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 it 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 Iipsa 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.