Concord University School of Law
Practice Essay

Instructions:

This is a timed practice, and you should take no more than one hour to complete this exercise. Set a timer and allow no interruptions. Before you write, be sure you have memorized all of your definitions and rule statements so that you can recite them in the appropriate place. Remember that you cannot demonstrate your best analysis unless you use the IRAC formula. If necessary, review IRAC before you begin to write.

This is closed book and designed to test your ability to recognize legally significant facts, to reproduce on paper the proper rule statements and definitions, and to apply the relevant facts to the elements of the rule in order accurately to predict the legal outcome. You will need these skills to do your best on your final exams as well as on the FYLSE.

The best practice is to write an outline or an "issues list" before you begin to write. Under no circumstances should you spend more than 5 or 6 minutes on this overview. Yet, under no circumstances should you ignore it. If you make an issues checklist before you begin, you can go back and check off the issues at the end. On the other hand, if you do not have a checklist, it is too easy to lose your way as you write and totally forget to include an issue you, in fact, actually identified. To lose points through inadvertent omission is a frustrating – and unnecessary – outcome.

Getting Started: Set a timer and write your outline or issues list. Then, write the essay itself. When the timer rings, stop, draw a line across the page – and keep going until completion. Note your Total Time clearly in parentheses. This will become an important diagnostic tool to help you improve your skills.

Finally:

1. Make and keep clean copies of this essay so you can practice rewriting it, especially if you find you cannot complete it in the required hour allotted. Candidly, you cannot practice writing too many essays. First, you will learn to think more rapidly, a real advantage on finals as well as on the FYLSE. Second, you will begin to recognize common and recurring fact patterns, another incalculable advantage, especially under time pressure. Certainly, if your time is running well over an hour, you should practice writing the same essay several times as your exams approach – until you can complete it in time.

2. When you review your answer against the model answers, pay attention to your weakest areas. Do you need to work on memorizing the Rule Statements? Organizing? Applying the Facts? Stating a conclusion without being inconsistent or unsure? Does the structure of the essay wobble from Rule to Conclusion and back to the Issue? Are the facts analyzed before the Rule Statement if provided? Have you omitted the Rule Statement altogether?

Above all, remember that the tasks are familiar ones to all students everywhere. Hard work pays off. Cramming does not work. There are no short cuts to memorization.

Good luck.
Bob's Baseball Camp

Thirteen year old Paul attended Bob’s Baseball Camp, owned and managed by Bob. During the last week of camp, Paul was invited to play in the camp “All Star Game” in which selected campers would play a nine inning game against the camp counselors. Paul had some concern about playing against the older, stronger counselors, but decided to participate since his selection was an honor.

Bob cautioned the counselors just before the game to remember to “take it easy” because they were playing against younger, less experienced players. The rules of the American Baseball Camp Association, to which Bob’s camp belongs, prohibit play between players of disparate ages and abilities. The rules also bar players younger than 14 from nine inning games.

The game was tied when Paul reached third base during the last inning. Excited by the chance to score the winning run, Paul took off his batting helmet even though counselors had repeatedly told all campers to keep their helmets on while running the bases because there is always a risk of being hit by a thrown ball.

When the next batter hit the ball, Paul ran toward home plate. Charles, a nineteen year old camp counselor, caught the ball. Bob, who was standing near Charles, shouted, “Don’t throw. Hold the ball.” Charles threw toward home plate anyway, using his full strength. The ball stuck Paul in the head, injuring him severely.

On what legal theory or theories, if any, might Paul recover damages from, and what defenses, if any, might be raised by:

MODEL ANSWER FOLLOWS

PLEASE COMPLETE

ESSAY BEFORE

REVIEWING MODEL ANSWERS
Model Answer: General Materials

[Editor’s Note: This was prepared by a Concord Professor. In a full essay it is important to expand the analysis and apply law to fact and fact to law.]

Bob’s Baseball Camp
Torts: Outline of Issues

I. Paul v. Charles

A. Battery: A volitional act, done with the requisite intent, which causes plaintiff to suffer a harmful or offensive touching.

[Editor’s note to students: since a touching clearly occurred, a battery should have been discussed. It did not matter how you concluded on the substantial certainty issue, so long as you raised it.]

1. Substantial certainty: While Charles may not have intended to touch Paul, it may be argued that he should have been substantially certain that a touching would occur.

2. Consent: Paul voluntarily entered the game. Therefore, he was consenting to the type of touching that would normally occur in such a game. However, the touching in question here may have exceeded the scope of the consent.

B. Negligence: A duty to conform to a standard of care that is breached by the defendant, which is the actual and proximate cause of plaintiff’s injuries.

1. Breach of duty: Charles owed a duty to act with due care. He may have breached that duty (failed to act as a reasonable and prudent person) by throwing toward home plate using his full strength. He knew there were underage and inexperienced participants in the game, and Bob shouted to him not to throw the ball.

2. Causation and damages: Clear from facts.

3. Defenses

   a. Contributory Negligence: Paul removed his helmet moments before he was struck by the baseball. If it were unreasonable for Paul to do so, he would be barred from recovery in a jurisdiction that follows contributory negligence. However, since it could be argued that Charles had the last clear chance to avoid the injury by not throwing the baseball, Paul would still recover despite his contributory negligence.

   b. Comparative Negligence: In a comparative negligence jurisdiction (which is the majority view), Paul’s recovery will be reduced by the percentage degree of fault Paul bears in causing his injuries.
c. **Assumption of the Risk.** Paul removed his helmet even though he had been repeatedly told not to do so by the camp counselors. If it can be established that Paul knew and appreciated the risk involved in removing his helmet, Paul will have assumed the risk of injury and will not recover. However, assumption of the risk is judged on a subjective scale, meaning it must be established that Paul actually knew and appreciated the risk, not that a reasonable person would have known and appreciated the risk. Paul’s age will be a factor in this determination.

II. **Paul v. Bob**

[Editor’s note to students: It was important to discuss both Bob’s potential vicarious liability for Charles’ actions, and any direct liability Bob to which Bob may be held.]

A. **Respondeat Superior:** Since Bob was Charles’ employer, and the injury to Paul took place while Charles was acting in the course and scope of his employment duties, Bob would be vicariously liable for Charles’ torts.

B. **Battery:** Bob allowed Paul to participate in the game. If he should have been substantially certain that a touching would result, he would be directly liable for committing a battery. However, Paul’s consent may bar recovery (see discussion above).

C. **Negligence**

1. **Breach of duty:** Bob may have been unreasonable in allowing younger, inexperienced players to participate in the game. In addition, Bob failed to follow the rules of the American Baseball Camp Association in this regard. While the rules are not binding on the issue of negligence, they do represent factors that will be considered in judging the reasonableness of Bob’s actions. Bob’s cautioning to the counselors to “take it easy” may not have been enough to prevent liability.

2. **Causation and damages:** The analysis here is basically the same as discussed under Paul v. Charles. The only difference is with proximate cause. Charles would be an intervening actor. However, since his actions may be considered foreseeable, Bob’s liability would remain intact.

[Editor’s note to students: It could have easily been argued that Charles’ actions were unforeseeable, since Bob yelled to him not to throw the baseball, but Charles did so anyway. If so, Bob would be relieved from liability.]

3. **Defenses:** Incorporate by reference from Paul v. Charles.
Sample Student Model Answers

This portion of the Model Answer collects several examples of "likely to pass" essays written by Concord students themselves over the last several years. As you review these Model Answers, please remember that

- there are often many good ways to write a passing essay
- "likely to pass" may be a 70 (under Concord's grading system) or it could be much higher; the collected model answers do not distinguish
- generally a 70 will be "good enough" to pass on the FYLSE
- none of these samples is presented as a perfect answer – they are, however, generally "good enough" to pass
- you cannot earn points for issues you do not spot, so fact-identification is critical
- even if you see missed issues or essays that were not as thorough as necessary, please remember that the Bar Examiners will give a holistic grade: they look to the overall presentation
- missing core issues is generally a problem; but students who miss smaller, associated issues can still score "likely to pass"
- students should be reassured that perfection is not required
- many essays note the "time" – and sometimes it exceeds the required hour; on the FYLSE, students must write a passing answer in the allotted time – there are no extensions
- your score "likely" or "unlikely" to pass is not a prediction! It is only an indication of one single essay compares at this point in time with the expectations of the Bar Examiners
- you control your own future! Your scores will alert you to how much time you need to set aside in order to improve.

Please use these materials carefully: They are designed to help focus and define your skills of analysis, structure (IRAC), and writing. Certainly, there are other "good" ways to craft a passing answer, so you should not be discouraged. Even the Bar Examiners publish more than one "good student answer." The best approach is to use the various samples to set your feet on the right path.

Please note: Some collections of student answers are lengthy, containing many student models, but some are "thin." The differences are a result of how many students actually wrote answers. Some essays come earlier in our sequence and tend to have greater participation – and, therefore, more good answers to chose from. Others produced fewer answers from which to chose. In addition, it is possible that Concord students found some essay questions harder than others. Since all of the essays are drawn from former FYLSE questions, this is a realistic experience: some administrations of the FYLSE will be more difficult than others. Over time, we hope to add to our collection.

A further note: The student answers were spellchecked and "edited" lightly by adding spaces to make some of the text easier to read. That's all. The materials presented were produced by students under test conditions – and are presented "as is."

A final note: Often a student will post his or her "time." Clearly, a student who exceeded the time limit might not receive the same assessment if restricted to only 60 minutes. Still, it was decided to include the good answers anyhow. Be alert to this issue because, on the FYLSE, time is strictly enforced.
Our Best Advice:

All-in-all, Concord students participating in CEO / Concord First have seen huge improvements in their skill levels and in their ability to write and organize under time pressure. Above all, our data and experience demonstrate that students who participate in Concord Essay Outreach and Concord First tend to pass the FYLSE in greater numbers than non-participants!

Good luck, and keep practicing!
1. **Bob’s Baseball Camp**

1. Paul v. Charles

A. Is Charles liable to Paul for battery?

Paul will bring an action against Paul for the intentional tort of battery.

Battery is an intentional act causing harmful or offensive contact with plaintiff’s person. Intent is the desire to cause the result or knowledge to a substantial certainty the result will occur. If Paul can prove that Charles was substantially certain the ball would hit him, clearly the harmful contact element will be satisfied by the serious injury to Paul’s head. Charles will be liable for damages unless he can raise an affirmative defense.

B. Can Charles raise the defense of implied consent?

Effective consent, either express or implied is a defense to intentional torts. Participants in athletic games are deemed to imply consent to the normal amount of contact with the ball and with other players. Charles will assert that by playing baseball, Paul consented to the routine type of close contact at home plate. This argument will fail since Charles clearly exceeded the scope of consent when he threw towards home with his full strength after Bob told him not to throw.

C. Is Charles liable to Paul for negligence?

The prima facie elements for negligence are duty, breach, causation, and damages.

Duty is the legal standard of conduct. The general standard of care, applicable her to Paul, is to conduct his activities—here to play baseball—with the care a reasonable person would exercise under the same or similar circumstances. Paul will need to prove that Charles breached that duty.

Breach is unreasonably risky conduct, generally measured by the Hand formula whereby the gravity times the probability of the harm is weighed against the burden to the defendant of alternative conduct. Charles threw the ball with his whole strength in order to prevent Paul from scoring the winning run irrespective of the danger that ball, headed for the exact spot Paul was running towards, was very likely to hit and injure him severely.

Actual cause is established by showing but for Charles’ throwing the ball, Paul would not have been injured. Proximate cause is established by a showing that there are no policy reasons to prevent holding Charles responsible for the direct result of his act.

Damages are part of Paul’s prima facie case; the serious injury to his head is a compensable injury.

4. Can Charles raise the defense of contributory or comparative negligence?

Contributory negligence is conduct on plaintiff’s part falling below the standard of care to which he should reasonably adhere for his own safety and is a cause in fact of his injury. Formerly a complete bar, most states follow comparative negligence under which liability is apportioned between the parties based on fault.

Charles will argue that by removing his helmet before running to home plate, Paul was contributorily negligent because the camp rule that helmets must be worn while running bases is specifically designed to prevent serious injury to the head should the runner be struck by the ball. However, Paul is only 13 years old and therefore the standard of care will be that of a child of like age, intelligence, and experience. Under such a standard, Paul will probably be found to have acted reasonably for his age given the excitement of the game.
2. Paul v. Bob

A. Is Bob liable for the negligence act of Charles, his employee?

Under the doctrine of respondeat superior, the employee is liable for negligent, but not intentional torts, committed during the employee’s scope of employment. Bob will not be liable for Charles’ battery, but he may well be held liable for Charles’ negligence. Here, even though Bob will insist that Charles disobeyed him by throwing the ball to home when Paul was helmetless, the game itself was clearly within Charles’ duties as a camp counselor.

B. Is Bob liable to Paul for his own negligence?

Negligence defined supra.

Duty is defined supra. Here, there are two separate standards of care Paul may pursue. First, as a landowner, Bob owes Paul, his invitee, the duty to conduct activities such as the baseball game, with reasonable care for his safety. Second, Paul will argue that the special relationship of dependence between the campers and Bob as the camp director gives rise to a duty to protect the campers from injury by third persons, including the counselors.

Breach. The rules of the American Baseball Camp Association will provide Paul plenty of ammunition on the accepted practices or custom in the camp industry. Under these rules, allowing Paul to play nine innings before he was fourteen and mixing the older and younger players is against the association’s regulations. While such evidence will not be conclusive, it will be admissible.

Under the Hand formula, the probability of a younger smaller player being injured when struck by a baseball thrown by one of the older campers, and the resulting serious injury, far outweighs the benefit of allowing the younger kids to play in the All-Star Game. Bob clearly breached the duty to protect Paul from harm by allowing him to play in the game.

Causation is defined supra. Bob is the actual cause of Paul’s injury because but-for his being allowed to play in the game, he would not have been injured. However, Bob will argue that Charles’ conduct in throwing the ball after being told to hold it is a superceding intervening event that relieves him of liability. However, since it is just such an event Bob has the duty to protect Paul from, even his employee’s intentional tort should not relieve him of liability.

Damages defined supra.

C. Does Bob have an affirmative defense?

Contributory/comparative negligence principles defined supra. Here, given the responsibility Bob assumed to care for Paul’s safety, it’s unlikely the jury would find that Paul contributed to his own injury by simply acting like the 13 year old boy he is.
2. **Bob's Baseball Camp**

*On what legal theory or theories, if any, might Paul recover damages from, and what defenses, if any, might be raised by:*  

1. **Charles? Discuss.**  
2. **Bob? Discuss.**

**Charles**

**Battery**  
Battery is a voluntary act done with the requisite intent, which causes the plaintiff to suffer a harmful or offensive contact. The following questions need to be answered to determine if Charles is liable to Paul for battery:

- Did the defendant engage in a volitional act? – Yes, in this case despite the fact that Bob shouted “Don’t throw, hold the ball”, Charles still threw the ball, disregarding the warning of another counselor. So his act was voluntary.
- Did the defendant intend to touch the plaintiff? – He did not intend to touch Paul. As a part of the game, though, he threw the ball, which hit Paul and injured him severely.
- Did the actions of the defendant cause the harm to the plaintiff? – In this case if it were not for Charles throwing the ball, Paul would not have received the injuries. Charles actions were the actual cause of Paul’s injuries.
- Did the plaintiff suffer a harmful or offensive touching? – In this case Paul was hit by the ball thrown by Charles and injured. This was harmful touching of the victim.

Based on the above facts, Charles would **not** be liable to Paul for battery because with his actions he did not intend to cause injury to Paul. It was simply part of the game, and the players consented to a certain degree of risk of being hit by the ball.

**Assault**  
Assault is a voluntary act done with the requisite intent, which causes the plaintiff to suffer reasonable apprehension of an immediate battery. The following questions need to be answered to determine if Charles is liable to Paul for assault:

- Was the defendant’s act voluntary? – In this case Charles’ act was voluntary.
- Did the defendant intend to place the plaintiff in apprehension of an immediate battery? – Based on the facts, it does not appear that Charles wanted to place Paul in apprehension of an immediate battery. The fact that Bob yelled warning Charles not to throw the ball, and Charles threw it, does not mean that Charles intended to place Paul in apprehension of an immediate battery.
- Did the actions of the defendant cause the harm to the plaintiff? – Yes, in this case, Charles threw a ball that hit Paul causing injuries.
- Did the plaintiff suffer reasonable apprehension of an immediate battery? – It is possible that Paul suffered reasonable apprehension of an immediate battery, because it is likely that he heard Bob yell out to warn Charles not to throw the ball.

Based on the facts, Charles would not be liable to Paul for assault, because he did not intend to put Paul in the reasonable apprehension of an immediate battery.

**Intentional infliction of emotional distress**  
Voluntary act done with the requisite intent which amounts to extreme and outrageous conduct and which causes the plaintiff to suffer severe emotional distress. To determine if Charles was liable for intentional infliction of emotional distress, the following questions will need to be answered:
• Did the defendant engage in a voluntary act? – Yes.
• Did the defendant intend to cause severe emotional distress or recklessly disregard that severe emotional distress might occur? - No, there were no such actions by the defendant. He was simply playing the game and did not intend to cause severe emotional distress or recklessly disregarded that severe emotional distress might occur.
• Did the actions of the defendant cause the harm to the plaintiff? – Yes, Paul was injured by the ball thrown by Charles.
• Did the plaintiff suffer severe emotional distress? – It is possible to assume that Paul suffered emotional distress when he heard Bob yell out to Charles not to throw, and he anticipated the ball. But it would be an unreasonable assumption. It was a baseball game, and actions by Charles were not that unreasonable.

Based on the facts it is clear that Charles is not liable to Paul for IIED.

Negligence

A cause of action for negligence requires proof of the six elements below plus absence of defenses.

The six elements are:

1. Duty
2. Standard of care
3. Breach of duty
4. Causation
5. Damages
6. Defenses

Duty
The plaintiff must show that the defendant owes him a duty of care. As a general rule, any person that affirmatively acts owes a duty of care to any and all foreseeable plaintiffs. In this case Charles was acting affirmatively and owed duty of care to any and all foreseeable plaintiffs. Thus he owed a duty of care to Paul.

Standard of care
The duty owed is that of the reasonably person engaged in a game of baseball.

Breach of duty
The plaintiff must show that the defendant’s conduct has failed to meet the standard of care. Here it means that the plaintiff must show that Charles failed to meet the standard of care of a reasonable baseball player. This generally requires proof that the gravity and likelihood of harm outweighs the burden on the defendant to have acted differently and the utility of defendant’s allegedly negligent conduct (Hand formula). The probability of being hit in a baseball game is pretty high, therefore the use of helmets is advised in the games. And any player who agrees to play assumes the risk of being hit by the ball. It does not appear that Charles breached his duty of care, unless Paul can successfully argue that the counselors were advised to play the game considering the strength of younger players, and that would be reasonable to assume that counselors were then supposed to play more careful. In this case it is possible that Charles breached the duty of care, especially if he saw Paul take off his helmet.

Causation
The plaintiff must also show that the defendant was the actual and proximate cause of his injury. Actual cause is established if “but-for” the defendant’s act, the plaintiff would not have been injured. It is clear that Charles’ actions were a direct cause of Paul’s injuries. Charles threw the ball that hit Paul and this caused severe injuries to Paul. Proximate cause is required to determine whether the defendant’s breach of duty, which was the actual cause of plaintiff's injury, can also serve to establish defendant's legal responsibility for the injury. Generally, a defendant will be liable only for those consequences of negligence, which were reasonably foreseeable at the time of the negligent event. It was reasonable to
foresee that the ball may hit somebody – there is a high risk of that happening during a baseball game. A defendant’s conduct will not be deemed a proximate cause of plaintiff’s injury if, after looking back in hindsight, it appears as highly extraordinary that the negligence should have caused the harm to plaintiff. In this case it is likely that the injury would have been avoided if it was not for Charles’ negligence. Another counselor warned Charles not to throw the ball, yet Charles threw it anyway, causing injuries to Paul. Thus, Charles may be considered actual and proximate cause of Paul’s injuries. However, if it was not for Bob’s approval to conduct the game between the counselors and campers, the game would not have taken place and Paul would not have been injured. So Bob’s actions may be considered an intervening force here.

**Damages**

Paul suffered injuries from the ball thrown by Charles. And it is determined here that Charles was the cause of these injuries.

**Defenses**

**Contributory negligence.**

Charles may assert that Paul was contributorily negligent (a complete bar to recovery in states that retain this common law defense) or at least partially at fault (which will reduce Paul’s recovery in the other states that have adopted some form of comparative fault) due to the fact that Charles took off the helmet.

**Contributory negligence per se**

Charles may not assert that Paul was contributorily negligent per se, because Paul did not violate any statute. When it turn Paul and the camp violated the statutes prohibiting games between players of disparate ages and abilities. The rules also bar players younger than 14 from nine inning games.

Based on the above analysis, it appears that Charles may be found liable to Paul for negligence.

**Strict Liability for Ultrahazardous Activities**

**Six-Factor Test to Determine if Activity is Abnormally Dangerous**--

1. **Unavoidable Danger.** – It would be safe to assume that the danger was unavoidable for children playing with adults.

2. **Seriousness of Harm.** – the harm inflicted upon Paul was serious especially considering that the strength of two teams were not comparable.

3. **No Elimination of Harm.** – it could have been eliminated by the Paul’s actions not to take a helmet.

4. **Uncommon Activity.** – This is uncommon activity to allow the game of baseball between children and counselors. The rules do not allow that.

5. **Inappropriate Place.** – It was inappropriate for the game between counselors and campers to take place anywhere. The rules were violated.

6. **Danger v. Value to Community.** – The game was potentially dangerous for the children, thus the value to community was reduced.

The actions of Bob and counselors may qualify as ultrahazardous activity, based on the analysis above.

**B. Defenses:**

1. **Scope of Risk** -- Activity which causes harm must be within the normal Scope of Risk of the Dangerous Activity. The activity of a game between the campers and counselors would not be within the normal scope of risk, as it is prohibited by the rules of American Baseball camp association.

2. **Abnormally Sensitive Activity by Plaintiff** -- Harm would not have taken place except for Abnormally Sensitive Activity of Plaintiff. In this case does not apply. Paul was simply involved in the game, it was not abnormally sensitive activity on his part.

3. **Contributory Negligence** -- Not Applicable.

4. **Assumption of the Risk** -- Only applicable if Plaintiff Knowingly and Voluntarily subjects herself to harm in an Unreasonable Fashion. This may possibly be a viable defense, because Paul took off his
helmet, despite constant reminders by the counselors to have it on during the game due to a high risk of injuries.

C. Damages / Remedies.
Direct loss for the value of bodily functions, economic losses, pain and suffering, hedonistic damages for the loss of the ability to enjoy life, future damages, and punitive damages.

Bob

Negligence
A cause of action for negligence requires proof of the six elements below plus absence of defenses.

The six elements are:
1. Duty
2. Standard of care
3. Breach of duty
4. Causation
5. Damages
6. Defenses

See discussion of each item above.

In this case Bob owed a duty of care to each of the campers. Paul was one of them, so Bob owed a duty of care to Paul. The standard of care should have been of any reasonable baseball camp owner. When Paul was injured during the game – Bob breached his duty of care for a variety of reasons. One of them is that according to the case facts, play between players of disparate ages and abilities were prohibited. The rules also bar players younger than 14 from nine inning games. In this case both of these rules were violated. Even though Bob was not the actual cause of the injuries (it was determined above that Charles was the actual cause of the injuries), Bob was a proximate cause of the injuries Paul sustained. Bob allowed the game between the campers and counselors to go on, and that in itself may have been a reason why Paul was injured. Paul suffered damages and it is determined that Bob was at fault. Bob may assert the defense of contributory negligence against Paul (see discussion above). He may also try to assert the defense of contributory negligence per se. However, Paul did not violate any statutes and Bob’s assertion would not be successful.

Based on the facts, Bob is liable to Paul under the theory of negligence.

Strict Liability for abnormally dangerous activity

Please see discussion of theory above.

The activity of the game between the campers and the counselors could be considered abnormally dangerous. Therefore Bob may be liable to Paul under the theory of strict liability for abnormally dangerous activity. Contributory negligence defense would not be effective. Contributory negligence per se defense is also not effective – see discussion in negligence section above.

IIED

Paul may assert a claim of IIED against Bob because of Bob’s loud warning to Charles not to throw the ball. It is possible that this could have caused emotional distress to Paul as he anticipated the ball to hit him.

Please see discussion of theory above.

It is not likely that Bob would be liable to Paul for IIED. He was lacking the requisite intent to cause harm.
3. **Bob’s Baseball Camp**

**Paul vs Charles**

**Negligence.** Charles will be found guilty of Negligence if it can be found that he failed to act with the degree of care which a reasonably prudent person would use in the same situation. The following elements must be satisfied:

**Duty.** The general rule is that a duty is owed to all foreseeable Plaintiffs. Duty is created by Statute, Contract, Relationship, Assumption, and Peril caused by the Defendant. Here, duty has been created by the relationship between counselor and camper within his care, as well as peril caused by Charles. The majority view (Cardozo) is that duty is created to a reasonably foreseeable persons within zone of danger. Andrews (minority view) says that if duty is owed to anyone it is owed to all. Here, Charles is a nineteen year old camp counselor who knew that Paul did not have his helmet on and was running toward home plate. Paul was a reasonably foreseeable person within the zone of danger (area where ball was to be thrown). Charles owes a duty to Paul.

**Standard of Care.** The standard of care is the duty to act as a reasonably prudent person unless a special duty is imposed. Here, Charles will probably not be found to have a legal charged duty, because he was an employee of the camp’s and did not have the legal charge for the safety of Paul. The reasonably prudent person standard is determined by objective community standards. Therefore, this standard would dictate that Charles standard of care is avoid throwing a baseball towards someone without protective gear.

**Duty Breached.** Duty may be breached by Charles unreasonable conduct or Res Ipsa Loquitur or Negligence Per Se. Here, Charles fell below the standard of care by throwing the baseball at Paul when he did not have protective headwear on. Unreasonable conduct is determined by applying the Hand formula, which weighs the burden to avoid the conduct or the utility of Charles conduct against the likelihood and gravity of harm. Here, the utility of Charles conduct was to win the game or avoid a run by the other team. The gravity of harm is great when protective headgear is not worn. The likelihood that Paul may be hit in the head & the gravity of a head injury is great. Therefore, Charles breached his duty when he threw the ball towards home plate risking hitting Paul in the head.

**Cause in Fact.** The conduct of Charles must be the actual cause of Paul’s injury. Here, the baseball thrown by Charles was the only cause of Paul’s injury. Applying the “but-for” test, but for Charles throwing the ball towards Paul, Paul would not have incurred a head injury.

**Proximate Cause.** If the Cause in Fact is satisfied and there is a subsequent unforeseeable, supervening event which breaks the chain of causation, Charles may not be held liable for Paul’s injury. Here, there was no subsequent supervening event, which contributed to the injury. This element is satisfied.

**Harm.** Negligence requires actual injury to Paul. Paul suffered severe head injury.

**Defense:** Under Negligence, several defenses are available to limit the recovery or complete defense when the injured party either assumes the risk or contributed to the injury by his actions.

**Conduct by Paul:** Recovery may be limited if Paul contributed to his injury through his own negligent conduct. This limitation varies by jurisdiction – Contributory Fault (No recovery if Paul is found negligent), Comparative Fault (varying recovery based on jurisdiction and Paul’s degree of fault). During the excitement of the game, he took off his helmet, knowing that he shouldn’t, which may have contributed to his injury. An exception to these defenses is when the law or Charles undertakes responsibility for Paul’s safety. Charles was Paul’s counselor and Paul was only 13. It is implied that
Charles, as a counselor and adult, has assumed responsibility for Paul’s safety. Here, knowing that Paul did not have his helmet on, Charles threw the ball. This defense will fail.

Assumption of Risk. If Paul knowingly & willingly assumed the risk of injury, knowing & understanding the risk of removing his helmet, Charles may use this as a complete defense if express – subjective test & partial defense if implied – objective standard. Because Paul is a child, he will be held to the Child Standard of Care, which is based on his age, intelligence, and experience. This standard will most likely show that Paul did not understand the risk of removing his helmet and this defense will fail.

Battery is the intentional & voluntary act of causing harmful or offensive touching to a person or closely connected to a person. Here, Charles intentionally and voluntarily threw the ball towards Paul. It caused a harmful touching. Charles need not desire to cause the result but be reasonably certain that the result may occur. Absent a successful defense, Charles will be found liable for Battery.

Consent  Consent for the touching is a full defense for Battery. In sports activity, it is assumed that a certain amount of physical contact may occur and by participating in the sport, consent is given. In baseball, it is well known that one may be hit by a ball or have physical contact with a person. But Paul must have given informed consent and be of legal capacity. Legal capacity, as to age, is considered as to the circumstances of the situation. Here, Paul will probably be found of legal capacity to give informed consent to play baseball and the potential contact involved. Charles will not be held liable for Battery.

Assault is a intentional & voluntary act which causes reasonable apprehension of battery. Paul must have actually experienced the apprehension. Here, there is no evidence that Paul saw the ball coming towards his head and experienced apprehension. Since this is a part of baseball, there is no cause of action suggested for Assault.

Paul vs Bob

Negligence. Bob may be held liable for negligence as described above.

Duty. Even though, Bob did not throw the ball or play in the game, duty may be created to a 3rd party where Bob did not create the peril when there is a special relationship, contract, undertaking to act or reliance on a gratuitous promise. If the duty is to protect, then is must also be highly foreseeable and not highly burdensome. Here, Bob was under contract with a special relationship as to camp owner/camper and it is implied that Bob has a duty to protect Paul from harm. To ensure that Paul did not have a serious injury by another’s negligence does not appear to be highly burdensome (no game with older players) and it was highly foreseeable because he warned the older players to take it easy. Bob has a duty to protect Paul.

Standard of Care. Standard of care, beyond a reasonably prudent person, can also be determined by Negligence per Se – Regulation. This standard may only be applied if the statute or regulation is designed to protect the specific class of people and the type of injury/harm. Here, the regulations do not allow players of disparate ages & abilities to play baseball with another nor allow players under 14 to play 9 innings. Paul falls within the class of people because he is a baseball player under 14. If the disparate age & ability is designed to protect younger players from being hurt by older players because of this disparity, then this standard of care will apply. If the 9 inning limitation is designed because younger players become to tired to make effective decisions, risking chance of injury, then this standard of care will also apply.

Breach of that Duty. If the regulations described above apply, then Bob will be found to fall below the standard of care and breach his duty through standard of care. In addition, he had a duty to act as a reasonably prudent person for the safety of Paul – under nonfeasance. By having the game when he knew the risk to younger players and Paul, he breached his duty to protect Paul.
**Cause in Fact/Proximate Cause.** As described above, if not for Bob's letting the older players play with the younger ones and letting Paul play beyond the 9th inning, Paul would not have been injured – **But For** test. The **substantial factor** test requires Bob's behavior, as described above, to have materially contributed to the harm. In addition, Bob did not stop the game when Paul threw off his helmet. He did try to stop Charles from throwing the ball, though. **Cause in Fact may be difficult to prove.**

**Harm.** Paul had a serious head injury and actual harm.

**Defenses.** If causation can be satisfied, Bob will have the same defenses available to him as Charles had for negligence.

**Vicarious Liability for Battery/Assault.** Bob will be vicariously liable for the actions of Charles if Charles is his **employee** and Charles conduct was **in furtherance of his job** and **foreseeable.** Playing baseball with Paul was a specific instruction by Bob and if Charles is found liable for either offense, Bob will be held vicariously liable.

**Damages**

**Damages for Negligence.** If Charles and/or Bob are found liable for Negligence, Paul may recover all present & future costs for medical expenses, diminished earning capacity for future wage earnings, incidental economic consequences, pain & suffering, and Hedonistic damages for loss of enjoyment in life caused by the head injury. If Charles or Bob's conduct is found to be reckless, punitive damages may also be awarded. Since comparative fault defense will probably not be successful, there will no reduction in recovery.

**Joint Tortfeasors.** Paul may claim damages for both parties, but only recover from one.

*One hour*
4. Bob’s Baseball Camp

Total time: 52 minutes

I. Paul v Charles -- Theories of Recovery; Defenses

A. Battery.

1. A battery is an intentional and voluntary act of harmfully or offensively touching another. The touching need not be done by the defendant’s person so long as he used and instrument that was in his hand or in his control. Intent means to do something purposely or to know to substantial certainty that the result will occur. Here, Charles threw the ball that he held in his hand toward home plate and using his full strength. Paul was standing near him. Charles saw or should have known that Paul was nearby, especially since Paul shouted to him, and should have realized that Paul might get touched. Since the ball was in his hand, he had control over the instrumentality (ball). Even if the touching of Paul had not been harmful, it was done in a social setting and would have been offensive. There is no indication that Charles acted out of reflex, if he heard Paul’s scream and could have prevented the ball from leaving his hand or not throw it at full strength. Charles is liable for a battery on Paul.

2. Defense. Consent means that plaintiff gave permission to be touched and that defendant did not exceed the scope of consent given. Here, Paul consented to playing the game. He did so by conduct (continuing to participate) even if he did not make an express statement to that effect. However, Paul shouted “Don’t throw. Hold the ball” indicating that he no longer consented to participate, or at least not until he had put his helmet back on. If Charles heard Paul’s words and threw the ball anyway, he exceeded the consent, and Charles has no defense.

B. Assault.

1. Assault means the intentional and voluntary act of putting the victim in imminent apprehension of a battery. Here, Paul must show that he saw the ball coming and was put in reasonable and imminent fear (apprehension) of being hit. Paul will say that his shouting was clear evidence that he realized Charles would throw the ball and was afraid of being hit (apprehension of battery). Charles will argue that he did not have the requisite intent of assaulting Paul. However, the transferred intent doctrine means that where Charles had the requisite intent for one intentional tort (battery, above), that intent suffices and transfers also to some other intentional torts that actually occurred, such as assault. Here, Charles can also be charged with assault.

1. Defense of Consent. Will fail per battery discussion.

C. Negligence. Alleged unreasonable conduct by Charles the camp counselor was to not protect Paul from harm and to not make him put his helmet back on or stop the game until Paul had put the helmet back on. Also, to engage in the game in the first place, or allow Paul to participate, which went against the ABCA rules.

1. Duty and standard of care. The alleged unreasonable conduct implies that Charles should have taken some action which he omitted to do. In general, one has no duty to take action absent a special relationship imposing such a duty. Here, Paul was a minor, entrusted to the care of Bob and Bob’s employees-camp counselor. As such, both Bob and Charles had a duty to protect Paul against reasonably foreseeable harm.
2. Breach of duty. The learned hand formula says that Charles breached his duty if the burden on him to act reasonably to protect Paul was lower than the probability of likely harm multiplied by the magnitude of likely harm. Here, the burden was to observe the young players and make sure that the game was stopped if anyone got too excited, took off his helmet or otherwise acted in a manner that could cause harm. The duty more likely involved abiding by the ABCA rules and not start the game involving players younger than 14 (Paul was 13) in the first place. Since Charles was employed as a counselor, he was paid to take these acts and the burden on him was very low. The probability and magnitude of likely harm was great, or ABCA rules would not have expressed the prohibition. Also, Bob had realized the danger and admonished the counselors at the beginning of the game, indicating that he realized that there was a probability of harm. Balls in baseball travel at high speeds and can therefore cause severe harm (magnitude). Charles’s burden to take reasonable steps will be found to be breach.


5. Cause-in-fact. But-for Charles’s throwing the ball and otherwise failing to protect Paul, Paul would not have been hit in the head. However, Bob and the other counselors also failed to act appropriately. Therefore, the better argument is that Charles was a substantial factor in the cause or Paul’s harm, since others were at fault as well.

6. Proximate cause. There are no indications of any superseding intervening act between Charles’s throwing the ball and Paul’s being hit to break the chain of close causal connection which will hold Charles liable.

7. Defenses.

a. Assumption of the risk (ATR). ATR means that Paul knew and understood the risk and voluntarily encountered the risk. Here Paul initially had some concern about playing against the older and stronger counselors. This indicates that he was aware of and, at least to some extent, understood that he might get hurt. He decided to participate and this act was voluntary. The fact that it was an honor to play does not make his participation coerced or under duress. Paul will argue that as a 13 year old, he did not have the full ability to comprehend the risk and therefore did not fully understand the risk. If Paul is found to lack capacity to understand the risk due to infancy, he will not have ATR’d.

b. Contributory negligence (CN). A plaintiff who fails to take reasonable steps to protect himself against reasonably foreseeable harm is said to be CN (or CF, below). In CN jurisdictions, his recovery is completely barred if he was even slightly CN. Here, Paul is 13 and will be judged by the child standard of care, which is a standard of a comparable child or same age, intelligence, experience and ability, or, the rule of sevens which says that children 7 thru 13 are presumably capable of negligence. Since Paul took off his batting helmet even though counselors had repeatedly told him to keep it on, Paul may be found to have been contributorily negligent, unless his excitement and his age rendered him incapable of such negligence. This is a matter of fact.

   (i) Last clear chance (LCC). However, an exception to CN is where the defendant had a last clear chance to avoid the accident, after plaintiff was CN. Here, Charles heard Paul’s screaming to not throw the ball and had the last clear chance of avoiding Paul’s injury had he not thrown the ball. Therefore, even if Paul was CN, LCC means that his recovery will not be barred in a CN jurisdiction.

c. Comparative fault (CF). Plaintiff’s recovery will be reduced by his percentage fault – the exact figure in pure CF and the exact figure up to 50% but thereafter completely
barred in modified CF. Some jurisdictions have absorbed ATR into CF as well. Thus, if Paul’s taking off his helmet or ATR means that he had some level of fault, his recovery will be reduced under CF, if the jurisdiction has adopted CF instead of CN.

II. Paul v Bob – Theories of Recovery; Defenses

A. Vicarious liability for Charles’s acts. Vicarious liability means that an employer can be held liable for an employee’s acts if done within the scope of employment and for the purpose of employment (respondeat superior). Here, Charles was Bob’s employee.

1. Assault and battery. The issue becomes whether the assault and battery were within the scope of the duty. An intentional or criminal act is typically not deemed to be within the scope of employment, especially since Charles here did not thereby further Bob’s baseball camp business. Bob is not likely to be vicariously liable for the assault and battery.

2. Negligence. One’s negligence is typically not imputed to another unless there was a joint enterprise, meaning that the two people had a common pecuniary interest and an equal right of voice in the enterprise. Here, Bob will argue that Charles was an employee and was paid by Bob, and that there was no pecuniary interest in common between the two. However, Bob gained more camp participants only if he had employees such as Charles. Charles and Bob had an equal voice in the carrying out of the baseball game, which was in furtherance of the camp participants. If the relationship is found to be one of joint enterprise and Charles found negligent, then Bob will also be liable.

B. Negligence. Alleged unreasonable conduct is Bob’s failure to inspect for and warn of known dangers and to protect his camp participants against the risk of participating in the game.

1. Duty and standard of care. Bob was a land occupier, and Paul was an invitee, because he conferred a pecuniary benefit on Bob by participating in the camp. Land occupiers owe invitees a duty to inspect for and warn of known dangers and to make such conditions safe. Under the modern unitary standard of care, all plaintiffs are owed a duty of reasonable care by land occupiers. Bob, as a participant in the game, also owed Paul a duty to protect (same as Charles)

2. Breach of duty. Same as for Charles with respect to letting the game go on and Paul’s act of taking his helmet off.

3. Actual harm. See above.

4. Cause-in-fact and proximate cause. As above with respect to the game going on.

5. Defenses. Same as above.

III. Recovery.

A. Compensatory damages. Purpose is to put plaintiff in the same position he was in prior to the injury.

1. Special. Special damages are expenses actually incurred, such as medical expenses, his parents’ lost wages while taking care of him, and cost of transportation to hospital for care.
2. **General.** General damages are pain-and-suffering, embarrassment or humiliation and, in a minority, hedonistic damages, i.e. loss of enjoyment of life if Paul's head injury had long-lasting impact.

3. **Multiple defendants.** If both Bob and Charles are liable, in CN, each will be liable for the negligence portion for \( \frac{1}{2} \) of the recovery, but in a CF jurisdictions, each will be liable for its percentage of fault after Paul's percentage (if any) has been subtracted. If Paul recovers only against one defendant, the defendant can later seek contribution from each other per above formula, whichever applies.

4. **Punitive damages against Charles.** If Charles's assault and battery was found to be sufficiently malicious and done with intent to harm, he can be liable for punitive damages, which will take into account his financial situation.

5. **Collateral source rule (CSR).** CSR means that his recovery will be unreduced by any insurance payouts, gifts or donations Paul receives and that such money will not be taken into account and such evidence not allowed to be presented to the jury.
5. Bob’s Baseball Camp

I. Paul v. Charles. Paul can recover damages from Charles under the theory of negligence if P if he can prove: Duty, Standard of Care, Breach of Duty, Causation, Damages, No Defenses,

A. Duty. A person acting affirmatively owes those foreseeable plaintiffs in the zone of danger a duty of care. Here, Charles was playing baseball with other players and owed those other players a duty of care to prevent them from being injured.

B. Standard of Care. Charles owed the other ball players a standard of care that any reasonably, prudent ball player would owe towards the other players.

C. Breach of Duty. Breach of duty is measured by the Learned Hand Rule, B<PL, where B is the Burden of the defendant to have acted differently in order to avoid the harm that befell the plaintiff; P is the probability of the harm occurring; and L is the gravity of the harm. Here, Charles was warned before the game began to “take it easy”, because of the campers younger age and less experience level. Also, just before Charles threw the ball that struck Paul in the head, the owner Bob verbally shouted at Charles to “hold the ball, don’t throw”. Charles knew full well what the stakes were when they were playing the ball game against the campers but decided to throw the ball anyway in the direction of home plate resulting in P being struck in the head. The burden on C to have acted differently (not throw the ball) would have been extremely slight compared to the gravity of harm that occurred (P being struck in the head). Charles breached his duty of care towards Paul.

D. Causation. Causation can either be measured by the “but for” test if there is only 1 Defendant, or the “substantial factor” test. Here, if not but for defendant’s acts, Paul would not have been injured. C is the actual cause of P’s injuries.

1. Proximate cause. The defendant must also be the proximate cause of P’s injuries. Here, there are no proximate (intervening) causes.

E. Damages. For Paul to recover from Charles for his injuries, Paul will have to actually show that there were injuries. The facts clearly state that “the ball struck Paul in the head, injuring him severely.

F. Defenses. Paul’s damages will be reduced or barred if the defendant, C, shows that Paul assumed the risk, was contributorily negligent, or comparatively negligent.

1. Assumption of the risk. Paul will be denied recovery if he assumed the risk of any damage by the D’s acts. He must have known about the risk and voluntarily assumed it. Here, the facts state that P had some concern about playing against the older, stronger counselors…but played anyway. Paul assumed the risk

2. Contributively negligent. This means that the plaintiff, by his own voluntary actions, contributed to the injury that occurred to him. Here, Paul removed his helmet when he was on 3rd base contrary to what the camp counselors had told him about keeping their helmets on when running the bases. Paul contributed to his own injuries by running the bases and failing to use a helmet. If this injury occurred in a doctrine that recognized the defense of contributory negligence, then P’s damages will be barred. If the jurisdiction recognized comparative negligence then P’s damages will be reduced by an amount equal to the percentage of fault attributable to Paul’s negligence.

3. Last Clear Chance. This is a doctrine invoked by the plaintiff that permits the Plaintiff to recover even though the P’s own negligence contributed to his injuries. This means that the person with the last clear chance to avoid an injury and fails to do so is liable
for that negligence. Here, Bob shouted at Charles to “check” his throw to home plate, but Charles failed to do which resulted in Paul’s injuries.

Therefore, Paul will be able to recover from Charles under the theory of negligence under the Last Clear Chance doctrine.

NOTE: I did not discuss Negligence Per Se b/c there was no violation of any statutes, but rather a violation of the rules of the American Baseball Camp Association, which is not a statute.

II. Paul v. Bob. Paul can recover from Bob under the theory of negligence, also if he shows the elements listed above for the Charles part.

A. Duty. The duty between Bob and Paul is that of a special relationship. The defendant, B, had a duty to care for the plaintiff and a duty to control others. Here, Bob has a duty to take affirmative action to help the plaintiff when the D, B, derives an economic benefit. Bob also had a duty to control others, such as his employee, Charles from injuring Paul. Bob breached his duty of reasonable care towards Paul.

B. Standard of Care. See definition/discussion above for Charles.

C. Breach of duty. Bob breached his duty of reasonable care towards Paul by not controlling his employee, Charles.

D. Causation. See definition above for Charles.

E. Damages. See definition/discussion above for Charles.

F. Defenses. See definition/discussion above for Charles.
6. **Bob's Baseball Camp**

I. **Paul v. Charles: Theories & Defenses.** Paul may bring tort actions in battery and negligence

A. **Negligence.** For Paul to prevail on this tort he must prove the following elements: **Duty, Standard of Care/Breach of Duty, Actual Cause, Proximate Cause, and Damages.**

1. **Duty.** Generally, anyone engaged in an affirmative act owes a duty toward foreseeable plaintiffs to take reasonable care to protect from harm. Here, Charles is engaged in an affirmative act, playing baseball with young kids. Therefore, he owes a duty toward the youngsters to protect from harm.

2. **Standard of Care/Breach of Duty.** Generally, the level of duty owed by one engaged in an affirmative act is to act as a reasonable person under the same circumstances as the defendant. Here, Charles is a camp counselor playing in an "all star game" with young kids from the camp. Thus, he owes the duty that a reasonable camp counselor would owe toward youngsters he is playing ball with.

   a. **Hand Calculus.** When the probability that the defendant's conduct will cause harm multiplied by the severity of harm to occur outweighs the burden to protect against harm, the defendant is considered to have breached the standard of care owed. Here, Charles has thrown a ball, as hard as he could toward home plate in the vicinity of Paul, after being told "Don't throw." Therefore, the burden of Charles not to throw the ball is significantly less than the probability of harm (quite foreseeable) multiplied by the severity of harm, which could be and was quite severe (Paul being hit in the head). Therefore, Charles has breached the standard of care owed to Paul.

3. **Actual Cause.** The plaintiff must prove that the defendant is cause in fact of the harm.

   a. **But-for-test.** Where it can be said that but-for the defendant's conduct the plaintiff would not be injured, the defendant is the cause in fact of the harm. Here, Paul's injury would not have occurred but-for Charles' act, throwing the ball to home plate "using all his strength." This test is satisfied.

   The facts of the case illustrate that Charles was the but-for-cause of the harm. Because the but-for-test is satisfied, Charles is the actual cause of the harm.

4. **Proximate cause.** The defendant will be liable to all foreseeable plaintiffs within the zone of danger for all foreseeable types of harm which flow as a natural and probable consequence from his negligent conduct, unless interrupted by a superseding force. Here, Charles' unreasonable conduct, throwing the ball to home after being told not to, has resulted in Paul's injury. Because Paul, a camp kid playing ball, is a foreseeable plaintiff and suffered a foreseeable type of injury, being hit by the ball, Charles is the proximate cause of injury.

   a. **Supervening force.** Where an intervening force occurs between the negligent conduct and the harm, and the nature of the force is highly unforeseeable and highly culpable the defendant will not be liable for the harm. Here, Charles may claim that Paul's "taking his helmet off" was an intervening force. However, Paul's conduct may have contributed to the
harm or merely extended, but it was not an intervening force so culpable as to relieve Charles of liability.

5. **Damages.** The plaintiff must prove that he suffered damages in order to recover for the defendant's negligence. The facts of the case state that Paul suffered "severe" injury from being struck in the head. Therefore, this element of the tort is established. Provided there is no valid defense, Paul should recover for his damages.

6. **Defenses--Assumption of the risk.** Where the plaintiff knows and understands the risk and voluntarily assumes the risk, the defendant will not be held liable for his negligence toward the plaintiff. Here, analysis of the case reveals that Paul had some "concern" about playing in the "all star game", but he decided that he would play because of the honor related to being selected for the game. Thus, it appears that Paul accepted the risk of being injured from acts associated with playing in such a game.

   a. **Aware of the risk/youth.** Infancy may negate the ability of the child plaintiff to be subjectively aware of the risk associated with participation in a sporting event. If the jury were to find that Paul was too immature to understand the risks associated with playing the ball game, then this defense would fail. However, because Paul is an "all star" junior league baseball player, assumption of the risk may be a valid defense and bar his recovery.

7. **Contributory negligence/comparative fault.** Generally, where the plaintiff is a child below age 14, the childcare standard will apply to determine whether or not his contributory negligence will bar his recovery (minority contributory negligence approach) or reduce his recovery (majority contributory fault approach). Here, Paul "took his helmet off." Therefore, if a child of similar baseball talent, age and IQ would not have done such a negligent act, Paul's negligence will either bar or reduce his recovery.

B. **Battery.** A voluntary intentional act resulting in contact with the plaintiff or something closely connected to the plaintiff amounting to harmful or offensive touching.

1. **Intent.** Intent may be found through the defendant's desire to cause a harmful contact or through the defendant's knowledge to a substantial certainty that a contact with the person may result from his act. Here, Charles was told to "hold the ball." If he understood that Bob wanted Charles to hold the ball because there was a risk that Paul could get injured by throw, then he would have sufficient intent to meet this element. However, it would be unlikely that Charles' indirect contact (though an object) with Paul was intentional or "substantially" certain. Therefore, there may not be sufficient intent to find Charles guilty of this tort.

2. **Harmful/offensive contact.** When the intentional touching of the person of another results in offensive or harmful contact, as judged by a reasonable person in the shoes of the plaintiff, the defendant will be liable for battery. Here, Charles threw a ball toward Paul and it hit him in the head causing serious injury. Therefore, since harmful contact resulted. This element is satisfied.

3. **Defense--consent.** The majority rule is that minors below the age of majority (18 most jurisdictions) are incapable of consenting to intentional torts. Here, Paul is 13 years old. Therefore, by law he may be legally incapable of consenting to
such contact. Thus, this would bar consent as a defense on behalf of the defendant.

II. Paul v. Bob: Theories of recovery and defenses. Paul may bring actions against Bob for negligence, possibly battery--through a vicarious liability theory, but only if Charles' actions were in furtherance in the baseball camp's business purposes.

A. **Negligence.** The issues of concern relating to Bob are breach of duty and proximate cause.

1. **Standard of Care/Breach of Duty.** See supra for definitions and rule statements. Here, Bob must act as a reasonable owner of a baseball camp for youths.

   a. **Custom as evidence of breach.** Deviation from custom does not represent breach of the standard of care. However, it does provide evidence as to reasonableness or unreasonableness of the defendant's conduct. Here, there were rules of the "American Baseball Camp Association" which prohibit games with varying degrees of experience and talent. These rules provide evidence that there is a high probability of harm that should encourage compliance with the standard. Further, it demonstrates that the burden to protect against such probable danger is low.

   b. **Hand formula.** Where the defendants burden to protect against harm is less than the probability multiplied by the severity of harm that will result from the defendant's conduct, the defendant is in breach of the standard of care. Here, there is a custom that shows that there is a high probability of risk associated with the defendant's conduct (kids playing with adults in a competitive sport). Further, it demonstrates that the burden to protect against such harms is low (putting players of like talent and experience in the same game). Considering the social benefit of the conduct, an "all star game" honoring the players, the defendant's conduct can be considered a breach of the standard of care toward Paul and any other baseball player.

   Conclusion. The facts of the case reveal that there was a custom related to the game played. Although the custom does not evince breach of standard of care, it does demonstrate the need for the defendant to exercise reasonable care to avoid injury to foreseeable plaintiffs, youth baseball players. Here, Bob breached that duty and Paul was seriously injured.

2. **Proximate cause.** See definitions and rules supra. Here, Bob may claim that Charles intervening act, throwing the ball toward home plate after Bob told him not to, was a superseding force or that Paul's taking his helmet off resulted in the injury. However, Charles activity may be considered foreseeable in the heat of a competitive game. Moreover, Bob's failure to adhere to the traditional custom or take reasonable steps to alleviate the dangers that the custom was designed to help alleviate prevent the finding of an intervening force from Charles' actions. Further, Paul's act of taking his helmet off was merely negligent. Thus, there is proximate cause to find this element sufficiently met.

3. **Defenses.** All defenses applicable to Charles would be applicable to Bob. See above for defenses supra, incorporated here by reference.

4. **Vicarious liability.** A defendant, due to special circumstances or relationship to a third party, may be liable for another party's negligence toward the plaintiff. Here,
if Bob was found not liable because of his own conduct, he might still be found guilty for the negligence of Charles, if Charles was found liable for unreasonable conduct and Charles’ conduct was in furtherance of the baseball camp (owned by Bob). Thus, Bob may be found guilty through Charles’ actions.

a. Exception—intentional torts. Where the tort is intentional and not in furtherance of the employers business interest, the employer will not be liable for the actions of the employee. The facts of the case reveal a possible battery by Charles. If his conduct was designed to showcase or increase applications to attend the baseball camp, Bob may be held liable for Charles conduct. However, if Charles intended to hit Paul, Bob will not be liable for the tort.

B. Battery. See definitions, rule statements, and defenses above. Additionally, in regard to defenses. Provided that Paul’s infancy does not prevent a finding that consent or assumption of the risk is a valid defense. **Primary assumption of the risk** may preclude a finding that there is a duty owed between Bob and Charles. If it is understood by Paul that he has consented to contact within the scope of the baseball game, then Bob or Charles merely owes him a duty not to inflict intentional or wanton injury upon Paul.
7. Bob’s Baseball Camp

A) Paul v Charles

1) Battery
Intentional unconsented harmful or offensive touching of another.
Intent is desire or substantial certainty.

**Intent**
Charles threw the ball toward home plate while Paul was between 3rd and home. Charles did not intend to hit Paul.

**Consent**
Paul agreed to play in the game but he did not give his express consent.

Harmful
Paul was hurt seriously when he was hit in the head.

Charles not liable for battery.

2) Assault
Intentionally causing another to apprehend an imminent harmful or offensive contact.

**Intent**
Intent to cause an apprehension or attempted battery.

Here Charles did not want to hit Paul, he was throwing toward home plate. Also, Paul would have to have been looking at Charles.

No assault.

B) Paul v Charles Negligence
Negligence is a breach of duty to act reasonably.
Requires Duty, BOD, Causation, Damages and absence of defenses.

**Duty**
Generally one who engages in an affirmative act owes a duty of reasonable care to foreseeable plaintiffs in the zone of danger. Reasonable care is the conduct of the reasonable prudent person under same or similar circumstances.
Engaging in an affirmative act, i.e. throwing the ball, Charles owed Paul a duty of reasonable care.

**BOD**
Breach of duty is a failure to act reasonably.
Charles may not have acted reasonably when he threw the ball in Paul’s direction and Paul was without his helmet. He was told by the Bob not to throw the ball yet he threw it anyway. According to the Learned Hand Calculus a person acts unreasonably when they fail to meet the burden of avoidance and the burden is small in comparison to the probability of harm multiplied by the potential magnitude of harm. All was not at stake, Charles could have held the throw, it would have been a small thing. Charles breached his duty.

**Cause**
But for Charles throwing the ball Paul would not have been injured.

Proximate Legal Cause.
Proximate legal cause is found where the injury was a foreseeable result of the negligent act.
Here
Paul was in the line of fire, he was not wearing his helmet. It was foreseeable that he would be hit and that he would sustain injuries to the head. Charles was the proximate legal cause of the injury. Charles will argue that Paul’s taking off his helmet was an unforeseeable intervening and superceding cause of his injuries, but Charles knew his helmet was off so this would not break the chain of causation. Charles will also argue that Paul should not have been in the game at 13.

**Damages**
Paul sustained serious head injuries.

**Defenses**
*Contributory Negligence* is a bar to recovery when the plaintiff fails to use reasonable care for his own safety. Paul took off his helmet. Paul would be held to an adult standard in that he was engaged in a game with adults. As such the court may find that Paul was negligent. Charles had the last clear chance to avoid the injury by not throwing the ball. Paul will not be contributorily negligent.

*Comparative Negligence*: In a comparative negligence jd, Paul may recover for sharing any degree of fault or any degree which is less than the defendant.

*Assumption of Risk* is a defense where the plaintiff knows the risk, understands the risk and volunteers to take the risk. Assumption of risk is an absolute bar to recovery. Here Paul knew the risk of playing with the adults, he had to understand that he might get run over by a bigger runner, might get hit with the ball on a pitch, might get hit throwing out. Paul took that risk when he joined the campers against the counselors. Paul had alternatives, and his assuming this risk may not have been reasonable depending on the size of these adults. Paul’s age might work in his favor here as a plaintiff, he probably will not be found to have assumed the risk. Paul had reservations about playing against the older and stronger players but decided to play anyway.

But Paul is a 13 year old boy and as such, as a plaintiff, will probably be compared with others of his age, even though he is engaged in a game with adults. A 13 year old probably could not resist invitation by adults into this game, and so Paul would not be found to have

Charles is over 18, he is liable for the injuries to Paul.

**B) Paul v Bob**

**Negligence**
Definition: Supra

**Duty**
As operator of the Baseball Camp, Bob owed a duty to Paul and all campers to exercise reasonable care in the operation of games at the camp. Reasonable care is the conduct expected of the reasonably prudent person under the same or similar circumstances.

**BOD**
Bob acted unreasonably when he allowed Paul to enter the game against the adults. The Baseball Camp Association prohibited play between players of disparate ages and abilities and barred players younger than 14 from nine inning games. Breaching of these customs can serve as evidence of the unreasonableness of Bob’s act, at least the one that prohibited play between players of disparate ages. The reason for this rule was to prevent injury to younger players and Paul was the kind of player the rule was designed to protect. Not sure about the rule against 9 inning play, perhaps that was not designed to protect the same interests.
Either way Bob breached his duty to Paul when he allowed Paul to be included with this group.

According to the Learned Hand Calculus (supra) Bob’s burden of avoidance was small, i.e., Paul can’t play.

Bob will argue that he admonished the players to take it easy, that he told Charles not to throw the ball. But these efforts don’t make his overall decision reasonable.

**Causation**
But for Bob’s decision Paul would not have been in the game and would not have been injured. He shared this with Charles, together they were substantial factors in Paul’s injury.

Bob’s act of putting Paul in the game had the foreseeable result of Paul being injured by the bigger players and sustaining the kind of injury he did.
Bob will argue that Charles’ throwing the ball after Charles saw that Paul had his helmet off was a superceding event. This was an event that occurred after Bob’s negligent act of putting Paul in the game. But this was a heated game of baseball and it would not be unforeseeable that Charles caught up in the game would throw the ball regardless of Bobs demand. Not superceding

Bob would also argue that Paul’s taking off of his helmet was unforeseeable and therefore superceding. But anything can be expected in a game where decisions are made quickly, spirits are high, people are running for bases. This was not unforeseeable.

Bob is the proximate legal cause of Paul’s injuries. Sorry Bob.

**Damages: Supra**

**Defenses: Supra**

**Assumption of Risk:** Paul considered the risk, but then took it. But Paul is a 13 year old boy and as such, as a plaintiff, will probably be compared with others of his age, even though he is engaged in a game with adults. A 13 year old probably could not resist invitation by adults into this game, and so Paul would not be found to have assumed the risk.

Bob would be liable for Paul’s injuries.

**Vicarious Liability**
Under the doctrine of respondeat superior an employer is liable for the acts of an employee if the acts were within the scope of employment.
Charles was a camp counselor. Bob would be vicariously liable for his actions in the scope of his duty. Charles was acting in the scope of his duty in playing the All Star game. Bob would not be liable for any intentional acts by Charles, but he would be liable for negligent acts. If Charles was negligent then Bob would be liable.
Bob will argue that he told Charles not to throw the ball, but that would probably not excuse Bob.

Bob is liable under this theory as well as negligence.

**Joint and Several Liability**
Bob’s and Charles being **substantial factors** in the injuries to Paul would be jointly and severally liable for his injuries.

End 85 minutes.