

**June 2004 Baby Bar  
Question 1 -- Torts**

**1) A. Penelope v. Deal**

Vicarious Liability

An employer is liable for his employee's torts that occur within the course and scope of the employment.

Deal is a department store that has contracted with Reliable Elevator Company to maintain the elevator. Since Reliable is contracted to maintain the elevator and the elevator malfunctioned, Reliable was acting within the course and scope of their agreement with Deal.

Deal will argue that Reliable was an independent contractor, thus, no employer/employee relationship existed.

Non-Delegable Duty

There is a non-delegable duty to keep premises safe for business visitors by the premises owner.

As the premises owner, Deal had a non-delegable duty to keep its premises safe. Thus, Deal will be vicariously liable for the damages cause to Penelope caused by independent contractor, Reliable.

Negligence

Negligence requires that a duty is owed, that the duty is breached, and the breach is the actual and proximate cause of the damage.

Duty

Because Penelope was shopping in Deal's department store she is an invitee. Deal owed Penelope a duty to inspect and discover and correct or warn of any dangerous condition. Deal owed a duty to warn Penelope of the inoperable elevator.

Breach

Since Deal did not warn Penelope of the dangerous condition, Deal breached its duty. Deal will counter that they hired Reliable to maintain the elevator and were not aware of any problems with the elevator maintenance, thus, they did not breach their duty.

Res Ipsa Loquitur

Res ipsa loquitur is established when you show that an accident does not normally occur in the absence of negligence, the instrumentality is in the exclusive control of the defendant, and the plaintiff did not contribute to her own injury.

Penelope pressed the button for the elevator. When she heard the elevator door open she stepped in. The elevator car was not present and she fell into the shaft. The elevator not being present does not occur absence negligence.

Deal will argue that while it owned and operated the store, the elevator was serviced exclusively by Reliable and thus was in Reliable's exclusive control. However, because of Deal's non-delegable duty, it is responsible for Reliable's conduct.

Because Penelope was only attempting to use the elevator, she did not contribute to her own injury. Thus, res ipsa loquitur will establish a breach.

### Actual Cause

“But for” the elevator door opening without the elevator car being present, Penelope would not have been injured.

### Proximate Cause

Absent a warning, it is foreseeable that when an elevator door opens and no elevator car is present that one could fall down the elevator shaft and be injured.

Deal will argue that they are only liable for the minor injuries suffered by Penelope, and not her permanent disabilities since they were not foreseeable.

However, under the thin skull plaintiff doctrine, you take your victim as you find them. Since Penelope had a pre-existing psychological condition, Deal will be liable.

### Damages

#### General Damages

Deal will be liable for the pain and suffering of Penelope's minor physical injuries and permanent disabilities.

#### Special Damages

Deal will be liable for any medical expenses and lost income.

#### Negligent Infliction of Emotional Distress

A duty is owed to exercise due care and not to subject others to a foreseeable risk of physical injury that might foreseeable result in emotional distress.

Deal had a duty to eliminate the danger of the elevator and not subject Penelope to a risk of physical harm. It is foreseeable that falling down an elevator shaft could cause a psychotic breakdown. Further although plaintiff's psychotic breakdown was due to a pre-existing condition, plaintiff's pre-existing condition was foreseeable.

Thus, plaintiff may recover for negligent infliction of emotional distress.

### General Damages

Defined and discussed supra.

### Special Damages

Defined and discussed supra.

### Indemnity

Where a defendant is only secondarily liable for the plaintiff's injury, he is entitled to indemnification against the party who was primarily responsible for causing plaintiff's injury. One circumstance where indemnification is appropriate is where one party is only vicariously liable for plaintiff's injury due to the conduct of another defendant.

Since Deal was only vicariously liable for plaintiff's injury arising out of Reliable's conduct in manufacturing a defective elevator, Deal is entitled to indemnification from Reliable for the amount of the judgment against Deal.

## **B) Penelope v. Reliable**

### Products Liability

#### Negligence

Defined supra.

#### Duty

A manufacturer owes a duty of due care to all persons who may be foreseeably injured by negligence in the manufacture of a defective product. A manufacturer has a duty to inspect discover and correct any defects.

Reliable manufactured the elevator. As the manufacturer, Reliable owed a duty of due care to inspect, discover and correct any defects associated with the use of the elevator to insure its safety and eliminate harm from the product. Since Penelope was a shopper where Reliable installed the elevator in which they manufactured, Penelope was a foreseeable user of the elevator.

Thus, Reliable owed a duty to Penelope to inspect, discover and correct or warn of any defects.

### Breach

When Penelope went to use the elevator and no elevator car was present causing her to fall down the elevator shaft because Reliable failed to warn of the defect.

Therefore, Reliable breached its duty of due care to Penelope.

### Res Ipsa Loquitur

Defined supra and discussed supra.

Moreover, as argued above, since the elevator was in Reliable's exclusive control, breach can be established against Reliable.

Thus, res ipsa loquitur will establish a breach.

### Actual Causation

"But for" Reliable's failure to warn Penelope, she would not have been injured.

Thus, Reliable is the actual cause.

### Proximate Causation

It is foreseeable when a manufacturer fails to warn of a product defect, i.e., that an elevator car may not be present when the elevator door opens, an injury will result. Thus, Reliable is the proximate cause of Penelope's injuries.

### General Damages

Defined and discussed supra.

### Special Damages

Defined and discussed supra.

### Breach of Implied Warranty of Merchantability

The implied assurance from a manufacturer that the product is of fair and average quality and fit for the product's ordinary use.

Because the elevator door opened without the elevator car being present, the elevator was not of fair and average quality and not fit for normal use.

Reliable breached the implied warranty of merchantability.

Actual Causation

Defined and discussed supra.

Proximate Causation

Defined and discussed supra.

General Damages

Defined and discussed supra.

Special Damages

Defined and discussed supra.

Strict Liability in Tort

If a defective product is placed in the stream of commerce, the manufacturer will be held strictly liable in tort to all consumer-users for their injuries.

The elevator door opened without the elevator car being present, thus a defective product. Reliable sold the elevator to Deal, placing the product in the stream of commerce. The elevator door opened without the elevator car being present. This dangerous condition would not be expected by an ordinary consumer in normal use.

Thus, Reliable will be strictly liable.

Actual Causation

Defined and discussed supra.

Proximate Causation

Defined and discussed supra.

Damages

Defined and discussed supra.

2) **What Defenses Should Be Raised?**

Contributory Negligence

Conduct of plaintiff which falls below the reasonable person standard of care, which, if proven, is a complete defense to a negligence cause of action.

Penelope entered into the elevator by stepping backward into the opening while chatting with her friends. Since she did not look before entry, Penelope's conduct fell below the standard of reasonable care.

Thus, Penelope was contributorily negligent

### Comparative Negligence

Where plaintiff's conduct falls below the standard of reasonable care such that liability, including the amount of plaintiff's negligence, is apportioned according to fault.

Since Penelope's conduct fell below the standard of care owed, the court will apportion her fault against Deal's and Reliable's liability.

### Last Clear Chance

Penelope will argue that Deal and Reliable had the last clear chance to prevent the injury by warning her. Thus, contributory negligence will not be a valid defense.

### Assumption of Risk

One voluntarily enters the risk with the knowledge of the risk.

The defendants will contend that Penelope entered into the elevator without looking to see if the car was present, thus she voluntarily assumed the risk. However, it is reasonable when a person calls for an elevator, and quickly steps in without checking to see if the car is present without assuming the risk.

Thus Penelope did not assume the risk.