawl
in the hatch into the space under the roof, fair market value should be deemed to be $57,250. Thus, under this measure, Buyer is entitled to $2,250.

It should be noted that Buyer was not in any way negligent in failing to discover the defect since it is not reasonable to require him to crawl in the hatch. Therefore, he should be

entitled to recover full damages.

A minority view, and a view followed by many courts upon a showing of bad faith (as there was here), would give the defrauded buyer the benefit of his bargain or the value as represented minus the actual value. Under this measure, the value as represented would be $65,000 (the value with a good roof) and the actual value would be $60,000 or $57,250 if the above argument about subsequent repair is accepted. Thus, under this measure, Buyer gets $5,000 or $7,250.

Restitution:

Buyer can also seek to recover his out-of-pocket losses on a theory of restitution. Seller has been unjustly enriched by his fraud. Although Seller saved $4400 ($5000 - $600 new roof covering) by his fraud, Buyer should be able to recover his full $7,500 cost of repair, due to Seller's bad faith. To do this, Buyer must waive the tort.

Rescission:

Buyer might also evoke the remedy of equitable rescission (he must go to equity since a deed is involved) and then seek restitution in quasi-contract. However, he cannot do this if he sues for damages first as this will be deemed an election of remedies. His restitution recovery will be as discussed under restitution.

Breach of warranty:

Seller probably disclaimed the implied warranty of merchantability through his use of the "as is" clause. But Broker, his agent's, statement might be deemed an express warranty which must be expressly waived. Disclaiming language is effective to waive such a warranty only to the extent that it is consistent with the warranty.

Therefore, Buyer can probably recover damages for breach of warranty equal to the value as warranted ($65,000) and the value as delivered ($60,000 or $57,250).

Strict Liability in Tort:

This has been applied to merchants of tract housing but would probably not be available since Seller is neither a merchant nor is this tract housing. Relief against Broker:

Broker participated in the fraud and is liable for the damages that Seller would be liable for, as discussed above.

Broker made no warranty to Buyer in his individual capacity. He spoke only as Seller's agent, so is not liable on this theory.

However, as indicated, Broker did perpetrate a fraud for which he may be liable not only for damages but also restitution of ill-gotten gains. Broker was unjustly enriched to the extent of his commission. Therefore, Buyer is entitled to recover his out-of-pocket losses $7,500 out of that commission.

Finally, it should be noted that Buyer may recover only once for his injuries, although Broker and Seller may be jointly and severally liable for the fraud.

Spring 1978

QUESTION NO. 9

Owen owned Blackacre, a tract of grazing land which could not be used for farming because of periodic flooding. Its market value was $40,000 on April 1, 1977. County owned the adjacent tract, Whiteacre. On April 1, 1977, Deft contracted with County to construct an earthen flood control dam on Whiteacre.

Deft started the project in late April. There was not enough sand on Whiteacre to build the dam. In May, without Owen's knowledge, Deft began removing sand from Blackacre to use in building the dam. Deft built a shed and a conveyor belt on

Blackacre so that the sand could be removed more efficiently. Deft removed 1500 tons of sand from Blackacre during May, June and July. Deft ceased all operations and removed all his equipment from Blackacre on July 31. He completed the dam in October and earned a net profit of $40,000 on his contract with the County.

Deft could have purchased sand from a commercial dealer about 10 miles from the dam site at a cost of $5.00 per ton. Transportation costs would have been $1.00 per ton. The rental value of Blackacre during May, June and July was $300 per month. The removal of the sand levelled Blackacre to some extent but did not affect its market value. However, the completed dam increased the market value of Blackacre to $50,000 because the dam will prevent flooding of the property, making it suitable for farming.

What claims for relief might Owen properly assert against Deft and what is the probable recovery under each claim? Discuss.

Answer A to Question 9

The claims for relief by Owen would seem to be entirely tort claims and essentially two in number.

The first is that of trespass to land. Owen was the owner of Black Acre and entitled to immediate possession of it even though there is no indication in the facts that he was using it at this time. Deft acted to invade Blackacre and compounded this invasion of land by constructing a shed and conveyor belt on the land. There is no doubt of Deft's intent to use the land of Owen without his permission.

There is nothing to suggest that the trespass alone damaged the land see below for removal of sand). The shed remained there for 3 months presumably visited at times by Deft or his

workmen trespassing on Blackacre land.

But Owen is entitled to nominal damages for the trespass at a minimum, since Deft had no right to trespass. Possible defenses such as necessity, private or public, seem ludicrous. Deft merely took advantage of the closeness of Blackacre to save time and money. Nor is there any evidence of mistake in that Deft thought the land belonged to County since it was immediately adjacent.

The flagrancy of the trespass, i.e. not just one or two excursions onto the land, suggest that punitive damages are also available to Owen. The court will add these damages where the intent is a callous as that shown by Deft.

In addition there are compensatory damages available to Owen. While the land of Blackacre was suitable only for grazing it apparently did have a rental value which could be calculated at $300/month. Owen need not show more than that and demand $900 in such damages for the three months Deft, his shed and conveyor belt occupied Blackacre.

The second tort claim would be that of conversion of the sand on Blackacre. Again this was patently Owen's property taken without his consent for the benefit of Deft. There was an intentional invasion of the chattel interest of Owen and an exertion of dominion over it by Deft. For this Owen may demand damages to the amount of the value of the sand which is $7,500 if calculated at $5 per ton for 1,500 tons removed. This would be a customary damage for a conversion tort, that is the selling of the product to the converter.

Owen might sue in Quasi Contract for the benefit bestowed on Deft and thus increase his damages. In this instance Deft saved himself $1 per ton of transportation costs and would have benefited by another $1,500 which Owen could claim under a quasi contract suit.

Could Owen obtain a mandatory injunction demanding the return of the sand? Here the courts would probably be stopped at' the point of asking if the legal remedy was inadequate since this is a customary requirement for a mandatory injunction. The answer would seem to be no as there are no facts to show that removal of the sand significantly decreased the market value of Blackacre. Indeed the entire project seemed to have increased its value. Owen would have to show some definite need or use for the sand taken.

The question arises as to whether or not Deft has any set-off because what he did increased the value of the land of Blackacre for farming from $40,000 to $50,000. Perhaps the best argument in rebuttal is that the value of the land would have been similarly increased by the building of the dam if the sand had been obtained elsewhere.

Can Owen sue for any portion of the profit made by Deft?

Not directly as he has no claim on this, but punitive damages for the grossness of the intentional torts (both) should allow Owen an extra measure of recovery from Deft.

Answer B to Question 9

1. Conversion

Owen might attempt to bring suit against Deft for damages for the tort of conversion in Deft's unconsented to taking away of the sand from Blackacre. The primary problem encountered in this theory is that conversion lies only for the taking of personal property; although the sand can be taken from the land it is *highly* questionable that it would be considered a chattel, as it is more akin to lumber or minerals and, hence, would probably be considered part of the realty.

If, however, a court could be convinced that the sand was a chattel that could be converted, Owen would be entitled to the market value of the sand in a "forced sale" (since the sand could probably not be feasibly returned), which would probably be the same as what it could have been purchased for by Deft -without transportation charges, namely a total of $7,500.00.

2. The second theory upon which Owen could proceed against Deft would be that of trespass to the land. The problem with this theory, however, would be that there was no apparent damage to the land. *Although* the land was changed it is stated that its value was not impaired and, in fact, it was increased. There is, however, the possibility of nominal damages for the trespass, even *though* there was no damage, but it is unlikely that Owen would be interested in such a recovery, other than to establish the fact of the trespass.

3. The third and most useful theory for Owen would be to sue in quasi-contract for restitution. In quasi-contract the Plaintiff is deemed to have waived the tort and sued in assumpsit (namely on a contract implied in law, usually for common counts) The purpose of quasi-contract is to prevent the unjust enrichment of the defendant, even where there has been no apparent harm to the Plaintiff.

In this case there clearly was a benefit to Deft, at Owens' expense. By using sand from Blackacre, Deft saved approximately $9,000.00 in the cost of buying and transporting sand to Whiteacre from elsewhere. As a result, he was able to add the $9,000.00 to his profits, all to his unjust enrichment.

Under these circumstances, equity will imply a contract between Owen and Deft under *which* Deft will be required to disgorge the profits unjustly gained. On this basis it makes no difference whether Blackacre was harmed or benefited by either the taking of the sand or the building of the dam.

Furthermore, Deft was also unjustly enriched by having the use rent-free of Owens' land for 3 months for his own purposes. Under these circumstances, there should be added to the profits he unjustly received the rental value of
Blackacre for the period in question, namely $900.00.

Although it is arguable that Deft was not unjustly enriched in his use of Blackacre, since, had he purchased & transported the sand from away, he would not have used the land, the fact remains that the land was used and Owen is entitled to the reasonable rental value thereof as restitution of the benefits reaped by Deft.

Although there may be tort claims available to Owen, namely for conversion and trespass to real property, the recoveries to be had thereunder would not serve to fully redress the injury suffered by Owen due to Deft's unprivileged invasion of Blackacre. A more suitable remedy would be available in equity in quasi-contract. Owen need only show that he has no adequate remedy at law and that equity has been done; no equitable defenses are indicated by the facts. The inadequacy of the remedy at law is evidenced by the fact that at a minimum Owen should be entitled to the market value of the sand removed and there is no theory upon which such value can be recovered where the item removed is realty.

Furthermore, it would not appear that any offset would be in order as between Defendant and Owen for the increase in the value of Blackacre by the County's building of the dam.

In conclusion, on a quasi-contract theory Owen could probably recover a total sum of $9,000 in profits unjustly gained by Defendant for sand, transporting sand and rental.

The facts indicate that some punitive damages might be in order, since there probably was an intentional trespass to the land.

Spring 1978

QUESTION NO. 14

Jones, a civil engineer with two years work experience, entered into a three-year written employment contract with Alpha, a corporation, at a salary of $24,000 per year. The contract was executed on January 15, 1977, and Jones was to begin work on March 1, 1977. Jones was particularly pleased with the contract for two reasons. First, Alpha's offices were located in City where Jones' mother lived in a retirement home. Secondly, Alpha's employees worked a 32 hour work week on a flexible time plan scheduled at the employee's convenience Monday through Friday between 7:00 a.m. and 7:00 p.m. This plan had been designed primarily for the benefit of working parents. Although he had not discussed it with anyone at Alpha, Jones, who was a bachelor, planned to use his free hours each week doing "free-lance" consulting. While a graduate engineering student, Jones did approximately 10 hours of free-lance consulting each week at an hourly rate of $15.00. The current rate for persons with Jones' experience is now $20.00 per hour.

Jones spent $75.00 to have a summary of his qualifications and experience printed. This summary stated that Jones was employed by Alpha. Jones intended to use the summary in his efforts to obtain consulting work.

On February 28, 1977, Smith, who knew of the contract between Jones and Alpha, persuaded Alpha to breach its contract with Jones and to hire instead Donna, the daughter of a prominent local politician. Smith received a fee of $1,000 from Donna for obtaining the job for her.

Jones spent all of his time during the next three months looking for a job and had no time to do consulting. He obtained unemployment compensation of $300 per month for those three months. On June 1, 1977, because of his mother's financial needs, Jones accepted an engineering position with Beta for three years at a salary of $18,000 per year. Beta's offices are 100 miles from City. This position requires a full 40-hour week, leaving Jones no time for consulting. Jones now spends about $10 every weekend on gasoline in order to visit his mother in City.

What relief might Jones obtain against Smith and on what grounds? Discuss. What relief might Jones obtain against Alpha and on what grounds? Discuss.

Answer A to Question 14

(1) Jones v. Alpha

(a) This was a written contract so its length of 3 years does not violate the statute of frauds.

(b) Jones' (J's) action against Alpha **(A)** is probably limited to contract recovery although he probably has a tort claim against Smith (S).

(c) Since Jones has apparently looked for replacement work in good faith there is no issue as to failure to mitigate damages.

(d) For the three months following his contract breach, Jones was entitled to 3 x $2,000 (monthly salary) or $6,000 since the contract called for an annual $24,000 salary. A will argue that this should be reduced by the $300 per month received in unemployment compensation. If this were a Tort case A could clearly not claim the benefit of a collateral source such as this to mitigate his damages. In contract, however, damages must be "actual" and J's actual damages were reduced by this unemployment compensation by $900. Therefore, J receives $6,000 - $900 or $5,100 for this time period.

(e) For the remaining 33 months of the contract with A, J will be working under his new contract for $18,000 per year or $1,500 per month. This was a good faith attempt to mitigate, in the same job type as with Alpha, and J should receive the difference between his old salary and the new one or $66,000 minus $49,500, or $16,500.

(f) Gas money: It probably was not foreseeable that Jones would have to spend this money, unless (under the Hadley v. Baxendale Rule) A knew at the time of contracting that J would incur this damage at the moment of breach. Assuming no knowledge by A, J probably can't get this money although he probably could get the expenses of moving if it was clear to both parties that breaching the contract would require relocation.

(g) Lost consulting work; J probably cannot get this damage item from A. Although it might be foreseeable (due to the type 'of work week at A's offices) that several employees might freelance, the damages are probably so uncertain as to be unrecoverable. In that regard the loss is similar to lost future' profits, which courts rarely allow. On the other hand, it probably was foresee-
able that employees might freelance and might need resumes for that activity, so that the money spent on the summary ($75,00) might be recovered, it is clear that J can no longer use them since he no longer works for A as mentioned in the summary so the damage is actual and a consequence of the breach.

(h) The different work week hours. There probably should be some adjustment made for this factor since the annual salaries of the jobs rely on a different worker work week. A court could compute this figure with reasonable exactness and proportionately increase the amount owed J for the remaining 33 months as mentioned in (e) above.

(i) Specific performance. Because i's job does not appear "unique", and because he already has a different job, this remedy is probably not contemplated by J. If he did decide he wanted his job with A he would run into major difficulties since he has very adequate remedies at law despite the fact he now lives far away from his mother. If J had not taken the new job it is doubtful that he would have been charged with failure to mitigate but, since he has, it probably demonstrates that his job is not unique in character so as to obtain specific performance.

(2) J v. Smith (s)

(a) S is apparently guilty of intentional interference with J's contract rights by his inducing A to fire J.

(b) The damage formula for this tort requires that J recover all damages which were proximate foreseeable, consequential and actual. This is the general tort formulation. Moreover, J can also probably recover the $1,000 which S received for his tortious conduct under the doctrine of unjust enrichment. Although this benefit was not conferred on S by J, it is more equitable to allow J to claim it than S.

As to the general tort remedies, J can probably recover all of the actual damages mentioned above under the contract formula used against A. Moreover, tort remedies are usually more extensive than contract remedies and J could possibly recover some of the damages mentioned above which J couldn't get from A (gas money for instance) if it was a proximate cause of S's tort. Moreover,
J could at least claim damages caused by the emotional distress caused by having to move away

from City although most courts would reject this recovery as not being "actual".

J might also be entitled to invoke the collateral source rule re the unemployment compensation. Please note, however, that J can only get 1 recovery for his contract breach from the two guilty parties. Due to the different natures of the separate claims, however, i's cause of action against S might be more beneficial for him. Probably, however, the surer source of actual recovery is the business enterprise, A, on the contract claim with a separate claim of njust enrichment against S for the $1,000.Answer B to Question 14

1. Jones vs Smith

When Smith persuaded Alpha to breach its contract with Jones and instead hire Donna, he was committing a tort; he was inducing breach of contract, without any apparent privilege to do so. Because it is a tort, Jones is entitled to bring an action for damages and also, if he wishes, to bring an action in quasi-contract, a "waiver of tort and suit in assumpsit" whereby "unjust enrichment" conferred on Smith would b6 restored (disgorged) to Jones. No other remedies, either at law or equitable appear appropriate for Jones here. Smith's action was not more than a one shot deal, so no injunction is required or appropriate. No other restitutionary remedies are required as no specific property was taken; and finally, no need exists for a constructive trust or equitable lien; Smith has not misappropriated Jones personal property.

(a) Quasi contract

In an action at law for benefit conferred, Smith is liable to Jones for the $1,000 he received from Donna for inducing the breach. Since this does not make Jones whole by any means he would choose the quasi contractual action but would instead choose an action in damages.

(b) Money Damages

By virtue of the fact that inducing breach of contract is a tort action, Smith is liable for all damages proximately caused as long as certain. There are no forseeability limitations in the Hadley-Baxendale sense because this is not a contract action. As a result, Jones can obtain all compensatory damages to cover his proximately caused losses and may even, if Smith's breach was willful, obtain punitive damages over and above his injuries.

Jones should be able to recover the difference in salary between the Alpha and Beta jobs for the period between 3/1/77 and 3/1/80, the period of the Alpha contract, and the Beta salary for the period up to 3/1/80. That amounts to 3 months of $24,000 per year, or $6,000 plus $6,000 per year from 6/1/77 to 3/1/80 or $18,000 for three years less the three months not worked in the beginning; this amount will be $1,500 less than $18,000, so in total Jones will get $16,500 plus 6 earlier or a total of $22,500 on this salary difference.

In addition he will get loss of consulting work for the same period at $200 per week. Although not foreseeable to Smith, it will be recoverable anyway as long as proximately caused.

Similarly, he will recover for the $75 spent on the resume and no longer usable.

The opportunity to do consulting work was lost by the inability to work for Alpha and appears proximately relation to Smith's tort. This should be no problem. Similarly everything else which flows from the tort either special damages or general damages is recoverable.

This might include the $10 per week Jones is spending on gas to travel back to city on weekends, although possibly too remote to pin on Smith.

Jones' only obligation to Smith is to avoid avoidable loss and mitigate damages similar to that requirement in any tort. (as, when an injured party doesn't go for medical care, subsequent injuries are not the liability of the tortfeasor).

Here, he is stated to have looked for a job continuously, to the detriment of his consulting work, finally accepting a job with Beta at a lesser salary. He appears to have done all he could.

2. Jones vs Alpha

Jones ability to sue Smith does not prevent him from suing Alpha as well, for the basic

underlying breach of contract. The contract appears valid in all respects. It is written, therefore there is no statute of frauds problem even though not performable within a year. Alpha appears not to have any excuse for breaching; there is no apparent failure on Jones part to perform or have excused a condition, and these facts reveal no breach by him.

(a) Specific Performance

As a result, Jones could bring an action for damages and might think about specific performance. The latter is most probably not available to him, as this contract between Alpha and Jones is an employment contract.

Courts of equity have consistently refused to issue decrees of specific performance in such cases. They are difficult if not impossible to enforce requiring a mandatory decree that requires a complex, 3 year supervision on the court's part to oversee the relationship. In addition, mutuality of obligation might be a problem. Alpha could not obtain specific performance against Jones, because that would be tantamount to slavery or indentured service in the eyes of the 13th amendment. Although the restatement--Cardozo view requires only mutuality of performance, and not obligation, and the court could probably make the decree conditional on the basis that Jones perform his obligations as well, the difficulty in assuring that the decree is feasible to enforce makes it extremely unlikely Jones can force Alpha to employ him via a decree in specific performance.

(b) Damages

Except for the limitations of the Hadley-Baxendale situation, Jones can recover all damages flowing from the breach. However, that case requires that the damages recovered be foreseeable to the parties at the time of formation, either because they naturally flow from the understanding about the contract or because the breaching party was informed as to the consequences.

Here, the salary difference is probably foreseeable as a natural consequence of the breach; its amount would have to be proved- up, but it was foreseeable, It is also certain as to loss and amount and should be collectable,

On the other hand, the consulting losses to Jones were probably not foreseeable; he had only 2 yrs of experience and would not be expected to be a consultant. In addition, the ability to have 8 extra hours a week to do the work does not make the loss of the work foreseeable. The time was intended to be used by working parents; Jones was a bachelor and did not require time for child care.

Thus, unless Jones convinces the court that his prior work "as a consultant' should have been foreseeable to Alpha, he will not recover from them in that regard. A similar argument militates against his recovery for the gas costs involved in driving home on weekends. Alpha can't be expected to foresee the presence of his mother in city.

Jones will be required to reduce any damages by the unemployment compensation received while out of work, by way of mitigation; he has a duty to avoid avoidable consequences by seeking employment of a similar kind at an acceptable wage. His job at Beta appears to meet this criteria, and his wages at Beta will therefore go towards reducing Alpha's liability.