

## Question 1

Pam drove to Diner, a local restaurant, at about 5:00 p.m. When she got out of her car in Diner's parking lot, she was robbed at gunpoint by an unknown assailant, who took her purse and her cellular phone. Pam later discovered that she was not the first victim of a crime in the Diner parking lot. In the past year, two other customers had been the victims of auto burglaries, which occurred while they were dining inside the restaurant. Diner put two video cameras in the parking lot, but did not hire security guards to patrol the parking lot.

As the robber began to flee, Pam wanted to get help and decided to run into Diner to use one of its telephones. She hoped that by calling "911" quickly, the robber could be apprehended and her property returned. As Pam ran across the parking lot she tripped in a large pothole and fell and broke her arm. Diner had not repaired the pothole, although customers had been complaining about it for weeks. All of the complaints were from customers who had not spotted the pothole while driving, hit it, and worried that their tires would be knocked out of alignment. The pothole was readily visible to pedestrians. Had Pam not been so panicked by the robbery, she likely would have noticed the problem and avoided it.

When Pam entered the restaurant, she asked a waiter, Wayne, to let her use Diner's phone to call "911." Wayne refused to let her use the telephone. He said Diner's policy limited use of the telephones to employees making business-related calls and strictly prohibited calls by customers. In fact, Pam later found out that Wayne had misstated the policy, which included an exception for emergencies. When Wayne refused, another customer promptly called "911" for Pam, using his own cellular phone. The paramedics and police arrived shortly thereafter, enabling Pam to get immediate treatment. However, the robber was never apprehended and Pam never recovered her purse or her cellular phone.

Pam is suing Diner. Under what theory or theories might Pam bring an action against Diner, what defenses, if any, might Diner assert, and what is the likelihood Pam will be successful in obtaining damages for:

- 1) The loss of her purse, her cellular phone, and her emotional distress as a result of the robbery? Discuss.
- 2) Her broken arm? Discuss.
- 3) Exacerbation of her injuries due to Wayne's refusal to allow her to use Diner's phone to call "911"? Discuss.

## Answer A to Question 1

### Pam v. Diner

#### **Negligence – Pam’s loss of purse and cell phone**

*Negligence is breach of duty which actually and proximately causes damage to the person or property of another.*

#### Duty

##### General Duty

The diner has a general duty of due care to exercise due care in preventing harm to others.

##### Special Duty

*An invitee is one who comes onto a landowner/occupier’s premises to fulfill a business objective of the landowner/occupier. To an invitee, a landowner/occupier owes a duty to make a reasonable inspection of the premises and correct or warn of any dangerous conditions a reasonable inspection would reveal.*

The facts indicate that Pam had come to the diner most likely to fulfill a business objective of the diner. As such, she would [be] an invitee with respect to Diner.

Therefore, it will be found that Diner had a duty to make a reasonable inspection of the parking lot and correct or warn of the danger of criminal activity in the parking lot.

#### Breach

The facts do not indicate that the diner had warned of the danger of criminal activity in the parking lot. Further, they did not take steps to correct the situation by preventing entrance by thieves by way of a secure entry or posting security guards. Therefore, they breached their special duty to correct or warn of known criminal activity.

Diner will argue that they took reasonable steps to counter the risk of injury to invitees by placing the two video cameras in the parking lot. However, this will not meet the standard of their special duty to correct or warn.

This being the case, Diner will be found to have breached their duty because they neither corrected the dangerous condition nor did they warn of it.

### Causation

Actual Cause – But for Diner’s failure to correct or warn of the criminal activity, Pam would not have been robbed because it is likely that security would have prevented the presence of the robber or a warning would have given Pam the opportunity to avoid crime.

Proximate Cause – It is foreseeable that failing to correct or warn of the criminal activity could result in a robbery.

Diner will argue that the robbery act is an independent intervening cause cutting the chain of causation because it is a criminal act. However, this principle will not apply when the duty is to prevent criminal harm.

Having proven actual cause and proximate cause, Diner’s breach of duty will be found to be the cause of Pam’s damages.

### Damages

Pam suffered, as a result of the breach, the loss of her purse, cellular phone, and, most likely, emotional distress.

Having proven a breach of duty which actually and proximately caused Pam’s damages, Pam will have proven a prima facie case for negligence.

## **Defenses**

### Assumption of the Risk

*A plaintiff will be barred from recovery for negligence if it can be shown that they voluntarily encountered a known risk.*

Diner will argue that it was well known that criminal activity occurred in the parking lot and the video cameras were further evidence of that and, therefore, she voluntarily encountered the risk of robbery.

However, the facts indicate that Pam did not learn until later that auto burglaries had occurred there. Therefore, this will not be a valid defense.

### **Negligence – Pam’s broken arm.**

*Negligence is breach of duty which actually and proximately causes damage to the person or property of another.*

### Duty

#### General Duty

The diner has a general duty to exercise due care in preventing harm to others.

#### Special Duty

*An invitee is one who comes onto a landowner/occupier’s premises to fulfill a business objective of the landowner/occupier. To an invitee, a landowner/occupier owes a duty to make a reasonable inspection of the premises and correct or warn of any dangerous conditions a reasonable inspection would reveal.*

The facts indicate that Pam had come to the diner most likely to fulfill a business objective of the diner. As such, she would [be] an invitee with respect to Diner.

Therefore, it will be found that Diner had a duty to make a reasonable inspection of the parking lot and correct or warn of the pothole in the parking lot.

### Breach

The facts do not indicate that the diner had warned of the danger of the pothole in the parking lot. Further, they did not take steps to correct the situation by having the pothole repaired, despite the fact that customers had complained. Therefore, they breached their special duty to correct or warn of the pothole.

This being the case, Diner will be found to have breached their duty because they neither corrected the dangerous condition nor did they warn of it.

### Causation

Actual Cause— But for Diner's failure to correct or warn of the pothole, Pam would not have tripped and broken her arm, because it is likely that repairing the pothole would have avoided Pam's tripping, and warning of the pothole would have given Pam the opportunity to avoid tripping and breaking her arm.

Proximate Cause— It is foreseeable that failing to correct or warn of the pothole could result in Pam's tripping and becoming injured.

Diner will argue that the robbery act is an independent intervening cause cutting the chain of causation because it is a criminal act. However, this principle will not apply as Pam could also have tripped while walking at a normal pace and become injured.

Having proven actual cause and proximate cause, Diner's breach of duty will be found to be the cause of Pam's damages.

### Damages

Pam suffered, as a result of the breach, a broken arm, related medical bills, possibly loss of wages, and pain and suffering.

Having proven a breach of duty which actually and proximately caused Pam's damage, Pam will have proven a prima facie case for negligence.

## **Defenses**

### Assumption of the Risk

*A plaintiff will be barred for recovery for negligence if it can be shown that they voluntarily encountered a known risk.*

Diner will argue that the pothole was clearly visible, acted as its own warning, and she voluntarily encountered the risk of tripping.

However, if Pam can show that she acted in a reasonable manner, this defense will not apply. Therefore, this will not be a valid defense.

### Contributory Negligence

*In some jurisdictions, a plaintiff will be barred from recovery for damages for negligence if defendant can prove that the plaintiff negligently contributed to their own injury.*

Diner will argue that by running in a parking lot, Pam breached a duty to exercise ordinary care when running through the parking lot and, thus, negligently contributed to her own injury.

However, if Pam can show that she acted in a reasonable manner, this defense will not be valid.

### Comparative Negligence

*In some jurisdictions, the amount plaintiff can recover for damages for negligence will be proportionately diminished to the degree that plaintiff negligently contributed to his own injury.*

If Diner is successful in their argument discussed above under Contributory Negligence, and they are in a comparative negligence jurisdiction, they may be able to reduce the amount Pam is entitled to recover.

## **Negligence – Failure to Render aid.**

*Negligence is breach of duty which actually and proximately causes damage to the person or property of another.*

### Duty

#### **Vicarious Liability – Doctrine of Respondeat Superior**

*The master will be liable for the torts of his servants which are committed during the course and scope of their employment.*

Because Wayne is an employee of Diner, Diner will be held liable for his torts if it can be shown that they were committed within the course and scope of his employment.

### General Duty

The diner has a general duty of due care to exercise due care in preventing harm to others.

### Special Duty

*Generally, there is not duty to render aid unless there is a special relationship between the parties: by statute, contract, relationship, assumption of care or immediate peril.*

The facts indicate that the restaurant had a policy that allowed for the use of the phone for emergency purposes. Pam, as a customer, may have had a special contractual relationship that caused them to owe a duty to come to the aid of Pam in letting her use the phone to call 911.

If Pam can prove this special contractual relationship and, therefore, a special duty to come to Pam's aid by allowing her to use the phone to call for help, she may proceed as follows:

### Breach

Because Wayne did not allow Pam to use the phone, Pam will argue that Diner breached their duty.

This being the case, Diner will be found to have breached their duty.

### Causation

Causation will be a moot point; see below under Damages.

### Damages

When Wayne did not allow Pam to use the phone, a restaurant patron did and Pam was able to call for help. Therefore, she suffered no damages as a result.

If the court finds a duty and breach, there will be no cause for negligence because there were no damages.

## Answer B to Question 1

***What claims does Pam have against Diner, what defenses can Diner assert and what is the likelihood Pam will be successful in obtaining damages for:***

***1. The loss of her purse, her cellular phone, and her emotional distress as a result of the robbery? Discuss.***

### **Negligence**

A plaintiff may recover personal and property damages if it can be established that the defendant owed the plaintiff a duty, that the duty was breached, and that the defendant's negligence was the actual and proximate cause of the plaintiff's injuries.

### **Special Duty-Landowner**

Here, Diner is a local restaurant open to the public; thus, Diner is a landowner.

### **Business Invitee**

Here, Pam was trying to park her car in Diner's parking lot so that she could go into the restaurant to eat. Thus, she is a business invitee, as she was going onto Diner's property for the purpose in which it was being held open. Therefore, Diner owes a duty to make a reasonable inspection of dangers and to protect against and warn against known dangers.

### **Breach**

Diner knew that prior to Pam being robbed that two other incidents of auto theft had occurred. Diner placed two video cameras in the parking lot as a result but did not hire security guards. Under the Learned Hand formula, Diner has breached its duty if the burden of preventing harm to its patrons was outweighed by the possibility of harm occurring. Here, Diner will argue that the harm that it had a duty to protect against was that of auto theft, not robbery. However, Diner was aware that criminal activity was taking place in its parking lot and that some crimes have the potential to escalate into dangerous situations. Since the likelihood of a person being robbed and possibly

murdered was high and outweighed the cost of hiring security guards it can be argued that Diner breached its duty.

Therefore, Diner breached its duty to protect its customers from known criminal activities and failed to protect Pam by failing to hire security guards.

### **Actual Causation**

But for Diner's failure to provide security guards Pam would not have been robbed, as the security guards would have deterred individuals from committing crimes in that location.

Diner is the actual cause of Pam's injuries.

### **Proximate Causation**

Diner's failure to provide security guards was an indirect cause of Pam having her purse and cellular phone stolen, as the robber was an intervening cause. However, the robbery was dependent on the Diner's failure to provide security guards and was a foreseeable result of a failure to provide adequate security. Therefore, Diner is the proximate cause of Pam's loss of her purse and cellular phone.

### **Damages-General**

Pam may recover money damages for the loss of her purse and cellular phone.

### **Damages-Special**

There are no facts indicating that Pam suffered any consequential damages as a result of the loss of her purse or cell phone; Pam will not be able to collect special damages.

### **Negligent Infliction of Emotional Distress**

One owes a duty not to subject another to an unreasonable risk of harm that may cause unreasonable emotional distress.

### **Non-Bystander Rule**

All jurisdictions allow [damages to] a plaintiff who was directly impacted by the defendant's negligence. The majority of jurisdictions, and the general rule, require that the emotional distress results in a physical manifestation.

Here, Pam was the direct victim of Diner's negligence of failing to provide adequate security measures for its patrons. However, there are no facts that indicate Pam suffered physical manifestations of the emotional distress caused by the robbery. Therefore, Pam will not recover damages for emotional distress resulting from the robbery under a negligent theory.

### **Defense--Contributory Negligence**

Under the common law rule, one who negligently contributes to his own injuries will be barred from recovery.

Here, there are no facts that indicate Pam was negligent. She intended to eat at Diner and parked in its parking lot as a reasonable person would have. This defense will fail.

### **Defense--Comparative Negligence**

As discussed supra, there is no evidence that Pam contributed to her negligence. This defense will fail.

### **Defense--Assumption of the Risk**

One who has knowledge, comprehension, and appreciation for the danger and voluntarily chooses to encounter the risk will be barred from recovery.

Pam did not know that there had been a history of criminal activity in the parking lot at Diner's prior to her robbery; therefore, she did not assume the risk. This defense will fail.

**Outcome:**

Pam will recover losses for her purse and cell phone but will not be able to recover for emotional distress resulting from the robbery.

**2.) Her broken arm?****Negligence**

A plaintiff may recover personal and property damages if it can be established that the defendant owed the plaintiff a duty, that the duty was breached, and that the defendant's negligence was the actual and proximate cause of the plaintiff's injuries.

**Special Duty--Landowner**

As discussed supra.

**Business Invitee**

Here, Pam was at Diner's to eat. Pam was parked inside of Diner's parking lot and was attempting to cross the parking lot; thus Pam was a business invitee on Diner's land. Diner owes a duty to its business invitees to make reasonable inspections and to warn [of] and make safe known dangers.

**Breach**

Diner knew about the pothole in its parking lot. Diner had received numerous complaints, albeit complaints from drivers who had not seen the pothole. However, it is foreseeable that one not paying attention may hurt himself and thus the pothole posed an unreasonable risk of harm to persons crossing the parking lot. Therefore, Diner breached its duty.

**Actual Causation**

But for Diner's failure to cover the pothole Pam would not have tripped and been injured.

**Proximate Causation**

Diner's failure to cover the pothole was a direct and foreseeable cause of Pam's injuries. Thus, Diner was the proximate cause of Pam's injuries.

### **Damages--General**

Pam will recover general damages for her pain and suffering related to her broken arm.

### **Damages--Special**

Pam may recover special damages such as medical expenses and any wages she may lose due to her broken arm.

### **Defense-Contributory Negligence**

Defined supra.

Here, Diner will assert that Pam should have seen the large pothole, and that her negligence for failing to notice the pothole contributed to her injury. The court is likely to find that she should have seen the large pothole and that she did contribute to her own injury. Thus, if the court finds Pam contributed to her own negligence she will be barred from recovery.

### **Defense--Comparative Negligence**

Damages are weighed according to blameworthiness.

Here, if the court finds that Pam contributed to her injury she will be allowed recovery minus the percentage that she was negligent in a jurisdiction that follows the pure system. In a partial system, she will only be allowed recovery if she is 50% or less at fault. It is likely that [the] court will reduce Pam's damages based on a percentage that she was negligent.

### **Defense--Assumption of the Risk**

Defined supra.

Here, the facts indicate that Pam did not see the pothole; therefore, she did not know, comprehend, or appreciate the danger. Pam did not assume the risk.

**3.) Exacerbation of her injuries due to Wayne's refusal to allow her to use Diner's phone to call "911"? Discuss.**

### **Vicarious Liability**

Diner is vicariously liable for its employees' negligent conduct during the course of scope of their employment.

If it is found that Wayne negligently (see *infra*) misread the restaurant's phone policies and denied Pam use of the phone, [and] based on this mistake and this denial caused injury to Pam, Diner will be liable under the doctrine of *Respondeat Superior*.

### **Negligence**

Defined *supra*.

### **General Duty**

One owes a duty to act with due care to prevent unreasonable risks of harm and to act as a reasonable person would under the same or similar circumstances. Under *Palsgraf*, Cardozo argued that a duty is owed to foreseeable plaintiffs, and Andrews argued that a duty was owed to all.

Here, Wayne owed a duty not to subject persons to unreasonable risks of harm, such as an exacerbation of an existing injury by calling 911 at the request of Pam. Pam is a foreseeable plaintiff as she was injured in Diner's parking lot. Wayne was Diner's employee. As an employee he owed the patrons of Diner's a duty.

### **Breach**

The burden of prevention, that of calling 911, was greatly outweighed by possibility of increased harm to Pam. Therefore, Wayne did not act as a reasonable person would

have under the circumstances. A reasonable person would have called for assistance. Wayne breached his duty.

### **Actual Cause**

There are no facts indicating the Pam was injured or that her injury was exacerbated by Wayne's failure to call 911. The facts indicate that a patron immediately dialed 911 for Pam and as a result she was able to get immediate medical attention. Thus, Wayne's failure to call 911 did not cause Pam's injury to get worse in a matter of minutes that it took for the patron to call 911. Therefore, Wayne is not a factual cause of any injury to Pam.