THESE EXAMINATION QUESTIONS MUST BE RETURNED AT THE END OF THE EXAM.

This examination is CLOSED BOOK, NO NOTES. You may not consult any other materials or communicate with any other person. You are bound by the Law Center’s Honor Code. Don’t forget that it is a violation of the Honor Code to discuss the exam’s contents with any student in this class who has not yet taken it. I recommend that you not talk about the contents of the exam until finals period is over.

Write your student exam number in the blank on the right side of the top of this page. If you are handwriting your examination, write your examination number on the cover of each of your bluebooks. Number your bluebooks by indicating the book number and total of books (e.g., 1/5, 2/5, 3/5, 4/5, 5/5). If you are handwriting, please do not use pencil. If you write your exam, use ONE SIDE of a page only, and SKIP LINES.

If you are using a computer, please follow the directions that you learned at the training session. If the system fails, you should immediately start writing in your bluebooks. You do not need to write your exam number on the flash drive.

At the end of the exam, you MUST turn in this copy of the examination. Please do not write your name, social security number or any other information that provides me with your identity.

This exam is SIX pages long, with THREE questions. Question I is worth 50 points. Question II is worth 25 points. Question III is worth 25 points. I recommend that you spend 120 minutes on Question I, 60 minutes on Question II, and 60 minutes on Question III.

Your job is to analyze the facts in each question. Do not make up facts or fight the facts given. If you need more information to resolve a difficult question, state what information you would need and how it would affect your answer. Read carefully. Think before you write. Accurate reading of the question is essential. Good organization, clear statement and avoidance of irrelevancies all count in your favor.

Honor Code. It is a violation to use ANY aid in connection with this examination; to fail to report any such conduct on the part of any other student that you observe; to retain, copy, or otherwise memorialize any portion of the examination; or to discuss its contents with any student in this class who has not yet taken it. By placing your exam number in the PLEDGE blank below, you are representing that you have or will comply with these requirements. If for any reason you cannot truthfully make that pledge, notify me as soon as possible. Sign your number and not your name.

PLEDGE: ____________________________
Question I (50 points, 120 minutes)

Harry and Sally spent a quiet Christmas Day. They both recently lost their jobs due to the economic downturn. Because of their lost jobs, they decided not to buy each other Christmas presents. Instead, they agreed that they would spend a quiet, giftless Christmas and then go to the malls the morning after Christmas to hunt for real bargains.

Members of Congress were relieved to get home for the holidays. They had spent a long month arguing about and then passing the “Grand Bailout Act of 2008,” which appropriated $10 billion to distribute to “any store that sells computers.” According to the language of the Act, “in recognition of the severe economic downturn occurring at this traditional holiday season of celebrating and selling, and the particular economic hardship faced by the computer industry, the Congress provides $1 million to each store that sells computers. In exchange for the money, we encourage these stores to cut costs without cutting jobs and to try to operate more efficiently.”

The economic downturn also affected Walstore, a large, national chain store that offers big discounts and low prices to consumers throughout the year. Although Walstore had lowered prices before Christmas, executives at the store’s national headquarters in Old York State were disappointed that their sales figures this Christmas were down from last year. They decided that, in order to break even, they needed to have a highly-publicized Super-Duper Post-Christmas sale, with Walstores around the country opening their doors at 4 A.M.

Harry and Sally do not frequently shop at Walstore; they go there occasionally, about once every two months. In their Christmas Day newspaper they saw the company’s huge ads, which stated:

Come Dancer, Come Prancer, Come One and All to Walstore, where you will find the lowest prices in the nation. Our Elves will welcome you when Walstore’s doors open at 4 A.M. on December 26. The first ten customers to buy goods at each store will receive an automatic 30% discount on their bills from a friendly Elf.

Harry and Sally thought Walstore’s sale would be a great opportunity to buy the laptop computer they needed for writing resumes and applying for new jobs, and they made their plans to spend the next day at Walstore.

After reading Walstore’s ad in their Christmas newspaper, Harry and Sally rested all day and then left their home at 2 A.M. in order to drive over to the Walstore in their home State of Utopia. In the car on the way over, they talked about which laptop model they wanted to buy. Sally put her credit card in her pocket so that she would be ready to pay once she had the laptop in hand—she had to be among the first ten! From their previous trips to Walstore, the two recalled that the laptop computers were displayed about 35 yards from the store’s entrance, on the east side of the store. The Utopia Walstore has only one entrance, which contains two automatic glass doors that open when people stand
on the carpet in front of the doors. The doors open automatically only when they are unlocked from inside.

As Harry and Sally pulled into the mall’s parking lot at 3 A.M., they saw a crowd of about 150 people already gathered in front of Walstore’s entrance. They parked and walked toward the store, asking each other where the end of the line was and how they could get closest to the eastern part of the store. Once at the store, however, they realized there was no line, so they moved as far east as they could in front of the easternmost store door, and pushed their way into the crowd to get a good position.

Harry and Sally remained in the crowd for the next hour, jostling the people around them and throwing a sharp elbow or two. Near them was a tall man, Manny, whose voice was easy to hear. Manny kept asking the people around him if they had heard about the “Thanksgiving event at the Old York Walstore.” Apparently on Thanksgiving Day a crowd of shoppers outside the Old York Walstore rushed into the store when the doors opened at 5 A.M., and in their haste trampled a Walstore security guard to death. Harry and Sally laughed when they heard the story, and told Manny that there wasn’t a security guard alive who could keep them from getting their laptop. “You better stay out of our way too after the doors open, Manny,” joked Harry and Sally.

As promised in the ad, inside the store Walstore employees had spent the hour from 2:30-3:30 A.M. dressing up in elves’ costumes. All store personnel, including the security guards, were given pointy hats and pointy ears and had bright red rouge applied to their cheeks and lips. At 3:45, Bob and Ray, the two employees assigned to security, each walked toward one of the front doors of the store. Bob, who had worked for the local police force for twenty years before applying to Walstore as a private security guard, wore an old police uniform along with the elf hat and ears. Ray, a college student who had applied for a sales job at Walstore over Christmas break in order to earn some tuition money, but agreed to fill in with security once the crowd size increased over 100, wore jeans and a sweat shirt and elf ears. Bob and Ray and the other elves smiled and waved through the glass doors at the customers outside.

At 3:58, Bob and Ray took out their keys and each unlocked a front door. The crowds rushed into the store. Sally and Manny raced toward the computers. Harry, who was out of shape, tried hard to keep up with Sally and Manny. When he found himself falling behind, however, he reached out and grabbed Manny by the elbow, trying to slow Manny down. Manny fell down, and Harry jumped over him to join Sally at the computer counter. Harry and Sally grabbed their computer and ran toward the checkout counter, where a friendly Elf rang up the sale and gave them their 30% discount because they were the first to complete a purchase.

Behind them, Manny had never gotten up from the floor because some of the other 147 customers ran over Manny on their way to get bargains. Ray fought through the crowd to try to save Manny’s life. Finally he was able to grab hold of Manny’s shoulders and dragged him to a corner of the store. While lying on the ground in the corner, Manny, who had blood all over his face, saw Mickey and Minnie holding a laptop over their
heads yelling “we got our cheap laptop!” Manny told Ray that Mickey and Minnie had knocked him over, and Ray relayed that information to Bob. Bob caught up with Mickey and Minnie before they left the store and told them they had to accompany him to the office in the back of the store, to wait there until the police arrived. Bob locked the door behind him as he left Mickey and Minnie in the office and went back to help Manny.

After the police arrived, they put Manny in an ambulance to send him to the hospital. The mall was so crowded, however, that the ambulance could not get through the traffic. Manny died in the ambulance in the parking lot. An autopsy indicated that Manny had suffered severe bruises across his body, had broken his nose, and that his neck had likely been broken by being pulled away from his shoulders. The autopsy concluded that the broken neck had caused Manny’s death.

Harry and Sally used their savings to buy a delicious holiday dinner at the mall’s restaurant, Chez Louis.

Identify and analyze all possible tort lawsuits arising from this situation. Will the plaintiffs win their cases? Why or why not?
Max is a magician, hand model and actor. His hands have appeared in numerous magazine advertisements for gloves and hand cream. His magic act is multifaceted. He can pull a rabbit out of a hat; he can find coins behind children’s ears; he can even wriggle his way out of a locked box. Sometimes Max plays the banjo during his act. Max has also been master of ceremonies at the Magic Castle for the last fifteen years, where he earns $1,000 for an appearance.

Martha Blueart designs products for Martha Blueart Living Company, which specializes in home décor. Her company produces kitchen items such as dishes and pots and pans; sheets, towels and other linens for the bedroom; and some rugs and casual furniture for the living room and the outdoors. J-Mart advertises and sells the “Martha Blueart Everyday Living” line because it is stylish yet inexpensive, perfectly priced for J-Mart’s lower middle class clientele. Indeed, years ago J-Mart asked Martha, whose initial products appealed to upscale customers who shop at Neiman Marcus and Saks Fifth Avenue, to produce the everyday living line for its customers.

Max lives in a rented apartment with an outdoor deck. Six months ago he stopped at J-Mart to buy a new lounge chair for the deck because his old chair was falling apart. For $75, he bought a lime green Martha Blueart Everyday lounge chair with four steel tubular legs held onto the chair by one bolt for the front two legs and one bolt for the back two legs. Max took the chair home and set it out on the deck.

Recently Max decided to move the chair so that he could catch more sunlight when he sat on the deck. He was dragging the lounge chair across the deck, holding the chair by the front legs, when the front tubular legs collapsed, crushing his right index finger between one of the chair legs and a tubular bar on the base of the chair. The collapsing chair sliced Max’s fingertip from his finger, and it fell between the cracks and under the deck, where a relative found it a few hours later. A surgeon was able to reconnect the fingertip to Max’s finger. The surgery cost $100,000, $80,000 of which was covered by Max’s insurance.

After the accident, Max missed four days work at the Magic Castle before he headed back to work. He has some sensation in the fingertip but has decreased hand function because he cannot move his fingers as easily as he could before the accident. Max’s doctors tell him that the scars from the surgery will fade over time but that the index finger will always look like it was crushed.

Last week J-Mart started selling a model of the chair that has two bolts on the front legs, and two bolts on the back legs, instead of one.

Identify and analyze all the potential lawsuits that Max will bring against the appropriate defendants. Will he win or lose his claims? Why or why not?
Proposal Rock is a favorite romantic spot located in the State of Sunshine. The rock sits at the edge of a beach along the Great Western Ocean. The Rock is five feet tall, and, like most big rocks, has many ledges and crevices along its surface. Because it sits at the edge of the ocean, it is always damp from the spray of the ocean. The setting is especially beautiful because someone standing on the rock and facing toward the ocean can watch the sun set in beautiful shades of orange and pink.

Jane has lived near Proposal Rock all her life and, as her boyfriend Jay knows, has always dreamed of receiving her marriage proposal there. Jane is afraid of heights, however, so although she spends lots of time at the beach she has never stood on Proposal Rock. Jay and Jane have dated for three years. Jay is a funny guy, and on April 1 he asked Jane to go for a “special walk” with him along the beach. As they neared the Rock, Jay turned to Jane, took her hand and said, “I propose we continue our special walk on Proposal Rock.” The two climbed up to the top of the Rock and stood looking at the sunset. Then Jay grabbed Jane’s hand, turned her around so she was facing him, and went down on one knee to propose. Jay is clumsy as well as funny, however, so his feet slid out from under him on the way down. Falling forward, he knocked Jane into the ocean, where she screamed for help, bobbing up and down in the water.

Jay panicked and ran away. Fortunately, an off-duty lifeguard walking on the beach saw the whole episode and was able to pull Jane out of the water. Bystanders saw Jay throw a box into a garbage can as he fled the beach. When police later searched the garbage can, they found a fancy bright blue jewelry box from an expensive store. When they opened the box, they found a dull grey rock and a little sign that said “April Fool’s!”

Jane spent a night in the hospital after the incident and had a head cold for several days because of her exposure to the ocean water. Since the incident, she has not been able to sleep at night and has lost her appetite. She cries all the time and keeps telling her parents (Mom and Dad) that she will never be happy again. Her parents were understandably furious with Jay and kept urging the police to haul him in for questioning. The police, however, could not find Jay anywhere around town. In order to help the police, Mom and Dad therefore printed flyers with pictures of Jay above the caption:

Be alert to crimes of passion. Help us find this murderer before he murders your daughter. If you see this man, call (713) (POLICEHELP).

Mom and Dad posted the flyers along the beach walk, and even pasted a few to the surface of the Proposal Rock, where anyone who passed by could read them.

Identify and analyze all possible tort lawsuits arising from this situation. Will the plaintiffs win their cases? Why or why not?
Your letter grades in this course were based on the following point totals from the final examination and were awarded according to the mandatory UH grading curve for first year courses, which requires that the class average fall between 2.9 and 3.1. The class average was 3.09. The number in parentheses is the number of students that received each letter grade.

- 90-100 A (4)
- 86-89 A- (2)
- 83-85 B+ (7)
- 74-82 B (19)
- 70-73 B- (6)
- 65-69 C+ (3)

All three questions contained a lot of facts, offering the possibility of a lot of lawsuits. The highest grades went to those who were able to spot the most difficult issues and to do the most detailed analysis instead of a superficial listing of elements. In Question I, many of you missed preemption. The congressional legislation was included in the question for a reason, and you shouldn’t have ignored it. (It is always dangerous to ignore something in a law school examination.) If Congress sets a policy to encourage employers not to cut back on jobs, would it undermine that policy to allow stores to be sued in state court for saving money on security employees like Ray? Probably not, but you needed to talk about the possibility and to list preemption as a possible defense.

Good answers considered the possibility of suing Walstore for negligent hiring as well as its general negligence for breaching the duty to invitees. You received more points if you discussed Posecai and when/how the duty to provide security arises. You also needed to do a careful analysis of causation in Question I, especially whether intervening causes—Harry’s battery, Ray’s rescue, and the ambulance’s stalling—broke the chain of liability. Many of you forgot the ambulance case and the medical aggravation rule.

For Question II, most the points were related to the strict products liability lawsuits against Martha Blueart Co. and J-Mart, but you also should have considered negligent design. Almost everyone discussed consumer expectations, risk-utility and reasonable alternative design in the SPL case, but the best answers analyzed which theory would be most favorable to each side and what the outcome of the lawsuits was likely to be.

Question III, Proposal Rock, yet many of you forgot to mention the recent trend to disfavor “romantic” torts involving alienation of affections and the like. You should have considered that as a policy reason not to allow Jane to sue Jay—only after considering
possible lawsuits for battery, assault, IIED, NIED and negligence. Everyone got the defamation claim against Mom & Dad!

These three questions were all based on recent events described in local and national newspapers, including the ghastly story of a woman who was swept off Proposal Rock in Oregon by a wave during a legitimate proposal. http://www.telegraph.co.uk/news/worldnews/northamerica/usa/3568340/Bride-swept-to-sea-at-Proposal-Rock.html.

I have pasted the best student answers to the exam questions below. I am happy to answer questions about your exams AFTER you have read through your answers and compared them to the model answers.

Enjoy the holidays and congratulations on successfully completing first year torts. (That means everyone passed!)
Student Model Answers, Torts Fall 2008, Professor Griffin

Question I

Plaintiff Manny has claims against Walstore, Harry, and Ray for negligence and battery.

Plaintiffs Minnie and Mickey have false imprisonment and unlawful citizens arrest claims against Ray, Bob and Walstore.

All plaintiffs will claim that Walstore was negligent because they were all invitees on Walstore's property and Walstore had actively tried to get them to come onto their premises and failed to mitigate and warn of all foreseeable dangers.

1. Manny v. Harry (battery, assault)

Manny will claim that Harry intended to grab his arm that this contact which forced Manny down to the ground wasn't consensual and that the result should have been known by Harry. He will posit that the contact was offensive to him and that it was the actual and proximate cause of his contact with the ground in which he sustained the injuries sued upon.

Harry may argue that the contact with Manny's arm was the only thing he intended to do and that it was not foreseeable that the contact which occurred between the two would result in Manny striking the ground and sustaining his severe injuries. Harry is unlikely to prevail on this argument and Manny will prevail on his battery claim against Harry. Proximate cause will likely make Harry liable for the full extent of Manny's injuries.

M may also argue that S's comment "watch out we are going to run you over" was an assault that put M in reasonable apprehension of the battery that took place. This claim will fail because there was no physical action to make such an apprehension reasonable in M. The fact that there was laughter accompanying the statement will be the most damning fact to the assault claim.

2. Manny v. Harry (negligence)

If his battery case fails, Manny will argue that Harry is liable for his injuries under a negligence theory. Manny is likely to prevail on this theory.

M will point out that H owed a duty to M either because they were friends in a social venture because of their chit chat out front before the store opened, or because he was responsible for M's fall and he should have stopped to pick him up because accident invites rescue or because H didn't take his last clear chance to help Manny. Last clear chance cases usually involve P's who are unable to help themselves. Here there is evidence that M was unable to help himself up. The duty assumed by H when he grabbed M by the arm, resulting in Manny's falling to the floor is also a reasonable grounds for duty. The "friends in a common venture" as in Keaton v. Farwell represents the minority of jurisdictions and this source of duty is likely to fail.

H will argue that there was no duty because they were not friends and his contact with Manny was insufficient to initiate a duty. Additionally, he may argue that last-clear-chance is often
used in situations where P's are in a helpless place due to their own negligence. However, the court will likely find that there was a duty. H may also argue that M assumed the risk because he himself was telling stories about a Walstore security guard being trampled by patrons in a similar situation to the ones that day. This claim is valid but even if it is observed as valid, it will not totally negate H's negligence.

This duty was breached when H failed to help Manny up after seeing him fall. There is no evidence that H didn't know M had fallen to the ground and was helpless. He acted with complete disregard for M's safety this should be enough to satisfy breach.

In arguing against breach, H will likely reiterate his claim that there wasn't any duty in the first place but this is likely to be a losing argument.

Here M will argue that H's negligence was a but for cause of M's fall and he should be liable for all reasonably foreseeable injuries suffered after the fall.

H may try and argue that it wasn't foreseeable that M would be trampled by the customers flooding into the store but this argument will fail because it will likely be determined that H was given notice of this danger when Manny told him the security guard in the other Walstore suffering a similar fate. H may be able to prove that he is not liable for all the injuries suffered by M because there were several intervening actors such as the other customers, Ray who attempted rescue, and the ambulance that failed to get to the hospital in time. These are all relevant but a tortfeasor is usually responsible for all foreseeable intervening actors and here it would seem that the trampling customer, a rescuer, and the failure of the ambulance were all reasonably foreseeable at the time of breach and the ambulance was part of the medical aggravation rule. M should prevail on causation.

If H is found liable to M's estate then he will probably be forced to pay damages for lost wages, pain and suffering for the time in between the accident and death, loss of consortium to his estate, and potentially punitive damages if the jury decides that his disregard for the injury he caused M and his failure to take any steps to help M were wanton and reckless enough to justify them.

H may also argue that because M knew that other people had been trampled in Walstore stores and though the risk was significant enough to mention the story on the day he was injured, he assumed the risk of suffering the same fate. There is some credibility to this argument but it probably won't prevail and if he does it won't be enough to wipe out liability entirely.

3. Manny v. Ray (negligence, battery)

M will argue that Ray is liable for his injuries because he commenced rescue and in doing so caused M to suffer greater harm. The duty owed by Ray arose out of his commenced rescue. Since he is not a professional but just a college kid, he will not have any immunity.
This duty was breached when Ray left M in a worse position than he had been when he found him. Ray may argue that M would have been killed more quickly if he had left him in the crowd on the floor but there will have to be compelling evidence that M was better off on the floor that he was of a broken neck in the corner of the store waiting his death in the back of an ambulance. Breach should be easy to prove.

M will next argue that the autopsy report clearly shows that the broken neck was the actual cause of his injuries and that Ray was the actual cause of his broken neck. Ray may try and counter that it’s impossible to be sure whether or not the neck was broken by his moving of M or before he ever got to him. Since the autopsy report seems fairly certain that the broken neck was caused by him being dragged by the shoulders by Ray, full causation should be satisfied.

Once Ray initiated a duty between himself and M, he became liable for all injuries suffered as a result of his negligence. This means that he will be liable for his death even though his death was a result of the failure of the ambulance to get out of the parking lot quickly enough. The injuries are not really divisible and there would probably be a loss of a chance claim on the ambulance because their failure to get out of the parking lot on time could have precluded M from surviving. This claim will probably not help out Ray and he will be found liable for M's death. Recovery will include lost income, consortium, burial expenses, and pain and suffering.

M may also try to press battery charges against R because he touched him without consent and the consent wasn't within the course of everyday human activity. It is reasonable to assume that an individual wouldn't consider being dragged across the floor by another an offensive manner of touching and this touching actually and proximately caused the broken neck suffered by M. Since Ray was acting in an effort to save M, it is unlikely that the battery claim will prevail (plus if his estate succeeds in negligence, he has no reason to try and recover on the battery claim).

4. Manny v. Walstore (respondeat superior, negligence)

If Ray is found liable to M in negligence, walstore will be liable for the full extent of Ray's liability by the doctrine of respondeat superior. This makes employers vicariously liable for the torts of their employees when the employees are acting within the scope of their employment, on or about the property of the employer, and are acting to serve the employer.

W may argue that Ray wasn't usually a security guard or an EMT and so the commencing of a rescue was really within the scope of his employment. This argument is likely to fail because Ray was in a security position that day because the store asked him to and it is reasonable to assert that he was furthering the interests of the company by trying to save a customer.

M may also argue that since he was an invitee on Walstore's
premises they were liable to him for any injuries suffering from dangers that the store knew about or should have known about.

Since there had been an accident of this same type at another Walstore, W had a duty to either warn the other customers that this type of injury was a distinct possibility or to take measures to mitigate this harm.

Ray wasn’t even usually a security guard and their using him as an added precaution shows that they were aware of the risk but hiring a college kid to act as a security guard was clearly negligent and their duty to M as an invitee was breached when they failed to take further steps to prevent this type of accident from happening or to at least warn of its possibility. They could have provided more entrances for people to come through than the two automatic doors or even created an orderly line out front before the store opened so that there wouldn’t have been a mad dash for the shelves.

M will argue that the cause in fact of this negligence was a trampling crowd- the exact danger that he has proven W knew about and had a duty to warn of and protect against.

W may argue that the trampling crowd and Harry were all unforeseeable intervening actors that broke the chain of causation between W's negligence and the injury suffered by M.

M will likely prevail because the type of harm he suffered by W's negligence was the exact type of harm that they had notice of and should have taken steps to warn of or limit.

5. Mickey and Minnie v. Bob and Ray

M's will press charges against Bob for false imprisonment stemming from his improper citizens arrest that was based on Ray's false accusations stemming from his unreasonable reliance on Manny's statement. This claim is likely to prevail.

Most states hold that a citizens arrest cannot be made unless the person making the arrest has actually witnessed a misdemeanor theft, or some other unlawful act. M's will argue that the arrest here wasn't warranted because B was acting on the word of a man laying in a corner, his face covered in blood possibly obscuring his vision, who had been trampled half to death and that this reliance was unreasonable. We do not know from the facts given but it does not appear that at this time there have been any charges pressed against the M's but if they are found not guilty, the arrest is pretty much unlawful by definition.

M's will claim that they were detained against their will and B used force and/or his apparent authority (he was wearing his cops uniform even though he wasn’t a cop and could be in trouble for impersonating an officer) and that they complied with his request because they thought he was a police officer. B may try and argue that since he was/had been a cop he wasn't impersonating an officer and/or there he wasn't using his appearance as a cop to coerce the M's into obeying his orders. These claims will likely fail because it is reasonable to believe that his appearance as a cop was a large factor in them complying with the arrest.
B locked the office door and they were aware that they were being detained and their locomotion restricted by B. B should have known that he was having this effect on M's because he locked the door himself and told them to stay where they were, implying (again bolstered by his uniform) that they were under arrest and would suffer criminal sanctions if they failed to comply.

M's should prevail on their FI claim because they were coerced using a display of force or authority (uniform), B knew that his actions would restrict their freedom of movement, and they were at all times aware that they were unable to leave the office. B was not within his rights when he arrested them on suspicion of stealing as indicated by Manny who was relying on Ray. B could argue that he thought he was relying on Ray and that in the melee going on in the store he couldn't determine whether or not Ray had actually seen the battery on M or not and that he was acting reasonably given the circumstances. This defense shouldn't prevail at court and B will be liable for false imprisonment.

There is not enough evidence from the facts given but if there was any contact during his arrest and FI of M's, B should be liable for battery because the contact was made with intent, it was likely offensive because he was arresting them, and the contact proximately caused the humiliation or pain that was suffered by M's as a result.

6. Mickey and Minnie v. Walstore

M's will claim that Walstore is liable for their false imprisonment by B because of respondeat superior. This claim is likely to prevail because there is no evidence that B was acting outside the scope of his employment. W may argue that employers are generally not responsible for the torts of their employees but here that defense is unlikely to prevail because the acts undertaken were likely strictly within the scope of B's employment and sanctioned by his employer. M's should prevail against W on a respondeat superior theory.

7. Walstore Preemption Defense to all Respondeat Superior Claims

W will likely argue in each of its respondeat superior claims that allowing tort suits to be brought against it in the preceding cases would directly undermine the federal legislation that has just been passed to stimulate growth for any store selling computers. As a "store that sells computers", W will argue that it is of the class that the legislation is seeking to protect. W will claim that allowing suits to be brought against them in tort will force them to pay large sums to a variety of plaintiffs and that this will undermine their ability to pass savings along to their customers and employees in a manner consistent with the goal of the legislation.

P's will argue that the goal of the legislation would not be served by protecting W from liability for their gross negligence. Especially in the case of Mamt, there is evidence that they were grossly negligent because they knew of this specific danger and apparently took small or nonexistent steps to warn of or mitigate the specific danger.

Since Mickey and Minnie’s claim is unlikely to result in
anything more than nominal damages because they suffered minimal
embarrassment and no physical or other harm that we know of,
allowing W to be liable is unlikely to result in any financial
hardship.

W might also argue that imposing liability for injuries
sustained by robust crowds of consumers at a store would discourage
retailers from encouraging large numbers of shoppers to come to
their stores and spend money. This would have an effect directly
opposite to that desire by the legislation and therefore implied
preemption would be appropriate.

The legislation also has the goal of encouraging stores to
increase sales and pass on savings to customers but not to cut back
on staff. If there is any evidence that W skimped on security
personnel or other staff that could have served to control the
unruly crowd on the day in question, they may not be immune from
suit because they were grossly negligent and themselves acting in a
manner contrary to the state goal of the legislation. The express
language of the legislation is that it hopes to encourage retailers
to "cut costs without cutting jobs and to try to operate more
efficiently". If this is the expressed goal of the legislation then
finding that M's injuries was a result of them cutting back on
employees, then allowing his claim would not undermine the goals of
the legislation because W's negligence wasn't in line with the
legislative goals.

I think that W will likely be found liable because even though
there is legislation with the goal of helping out ailing retailers,
allowing them to advertise and execute sales in such a way as to
have unruly, dangerous mobs of shoppers which pose a very real risk
to the consumers, along with failure to mitigate these risks by
proper hiring and safety measures is not in the best interest of
consumers, the economy, or society at large. For these reasons I
find it unlikely for W to prevail in its implied preclusion defense
to the tort suits brought by M1, M2, and M3.

Walstore may also try and argue that the intentional tort of
Harry (battery), upon Manny, breaks the chain of causation and they
should therefore not be liable for the injuries he suffered from
that point on. This contention will probably fail even if harry is
found guilty of a battery on Manny.

**Question II**

Max will have a strict product liability claim against Martha
Blueart (MB), Martha Blueart design company (MBLD), and J-mart (J)
for defective design of the chair.

Max will also have a claim in negligence against MB but not
against MBLD or J.

The SPL claim for defective design should prevail and if it
does not for some reason, he might be able to recover from MB for
negligent design.

1. **Max v. MB, MBLD, and J (strict products, defective design)**

M will argue that the 3 defendants are strictly liable to him
because they were all a part of the chain of distribution that got the product to him. Since the defect is the design and not the physical product itself, MB will be included in the chain.

M will argue that the design of the product was defective because there were only two bolts on the front and this was inadequate to safely attach the legs to the frame of the chair. We do not know from these facts, but if this is the only such incidence of a this design of chair failing, M may try and prove that the design itself was not defective and that the accident was caused by the negligence of some other, unforeseeable 3rd party.

M will counter by pointing out that the model of chair he bought now uses two bolts to secure the legs to the frame and that this is clearly evidence that the product was defective as it came to him with only two bolts. M will argue that this two bolt design is an RAD that the D's should have known about when they designed the chair because it is not a complex product and it is reasonable to argue that they could have easily discovered that a single bolt was inadequate to secure the legs of the chair to its frame.

If the RAD test fails, M may argue that since this is a simple product of which almost all consumers probably have knowledge of, the consumer expectations test is applicable. Under this test the jury looks to how an average consumer would expect the product to behave and whether or not the danger which has befallen the P was within the expectation of the consumer when he purchased the product. Here M would likely be able to argue successfully to the jury that the average consumer expects to move his chair around his house every once in awhile (its not meant to be a stationary object) and that they do not expect the chair to fall apart and injure them in the course of this movement.

M could also argue that the dangers posed by the chair weren't so open and obvious that the consumer should have known not to move the chair himself because to do so would be to risk a severed hand and other injury.

M could also argue for use of the totality of the circumstances test in which a jury weighs the burden which requiring the manufacturer to change the design and the need for compensation by the P, as well as any other salient factors, to determine whether or not the imposition of SPL for defective design is reasonable.

Here I think M will be able to prevail on any of these tests because the dangers aren't open and obvious, the cost of fixing the design is small, manufacturer probably should have known that using only one bolt wasn't enough, and M's need for relief is probably relatively great because he derives most of his income from the use of his hands. M should have no problem proving that the product is defective.

Once the element of proving that the product design itself was defective, M will have to prove causation. This should be relatively easy because the defective chair manufactured by the D's was the actual cause of M's injuries. Furthermore, the defective design itself, and not just the product more generally, were the part of the product that led to M's injuries. M was a foreseeable user of the chair because he was a part of the lower middle class clientele that the chair was marketed and developed for.
On the issue of proximate cause, D's may argue that it is possible that M loosened the bolts or was negligent in some other way that broke the chain and actually made the chair dangerous. M should be able to prove causation because he bought the chair new from J and there is no evidence that there were any other modifications or damage to the chair between design, production, and sale to M.

D may also argue that M assumed the risk that the product might not be as safe as others because the price was so low and that was probably a big reason he purchased that specific chair in the first place. It is probably true that M knew the chair wouldn't be of a high quality given the price he paid for it (and perhaps the reputation of MBLC and J-mart) but is unreasonable to infer that he assumed the risk that the chair might be seriously hazardous. The fact that MB's products had previously been marketed to upscale clientele and that J-mart was using her reputation for quality products to promote their own products of lesser value might cut against the assumption of the risk from a lower quality product argument.

D might further argue that the product was a "lounge chair" not a "deck chair" and that they aren't responsible for use of their products as not intended. This claim is likely to fail because it was reasonably foreseeable that a consumer of their products would use the product outdoors in the absence of any warning to the contrary.

Once M proves the above elements of his claim and proves that they should be strictly liable for the injuries he has suffered as a result of their defective design, M will be able to recover a variety of damages. He will be able to recover lost income because he was unable to perform in the magic show for 4 days equalling $4,000 dollars of lost income. He will also probably be able to recover for what I will assume was the loss of his career in hand modeling. While the facts show that he models in glove ads might lead us to find that his hands are always covered up anyway and it might not cause any detriment to his career, if this is not the case (as it certainly will not be in the case of his modeling for hand cream), and his modeling career is over, he will be able to recover on any future income he can prove to a reasonable degree. Since M is also probably vain (he is a model after all) and his hands are likely a great source of vanity to him, he may also be able to recover mental distress or hedonistic damages for this permanent, visible disfigurement. M may also argue that he is not able to play the banjo, something he loves to do, or that he is no longer able to pull bunnies out of hats and coins from behind children's ears because they are terrified of his disfigured hand. If M can show that there has been substantial damages to his ability to practice his profession in the future, he will be able to recover these damages as well. Max will also be able to recover medical expenses stemming from the surgery.

D's will probably argue that they are not liable for the portion of his medical expenses because it was covered by medical insurance. This is not the case however because the collateral source rule allows Plaintiffs to recover damages from D's how should
be liable even if they have already recovered from their insurance or other 3rd parties. To allow this collateral source of relief to cancel out some of the D's liability would make recovery on the insurance that the plaintiff has paid for, a windfall for the defendant.

2. Max v. MB (negligence)

   If M's SPL claim fails on any element then he may try and sue MB for negligent design of the chair. He will argue that there was a duty initiated when MB advertised and made financial gains from the sale of her products.

   This duty was breached when the chair broke during M's non-negligent use of the product.

   If M can prove that the single bolt design did in fact constitute negligence on the part of MB, the she may be liable for the full extent of his injuries (if we rely on the same causation argument as used in his SPL claim). This is a very weak claim on negligence however and M would be much better of pursuing his SPL claim for defective design.

3. Max v. MB, MBLC, J (negligence, res ipsa)

   M may also try and assert a claim against the D's by relying on res ipsa. Here the production of the chair and whatever negligence led to M's injuries constitutes knowledge exclusively within the control of the defendants.

   M will still have trouble with this claim because it cannot be said that the accident which occurred only can't happen in the absence of negligence. M would have to prove that he was not contributorily negligent in any way and that the failure of the chair was concrete evidence that some negligence had taken place somewhere between the design by MB and sale by J.

   If M can prove that there was a duty and negligence, causation will be easy to prove as its the same is in his SPL suit against these same defendants.

Conclusion

M has a very strong case against MB, MBLC, and J for design defect and since each of these defendants is in the chain of distribution, they should all be liable for his injuries. He will be able to recover lost income (past and any future he can prove with reasonable certainty), and any pain and suffering hedonistic damages that he can reasonably argue for.

M's negligence claims are much weaker especially on the breach claim, if he is allowed to argue res ipsa his case strengthens but this is unlikely and even if he is allowed to use res ipsa, there is no guarantee that he will be able to recover.

Question III

Jane will have a claim against Jay in negligence for his failure to save her or seek help after she fell in the water, IIED
and battery.

Jay has a defamation suit in libel against Jane's parents for the fliers they posted up all over the beach.

1. Jane(P) v. Jay(D) (negligence)

P will argue that there was a duty owed to her by D when he invited her out on a walk and invited her up onto proposal rock. They were companions in a social venture and even though this is a minority holding, the fact that D led P up onto the rock, the court is likely to find that there was duty owed.

This duty was breached when D accidentally knocked her into the water and then ran away without attempting to rescue her or seek the help of somebody else to save her. Indeed, had the life guard not seen her, she could have died in the water. P will also argue that she was knocked into the water when D failed to exercise reasonable caution and negligently knocked into her. Falling off the rock was a consequence of D's negligent failure to exercise due care when standing on top of proposal rock with P.

D will probably not argue that there was no duty but may try and argue that there was no breach of his duty towards P. D may argue that there was no duty to rescue even though he was responsible in knocking her into the water because there was no duty to rescue. Farwell v. Keaton is a minority ruling and D will argue that there was no duty to rescue here and therefore no breach when he failed to do so. D is likely to lose on this claim because he got P to come up onto the rock and there is no evidence that she would have done so without his encouragement. P probably ventured up on top of the rock because she thought her boyfriend might propose to her. The court may view this as fraudulent inducement.

D may also argue that since she had lived nearby the rock for so long and had never gone on top before because she was aware that it was dangerous, she assumed the risk of any injury which might befall her when she agree to climb on top of it. This defense might have been valid except that there is evidence that she would not have ventured on top of the rock were it not for D's entreaties and possibly misleading behavior. He knew she wanted to get engaged on top of the rock but hadn't ever gone up before (despite having what we will assume was a lifetime of opportunity to do so) and in "proposing" to her that they head up on their "special walk" he was using the hope of a proposal to lure her up only to play a trick on her.

D may further argue that he wasn't a professional swimmer and that it was not negligent of him to refuse to rescue P because the risk to himself (and possibly to her if his rescue failed) would have outweighed any benefit. D will argue that it was reasonable for him to react the way he did and that his failure to go for help was reasonable given the circumstances.

All of D's defenses are likely to fail though because he initiated the duty to P when he asked her out on the walk and to climb on top of the rock. Since he knocked her in, he probably had a duty to save her or at least go for help. His failure to do either was a breach of this duty as was his failure to exercise reasonable care when he was on top of the rock. If D clearly failed to exercise
caution reasonable to a person standing on top of a tall, slippery rock.

P will also argue that D was negligent in that he had the "last clear chance" to save P who was apparently helpless to save herself. Even if she did assume the risk by climbing onto the rock and fell in to the water through some negligence of her own, D failed to use the last clear chance to save her from the full extent of the injuries that she suffered and should be found negligent. This last clear chance argument is a good claim for negligence if the other bases fail at trial.

D's failure to exercise ordinary care towards P while they were on top of the rock as a result of his luring her up there was the actual and proximate cause her sickness and emotional distress. If D had exercised reasonable caution while the two were standing on top of the rock, she would not have been knocked into the water and suffered the injuries that she did.

Proximate cause for the full extent of P's injuries is not broken by the intervention of the off duty lifeguard because he actually mitigated the injuries that P could have suffered had she been left bobbing up and down helplessly in the surf. Therefore causation stemming from D's negligence should be relatively easy to prove.

D should be held liable for the full extent of P's injuries because they all arose out of his negligence. This includes recovery for emotional distress. Courts generally require that there be some physical impact or at least some physical manifestation of the emotional distress in order for a P to recover on such a claim. Here, P is likely to point out that her injuries resulted from contact between P and D. This should satisfy the "emotional distress parasitic to a physical injury" standard that is followed in some jurisdictions.

If this is a jurisdiction that doesn't require physical contact to recover on an emotional distress claim but still requires physical manifestations of that distress, P will still be able to prevail on her claim. She has had trouble sleeping, can't eat, cries all the time; these are generally recognized as reasonable physical manifestations of compensable emotional distress and the court will probably uphold any award for emotional distress on these facts.

2. Jane(P) v. Jay(D) (IIED)
P may argue that D is liable for intentional infliction of emotional distress because he lured her up on top of proposal rock for a sham proposal that would have been pretty emotional distressing. Since D didn't actually go through with the sham proposal she would have difficulty recovering but if we assume that she discovered the story of the "April Fools!" stone in the engagement ring box, her claim may still be justified.

D would argue that there was no intent to inflict emotional distress but rather just to play a harmless joke on her. This defense will fail however because so long as the effect of the intended act is foreseeable, lack of malicious intent is generally
not a defense. Therefore the intent element would be satisfied.

Causation might be trick because P would have to prove that the emotional distress which D intentionally inflicted on her was the direct cause of her distress and not the fact that she fell into the water and bobbed up and down for some time helplessly before she was rescued. The emotional distress is not really a divisible injury but the jury may find that at least her claims that she "will never be happy again" and even her inability to eat or sleep might be more the result of the nasty trick D played on her than they were the cause of the head cold she suffered. The divisibility of injuries is always tricky but in the case of emotional injuries it is especially so.

D will likely argue that his intent was not to inflict emotional damage on P and that there is no way to prove that this intended act proximately caused her distress because (we will assume from the facts), that her discovery of the fake proposal came not from him but from the discovery of the fake engagement ring after being advised by the bystanders to the whole scene that D had thrown something in the trash. He will argue that these other actors were superceding causes and that it was not his intent that P find out about the joke out of context like she did.

P will likely be able to prove causation because the chain wasn't broken by any of the 3rd parties that got involved.

D might well be found liable for IIED. If he is, he will be liable for compensatory damages to P but probably not punitive damages because his actions weren't wanton or reckless enough to justify such an award.

2.5. Jane(P) v. Jay(D) (battery)

P may try and argue that the contact D had with her constituted a battery because it was non-consensual and the average individual would find such contact offensive. D did grab P's hand without her consent to play the joke on her though she would be hard pressed to argue that the contact was offensive to her because D was her boyfriend and if he was making a proposal (fake or not), he probably wasn't being rough or otherwise offensive in his contact.

This claim will probably fail though because it appears that the contact which resulted in P's injury and was likely offensive or at least not consented to was merely a result of D's negligence in exercising reasonable care on top of the rock and there was no intent to make that allegedly (batterious?) offensive contact.

3. Jay(P) v. Mom and Dad(D) (defamation, libel)

P may argue that Ds are guilty of defamation because they posted the libelous fliers around the beach after the injury suffered by their daughter. P will first argue that the fliers were false and misleading and that they were harmful to his reputation. The flier implies that he is a murderer of daughters and that this harms his reputation in the community in which he lives. D may argue that he could have killed their daughter because she couldn't have saved herself in the water and it was only an act of
providence that an off duty lifeguard happened to see the whole thing and rescue her. Still even on those facts, "help us find this murderer before he murders your daughter" directly below P's picture, is probably an unreasonable statement. P is in fact not a murderer at all. Furthermore, the police are not looking for P in connection with any "crime of passion" and given the facts of the case, it is unlikely that he would ever be charged with such a crime. Therefore P should have no problem proving that the statements were false.

P will next prove that there was publication. These fliers were distributed throughout his beach neighborhood and it is safe to assume that many people saw them because they were in such a public area which we will assume receives heavy traffic. D probably doesn't have any defense to this element.

P will also have to prove that the statements made in the flier are "of and about" him. Since there are several pictures of P and only P on the flier and the language about murdering is not qualified in any way. A reasonable viewer would almost certainly understand that the representations made on the flier were about P. D may argue that the text doesn't mention P's name but this argument is likely to fail because there are only pictures of P on the flier and the words "this murder" and "this man" are clearly supposed to (or at least would reasonably understood to the average viewer), refer to P. P will prevail on this element. The fact that the number on the flier also contained the number 713(policehelp) probably lent some credibility to the representations in the fliers because the average view might think that the flier had been published by the police and not some less credible private citizen.

Because the statements suggested that Jay had been involved in criminal activity, the courts would probably view them as libelous per se and award general damages.

If P is successful in bringing his libel suit against D's because they distributed a libelous statement to the public which was clearly of and about the P and which contained false misrepresentations of him. D may argue that they have a 1st amendment protection to their freedom of speech but in libel cases this protection rarely applies to malicious comments about private individuals. There is no evidence that P is in any way a public figure, the critiques of which should be protected as freedom of speech.
QUESTION #1

To facilitate reading of this essay, I will refer to Manny's lawsuits as (M), with the understanding that his estate will bring them on his behalf.

Dispute #1: Manny v. Walstore: Manny brings a suit against Walstore for negligence

In order to win on a negligence lawsuit, Manny must prove: (1) duty, (2) breach of duty (negligence), (3) causation and (4) damages.

In order to establish that Walstore ("W") owes him a duty, Manny will cite the special relationship that businesses owe to their customers. Businesses owe a general duty of care to prevent foreseeable harm to their customers. There are four different possible ways for the court to decide whether or not the harm was foreseeable. First, the most narrow construction of the foreseeable duty here is the specific harm test. Manny will encourage the court not to look at this test because it only holds W owes Manny a duty if the store is directly aware of a danger about to occur. Manny will encourage the court to move on to the prior similar incidents test to determine the foreseeability of the danger. If Manny's statement before entering the store regarding Walstore's "Thanksgiving event" is true, then Manny can argue that a customer death by trampling already occurred at another W store, thus putting W "on notice" of the danger. W will counter that the specific incidents test should be construed narrowly, perhaps applying only to the specific location, not any W store. Manny can then argue the court should defer to the totality of the circumstances test, which takes into account prior incidents, the mood of the crown, in effect, all the circumstances of that morning, to decide whether the harm was foreseeable. Manny has a good argument with this test, although W will voice the recurring criticism that the test is too broad and sets different standards for each store, failing to apply a uniform duty. W might prefer to argue the final balancing test, which, following Learned's Hand reasoning, asks the court to balance the burden of imposing a duty against other factors, like the likelihood of an accident. Relying on the Posecari case, Manny has a good argument that the trampling accident was much more foreseeable than a parking lot robbery, given that one had happened recently, at Thanksgiving. The court will likely find that W owes Manny a duty as a patron of the store to prevent reasonably foreseeable harm from occurring. W may give one last try arguing Gipson v. Kasey to say that, at least in AZ since 2007, courts not longer look at foreseeability to determine duty. But, given that the court in Gipson was a proponent of construing duty based on categories, the business to patron special relationship will likely still satisfy the court.

If Manny establishes the duty element, he must move on to prove that W violated the standard of care, thereby resulting in breach. In general, the standard of care is that of a reasonable person. In Byrne v. Boadle, the courts also looked at the "facility of protection" as a way to construe the standard of care. That is,
if a harm is easily preventable, the court could find W had a duty to use reasonable care to prevent it. Here, Manny can argue that W could have easily prevented his death by making people line up outside single-file, or take numbers to provide some kind of order to the volatile crowd. W can try to fall back on the custom argument to say that stores with a single entrance simply allow all shoppers to make a mad rush for the items. However, Manny can argue using Klein that the custom is subject to change and W should be found negligent for not updating its method of allowing customers to enter the store, especially given the recent accident at Thanksgiving.

In order to prove causation, Manny must prove both cause-in-fact and proximate cause. In order to prove cause-in-fact, Manny must argue that "but for W's negligence in failing to make people enter the store in an orderly fashion, the trampling wouldn't have occurred." However, W can argue that, given that Harry actually tackled Manny inside, W's changing the entrance wouldn't have made a difference. But, Manny can also prove actual cause by arguing the substantial factor. If the State of Utopia is inclined to follow either Cardozo in NY or Traynor in CA, Manny can argue that W's failure to control the crowd was a substantial factor leading to his accident and that that permits an inference which is enough to satisfy cause-in-fact. As long as Manny can show that (1) W's action (or inaction here) was a but for cause of his injury, (2) it was proximate to the injury and (3) it was causally linked to the harm, the courts could allow Manny to establish cause in fact (Zuchowicz). However, W will argue, relying on Utica College, that courts have moved away from allowing inferences to establish actual cause. W can cite the old proposition post hoc, ergo propter hoc, and the Wolf case to argue that succession in time (like finding a man injured at the foot of the stairs) doesn't necessarily imply causation, and here, just because the crown entered wildly doesn't mean the store was responsible for the trampling. Manny can retort with the Hinman case, where the courts allowed inferences if the harm that resulted can be commonly inferred from the circumstances.

Though Manny may be able to prove cause-in-fact, his argument may falter somewhat on the proximate cause issue. Proximate cause can be proved in one of two ways, either through the old argument of direct causation or through foreseeability. Direct causation, which came to fruition in the Polemis and Wagon Mound II cases, allows a plaintiff to establish proximate cause so long as the harm that resulted is directly traceable to the act, no matter how far-fetched or attenuated the connection. This argument works well for Manny. The foreseeability method of determining proximate cause however, which is now preferred, gives Manny more trouble. As Cardozo said in Palsgraf, "negligence in the air, so to speak, will not do." The court here will examine the extent and manner/mechanism of the harm, which need not be foreseeable, as well as the type of harm and the victim, which must be foreseeable. Here, Manny will argue that the type of harm/injury was foreseeable because of the trampling that occurred at W's other store. Indeed, this may be enough to convince the court. W will try to argue that Manny, a man with a loud voice (perhaps a bigger guy, facts don't say) might not be the foreseeable victim, which are probably women or children. Manny can also say that manner (the trampling) and the extent (death) are foreseeable,
given that an identical incident occurred recently. W's only argument is that Ray's pushing Manny to the floor was a superseding, intervening cause, breaking the chain of causation. Restatement 2nd of Torts § 442 states that a defendant will only be relieved of liability if the intervening cause is (1) intentionally caused by a third party or (2) is outside the scope of risk created by D's action. While Ray's act against Manny was intentional, the court will probably still find it was the same risk which made W's actions (inaction) negligent in the first place. Citing Hoboe's Hollow, Manny can argue that Ray pushing him to the ground resulting in his getting trampled, which was the same harm within the scope of risk created by W's negligence. Finally, given that recurrence of these trampling deaths every holiday season, it is likely the court will want to extend liability to W, a big department store, since they are best able to bear the costs and prevent the danger to the consumer.

Moving on to damages, Manny has clear injury here: death. He can likely recover compensatory damages for lost wages, lost life, etc. These are special damages which must be pled with specificity. Further, the court will likely wish to deter future cases and may even wish to punish the store, so Manny's estate could even argue for punitive damages, but they are unlikely given that malice (something beyond negligence) must be shown. However, given that W was on notice from past incidents in its other stores, the court could consider punitive damages a viable option. Looking to Gore v. BMW, the court would have to consider (1) reprehensibility, (2) proportionality, and (3) disparity. Within the reprehensibility, the court looks at past occurrences (as it did in the Taylor drunk driving case), whether physical harm results, and whether the court thinks something beyond compensatory damages is needed. The court would have to examine the disparity issue, given the lack of precedent on this issue. On the proportionality, the court will simply not want to allow the amount of punitive damages to surpass the compensatory damages by a huge ration (although 1:526 was upheld in the TXO case). In addition, in the past some courts have employed punitive damages when the accidents are recurrent and it is unlikely claims will be brought each time. Based on whether or not a case is pending before the court with regards to the Thanksgiving incident, the court may want to use Manny's death as an opportunity to make a statement (although W will argue the Philip Morris case hoping the court won't use a single opportunity to publish for state-wide or nation-wide activities). Given the types of cases where punitive damages have been imposed in the past (Gore for acid rain damage!) it is certainly within the courts discretion to consider punitive damages.

**Dispute #2: Manny v. Ray: Manny brings a suit against Ray for negligence**

As listed above, Manny must prove duty, breach of duty, causation and damages.

Manny can try to establish a duty running between R and himself by arguing the commenced rescue rule. Citing Farwell v. Keaton, Manny can argue that duty established because, while there was no duty initially obligating Ray to rescue Manny, once Ray
commenced the rescue, he had the duty to see Manny to the end, to make sure he got help. Given the similarities of the cases, and the fact that there is past precedent relating to crashing ambulances not negating the duty, it is likely Manny can establish duty here.

The standard of care is that of a reasonable person. Here, Manny can argue that might have included not accepting a job as a security guard if one is not trained or that it would have involved making sure an ambulance would be able to arrive. Although Ray might not have done anything differently than a normal person would have done, given that he commenced a rescue, he breached in that he did not ensure Manny made it safely to the hospital.

On the causation issue, Ray has some good arguments on both but for/actual cause and proximate cause. Manny will try to argue that but for Ray exacerbating his injuries and failing to get him to a hospital on time, he would not be dead. Ray can counter that the injuries Manny sustained under the feet of the crowd would already have killed him. However, in arguing proximate cause, Manny can argue the eggshell plaintiff rule, that is, a defendant takes his plaintiff as he finds him. Citing Benn v. Thomas, Manny can point out that his injuries didn't negate Ray's cause of his death. Further, Manny can point to the medical aggravation rule and cite to the Stoelerson case, arguing that Ray should be liable for exacerbating his injuries. However, here the court may wish to step in and choose to step in. For example, Utopia could have some kind of legislation like a good Samaritan statute making those who voluntarily give aid not liable for the results if the attempt to save the person don't go as hoped. For example, just as Vermont does for doctors, Utopia may wish to encourage ordinary citizens to aid others in distress, and so not hold Ray liable. Further, Ray can argue that, as a rescuer, he did not cause the injuries. Given that courts accept Cardozo's axiom that "danger invites rescue," a rescuer is an exception to proximate cause, because they are foreseeable. Thus, the courts will likely not find Ray negligent here.

**Dispute #3: Manny v. Ray: Manny brings suit against Ray for the intentional tort of battery.**

Battery is the intentional infliction of harmful or offensive bodily contact or the intent to commit assault which indirectly or directly results in contract. While it seems strange to sue Ray for battery, given that Ray "saved" Manny from the crowd, Manny can argue that Ray's method of saving him actually exacerbated his injuries. Ray must establish (1) act, (2) intent, and (3) causation.

Intent is established if D either intended the consequences of his action or knew with substantial certainty that they were likely to result (Garrett). Thus, though Ray did not intend to hurt Manny further, he did intend to touch him. Harmful or offensive bodily contact is that which harms or offends the reasonable person not unduly sensitive as to his personal dignity (Wishnastsky). Here, given the autopsy report, which shows Manny's cause of death as neck being pulled away from shoulders, Manny can likely prove that Ray caused the harmful contact, given that Ray dragged him out of the crowd by his shoulders. Thus, though Ray did not intend to harm
Manny, it does not matter: he intended to make contact, and the contact was harmful. Thus, should he want to bring it, Manny has a good case for battery against Ray.

Ray, however, has one defense worth raising, that of consent. Consent can be express or implied. Implied consent can be either implied in fact or implied in law. Here, Ray has a good argument for a defense based on consent applied in law. Consent is implied in law in emergency situations when a plaintiff is (1) unconscious or otherwise unable to give consent, (2) when a reasonable person would consent to being aided (3) and when no manifestation is made of objection to D's acts. Here, Manny was apparently cognizant for a time after Ray rescued him because he pointed to Mickey and Minnie, thus, he had an opportunity to object to Ray's efforts to stabilize him, and did not do so. Thus, consent will probably get Ray off the hook here if Manny brings a battery suit.

Of course further, Manny's estate might not wish to bring this suit, given that Ray was the one person trying to help Manny and Ray, a poor college student, and is pretty clearly insolvent.

Dispute #4: Manny v. Harry and Sally for the intentional torts of battery, assault and the intentional infliction of emotional distress

As discussed above, battery is the intentional infliction of harmful or offensive bodily contact. Here, Manny's best case is against Harry for battery. Harry grabbed Manny's arm "intending to slow him down." Because intent is either a desire for the consequences to occur or knowledge that the consequences are substantially certain to occur, it is clear that Manny can establish Harry's intent here. Harry intended to make contact and to slow Manny down. Harry can try to argue that he didn't intend for Manny to fall to the floor, but relying on Garret, Manny shouldn't have much trouble establishing the intent to make contact with Harry when he grabbed him. Given that both men were racing at top speed towards the laptops, Manny's contact with the floor was substantially certain to result. Further, just about any person not unduly sensitive as to his dignity would find Harry's action offensive. These are adults entering a store to buy laptops. Citing the Barry Pontiac-Buick case, Manny has a strong claim for battery against Harry.

Assault is an intentional act of a threatening nature or a threat to cause bodily injury that results in a plaintiff's reasonable apprehension of imminent bodily contact. Manny has a case for assault against both H & S, since both told him "you better stay out of our way after the doors open." In general, words alone do not constitute an assault, but they can if they are offered in conjunction with actions. Manny's case is a little weak here, given that H&S will contend that they were clearly joking, but given the circumstances and Manny's mention of the prior store incident, Manny may have been placed in reasonable apprehension of imminent bodily contact. He need not even have felt fear, only that unwanted bodily contact was likely to result. Further, if tried together, the fact that battery actually did result will likely serve to show that Manny had reasonable fear of imminent bodily contact, so his claim, at least the one against Harry, may succeed.
Harry may try to make some rather lame defenses of either protection or property (which fails because laptop wasn't his yet!) or self-defense (does not work because Manny was never an aggressor), but the court will likely find Harry liable for both assault and battery. Further, Manny never consented to any such touching or threats because it was outside the scope of the normal activity of purchasing a laptop. Harry can argue that rowdy crowds are to be expected and Manny started running/racing him to the laptop section, but Manny did not consent to being thrown to the floor/tripped. Manny's case against Harry for battery and assault remains strong.

It should also be noted, that because Harry caused Manny to fall to the floor, he will likely be held liable for the extent of Manny's injuries (including his death). The eggshell plaintiff rule still applies, so just as a kid playfully kicking a classmate in the school room was liable when the boy's shin shattered, so Harry will be held liable for the extent of Manny's injuries.

The intentional infliction of emotional distress is the intentional infliction, by reckless or outrageous conduct, or extreme emotional or mental distress, even in the absence of physical harm. Here, Manny had the physical harm to boot! Manny's strongest case is once again against Harry, as Harry likely intended to cause Manny emotional distress in knocking him to the ground and beating him to the laptop aisle. However, unless the action makes the jury exclaim "outrageous," courts will usually not find IIED. However, given the circumstances surrounding Harry's action (the rampaging crowd), Manny should at least raise the claim.

**Dispute #5: Manny v. Harry and Sally for negligence**

Manny will attempt to establish duty through the innocent causation rule. Rest. 2nd of Torts § 40 states that one whose action, even if non-tortious, causes a continuing risk of physical harm to another acquires a duty to use reasonable care to prevent or minimize the harm. Manny will claim that Harry's action (pulling his elbow) resulting in Manny falling to the ground, thus Harry had a duty to help Manny get up. Citing Galindo v Town of Clarkstown (even though P lost on a property rights technicality), Manny has a strong argument that Harry acquired a duty towards him.

If the court finds a duty, Manny will have to show breach of duty. Here, the standard of care is likely a reasonable person stopping to help Manny get back up. Harry did not do this, so Manny has a strong case for breach.

Causation: actual cause is clearly met. But for Harry's pulling his elbow, Manny would not have fallen to the floor and been squashed. Proximate cause: Harry will argue the hundreds of charging shoppers were superseding intervening causes, however given that the harm that resulted (trampling) was within the scope of risk which made Harry's actions negligent in the first place, the court can still find proximate cause. Harry will argue Doe v Manheimer, Manny will win on Hoboe's Hollow.

**Dispute #7: Micky and Minnie v. Bob for the intentional tort of false imprisonment**
A defendant falsely imprisons a plaintiff if he (1) acts intending to confine the plaintiff to a bounded area fixed by D, (2) his actions result in such confinement, and (3) P is conscious of the confinement or harmed by it.

Here, in contrast to *Lopez v. Windell's Donuts*, M&M have a good case of FI against Bob. Their claim is more comparable to the woman who placed the wrong sticker on the shoebox. Here, M&M can prove the type of FI known as false arrest, which is arrest under the color of legal authority when Bob (1) asserted legal authority (wearing police man's uniform), (2) they believed him (which they did by entering room) (3) and relied on that to their detriment (hold-up in time, possible mistaken prosecution), and (4) and Bob had no legal authority for the detention. Bob will claim that he had reason to suspect them for causing harm to Manny, given that Manny pointed to them. However, Bob should not have been wearing a police uniform (giving false impression as to authority) and could have asked them to wait rather than detaining them. Further, given that Manny's accident was unrelated to the security of the store, Walstore and Bob had no reason to investigate M&M under the shopkeeper's privilege, given that they weren't suspected of stealing from the store.

In sum, M&M have a very strong claim for false imprisonment.

**Dispute #10: Manny v. Walstore under the theory of vicarious liability**

Vicarious liability holds a superior party (usually an employer) liable for the actions of its subordinate (usually employee) based solely on the relationship between the two. Here, Manny can try to bring suit against W based on the actions of Ray and Bob.

It should be noted that, if the underlying employee's action is not found actionable, the store cannot be held vicariously liable. Thus, because above we've concluded it's unlikely the courts will find Ray liable in any suite Manny brings against him, it may be better to focus on Bob's actions.

The doctrine of respondeat superior is essentially vicarious liability applied to employers/employees. An employer is vicariously liable for the actionable conduct of its employees, either negligent or intentional, if the employee's actions are carried out within the scope of employment. Looking to *Christensen v. Swanson* and the *Birkner* factors, a plaintiff will have to show that an employee was (1) performing acts for which he/she was hired, (2) within the time and spatial areas of the workplace, and (3) the actions were in furtherance of the employer's interests.

Given that Manny's claims against Ray are weak, it might actually better for Minnie and Micky to sue W under respondeat superior for the actions of Bob in arresting them. They can argue that W should be vicariously liable for their false imprisonment given that he was performing store duties (unless W can prove he was not supposed to take customers into custody) during store's open hours, and Bob will claim he was acting in furtherance of W's goals (store safety). Further, M&M can argue that W should be liable under the theory of apparent agency (citing *Roessler v. Novak*) given that the purported principal (W) allowed Bob to work in his old
policeman's uniform, thereby resulting in M&M's detrimental reliance as to his authority which led to their false arrest.

QUESTION 2:

Dispute #1: Max v. Martha Blueart for strict products liability

Max should bring a strict products liability lawsuit against MB for manufacturing defect, design defect, and defective warning. Unlike negligence, in strict products liability duty and breach elements are replaced with the questions: (1) Did D supply the product to P? (replaces duty) and (2) Was the product defective? (replaces breach). Causation and damages must also be proven.

Here, Max will not have any trouble proving that MB supplied him the product. Citing the Planter’s case, Max can show that any foreseeable user/consumer of the product is adequate to establish that a defendant supplied the product. Further, given that Max is the actual purchaser of the product (and not a mere bystander, who would also be allowed to recover as per Elmore), Max has no difficulty on the first element.

Manufacturing defect

A manufacturer incurs an absolute liability if it places a product on the market, knowing it is to be used without inspection, and the product is defective and causes injury. Here, though, MB likely will say that the chair performed as it was supposed to perform and was no different than any other chair sold from her line. Thus, Max should move on to his design defect case, which is probably his strongest.

Design Defect

The real issue in Max's products liability lawsuit will be on proving that the second element, that the product was defective. There are five ways for Max to try to achieve this.

First, the oldest, and now practically defunct test, is from Restatement 2nd Torts § 402A, which states extends liability for a design that is a defective condition unreasonably dangerous. The main criticism of this tests is that it "rings of negligence" given that the word (un)reasonably appears in the test, which courts tend to shy away from in products liability.

Max can also argue the consumer expectations tests. Under the consumer expectations test, a design is defective if ordinary knowledge as to the product's characteristics permits an inference that the product does not perform as it should. Here, Max may be able to rely on this test (despite the fact that the PL Restatement 3rd relegates it to the area of food only), given that consumers have pretty standard expectations for chairs. The limitations of this test are that no expert testimony can be prevented, and proof of the design defect must stem solely from the ordinary knowledge of the jurors. Here, MB could assert the defense that Max was somehow misusing the product, although dragging a chair across the deck does not seem like misuse. Further, while courts only like to deem products defective if there is injury stemming from their intended use (Barker v. Lull Engineering), courts in the past have held that manufacturers/suppliers of products must anticipate foreseeable
misuse. Thus, chairs are often used as ladders, screwdrivers as can-openers, etc. Ultimately, foreseeable misuse is not even a defense (Lugo case, boy throws action figure shield, as seen on tv). Further, MB's defense of misuse does not hold weight in the first place, given that moving a chair from one spot to the other cannot readily be classified as misuse.

However, if Max decides he needs to present expert testimony as to the structure of a chair, he will have to move on to the risk/benefit analysis (Soule case), which states that a product is defective if the design presents an excessive preventable danger UNLESS the benefit of the product outweighs the risk. Here, the court will examine the Ortho factors, looking at (1) the overall usability/desirability of the product, (2) whether a substitute product exists, (3) the safety aspects of the product, (3) whether the manufacturer can prevent the danger, (4) whether the manufacturer can prevent the danger, (5) whether the consumer is aware of the risk, and (6) whether the risk can be prevented with the use of due care. Here, the court will likely find that, given the magnitude of lounge chairs on the market, there is no need for a defective one to be on the market. Further, MB can easily prevent the danger by adding a second bolt to the leg. Further, Max's actions were not negligent, nor did he have any reason to suspect a defect in the product initially.

The reasonable alternative design test is often discussed in conjunction with the risk/benefit analysis. If there is a reasonable alternative design on the market, this can provide further weight to Max's argument that MB should be held liable for the defective design. Here, there IS a RAD on the market, many of them (all other chairs)! In fact, there is even a RAD within MB's own line, given that she just came out with a new model which has two bolts. Given that this is strong evidence that MB was aware of the defective design, the court should give weight to the RAD argument. As discussed below, this is also evidence MD should have recalled the defective chair.

If the court likes the RAD argument, it can also look to the Products Liability Restatement 3rd (1998), which states that a product is defective if a reasonable alternative design is on the market and it is unreasonable for D not to adopt it.

There are no facts to suggest that Max in any way modified the chair (which would be a defense, even if modification was foreseeable, as per Jones v. Ryobi). As discussed above, MB has no defense in citing any misuse of the chair. MB may also argue that Max assumed the risk in purchasing a cheap chair from J-Mart. She will say if he wanted a good chair he should have purchased from her expensive line at Neiman Marcus. MB will say Max, a "lower middle class client" should have lower middle class expectations as to quality. The court will not like this argument and will likely not find that any assumption of the risk bars Max's claim. Strict liability seeks to hold manufacturers liable because they can best bear the burden and so as to encourage product testing and quality control. Now that we are almost in 2009, the court will likely remain unconvinced by anyone that tries to argue a defective chair design is acceptable to put on the market.

Defective Warning
In general, no warning is needed for open and obvious dangers, but here, a collapsing chair is neither expected nor obvious. Thus, Max can also claim the product required a warning of the danger associated with it and MB should be liable for failure to warn.

Here, it is unclear whether the chair contained any warning at all. It seems it did not, and MB will vehemently argue that this case is like the tequila case or the men riding in the back of a truck case: no duty to warn when danger obvious. Max has a very strong argument though that the danger of sitting in a chair is not readily apparent to a consumer.

In general, a warning must adequately convey any dangerous consequences that may result from use/misuse of the product (Hood v. Ryobi). In order to evaluate the adequacy of a warning, courts look at the factors set forth in Pittman v. Upjohn and thus will evaluate (1) if the warning adequately indicates the scope of the danger, (2) communicates the extent of the danger, (3) including the consequences that might occur, (4) the physical aspect of the warning, and (5) the way in which the warning is presented.

MB will likely raise two defenses here. First, taking into account the heeding presumption, the onus is on MB to show that Max would not have followed instructions/warning had they been given. This is very difficult for MB to prove, especially given that there was no warning at all. It is likely Max can convince the court he would have followed a warning regarding the collapsible qualities of the chair or refrained from buying the chair at all.

Second, MB will argue the state of the art, or hindsight, defense. As stated in the Bexter Healthcare case, a manufacturer has no duty to warn of dangers that are not foreseeable at the time of sale or readily discoverable through research. Thus, MB will argue that it did not know the chair would collapse. Max will certainly seek, through discovery, past incidents of the chair collapsing and will also argue, using Lovick v. Wil-Rich, that MB had a continuing duty to warn if (1) the danger the product presented was great, (2) the consumers were identifiable, and (3) the burden of warning was less than the danger risked. Here, given that a new product was placed on the market with two bolts, Max has a good argument that MB failed to provide an adequate warning of the products flaws.

There could be an argument about expert testimony (as MA requires) vs. generally accepted best knowledge in the field (as FL requires), but such a discussion of experts will likely not be necessary given that a chair is a simple product.

Dispute #2: Max v. Martha Blueart for negligence

Max should also bring a negligence lawsuit against MB for negligence related to the design and sale of the chair. He will have to prove duty, breach, causation, and damages. Here, the lawsuit will focus on MB's conduct, rather than on the product.

He will argue that everyone has a duty not to harm others, and that businesses have a duty not to harm their patrons.

He will argue that MB should not have designed and marketed a chair that collapses, and court will likely find this convincing.

Here, MB will have a stronger causation argument, the court may decide that, while the chair was the actual cause of Max's injuries, it may not, as a policy decision, wish to extend liability
to MB. MB can argue that the type of injury (which, along with the victim, must be foreseeable as opposed to the extend and manner which need not be) was not foreseeable. If a chair collapses one might anticipate a bruised tailbone, but not necessarily a finger to be cut-off. MB can argue using the Darby (Weil's disease case), that the type was not what was created within the scope of risk.

Max can also seek to prove his negligence case relying on res ipsa loquitur, which states that a D is liable for P's injury if (1) the accident does not occur in the absence of negligence, (2) the object was within the exclusive control of D (here MB), and (3) there was no contributory negligence on Max's part. Here, citing Byrne v. Boadle, Max can argue that, just as barrels do not of their own volition fly through the sky, so chairs do not generally collapse. Here, Max has a good argument, but MB will try to place the blame on J-Mart and argue that the chair left MB's control when it went to the retailer. But, relying on Summers v. Tice, the court could conceivably hold both manufacturer and retailer liable.

Further, Max's res ipsa argument is strong given that he did nothing contributorily negligent. Further, the court will like the policy behind res ipsa here, as res ipsa seeks to place the burden of paying for the injury on those who can best bear the cost (here, the manufacturer). However, the facts do not say where Max lives thus, if it is a state like CA, Max will be lucky and res ipsa will operate as a presumption of negligence, meaning if MB doesn't rebut it he will win his case. If he lives in a state like NY or FL, res ipsa will operate as an inference, which will serve to get him to the jury, but he will still have to prove causation and damages.

A word on damages here: Because of the egg-shell plaintiff rule, Max will definitely want to bring this negligence claim because he will be able to recover significantly more damages. Max, like a professional athlete, has been injured in a way that affects him more given his line of work than it might the average chair consumer. Because he relies on his hands in so much of his modeling and magician work, Max should be able to recover quite a bit for compensatory damages and lost earnings (special damages which must be pled with specificity). He can likely recover the $20,000 not covered by his insurance and should also try to recover pain and suffering damages. Max should also try for pain and suffering, given that his insurance company will likely try, through subrogation, to get the $80,000 back from whatever he recovers to compensate them for what they paid out for his medical bills. The collateral source rule may also come up here, as Max's surgeries were essentially paid for by insurance. But, will depend on if CSR is allowed in the state, also policy rationale is that Max should still recover a lot, despite MB's likely argument of double recovery, so the tortfeasor won't be rewarded.

**Dispute #3: Max v. J-Mart for strict products liability**

Since the Vandermark case made retailers liable as well as manufacturers in products liability lawsuits, Max's case against J-Mart will be essentially the same as his case against Martha Blueart. Therefore, please refer to the arguments made in Dispute #1. Because J-Mart is a usual seller of goods, Max can bring all of his strict products liability lawsuits against J-Mart and will have
the same probabilities of success discussed above.

**Dispute #4: Max v. J-Mart for negligence.**

Max's negligence case against J-Mart will be much like the negligence case against MB, discussed above, except the cause against MB is likely stronger, given that in negligence the focus is on the conduct, and J-Mart did not do much here, apart from distribute. Here we see why strict liability is so good for plaintiffs, it allows Max to recover against J-Mart where a mere negligence case might be tougher for him to prove.

**QUESTION #3**

**Dispute #1: Jane v. Jay for intentional tort of battery**

Battery is the intentional infliction of harmful or offensive bodily contact. Intent is either the desire that the consequences result or knowledge that they are substantially certain to result. Here, Jane will try to claim battery based on Jay's pushing her into the ocean. Here, Jay did touch Jane and turn her around and he did make contact with her, however the contact was seemingly accidental and a result of his clumsiness. However, given that he took her onto the rock and actually did make the contact, the court may likely find the requisite intent. Harmful or offensive bodily contact is that which offends a reasonable person not unduly sensitive as to his or her dignities. Here, the contact (pushing her into the ocean) was clearly harmful.

Also, Jane should argue that the intent to commit assault that indirectly or directly results in harmful contact suffices as intent for battery. Here, while Jay may not have intended to knock Jane into the ocean, she may be able to show he created in her the apprehension of imminent bodily harm, given that she was afraid of heights. His initial method of getting her onto the rock was not much of a threat, Jay will argue.

Because contact was made and harmful contact resulted, Jay will try to raise the defense of consent. Jane will argue that, while she did consent to climbing the rock, she his actions (knocking her into the water) exceeded the scope of her consent. This is likely the case, as she did not consent to nor anticipate being pushed into the water.

**Dispute #2: Jane v. Jay for intentional infliction of emotional distress**

IIED is the intentional infliction, by outrageous means, of extensive mental or emotional distress, even absent physical injury. Here, given that it was April Fool's, the court may not be persuaded that Jay's actions were truly outrageous, as they certainly did not rise to the level of the *Womack* case. However, given what Jane was expecting, perhaps a jury dominated by women could potentially find that Jane asserted enough to claim IIED.

**Dispute #3: Jane v. Jay for negligence based on theory of innocent causation and negligent misrepresentation**

In order to prove negligence, Jane must establish duty, breach of duty, causation and damages.
Jane can establish duty through Restatement 3rd of Torts §40, arguing innocent causation, which states that D, if his actions, even if non-tortious, create a continuing risk of physical harm acquires a duty to use reasonable care to prevent or minimize the risk of harm. Here, Jay fell and caused Jane to fall into the ocean. Citing Galindo v. Clarkstown analysis, Jane can argue that Jay acquired a duty to minimize the harm. She was screaming in the water and afraid, thus Jay had the duty to save her, and mitigate the consequences of the harm he caused.

Jane will argue breach of duty, given that the standard of care would have required a reasonable person to go assist Jane. Jay failed to do so, but instead ran away, much like Farwell v. Keaton. Thus, the court will likely find that Jay breached the duty.

Finally, on the causation, Jane must prove actual cause and proximate cause. Jane should not have much trouble on the cause-in-fact, given that but for Jay's pushing her into the water, she would not have gotten a head-cold or had to stay in the hospital. Also, on proximate cause, the court will analyze the extent and manner of the injuries (which need not be foreseeable) as well as the type and victim (which need be foreseeable). Because Jane was the only foreseeable victim of Jay's failure to aid her and because a cold is a common injury from exposure to ocean water, Jane can also establish causation.

Her injury, her illness, is also readily apparent. Her emotional injury will be discussed below. Jay will try to claim that Jane assumed the risk in climbing on the rock. Assumption of the risk must be knowing and voluntary. While Jane voluntarily climbed on the rock, knowing it was slippery, she did not anticipate Jay would crash into her and push her off. However, a court will potentially buy Jay's argument that she assumed the risk, given that it was common knowledge the rock was slippery and falling off obviously means falling into the ocean. Jay can cite to Knight for danger inherent in an activity (drawing a parallel between "rock climbing" and playing a sport like touch football).

Jane should also bring a claim against Jay for negligent misrepresentation. Restatement § 311 states that a defendant is liable for the harm resulting from his providing false information which a plaintiff reasonably relied on. Here, given Jane's knowledge of Proposal rock and its purpose (to be proposed to!), Jane can argue she only agreed to go up on the rock because she believed Jay was going to propose to her. Thus, when the police found the rock in the jewelry box instead of the ring, it is clear that Jay never intended to propose to Jane. Jane relied on Jay's misrepresentation to her detriment, given that she suffered multiple physical and emotional injuries as a result of going up on the rock. Jane likely has a strong case for negligent misrepresentation (and can rely on Randi v. Muroc Joint School District)

Dispute #4: Jane v. Jay for negligent infliction of emotional distress

Historically, courts have been hesitant to allow plaintiffs to recover on NIED cases. Courts much prefer intentional infliction of emotional distress claims. Thus, although Jane was the clear victim in this case, she will face difficulty recovering for her ED, given
that the majority of her injuries are emotional. It would be easier if her ED was parasitic to a severe physical injury.

Traditionally, no recovery was allowed for these types of claims. But, with *Falzone v. Busch* the court allowed recovery when the plaintiff was at fear for her own life and the fear manifested itself in physical symptoms. Here, Jane was the victim, as the harm (falling into the water) was aimed at her. Thus, she is more like the *Falzone v. Busch* case than a case where she is merely an observer of the harm to another person. If the State of Sunshine adopts the Zone of Danger test, like in NY, Jane may be able to recover for her ED. Under the Zone of Danger test, she must have exposure to the danger, she must have identifiable, objectively discernable symptoms and the court should want, for policy reasons, to allow recovery. Jane will probably not recover here.

First of all, the court will likely find that Jane's symptoms are not severe enough. In the *Sullivan* case, where a women watched their house burn down, the court showed just how picky it can be in analyzing the symptoms. Thus, the court explained that headaches would only suffice if they were sustained over a lengthy period of time and vomiting was a "transient reaction" to the stress, not evidence of severed emotional distress. Thus, while Jane suffers from insomnia and loss of appetite, the court may not find this severe enough.

Ultimately, the court will probably reject Jane's claim for NIED for policy reasons. As evidenced in the *McDermott* case and the history of criminal conversation cases, courts do not like to intervene in cases related to amorous relationships or marital affairs. Thus, the court will likely find that Jane's ED really only stems from her break-up with Jay and her failed expectations, not from fear of falling into the water or time spent in the hospital. This makes it much less physical from the court's perspective, and the court will stick to its policy position that the law should not intervene in the personal relationships of husband/wife, boyfriend/girlfriend, etc. Courts have often held that it is not the role of law to seek to rectify such relationships and the court will likely here also seek to avoid entering that sphere.

Jane's parents may try to bring a claim for negligent infliction of emotional distress as well, but for them to do so would be over-reaching. Of course, they can try to claim that seeking Jane in the hospital and so hurt caused them emotional distress. Looking to *Portee v Jaffee* and the *Dillon* factors, the court will look at (1) direct observance, (2) physical proximity, (3) closeness of relationship, and (4) severity of the symptoms. From the facts, it appears the parents arrived after the fact, so #1 and 2 are not met, and, while they are parents like the mother in *Portee*, Jane's symptoms are not severe enough for them to recover.

**Dispute #5: Jay v. Parents for defamation**

Common law defamation requires a plaintiff to prove (1) a defamatory statement, (2) of and concerning the plaintiff, (3) which is published, (4) resulting in damages. Here, Jay will try to claim that the parents' published flyers constituted common law defamation.

A defamatory statement is one which is injurious to the
reputation of the plaintiff and/or causes him to be lowered in the
good will or estimation in the eye's of others. Here, Jay will claim
that the statement was injurious to his reputation given that it
accused him of being a murderer, which is a construction of the
events far beyond what actually occurred.

The "of and concerning" requirement is met because the flyer
includes Jay's picture, Jay will be able to establish that it is
clearly of and concerning him.

Flyers will constitute publication, though the Parents will
argue it was not published in a newspaper. Nonetheless, the
defamatory statement did arrive to an audience of more than one
person (given that it was posted everywhere around town), thus the
publication requirement is met.

As to the damages, Jay will likely argue that his reputation
was tarnished in the eyes of his peers and certainly in any future
lady prospects.

Relying on the Romaine case, Jay can argue the flyer
constitutes defamation. However, given that there the court found
that implications of criminality do not constitute defamation as a
matter of law, Jay may have to overcome such precedent. However,
given that here the flyer is solely for that purpose of making him
look like a criminal (unlike Romaine which was just one sentence in
a long book), the court may be convinced it was defamatory.

However, in defamation cases the courts frequently award
nominal damages of $1, so Jay might not get much in return for the
effort of bringing a lawsuit.