The 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.

Write your examination number in the blank on the top of this page. If you are handwriting your examination, write your examination number on the cover of each of your bluebooks. If you are using the computer, write your examination number on each diskette and at the beginning of your response to each question. At the end of the exam, you MUST turn in the examination along with your answers. 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. You have an extra 30 minutes to use at your discretion.

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.

If you write your exam, use one side of a page only, and skip lines. If you type, double space, and leave wide margins.

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: _________________________________
In November 2003, Polly and Harry went to Wizardland because they liked to ride the rides. First they went to the Indiana Jones Adventure, then to the snow-covered Mount Everest and then to Space Mountain. Next came their favorite, the Big Thunder Mountain Railroad, a train-style roller coaster. Big Thunder Mountain takes people on a three-minute roller coaster ride based on the idea of a runaway mine train in the Wild West. Its small red engine, which is connected to five open-top passenger cars, speeds through the faux desert landscape. Riders zoom past falling rocks and tumbling waterfalls, occasionally entering tunnels that look like mine shafts and caverns. Each train can hold up to thirty passengers.

Polly and Harry walked up to the Big Thunder ride and bought their tickets at the entrance to the ride. There were about 30 people ahead of them, so they had to wait on line. They talked and laughed and studied the crowd. They admired the sign, shaped like a cowboy hat, that announced "Tour the Wild Wild West on our runaway train!" They almost made it onto the 10:45 train, but the ticket-taker stopped taking passengers right when they got to the gate. That meant that they were first in line for the 11 o'clock train. When the train pulled up, they heard a loud clanking noise that they had never heard before. The ticket-taker covered his ears as the train pulled up and the passengers started to board. Polly and Harry covered his ears as the train pulled up and the passengers started to board. Polly and Harry quickly turned over their tickets, and then jumped eagerly into the front car, where they sat laughing and singing the song "Deep in the Heart of Texas."

The ride started and went racing around the tracks. The train entered the ride's second tunnel, which was very dark and on a steep upward slope. Suddenly the passenger cars disconnected from the little red engine and rolled backward down the slope. Polly was thrown from the train and killed and Harry suffered broken ribs and a concussion. He later told friends, "All of a sudden I heard something really loud and shaky and I told myself, 'This isn't normal.' We went there just to hang around and goof and have a good time."

Big Thunder Mountain Railroad first opened at Wizardland in 1979. More than 300 million people ride on Wizardland rides each year, 5 million a year on Big Thunder. Polly's death was the tenth fatal accident since the park opened in 1955.

Wizardland says that its safety procedures start in the middle of the night, when a shift supervisor reviews assignments and work orders. Soon after, inspectors walk the tracks and check the equipment. Engineers and maintenance workers examine ride vehicles and various parts for wear, and wheels are checked with torque wrenches.
Later, two or three hours before the ride opens for the day, the attraction is powered up and then reviewed again in checklist fashion by the operating staff. The Wizardland president says that ride parts are replaced so frequently that the rides are all "like new." At Wizardland's competitor, OceanWorld, employees visually inspect the ride and then climb aboard to see whether it feels okay.

On the daily inspections, the supervisor filled out the entire checklist even though he did not look at all parts of the train. The ride operators and ticket-takers were not trained to do anything if an unusual noise occurred.

Some former Wizardland workers report that, as part of a push for efficiency and cost savings, Wizardland cut back on its staff in 2001. Wizardland now prefers "reliability-centered maintenance," which relies on repair histories and failure rates, rather than the intuition of the workers. John, a former Wizardland mechanic, told newspapers that, "We didn't have full crews." Upon his retirement in 2002, John wrote a warning memo to his supervisor, followed by a registered letter to an administrator, warning of the dangers of cutbacks in staff.

The government investigator found that two bolts on the red engine's left guide wheel assembly fell off, causing an axle to jam into the railroad ties. The red engine then hit the top of the tunnel. The force snapped a tow bar connecting the red engine to the lead passenger car. The red engine separated from the passenger cars and the passenger cars rolled down the slope. The government inspector faulted a mechanic who didn't tighten bolts and attach a safety wire on the wheel assembly that fell off. In addition, a safety mechanism that would have kept the bolts in place was not used.

Polly and Harry's accident was the third major accident in the last ten years in which maintenance has arisen as an issue. Two of those accidents occurred on the Space Mountain ride and one on Big Thunder Mountain.

After the accident, Harry told the newspaper to tell Wizardland visitors: "Just be aware of the sound, because that tells you a lot. This was like a really loud rattle, a shaking rattle, a metal clank, and that's not normal. It should be smooth metal against metal. If you hear anything else, you shouldn't ignore it."

Tokyo Wizardland heard about the accident and immediately suspended the operation of their Big Thunder Mountain ride. The next day, however, Tokyo resumed operations. Tokyo Wizardland said they were sure their ride was safe. Like Wizardland, Tokyo builds its Big Thunder Ride on site in Wizardland. A Tokyo spokesman said that the ride in both Wizardland parks is based on the same concept, but a Japanese firm built the one in Tokyo and the rides operate differently.
1. Identify and analyze Polly's and Harry's tort lawsuits against Wizardland.

2. In court, plaintiffs' lawyers argued that Wizardland should be held to the standard of the common carrier. This question of first impression is certified to your Supreme Court. What should the court rule on this argument? Why?
Question II

(25 points, 60 minutes)

Walt took his two sons shopping in the mall. They went into Pinney's, where they looked at men's clothing, including jackets and sweaters. Then they went to the boys' department, where the boys tried on sweaters. Walt felt warm when he was helping the boys find sweaters, so he pulled his sweater off. Then the three decided to leave Pinney's. As they walked toward the exit that led into the mall, Walt put his sweater back on.

Mo, Pinney's private security guard, was watching the store from the surveillance booth. The men's suit racks blocked some of his view of Walt and the boys, but he saw Walt without a sweater one minute and leaving the store wearing a sweater the next.

Walt and the boys headed over to Seers. Shortly after they left Pinney's and while they were still in the mall, Mo's partner, Larry, walked up behind Walt and grabbed the back of his sweater. Larry did a quick flip of a badge and told Walt that he was a police officer. Larry accused Walt of shoplifting the sweater he was wearing, handcuffed Walt, and led him back through the mall to the Pinney's store. Mo was waiting in the loss prevention office. The three sat down in the room and Larry locked the door. Walt's sons were allowed to stay in the store, where they used their cellphone to call their mom. Although Walt offered to prove the sweater had been purchased at the store earlier in the week, Mo and Larry called the Police Department and continued to detain him. Walt kept telling the guards repeatedly that his wife Alice could bring the receipt to them and prove his innocence.

The police arrested Walt and decided to prosecute him for criminal shoplifting. Fortunately for Walt, he really had bought the sweater at Pinney's the week before. Although he couldn't find the receipt right away, once he found it the jury acquitted him.

Identify and analyze the tort lawsuits that are available to Walt and his family.
Molly and Mack, sister and brother, stayed overnight at a Blue Roof Inn, which is owned by the Motel 8 Corporation, a big chain of hotels and motels. Their rooms cost $100 a night each. While there they were bitten by bedbugs, which are making a comeback in the U.S. as a consequence of more conservative use of pesticides.

In 1999, BugLab, the extermination service that the Blue Roof Inn used, discovered bedbugs in several rooms in the motel and recommended that it be hired to spray every room, for which it would charge the motel $500; the motel refused. In 2000, bedbugs were again discovered in a room but BugLab was asked to spray just that room. The motel tried to negotiate a building sweep by BugLab, free of charge, but the negotiation failed.

In 2000, one guest, after complaining of having been bitten repeatedly by insects while asleep in his room in the motel, was moved to another room only to discover insects there; and within 18 minutes of being moved to a third room he discovered insects in that room as well and had to be moved still again.

By the spring of 2001, the motel's manager, Sarah, started noticing that there were refunds being given by the desk clerks and reports coming back from the guests that there were bedbugs in the rooms that were biting. She looked in some of the rooms and discovered bedbugs. She instructed the desk clerks to call the bedbugs "ticks" whenever the guests complained of bugs. The desk clerks started to compile a list of rooms that had bugs. Nonetheless, rooms that the motel had placed on "Do not rent, bugs in room" status were rented. Further incidents of guests being bitten by insects and demanding and receiving refunds led Sarah to recommend to her supervisor in the company, Donald, that the motel be closed while every room was sprayed, but this was refused. Donald was a management-level employee of the Motel 8 Corporation.

Molly and Mack checked into the motel during Thanksgiving Week 2002. They were given Rooms 201 and 504, even though the motel had classified those rooms as "DO NOT RENT UNTIL TREATED," and they had not been treated. Indeed, that night 190 of the hotel's 191 rooms were occupied, even though a number of them had been placed on the same don't-rent status as Rooms 201 and 504.

1. Identify and analyze the tort lawsuits that are available to Molly and Mack.

2. A jury who heard this case awarded each plaintiff $5,000 in compensatory damages and $186,000 in punitive damages. Judge Posner affirmed the damages in the Court of Appeals. Should the U.S. Supreme Court uphold the award of damages? Why or why not?
The three exam questions covered most of the issues in the course. Missed issues were the problem for the lowest grades; the highest grades had the best analysis and citation of cases.

The grade range was as follows:

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Question I covered the two big issues in the course: negligence and strict products liability. Point totals varied based on how well you analyzed the issues and whether you included case law.

Question II tested your understanding of intentional torts. You should have considered battery, false imprisonment, false arrest and malicious prosecution. You could pick up some points by mentioning the emotional distress torts.

Many of you missed some key issues in Question III! You should have considered fraud/misrepresentation. Many of you spotted the battery from the bug bite, but others missed it. Offensive contact! You should needed to do a good job on the basics of negligence and respondeat superior.

Of course you couldn’t discuss punitive damages without remembering the Supreme Court case law, and identifying and applying the punitive damages factors.

Student model answers are available.

I am happy to discuss your exams with you.
Polly and Harry will first try to bring a strict liability claim against WizardLand. This is the plaintiff's easiest claim if they can prove that WizardLand manufactured the Big Thunder ride (which WizardLand Tokyo testifies they did) and that the ride was defective. The court may very well allow this claim to proceed since it would further the policy reasons for adopting strict liability over negligence: prevention (of other parks from carelessness), loss-spreading (of both the plaintiff and defendant).
The court may find traditional strict liability under either the "abnormally dangerous act" test or the "ultra-hazardous activity" test of the 1st and 2nd Restatement respectively. However, these tests are somewhat ambiguous and will probably not employ these tests. The court would be more likely to allow a strict products liability claim to proceed in this case. A products liability claim would give a great boost to Polly's and Harry's case. If Plaintiffs need...
only shows that D manufactured the product and that the product was defective. Plaintiffs may compare the Big Thunder to its copyright ride in Tokyo to determine if there was a Reasonable Alternative Design (the Restatement Test). An easier test for Plaintiffs would be the Consumer Expectations Test from Barker, but since the rollercoaster's mechanics are probably beyond normal consumer experience, this will be replaced by Barker's other test, a Risk-Utility Test much like the RDA test of the Restatement.
Under the Risk-Utility test, factors like the cost of prevention of such a problem (tightening bolts and attaching a safety wire to faulty wheel), reasonable steps to ensure safety (usually inspect, but here, worker did not inspect), gravity of danger (death and likelihood of danger (minimum overall at Wizardland)). Several cases set the standards the court should follow. Since the worker filled out a checklist without checking, he cannot be held liable (and Wizardland vicariously liable and perhaps negligent in hiring him).
since he knew the customers would rely on his safety report and could be seriously injured due to his laziness and dishonesty. The seminal case is *Rand v. Muroc School Dist.*, where school administrators were held liable when they knew a teacher had been accused of sexual misconduct, then gave him completely positive recommendations, knowing children depended on the accuracy of those recommendations for their safety, and a child was injured as a result of the fraud. Here, the information communicated to the school was that the student was
Life, even though the worker did not really know if it was. Plaintiff relied on this information and was injured because of their reliance.

As a matter of public policy, industries cannot be allowed to set their own standards. Therefore, though Wizardland will try to defend itself by citing their usual safety checks, which are comparatively better than competitor Ocean World's checks, this evidence may only be a factor in the court's determination.
In Stage v. Delta, the court found error when the expert witness was a baggage carousel mechanic since he probably worked for airlines and airports and would be biased. Also, in People's Airline, the industry's custom with regard to baggage bins on planes was determined not to be a total defense, but merely an issue that could be submitted to the jury. Here, custom may only be a factor that Wizardland can submit to the jury.
Defense that the ride was like a closed car, which cannot be held to the same standard as a new car unless adequate maintenance is proved. This defense will fail, since Wizelle president testified that the ride parts are all "like new."
Wizardland's weakest defense will be that the danger was open and obvious, since riding a roller-coaster is a very dangerous venture. Public policy reasons would reject this claim, and Wizardland would have to face by not even presenting it. As for Wizardland's final and strongest defense, it will be that Plaintiffs were comparatively negligent in going on the ride even though they
Heard a strange, new, abnormal noise at the close of the 10:45 ride. Harry Deven told a newspaper that Wizardland Visitors should "be aware of the sound, because that tells you a lot... (the loud, rattling clank) is not normal... if you hear anything else, you shouldn't ignore it." Harry, class clearly admitted this of Polly's own complaining.
Comparative fault can be calculated in products liability claims, which can lessen the P's recovery damages. Therefore, Polly and Harry may recover less because of their failure to protect themselves.

Damages in this case will compensate Polly's family for her pain and suffering (emotional distress, physical and medical bills, funeral expenses, and loss of consortium (if it applies). Harry's damages will be for
medical expenses, lost
wages, and emotional
distress at the thought
of dying or being
injured badly,
and emotional distress at
watching Polly die (if he can
establish an intimate relationship
These damages probably won’t
be lessered dramatically by
the Court since the comparative
fault of Polly and Harry is minor
next to Wizardland’s fault.
Prininte damages will likely be
apportioned to Polly’s family & Harry as well.
Polly and Harry may also have a negligence claim against Wizard Land. First, they will try to argue a Res ipsa loquitur case, since most of the facts and evidence would be at Wizard Land's disposal. However, there is adequate factual evidence on Plaintiff's side, since the government inspector found the defect. Furthermore, though the ride was in the Defendant's exclusive control,
and though it did cause an injury to Plaintiff's, his long hesitation cannot be used, since Plaintiff's could be shown to have been negligent in their own right.

So we move to a general negligence claim. Because Polly and Harry were customers at Wizardland, they were invitees and Wizardland owed them a duty to protect against dangers known and those that shouldn't have been known with adequate inspection.
Through the traditional categories may not be used by the court, a balancing test will likely be employed as in Heins v. Webster Co., where because of the fuzziness of the categories, a balancing test was developed that weighed the entrant's purpose, the foreseeability of the harm, the adequate prevention against risks, etc. The court under either test—traditional categories or Heins—there clearly is a duty owed by Wizardland as landlord.
Plaintiffs can prove breach by bringing in experts to testify that "but for" mechanical negligence on Wizardland's part, the accident would not have occurred, hence Plaintiffs have not advantage unnecessary since they have the testimony of the government inspector who has found negligent maintenance. Proximate cause is also clear since Plaintiffs were foreseeable, identifiable group who could be harmed and
The type of harm was clearly foreseeable.

_Palsgraf v. Long Island R.R._ sets the standard for foreseeable victim, where the R.R. was not liable for harm to lady on opposite platform injured by fireworks dropped by passenger whom conductor was helping on train, since she was not a foreseeable victim (therefore no duty).

Clearly, the ride's passengers are foreseeable victims here.
Weapon found sets the standard that the type of harm must be foreseeable. There was fire injury was not recoverable since fire was not a foreseeable type of harm of air leaking out into 
H. Actually, it was slightly foreseeable, but Plaintiffs couldn't argue that since at the time contributory negligence was a complete clear, and the P.i.'s manager also assessed the situation and work.
Here, the mechanical danger resulting in a passenger car crashing is clearly a foreseeable type of harm.

In determining fault under proximate cause, the court will likely use the balancing test adopted in Boseco v. Wal-Mart, where the foreseeable risks and their likelihood are balanced against the burden of protecting against the harm. This test is in line with the...
Learned Hand formula of Carroll Towing where fault and negligence can be proven if Plaintiff shows that the burden of prevention was less than the likelihood multiplied by the gravity of foreseeable harm. Here, the burden of aggregate inspection is slight in comparison with the product of a low likelihood (very few accidents and deaths when 500 million customers per year taken into account) and a high magnitude.
In Carroll v. Sorrell, Defendants were held liable because the burden of adequately securing the moorings of the vessel was slight in comparison with the product of the low likelihood and the great magnitude of loss. Therefore, there, in a similar numerical situation, Defendants will likely be found at fault.

A further piece of evidence to be factored into the risk is Wizardland’s constructive...
notice of the risk.
Wizardland mechanic John warned his supervisor and administrator in writing of
the dangers of cutting back staff in 2002. Wizardland did not heed his advice, however.

Wizardland may argue the defense of assumption of the risk, which was a complete defense in a similar amusement ride case, the 'Hopper.' However, unlike the 'Hopper' case, where the injury was a fall
and the whole point of the ride was to fall. The point of "Big Thunder" was not to die or break ribs! There is a difference here between primary and secondary assumption of the risk. Maybe Polly + Harry assumed the risk of thrilling fear, but not the risk of death. The lead case is Davenport v. Cotton Plantation, where though the Plaintiff assumed a known risk, the landowners...
comparative fault was greater (since they didn't light the stairway and they had actual notice of the danger) and therefore Plaintiff recovered.

Damages here can be for the death of Polly, her pain and suffering before death, Harry's medical expenses & lost wages, and his emotional distress (at facing possible death) and perhaps as a bystander (if Polly was an intimate relative)
3)

1. Molly and Mack (of course, they can bring these suits individually) against Sarah

   a. Negligence

   Sarah had a duty to act as a reasonable person of ordinary prudence would act under the circumstances. This, alone, may be enough to show a duty, and her failure to take sufficient action against the bedbugs may be enough to show breach. The prior incidents of bed-bug complaints put Sarah and Motel 8 on notice of the problem. Furthermore, Sarah might be considered to be like the landlord of the motel. Many landlords have a duty to complete repairs once they have commenced the repairs. Sarah had commenced the eradication of the bugs but failed to complete the eradication; this may establish both a duty and a breach. In other jurisdictions, landlords have a duty to fix dangers that they know of but the rentee does not know of. Since the rentees didn't know of the bedbugs, this might be sufficient to establish a duty, and her failure to eradicate the bugs might establish a breach.
If this jurisdiction has the majority rule for obligations of property owners to those on their property, Molly and Mack would be held to be invitees: those on the property for the financial benefit of the property owner.

Licensees are owed a duty, by landowners or occupiers, to inspect the land and repair, or protect the invitees from, dangers a reasonable inspection would reveal. Molly and Mack were invitees, as they paid for the rooms where they stayed.

In a minority of districts, landowners and occupiers owe a duty to anyone on their land to protect them from dangers a reasonable inspection would reveal. Regardless of the jurisdiction, it seems that this might establish a duty and breach by Sarah.

The Learned Hand formula \((B \times P \times L)\) would hold establish a duty and a breach, if the cost of eradicating the bugs was less than the severity of the harm that might manifest multiplied by the probability of the harm. It is quite likely that this would reveal a duty and a breach, as the cost of eradicating the bugs would probably be less than the certainty that the harm would materialize multiplied by the damages that would be sustained by the motel's numerous occupants.
Finally, custom could establish a duty and a breach; if similar motels eradicate bed bugs when they are found for safety reasons, Motel 8's failure to do so is evidence of a breach of the duty of reasonable care.

These breaches, if established, would then have to be shown to be the "but for" (a substantial factor) and the proximate (foreseeable victim and type of injury) cause of Molly and Mick's injuries. No injuries are given in the hypothetical, so injuries, inflicted by the bedbugs, would have had to occur for a negligence cause of action to succeed.

b. Negligent Infliction of Emotional Distress

Negligent infliction of emotional distress is a derivative action; the negligence cause of action would have to succeed first. According to [the case where a man is sent a severed leg in a box supposedly filled with]

his dead father's possessions], a plaintiff can recover for negligently inflicted emotional distress if 1. the emotional harm is severe, and 2. a person of ordinary sensitivity would foreseeably suffer this emotional

distress. If Molly and Mack suffered emotional distress as a result of Sarah's, Donald's, or Motel 8's negligence, they could possibly recover for this if it was foreseeable to the relevant entity that a person of
ordinary sensitivity would suffer emotional distress as a result of the bedbugs. In some jurisdictions, physical injury or impact is required to recover for neg. infliction of emotional distress. If this case is in one of those jurisdictions, the bugs would have had to bitten, or at least crawled on, the plaintiffs.

c. Battery

By intentionally setting in motion a series of events that would cause an unconsented or traumatic touching between the bedbugs and Molly and Mack, Sarah, Donald, and Motel 8 might be liable for battery.

Showing this would require showing that these Ds knowingly set in motion a series of events the natural consequence of which would be an unconsented touching of the plaintiffs.

d. Negligent Misrepresentation

Sarah instructed her employees to make false statements about the bedbugs. One who makes a false statement may be liable for physical harm resulting from foreseeable reliance on that false statement if the maker of the statement was negligent as to the content of the statement or how the statement was made. Molly and Mack could sue the employees for these false statements, which they foreseeably relied upon.
The Damages

Compensatory damages are awarded for lost income, pain and suffering, medical expenses, and loss of consortium. As the precise damages suffered by Molly and Mack are not given here, it is hard to say if the

and 3. Pursuant to the interests of her employer, Sarah's employees, Sarah, and Donald meet

The Bickett test for respondent superior is that the employee's conduct must have been 1. of the

general kind; and she was hired to perform, 2. substantially within the hours and spatial boundaries of

misrepresentation by her employees; and 8. for the negligence ofSarah, the lower-level

employees, and Donald.

Under the doctrine of respondent superior, Molly and Mack could sue Sarah for the negligent

Intentional misrepresentation, suit could be brought by Molly and Mack against Sarah, lower-

level motel employees, and Molly.
compensatory damages awarded were proper.

In State Farm v. Campbell (bad faith insurance company, car wreck), it was established that punitive damages are determined by judging 1. the level of wrongdoing committed by the tortfeasor, 2. other civil or criminal penalties that could be levied against the tortfeasor for this action, and 3. the deterrent value of punitive damages in stopping future violations of this kind. It was also established that excessively high punitive damages might violate due process. Furthermore, a damage award can be properly overturned if it shocks the conscience or is prima facie evidence of prejudice or passion on behalf of a jury. I think that

the level of wrongdoing here shown, and the comparable civil penalties that could be brought against the Ds (including the compensatory damages from this very case), and the necessity for a strong deterrent,

does not justify $186,000 in punitive damages. I think that this might violate due process by depriving the parties of a large amount of property arbitrarily. I think that the size of the punitive damages indicates passion or prejudice on behalf of the jury, and for these reasons, the punitive damages should be reduced.

\[ \text{[Signature]} \]
4)
END OF EXAM
First, Polly and Harry could sue Wizardland on the theory of strict liability for a design defect of the Big Thunder Mountain Railroad. The plaintiffs would first need to show that Wizardland supplied the product of the ride, which is easily established as Wizardland built the ride on site and operated it at their place of business. The plaintiffs would then need to prove that the product was defective. The two main theories for establishing that a product is defective are the consumer expectations test and the risk utility test, both set forth in Barker. Under the consumer expectations test, the plaintiffs would try to establish that the Big Thunder ride did not operate according to the reasonable expectations of an ordinary consumer. The consumer expectations test is typically used for simple cases on which the jury is sufficiently knowledgeable as to how a product should operate. While the ride is somewhat technical, a juror would understand that the passenger cars should not become detached from the engine and roll backward down the slope. Thus, this test may be appropriate. However, Wizardland will likely argue for use of the risk utility test, which is typically used for complex products that require expert testimony in order to sufficiently educate the jury as to how the product should operate. The risk utility test is a balancing test which balances the risks of the product and its usefulness against the costs of producing the product. The plaintiffs will try to establish that the product was defective according to the risk utility test. They will likely try to show that changes to enhance the safety of the product, such as the use of the safety mechanism that would have kept the bolts in place, could have been made at a reasonable cost. Additionally, the plaintiffs will try to establish that a reasonable alternative design was available, perhaps the one used at Tokyo
Wizardland which is based on the same concept but operates differently. If Polly and Harry sufficiently establish a reasonable alternative design, the burden will shift to Wizardland to show why that alternative design was not feasible or was disproportionately costly. Both parties will likely have to use expert testimony in order to discuss the mechanics of the ride, how they should operate, and what alternatives are available. Further, the plaintiffs may try to point to a particular defect in the product, perhaps the use of open-top passenger cars and establish that it was merely a product feature that could easily be altered to enhance safety. The defendant will then argue that the particulars of using open-top passengers cars constitute its type, and if altered the product would not be the same and riders would not get the same experience from the ride. If the plaintiffs can successfully show that the product was defective, they will then attempt to prove that the product caused their injuries. But-for causation is easily established as neither Polly nor Harry would have been hurt if they had not ridden Big Thunder. Proximate causation requires that both the type of harm and the person harmed be foreseeable. This is also easily established as being thrown from an open-top ride is likely foreseeable, and it is also foreseeable that the riders of the Big Thunder would be injured. Injury is established in this case as the accident resulted in Polly’s death and Harry’s broken ribs and concussion. If the plaintiffs establish their case according to the preponderance of the evidence standard, Wizardland will likely assert the defense of assumption of the risk. The plaintiffs knowingly and voluntarily participated in riding the ride; they had the benefit of waiting in line for a period of time in which they could observe the ride and how it operated, evidenced by the fact that they studied the crowd. Further, they heard the loud noise before boarding the train and chose to ride anyway; in fact they jumped eagerly into the front car. The facts of this case are similar to those of Murphy v. Steeplechase Amusement, in which passengers were injured while riding an amusement ride and sued the amusement park. In Murphy, the ride operated normally and the court held that the plaintiff could not recover as he had knowingly and voluntarily assumed the risks inherent in the ride.
However, in the present case, plaintiffs can establish that the ride did not operate as it should have as it resulted in a fatal accident. Thus, the plaintiffs have a very strong chance of prevailing on this claim.

Another claim that Polly and Harry could bring against Wizardland is strict liability based on a warning defect. Wizardland's supply of the product is established as mentioned above. The plaintiffs will then attempt to prove that the warning was inadequate. In this case, the sign posted outside Big Thunder simply read 'Tour the Wild Wild West on our runaway train!'. Wizardland did not indicate that there may be any danger in the ride or that the riders should use caution, hold on, etc. The plaintiffs must also establish that if the warning had been adequate, they would have heeded it. Wizardland will likely defend the adequacy of its warning by the fact that no warning was necessary as any dangers inherent in the ride were open and obvious dangers and did not require a special warning. They may also claim that any warning could be too mechanical and complex and could cause information overload, thus not really benefitting the reader. Further, they will rebut the plaintiff's heeding presumption by claiming that they would not have heeded the warning had it been any different. The defendants may point to evidence such as Polly and Harry's singing and laughing while boarding the ride. Causation and injury are established as noted above. Wizardland has a strong defense on this claim and the plaintiffs will probably not prevail.

Polly and Harry could also sue Wizardland under the theory of warranty, specifically the implied warranty of fitness for purpose. They were buyers in the sense that the paid to use the ride and therefore Wizardland, the seller, was required to warrant that the ride be fit for the purpose for which it was designed.

A fourth claim that Polly and Harry may have against Wizardland is that the were negligent in their maintenance and operation of the ride. On this claim, the plaintiffs will show that Wizardland owed a duty of ordinary care to them and to other park guests to provide rides
that are reasonably safe. This would include the maintainance procedures that Wizardland and its employees use to check the rides in order to ensure their safe operation. The plaintiffs will likely look to the customs of the industry to establish the appropriate maintenance procedures. For example, OceanWorld, a competitor, uses visual inspections and then employees climb aboard the rides to ensure that they feel OK. In contrast, Wizardland used a method of reliability-centered maintenance in which they relied on repair histories and failure rates rather than the intuition of the workers. Although compliance with industry custom can be evidence of meeting a duty of ordinary care, it is not necessarily dispositive. Wizardland will likely argue that this method is more appropriate as it seems more objective and mechanical than OceanWorld's more subjective method. They will also likely point to the fact that this the first major accident on Big Thunder Mountain in the last ten years. Reasonable duty could also be established by any federal standards that the government requires of amusement parks. If this is a highly regulated industry, Wizardland has a better chance of demonstrating that it has met its duty. However, it is likely not very regulated, making the appropriate duty more difficult to establish. Additionally, Wizardland can be held vicariously liable for the actions of its employees under the doctrine of respondeat superior. According to the test used in Christenson v. Swenson, an employer can be held vicariously liable for the actions of its employees if they occur within the scope of employment, including being about the employer's business, being within the employer's spatial boundaries, and serving the employer's interests. According the this test, Wizardland's vicarious liability is easily established for its inspectors, engineers and maintenance workers, and especially the supervisor who completed the entire checklist without looking at all parts of the train. Further, the ride operator and ticket takers heard the unusual noise, but were not trained to do anything about it. One method that Polly and Harry may use to establish that Wizardland breached it's duty is the Hand formula, set forth in the Carroll Towing case. Under this method, plaintiffs attempt to show that the burden of preventing negligence is

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less than the probability times the possible injury. The testimony of John, the former Wizardland mechanic, may be helpful in establishing that having full crews could have prevented the accidents. If the burden of maintaining a full staff is less than the probability of injury, it is likely that the jury will find that Wizardland breached its duty. Polly and Harry will next need to establish that the negligent maintenance was both the cause in fact and the proximate cause of the accident which caused Polly's death and Harry's physical injuries. It is likely that cause in fact can be established based on the government investigator's finding that the bolts fell off since they were not tightened safety wire was not adequately attached. Additionally, the safety mechanism that would have kept the bolts in place was not used. Proximate cause may be more difficult to establish, however. Ride passengers were likely foreseeable victims of negligent maintenance, however the specific type of harm is not definitively established. The plaintiffs will likely argue for a general type of harm such as passenger injuries based on mechanical difficulties. However, Wizardland will attempt to defeat this aspect of the plaintiffs' claim by arguing that the type of harm caused must be more specific, pointing to the failure of a particular device such as the wheel assembly. If the plaintiffs can fully establish their negligence case, Wizardland will likely assert a defense that the plaintiffs had the last clear chance to avoid the accident by not riding the ride after hearing the strange noise. They will probably also use the assumption of the risk defense as mentioned above. Given all the facts, it is likely that the plaintiffs will prevail on their negligent maintenance claim.

Additionally, the plaintiffs may bring a negligence claim based on res ipsa loquitur. For this claim, the plaintiffs only need to establish that the accident would not have occurred except for Wizardland's negligence, that the ride was within the exclusive control of Wizardland, and that the accident was not due to a voluntary act of the plaintiffs. Although the first two criteria are easily met and are helpful in avoiding some of the problems of establishing duty and breach as mentioned above, Wizardland will likely claim that it was a voluntary act of Polly and Harry
to ride the ride. Accordingly this claim would be defeated.

Other possible suits against Wizardland include those for emotional harm. On behalf of the decedent, Polly, plaintiffs may raise a claim of negligent infliction of emotional distress directly to Polly if she was aware of imminent danger of death. Harry may also bring a claim for direct emotional distress for his fear as well as indirect emotional distress for witnessing Polly's death as a bystander. However, the evidence does not seem sufficient to definitively establish any of these claims as we are unsure how long the cars rolled backward, if the plaintiffs were aware of the danger and the seriousness of the emotional distress suffered.

Regarding the common carrier standard, this claim is not likely to prevail. Historically, carriers such as trains were held to an ordinary standard of care as passengers were held to assume the risk of riding. However, as mass transportation became more prevalent, commonplace, and mechanically sound, common carriers were later held to a standard of utmost care to ensure the safety of their passengers. Cases supporting this include the case in which a woman was attempting to board a bus and was caught in the door and dragged for some distance. Another case is that of Andrews v. United Airlines, in which the airline was held to a higher standard of care when a passenger received physical injuries from falling baggage. The plaintiffs will likely argue that amusement parks have become so popular and commonplace that riding a ride at an amusement park is similar to riding a bus or a plane. However, this seems to be a leap in logic are amusement park rides are ridden merely for an enjoyment, are not relied on as a practical means of mass transportation in everyday life. Therefore, amusement rides are inherently more risky and riding them is not a necessity of life, but merely a choice that people make for entertainment reasons. Accordingly, the court should rule that Wizardland be held the an ordinary standard of care as an amusement park, not to the higher standard of utmost care as a common carrier.
1) Question I:

Harry should bring a claim for negligence for the failure of Wizardland’s employees to adequately perform their duties of reasonable care which led to the accident on their Big Thunder mountain ride. The suits would include the claims for the wrongful death of Polly, Harry’s loss of Polly’s consortium, Harry’s emotional distress, physical injuries, and possibly Polly’s emotional distress during the moments as she was thrown from the ride to her death. Alternatively, Harry may have a strict liability claim against Wizardland, under a products liability design or manufacturing defect claim, but would not be favored by the courts, who prefer to apply negligence when possible.

The duty of a landowner towards a party who comes onto his property may, in some jurisdictions, be determined by the classification of the party’s status in relation to the landowner, or more broadly by the balancing of several factors. If a person provides a pecuniary benefit to the landowner, their status would be that of an invitee, and the duty of care would entail the prevention of harm from known dangers or those that would be revealed upon reasonable inspection (Carter v. Kinney). Harry and Polly paid for their tickets to Wizardland, to ride the rides and enjoy the activities that Wizardland offered. Thus, they were invitees and Wizardland needed to protect them from the foreseeable dangers posed by their rides. Even under the broader balancing test, weighing factors such as the time, manner and circumstances and the purpose of their presence, their activities as members of the public whose presence is bought sought-after by the lawowners and within the hours of the park’s operation would justify a duty of care to them to prevent harm from known dangers. The establishment of this duty is unlikely to be disputed by Wizardland. Additionally, doctrine of respondeat superior, the negligence of the employees would be imputed to their employer. Thus, the doctrine would allow the the failure of Wizardland’s employees to exercise of due care in the course of their duties to be imputed to Wizardland itself. This occurs under the doctrine of respondeat superior. Because Wizardland hired personnel to provide maintenance, services, and the operation of its rides, it was under a duty to be selective about its hiring process and ensure that its personnel performed up to the acceptable standards of safety. If they did not, then Wizardland itself would be responsible for the consequences.

The breach of Wizardland’s duty would be established by demonstrating that Wizardland’s employees failed to perform their inspections adequately, and that the existence of better methods and measures should have been adopted to prevent this very accident from occurring. An invocation of res ipsa loquitur, the thing that speaks for itself, would be appropriate in a situation where the defendant was in control of the instrumentality of the harm, the incident wouldn’t ordinarily happen without negligence, and the plaintiff was not contributorily negligent in causing the harm. Because Harry would not likely know the facts of the case, beyond his own impressions of the accident, res ipsa would allow him to substantiate his claim even without direct proof of what the defendant did or did not do. First, Wizardland’s employees were the exclusive parties in control of the train and its maintenance and operation. Second, a train car ride would not be expected to simply detach from its engine and careen backward. And lastly, neither Polly nor Harry had done anything to contribute to the ride’s failure. By applying res ipsa, their claim could automatically provide the inference of negligence. In some jurisdictions, a “Farina style” presumption of negligence would occur, in which the invocation of res ipsa automatically shifted the burden of proof to the defendant to prove that he was not. Otherwise, he would be declared negligent as a matter of law.

Of the the employees whose behavior may have illustrated a breach of duty, the first is the Ticket-taker at the entrance of the ride had notice of some odd sounds emanating from the ride. He had reacted involuntarily by covering his ears at the loudness of the sound. For one that would clearly be aware of what was "normal" in the standard operation of the ride, it would...
be a reasonable expectation that upon hearing such an extraordinary sound, he would automatically seek to investigate the source and reason for the sound. However, the ticket taker's duties could be limited to the very narrow act of distributing tickets to the passengers and not encompass the monitoring of the manner in which the ride itself was to function.

Wizardland's own procedures showed that the inspection was conducted through a step-by-step process before the ride was opened to the public each morning. However, a company's custom and of itself may not be enough to establish that the standard of care has been adequately met. Though the industry's custom may not always be indicative of reasonable care, the existence of more extensive procedures may show that a defendant, in failing to adopt the same measures, has breached his duty of care. (Trimaro v. Klein). At Wizardland's competitor, OceanWorld, the standard procedure involved both the visual inspection of the rides by its inspectors, but also the actual riding of the rides by the employees to test the 'feel' of the rides. This may indicate that there are some dangers which would not otherwise be revealed to the maintenance staff unless they were to actually climb aboard and test the ride from the passengers' perspective. Wizardland did not incorporate this mode of testing in its procedure, and in doing so, may have failed to meet the custom of the industry. Furthermore, a government accident investigator determined the very cause of the problem to be a failure to tighten a bolt on the wheel.

Additionally, those employees who had access to the information and opportunity to assess defects were not taught to take proactive measures to prevent forseeable harm. A supervisor who automatically signs off on a checklist even though he never inspected a train did not adequately perform his responsibilities. And ride operators and the ticket-taker, as mentioned above, would have recognized that unusual sounds coming from the ride would merit further investigation. Wizardland's policies may have thus failed to provide the type of internal policing that should be a part of their innate responsibilities. Wizardland has merely relied on the repair history and past failure rates instead of seeking out problems actively and training its staff what to do to prevent emergencies.

Wizardland had also reduced its staff. Though the idea of reasonable care, as advocated by Learned Hand in Carroll Towing, should take into account the cost of preventing a forseeable harm, the severity of the harm that could occur also justifies imposing the cost of preventing the harm. The three prior accidents surrounded the same problems of maintenance. In fact, one of them was on the very ride that killed Polly and injured Harry. A landowner who has reason to know of danger must therefore incur the cost of preventing that danger, particularly when the severity of the injury is severe. Wizardland itself may argue that, after having more than 300 million people at its park every year, an accident rate of only three serious problems in a span of ten years shows that the likelihood of injury at its park was very small. And the staff cutbacks were a necessary part of their operation, in keeping their business alive. However, the existence of a warning letter from a former employee, indicating serious concerns about the effects of such reduction in staffing shows that Wizardland had notice of a potential problem and failed to correct it. The employee had even intentionally sent a copy to both his direct supervisor and someone farther up in the discretionary chain of command, with the express purpose of addressing this problem, only to have it ignored by Wizardland.

Causation would not be difficult to prove. Actual, or but-for cause, is demonstrated by showing that the actions of the defendants were a substantial factor in causing the harm that occurred. (Stubbs) But-for the train car's detachment, Polly would not have been thrown from the train and killed, and Haarry would not have sustained his injuries. Proximate cause must show that the person who is likely injured as a result of the defendant's actions, and the type of injury likely to be sustained both be forseeable. (Palsgraf, Wagon Mound). Here, the people who pay to ride the rides at Wizardland are the forseeable victims of their failure to adequately maintain the rides and prevent accidents from occurring. Polly and Harry were two of such people. Also, the type of injuries that would forseeably occur when an open-car train ride fails
apart would involve the ejection of passengers and other physical impact upon those who would have been sitting in the cars when they detached. Thus, both the cause in fact and legal cause would unlikely be disputed.

Injury must also be shown. Because Polly was killed, and Harry sustained clear physical injuries consisting of a concussion and broken ribs, objective evidence may be shown to substantiate their claims. Additionally, some courts would allow Harry to collect for Polly's during the window of time between her realization of doom and the impact which caused her death. Loss of consortium may also succeed, for the loss of Polly's companionship, and if she had income, the economic loss stemming from her death. Harry also may show that he sustained emotional harms as a witness to his wife's death. Because he sustained physical impact, his emotional distress claim would likely succeed.

Wizardland might attempt to argue that Harry and Polly assumed the risk of injury upon boarding a ride that they were familiar with after hearing strange sounds coming from it, and voluntarily boarding it regardless of the oddity of the sound. The facts of the situation recall those in Murphy, the famous Cardozo case, where an amusement park was not held liable when a man boarding one of its rides was injured by a fall which was the open and obvious purpose of the ride itself. In fact, here, Harry told a newspaper that he "rattling" sound he heard was clearly "not normal." If this were true at the time that he and his wife boarded the ride, perhaps they did willingly accept the possibility of injury. He and his party were clearly cutting up and enjoying themselves merrily, not giving much thought to what they were about to do. But even Cardozo indicated, later in the holding, that latent dangers, particularly those involving serious harm, would not allow the park to shield itself from liability through an assertion that the park goer had assumed the risk. Unless the danger itself is known, one cannot assume the risk of injury caused by that danger. Here, the sounds themselves may have meant nothing to Polly and Harry. They were simply visitors at the park, enjoying themselves. The danger, a loose bolt, was not something that they could have known about, and even less justifiable is the assertion that a person who boards an open-car ride assumes the risk of being killed by it, when it is clearly not designed to catapult people off of it, to their deaths.

A strict liability claim against the park, under the Restatements 2nd, would stem from the premise that one who produces a product unreasonably dangerous and supplies it to an end user who will not have opportunity to inspect it would be strictly liable if the dangers result in harm to the user. Thus, Wizardland, who created the ride and offered it to the public for its use, could be liable for the dangers of Big Thunder Mountain. A ride which would spontaneously fail and cause death or serious injury could easily be labeled as unreasonably dangerous. And the inspection was completely in the control of the manufacturer, Wizardland. Thus, under this test, strict liability should apply. An application of the court's holding in Cronin would provide an even more definite imposition of strict liability, since the court chose to get rid of the "unreasonably dangerous" language altogether, stating that it wished to distinguish strict liability from something that would "ring of negligence." If this application were used, the strict liability claim would be even more compelling.

The Products Restatement allows for strict liability suits in three areas: manufacturing defect, design defect, and failure in warnings. Here, Harry would seek to collect under both manufacturing defect and defect in design. A product may be deemed as defective if it deviates from the intended function. Here, the train cars separated from the engine. Clearly, it was not intended to do so. In Escola, Justice Traynor indicated that absolute liability is appropriate when a product which provides a pecuniary benefit to its maker is introduced to the public, who is reliant on the safety of the product, and when the product is an aberration that causes injury. Scores of people depend on Wizardland's proper assembly and construction of its rides. Thus, strict liability may be supportable.

Additionally, a design defect may be shown if a reasonable alternative design would have made the product safer. Two tests from Barker may show that the ride was defective. A
consumer expectations test simply asks whether the item failed to perform as safely as a consumer would expect under the circumstances. Here, a seemingly innocuously ride aboard a standard rollercoaster resulting in a horrifying tragedy. Certainly, a jury would have reason to say that the consumer expectations test, as applied, demonstrates that the design was in fact defective. Alternatively, a risk-utility analysis could determine whether safer, alternative designs exist which could have reduced the potential for harm. This is illustrated in the case of Soule v. General Motors, where a car failed to perform as crashworthy as other similar cars on the market. However, in order for an RAD to exist, the plaintiff must usually show that the RAD would not so substantially alter the item such that it eradicates an entire type of product. The Wizardland in Tokyo has a version of teh very same ride. It possesses different safety features which might indicate that a superior design does exist, and its application to the Wizardland location in the US would be feasible. Also, as shown in Soule, the application of safety features may make a product perform better under forseeable circumstances. For a ride to be run for 24 years, even if staff were diligent in their efforts to maintain the mechanisms, back-up safety devices should be used to cover the possibility of parts failing with repeated use and stress. Here, a safety mechanism that would have kept the train together by holding the bolts in place had not been installed. If such a device exists, Wizardland would have to show a compelling reason, be it exorbitant cost, or other complications arising from teh use of the device (perhaps that it would impair the very functioning of the ride) in order to justify its exclusion. Failure to include it could thus make Wizardland strictly liable for the harms to Polly and Harry, and the proof of causation and injury as discussed above in the negligence suit would also be included as part of their claim.

Alternatively, the claims may return to the old Restatements test, those recalling ultrahazardous and uncommon activities or abnormally dangerous activities whose dangerous could not be eliminated thorough the exercise of reasonable care. The ultrahazardous language may not fit the circumstances of this case, since very few incidents had occurred in the past and the activity might not be inherently dangerous. Certainly, with so many people involved in attending the park, it may not be uncommon, either. Within the 2nd restatements test, though there is a public need exception, that weighs the burden of strict liability against the benefit to teh community. Here, the argument on the part of Wizardland is that the facility is of a great benefit to the public. However, if the danger is irreducible, if accidents will occur regardless of the care exercised, then the public need exception might not protect them. But typically, the old restatements test have seen new life outside of the old blasting cases only in environmental tort settings and would likely not be applied.

Though a case for strict liability may exist, typically, courts have not favored its application over that of negligence. As Posner indicated in Indiana Harbor, when reasonable care could have prevented the harm which occurred, then the suit should be brought under negligence. Here, the most compelling reason for an application for strict liability is that of dependence and cost-spreading. Wizardland, who makes money from the public which comes to its amusement park, is most equipped to bear the risk of loss. Posner, in GJ Leasing, uses the "tiger analogy" in describing the application of strict liability in situations where danger exists in spite of the exercise of reasonable care. If a party cannot guarantee that something can be done safely, we either want him to pay for the harms when the risks materialize, or not conduct the activity at all. Arguably, if Wizardland cannot promise the public that its rides are safe, then the least they should do is pay for the injuries when they happen. Or, alternatively, they should not be in operation at all. However, as Indiana Harbor indicates, when the public benefits from the activity, and reasonable care to prevent the harm would have averted the injury, strict liability is unlikely to be favored. Particularly because the facts of Harry's case show that he will likely succeed in a claim of negligence, strict liability will probably not be applied.
2) The common carrier standard advocated by plaintiff's lawyers imposes a duty of upmost care to the carrier's passengers. In a way, this standard, if imposed, would provide a "middle ground" between strict liability, which imposes liability irregardless of care, and negligence, which only requires a showing of "reasonable care under the circumstances." By compromising between the public's need for a high level of protection and the operators of Wizardland's fear of overextensive liability, the revival of this standard could provide a good solution to this case.

The purpose of imposing a higher standard for entities that provided public transportation was to protect the passengers from the machines upon which they relied, and the personnel who manned them, at a time when industrialization was booming and the very real threat of serious injury loomed ever present with the machines which could maim and mangle as never before. The court in Bethel v. NY City Transit Authority, however, abrogated this higher standard in favor of one that is equivalent to the general standard of reasonable care. In the holding, the court justified this change by stating that the concerns and risks from which the standard was born were antiquated. The industry itself had improved in its safety standards, and regulations of legislative bodies had helped to reduce the potential for harm. Concerns for the continued imposition of this upmost care measure would also take into account the costs of ensuring public safety, and the costs which would in turn be passed back onto the consumers who traveled on the carriers. Because transportation plays such a vital role in the functioning of our society, the burdens became less and less palatable, and led to the reduction in the requisite standard of care. Even in Andrews v. United Airlines, the industry customs were measured merely according to this "reasonable standard," even though the harms discussed in that case, risks of injury from baggage falling from overhead bins, were imminently foreseeable.

However, The issues of dependence, reliance, and vulnerability are still very much the same now as they ever were. If strict liability could not apply to the accident at Wizardland, then at the very least, the public which ventures on the rides of an amusement park, seeking some entertainment, but not involved in a necessary and crucial activity, should be owed a high level of assurance that their safety was of primary concern, and that the failure of the operators to provide the upmost level of care would make them liable for injuries. Clearly, Wizardland's argument that having so 'few' accidents in the course of the decades they had been operating the ride showed that they in fact had exercised reasonable care. But the knowledge that they would be accountable if they failed to use this higher, common carrier standard, would force them to think twice upon receiving letters from employees warning of possible dangers, force them to take a pro active view regarding maintenance and safety devices, and perhaps cause them to simply stop offering rides which contain irreducible dangers. The burden would shift to their shoulders, as defendants, to show that such upmost care was in fact exercised, whereas in a traditional negligence suit, the plaintiff, upon invoking res ipsa loquitur, would, depending on the jurisdiction, be allowed only the inference of negligence.

3) Walt and his family would likely bring suits against Pinney's for the battery, false imprisonment, and malicious prosecution claims, and perhaps for intentional infliction of emotional distress. Furthermore, his two sons were also wrongfully imprisoned and forced to sit in a locked room while his father was being detained at the store. Under respondeat superior, the tortious acts of employees are imputed to their employer. The acts committed by Walt and Larry, can thus create liability on the part of their employer, Pinney's. Though Walt's sons may
succeed in their false imprisonment claim, Walt's battery claim would likely provide his surest avenue for recovery. The claims for imprisonment and malicious prosecution would be much more difficult to substantiate. Perhaps they could also seek negligence claims upon these same facts, and in doing so, they would be able to recover more sizable damages, since insurance companies typically do not cover intentional torts.

Battery occurs when a defendant acts with the purpose of or with the substantial certainty of causing unconsented or offensive contact to a plaintiff. Here, Larry, one of Penny's security guards, came up behind Walt and grabbed his back. In the Picard case, a woman succeeded in her claim for battery against the car mechanic, even though the only contact he made with her person was with the camera which she was holding in her hand. Here, the contact with his sweater was arguably even a "closer" contact with Walt than the camera in the cited case. The direct act of Larry, who purposefully reached for Walt's sweater, stops him, demonstrates intent to make contact, and the contact with Walt's clothing would constitute an unconsented touching. Thus, battery can be substantiated.

False imprisonment, as discussed in Lopez v. Winchells, can be demonstrated when a defendant acts with the intent of causing or with the certainty of causing an unlawful restriction of an individuals' personal liberty. This can be accomplished by threats of physical force, duress, coercion, or threats in creating barriers to the individual's freedom of locomotion. Here, Walt was handcuffed by the staff of Pinney's, and he and his sons were taken to a room and locked in. These are very real, physical barriers, asserted with only the slightest trappings of legal authority.

However, courts have allowed retailers some flexibility in the application of these standards, because of the very real concerns regarding theft and the difficulties in adequately policing their shops and detaining suspected shoplifters. Pinney's would likely claim that their employees had the privilege to exercise their duties, even if they involved acts which, under other circumstances, give rise to claims for intentional torts. In some cases, security personnel would be required to have actually witnessed the act of shoplifting in order to justify detaining the suspect. Here, Mo did not see Walt remove a sweater from the rack, but based his conclusion on his momentary observations of Walt's movements and apparel. If he had directly observed Walt, naturally, he would have realized his mistake. However, other jurisdictions apply a reasonableness standard, such as NY, wherein as long as a retailer has good reason to think that a shopper has in fact stolen merchandise, they may detain the individual for a reasonable length of time to conduct an investigation. Even if this standard applies, though, the actions of Pinney's guards may still be unjustifiable, because Walt clearly told them that he had just recently bought the sweater from their store, and his wife could produce the receipt upon her arrival. In fact, she had already been contacted by Walt's children. Pinney's would argue that, in retrospect, Walt would have been unable to exonerate himself at the time, anyway, because the receipt had been misplaced.

This ties in with the claim for malicious prosecution. The suit would require that the defendant acted without probable cause, that the prosecution was malicious, and that the plaintiff be exonerated. In Soares v. R.I., a woman who was similarly seen by a security guard picking up a price tag from a box and sticking it back on a pair of sneakers succeeded in a claim for malicious prosecution against the shop which had arrested her. She was accused of interchanging price tags, but the difference in the price of merchandise was only $3, and she was in fact exonerated at trial. In Walt's case, however, probable cause may have been established, because the guard earnestly believed that Walt had appropriated the sweater from the store. After all, he was wearing a sweater that had been purchased only the week before and was probably still a part of their current merchandise, perhaps even still in stock. The guard only saw him after he had removed it, and again after he was seen to have "suddenly" appeared wearing a Pinney's sweater. It is arguable that if they had simply allowed an investigation to take place, listened to the testimony of the boys, perhaps, the entire incident
would have been avoided. But immediate investigation would have yielded little, since even Walt was unable to find his receipt until the period leading up to his trial, and the sweater, though bought recently, had not been purchased recent enough for them to have clearly found someone who might remember selling it to him. Still, instead of attempting to get more information from Walt and his family and listening to his story, which was plausible on its face, they immediately pursued the extreme option of having police arrest him and haul him off to jail. But malice would be more difficult to prove. Walt's situation is also substantially different from what occurred in Soares, where the prosecution for a perceived $3 loss was likely excessively zealous on the part of the store owners, Pinney's, in their legitimate efforts to reduce losses resulting from shoplifting, had hired security guards to watch over their customers and intervene in the event that someone were caught stealing merchandise from their store. Even though Walt was exonerated, after providing definitive evidence that showed he had clearly not shopped, Walt's claim for malicious prosecution may fail.

Walt and his family's negligence suit would require the establishment of Pinney's duty to them as invitees, the breach of this duty, causation, and injury. Duty of a store to its customers is that of a landowner to their invitees. Those who venture on the premises for the purpose of conducting business, to the benefit of the party which owns or controls the property, are labeled as invitees in jurisdictions which recognize three categories of distinction between those who venture on another's property. (Heins v. webster). Thus, Walt and his sons, as customers shopping at Pinney's, were owed a duty of care to prevent harm from known or unknown dangers. Incorporated in this would be a duty to respect their rights against wrongful bodily invasion, captivity, and persecution.

Arguably, the actions of both Mo, in failing to accurately determine the truth of the situation involving Walt's acquisition of the sweater constituted a breach of reasonable care. And Larry did not have a reasonable excuse for grabbing ahold of Walt as he was in the store. A better, reasonable course of action could have been to tell Walt to stop in place so that they could address the issue, and not to make unconsented contact with his physical person. Additionally, Walt and his sons were actually locked in a room! Even if they had reason to detain them, by confining the sons, who were not accused of any wrongdoing, and their father, in such an extreme fashion, they could be seen to have breached their duty of care to Walt and his children. This and the prosecution, which Walt insisted all along was based on a silly error, could also be considered as evidence of failure to use reasonable care. The incident would have caused Walt and his family undue distress, likely humiliation, and other injuries, both tangible and intangible (attorneys costs, for one), for which they could seek compensation from Pinney's. So long as they can substantiate their injuries with reasonable certainty, they should be able to collect sizeable damages with a negligence claim for this incident.

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Molly and Mack would likely succeed in their suit for negligence against the Blue Roof Inn and Motel 8 as its owner for the bedbug bites they sustained during their overnight stay at the motel. The basis for this suit would be both that the motel failed to reasonably combat the insect problem, and the motel also failed to act on its own internal recommendations to prevent their injury. A suit against BugLab for negligence performance of extermination duties would likely fail, because BugLab's duties were circumscribed within its relationship of privity with the motel and its owners.

The duty of a landowner is to prevent against known and unknown dangers to those who come onto the property, providing a pecuniary benefit to the owner. Buglab had specifically informed the Blue Roof Inn of the problems within its rooms, and had recommended a recourse for treatment. Guests, both in 2000 and 2001, had actively complained about the
bedbugs and the bites that they caused. Thus, the insect problem was clearly known to both the Inn and the Motel 8 corporation, and they had a duty to make a reasonable effort to combat the problem. Furthermore, the employees of both the motel and the parent corporation all failed to carry out their duties with reasonable care, and thus, the parent companies would be responsible under the doctrine of respondeat superior.

Arguably, the duty of the motel also encompasses a duty to warn. Although these duties typically exist only within certain designated special relationships, such as parents and children and doctors and their patients, the existence of reliance may also justify the extension of an affirmative duty. Where a patron is utterly dependent on the judgment of the one who provides service, a duty to warn may exist.

Here, the company had actual knowledge of the danger. Every tier of the company, from the personnel at the check-in desk, to the manager, and also the parent company all knew of the danger. In fact, the manager herself contacted Motel 8 and informed them of the pervasive problems, asking for permission to spray the room and temporarily close the hotel while the issues were being addressed, but the administrators refused. Even in the face of actual notice of the problems, they willfully chose to turn a blind eye to the hazards. And when Molly and Mack and other guests came to check into the room, instead of being informed by the staff that the facilities had problems with bedbugs, they were told absolutely nothing. In some cases, the staff made statements that were outright lies (see fraud discussion infra). Thus, the motel may have also possessed this additional duty, which they failed to meet.

Breach of this duty is clearly established by the facts of Molly and Mack's case. Reasonable care of a landowner would be established by addressing dangers of which they owners knew and preventing foreseeable injury from these dangers. Company customs may not always be indicative of reasonable care, but failure to follow a custom or procedure which was expressly designed to prevent the harm that occurred may be treated as a breach of duty. With utter disregard for their own directives, the motel, clearly in an effort to make a quick buck, rented out the rooms in spite of the extreme likelihood that the patrons would in fact be bitten. Molly and Mack, in fact, were sent to a room which had specifically been designated as 'off limits' because of the bug infestation extant in those rooms. Thus, this failure to adhere to procedure constitutes a breach of duty.

Learned Hand's formula, as applied to these facts, would also indicate that a breach of duty has occurred. In Carroll Towing, Judge Hand developed the equation which states that if the burden of preventing the harm is less than the severity of the likely injury multiplied by the probability of the injury, then the defendant would have failed to meet his duty of care. The motel's exterminating contractor had recommended that the rooms be completely sprayed. The cost of conducting such a service was paltry in comparison to the income generated by renting the rooms. In fact, just renting one room for five days would have covered the exterminator's fee completely. Instead, the motel was fixated on trying to negotiate free services, an offer which Bug Lab was clearly within its right to reject. For a period of two years, guests had been continually bitten. Thus, the likelihood of continued injury to guests was not only foreseeable, it was predesigned based on the motel's failure to act affirmatively and eliminate the problem. The manager engaged in a cover-up by instructing employees to use the arguably more innocuous description of the insect infestation as that of "ticks" instead of "bedbugs." This could even constitute a separate tort, that of fraud. Fraud requires a reckless disregard for the truth, a false statement made by one in the course of business which is designed to create reliance, such justifiable reliance occurs, and the party relying on the information suffers a detriment. Prior guests who had stayed at the motel, after being bitten, were told that the bugs were in fact of some other source. Undoubtedly, beyond offering refunds for unhappy patrons, the false claims that the insects were only ticks and not bedbugs probably protected the Inn from further liability. However, there were no signs that the Inn itself made affirmative statements towards Molly and Mack regarding the condition of the room or the
insect problems within them. Therefore, Molly and Mack would not seek to bring a claim for fraud against the motel.

Causation would be established by showing that but-for the reckless behavior on the part of the employees and management of the Blue Inn and Motel 8, the bedbug problem could have been eliminated, or at the very least, molly and mack if told of the problem, could have chosen to stay elsewhere and not sustained bedbug bites. Proximate cause is demonstrated by showing that the person likely to be injured would be a guest, as Molly and Mack were guests, and the type of harm, that resulting from bedbug bites, was foreseeably. Because the company and the inn managers and employees had actual notice of the infestation, the danger to the guests and the imminent threat of bug bites causing injury were both foreseeable.

Molly and Mack would sue for the cost of their medical treatment from bites and the emotional harm arising from this dreadful experience. The physical injuries they sustained automatically allow for recovery for intangible harms, both emotional and economic, so long as they provide a basis for recovering those losses. However, they would not recover for bystander emotional distress, because they were not in the same room when the injuries occurred.

Portee and the more restrictive case of Johnson v. Jamaica hospital both require the existence of a special relationship, contemporaneous observance of a loved one’s injuries, serious injury or death of the loved one, and resulting emotional harm. Arguably, too, the extent of their injuries was relatively minor and do not provide a basis for bystander recovery.

The duties of Independent contractors, however, are often confined to the contractual relationship. In Jansen v. Fidelity, an inspector who was hired to assess a facility for reasons of insurance was not held liable when a worker was injured later on. The court limited his duty to his employer, even though arguably a more thorough exercise of his inspection would have revealed the source of danger which led to the worker’s injury. Buglab was hired by Blue Roof two years before Molly and Mack were injured. Their duties were narrowly circumscribed by the terms of their contract, and the duties involved spraying the rooms and informing their employer of the problems. However, they could only perform as much as their employers allowed. When the motel requested free service an assessment of the building by their company, BugLab refused, as was its privilege. They did in fact exercise reasonable care to discern the problem and instruct their employer, the motel, of the proper course for combating the infestation. But when the Blue Roof Inn refused to act, their duties would have ended. Thus, this situation constitutes an even more justifiable limitation of duty within privity than the circumstances of Jansen, where the inspector arguably failed to use reasonable care.

II.

Systematic fraudulent misrepresentation, blatant disregard for a known and ever present danger, and failure to prevent the the harms from occurring when notice is veritably screamed at the defendant by both patrons and those contracted to discern the problem provide justification for awarding punitive damages. When conduct rises above the point of being negligent as to show gross negligence or recklessness, punitive damage awards are justified. In Gore v. BMW, which involved a car which was represented as being a new car when in fact it had been repainted, the Supreme Court listed several factors which were then cited in Campbell v. State Farm insurance as providing grounds for awarding punitive damages. Among those were: the level of reprehensibility of the acts/omissions, evidence showing repeated behavior of a similar type, and the extent of the harm. Allowing guests to be systematically attacked by and routinely bitten by something as offensive as bedbugs could certainly be considered reprehensible behavior. The facts also show that the Motel 8 and the Blue Inn’s behavior belied a continuing pattern of disregard for the health and well being of their guests, all so that they could maximize their own profit. The cost of treating the situation, definitively, would have been so slight in the beginning, and with such a rampant problem, instead of accepting the reality of the problem that their lack of concern created, motel 8 openly
refused to allow treatment to occur.

However, in State Farm, the Supreme Court expressed concern that punitive damages should not exceed a single-digit ratio in proportion to the amount of compensatory damages. Their decision was primarily governed by concerns of due process and protection from overextensive liability. Still, the cases of State Farm and Gore arguably can be limited to their facts, since both cases involved charges of fraud, misrepresentation, but not physical injury. A strict application of the Supreme Court's holding would essentially protect the defendants beyond reason, because in cases such as this where the injuries are relatively minor and the compensatory damages would therefore necessarily be small, the punitive damage awards would also be proportionately small. If so, then the entire deterrent motive behind the award of punitive damages would itself be eradicated. Furthermore, the problems with the plaintiff's case in State Farm involved the use of evidence that was outside of their jurisdiction and involved company wide misbehavior regarding acts that were, unfortunately, not closely related to their own case. Here, Molly and Mack can show that the bugs were a continuing problem, and the owners, managers, and employees were callously indifferent to the dangers.

Generally, the standard for overturning damage awards asks whether the amount of damages awarded "shocks the conscience and belies passion or prejudice" on the part of the jury. Additionally, as stated in Seffert v. LA Transit Authority, the trial judge, upon hearing all the evidence, should sit as the "thirteenth juror," and he has the power to either enter the jury verdict as rendered or reduce the damages as he sees fit. In this case, after hearing all the facts of the plaintiff's case, the trial judge upheld the damages. Judge Posner affirmed it at the appellate court level. His perspective is one which has consistently demonstrated a concern for economic equity, being a strong advocate for limitation of strict liability, and also for defining the standard of care in negligence cases as that which would be the most 'cost effective standard' of safety. Knowing this, and given the fact that he supported the ruling, it seems that the egregiousness of the conduct merits special considerations which would obviate the need to reduce the punitive damage award.

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Because Pinney's probably has more money than Larry the guard, Walt should sue Pinney's through vicarious liability. As set out in question 1, Pinneys would be vicariously liable for their security guards because the guards were doing the act they were hired to do, were within the time and spatial boundaries of employment, and Larry's acts were motivated by serving the employer (Christensen v Swensen).

Battery:

Walt has a valid claim for battery. Battery is an act of an offensive nature or unconsented touching or trauma intended to cause and did cause contact upon the body of another. In the Wishnatskey case, plaintiff tried entering a room with a closed door but defendant shut the door on him causing him to go back into the hallway. The court held that though there was contact, it must be of an offensive nature to a reasonable sense of personal dignity. Though defendant's actions were rude, they would not offend a reasonable person's sense of personal dignity. In his case, grabbing of a sweater while walking in a mall constitutes an act which would offend a reasonable sense of personal dignity that was not consented to. In Picard v Buick, defendant service man touched plaintiff's camera while she was trying to take a picture of him. The court held that the touching of a camera constitutes bodily contact because the camera was considered to be part of the plaintiff's body. Likewise, the sweater would be considered part of Walt's body. Larry must have intended the act. In Garatt, a boy pulled a chair from underneath his aunt and she fell. The court held that the boy would be meet the intent requirement if the court can prove that he knew with substantial certainty that this act would occur, or in other words he intended the act. Larry intended the act because he obviously knew with substantial certainty that his act of grabbing Walt's sweater would occur. Injury need not proven in a battery case, but causation
must be. But for Larry's act, contact would not have occurred. In addition, the contact was a foreseeable cause, of a foreseeable type and to a foreseeable person. Because Walt meets the act, intent, and causation elements of battery, he has a successful claim against Larry for grabbing his sweater.

Pinney's possible defenses of consent and self defense are very weak if not impossible. Self defense is a valid defense where a reasonable person would be justified by committing an act (out of honest and reasonable fear). This is not the case here. In addition, consent as outlined in the prizefighting case is not applicable. Pinney's might argue protection of property. In the Katko case, the court held that a spring gun capable of severe injury can not be defended based on protection of property because value of people outweighs value of property. In that case, however, the house was uninhabited and so the spring gun injury seemed unreasonable. In this case, the battery of grabbing his sweater might possible be considered by a jury as small harm when taking into account the purpose of protection of property.

Assault:

Walt does not have a successful assault case for Larry grabbing his sweater. Assault is an act of a threatening nature which intends to and actually causes reasonable fear or apprehension as stated in Picard (supra). In this case, Larry came from behind and therefore, Walt was not aware of the assault at the time it occurred and would not have caused reasonable apprehension or fear. If Larry would have come from within Walt's sight, the act element might have been satisfied and the court would have to determine if the intent element from Garatt (supra) and causation were met.

False Imprisonment
Walt's claim

False imprisonment is the confinement against one's will of one's freedom of locomotion or personal liberty. In the Donut Shop case, plaintiff claimed false imprisonment for being detained in the back of the store while being questioned by employer for missing money. Plaintiff voluntarily went to the back of the store, and the employer never physically forced her to stay, set up any physical barriers, or made any threats. The court held that mere moral pressure is not enough reason for confinement. In this case, however, plaintiff Walt did not voluntarily go back to Pinney's for questioning because he was handcuffed and escorted by Larry. In addition, Larry locked the door, setting up a physical barrier. Thus the act of confinement was adequate here. In addition, Larry knew handcuffing and locking the door was substantially certain to cause confinement and was both a but for and proximate cause. But for locking the door and handcuffing, confinement would not have occurred, and through locking the door and handcuffing Walt it was foreseeable that this type of confinement would happen to a particular person, Walt.

If Pinney's was in New York, the false imprisonment claim might be harder to prove. New York enacted statutes to allow retailers to detain people they reasonably suspect of larceny for a reasonable period of time. In this case, however, it seems unreasonable to detain a person like Walt who offers to prove innocence when the retailer refuses to let the suspect prove his innocence.

Walt's boys' claim

The two boys could also possibly sue for false imprisonment for being confined to the store. The act of confinement was by something more than mere moral pressure, but more along the lines of physical barrier. In addition, Pinney's knew with substantial certainty that holding their father in the back room was likely to cause confinement for two boys. The elements of causation are also
met because it was foreseeable that confinement to these two boys would occur and would not have occurred but for Pinney's actions.

**False Arrest and Malicious Prosecution**

Plaintiff can sue for false arrest when arrested under the pretenses that defendant had authority and reason to detain. Larry exerted legal authority by handcuffing Walt and leading him back to Pinney's. For a civil arrest, a warrant is required. Larry did not have a warrant but needed a warrant to arrest Walt. Accordingly, Walt could probably pursue a successful false arrest claim.

Walt can also sue for malicious prosecution. Malicious prosecution is when a defendant pursues litigation maliciously against the plaintiff without probable cause and the case ends in plaintiff's favor. In this case, Larry lacked probable cause for the arrest. Mo, his partner, was watching the surveillance and so Larry did not have a probable cause. Even if Larry was watching the surveillance he lacked probable cause because he did not see any stealing. His view was blocked by racks. In addition, Larry pursued litigation maliciously by not allowing Walt's wife to prove his innocence. He disregarded Walt's claims of innocence and failed to look into those defenses. The jury acquitted Walt in this case. Accordingly, Walt can pursue a successful malicious prosecution claim.

**Intentional Infliction of Emotional Distress**

Innocent Walt was handcuffed and escorted through the mall as if he had done something wrong. For a claim of IIED, plaintiff must prove the act was outrageous or intolerable. In today's day and age, few acts seem to fit that standard. In Womack, the plaintiff was connected to a child molestation case and suffered emotional distress. It was up to a jury to decide if this was
outrageous enough. If by some reason, the jury finds the act of handcuffing and escorting an innocent person in a public place to be outrageous, the element of act would be met. Intent, or knowledge with substantial certainty, would easily be proven. Larry should have known with substantial certainty that handcuffing and escorting a person would cause emotional damage. The but for and proximate causation elements would also be met here because but for Larry's act, the emotional harm would not have occurred and such emotional harm is foreseeable to Walt. An important distinction from other intentional torts is that IIED claims must have severe injury. In this case, Walt would have to prove severe emotional harm beyond that which a reasonable person would be expected to endure. It is doubtful that Walt's injury would fall into that category. Accordingly, Walt's claim for IIED will probably be unsuccessful.

**Other extra possible claims**

In addition, Walt might possibly, however slight that chance is, have a claim for family interference. His boys were in the store while Walt was required to stay in the back room. A parent has a right of action for familial interference when their child is abducted.
II.
False Imprisonment

Walt could bring a False Imprisonment claim against the store. False Imprisonment is an unlawful restraint of an individual's personal liberties or locomotion. Walt should not have a hard time showing that this act was against his will or that the security guards had the intent to restrain him. The fact that he was handcuffed and led into this room and the door being locked would lead any reasonable person to believe that he could not just get up and leave. Even if the store argues that he could have left at any time it certainly did not appear that way and Walt would also need to tell about how they "continued to detain him" while he did try to constantly show his innocence this is not the same situation as what was decided in Lopez v. Whaley Drant. In that case it was decided that if Plaintiff is staying there because they feel morally obligated
In this case there was more than a mere obligation.

While force is not needed the security guard’s force in handcuffing Walt will only help him prove his case.

Malicious Prosecution

Walt would also bring a claim for malicious prosecution. Here he would have to show that the Defendant had brought the claim of ‘Criminal Shoplifting’, that the Defendant did it without probable cause, that the Defendant did it with a malicious intent, and that he (the Plaintiff) actually won the Shoplifting case. The first element seems to be proven sufficiently, while it says the police decided to prosecute him for criminal shoplifting, they would have to be doing it in Pinney’s charges. If not then this will fail. If they did then Walt will say they had no probable cause because he never even saw Walt take a sweater, he merely assumed he did. Also, it does not appear that Pinney’s conducted
a reasonable search in order to determine the truth. For Walt to prove that this was done maliciously will be much harder.

There do not seem to be any facts to determine the intent of Pinney's but Walt would have to show that it was, in fact, malicious.

Finally, he did get acquitted in the trial so it is possible he could pursue this claim.

Battery

Walt could also pursue a battery claim against Larry.

Larry's act of grabbing the back of Walt's sweater could be described as an unconsented touching. Following Picard where a camera was considered an extension of the body, Walt would argue that the touching of his sweater constituted touching his body.

To prove Larry's intent Walt would only have to prove that Larry had knowledge with reasonable certainty that contact would occur, not injury (Garrett v. Daley). While injury is not
FALSE ARREST

Walt's claim for false arrest would rely on the fact that an
arrest of this nature would require that the arresting party have
seen the theft and that the thief be charged with a misdemeanor.

Neither happened in this case. Mo did not see the actual
theft and it doesn't appear that Larry did either. In

New York however, detainment of this sort is allowed if by a
reasonable means and for a reasonable time in order to do a
proper investigation. Handcuffing Walt and taking him back through
the mall does not seem reasonable, but that can be argued.

Most importantly though, the security guards did not attempt
to do an investigation at all. This argument would matter
if the suit was in New York only.
an element that has to be proven in a battery claim the
facts do not show what Walt would be recovering for from
this claim. He probably would not bring an assault
claim because he would have to show a reasonable apprehension
that contact would occur and that is highly unlikely
due to the fact that Larry approach Walt from behind.
Walt probably did not see him coming, therefore did not experience
apprehension.

IED

It is possible that Unltd family could bring an Intentional Infliction
of Emotional Distress claim against the security guards on behalf
of their two sons. However, I do not think this will be
valid because the security guards actions and intent do not appear
to be directed at delivering emotional harm to the boys.

NIED

A Negligent Infliction of Emotional Distress would likely fail
as well. The action was not direct to the boys as in German.

nor do I think it would fit into the Dillon factors as

used in Porter v. Jaifee. While possibly fitting the 3 steps (close proximity,

contemporaneous perception and close relationship) the boys, unlike

the mother in Porter, did not witness their father suffer any

severe injury or death. I am unsure as to how this would turn

out but it does not look hopeful.

In all of the claims against the security guards it

can be argued that Pinney is vicariously liable for their actions.

(Christensen v. Sheenon) I am not sure how security guards are employed,

so if they are independent contractors then vicarious liability would

not stand. Unless, however, Walt could argue the doctrine of Ostensible

Agency (Benefit Mutual) where the actions of the Employer and

Employee give the Plaintiff a reasonable belief that the Employee
was the agent of the employer and then relied on that
agency. In order to prove vicarious liability Walt would
need to use the Scope of Employment test (1. The employee
was about the employer's business, 2. Employer was within the time and
special boundaries of employment, 3. Employee motivated, at least in part,
to serve the employer's interests). It seems clear that requirements
#1 and #3 are met by the facts, Pinney's might argue.

What since Walt was in Sears when he was arrested then #2 would
not be met. Walt will have to find out and show how far
security guards can go to apprehend a thief.

Walt would likely want to go after Pinney's because they
are more likely to pay any awards. But he should keep in
mind that insurance will not cover intentional torts.