



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

**Essay Questions  
and  
Selected Answers**

June 2009

**ESSAY QUESTIONS AND SELECTED ANSWERS**  
**JUNE 2009 FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the essay questions from the June 2009 California First-Year Law Students' Examination and two selected answers for each question.

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

Applicants were given four hours to answer four essay questions.

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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

Al, Bob, Carl, and Dolly were coworkers at Zco. Al, Bob, and Carl did not like Dolly and wanted her fired from Zco.

On Monday, all employees of Zco were required to attend a mandatory meeting. Prior to the meeting, Al entered Dolly's office and told her not to leave her office until the meeting was over. He then said to her, "If you leave this office before the meeting is over, some of my friends and I will come to your home and beat you up." Al then left for the meeting. Dolly, scared for her safety, remained in her office, missed the meeting, and was reprimanded by Carl, her supervisor.

On Tuesday, Bob placed a sleeping pill in Dolly's coffee when Dolly was not looking. Dolly drank the coffee and fell asleep at her desk twenty minutes later. She slept for four hours, and was again reprimanded by Carl for sleeping on the job.

On Wednesday, the Human Resources Manager for Zco asked Carl if he knew why Dolly had missed the meeting on Monday and fell asleep at her desk on Tuesday. Carl responded that Dolly had a serious drinking problem that interfered with her job performance. Carl was aware of the actual reasons why Dolly had missed the meeting on Monday and fell asleep on Tuesday, and he had no reason to believe that she had a drinking problem. On Thursday, Dolly was fired from Zco.

Under what intentional tort theories might an action for damages be brought by Dolly against Al, Bob, and Carl, and what defenses, if any, might Al, Bob, or Carl assert, and what are the likely results?

Discuss.

## Answer A to Question 1

Dolly v. AI

### 1. False Imprisonment

Dolly may have a cause of action against AI for false imprisonment.

False imprisonment is a volitional act done with the requisite intent that causes plaintiff to be confined to a bounded area and the plaintiff is aware of the confinement or injured.

Intent

To be intentional the defendant must have desired the outcome of his conduct or be substantially certain that the outcome would occur as a result of his conduct. Here, the facts are clear that AI acted voluntarily and intentionally by telling Dolly she could not leave her office.

Confined to a bounded area

The plaintiff must be confined to a bounded area against the plaintiff's will. Here, AI told Dolly she could not leave her office and if she did that he and some friends would come to her home and beat her up. This threat would make Dolly fearful and feel that she could not leave her office. However, AI will assert that he told her not to leave her office until the meeting was over; therefore, she was not confined. This argument will fail as confinement for a short period of time will establish confinement. Although AI left for the office meeting immediately and Dolly would have been able to escape her office, the confinement by AI had already taken place. In addition, Dolly will assert that she was afraid to leave the office due to the threat of harm by AI and his friends. Use of threats of harm is sufficient to form a barrier for confinement to a bounded area. Therefore, Dolly will have a cause of action against AI for false imprisonment.

## 2. Assault

Dolly may also have a cause of action against Al for assault. Assault is a volitional act done with the requisite intent that causes the plaintiff to fear an imminent harmful or offensive touching.

Intent - as defined under false imprisonment supra.

Here, Al's conduct of telling Dolly that he and some friends will come over to her house and beat her up shows that he voluntarily and intentionally engaged in the conduct. Therefore the intent element is satisfied.

### Fear and apprehension

The plaintiff must be placed in fear of apprehension of an imminent attack in order to recover for assault. Here, the facts are clear that Dolly was scared.

### Imminent harmful or offensive touching

The issue here is whether there was an imminent harmful or offensive touching. Al will assert that his threat was of future harm and not imminent; therefore this element is not established. Here, Al's threat is open-ended as coming to one's home to beat them up [and] doesn't necessarily mean that same day. Therefore, it is unlikely Dolly will prevail on the cause of action for assault.

## 3. Dolly v. Bob

Dolly may have a cause of action against Bob for battery.

Battery is a volitional act done with the requisite intent that causes plaintiff to suffer a harmful and offensive contact.

Intent - as defined under AI, false imprisonment supra.

Here, the facts are clear that Bob voluntarily and intentionally placed the sleeping pill in Dolly's coffee.

#### Harmful and offensive contact

The harmful or offensive contact must be to the plaintiff's person or something closely connected thereto. Here, Bob put the pill in Dolly's coffee when she wasn't looking. A coffee cup is something closely connected to the plaintiff. Bob will assert that he did not touch Dolly; however, injection of the pill will suffice. Bob will be liable to Dolly for battery.

#### Dolly v. Carl – Defamation

Dolly may have a cause of action against Carl for defamation.

Defamation is a defamatory statement of and concerning the plaintiff that is published and causes damages to plaintiff's reputation.

Defamatory Statement – A statement is defamatory if it holds the plaintiff up to scorn or ridicule or lowers plaintiff's esteem in a minority of respectable community. Here, Carl's statement that Dolly has a serious drinking problem would be defamatory in that it would lower her esteem among her coworkers.

#### Of and concerning the plaintiff

The defamatory statement must be understood as to be about the plaintiff. Here, Carl's statement was defamatory on its face in that it was made to the Human Resources Manager in response to her question about Dolly missing the meeting and falling asleep

at her desk. Therefore, Dolly will not have to provide any extrinsic facts to show the statement was made about her.

Published to – The defamatory statement must be intentionally or negligently published to a third person. Here, Carl intentionally made the statement to the Human Resources Manager; therefore it was published.

### Damages to the Plaintiff

Slander per se is slander in which damages are presumed and the plaintiff will not have to prove special damages. (Slander is any form of oral defamation.) One way to establish slander per se is if the defamatory statement implies misconduct of one's business trade or profession. Here, Carl's statement that Dolly had a drinking problem that interfered with her job performance would impute that Dolly's drinking problem caused professional misconduct.

Therefore, Dolly will be entitled to damages.

### Defenses

#### Conditional privilege

Carl will assert that he was privileged to make the defamatory statement about Dolly since he was her supervisor and the statement was made to the Human Resources Manager regarding her work. However, Carl will lose this privilege because he acted intentionally by making the statement he knew was false because the facts show that he was aware of the real reason Dolly missed the meeting. Therefore, Carl will be liable to Dolly for pecuniary and nonpecuniary damages for defamation.

## **Answer B to Question 1**

### Intentional Tort Theories which Dolly may have action against Al, Bob and Carl

#### Dolly v. Al

##### Assault

Assault is the volitional intentional placing of another in reasonable apprehension of an imminent harmful or offensive touching without consent or privilege.

The facts indicate that Al entered Dolly's office prior to the meeting and told her not to leave her office until the meeting was over or he and some of his friends would go to her home and beat her up.

By Al speaking the threat, this was a voluntary movement. By Al telling Dolly he would go to her home if she did not remain in the office, his intent was to scare her or he should've been substantially certain that this threat would've scared one in Dolly's position.

By Al stating that he would come to her home, this was a reasonable apprehension. The facts indicate that Dolly was scared for her safety.

The threat was to go to her home later on because it would've had to have been after Al got off work. This means that it was not an imminent threat to her person.

Al will not be liable for assault to Dolly.

## False Imprisonment

False imprisonment is the volitional, intentional confinement of another within fixed boundaries, for any period of time, without consent or privilege, in which there is no reasonable means of egress.

Al went in to Dolly's office and told her "not to leave." This was a voluntary act and a volitional movement of Al. By Al saying "if you leave..." his intent was to keep her in the office or he was substantially certain that she would remain. Dolly was already in her office which has 4 walls and a door indicating it was within fixed boundaries. She wasn't to leave until after the meeting was over, which may have been a considerable amount of time.

The facts indicated that she was "scared for her safety" and "remained in her office" because of a future threat of Al and friends beating her up. She did have the ability to walk out and tell a supervisor which gave her reasonable means to escape.

Al will not be liable to Dolly for false imprisonment.

## Defenses to Al's Assault and False Imprisonment Liability:

### Defense to Assault:

The facts do not indicate that Al would've had any good reason to threaten Dolly, but due to it being a future threat, he will not be liable.

### Defenses to False Imprisonment:

Consent - can be expressed or by conduct. Al will argue that Dolly could've walked out at any time during the meeting, and that she impliedly consented by remaining in her office.

AI will not be liable for false imprisonment.

### Dolly v. Bob

#### Battery

Battery is the volitional intentional harmful or offensive touching of another without consent or privilege.

Bob placed a sleeping pill in Dolly's coffee. This was a physical voluntary act of Bob. By giving her a sleeping pill, he intended her to fall asleep or should've been aware that her falling asleep was substantially certain to occur. Although he did not hurt her, the reasonable person would not appreciate someone slipping any substance into their drink. This indicates there was an offensive touching. Dolly's drink was an item so closely associated with her person, as to be a touching directly to her. The facts state that Dolly was not looking. This is an indication that she did not consent to Bob's act of giving her the pill.

Bob will be liable for assault absent any defenses.

#### Defenses to Battery:

The facts do not indicate that Bob had any valid defense to his actions.

Dolly v. Carl:

Defamation:

Slander Per Se (as to Business)

Defamation is the false defamatory statement publicated [sic] to a 3<sup>rd</sup> party, wherein the 3<sup>rd</sup> party knows and understands the statement to be of and concerning the plaintiff in which the plaintiff suffers damages.

Carl told the Human Resources Manager that Dolly had a serious drinking problem that interfered with her work.

Carl knew this to be false because he knew that Bob had given her sleeping pills. By the H.R. Manager believing Dolly to be a drinker, this could lower her esteem within her workplace and, therefore, the statement was defamatory.

Carl spoke this to the H.R. Manager, which [sic] was a 3<sup>rd</sup> person, and it was directly related to Dolly and the H.R. Manager understood it to be of and concerning Dolly since that is who he inquired about.

Dolly lost her job as a result of Carl's words about her performance. Because the slander was directed to her business involvement, damages are presumed.

Carl will be liable for defamation absent any defense.

Defenses to Defamation:

Truth:

The facts state Carl "was aware of the actual reason." This is not a valid defense.

### Qualified Privilege:

The facts state that Carl was aware of the actual reason and had “no” reason to believe that she had a drinking problem. This means that the statement made by Carl was not in good faith, which extinguishes his privilege to the employer.

### Injurious Falsehood:

An act by Carl which purposefully interferes and causes another not to deal with Dolly. Carl told the H.R. Manager that Dolly had a “drinking problem.” This statement was intended to cause the H.R. Manager not to deal with Dolly any further.

Dolly was fired as a result, which she suffered damages.

Carl will be liable for injurious falsehood, absent any applicable defenses.

### Interference with Expectancy of a Contract:

One is liable if he intentionally interferes with the expectancy of another in dealings in a contract.

The facts indicate that Dolly was fired for her “alcohol use,” which was false. Carl told this purposely to get Dolly into trouble. This was an intentional interference between his corporation and her. She suffered damages by being fired.

Carl will be liable absent any valid defense.

## Remedies

Dolly will recover general damages and punitive damages from Bob regarding the battery and general damages and punitive damages from Carl, and also any special damages from losing her employment if they can be reasonably calculated.

## Question 2

Delta Print Co. ("Delta") ordered three identical Model 100 printing presses from Press Manufacturer Co. ("Press"). Delta's written order form described the items ordered by model number. Delta agreed to pay Press \$25,000 for each Model 100 press. A few days later, Press sent Delta its own form confirming the order. Press's form repeated all of the items on Delta's form, but added the clause, "Delta must make any complaints concerning defects in, or nonconformity of, the goods delivered within a reasonable period after delivery."

One week later, Press delivered the Model 100 printing presses to Delta's place of business. Delta immediately removed its old printing presses and placed two of the new presses into operation. Delta stored the third new press in its original unopened carton. One week after delivery, Delta's Vice President for Operations, Vanessa, notified Press's Sales Manager, Sally, that it wanted to return the third press. Sally asked why it wanted to return the press, and Vanessa responded, "Delta doesn't need a third press at this time." Sally replied that all sales were final and that Delta was obligated to pay for all three presses. Vanessa said that Delta did not want the third press and expected Press to pick it up immediately. Sally responded that she would have a truck pick up the third press the next day, but that Delta was expected to pay for all three presses.

The next day, Press picked up the third press. Press sold the third press to Offset Printing Co. ("Offset") a week later for \$22,000 — a discount off the contract price of \$25,000. It cost Press \$18,000 to build the Model 100 press. Offset is one of the largest printing companies in State X and regularly purchases multiple Model 100 printing presses from Press. Press maintains a large inventory of the Model 100 printing press because of its popularity.

Delta has not yet paid for any of the three Model 100 presses despite repeated demands by Press.

Is Press likely to prevail in an action against Delta for breach of contract and, if so, what is the likely measure of damages? Discuss.

## Answer A to Question 2

### Press v. Delta

#### 1. Is Press likely to prevail in an action for breach of contract against Delta?

##### UCC or Common Law?

Under the Uniform Commercial Code (UCC), all goods are covered under the UCC. A good is a tangible, movable object when it is identified to the contract. If the UCC is silent with regard to a matter involving the sale or buying of goods or the subject matter does not fall under the UCC, then the Common Law is used.

The “three identical model 100” printing presses were tangible, movable objects when identified to the contract.

Conclusion: The UCC controls because the subject matter of the contract involves goods.

##### Merchants?

Under the UCC, a merchant is an entity that regularly trades in the goods subject to the sale or purchase, or by experience or profession holds himself out to be particularly knowledgeable of the goods or type of goods traded.

Here, Delta is a merchant because it is the “Delta Print Co.” and Press is a merchant because “Press maintains a large inventory of the Model 100 printing press.”

Conclusion: Both parties are merchants.

### Delta's written order form an offer?

Under the UCC, the objective manifestation of intent to enter into a bargain with specified essential terms communicated to a party such that a reasonable person would believe that assent would form a bargain is a valid offer. The essential terms for an offer under the UCC are the parties and quantity.

Here, Delta "ordered three identical Model100 printing presses from Press Manufacture Co. ("Press")." Delta sufficiently supplied the minimum terms to form a bargain because "Delta's written order form described the items ordered by model number."

Conclusion: Delta's written order forms an offer.

### Valid Acceptance by Press?

Under the UCC, an acceptance can be made in any reasonable manner, if not specifically indicated in the offer, including the shipping of goods or the promising of the shipping of goods. Unlike the Common Law's Mirror Image Rule, which requires an unequivocal assent to the offer's terms, the UCC under 2-207 permits acceptance with varying terms as long as the varying terms are not materially different than the offer, the offer did not expressly state that the offer was conditioned on the acceptance of the explicit terms, or the offeror objects within a reasonable time. Varying terms do not materially offer [sic] the contract if they are implied material terms. An implied material term is one which is implied by the making of a contract such as that the parties will operate in good faith and fair dealing, and that the parties will follow the UCC and other laws.

Here, there is a valid acceptance by Press because "Press sent Delta its own form confirming the order." The manner of acceptance is reasonable because the written confirmation would [be] in a manner identical or similar to Delta's offer. Delta's clause stating that "Delta must make any complaints concerning defects in, or nonconformity

of, the goods delivered within a reasonable period after delivery” is an implied material term because it is the law according to the UCC - a buyer who accepts goods must notify the buyer of their nonconformity within a reasonable period of time after delivery and inspection, and give the breaching seller (if there is a breaching seller) an opportunity to cure the breach.

Conclusion: Because Press sent a written confirmation, which is a reasonable manner of acceptance, and did not vary the terms such that the contract was unenforceable or the terms deficient, there is a valid acceptance by Press.

### Breach

Under the UCC and contract law, a breach of contract is the failure of a party to perform when that party's duty to perform is due. A material breach is one in which the non-breaching party is affected so substantially that it will be denied the benefit of the bargain due to the breaching party's non-performance.

Here, Press tendered the goods to Delta because “Press delivered the Model 100 printing presses to Delta's place of business.” Delta accepted the goods because “Delta immediately removed its old printing presses and placed two of the new presses in operation.” Furthermore, because Delta kept the other printing press and exercised dominion over the goods inconsistent with a rejection of the goods for a period exceeding the reasonable time for their inspection, i. e., “one week after delivery,” the facts suggest that acceptance occurred. However, the reason that the 3<sup>rd</sup> unit was not inspected was not that Delta needed more time to inspect but rather because Delta had no intention of keeping the 3<sup>rd</sup> unit because Delta said “Delta does not need a 3<sup>rd</sup> press at this time.” Delta was in breach because its duty to perform had become due after Press tendered (delivered) the goods. When Delta said that it did not want the 3<sup>rd</sup> press, it was saying that it was not going to comply with the original valid contract – that it wasn't going to fulfill its contractual obligations because Delta did not claim that the 3<sup>rd</sup> unit was defective or nonconformant. Delta was in material breach at the moment that it

said that it wasn't going to pay for the 3<sup>rd</sup> unit because it didn't need it, because Press' expectation was that it would sell 3 units and receive payment for 3 units. Therefore, it was being denied the benefit of its bargain.

Conclusion: Press is likely to prevail in an action against Delta for breach of contract because Delta and Press entered into a valid contract, and the contract was materially breached by Delta when it unlawfully rejected and refused to pay for the 3<sup>rd</sup> press because it simply didn't want it. Additionally, Delta is in material breach of contract because it hasn't paid for the presses despite Press's repeated demands.

## **2. If so, what is the likely measure of damages?**

### Remedies: Non-Breaching Seller

Under the UCC, a non-breaching seller is entitled to the benefit of the bargain – expectation damages – for a material breach of contract. Also, for an unlimited supplier of goods, the non-breaching seller is entitled to consequential damages or “loss profits” plus incidental damages less any recovery for salvage sale. A non-breaching seller can sell the goods subject to the breach and recover the salvage amount as an offset against its losses. This is the way a non-breaching seller reduces (mitigates) the buyer's damages. Under *Hadley v. Baxendale*, consequential damages are permitted as long as the loss profits were certain in amount, contemplated by the parties (foreseeable), could not be avoided, and caused by the breach.

The likely measure of damages will be expectation damages because the benefit of the bargain was denied to Press. Press attempted to mitigate damages because it sold the 3<sup>rd</sup> press to Option (but at a discount – which the UCC allows as long as the sale is conducted in a reasonable commercial manner).

Consequential damages should be awarded because Press is an unlimited volume dealer because “Press maintains a large inventory of the Model 100 printing press

because of its popularity.” Press should also be awarded incidental damages, and, finally, the amount of damages should be reduced by the amount that Press collected from Offset. Contract Price (3 @ \$25K = \$75K-\$22K=\$53K).

## Answer B to Question 2

**Is Press likely to prevail in an action against Delta for breach of contract and, if so, what is the likely measure of damages?**

PRESS (P) V. DELTA (D)

In order to have any rights, P must show a valid contract under a governing law.

GOVERNING LAW

The UCC governs contracts predominantly involving movable goods, the common law otherwise. Here, the contract is for Model 100 Printing Presses, which are shipped and thus would be a movable good. The UCC will govern this contract.

Merchants

A merchant is one who deals in the goods of the kind or holds himself or his agent out to be skilled in the goods. Here, P is a manufacturer of the presses, and D purchased them for use in its business. Both parties are likely to be considered merchants, thus certain rules apply to these parties in formation.

FORMATION

A contract is formed where there is mutual assent (offer and acceptance), good consideration, and no valid defense.

## Offer

A manifestation of intent to be legally bound by certain definite terms, communicated to an identified offeree or his agent. Here, D ordered three identical Model 100 printing presses from P, thus establishing a reasonable intent to be bound.

## Definite Terms

Under the UCC, the offer must contain a description of the goods and quantity. Here, the offer is for three Model 100 printing presses, thus satisfying the good and quantity requirement. As well, a price term was provided: \$25,000 each though would not be required as it could be gap-filled if necessary.

## Merchant's Firm Offer

A signed offer by a merchant remains open, irrevocably, for a reasonable time not to exceed three months of the time stated. Here, D's written order form described the items ordered by model number.

## Identified Offeree

The offeree is D, thus, all the elements of an offer have been satisfied.

D's offer is valid, and is open and irrevocable for three months.

## Acceptance

An unequivocal assent to the terms and conditions of the offer, communicated to the offeree or his identified agent. Under the common law, the acceptance had to be a mirror image of the offer. Under the UCC, however, an acceptance may be in any means reasonable under the circumstances as the UCC prefers to find a contract.

Here, P sent D its own form confirming the order and the confirmation states the identical terms of the offer, with an added term (infra). Where the writings agree, the UCC prefers to find a contract and thus the confirmation is likely an acceptance where the terms agree (the presses and price). However, the memorandum contains that extra term.

### Merchants' Confirmatory Memoranda

Between merchants, a signed confirmatory memorandum may be made by a party. Where the confirmation includes additional terms, between merchants, the new term becomes part of the contract unless there exists a proviso in the offeror's offer, the other party objects within a reasonable time, or the term materially alters the agreement.

Here, P sent D its own form confirming the order which establishes a confirmatory memorandum. The memorandum added the term: "Delta must make any complaints concerning defects in, or nonconformity of, the goods delivered within a reasonable period after delivery."

D did not respond to the memorandum and D's original offer contains no ironclad statement that the offer (supra) terms must be expressly consented to; thus, unless the term is material, it becomes part of the contract.

The question is whether this is a material term. D may try to argue that it is a new term and would materially alter the contract, but the argument would be weak. P can argue that the UCC, in general, by the Perfect Tender Rule, requires that a seller send the goods in perfect conformance with the contract (discussed infra). However, even where delivery is tendered and accepted, a party may revoke acceptance upon notice of a defect, and thus the "new term" appears to state more or less what the UCC provides anyway.

On balance, the new term comports well with the UCC, and is not likely [to] be found as a material addition; thus will be added to the contract.

### Acceptance by Conduct

While the discussion supra finds the confirmation is likely an acceptance, the UCC (as noted) allows acceptance in any reasonable [form]. Here, P did ship the three presses, and D put two into production. Thus, the parties are conducting themselves in a way to express objective acceptance. The offer has been accepted by P and the term of the memorandum will be added to the contract.

### Consideration

The bargained for exchange of mutual binding legal detriment and benefit.

Here, the parties are exchanging presses for money, which is good consideration.

## DEFENSES TO FORMATION

### Statute of Frauds (SOF)

The SOF requires certain contracts to be in writing to be enforceable. Under the UCC, a contract for goods of value \$500 or greater must be in writing and evidence the requisite UCC terms. Here, the contract is for \$75,000 total in value, thus is within the statute. Here, both the offer, and, as well, the confirmatory memorandum (supra), the contract evidences the parties, the goods and quantity, and thus, the writings, will satisfy the statute.

### Part Performance

Even if the writings are insufficient, the UCC allows a part performance exception in that the contract is enforceable to any performance made. Here, P delivered all three presses; thus the contract would be enforceable anyway.

### Unilateral Mistake

Where one party makes a mistake about a material term, and the other party knows or has reason to know of that mistake, the mistaken party may avoid the agreement. Here, D may argue that it mistakenly ordered three presses when it only needed two. P will argue that as a very popular item, and with no notice of such mistake, they could not have known of this mistake. There being no facts to refute P's position, the defense will fail.

### Unconscionability

Where the terms of a contract are simply unfair or oppressive, or an adhesion exists, the court may rewrite the contract in any way to make it fair. Here, D may argue that it is unconscionable to force it to spend \$25,000 when it does not need such. However, simply misordering without a bona fide good faith mistake that the other party knew about is not likely to be unconscionable; thus the defense should fail.

There being no other valid defense, a contract exists for three presses at \$25,000 each with a notice term for defects or otherwise.

### MODIFICATION

Under the UCC, parties may modify the contract so long as the modification was made in good faith, and comports with the statute of frauds.

Here, D told P it did not need the third press when D's VP of Operations notified P's Sales Manager (S). S then replied that all sales were final and that D was obligated to pay for all three. At this point, P has not acquiesced to any modification.

However, when pressed by D who insisted P pick up the third press the next day, S then responded that she would have a truck pick it up, but D was expected to pay for all three. D will argue that in this exchange P has agreed to the modification. P can argue, however, that it did not agree; rather it made clear, through S [an] indication that it expected P to be bound to the original terms.

On balance, there is no modification as P did not accept the terms, simply helped out by picking up a press D did not intend to use (mitigation infra).

### Statute of Frauds

Defined supra

There are no indications that the modification was in writing, and if not, it is unenforceable nonetheless as the modified contract (if it were so), is still for value greater than \$500 and thus within the statute.

### PERFORMANCE

All duties must be performed, and thus, all conditions must be satisfied or excused or a breach occurs.

There being no express conditions, only constructive conditions apply.

### Perfect Tender Rule

Under the UCC, a shipment must be perfect in every way per the contract; otherwise the condition of delivery fails. Here, one week later, P delivered the three Model 100 printing presses to D's place of business. There were no notices of defect. The condition is satisfied and thus D's duty to perform becomes absolute.

### D's Duty to Pay

D accepted the delivery, most definitely, when it immediately removed its old printing presses and placed two of the new presses into production. By accepting the delivery, D must now pay for the three presses (per the non-modification to the contract [supra]).

### Anticipatory Repudiation

Expressly or by conduct a party who repudiates prior to performance such that a reasonable person would construe the repudiation as an intent or inability to perform is an anticipatory repudiation and an immediate breach of contract.

Here, P will argue that [it] stored the third in its original packing, after which D's VP of Operations told P's Sales Manager (S) it wanted to return the third press, telling S that D "doesn't need a third press at this time." The exchange was discussed in modification, supra, and by insisting that P pick up the third press, P will argue that a reasonable person would construe that as clear intent not to completely perform.

D will argue that it thought the contract was modified, but that is a subjective view, not objective.

On balance, a reasonable person would probably find that the statement was a repudiation; thus, D has breached by anticipatory repudiation.

### Impracticability

D may raise the defense in that an event, unforeseeable at the time of formation, caused his performance to become impracticable, his duty is discharged. Here, D will argue that the cost was too high due to the over-ordering, thus making his performance impracticable financially. However, P will argue that such is subjective impracticability, not objective in that only D himself could not perform, all others could. The defense will fail, and D has breached.

### BREACH

Failure to completely perform is a breach of contract and the ramifications depend on whether the breach is material or partial. Here, D failed to pay even after its breach by anticipatory repudiation, thus may be material breach.

### Failure to Perform by Payment

Under the UCC, a failure to pay is a material breach, giving rise to an action in damages. Here, D has not yet paid for the presses despite repeated demands from P, thus has materially breached the contract.

### REMEDIES

P may sue in damages against D. Under the UCC, a seller may recover in market price, lost profit, lost volume sale, resale or an action for price.

### Expectation Damages

Seeks to place the party in the financial position as if the contract was fully performed.

### Market Price Recovery

P may accept a market price recovery in which the recovery is for the difference between the contract price and good faith market resale. Here, P resold the third press for \$22,000, which is a \$3,000 loss in market between the original contract and the sale. Thus, it could recover on this theory, though there may be a better recovery.

### Lost Volume Sale

P should sue for lost volume sale where the seller would essentially be subject to a wash sale had it gone to market, and the chattel is not unique (i.e., is part of a standard volume of sales to others).

Here, P can argue that it resold the third press a week later for \$22,000 (a \$3,000 loss). Offset is one of the largest printing companies in State X and regularly purchases Model 100 presses from P. P will argue that since it maintains an inventory, given that Model 100 presses due to its popularity, the failed sale to D was a lost volume sale, thus they are entitled to recovery.

The recovery under this model is the lost profit. Here, the cost of goods for the Model 100 is \$18,000 and the sale price was \$25,000. Under the recovery, P should recover the \$7,000 difference for the lost volume sale.

### Question 3

At 3 a.m. the City Police Department received a call that there was an unauthorized entry into Walt's Gun Emporium ("Walt's"), a store that sells firearms.

As the police officers drove around a corner behind Walt's to investigate the incident, they observed a man placing something into the trunk of a red car parked across the street from Walt's. The red car's engine was running. When the officers turned the police car's siren and lights on, the red car immediately sped away. One officer exited the police car and arrested Albert, the person who had been standing behind the red car, while the other officer followed the fleeing red car.

The police officer who arrested Albert then saw Burt slide a sealed box labeled "Walt's Gun Emporium" and crawl out of a store window. The officer then arrested Burt. It was later determined that the box contained six rifles.

While being chased by the police, the red car crashed into another car, killing its driver Vic. Chuck, the driver of the red car, was arrested. A sealed box stamped with the words "Walt's Gun Emporium" containing twelve pistols was found in the trunk of the red car.

Albert, Burt, and Chuck were each charged with larceny and murder.

At trial, Walt, the owner of Walt's, testified for the prosecution that Burt was employed by Walt's as a salesperson. Walt also testified that he was the only person working at Walt's authorized to open sealed boxes containing firearms or to remove the boxes from the gun vault where they were stored.

Albert testified that he was given \$10 by Chuck to help carry boxes to the red car, and that he had never seen Chuck or Burt before.

Burt testified that he was authorized by Walt's to possess the firearms located at the store in order to fulfill his duties as a salesperson.

Chuck testified that Burt convinced him that Burt owned the guns and that Burt had agreed to sell them to Chuck for \$400.

Do the facts support each of the charges against Albert, Burt, and Chuck and what defenses, if any, might they each reasonably assert? Discuss.

## Answer A to Question 3

### Crimes of Albert

#### I. Can Albert be charged with larceny?

A. To prevail on the charge of larceny, the prosecution will have to establish the trespass or taking and carrying away the property of another with the intent to permanently deprive. Larceny is a specific intent crime that requires an intent to steal.

##### 1. Trespassory taking

To prevail, the prosecution will have to show that the taking was trespassory. If we believe Albert's testimony, he was paid \$10.00 to help Chuck carry the boxes. To believe the testimony means that Albert didn't know that his taking was trespassory because he could assume that the box belonged to Chuck.

##### 2. Carrying away

Property must be carried away by the defendant. Even the slightest movement will suffice. Here, Albert clearly carried away the boxes by helping load them onto Chuck's truck.

##### 3. The property must be of another

Defendant must know that the property is of another and he is not authorized to take it. Here, Albert, according to his testimony, believed that the property was belonging to Chuck.

#### 4. Intent to permanently deprive

As discussed above, larceny is a specific intent crime and the prosecution must show that the defendant intended to permanently deprive the rightful owner of the property. If Albert believed Chuck and if we believed his testimony, Albert didn't have an intent to steal.

The prosecution will argue, however, that it was very unusual to be at 3 am on the street and to be further asked by someone to help him load some boxes. A reasonable person would know that the items were stolen. However, reasonableness is not enough. Good faith mistake is enough as a defense for a crime of larceny as long as the jury believes Albert.

### B. Vicarious liability

The prosecution will try to establish that Albert is not telling the truth and that he was acting in concert with Burt and Chuck.

#### 1. Accomplice liability

If the prosecution establishes that he had an intent to commit the crime of larceny and that he was aiding and abetting, Albert will be liable for the crime of larceny committed. However, it would have to be first established that larceny is committed – see discussion below. If the prosecution prevails that he had an intent the larceny be committed, Albert's loading the boxes would constitute aiding and abetting. If it is established that larceny in fact took place, Albert will be guilty of larceny.

## 2. Conspiracy

If the prosecution establishes Albert was in an agreement with either Burt or Chuck to commit a larceny or any unlawful act and if an overt act was committed, then Albert would be guilty of crimes resulting from the conspiracy agreement.

### II. Can Albert be charged with murder?

Albert did not kill Vic. The only way he can be held vicariously liable for the death of Vic is being held responsible either as a conspirator or as a co-felon under felony murder rule – see discussion below.

## **Crimes of Burt**

### I. Can Burt be charged with larceny?

Larceny is a crime against possession. Here, Walt testified that Burt was an employee of the Walt's. Generally employees have custody of goods belonging to employer; however, if an employee is in more of a supervisory rank, he will be deemed to have possession. Here, Walt testified that Burt was the only person who had access to the sealed boxes. That would make him more than a regular employee. In addition, Burt testified that he was authorized to possess the firearms pursuant to his employment duties. If it is determined that he had possession, he will not be guilty of larceny. That would be a crime of embezzlement.

However, if it is determined that he only had custody, the prosecution will have to establish:

A. Trespassory taking – Burt clearly didn't have permission to take the gun; therefore, it was trespassory.

B. Carrying away – he clearly carried the goods away when he slid them outside the store.

C. Property of another – he knew that the guns were not his but belonging to Walt's.

D. With intent to steal – the fact that he was doing it at 3 am and that he offered to sell them for \$400 could mean that he intended to permanently deprive the true owner.

If he only had custody and if the above elements are established, Burt will be guilty of larceny.

## II. Can Burt be charged with murder?

Burt's act didn't kill Vic; the only way to attach liability to Burt is to find him liable as an accomplice, coconspirator or under the felony murder rule. See discussion above and below.

## **Crimes of Chuck**

### I. Can Chuck be charged with larceny?

If Chuck's testimony is believed, he didn't have the intent to permanently deprive because he claimed he was buying the guns that he believed belonged to Burt. Facts don't tell us that Chuck took or carried away the guns; therefore, it would be difficult to directly charge him with larceny. However, if his testimony is not

believed, he will be charged with larceny under either accomplice liability or coconspirator liability.

## II. Can Chuck be charged with murder of Vic?

1. Murder is homicide committed with malice.
2. Homicide is unlawful killing of another by the defendant's act. Here, Vic died as a result of Chuck's act of crashing his car.
3. Malice can be established by either an intent to kill, an intent to seriously injure, wanton conduct, or under felony murder rule. Here, Chuck didn't have an intent to kill anyone. Perhaps his conduct could be considered wanton because he was speeding and driving recklessly but it was 3 am and not many people are expected to be out at that time of the night.

### A. Felony murder rule

Under felony murder rule, if death occurred during the commission of a dangerous felony, malice was established. Under common law, all felonies were dangerous but modernly this has been changed to include only inherently dangerous felonies. Larceny is generally not a dangerous felony; however, this larceny included the guns and ammunition and could be considered dangerous.

#### a. During the commission

Commission of felony includes the perpetration, the commission, and the escape until the felons reach a point of safety. Here, the crime was interrupted by the police and when the police [officer] was chasing Chuck, it was still a part of the felony. Therefore, when Chuck killed Vic, it will most likely be during the commission of a felony and therefore, malice would be established.

4. There don't appear to be any defenses available to Chuck and, therefore, Chuck would be guilty of murder.
5. Degrees – Here, if malice is established under felony murder rule, Chuck will be guilty of murder in [the] first degree. If it will be considered that his conduct was wanton then he will be guilty of second degree murder.

If it is established that malice cannot be proved because felony was not dangerous then Chuck will not be guilty of murder.

If Chuck's testimony is believed, he would not be charged with larceny or murder.

Finally, if it established that Albert, Burt and Chuck were coconspirators and the larceny was committed, then they could all be charged with larceny and murder. If no larceny was committed, then they could not be charged with larceny. If Chuck is found guilty of murder and conspiracy is established, all will be guilty of murder.

### Answer B to Question 3

1. State vs. Albert – Do the facts support Albert's charges of larceny and murder and what defenses might he assert?

#### LARCENY

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

Here, the facts indicate that Albert (A) was “placing something into the trunk of a red car”; thus, there was asportation of the goods. While the facts are silent as to if A actually took the goods, it is reasonable to infer from the facts that A took the box because he was “given \$10 by Chuck” to carry the box. After investigation by the police, it was determined that a sealed box containing guns was what was placed in the car. The box had the name “Walt’s Gun Emporium,” which would indicate that the goods were the personal property of another.

A will argue that because he had not met Chuck or Burt before that, he was unaware that the property belonged to another and that he did not have the intent to permanently deprive. However, the state will argue that reasonable people do not enter gun stores at 3 am and “crawl out of a store window” to retrieve their own goods. Thus, they will likely find the requisite intent to permanently deprive.

Additionally, because of A’s likely status of an accomplice, discussed below, whether or not he had the intent to permanently deprive may be found with his intent to assist in the overall crime.

Therefore, it appears that A is guilty of larceny.

## MURDER

### Homicide with malice aforethought

#### Homicide

The killing of one human being by another

Here, the facts indicate that Vic, a human being, was killed when his car was struck by Chuck, thus by another.

Thus, there is a homicide.

#### Malice aforethought

Malice can be found by an intent to kill, an intent to commit serious bodily injury, wanton conduct, or felony murder.

Here, there are no facts to support that A intended to kill Vic nor did he intend to commit serious bodily injury. Additionally, there are no facts to support wanton conduct. The state will likely have to find the requisite malice via the felony murder.

#### Felony Murder

During the perpetration of a dangerous felony, someone dies.

Here, the state is charging A with larceny. Larceny is not considered an inherently dangerous felony at common law.

Thus, because the felony murder rule does not apply, the requisite malice may not be available.

However, if the courts deem A to be an accomplice and either Burt or Chuck are convicted of the murder, then A may be found liable as an accomplice for Vic's murder. Thus, we will continue our analysis for murder.

### Causation

The death must be the actual cause (cause in fact) and the proximate cause (legal cause).

It can be said that "but for" A committing the larceny that Vic would not have died as when and how he did. Thus, A is the actual cause.

A person is the direct proximate cause if the death is the natural and probable result of the defendant's actions. Here, it does not appear that A is the direct cause. However, if it is foreseeable that the death may occur, then the person may be found to be the indirect cause. It is foreseeable that if someone is stealing goods from a store and their accomplices begin to take flight that an innocent person may be struck and killed by the fleeing vehicle. Thus, A is the proximate cause.

Therefore, if the requisite malice can be attributed to Burt or Chuck, A may be found liable for the murder of Vic.

### ACCOMPLICE

Someone who gives aid or encouragement before or during a crime. The accomplice will be liable for all crimes that were aided to or that are foreseeable.

Here, A will argue that he was not giving aid to commit a crime; rather he was simply doing a small job for compensation. However, the state will argue that reasonable people do not agree to remove guns from a store at 3 am for any price. Further, the facts indicate that Burt crawled out of a store window. A reasonable person in A's position would be able to determine that they were not rightfully able to enter the

premises, [and] that they were likely committing a crime in removing goods in the secrecy of night. Moreover, it was A's intention to assist in the crime because he stated he was receiving compensation for it.

If the state determines that A is guilty as an accomplice, he will be liable for all crimes that are foreseeable. It is foreseeable that while fleeing from the police that people may get injured or even die. Thus, if there is an injury/death that occurs while during the flight, A may be liable for those crimes.

Therefore, it appears that A will be guilty as an accomplice.

2. State vs. Burt – Do the facts support Burt's charges of larceny and murder and what defenses might he assert?

### LARCENY

Defined supra

Here, the facts indicate that Burt was observed by the police while he was sliding "a sealed box" from Walt's Gun Emporium and crawling out of a store window. There is sufficient asportation and carrying away personal property that belonged to another, Walt. The question here will turn on whether or not Burt had mere custody or possession. If Burt had possession of the goods, he cannot be charged with larceny but rather embezzlement.

Burt will argue that he had possession because at trial he testified that he "was authorized by Walt's to possess the firearms." However, the state will argue that Burt had mere custody because if he had rightful possession he would not have needed to "crawl" in and out of the window to gain access to the guns. Moreover, it is reasonable to infer that if he had possession he would not have needed to take the guns in the early morning at 3 am. Moreover, Walt testified that only he (Walt) was authorized to open or remove the boxes and that Burt did not have possession. Depending on how the trier of

fact determines Walt's level of possessory interest will depend on if he had the requisite intent to actually steal the goods. It does appear from the facts that he does not have a key to the store and that he has mere custody.

Therefore, if it is determined he only has custody, he will be liable for larceny.

### MURDER

Defined supra

Here, as discussed above, the main issue will be with respect to the requisite malice. Under common law, larceny is not an inherently dangerous felony for felony murder. However, if it is determined that Burt is guilty as an accomplice, then he may be convicted for Vic's murder if Chuck is found to have the requisite malice.

Therefore, if Chuck is found to have the requisite malice, Burt may be liable for murder as an accomplice.

### ACCOMPLICE

Defined supra

As discussed above, Burt will be liable for all crimes that are foreseeable. It is foreseeable that while fleeing from the police that people may get injured or even die. Moreover, Burt was aiding in the theft of the guns from the store as from the discussion above it appears he did not have possession but rather had only custody. Thus, if there is an injury/death that occurs while during the flight, A may be liable for those crimes.

Therefore, it appears that Burt will be guilty as an accomplice.

3. State vs. Chuck – Do the facts support Chuck's charges of larceny and murder and what defenses might he assert?

### LARCENY

Defined supra

Here, there are no facts indicating that Chuck actually took any of the goods. However, if it is determined that he is an accomplice to crime of larceny committed by Burt, he may be found liable under accomplice liability.

### ACCOMPLICE

Defined supra

As discussed above, Chuck will be liable for all crimes that are foreseeable. Chuck will argue that he did not believe he was committing or assisting in committing any crime because he believed he was helping Burt get back his own guns. However, the state will contend that Chuck was aware that the guns did not belong to Burt because they entered through a window and upon the police arriving on the scene Chuck fled. Depending on how the trier of fact views the testimony and the facts will determine if Chuck is liable as an accomplice. However, it appears that Chuck will be liable as an accomplice to larceny.

### MURDER

Defined supra

Here, the question of murder will turn on if the requisite malice can be found. As discussed above, larceny is not an inherently dangerous crime so felony murder may not be used. However, the court may find malice under wanton conduct.

### Wanton conduct

Consists of an act that creates a high risk of serious injury or death, an act with little or no social value, defendant intended the act.

Here, there is a high risk of death in fleeing from the police and in fact this did occur. Moreover, there is no social value in fleeing from the police, especially if you did not believe you committed a crime. Lastly, it was Chuck's intention to flee from the police as it is likely he believed he would be arrested for stealing the guns.

Thus, there is wanton conduct.

Therefore, because there is the requisite malice, Chuck will be liable for murder.

### DEFENSES – MISTAKE OF CIVIL LAW

Mistake of civil law will be a defense if the defendant believed they were rightful in doing the act.

Here, the facts indicate that Chuck believed he was helping Burt get back his own guns. However, from the facts that they broke into the store in the disguise of the early morning coupled with his fleeing from the scene, it does not appear that Chuck truly believed he was helping Burt get back his own property.

Therefore, he will not be able to assert the defense of mistake of civil law.

## Question 4

During the late summer, State College of Law held its annual student versus faculty softball game and picnic. The game was hotly contested and, as a result of poor sportsmanship on both sides, tempers flared.

Following the game, the students' team was presented with the winner's trophy, which Abel, the captain of the student team, held aloft. Thinking it would be funny, Charlie, a member of the faculty team, threw a ball at the trophy, striking it and knocking it from Abel's hands. Angrily, Abel picked up the trophy, approached Charlie and said, "If you weren't a professor here, I would take that trophy and stick it in your ear." Charlie, who was physically much bigger than Abel and a former professional boxer, did not feel threatened by Abel's reaction.

Edward, another professor and member of the faculty team, believing that Abel was about to attack Charlie, struck Abel with a baseball bat, resulting in a large bruise to Abel's arm.

1. Under what theory or theories might Charlie bring an action for damages against Abel, what defenses, if any, might Abel assert, and what is the likely result? Discuss.
2. Under what theory or theories might Abel bring an action for damages against Edward, what defenses, if any, might Edward assert, and what is the likely result? Discuss.

## **Answer A to Question 4**

### Charlie v Able

#### Assault

Intentional placing of another in apprehension of an immediate harmful or offensive bodily contact

The facts state that Abel picked up the trophy and approached Charlie and said “If you weren’t a professor here, I would take that trophy and stick it in your ear.” Abel’s actions appear to be volitional, and the menace to Charlie appears to be intended. However, a conditional threat can negate intent. Since Abel said “If you weren’t a professor here, I’d stick the trophy in your ear,” Abel’s threat was conditional on Charlie’s position as a professor. The conditional nature of the threat may negate the intent required for assault.

The facts state that Charlie was physically much bigger than Abel and also a former professional boxer and that he did not feel “threatened” by Abel’s conduct. The test for assault, however, is not fear, but a reasonable apprehension of an imminent harmful or offensive bodily contact. If Charlie believed Abel would throw the trophy at him or strike him with the trophy, even if Charlie was not ‘afraid’ because of his superior physical stature, the apprehension would be sufficient to sustain a claim for assault.

#### Defenses

##### Self-Defense?

Abel is permitted to use a reasonable force to repel an attack made against him. Here, the facts state that Charlie threw a ball at a trophy Abel held in his hands. If Abel reasonably believed the ball was meant for him, he would be privileged to defend himself. This seems unlikely, because Charlie thought the thrown ball would be funny, and as a result the threat to Abel had abated. Abel will not be privileged to claim self-defense.

### Consent?

If the plaintiff expressly or impliedly consented to the behavior by the defendant, the defendant will not be liable. Here, the facts state that the students and professors were engaged in a hotly contested softball game. During sporting events, some bad sportsmanship can be expected. Continued participation in the event will imply consent on the part of the participants to receive and administer the results of bad sportsmanship. However, the threat took place after the end of the game, and a reasonable person in Charlie's position would not impliedly consent to threats made after the game. The defense of consent will not be available to Abel.

### Intentional infliction of emotional distress

Extreme and outrageous conduct by the defendant calculated to cause, and which does cause, extreme emotional distress.

The facts state Abel said "If you weren't a professor, I'd stick this trophy in your ear." While in some circumstances that could be construed as extreme and outrageous, given the context in which the events transpired Abel's actions will not rise to the level of extreme and outrageous.

Abel will not be liable to Charlie for intentional infliction of emotional distress.

### Damages

Since Charlie did not feel threatened and sustained no injuries, he will likely be awarded only nominal damages.

## Abel v Edward

### Assault

Defined supra

The facts do not indicate that Abel was aware the blow from the baseball bat was coming. Without actual apprehension, Abel will not be able to sustain a claim of assault.

### Battery

Intentional harmful or offensive bodily contact without consent

The facts state that Edward believed Abel was going to attack Charlie, and also that Edward struck Abel with a baseball bat. Edward's conduct of swinging the bat appears to be volitional and the result of striking Abel with the bat intended, and Edward was apparently trying to stop an attack.

Being struck with a baseball bat can only be construed as a harmful bodily contact.

As discussed supra, everyone on the scene had just participated in a softball game in which tempers flared. While continued participation in the game would imply consent to some bad sportsmanship, the consent would not extend to being struck on purpose by a baseball bat. Abel did not consent to the attack.

### Defenses

#### Defenses of others

One is justified in using reasonable force to repel an attack on another. Majority rule: alter ego rule – the defendant must step in the shoes of the 'victim' of the attack. Here,

the facts state that Charlie had thrown the ball at Abel while Abel held the trophy. Since Charlie was the aggressor in the altercation between himself and Abel, he would not be privileged to defend himself. Further, as discussed supra, the threat to Charlie was conditional and Charlie was not in any real danger. Since Charlie would not be privileged to defend himself in the situation, in majority rule jurisdictions Edward would not be privileged to defend Charlie. No mistake, however reasonable, is permitted.

Minority rule: the modern trend is to allow a reasonable mistake. If the situation presented itself to Edward, and he reasonably believed Abel represented a threat to Charlie, Edward would be privileged to use reasonable force to repel the attack. Here, the facts state that Charlie is much bigger than Abel and that Edward used a baseball bat. Even if Edward was privileged to come to Charlie's defense through a reasonable mistake, the use of a baseball bat in this situation is not reasonable. Edward will not be able to assert the defense of others' defense.

## Damages

### General damages

Pain and suffering by Abel resulting from the injury.

Abel will recover general damages from Edward.

### Special damages

Specifically accountable expenditures incurred by Abel.

Abel will recover doctor's bills, lost wages, etc., as special damages for all expenditures he can specifically account for.

## Punitive damages

Where the defendant is reckless and wanton in his behavior, the plaintiff will recover punitive damages.

Since Edward used a baseball bat on a diminutive person with no available defenses, Abel will likely recover punitive damages.

## Answer B to Question 4

### 1. Charlie v. Abel

#### Assault

Assault is defined as intentionally placing the person of another in reasonable apprehension of an immediate battery without consent or legal justification.

The facts tell us that after Charlie threw a ball at the trophy held by Abel, Abel became angry and approached Charlie. The fact that Abel said, "If you weren't a professor here, I would take that trophy and stick it in your ear" indicates a possible intent on the part of Abel to batter Charlie.

In order to determine whether this statement by Abel to Charlie constituted assault we must analyze whether or not the words were intended to place Charlie in reasonable apprehension of an immediate battery.

Due to the fact that Abel qualified his statement by stating, "If you weren't a professor here" indicates that although he may have a desire to take the trophy and stick it in Charlie's ear, that he would only do so if Charlie was not a professor there. Since Charlie was a member of the faculty team it can be deduced that he was a professor at Abel's school.

Inasmuch as the facts also tell us that Charlie was physically much bigger than Abel, was a former professional boxer, and "did not feel threatened by Abel's reaction" it can be concluded that Charlie was not placed in reasonable apprehension of an immediate battery.

Abel will likely argue that his statement to Charlie which indicated that if he "wasn't a professor there he would take the trophy and stick it in his ear," specifically precluded

him from acting. In fact he was a professor there; thus, no actual words were stated which would cause a reasonable person to be in fear of an immediate battery.

Charlie would not prevail in an action against Abel for assault.

### Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress is defined as outrageous conduct which is intended to and does cause severe emotional suffering.

The question here is whether or not the statement made by Abel to Charlie was sufficient in nature to constitute outrageous conduct. The fact that the conversation between Abel and Charlie came after a “hotly contested” softball game in which there was “poor sportsmanship on both sides” and “tempers flared” serves to place the actions of Abel into context in determining what was reasonable under the circumstances.

It is reasonable under the conditions described that Abel would be upset at Charlie’s actions of throwing a ball at the trophy held by Abel, which served to knock it from his hands. Thus, the fact that Abel angrily picked up the trophy and approached Charlie making the statement previously described is not outrageous conduct under the circumstances.

The facts tell us that Charlie “did not feel threatened by Abel’s reaction” and there are no facts to indicate that Charlie suffered any type of emotional suffering.

Charlie would be unsuccessful in an action against Abel for intentional infliction of emotional distress.

## 2. Abel v. Edward

### Assault

Assault is defined as intentionally placing the person of another in reasonable apprehension of an immediate battery.

### Battery

Battery is defined as harmful or offensive touching of the person of another without consent or legal justification.

In this case Edward “struck Abel with a baseball bat,” which resulted in a large bruise on Abel’s arm. The contact between the bat which was being held by Edward and Abel’s arm was sufficient to satisfy the element of a touching of the person of another.

The touching was harmful in nature as evidenced by the large bruise it caused on Abel’s arm. At no point in the fact pattern does it indicate that Abel consented to being hit with the bat by Edward; however, there may be some evidence of legal justification which will be asserted by Edward in defense of the action.

The question as to whether or not an assault occurred rests with whether or not Abel saw Edward swing the bat at him prior to it making contact with his arm. There are no facts which indicate that Abel saw Edward swing the bat at him prior to contact. In fact, the facts support that at the time that Edward swung the bat striking Abel on the arm that Abel was involved in a heated conversation with Charlie. The exchange was occurring after the game in which “tempers flared.” Thus, it is likely to deduce, absent any facts to the contrary, that Abel did not see Edward swing the bat at him while he was engaged in conversation with Charlie.

Therefore, Abel would not have a cause of action against Edward for assault.

### Defense to Battery

Edward will likely assert a defense which rests on the notion that his actions were in defense of Charlie.

### Defense of Others

There is a jurisdictional split on whether or not a person may step in to defend another in a situation such as the one presented in this case.

In the majority of jurisdictions one may step in and defend another if they believe that the person is in need of protection. In these jurisdictions the courts rely on the reasonable person's standard; that is, would a reasonable person in [the] same or similar circumstances have reacted similarly?

In the minority of jurisdictions a different approach is taken. Here, the person who steps into a situation to defend another stands in the shoes of the person to whom they have come to aid. Therefore, a person would only have the right to defend the person if the person had the right to defend themselves.

In both cases the person providing assistance or defending another must use reasonable force short of a breach of the peace.

In this case, Charlie did not maintain the right to defend himself from Abel's words by hitting him in the arm with a bat. Thus, in the minority of jurisdictions Edward's defense would fail.

If this were heard in a majority jurisdiction Edward's actions would be based on a reasonable person's standard. Inasmuch as Abel made no direct threat to Charlie, Charlie was larger in size and not threatened himself by Abel's actions, it is not reasonable for Edward to believe that Abel was about to attack Charlie.

Therefore, Abel will prevail in an action against Edward for battery.