

10/20 Hypotheticals

Question I

Patrick works for Whole Foods as a stock boy. Part of his duties include unloading produce from delivery trucks as they arrive. Joe's Delivery ("JD") is a local distributor of bananas.

One day, JD brings a load of bananas to the store. Patrick immediately comes out of the store and begins to unload the stock. When he picks up the third of five crates, however, five spiders emerged from the box and bite Patrick repeatedly. Patrick has an extreme allergic reaction to the bites and ends up hospitalized for two days with breathing problems.

Patrick has consulted you about the possibility of bringing a suit for negligence against JD. In the course of your research, you find the Georgia statutes identified below. Evaluate the strength of Patrick's claim.

Title 26. Food, Drugs, and Cosmetics

Chapter 2: Standards, Labeling, & Adulteration of Food

26-2-22. Prohibited acts

The following acts and the causing thereof within this state are prohibited:

- (1) The manufacture, sale or delivery, holding, storage, or offering for sale of any food that is adulterated or misbranded;
- (2) The adulteration or misbranding of any food;
- (3) The receipt in commerce of any food that is adulterated or misbranded and the delivery or proffered delivery thereof for pay or otherwise;
- (4) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp, tag, label, or other identification device authorized or required by regulations promulgated pursuant to this article.

§ 26-2-26. Adulterated foods

A food shall be deemed to be adulterated if:

- (1) It bears or contains any poisonous or deleterious substance or animal which may render it injurious to health; but, in case the substance is not an added substance, such food shall not be considered adulterated under this paragraph if the quantity of such substance in such food does not ordinarily render it injurious to health;
- (2) It bears or contains any added poisonous or added deleterious substance which is unsafe

within the meaning of **Code Section 26-2-27**. In regard to pesticide residues, a food shall be deemed to be adulterated and unsafe if it bears a pesticide residue in excess of a tolerance established by the United States Environmental Protection Agency;

(3) It consists in whole or in part of a diseased or contaminated, filthy, putrid, or decomposed substance or if it is otherwise unfit for food;

(4) Its container is composed in whole or in part of any poisonous or deleterious substance which may render the contents injurious to health.

Patrick could try and bring a claim for negligence based upon the statute.

A. Class of Harms that the legislature intended to protect against?

1. No:

- A. The location of the statute – “food, drugs & cosmetics” – suggests that the legislature was concerned about the quality of the food, not dangers unrelated to the food itself.
- B. The violation of the act relates to the “adulteration of food” – again, seems to want to protect integrity of food supply. Would be focused on harms arising out of consumption of such foods exclusively.
- C. Defines “adulterous” food as containing “animal which may render it injurious to health” — again, focus in on consumption.

2. Yes:

- A. Broadly, the purpose of the act is to protect human safety from food that has become infected.
- B. In fact, the contents of the box are “injurious to health” – compliance with the statute would have foreclosed this type of risk.

B. Class of people?

- 1. No: Statute intends to protect people injured by consumption of bad food products – not people who are incidentally injured by the animals making the food bad for consumption.

2. Yes: Purpose is to protect people who are consuming or handling food – it is foreseeable that P would have been safer if regulation had been complied with.
- C. Public policy problems?
No particular reason not to impose here. There is underlying tort liability; statute seems clear on its face.
- D. Violated? Clearly
- E. Violation Excused? Doesn't look like any excuses are available.
- F. Effect:
1. In some jurisdictions, negligence per se. Breach of duty is established, but must still show causation & damages.
 2. In some jurisdictions, only evidence of negligence. Must continue with BPL/reasonable person balancing test, as discussed next.
- F. If statute rejected: Continue analysis with reasonable person standard
1. What did they do or fail to do that a reasonable person would have done? No specific evidence that we can point to on JD's part other than that the accident occurred.
 2. Res ipsa loquitur?
 - A. Probably don't have infestation of spiders in the absence of negligence, although not of same caliber as tire crashing through window.
 - B. Exclusive control?
 1. Not at the time of accident – Patrick was handling – and had gone through many hands since leaving warehouse.
 2. On other hand, if closed box, could try to argue that exclusive control over contents at time of accident, e.g., until opened.

- C. If applicable, effect?
 - 1. Some jurisdictions – gets it to the jury.
 - 2. Some jurisdictions, shifts burden of production to defendant.
 - 3. Some jurisdictions, shifts burden of persuasion to defendant.

- D. Causation would be presumed if applicable.

Question II

Abby and Ben were in Macy's Department store shopping. When they took the escalator up to the second level, Abby rode the escalator on the right-hand side, holding the moving handrail, one step ahead of Ben. When the two were about halfway up the escalator, the handrail stopped moving, but the steps continued their ascent. Abby lost her balance and fell into Ben, and both tumbled down the step. As a general rule, commercial property owners have a non-delegable duty to maintain the premises in a safe condition.

Abby & Ben come to you to discuss whether they can win a claim for negligence against Macy's. How do you assess their claim?

Abby & Ben will sue Macy's for negligence for failure to maintain the escalator in a safe condition.

- A. Duty: reasonable care to maintain premises in a safe condition

- B. Breach of Duty
 - 1. Problem: No evidence of what they did that they should not have done or failed to do that they should have

 - 2. Res Ipsa Loquitur appropriate?
 - A. Define the 3 part test
 - B. Apply the 3 part test
 - 1. Type of accident that doesn't normally happen in the absence of negligence?
 - A. Yes: There are escalators everywhere; they do not routinely stop unless something improper happened.
 - B. No: Mechanical things routinely break and wear down over

time regardless of whether there is negligence.

2. Under D's exclusive control?

A. No:

1. Possibility exists that another company maintained or repaired the escalator when not operating properly.
2. Ps themselves (and other customers) were on it at the time of the accident

B. Yes:

1. Non-delegable duty places effective control on D, even if someone else maintains it
2. P's were on the escalator but didn't appear to be any part of reason that stopped.

3. Effect of res ipsa?

1. Evidence of negligence
2. Shift burden of production
3. Shift burden of production & persuasion

C. Causation: Because res ipsa, can't connect act of negligence to but-for test. Satisfied

D. Damages: seem apparent