



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

**Essay Questions
and
Selected Answers**

October 2007

ESSAY QUESTIONS AND SELECTED ANSWERS

OCTOBER 2007 FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the essay questions from the October 2007 California First-Year Law Students' Examination and two selected answers for each question.

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

Applicants were given four hours to answer four essay questions. Instructions for the essay examination appear on page 3.

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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

Child, a four-year-old, was seated in a shopping cart her mother was using to shop at Market. While mother was distracted with her shopping list, Child took a banana from a display counter and took a bite out of it, peel and all. Child swallowed the bite she had taken and threw the remainder of the banana onto the floor. Eventually, Child became very ill from a toxic substance the banana supplier had sprayed the banana skin with before delivery of the bananas to Market.

Shopper slipped on the banana that Child had thrown onto the floor and fell against the shopping cart he was using. As he fell, he hit his face on a sharp edge protruding from the shopping cart, severely injuring his eye.

Polly, a police officer, who was off duty and doing her personal shopping, saw Shopper fall and ran to his aid. Polly slipped on the banana that child had thrown onto the floor and, as Polly fell, she came in contact with the sharp edge of the same shopping cart that Shopper had used. Polly's arm was seriously cut as a result.

Child, through her mother as guardian ad litem, Shopper, and Polly filed separate lawsuits against Market. Child claims that Market is strictly liable for injuries caused by the toxic substance on the banana peel; Shopper and Polly each claim that Market is strictly liable for the injuries caused by the sharp edge on the shopping cart.

What defenses might Market reasonably raise to each claim, and what is the likely outcome of:

1. Child's lawsuit against Market? Discuss.
2. Shopper's lawsuit against Market? Discuss.
3. Polly's lawsuit against Market? Discuss.

Answer A to Question 1

Child v. Market

Strict Products Liability for injuries caused by banana peel

To establish strict product liability, D must owe an absolute duty to prevent a foreseeable harm to P, D must breach that duty by providing a defective product, and P's damages must be actually and proximately caused by D's defective product.

D owes an absolute duty to prevent a foreseeable harm to P if D is a commercial supplier of the product. Privity is not required, only that P is a foreseeable user of the product. In this case, Market is a retailer of the bananas and is thus a commercial supplier of the bananas, and a child within its store makes the child a foreseeable user of the product. Thus Market owes an absolute duty to prevent a foreseeable harm to Child.

Breach of duty is established when the product is defective. A manufacturing defect occurs when a product's safety falls below the ordinary expectations of an average consumer. In this case, Child would argue that having a toxic substance on the banana skin falls below the standards of ordinary expectations of an average consumer. One would expect a banana skin, which is held in one's hand while the insides of the banana is being consumed, to be free of toxic substances capable of making one very ill. Market would argue that a toxic substance on banana skins does not fall below the standards of ordinary expectations of an average consumer. Fruits are often sprayed with chemicals and insecticides, and people generally know to wash the fruit before eating. However, eating unwashed fruit generally wouldn't make an individual very ill, particularly not after just one bite as in this case, and thus the manufacturing defect of a toxic substance on a banana peel would fall below the standards of ordinary expectations of an average consumer. Market has breached his absolute duty to Child.

P's injuries must be both actually and proximately caused by D's breach of duty. Actual cause is established when P's injuries would not have occurred but for the defect. Actual cause here is established, for Child would not have been ill but for the toxic substance. Proximate cause requires that the harm be foreseeable, or if there was an intervening force, that the result of the intervening force be foreseeable. In this case Market would argue that the harm was not foreseeable, for people do not normally eat the banana peel. Child would argue that it is foreseeable that someone could decide to eat the peel of a banana, perhaps out of curiosity, or someone who has never eaten a banana before. Thus the harm caused to Child is foreseeable, and proximate cause is established.

P must suffer damages to recover in strict products liability. In this case, damages occurred when child became very ill after eating the banana peel.

Defenses

Known contributory negligence. In strict liability, P's recoveries may be barred if P knew of the dangers associated with the product, and yet acted in a negligent manner that was below the standard of care set to protect P. Market would argue that P knew that eating a banana peel was not something people usually do, and can be assumed that eating the peel may pose dangerous, and thus eating the peel can be considered a known negligent act. Child would argue that he was only four years old, and thus did not know of the potential dangers associated with eating a banana peel. Most likely, a four year old would not understand the dangers of eating a banana peel, and thus Market's defense of known contributory negligence would probably fail.

Market could also argue that Child's mother was knowingly contributorily negligent because she should have watched Child to make sure Child did not act in a dangerous manner. Mother was distracted with her shopping list and did not watch child, but mother should have known of the dangers that could occur from not watching Child. Child would argue that mother cannot possibly watch Child at every single moment within the store, and thus was not knowingly contributorily negligent. It is true that a mother cannot have her eye on Child all the time, and so Market would probably lose on this defense.

In comparative negligence states, fault between P and Market would be apportioned and distributed accordingly. Any negligence child may have conducted for eating the peel will be deducted from her award of damages.

Shopper v. Market

Strict liability for injuries caused by shopping cart

To establish strict product liability, D must owe an absolute duty to prevent a foreseeable harm to P, D must breach that duty by providing a defective product, and P's damages must be actually and proximately caused by D's defective product.

D owes an absolute duty to prevent a foreseeable harm to P if D is a commercial supplier of the product. Privity is not required, only that P is a foreseeable user of the product. Market would argue that he is not a commercial supplier of the shopping cart, for it only provides shopping carts for shoppers to use while in the store. Market probably isn't a commercial supplier of the product, and thus probably does not owe an absolute duty to Shopper. Shopper would have to bring negligence to recover.

Breach of duty is established when the product is defective. A manufacturing defect occurs when a product's safety falls below the ordinary expectations of an average consumer. Assuming arguendo that Market is a commercial supplier of the shopping cart, Market would argue that a sharp edge protruding from a shopping cart does not fall below the ordinary expectations of an average consumer. A shopping cart is made of metal, and it would not be unreasonable to expect it from having sharp edges. Shopper would argue that having a sharp edge protruding from the cart falls below ordinary expectations. A sharp edge protruding from a cart probably falls below ordinary expectations, for sharp protruding metal objects are typically considered dangerous and expected to not be present, particularly in a grocery store with lots of people present.

P's injuries must be both actual and proximately caused by D's breach of duty. Actual cause is established when P's injuries would not have occurred but for the defect. In this case there were two independent concurrent causes that caused an indivisible injury to P. Both causes are still but for causation of P's injuries. In this case, actual cause is established, for even though Child's actions caused Shopper to slip, Shopper would not incur an eye injury but for the sharp edge protruding from the shopping cart. Proximate cause requires that the harm be foreseeable, or if there is an intervening force, that the result of the intervening force be foreseeable. In this case, Market would argue Shopper's injury was unforeseeable, for slipping on the floor and then having your eye meet an edge of the shopping cart is unlikely. Shopper would argue that it is very foreseeable that food items will be spilled onto the ground of a grocery store, and that shoppers can potentially slip on the ground and subsequently injure themselves on the shopping carts. Shopper makes a more compelling argument, for food items are regularly spilled on the ground.

P must suffer damages to recover in strict products liability. Shopper suffered a severe eye injury.

Defenses

Known contributory negligence. In strict liability, P's recoveries may be barred if P knew of the dangers associated with the product, and yet acted in a negligent manner that was below the standard of care set to protect P. Shopper did not act in a negligent manner knowing of the dangers associated with the product. Shopper did not know there was a sharp protruding edge from the shopping cart.

Comparative negligence – In comparative negligence states, fault between P and Market would be apportioned and distributed accordingly. Fault of shopper for negligently not watching where he was going could possibly be deducted from his award of damages.

Polly v. Market

Strict liability for injuries caused by shopping cart

To establish strict product liability, D must owe an absolute duty to prevent a foreseeable harm to P, D must breach that duty by providing a defective product, and P's damages must be actually and proximately caused by D's defective product.

Duty – see Shopper v. Market

Breach – see Shopper v. Market

Causation – see Shopper v. Market

Damages – Polly suffered a cut on her arm.

Defenses

A rescuer cannot be found contributorily negligent, nor can he be found to have assumed the risk. No defenses available for Market.

Answer B to Question 1

CHILD V. MARKET

Products Liability

A manufacturer or distributor of goods who places into the stream of commerce a product which is defective will be held liable for the harm resulting from the use of the defective product.

Privity

Under a leading case *McPherson v. Buick*, privity is not required. Therefore, Child may assert a claim against Market even though she did not purchase the banana.

Thus, Child's lack of privity does not bar the claim.

Defect – Design

Here, Child will contend that the product was defective in design because the toxic substance was intentionally applied to the banana. Therefore, the banana was made as intended. However, Market will assert that the cost of not using the toxic substance would not outweigh the cost of damage to the banana crop.

Therefore, the court will probably not find a design defect because the alternative design is not cost effective.

Defect – Manufacturing

Here, the product was impliedly made as intended. Therefore, there can be no defect in manufacturing.

Defect – Warning

The facts do not indicate that Market warned of the use of the toxic substance on the banana. Therefore, Child will argue that Market's failure to warn of the use of the toxic substance made the product defective in warning.

The court will probably find the banana to be defective in warning.

Strict Liability in Tort

A manufacturer or distributor of goods who places into the stream of commerce a product which is defective and abnormally dangerous, will be held strictly liable for the harm resulting from the use of the defective product.

Distributor

Here, Market is in the business of selling products such as the banana to the public and is thus a distributor.

Stream of Commerce

Here, Market's selling of the banana to the public in a public store constitutes a placing of the product into the stream of commerce.

Defective

As discussed supra, the banana was not defective in design because the cost of the alternative design outweighs the risk of harm. However, as discussed supra, the banana was defective in warning because the banana did not contain any warnings of the use of the toxic chemicals on the banana.

Thus, the product was defective in warning.

Abnormally Dangerous

Here, Child will argue that Market's failure to warn of the use of toxic chemicals, which were sprayed onto the banana by the supplier before delivery, caused the product to exceed the reasonable expectation of a consumer. Furthermore, Child became very ill because of her ingestion of the toxic substance on the banana.

Therefore, the court is likely to find that the product was abnormally dangerous due to the defect in warning.

Actual Causation

Market will argue that even if they applied a warning, it is unlikely that Child would be able to read it or change her actions because of the warning. However, Child will contend that but for the defendant's failing to place adequate warning on the banana, her mother would have paid more attention and possibly prevented her from consuming the banana.

Therefore, if the court finds actual causation, they will proceed to proximate causation.

Proximate Causation

Here, Child will argue that because there were no intervening causes of harm, Child's harm was directly caused by Market's failure to warn, thus making Child's injuries foreseeable. However, Market will contend that the eating of the entire

banana, “peel and all,” was not a foreseeable use of the product. However, Child will argue that someone who did not know the customary way of eating bananas might attempt to eat the entire banana; thus the use is foreseeable.

Thus, the court will probably find actual and proximate causation.

Damages

Here, the Child became very ill as a result of her ingestion of the toxic substance. These damages will constitute general damages consisting of the plaintiff’s general pain and suffering. Child may also have suffered special damages in medical bills.

Therefore, Child will probably be able to recover from Market on a strict liability in tort action absent a defense.

Defense – Assumption of the Risk

Plaintiff will be barred from recovery for negligence if it can be shown that the plaintiff voluntarily encountered a known risk.

Here, Market will contend that Child assumed the risk by eating the banana peel which is not normally consumed by consumers. However, Child will contend that because she is only four, and because no facts indicate that child knew of the toxic substance, that she did not in fact, nor have the capability of assuming the risk of toxic substance on bananas.

Therefore, this defense will fail due to the fact that Child did not know of the risk or voluntarily encounter it.

Defense – Misuse of Product

Market will contend that the eating of the entire banana, “peel and all,” was not a foreseeable use of the product. However, Child will argue that someone who did not know of the customary way of eating bananas might attempt to eat the entire banana; thus the use is foreseeable.

Thus, if the court finds that the use was foreseeable, misuse of product will probably not suffice for a valid defense.

SHOPPER V. MARKET

Strict Liability in Tort – Shopping Cart

Defined supra.

Here, Market does not deal with the sale of the shopping carts and is thus not a distributor. Furthermore, the facts do not indicate that Market manufactured the carts. Therefore, Market is not a manufacturer.

Therefore, because there is no liability for non-merchant or non-manufacturer defendant in a products liability claim, Shopper will not succeed in an action for products liability against Market.

Strict Liability – Restatement 2nd

One who maintains an abnormally dangerous condition or activity on his property, or engages in an activity which involves a high risk of harm will be held strictly liable for the harm resulting from said dangerous condition or activity even though due care was taken to prevent the harm which occurred.

Here, Shopper will argue that the use of the shopping cart was an abnormally dangerous activity because of the sharp edge protruding from the shopping cart. Furthermore, Shopper will assert that the presence of the shopping cart with the protruding edge constituted a dangerous condition.

Furthermore, Shopper will argue that Market's maintaining of the dangerous condition and activity gave rise to their liability. However, Market will contend that because owners of land are not normally held strictly liable for damages on their land, Market should not be held strictly liable.

Actual Causation

But for defendant's maintaining of said dangerous condition and activity, Shopper would not have injured his eye when he slipped on the banana peel.

Proximate Causation

Market will contend that the banana peel was an intervening cause of harm making Shopper's injuries an indirect result of Market's maintaining of said dangerous conditions. However, Shopper will assert that it is foreseeable that someone would injure their body on the cart, thus making the result foreseeable.

If the court finds actual and proximate causation, it will move to damages.

Damages

Here, Shopper severely injured his eye. Therefore, Shopper suffered general damages consisting of his general pain and suffering. Shopper may have also suffered damages consisting of his medical bills and lost wages.

If the court finds that Market can be held strictly liable for the dangerous conditions on the land, the court will probably find the defendant liable for the injuries sustained by Shopper absent any applicable defenses.

Defense – Assumption of Risk

Defined supra.

Here, Market will assert that Shopper assumed the risk that there would be slippery surfaces on the floor. However, no facts indicate that Shopper actually knew of the banana's presence. Thus, Shopper will argue that he did not know of the risk and that, consequently, he did not assume the risk.

This defense will probably not relieve liability.

POLLY V. MARKET

Strict Liability in Tort – Shopping Cart

Defined supra.

Here, Market does not deal with the sale of the shopping carts and is thus not a distributor. Furthermore, the facts do not indicate that Market manufactured the carts. Therefore, Market is not a manufacturer.

Therefore, because there is no liability for non-merchant or non-manufacturer defendants in a products liability claim, Shopper will not succeed in an action for products liability against Market.

Strict Liability – Restatement 2nd

One who maintains an abnormally dangerous condition or activity on his property, or who engages in an activity which involves a high risk of harm will be held strictly liable for the harm resulting from said dangerous condition or activity even though due care was taken to prevent the harm which occurred.

Here, Polly will argue that the use of the shopping cart was an abnormally dangerous activity because of the sharp edge protruding from the shopping cart. Furthermore, Polly will assert that the presence of the shopping cart with the protruding edge constituted a dangerous condition.

Furthermore, Polly will argue that Market's maintaining of the dangerous condition and activity gave rise to their liability. However, Market will contend that because owners of land are not normally held strictly liable for dangers on their land, Market should not be held strictly liable.

Actual Causation

But for defendant's maintaining of said dangerous condition and activity, Shopper would not have injured his eye when he slipped on the banana peel.

Proximate Causation

Market will contend that the banana peel was an intervening cause of harm making Shopper's injuries an indirect result of Market's maintaining of said dangerous conditions. However, Polly will assert that it is foreseeable that someone would injure their body on the cart, thus making the result foreseeable.

If the court finds actual and proximate causation, it will move to damages.

Damages

Here, Polly's arm was seriously cut as a result of her fall. Therefore, Polly suffered general damages consisting of her general pain and suffering. Polly may have also suffered special damages consisting of her medical bills and lost wages.

If the court finds that market can be held strictly liable for the dangerous conditions on the land, the court probably finds the defendant liable for the injuries sustained by Shopper absent any applicable defenses.

Defense – Assumption of Risk

Defined supra.

Here, Market will assert that Polly assumed the risk of the banana because she had just seen Shopper slip on it. Thus, Market will argue that Polly's action demonstrated an assumption of the risk. However, no facts indicate that Polly actually knew of the banana's presence. Thus, Polly will argue that she did not know of the risk and that, consequently, she did not assume the risk.

However, Polly will contend that because she was a rescuer, her actions were involuntary from a legal perspective. Thus, Polly will assert that assumption of the risk is inapplicable.

The court will most likely not apply assumption of the risk because Polly was a rescuer.

Defense – Firefighters Rule

Where a public servant such as a firefighter or police officer, in the course of his duties, is exposed to a danger that would be inherent in his course of work, the

public servant will generally be barred from recovery for harm resulting from danger inherent in his line of work.

Here, Polly was a police officer. Thus, Market will contend that under the Firefighters Rule, she is barred from recovery for her injuries incurred while rescuing someone. However, the facts indicate that Polly was off duty and doing her personal shopping. Therefore, this rule is inapplicable because Polly's harm did not occur during the course and scope of her work.

Defense will probably not apply.

Question 2

Twelve-year-old Al was throwing rocks against a tree alongside the road to amuse himself while waiting for his school bus. One of the rocks thrown by Al missed the tree and shattered the windshield of an approaching car driven by Bill.

Bill, who had just left a bank he had robbed, was driving carefully and below the speed limit to avoid attracting the attention of the police. When the windshield shattered, Bill swerved, causing the car to run off the road. The car struck and killed Vic, a boy who had also been waiting for the school bus.

Chuck and Dave, Vic's brothers, decided that the accident had been Al's fault and, together, carefully planned to avenge Vic's death. They pooled their money and bought a shotgun, planning to use it to shoot Al. When the time came to go to looking for Al, however, Chuck told Dave, "I'm not going. If you want to do it, you're on your own." Dave carried out the plan, shooting and killing Al. After killing Al, Dave removed Al's watch and kept it for himself.

1. Did Al commit any crime relating to the death of Vic? Discuss.
2. Could Bill be found guilty of any crime relating to the death of Vic? Discuss.
3. Did either Chuck or Dave, or both, commit:
 - a. Conspiracy to murder Al? Discuss.
 - b. Murder of Al? Discuss.
 - c. Theft of Al's watch? Discuss.

Answer A to Question 2

1. Al's crimes in relation to death of Vic

Battery - A battery is committed if an intentional unlawful application of force is applied to another person. Here Al is throwing rocks but one of his rocks accidentally hit a tree, bounced off and shattered Bill's windshield, causing Bill to swerve and hit and kill Vic.

Al would not be liable for battery.

Involuntary Manslaughter – A person would be found guilty of involuntary manslaughter if he acts by committing a misdemeanor or by acts of criminal recklessness, which result in the death of another.

There are no facts to show that Al acted with criminal recklessness as he was only throwing rocks against a tree.

Al would not be held liable in the death of Vic.

2. Bill's commission of a crime relating to death of Vic

Homicide – killing of another human being with malice

Malice is measured in one of four ways:

1. intent to kill;
2. intent to cause serious bodily injury;
3. wanton and willful disregard for human life; or
4. during the commission of an inherently dangerous felony.

Intent to kill is not shown from the facts.

Intent to cause serious bodily injury is also not shown from the facts.

Willful and wanton disregard is not shown here because Bill was driving very carefully.

Felony murder can be established if a murder occurs during the perpetration of an inherently dangerous felony. The felony continues until a zone of safety is reached. Here from the facts Bill had just completed a bank robbery (an inherently dangerous felony) and although he had left the scene, he was driving cautiously to avoid police. This indicates that he had not reached safety yet.

Therefore when he swerved as a result of the shattered windshield, and as a result hit and killed Vic, who was standing on the roadside, that death would result in felony murder.

Degrees of murder – Under common law, there were no degrees of murder, but modernly, first degree murder applies to premeditation and deliberation or felony murder. Here Bill would be guilty of first degree felony murder.

Conspiracy to murder Al

Conspiracy under common law is complete when two or more persons agree to commit an unlawful act. Under modern law, conspiracy also requires an act in furtherance.

Chuck's liability and Dave's liability

Here Chuck agreed with Dave and they bought a shotgun they were going to use to kill Al. Therefore the conspiracy was complete as there was an agreement to perform an unlawful act (murder). The purchase of the shotgun was the substantial step. Both Chuck and Dave are guilty of conspiracy to murder Al.

Chuck's withdrawal from the conspiracy

To avoid vicarious liability for the acts that are reasonably foreseeable in furtherance of the conspiracy, a conspirator may withdraw by advising all coconspirators of his withdrawal. However in many jurisdictions unless he thwarts the objective, he is still liable. If the withdrawal is effective, the actor will still be liable for the conspiracy but not any subsequent crimes.

Chuck's coconspirator liability for murder of Al and Pinkerton Rule

Under the Pinkerton rule all coconspirators are held vicariously liable for all unlawful acts that are reasonably foreseeable toward the goal of the conspiracy. If Chuck's withdrawal was not effective, he would be liable for the murder of Al as a coconspirator.

Dave's liability for murder of Al

Murder (defined supra)

Intent to kill (supra) Here Dave had planned the murder of Al, purchased a shotgun, and killed Al.

Causation His actions were the direct cause of Al's death. Dave is guilty of intent to kill, murder.

Degrees of murder – (defined supra)

Here the murder of Al was carried out with premeditation and deliberation. This type of murder is first degree murder. Dave is guilty in the murder of Al.

Theft of Al's watch by Dave

Larceny – Trespassory taking and carrying away the personal property of another with the intent to permanently deprive.

Here Dave took Al's watch off his wrist after killing him and kept it. The theft was complete and Dave is guilty of theft.

Chuck's liability for theft of Al's watch

Coconspirator liability only extends to any criminal acts committed in furtherance and that are reasonably foreseeable to the objective of the conspiracy. Here the conspiracy was for murder not theft and theft was not part of the plan.

Therefore Chuck would not be liable for theft (larceny).

Answer B to Question 2

Al: Murder

Murder is the unlawful killing of a human or fetus with malice aforethought. Malice includes an intent to kill, intent to cause serious bodily injury, or an abandoned/malignant heart.

Although Al's act of throwing the rock resulted in an accident causing the death of another, he did not show the necessary malice required, as he was just throwing rocks at a tree on the side of the road while waiting for the bus.

Al did not commit murder.

Al: Involuntary Manslaughter

Involuntary Manslaughter is homicide without malice. The homicide may be caused with the intent to inflict less than serious bodily injury, or during the commission of an unenumerated felony.

Al was simply throwing rocks at a tree. He was not acting with intent to cause any injuries, serious or not, nor was he committing a felony.

Al did not commit Involuntary Manslaughter.

Al's Defense: Infancy

There is a rebuttable presumption of inability to form intent for children between the ages of 7 and 14.

Al did not commit any crime relating to the death of Vic.

Bill: First Degree Murder under the Felony Murder theory

First Degree Murder is murder by poison, torture, lying in wait, or murder done wilfully, deliberately, and premeditated, or felony murder. Felony Murder is a death caused during the commission, or while fleeing, from an enumerated felony, including Robbery.

The facts stipulate that Bill had been driving on his way from committing a robbery. The fact that he was driving carefully and under the speed limit does not change the fact that he was still fleeing from a robbery. However, the purpose of the Felony Murder rule is to deter from the commission of dangerous felonies, such as robbery, not to punish one for an unrelated incident. Apparently the police were not in pursuit of Bill; otherwise he would not have been avoiding detection. Acting so carefully as to avoid detection does not constitute fleeing.

Fleeing implies that one is being pursued and trying to escape. Since Bill had already escaped, it can be argued that he has reached a point of temporary safety.

Bill should not be liable under the Felony Murder rule if it can be determined that he was not fleeing, and that he had reached a point of temporary safety. Deaths caused after one has reached a point of temporary safety are not Felony Murder.

Bill: Vehicular Manslaughter

Vehicular Manslaughter is homicide by means of negligent operation of a vehicle.

Because Bill swerved as a result of a rock shattering his windshield, he cannot be found to have been driving negligently, causing the death of Vic.

Bill should not be found guilty of any crime relating to the death of Vic.

Chuck and Dave: Conspiracy

Conspiracy consists of an agreement, intent to agree, intent to pursue an unlawful objective, and as a modern rule, an overt act in furtherance of the conspiracy.

The facts stipulate that Chuck and Dave carefully planned to commit murder. This satisfies the requirements of an agreement and the intent to agree. The facts go on to reveal that they bought a shotgun in preparation for carrying out their plan. This is the overt act required and shows that they did intend to pursue their unlawful objective.

Chuck: Withdrawal from Conspiracy

Withdrawal from conspiracy does not relieve liability for the conspiracy itself. It may, however, relieve liability for any subsequent crimes in furtherance of the conspiracy. The fact that Chuck decided not to follow through with the plan does not relieve him for liability for the conspiracy because the crime has already been completed upon purchase of the shotgun.

Dave: First Degree Murder

First Degree Murder is murder by poison, torture, lying in wait, or murder done wilfully, deliberately, and premeditated, or felony murder.

The facts stipulate that the murder was done wilfully, deliberately, and it was premeditated.

Dave should be found guilty of First Degree Murder.

Chuck: Accomplice Liability

Accomplices are liable for the crime itself. However, Chuck was not an accomplice because he was not present during the commission of the crime.

Chuck: Accessory before the fact to Murder

Because Chuck participated in the planning of the murder and the purchase of the murder weapon, although he was not a principal in the murder of Vic, he should be held liable as an accessory before the fact to murder.

Dave: Robbery

Robbery is the trespassory taking and carrying away of the personal property of another, from the person or presence, by means of force, fear, intimidation, and the intent to deprive permanently.

Because Al was already dead when Dave took the watch, Dave did not take it by means of force, fear, or intimidation. A dead person cannot have these emotions.

Dave has not committed robbery.

Dave: Larceny

Larceny is the trespassory taking and asportation of the personal property of another with the intent to deprive permanently at the time of the taking.

The facts stipulate that Dave took the watch from Al's arm and kept it for himself.

Dave has committed larceny.

Chuck's liability for the larceny

Chuck should not be liable for the larceny because it was not a foreseeable act in furtherance of the conspiracy.

Question 3

Apple Orchards (“Apple”), a grower of apples, entered into a written contract with Best Bakery (“Bakery”) to supply Bakery with all of Bakery’s apple requirements for one year. Under the contract, Apple was required to deliver on the first day of each month the quantity of apples that Bakery required. The contract price was \$5,000 per month, payable upon delivery of each shipment.

Apple delivered the required quantity each month for the first six months. At the end of the sixth month, Apple assigned its contract with Bakery to FruitCo, which undertook to deliver the requisite quantities for the remainder of the contract term. Bakery, having some doubts about FruitCo’s reliability, wrote both Apple and FruitCo a letter in which Bakery stated, “I want to be absolutely sure that both Apple and FruitCo will guarantee that I receive the quantity of apples that I require each month.”

Neither Apple nor FruitCo responded to Bakery’s letter. In the seventh and eighth months of the contract, FruitCo made deliveries that were substantially short of the quantity that Bakery required and that Apple had previously delivered. Nevertheless, Bakery accepted and paid for the short shipments.

At the end of the eighth month, Bakery entered into a contract with Davis Farms (“Davis”) to supply Bakery with its requirements for apples for the remaining four months of the year. The contract price was \$7,500 per month, payable upon delivery of each shipment. Bakery wrote a letter to Apple and FruitCo informing them that Bakery would no longer accept any apple shipments from either of them.

Bakery then sued both Apple and FruitCo for breach of contract to recover the difference between the Apple/FruitCo contract price and the Davis contract price.

Apple defended on the ground that, after its assignment to FruitCo, it was no longer liable to Bakery. FruitCo filed a counterclaim for breach of contract against Bakery to recover its lost profits.

Which party is likely to prevail in the lawsuit involving:

1. Bakery vs. Apple? Discuss.
2. Bakery vs. FruitCo? Discuss.

Answer A to Question 3

1. Bakery v. Apple (B v. A)

Does UCC apply?

UCC applies to contracts for the sale of goods. Here, the disputed matter is apples, also known as perishable goods. UCC is in accord.

Is there a valid contract?

Offer

Under UCC, a contract can be made in any sufficient manner to show the intention of the parties.

At common law, an offer requires a manifestation of present contractual intent in which the definite and certain terms are communicated to the offeree, creating the power of acceptance.

Here, A entered into a written contract with B. The terms of the offer stated that A was to supply B with all of B's apple requirements for one year. Therefore, an offer was made for the purposes of UCC; if the parties so intended then a contract was entered into.

Requirements/Output

A requirement/output contract requires the parties of a contract to deal exclusively with each other for the purposes agreed upon in regards to quantity.

Here, a valid requirements/output contract was entered into by A & B, in that A, grower of apples, agreed to output all of B's apple requirements for one year.

Statute of Frauds

Requires that certain contracts must be in writing. One of those requirements is that the sale of goods contract of \$500 or more must be in writing. Here, the contract price was \$5,000 per month and was written; therefore, the Statute is satisfied.

Firm Offer

Under UCC, an offer made by a merchant is irrevocable without consideration for the time stated in the offer or reasonable period of time, not to exceed three months.

Acceptance

Manifestation of assent to the terms of the offer

Here, the facts state that there is a valid contract; therefore acceptance has been assented to.

Consideration

Bargained for exchange in which there is a benefit conferred and detriment relied, causing something of value to be transferred between the parties. Under UCC, consideration is not required, only good faith and commercial reasonableness between the parties.

Here, \$5,000 per month is to be paid by B to A for all B's apple requirements to be supplied by A for one year. This is valid consideration.

Therefore, there is a valid contract.

Assignment of Contract

An assignment is the right to receive. A party in a contract may assign their rights to another to receive as long as the contract does not state otherwise. Even if the contract does state otherwise the party has the power to assign the right to receive.

Here, A assigned its contract with B to Fruitco (F), which undertook to deliver the requisite quantities for the remainder of the contract term. There is no language to state otherwise; therefore there was a valid assignment between B to F.

Under UCC, a valid assignment automatically carries with it the delegation of duties under the contract. A delegation is the right to perform under the contract. Here, when Fruitco undertook duty to deliver the requisite quantities for the remainder of the contract term, a valid delegation of duties was created under the contract. If F in any way breaches his duty to perform, then A can sue either B or F. Here, Bakery exercises that right to sue A for the breach of contract when F failed to perform as A did by delivering substantially short quantities of the apples Bakery required.

Demand of Assurance

Under UCC, if a merchant has reason to believe that the contracting party will not perform under the contract, then he may demand assurance of their performance. If the other party does not respond back within 30 days, then the party can presume by their conduct that they do not intend to perform, creating an immediate action for breach of contract.

Here, B had some doubts about F's reliability. It is unstated whether he was warranted in doubting F, but nonetheless, he wrote a letter stating "I want to be absolutely sure that both Apple and Fruitco will guarantee that I receive the quantity of apples that I require each month." Neither A nor F responded to his letter. A, who validly assigned the contract to F may have a defense in that he had been discharged of his duty to perform and right to receive by vesting power of assignment and delegation in F. F, on the other hand, is the primary party whose performance B is demanding assurance about. Since B did not get any response back within 30 days, then he can infer from his conduct that he does not intend to perform under the contract.

Seller's Breach

In order to prevail under breach, it must be determined whether or not a major or minor breach occurred. This is shown by whether or not the parties substantially performed under the contract. If substantial performance can be shown, then there is only a minor breach; if not then there is a major breach.

Here, the original contract before assigned required that A supply B with all B's apple requirements for one year. A delivered the required quantity for the first six months. At the end of the sixth month A assigned the contract with B to F. If the courts determine that A materially breached the contract with B, then B would be entitled to the difference between the A/F contract price of \$5,000 per month and the Davis contract price of \$7,500 per month plus incidental damages.

Therefore, it is likely that Bakery will prevail.

Bakery v. FruitCo (B v. F)

Prospective Inability not to Perform

Conduct by breaching part showing that he is not forthcoming to perform at the time it is due.

Here, F did not respond nor did he deliver the correct quantity of goods that B required in the seventh and eighth months of the contract. Therefore, B could have reasonably believed that F has no intention of performing the contract as promised.

Accepting non-conforming goods

If a seller sends non-conforming goods as an accommodation to the buyer, the buyer has the choice to accept all the goods, reject all the goods, accept in part, reject in part.

Here, although F delivered a substantially short quantity of apples that B required, B nevertheless accepted and paid for the short shipment. Therefore by his conduct, B accepted non-conforming goods and should not be able to bring suit for the loss of goods.

Damages

B would be entitled to damages for the difference in price to “cover” and the contract price plus incidental damages.

Therefore, it is likely that F would prevail under the lawsuit.

Answer B to Question 3

BAKERY (B) V. APPLE (A) and Fruitco (F)

Governing law?

Since this is a contract for the sale of goods, and not for a service or real estate transaction, the UCC will govern. Goods are defined as movable, tangible objects at the time of the contract.

Merchants?

Special rules apply to parties to a UCC K when they are both merchants, or parties who normally deal in the type of goods in the K or have a specific expertise in the goods. Here, Apple (A) is a grower who normally sells apples, and B is a baker who normally buys apples to incorporate into her baked goods.

Writing required?

A writing is required under the Statute of Frauds for the sale of goods which are over \$500. Here, since the K calls for \$5000/mo, a writing is required. Here, there is a writing to support the K.

Valid Contract?

A valid contract is a promise or set of promises that for the breach of there is a remedy at law, and performance of the law considers a duty. In order for there to be a valid K, there must be mutual assent (offer and acceptance), consideration or substitute, and no defenses to formation.

Offer?

An offer is a promise, undertaking or commitment, manifesting and present intent to be bound, with definite and certain terms, communicated to an identifiable offeree so that a reasonable person would construe it as inviting acceptance.

Here, we have a Requirements K for the supply of apples. A has agreed to sell to B all of the apples it may require (promise), for one year at the price of \$5000/mo (certain terms), and presumably signed by both parties (which demonstrates it was communicated to B). Because both parties are merchants, quantity does not have to be given in definite terms; they have an implied duty of good faith with respect to the quantity of the requirements. A court will find there is sufficient certainty of terms to find a valid offer.

Acceptance?

An acceptance is an unequivocal assent to the terms of the offer, made under no undue pressure or absent fraud or misrepresentation. Here, since the facts indicate there was a written K between A and B there was an acceptance. Also, substantial performance of bilateral installments K is deemed to be effective acceptance.

Consideration?

Consideration is the exchange of some form of legal detriment by the parties to a contract. The courts do not generally look into the adequacy of consideration, as long as it was in good faith. Furthermore, a K between merchants under the UCC requires no consideration, just that the parties agree to the terms of the K in good faith. However, there is still valid consideration here, where A has promised to sell apples, and B has promised to pay for them; therefore they have both incurred legal detriment.

Assignment/Third Party Beneficiary?

An assignment occurs where a party to a K (assignor) assigns his rights or responsibilities under a K to another party (assignee). Assignments are generally permitted as long as they do not materially alter the responsibilities or rights of either party to the K. Here, A has assigned its responsibilities to perform under the K with B to Fruitco (F). Such an assignment is legal and not a breach of the original K with B so long as it doesn't materially affect the benefit of the bargain that B expected from A, and as long as their K does not invalidate assignment. Also, A's assignment to F does not relieve A from liability under the K with B, and B can sue either one of them for breach of K. Here, B is a third party beneficiary of the assignment between A and F, and can sue either one of them for breach of K.

Demand for assurances?

Where a party to a K has doubts about the other's ability to perform according to the terms of their K, she may make a demand for assurances for the continued dedication of the other party. Where the party making such demand does not receive adequate assurances within a timely manner, the demanding party may treat it as an Anticipatory Repudiation.

Anticipatory Repudiation?

Where a party has received either an unequivocal statement from the other party of their intention not to perform under a K, or where the party has failed to give adequate assurances of continued performance when requested to do so, the nonbreaching party may 1) treat the repudiation as a breach and sue

immediately, 2) suspend her own performance and wait 'til the time the other party's performance is due, 3) make demand for assurances, or 4) do nothing and encourage performance.

Here, although there were no responses from either A or F in the demand for assurances, there was still not an unequivocal statement indicating an unwillingness to perform, and F did in fact make further shipments. Therefore, there likely was not an anticipatory repudiation.

Buyer's Rights of Rejection?

A buyer of goods may completely reject a nonconforming shipment, keep the entire nonconforming shipment, or keep only the commercial units and reject the rest. Here, although the quantity of apples was substantially short of the quantity B needed, she nevertheless kept the shipment and paid for them.

Breach?

A party has breached a K when she has failed to substantially conform to the terms of the K. Here, there is a question as to whether the short shipments by F constituted a material breach by F. The original K was satisfactorily performed by A for the first six months, and although B received two short shipments, that may not constitute a material breach and entitle B to cancel the K and seek cover. The facts indicate that she made no demands for a cure, not even a complaint about the nonconforming shipments by F. As mentioned above, a buyer has a right to reject certain shipments in an installments/requirements K, or to request that F cure the shipment, but she may not treat the whole original K between B and A as materially breached without first requesting a cure; therefore she was not justified in breaching the K and contracting with Davis Farms.

Damages?

B will sue for expectation damages, in other words, to receive the benefit of the bargain as if the K had been fully performed. Since she feels that A and F breached, she will want to recover the difference between market price and K price for the remaining 4 shipments she purchased from Davis, plus any incidental (cost of cover) and consequential damages (if foreseeable at time of K). However, since she was unjustified in rescinding the K between B and A, she will likely not be able to recover the damages.

Expectation damages?

Expectation damages are available to a nonbreaching party, giving them the benefit of the bargain they K for. Here, F and A might countersue B for expectation damages since they are relatively easy to assess, at 5K/mo. However, if the courts find that the damages are difficult to assess, then they can

sue for any costs incurred in reliance of the K under a Promissory Estoppel theory.

Can B sue either F or A?

As mentioned above, since A was not relieved from liability under the K with B, A and F can both be liable jointly to B; however, B's suit will likely fail.

Question 4

A residence hall on the campus of University was evacuated after a number of student residents became seriously ill from aerial dispersal of bacteria that had infested the air conditioning system. Reputable consultants retained by University to prescribe a remedy for the infestation advised University that there were three ways to proceed: the cheapest would be to purge the air conditioning system with disinfectants, which had usually taken care of the problem in several other similar circumstances; a more expensive method would be to seal off and fumigate the building, which would be more effective; and the most expensive, and the most effective, would be to do multiple sealed fumigations.

To minimize the expense, University chose the cheapest method. University was also motivated by the need to recover revenues that it had lost during the closure and by the need to be able to provide desperately needed housing for the students. After allowing time for the disinfectant to work its way out of the air conditioning system, University reopened the residence hall and advertised reduced rates to induce students to move back in.

Paula and her roommate Art, students attracted by the reduced rates, spoke with University's Director of Student Housing, who told them that it was safe to move back. Paula said, "Well, I guess I have to rely on your judgment." Art agreed, saying, "At that price, it's worth the risk." They resumed living in the residence hall. Soon after they moved back, Paula and Art had an argument, which left Paula harboring anger against Art.

Within a month, Paula fell ill with the same bacterial infection. Art did not become ill. However, while waiting for an ambulance to pick her up, Paula stuffed Art's pillow into the ventilator duct with the intent of allowing the pillow to accumulate as much bacteria as possible. She then placed the pillow on Art's bed. A week later, Art became ill with the same infection.

Paula and Art each wish to sue University for personal injury. What theory of liability should they assert, what defenses might University raise against each, and who would be likely to prevail in each suit? Discuss.

Answer A to Question 4

Paula v. University

I. Negligence? Negligence is the failure to act as a reasonable person would under the same or similar circumstances. In order to establish the prima facie case for negligence, Paula would need to show that University owed her a duty, breached that duty, and the breach was the actual and proximate cause of the injuries she suffered, and a lack of defenses.

Duty? One who acts affirmatively owes a duty of reasonable care to all foreseeable plaintiffs within the zone of danger. Here, University acted affirmatively by its actions to remedy the bacteria infestations and by then inviting the students to move back into the residence hall. Further, there will also be a duty imposed on the relationship between the University and the students. Therefore, duty will be established.

Standard of care? The standard of care will be that of a reasonable person. And, because of the unique relationship between the students and the University, University may also be held to a higher standard of care.

Breach? Breach is the failure to act as a reasonable person under same or similar circumstances. Breach can be established if the probability and likelihood of harm is greater than the burden to mitigate and the utility of the defendant's actions. Here, the University already had similar outbreaks of the bacteria infestation and a number of students had become seriously ill from aerial dispersal of bacteria in the air conditioning system, which would suggest that the probability of harm was fairly high. Additionally, the students were described as "seriously ill" from the bacterial infections. The University had three methods of dealing with the bacteria, and chose the one that was the cheapest – which had usually worked in the past. However, the fact that it "had worked in the past" implies that the issue was a recurring problem, and it's likely not reasonable to go with a method that may or may not permanently correct the issue. The facts also state that the University went with the cheapest option in order to gain back some revenues and "minimize the expense" as well as to provide much needed housing for students. Cost alone is probably not enough to justify a less effective option, and the facts state only that it usually worked in the past – which implies the university knew that the method might not work. Further, there are no facts to suggest the University tested to ensure the bacteria was gone. As for much needed housing, which the University may use to establish the utility of their actions, having the students move in, only to get sick and have to move back out doesn't make the housing situation better. Therefore, because there were other viable means to disinfect, and other steps that likely could have been taken to test to ensure the bacteria was gone, the University will be found to have acted unreasonably.

Causation? The University is the actual cause of Paula's injuries because "but for" their actions, Paula would not have been exposed to the bacteria and become ill. There are no intervening acts; therefore the University will also be the proximate cause of Paula's injuries.

Damages? Here, the facts show that Paula fell ill with a bacterial infection; therefore damages are established.

Defenses?

a. Contributory Negligence/Comparative Fault? In jurisdictions which follow contributory negligence, any fault on behalf of the plaintiff is a complete bar to recovery. Modernly, most jurisdictions follow comparative fault rules which will reduce the plaintiff's recovery by the percentage of fault attributable to the plaintiff. Here, the facts show that Paula said, "well, I guess I have to rely on your judgment" and resumed living in the residence hall. It's unlikely that moving back in after being told it was safe to do is unreasonable, but if it is found that it is then Paula's recovery will be reduced (comparative fault) or barred (contributory negligence).

b. Assumption of the risk? Assumption of the risk is a complete bar to recovery, and can be expressed or implied. Here, Paula's statement "well, I guess I have to rely on your judgment" is unlikely to be viewed as an expressed assumption of the risk. To be implied, University must show that Paula knew the risk, understood the risk, and voluntarily chose to encounter it. There are no facts that suggest that Paula knew there was a risk or understood the risk – she was merely relying on the judgment of the University's Director of Housing. Therefore, this defense will fail.

Therefore, Paula will recover from University for negligence.

II. Breach of expressed warranty? University may be held vicariously liable under the doctrine of respondeat superior because the University's Director of Student Housing told Paula and Art that "it was safe to move back in." Paula may be able to recover for breach of express warranty.

II. Vicarious liability for actions by the Director of Student Housing? Employers are held vicariously liable for the torts committed by their employees within the scope of their employment. Here, it may be established that the University's Director of Student Housing (employee of University) was negligent in telling Paula that it was safe to move back. He was certainly acting within the scope of his employment as he was encouraging them to move back into the residence hall. Negligence defined supra. Duty of reasonableness based on affirmative act (telling her it was safe); causation will be established because "but for" his statement Paula wouldn't have moved back in, and because the presence of bacteria was foreseeable proximate cause is established. Plus, the

presence of bacteria will likely be viewed as a “set stage” and not an intervening act. Paula was injured and the same defenses as above will apply. Therefore, if telling the students it was safe to move back in was unreasonable, the Director will have breached his duty, and University will be held vicariously liable.

Art v. University

I. Negligence? Supra. Duty, standard of care, breach and damages will be the same as above discussion.

Causation? Here, “but for” University’s actions, Art would not have fallen ill from the bacteria. Although the facts show that Paula stuffed Art’s pillow into the ventilator duct to accumulate the bacteria, and that Art didn’t become ill as early as Paula did, at a minimum the University is a substantial factor because if weren’t for their actions Paula wouldn’t have been able to accumulate the bacteria. University may claim that they are not the proximate cause and that Paula’s acts of accumulating the bacteria in the pillow and placing it on Art’s bed is a supervening act sufficient to cut off University’s liability. As a general rule, intentional torts and crimes are not foreseeable, while negligence is not, and clearly Paula committed an intentional tort. However, there are two problems with this argument. First, we don’t know whether or not Art fell ill because of the pillow or because of his residency in the University Hall. Secondly, his method of exposure may have been “intensified” due to Paula’s actions; it is foreseeable that he would fall ill from the exposure to the bacteria. Therefore, Art will establish causation.

Defenses?

a. Contributory negligence/comparative fault? Supra. Same argument as above.

b. Assumption of the risk? Supra. Here, the facts show that Art stated “at that price, it’s worth the risk”, which may be sufficient to establish that Art expressly accepted the risk of exposure to the bacteria. At a minimum, there is a strong argument that he impliedly assumed the risk, because he knew there was a risk of exposure to bacteria and he chose to accept it. However, it’s also likely assumption of the risk was negated due to the University’s Director telling him “it was safe.” Notwithstanding Art’s comments, there are no facts to suggest that Art knew bacteria would be a problem.

Therefore, Art will recover from the University for negligence.

II. Breach of expressed warranty? Supra, Art will recover for the reason Paula will recover.

III. Vicarious liability for Director? Supra, Art will recover for the same reason Paula will recover.

Answer B to Question 4

I. Paula v. University

A. Negligence?

Negligence is the failure of a duty to render a standard of care to any foreseeable plaintiff. Negligence is composed of the elements of duty, breach, causation, and damages, to be discussed below. Finally, defenses of the defendant will be discussed.

1. Duty is the obligation to render the appropriate standard of care. Here, University has an obligation, mainly by contract, to provide safe and effective housing for its students. University is aware that there is a problem owing to aerial dispersion of bacteria in their air conditioning systems. Given the contract duty, the students, Paula and Art, have the status as invitees in that they pay tuition and pay for housing. This yields an enhanced standard of care owed by University to Paula (and Art) to actively identify and correct any dangers, such as that of bacterial infection owing to the air conditioning system.

2. Breach is a failure to render or adhere to that standard of care. Here, University was aware of the risk of bacterial illness following remediation and identified 3 alternatives ranging in costs from cheapest to most expensive and along that spectrum, from least effective to most effective. University chose the cheapest and thus the least effective. Although not necessarily a breach established, there is the opportunity to apply some form of risk – utility analysis such as the Learned Hand analysis, where one balances the probability of harm multiplied by the gravity of that harm, and compares that to the cost or Burden to mitigate that harm. Here, the University has performed what appears to be a qualitative analysis rather than a quantitative risk assessment. University chose the cheapest and least effective in an effort to save money and remain within budgetary constraints. This may be a prudent strategy – a common strategy; however, additional care may be appropriate to discern the actual risk and make a more prudent decision based on quantitative analysis.

3. Causation is divided into issues of actual cause and proximate cause. Actual cause must meet the “but for” test – “but for” the plaintiff’s [sic] actions, the harm would not have occurred. Here, the decision of University to reopen the residence houses is most likely an actual cause. Had University supplied other housing options or completely replaced the air conditioning system, perhaps Paula would not have gotten ill. This brings about the issue of *res ipsa loquitur*. Typically a concept used to establish breach, it feeds into causation in that the elements are that the true reason for plaintiff’s harm is not known or fully explained, the harm more likely can be attributed to the actions of the defendant in that the conditions that brought about the harm are exclusively within the

control of the defendant, and the plaintiff (Paula or Art) did not contribute to the condition.

For proximate cause, there should not be any intervening, supervening events. Here, Paula became ill after living in the residence for a period of time. The facts do not present any potential intervening events, aside from an argument with Art. Given that there is no evidence this additional stress may have weakened her health system, there is no other event and the air impurification is the proximate cause of her illness.

4. Damages are the harm(s) suffered by the plaintiff – typically in the form of general and special. Here, Paula suffered ill health and presumably medical expenses. These expenses are readily monetized and fall under the category of general damages. However, unknown or latent effects may be appropriate, but cannot be discerned and calculated for value at this time. However, Paula became ill and there are damages.

B. Defenses of University

Traditionally, defenses for negligence cases are contributory negligence, comparative fault, assumption of the risk, and a counterdefense that the plaintiff may apply is avoidable risk/last clear chance. Here, assumption of the risk requires that the plaintiff know the risk, understand and appreciate the risk, and voluntarily encounter the risk. Arguably, Paula was only somewhat aware of the risk, not knowing. Arguably, she appreciated the risk in awareness of the potential severity of an illness. She made a conscious decision to encounter the risk in that she asked questions of the housing director and mulled over the decision. University is in a fairly strong position to say that Paula accepted the risk. However, Paula can assert that “Well, I guess I have to rely on your judgment.” As such, she acknowledged that she was not an expert and that she was not in a position to truly appreciate the risk – she relied on the judgment of the Housing Director.

In conclusion, Paula is more likely to prevail on this given that University was active in selecting an option that, for Paula, was ineffective in protecting her from the harm of bacterial illness. Absent any clear defenses beyond assumption of the risk, University is unlikely to prevail.

II. Art v. University

A. Negligence?

Negligence is defined supra, consisting of duty, breach, cause, and damages.

1. Duty – defined supra and the analysis remains the same as for Paula.

2. Breach – defined supra and the analysis concerning the Learned Hand Risk Utility Balance test and the Res Ipsa Loquitur remain the same.

3. Causation – defined supra. Actual cause remains the same as for Paula. However, for proximate cause, there is a potential intervening, supervening event. Here, Art had not become ill until after Paula stuffed his pillow into the air conditioning ventilator. However, this was during the relatively short time that she waited for the ambulance. This period may not have been long enough to matter. There is no way to know whether some lingering bacteria accumulated in the pillow, but more importantly, there is no way to know whether Art's resistance to bacterial illness was more than most and that this incident was enough to weaken his resistance. Proximate cause may possibly be established.

4. Damages – defined as general and special supra. Art became ill a week after Paula. Damages established.

Defenses of University

Assumption of the risk is the defense defined supra and applicable again. Here, Art indicated that "at that price, it's worth the risk". This appears to indicate that Art knew the risk, appreciated the risk, and voluntarily encountered the risk. However, just because he said "it's worth the risk" doesn't mean that he truly appreciated the risk. That may have simply been a saying of Art, having little credence. Finally, Art, like Paula, was in a position where he may have had little choice of options.

In conclusion for Art, University is probably in a stronger position to prevail given the defense of assumption of the risk and Art's statement of "it's worth the risk," and that perhaps University can attack the element of causation for Art's illness as the proximate cause element.