



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

**Essay Questions  
and  
Selected Answers**

**October 2002**

## **ESSAY QUESTIONS AND SELECTED ANSWERS**

### **OCTOBER 2002 FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the essay questions from the October 2002 California First Year Law Students' Examination and two selected answers for each question.

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

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

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## **ESSAY EXAMINATION INSTRUCTIONS**

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

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

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

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

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

## \_\_\_ Question 1

Windco manufactures and installs insulated window-frame units. Installation comprises about 15% of Windco's total price for the units.

Sam, a commercial builder, saw a Windco advertisement and mailed an order for thirty window frames, at \$100 per frame, for a total order of \$3,000. He also wrote on his order, "Must have your guarantee of installation within 15 days due to construction deadlines."

Windco immediately sent Sam an "Acknowledgment of Order," listing the windows and price as per Sam's order, and including a \$200 shipping charge. Shipping costs are customarily borne by the buyer of window-frame units. At the bottom of the Windco form was printed the following: "Installation guaranteed within 60 days." Also printed in bold and conspicuous type was the following: "All warranties of merchantability and fitness are hereby expressly disclaimed." Finally, the form stated, "Contract of Sale Subject to Terms Contained Herein."

Windco installed the windows 55 days after the order was placed and Sam incurred several delay-related expenses. Windco later submitted a bill for the full amount shown on the "Acknowledgment of Order" form. Sam refused to pay the \$200 shipping charges. He also discovered that because of a manufacturing defect, the glass in the windows did not fit snugly, permitting rain to leak through.

Windco sued Sam for the full price shown on the "Acknowledgment of Order" form. Sam counterclaimed against Windco for damages resulting from the delayed installation and unmerchantable quality of the windows.

How should the court rule on Windco's and Sam's actions? Discuss.

## Answer A to Question 1

### 1. Windco v. Sam – Full Price

Windco is suing on the contract (K) and must first show that all enforceable K was formed, i.e., mutual assent, consideration & no defenses to K formation.

#### A. Mutual assent.

##### 1. Offer.

- a. Advertisement. An advertisement is generally not an offer absent an identified group of offerees to which the ad is communicated, quantity & subject matter. Here, the ad is likely not the offer.
2. Sam's writing. An offer is a manifestation of present interest to be bound to sufficiently definite essential terms. Sam's writing contained quantity (30), subject matter (window frames), price (\$100 each) and his identity. His note to have installation within 15 days manifested his intent to be bound. This was an offer.

##### 2. Acceptance.

- a. Governing law. Acceptance and terms included turn on governing law. Here 85%, or the main purpose of the K, involved the sale of goods. Goods are moveable personal property; here, window frames. Sale of goods are governed by UCC.
- b. Acknowledgment of Order. An acceptance is a manifestation by the offeror of present intent to be bound to the terms of the offer. Here, Windco sent an acknowledgment of order. Typically, an acknowledgment of receipt of order is not sufficient manifestation to be bound, so this was not necessarily an acceptance. However, UCC permits acceptance by any reasonable means.
- c. Installing. Therefore, the fact that Windco performed and installed the frames will be Windco's acceptance, because acceptance can be made by conduct.

##### 3. Terms.

- a. Merchants. A merchant is one who deals in the course of business with goods of the kind or holds himself out as having special skills in the area. Here, Windco was in the business of

window frames, i.e., a merchant, and Sam was a commercial builder. Sam was a merchant, because he regularly dealt with and had skills in the area of windows. UCC's merchant-to-merchant rules will apply.

b. New terms between merchants. Between merchants, new and additional terms are included in the agreement unless: the offer was expressly conditional upon the offeror's terms, or acceptance was limited to the terms of the acceptance or the offeree objects to the new terms within 10 days.

(i) Sam's written note - Time for performance.

Here, Sam will argue that his "must have guarantee --- within 15 days..." was a term on which his offer was expressly conditioned, and that therefore Windco's change to "within 60 days" is not included. However, Windco will argue that Sam's wording did not say: "expressly conditional upon" or "offer limited to . . ." & that Sam's words were only a desire, not an express condition. Windco will likely prevail & the term is 60 days for installation.

(ii) Shipping charge & parol evidence.

Windco will argue that its additional term "\$200 shipping charge" was included, because Sam didn't object within 10 days. In support, Windco will offer parol evidence of the custom in the industry that shipping is borne by the buyer (here: Sam).

Sam will say that oral evidence of prior or contemporaneous terms are not admissible if the writing was fully integrated. Sam will also argue that the additional \$200 is material & onerous & changed the bargain & that therefore the \$200 is not included.

Windco will however be able to introduce oral evidence to explain & clarify what the shipping term was intended to be and what is customary in the trade, as such explanatory evidence is not barred by the parol evidence rule. Also, \$200 on top of \$3,000 total is not a material additional charge, so Windco will likely prevail & the \$200 term is included.

B. Consideration is the bargained-for exchange of acts or promises incurring a benefit as well as new legal detriment to both parties. Here, Sam obtained goods (benefit) in exchange for having to pay Windco (new detriment). Vice versa for Windco.

1. Promissory estoppel. If for any reason an enforceable K is not found, promissory estoppel is a substitute where one party has reasonably relied to his detriment on the other's promise. Here, Windco went ahead with the installation & supplied the frames. Doing so, it detrimentally relied on Sam's promise.

Consideration or its substitute existed.

#### C. Defenses to Formation

1. Statute of Frauds (SOF). SOF requires Ks for goods valued at \$500 or more to be in a sufficient writing. Here, the K was for a total of \$3,000 and had to be in writing. Since Sam is the one to be charged the \$200 in dispute, his signature was required by SOF, but the "Ack of Order" was on Windco letterhead.
  - a. Merchant's confirming memo. Where one merchant sends the other a memo confirming an agreement that the other has reason to know of and understand, the memo suffices as a writing under SOF even if not signed by the one to be charged. Here, since the Ack of Order contained subject matter (windows), identity of the parties, price & Windco's signature (or on Windco's letterhead), SOF is satisfied.
  - b. Divisible K. It can also be argued that the contract was a sequence of contracts, each for \$100, and that each such K therefore was not within SOF. The \$200 would then be for installation services (governed by common law; not UCC) which do not fall within the SOF goods provision. Since the services were to be provided within one year (here: within 60 days), that SOF provision also doesn't require a writing signed by Sam.

An enforceable K was formed with terms \$200 shipping & installation within 60 days.

#### D. Recovery

1. Expectation interest. Windco will recover its expectation interest, i.e., the price it expected to obtain under the contract, which was \$3,000 + \$200 shipping. Even if the court decides the \$200 term was not part of the K, Windco will get \$3,000.
2. Consequential & Delay damages. It W can show that it suffered damages as a consequence of not receiving Sam's payment on time, it will be awarded also consequential damages, i.e., those amounts reasonably foreseeable to flow from Sam's breach at K formation time. Here, since Sam is refusing only to pay the \$200 (not the \$3,000), consequentials shouldn't apply.

II. Sam v. Windco.

A. Recovery

1. Consequential. If the court finds that the time to performance was within 15 days, then Sam will recover consequential (defined supra). Delay damages that both parties knew or should have known would result from Windco's failure to install timely would be recoverable.

B. Breach of implied warranty.

Each product put into the stream of commerce carries an implied warranty that the goods are suited for their ordinary use. Here, window frames should be suited for use when it's raining, i.e., not leak[ing].

1. Parties. Plaintiff must be a purchaser or user. Here, Sam was the purchaser of the windows. Defendant must be one generally in the commercial supply chain. Here, Windco was (see supra under merchants). The parties are proper.
2. Merchantable. Defined supra. The product was defective due to a manufacturing defect in that the glass didn't fit properly; thus not fit for ordinary use (not merchantable).
3. Defenses. Windco will assert that it disclaimed all warranties of merchantability and fitness for a particular purpose. Such a disclaimer is effective if conspicuous, as here printed in bold. Sam will however argue his purpose for entering into the K was to obtain windows that were functional and that Windco will be unjustly enriched if allowed to not compensate him so he can obtain other substitute goods (to "cover") & be reimbursed by Windco for his expenses therefor.
4. Perfect tender rule. Under the UCC, where goods are to be delivered in a single delivery, the buyer (here: Sam) has a right to obtain perfectly conforming goods. Even though Sam didn't discover the defect (non-conformity) of the goods until later, he can still reject the lot, accept the lot or any portion thereof, upon timely notice to Windco. If Windco still has time under the contract (5 days left from 55 to 60 days) to perform it has a right to cure by replacing the windows.

## Answer B to Question 1

### WINDCO v. SAM

#### Does the UCC Apply?

The UCC applies to all contracts for the sale of goods. Goods are moveable, tangible property.

Here, the subject matter is shown to [be] predominately goods because “installation comprises 15% of Windco’s total price.”

Therefore, the UCC applies.

#### Merchants?

A merchant is one who regularly deals in goods of this kind or who, by his occupation, has some special skill or knowledge as to this type of goods.

Here, “Windco manufactures and installs insulated window-frame units” and Sam, “a commercial dealer,” likely has special knowledge of windows.

Therefore, both parties are merchants.

#### Valid Contract

In order to determine if any rights exist we first must determine if there is a valid, enforceable contract. A contract consists of an offer, acceptance, consideration and lack of formation defenses.

#### Offer

An offer is manifestation of present contractual intent, communicated to an identified offeree, containing definite and certain terms.

Here, Windco’s ad will be considered only an invitation to accept offers. When Sam mailed this order form he made an offer to Windco, containing terms (30 window frames @\$100/frame). A reasonable person would believe Sam made a commitment to enter a contract because of this information.

Therefore, there is a valid offer.

#### Acceptance and Acceptance With Addition[al] Terms UCC2-207

An acceptance is an unequivocal assent to the terms of a[n] offer, unlike common law, where the acceptance must be the “mirror image.” The UCC allows additional terms.

At issue here are the terms Sam first added to his offer guaranteeing installation within 15 days. Windco's acknowledgment of order altered this term guaranteeing installation "within 60 days." As between merchants any additional term will become part of the contract unless the contract limits it to its own terms, there is an objection within 10 days, or the term materially alters the contract.

Here, while Sam wanted installation within 15 days, the question arises if this qualifies as a time is of the essence condition. Because Sam did not object upon receiving Windco's acceptance with additional terms, it likely will be held that this is not a material term. And this term will become part of the contract.

Shipping cost language will not be a material term as "shipping costs are customarily borne by the buyer."

Warranty disclaimers are valid if conspicuous and use the term merchantability.

Therefore, unless a court finds the installation date guaranty to be a material term, all of these terms will become part of the contract.

### Consideration

Consideration is a legally sufficient, bargained-for exchange.

Here, there appear to be no consideration issues as Sam is to pay money, Windco is to provide window frames which neither were legally obligated to do.

### Defenses-Statute of Frauds (SOF)

Under the statute of frauds certain contracts must be evidenced by a writing to be enforceable. Contracts for goods of \$500 or more fall under the statute of frauds.

Such contracts can be taken out of the statute of frauds by performance. Facts here state "Windco installed the windo[ws]." Therefore, this contract can be taken out of the SOF.

In any case, because there are documents authenticated by both parties (mail order form by Sam & acknowledgment of order by Windco) that are writings sufficient to bring the contract within the statute of frauds.

Therefore, the statute of frauds will no[t] prevent this contract from being enforceable.

### Unconscionability

Unconscionability arises if there can be shown both procedural and substantive unconscionability.

Here, Windco's form stated "contract of sale subject to terms herein." Sam may attempt to claim this is substantively unconscionable, however to be procedurally

unconscionable a party must show a lack of bargaining power. Nothing in the facts indicates that Sam could not have purchased window frames elsewhere. Further, to be substantively unconscionable the term must be one-sided. On these facts there is no indication Windco was greatly or significantly in a position to make such a windfall.

Therefore, unconscionability will fail as a defense.

There is a valid enforceable contract.

### Terms and Conditions

As shown above Windco performed by installing the windows. This condition precedent was fulfilled. It therefore falls upon Sam to meet his obligation or be in breach.

### Breach

When one does not fulfill their obligation under a contract or excuse a condition they are in breach.

Here, Sam's refusal to pay the \$200 shipping fee is a breach. As noted above, this term became part of the contract because as shown by the usage in trade such a cost is "borne by the buyer." Sam must pay the \$200.

At issue here is the disclaimer of warranty discussed above. Often disclaimers of warranty can be material. However, as shown above, this disclaimer met the requirement of "bold & conspicuous" type and expressly mentioned "merchantability and fitness."

Therefore, Sam will have no claim under either warranty or merchantability claim or a warranty of fitness for a particular purpose. In fact, Sam did not indicate a particular purpose at time of contracting so as to become a basis of the bargain.

### Remedies

As discussed above, Windco will receive the full contract price plus the \$200 shipping fee.

However, if Sam can demonstrate that the late installation did cause the "several delay-related expenses" th[at] he claims this will be considered a minor breach (usually timely performance is not a major breach and, as shown above, this contract does not qualify as a "time is of the essence" contract).

Therefore, Sam will be able to offset the delay-related costs against the contract price, thus reducing his payment by that amount, because Windco will be found to have substantially performed. The court abhors a waste and will reduce Sam's debt by the difference between what the building now is worth and what it would have been worth if the contract was fulfilled as expected.

## Question 2

As Dan walked down a busy city street one afternoon, Vic, a scruffy, long-haired young man, approached him. For some time, Dan had been plagued by a pathological fear that long-haired transients were trying to kill him. Mistakenly believing that his life was about to be taken, Dan pulled out a handgun and fired the gun, intending only to wound Vic in the legs to prevent the anticipated attack. Rather than inflicting the intended leg wound, the bullet ricocheted off the sidewalk and hit Vic in the heart, killing him instantly.

1. With what crime or crimes should Dan be charged? Discuss.
2. What defense or defenses might Dan assert? Discuss.

## **Answer A to Question 2**

### **STATE V. DAN (D)**

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#### **AGGRAVATED ASSAULT**

Assault is either a substantial step toward an intended battery or the intentional placing of another in reasonable apprehension of imminent bodily harm. Modernly, an aggravated assault is an assault committed with a deadly weapon.

Here, the facts indicate that D shot at Vic (V), intending to wound him. If V was apprehensive of being shot, D will be guilty of assault. Additionally, because D shot at V with a deadly weapon, a gun, D will modernly be guilty of aggravated assault.

D will be guilty of aggravated assault. However, the assault will merge with the subsequent homicide.

#### **AGGRAVATED BATTERY**

Battery is the unlawful application of force to the person of another. Modernly, a battery is aggravated if it is committed with a deadly weapon.

Here, D intended to wound V by shooting V in the leg. However, the bullet actually killed V by striking him elsewhere. Under the doctrine of transferred intent, D will be guilty of the battery because the intended harm was criminal, and there is great similarity between the intended harm and the harm that actually occurred. Furthermore, because D used a gun to batter V, D will be guilty of aggravated battery.

D will be guilty of aggravated battery, though it will merge with the subsequent homicide.

#### **HOMICIDE OF V**

HOMICIDE is the killing of a human being by another human being. Here, the facts indicate that D killed V by shooting at V with a gun. There is a homicide.

#### **CAUSATION - ACTUAL CAUSE**

But for D shooting at V, V would not have died.

#### **CAUSATION - PROXIMATE CAUSE**

It is foreseeable that shooting to someone with intent to injure could result in a death.

#### **MURDER**

Murder is an unlawful homicide committed with malice aforethought. Malice aforethought may be proven under any of four theories.

- 1) INTENT TO KILL - Intent requires the conscious desire to cause the criminal result. The facts indicate that D only intended to wound V, not kill V. Thus, D did not have the specific intent to kill.
- 2) INTENT TO INFLICT SERIOUS BODILY HARM - Here, the facts indicate that D shot at V with the intent to hitting [sic] V in the leg. Shooting someone in the leg is likely to cause serious bodily harm and the facts indicate that D intended to wound V. Under this theory, then, D intended to cause serious bodily harm.
- 3) DEPRAVED HEART ACT - A depraved heart act is a wanton and reckless disregard for the value of human life. Here, D shot at V in a public place with an intent to wound V in the leg. Shooting someone in the leg present[s] numerous, dangerous risk[s] to his welfare and court[s] normally hold that any act that [is] likely to cause serious harm to others is a depraved heart act if the risk is disregarded.
- 4) APPLICATION OF THE FELONY MURDER RULE - A killing will be felony if it 1) occurs during the res gestae of a dangerous felony or a felony committed in a dangerous way, 2) is foreseeable, and 3) is independent of the target crime. Here, the State will not bring a charge of felony murder, because the only predicate felonies would merge with the crime. Because of public policy reasons, courts refuse to apply felony murder to felonious assaults and batteries, otherwise, strict liability for first degree murder would result from each killing.

Having found malice under the theories of 2) intent to inflict serious bodily harm, and 3) depraved heart act, the State will proceed as follows.

### **FIRST DEGREE MURDER**

First degree murder is an unlawful homicide committed with premeditation and deliberation and specific intent to kill. Premeditation and deliberation may be proven by application of the felony murder rule, or a killing by poison, bomb, torture, or ambush.

Here, the facts indicate that D lacked the specific intent to kill and the felony murder rule will not apply. The State will not bring a charge of first degree murder.

### **SECOND DEGREE MURDER**

All murder not raised to the first degree shall be second degree murder. Here, because the State proved malice under two theories, but did not raise the charge to first degree murder, the State will bring a charge of second degree murder. Because the State established malice under 2) intent to inflict serious bodily harm, and 3) depraved heart act, D will be guilty of second degree murder absent a defense.

D will be guilty of second degree murder.

## **VOLUNTARY MANSLAUGHTER**

Voluntary manslaughter is an intentional homicide committed with malice, but with mitigation. Mitigation may be proven by adequate provocation or mistaken justification.

Here, D may try to claim that he was provoked into shooting V. However, the first element of adequate provocation requires that a reasonable person be provoked by the conduct. Here, a reasonable person would not have been provoked by V's approach, so V may not claim provocation. Additionally, D may claim that his defense of self-defense is imperfect and results in a charge of voluntary manslaughter. As discussed infra, D will raise a defense of self-defense, and this defense will be imperfect. A court may apply this rule of mitigation to lessen the offense to voluntary manslaughter.

The State may bring a charge of voluntary manslaughter. D will be guilty of voluntary manslaughter if he succeeds in mitigating his crime by an imperfect self-defense claim.

## **INVOLUNTARY MANSLAUGHTER**

Involuntary manslaughter is an unintentional homicide that results from 1) application of the misdemeanor manslaughter rule, 2) intent to inflict non-serious bodily harm, 3) criminal negligence.

Here, D will try to mitigate his charge by claiming that the homicide was only involuntary manslaughter. D will claim that he only intended non-serious bodily harm and the killing was accidental. However, court[s] consistently hold that any intent to harm with a deadly weapon infers an intent to inflict serious bodily harm.

Additionally, D may claim that he was only criminally negligent, not reckless. D's claim may work depending on the surrounding situation of the terrain.

The State may charge D with the lesser included offense of involuntary manslaughter.

## **DEFENSES TO HOMICIDE**

### **SELF-DEFENSE**

Self-defense [is] the actual and reasonable apprehensions of bodily harm.

Here, D may claim that he believed V would harm him. However, this belief is not reasonable, because a reasonable person would not have assumed V's approach

meant V intended to do harm. Furthermore, D used unreasonable force because V was not threatening any harm.

D's claim of self-defense will fail, but may constitute an imperfect self-defense that mitigates the homicide, as discussed supra.

### **INSANITY - M'NAUGHTEN RULE**

The defendant is entitled to acquittal, if at the time of the crimes and as a result of a mental condition, he 1) did not know the nature or quality of his act, 2) or that his act was wrong.

Under this rule, D may claim that he believed V was going to attack D and kill D. If D subjectively held this belief, then he would have been permitted to defend himself. Even though this believe was unreasonable, in jurisdictions applying the M'Naughten rule, D may not have believed his act was wrong.

D may be able to escape guilt under the M'Naughten rule.

### **INSANITY - MODEL PENAL CODE**

Defendant is entitled to acquittal if at the time of the crime and as a result of a mental condition, he 1) lacked the capacity to conform his conduct to the requirements of the law, or 2) did not know his act was wrong.

Even though D was capable of conforming to the requirements of the law, he may claim that he did not know his act was wrong, because he believed he needed to defend himself. In jurisdictions holding to the MPC insanity position, D would need to prove he did not know his act was wrong.

D may avoid guilt under the MPC test for insanity.

### **IRRESISTIBLE IMPULSE TEST**

Defendant is entitled to acquittal if his crime was the result of an irresistible impulse that overcame his will.

Under this test, D would need to prove he was unable to control himself when he shot V. This test would probably not provide a defense because D could have controlled himself, he just thought he needed to defend himself.

D will probably be guilty in jurisdictions applying the irresistible impulse test.

### **DURHAM RULE**

Defendant is entitled to acquittal if his crime was the product of a mental defect.

Here, D's crime appears to be the product of a mental defect. That is, D believed V would kill D because of a delusion.

In the minority of jurisdictions that apply the Durham Rule, D may avoid guilt because the crime was the product of mental defect.

### **WELLS-GORSHEN RULE**

Under the Wells-Gorshen rule, insanity defenses that do not give rise to absolute defenses may negate the mens rea requirement of a crime.

Here, D may claim that he lacked the mens rea to commit murder because he thought V was going to do harm to D. However, under the malice theories, the State proved that D intended to harm V. Even though D thought he was acting in self-defense, he still intended this harm.

The Wells-Gorshen rule will not apply here.

### **DIMINISHED CAPACITY**

Here, D may try to argue that his delusions diminished his capacity to form the intent to commit murder. This rule only applies in a small minority of jurisdictions and usually is applicable only to negate the mens rea of a crime. Here, D is not seeking to negate the mens rea.

Diminished capacity will not apply.

## Answer B to Question 2

### CHARLES V. DAN

#### HOMICIDE CHARGES.

Murder: Murder is the voluntary taking of the life of another with malice. Malice can be shown by perpetrator's intent to kill, by his being responsible for death during commission of a dangerous felony ("felony murder"), by acting in a manner demonstrating a wanton disregard for human life, or by intending to inflict serious injury.

Here, Dan is on a busy street and is approached by someone he imagines intends to hurt him. Dan is carrying a concealed weapon, a gun, with which he shoots in Vic's direction intending, he says, "only to wound him," but a ricochet bullet kills Vic.

-There is clearly a homicide and Dan is clearly the cause. But for Dan's firing, voluntarily, the gun, Vic would not be dead.

-Intent: First degree murder is a specific intent crime, usually shown by evidence of premeditation and deliberation, or by felony murder. Felony murder is not likely to apply here. Though crimes of carrying [a] concealed weapon and criminal assault might be felonies, the shooting did not occur in furtherance of these crimes. So, premeditation and deliberation are the focus [sic]. A case can be made that Dan premeditated this crime by the fact that he was carrying a concealed gun. Moreover, deliberation can occur in a very short time; even a moment's deliberation can be enough to sustain the charges. Here Dan thought about his act long enough to consider Vic's "scruffy" appearance to be a threat to him, and to decide to shoot.

#### Second Degree Murder

Intent to inflict serious bodily harm satisfies the malice requirement. Vic shot "to wound Vic in the legs." A bullet to the legs is surely serious bodily harm, so Vic can be found to have malice on this basis.

Likewise, Vic's shooting a gun on a "busy street" is likely "wanton disregard for human life" so that Vic's malice can be shown to be based upon "depraved heart."

Finally, the killing of a person by "dangerous means" as a lethal weapon, here, a gun, is sufficient to establish intent.

#### Conclusion

Prosecutor can charge Dan with first degree murder based upon his intent, shown by carrying and firing [a] gun on [a] busy street and his premeditation. Second degree murder included.

#### Assault and Battery

Criminal assault merges into battery where the threat which constitutes assault occurs simultaneously with the harmful touching required for battery.

Criminal battery is the harmful or offensive touching of another without consent. The touching may be indirect so long as a physical touching occurs and the object which touches was set in motion by the perpetrator. Here Dan clearly caused the bullet to “touch” Vic in harmful manner.

### Conclusion

Vic can be charged with criminal assault and battery.

N.B. Legal statutes may result in a gun charge v. Dan.

### Defenses For Dan

#### **Justification**

A justification excuses the crime and results in “no crime.” Here, Dan will argue self-defense as justification. Self-defense excuses a killing if the perpetrator acted reasonably (general intent) and in good faith (specific and general intent crimes) to protect self from serious bodily injury or death and if the actions in defense were proportionate to the threat.

Here, Dan will argue he only acted to save himself from Vic, whom he believed intended to kill him, and that deadly force was proportionate and justified.

However, since Vic made no threatening gestures toward Dan and there are facts suggesting Vic was brandishing a weapon, a reasonable person in Dan’s position would not have concluded his life was in jeopardy. So Dan’s excuse falls in the majority. His “good faith” alone is irrelevant to second degree murder, a general intent crime. In a minority of jurisdictions, if his mistake is found to be in “honest” or in “good faith,” the crime may be mitigated to voluntary manslaughter.

### Conclusion

Self-defense is not likely available to Dan.

Excuses:

Dan will defend saying he did not have the requisite intent for murder.

He will say he only intended to wound Vic. However, as discussed above, both the specific intent for first degree murder and general intent for second degree are supported by his acts. His intent to do serious bodily harm by wounding Vic with a bullet, the use of a gun, [and] the thinking he did before firing all support Vic’s having requisite intent for murder, arguably first degree.

## Insanity

In majority the defense of insanity is established if, at the time of the offense, the perpetrator was suffering from a serious mental defect or disease such that he lacked substantial capacity either to appreciate the wrongfulness of his act or to conform his behavior to the requirements of the law (A.L.I).

Here, while Dan is described as having a “pathological fear” of long-haired persons, we do not know if he has had an established diagnosis of serious mental illness. If he does have such a defect or disease, Dan will have to show that his delusional state was of the kind that anyone believing as he did would have acted in the manner he did or that his disease caused him to lack substantial capacity to understand that he was shooting someone or that it is a crime to do so.

## Involuntary Manslaughter

Involuntary manslaughter is the killing of another in a state of passion or high emotional arousal caused by a provocation, more than mere words, that would have aroused such emotion in any reasonable person in that position, and that there was no time for the person to “cool off”, and that he did not, in fact, cool off.

Here Dan will argue that Vic’s coming toward him looking as he did caused Dan to be so afraid that he acted in a state of high emotion.

## Conclusion

Dan’s arousal is not that which a reasonable person in his situation would experience. Dan’s mental illness is not considered in this formulation.

## Conclusion

Charges of murder in first degree will lie against Dan, though they may be dropped to second degree murder. Dan’s defenses will fail, except possibly the insanity defense, for which we have insufficient information to decide.

### Question 3

Debbie, a well known photographer, owns a studio that offers “on location” photography, enabling patrons to be photographed in environments of their choice.

Jon owns a new health spa located in a nearby mountain region. Jon had seen and admired Debbie’s “on location” photography work. He called Debbie to arrange for photography as part of his promotional plan for the spa. Jon told her that he planned to trim 50 pounds from his own considerably hefty frame by participating in the program of diet, exercise and strength training offered at the spa. He wanted to have “before and after” pictures taken of himself eating at the spa, working out on the spa exercise equipment and hiking along one of the spa’s scenic trails. The photographs were to be displayed in strategic locations throughout the spa and would be included in the spa’s brochure. Debbie stated that the total charge for the photography (which would consist of five “before” pictures and five “after” pictures) would be \$1,000. The parties agreed that the “before” pictures would be taken on the following day.

When Debbie arrived at the spa, she learned for the first time that it was a health spa for nudists. Debbie was extremely uncomfortable, but the naked Jon persuaded her to stay and take the first set of pictures.

On the next day, Jon received the five “before” pictures and a letter from Debbie requesting immediate payment of \$500, and stating that the five “after” pictures would be taken by her assistant upon notification that Jon had lost 50 pounds.

Jon consults you and asks the following questions:

1. Does an enforceable contract exist between Debbie and Jon? Discuss.
2. Assuming that an enforceable contract exists, can Jon require Debbie to take the “after” pictures personally? Discuss.
3. Is Debbie entitled to a \$500 payment at this time? Discuss.

## Answer A to Question 3

### Contracts

This is a contract primarily for services and will be analyzed using common law principles. Debbie is a photographer and contract is for services - taking the photographs (not for the photos themselves) for common law. UCC rules discussed when they apply only. (Uniform Commercial Code).

#### I. Don v. Debbie - Enforceable Contract?

##### A. Formation

##### 1. Mutual Assent

- a. Offer must contain subject matter, definite terms, and intention to be bound. Here, Jon called Debbie and discussed the 10 photos and their purpose, the terms, and expressed intention to be bound. Offer is valid.
- b. Acceptance. Must be a mirror image agreement to the offer and express the intention to be bound. Here, Debbie accepts Jon's offer, and both agree to the specific terms.
- c. Consideration. Is a bargained for exchange of legal detriment. Here, Debbie agrees to take pictures in exchange for Jon's payment of money. Consideration is adequate.

#### II. Defenses

##### A. Statute of Frauds - (SOF) valuable and easily misunderstood contracts must be in writing.

1) UCC \$500 Rule - In order for the contract to be enforceable, it must be in writing if the value of the goods is more than \$500 (valuable). Here, under UCC, a writing is necessary. But because this contract is primarily a services contract, it would be enforceable without a writing.

- a. One year rule - Both UCC and Non-UCC. If a contract, at time at formation, cannot be performed within one year, a writing is necessary for the contract to be enforceable. Here, (hopefully) Jon can lose 50# in less than one year, and this rule does not apply. The contract is valid without a written contract.

##### b. Impossibility/Impracticability

If there are intervening events that occur which are unforeseeable, the performance is excused (leg. [sic] illegality destruction of subject matter, death/incapacity of the parties).

Here, Debbie became uncomfortable when she found out that Jon's spa was a nudist camp. She would try to assert that being uncomfortable once was enough; the second time was impossible for her.

c. Mistake

When ①Debbie did not know that Jon's spa was a nudist camp, ②Jon did not tell her that it was a nudist camp, and ③neither party knew (at formation) that Debbie was not comfortable in the nudist camp, there was a mutual mistake. The contract is voidable by either party.

Unilateral mistake - If Jon could argue that Debbie should have known or asked about certain circumstances that precluded her work, he can prevail on this issue.

If Debbie can show that Jon should have told her that his spa was a nudist camp, Debbie would prevail. The mistake is chargeable to the more unreasonable party.

d. Detrimental Reliance - Promissory Estoppel

Partial performance - Jon would argue that there was a partial performance by Debbie and that he relied reasonably and detrimentally that Debbie would finish the job.

e. Modification

At common law, modification requires additional consideration. At UCC, only good faith is necessary. Consideration substitutes can be used, e.g. detrimental reliance, supra. Here, Debbie wishes to modify contract from \$1,000 for 10 photos to \$500 for 5 photos. She can prevail at common law if she can show additional consideration, or, at UCC, good faith. But Jon has no consideration. This modification is not valid.

III. Can Jon require Debbie to take "after" pictures?

- A. Delegation of Duty - Courts favor assignment and delegation. The delegation must be with the consent of the obligee or must not be to his detriment. Here, if Jon does not want to give consent for delegation of duty to Debbie's assistant, he must show that there is diminution in value of the services.

- B. Personal Services - Contracts are not assignable. If Jon can assert that Debbie's services were so personal that her duties cannot be delegated, he would prevail. Debbie would argue that photography is not like a portrait and that an equally qualified photographer (such as her assistant) could perform just as well. However, courts are reluctant to enforce specific performance on personal service contracts. Damages would likely be in expectation damages.

IV. Is Debbie entitled to a \$500 payment at this time?

- A. Express v. Constructive Conditions

All express conditions must be completely performed to avoid breach. Constructive conditions must be substantially performed to avoid breach. Here, the question would be whether there was an express (v. constructive) condition that the total job would need to be completed before payment in order to avoid breach. The courts won't likely construe this to mean the entire contract.

- B. Divisible Contract?

If Debbie can successfully argue that the contract consisted of 2 parts (before and after) she would be entitled to partial payment for partial performance. This is not a divisible contract and Jon would prevail.

- C. Modification valid?

No, for inadequate consideration, supra.

- D. Quasi - Contract Recovery

In order to avoid unjust enrichment the court considers recovery in Quasi-Contracts. Traditionally, only the non-breaching party could recover. In modern law, the breaching party could also recover if the breach were not willful and in good faith. Here, Debbie would be able to recover \$500 for value of the before photographs, because her breach was in good faith.

V. Damages under UCC

- 1. Seller's breach - When seller breaches, the buyer is entitled to market price minus contract price. Alternatively, buyer can "cover."

A buyer is entitled to seek replacement from another buyer and sue the seller for the difference.

### **Answer B to Question 3**

#### Enforceable Contract Between Debbie and Jon?

Since this is not a contract for goods common law will be the authority.

1. Contract?

A contract is a promise or set of promises the performance of which the law recognizes as a duty and the breach of which the law will provide a remedy [sic]. It consists of mutual assent and [is] supported by consideration.

2. Was There an Offer by Debbie?

An offer is a manifestation of present contractual intent communicated to the offeree such that a reasonable person would conclude that a bargain had been formed. Under common law an offer must include: parties, subject matter, price, and time and quantity. Here the parties are implied because she is "stating" this to Jon.

The quantity is stated as "5 before pic[ture]s and 5 after" pictures.

The price is "\$1,000 dollars and the time is the next day".

Therefore there is a valid offer here.

3. Acceptance?

An acceptance is an affirmative assent communicated to the offeror in the manner requested, if not requested then in a reasonable manner. An acceptance to a bilateral offer may be by return promise or by performance.

Here there is an acceptance because "the parties agreed" that the before pictures would be taken the following day. Therefore Jon assented to the onset of Debbie's performance.

4. Consideration?

Is a bargained-for exchange that causes legal detriment. Here there is consideration because Debbie is promising to take photographs (using her professional skills and time) and Jon is promising to pay Debbie \$1,000.

5. Statute of Frauds?

The statute requires that certain contracts be reduced to writing to be enforceable. One of these is for goods \$500 and over. Although this seems like a contract for Debbie's services as a photographer, she is also producing tangible moveable goods. The goods were not moveable at the time the contract was formed, however, and therefore the statute would not apply. Therefore a contract exists and

it is enforceable.

Jon v. Debbie

Contract?

Assuming a contract exists, supra, what are the rights Jon may assert?

Was there an enforceable delegation from Debbie to assistant?

The law favors delegations. A delegation occurs when one party delegates his duties under an existing contract to a third party.

Here there is a delegation because Debbie says “the after pictures would be taken by the assistant.”

Is the delegation binding on the assistant? A delegation is binding on the delegatee only if they knowingly consent; usually consideration is involved. There are no facts stating whether the assistant consented. One could reasonably assume she was being compensated and consideration would exist.

Debbie would remain liable for performance as the delegator.

Are there exceptions to an enforceable delegation?

Exceptions -

1. Prohibited by contract;
2. Prohibited by statute;
3. Too personal in nature.

Here there may be a valid exception because it could be argued that the artistry of a “well known photographer” is too personal in nature to delegate.

Therefore Debbie would not be able to delegate her services.

Can Jon demand that Debbie take the pictures?

Where specific performance would require one to personally perform it will not be enforced based on a prohibition on involuntary servitude.

Therefore Debbie would not be forced to perform. She may, however, be enjoined from performing elsewhere during that time.

Her discomfort may be a factor to rebut based on impracticability.

Debbie v. Jon

If Debbie doesn't perform is she entitled to partial compensation?

If Debbie's "extreme discomfort" can be shown to make performance impracticable she may be entitled to services already rendered.

Impracticability exists where a reasonably unforeseeable intervening event, the risk of which was not assumed by either party, makes performance extremely difficult; the duties of the parties may be discharged. Here may be reasonably unforeseeable because "it was a nudist camp and Debbie didn't find out about it until that day. There is no indication she assumed this risk. In order to be successful, she would have to [show] that it would be very difficult to perform the contract. Since "Jon persuaded her to stay" the first time, it may be difficult.

She may be able to recover quantum meruit for the services already provided.

She may argue that there was a divisible contract and recover under this theory. "Jon received the 5 before pictures" and Debbie's demand for payment. There is nothing in the contract telling us there is a separate delivery for a separate payment.

## Question 4

A zoo maintenance employee threw a pile of used cleaning rags into a hot, enclosed room on the zoo's premises. The rags contained a flammable cleaning fluid that later spontaneously burst into flames as a result of the heat in the room.

The fire caused a large water main in the zoo to burst, and the escaping water from the main washed away a portion of the zoo's zebra pen fence. A zebra escaped from the zoo through the hole in the fence caused by the water.

A young child encountered the zebra in a nearby residential area. The child petted the zebra and offered it a stick of candy. In taking the candy from the child the zebra bit off one of the child's fingers.

On what theory or theories of liability might an action be brought against the zoo on behalf of the child and what should be the likely outcome of such action? Discuss.

## Answer A to Question 4

### I. Child vs. Zoo

Strict Liability. For the child to recover against zoo in strict liability she must simply show that the wild animal causing her injury was owned by or under the care of the zoo and that she suffered injury that were [sic] of the type consistent with foreseeable harm by the wild animal. This is because owners/caretakers of wild animals are strictly liable for the reasonable and foreseeable harm caused by the wild animal.

Here, the zebra was clearly under the care/control of the zoo when it escaped from its cage. As such, zoo would be strictly liable for any reasonable/foreseeable harm the animal causes.

Zoo will argue that the child assumed the risk when it petted the zebra and offered it a stick of candy. However, given the fact that the zebra is generally considered to be a wild animal, and that it is foreseeable that it could bite if in close proximity to a person, this would not relieve zoo's liability.

### II. Child vs. Zoo

Negligence. For child to recover against zoo in negligence, she must show duty, breach of that duty, causation, and damages.

[Note: Zoo's liability would be based on various liability under the theory of respondeat superior as the zoo's employer (Maintenance Man), and the performance of his duty, set into motion the series of events that resulted in child's injury.]

Duty. Duty arises when there is a legally recognized relationship between plaintiff and defendant that results in defendant having to act in [sic] some fashion other than arbitrarily towards plaintiff. The duty owed is one of reasonable care towards all foreseeable plaintiffs in the zone of danger created by defendant's negligence.

At common law, duty was largely based on one's status in relationship to defendant. One could be an invitee, a licensee, or a trespasser. Here the child plaintiff was not on defendant's property at the time of the accident, but rather was in a residential area "nearby" the zoo. As zoo is in the business of housing, caring for, and maintaining wild animals, it should be reasonably foreseeable that an accident could arise that would result in an animal being left loose in the nearby community, and because of the nature of a wild animal's behavior, harm could have resulted to a person in the nearby community. This is particularly true where children are around.

Breach of Duty. Breach of duty arises when defendant's actions do not rise to the standard of care required by the law. Here, Learned Hand's approach would note that the zoo breached its duty if the cost incurred with avoiding the harm causing incident was less than the product of the probability of the harm causing incident

arising and the magnitude of loss should the harm causing event occur.

Here, a fire caused a large water main to break with the ensuing rush of water washing away a portion of the zebra's pen fence. When considering a pen fence, (as opposed to a sturdy cage), it's entirely foreseeable that a sudden deluge of water could wash away a portion of the "fence." As such, the zoo should have ensured construction of a caged facility that would be sturdy enough to withstand this type of accident.

The cost involved with the construction of a pen of this nature would be significantly less than the potential danger that a wild animal could cause to men, women, and children in a nearby area should that animal escape. As such, it could be argued that the zoo breached its duty.

Causation. For liability to arise, the zoo (or in this case, the zoo's employee) would have to be both actual and primary cause of the child's injury.

Actual Cause. Actual cause arises when "but for" defendant's actions, plaintiff would not have been injured. Here, the zoo's maintenance employee threw a pile of cleaning rags saturated with a flammable cleaning fluid into a hot, enclosed room. The maintenance man should have known that there was the potential for the rags igniting resulting in a fire. When this happened, the fire set into motion a series of events that resulted in the zebra getting free and the child being bitten. As such, "but for" the maintenance man's action, the child's injury would not have occurred.

Proximate Cause. Arises when a result is the natur[al] and probable/reasonable and foreseeable consequences of defendant's actions. Here, we look to see if the injury is of the type reasonably expected, or was significantly more severe than reasonably expected. Here, there was a fire, that resulted in a water main bursting, that resulted in a fence being washed away, that led to a zebra escaping, that resulted in a child being bitten by the zebra. The zoo could reasonably argue that the type of injury resulting to the child was not of the type that would be the foreseeable natural consequence of a fire that caused a water main to break. As such, they could avoid liability as the maintenance man's actions would not be the proximate cause of the child's injury.

Defenses. At common law, contributing negligence was a complete bar to recovery. Here, the zoo could argue that the child was contributorily negligent when she petted the zebra and fed it candy. If the court argued, child would be barred from recovery.

Comparative Fault. Today, most jurisdictions have adopted comparative fault. Here, the could [sic] would weight [sic] the percentage of responsibility on each of the parties and assess damages accordingly. If child was less at fault than zoo, she could recover accordingly.

Assumption of Risk. If it can be shown that the child knew the consequences of her actions and knowingly embraced the danger, this could bar her from recovery. This would be a matter of fact for the court to decide.

## Answer B to Question 4

### Child v. Zoo

#### Strict Liability

Owners of trespassing wild animals will be held strictly liable (no fault need be shown) for damages proximately caused by the animals.

#### Zebra a Wild Animal?

A wild animal is one that is not domesticated (does not serve man). A zebra is a wild animal because its only use is to be displayed in a zoo. This zebra is from a zoo and thus is considered wild.

#### Causation.

The damage to the child was both actually (BUT-FOR TEST) and proximately (LEGALLY) caused by the zebra because the zebra bit off the child's fingers [sic]. But for this biting, the child would not have lost his fingers [sic]. There are no superseding causes.

#### Damages.

The child lost his fingers [sic].

#### Defense.

Because contributory negligence is not a defense to strict liability, the only question is whether Child assumed the risk.

ASSUMPTION OF RISK requires plaintiff to understand the nature and extent of the risk and to disregard that risk. Here there is no evidence that Child apprehended a risk when approaching the Zebra. Indeed, Child's offer of candy was a friendly gesture that showed Child probably was comfortable and had no idea that his fingers were in danger.

Therefore Child did not assume the risk of injury.

#### Domestic Animal?

Zoo could try to claim that, like a horse, a Zebra is a domestic animal, and as such, Zoo would not be strictly liable unless the zebra had known dangerous tendencies. However, this claim should be dismissed because a zebra only looks like a horse; they [sic] are not, however, domesticated.

Under the facts Child should be able to recover from Zoo in Strict Liability.

#### Negligence?

Negligence is conduct that falls below the standard of care set by law to protect others from unreasonable risk of harm.

Here Child may also assert a claim in negligence if he can show that Zoo breached an owed duty to him, actually and proximately causing Child's damages.

### Vicarious Liability

Under the doctrine of RESPONDEAT SUPERIOR Zoo will be liable for torts committed by its employees if they act within the scope of their duties.

Here the maintenance employee was doing his duties, cleaning up, when he threw the rag into the hot room. Zoo will be liable for any tort arising from this act if it is tortious.

### Duty.

Zoo owes a duty to act as a reasonable zoo. In addition, as possessor of land, they owe a duty not to harm others outside their land by activities on the land.

### Breach.

Under Cardozo from the Palsgraf decision a duty is owed to all foreseeable plaintiffs, generally within the zone of the activity. Here it is foreseeable that an escaped Zebra would run into civilians and so Zoo was under a duty to be very careful this wouldn't happen.

Here Zoo breached this duty in possibly several ways.

1. First, Child could argue that Zoo's employee was negligent in not realizing that a rag soaked with a flammable liquid could spontaneously combust in a hot enclosed room. This, however, is a poor argument because most maintenance men do not have that understanding of physics and chemistry.
2. Second, Child could claim that Zoo did not build a strong enough fence to keep the zebras penned in. This is not so strong either because the force from the broken water main probably exceeded any natural force that could reasonably be foreseen. But if the fence was not strong for normal wear and tear Child could show breach here.
3. A third argument, much better, is that Zoo has a duty to notice when wild animals escape and has ready plans to round them up or tranquilize them if they do escape. Here it seems Zoo did nothing while the zebra ran away.

Therefore Zoo has breached its duty to control its animals.

### Causation.

Zoo might claim that the Child's offer of candy was superseding cause that breaks

the chain of proximate causation. However, Child would have to be doing something independent and unforeseeable for Zoo to prevail. While carrying candy is not a response to an escaped zebra, it is not unforeseeable that a child should have candy, nor is it unforeseeable that such a child might offer it to the zebra.

Damages.

Discussed supra.

Defenses.

CONTRIBUTORY NEGLIGENCE is conduct by the plaintiff that fails to conform to the standard of care set by law for the plaintiff's own protection.

Here a CHILD STANDARD OF CARE applies. Child will be expected to act as a reasonable child of similar age, experience, and education will act in similar circumstances.

Here Child's behavior is typical of a "young child" and is therefore not negligent.

ASSUMPTION OF RISK fails for the similar reason as discussed supra.

Therefore Child could also recover for his damages under Negligence theory.