Part 4, page 241

Chapter 9, pages 243-46, 252-60, and 265-68

Chapter 10-

Do not have to brief Moore case on 271.

Chapter 11

283

FROM CLASS

* Registrar came and covered exam issues.
* Get your number on line.
* Make sure you download the exam schedule from the registrar’s page
* Proximate Cause 2 elements….
* Intervening Acts:
  + Hypo TF1 leaves a hole in the path. TF2 pushes P into hole.
  + What will TF1 argue?
    - TF1 will argue negligence to TF2 was the intervening act and supersedes
  + What kind of test will the court apply?
    - Old metaphysical way is the chain of events….don’t use
    - She then took us back due to frustration with the answers
      * The answer is the Scope of Risk analysis
      * Was the intervening cause with the scope of risk?
  + Original rule of intervening criminal acts was TF1 would not be liable to acts of TF2. Not true for the modern rule.
  + Intervening negligent acts – Ventricelli – the trunk lid.
  + Marshall v Nugent
    - The injury to the plaintiff was within the scope of risk of the original cause and within the class of persons. The bosom of time continues.
  + In Horton….
    - The risk terminated because the mother knew.
  + Review of the problem from the end that Brad covered.
    - Part 1 - The defendant 1 will be liable if the harm to the plaintiff’s foot is within the scope of risk if we look at the general character of harm. The class of individual was within the scope of risk because it was near a playground and children play there.
    - Part 2 – The intervening cause was the parents attempting to remove the tar because of the original harm (like Marshall going up the hill). Intervening cause number two might be within the original general character and did the risk terminate with the parents as in Horton. It would suggest there is superseding cause.
* Concerned at end of class she mis stated something….be clear:
  + P (child) vs D1 (Tar)

vs Parents

vs Cap Gun

Just focused on proximate cause. D1 would argue the parents were a superseding cause and the cap gun was too. Parents would argue they are also one with the original defendant and the cap gun child was the superseding cause.

The defendant’s negligence will be considered a proximate cause if (1) the plaintiff’s harm is within the scope of risk of the defendant’s negligence and (2) the plaintiff is within the class of persons harmed by the defendant’s negligence…..

That’s it….use the two part test.

Defenses to the Negligence Case (pg. 241)

* Plaintiff who proves every part of a prima facie case will survive a directed verdict and go to the jury.
* If the defendant mounts a successful affirmative defense then:
  + Recovery may be reduced
  + Defendant has burden of proving affirmative defenses.
* FROM CLASS:
  + We are focused on the common law defenses.
  + She reviewed the other defenses only to say we will see them later.

Fault of the Plaintiff

Contributory Negligence

* **CASE: Butterfield v. Forrester (pg. 243)**
  + PURPOSE: Illustrate Plaintiff fault
  + COURTS: The trial court directed the jury that if Plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for Defendant. The jury returned a verdict for Defendant and Plaintiff appealed. Found for the defendant. The plaintiff appealed for a new trial seeking the court to find a “new rule.” On appeal the new trial was refused.
  + FACTS: The defendant had left a pole across the road near his house, but there was another passage on the same road. Around dusk (as light was falling and the candles has just been lit) the obstruction could be seen at 100 yards. The plaintiff had left a public house and was riding his horse hard when they hit the obstruction. There was no evidence he was intoxicated.
  + ISSUE: Is Plaintiff permitted to recover for injuries sustained by Defendant’s negligence, if Plaintiff was also negligent?
  + RULE:
  + ANALYSIS: Jury was directed that if someone riding with ordinary and reasonable care could see the obstruction, and if they were satisfied the plaintiff was riding without ordinary care they should find for the defendant.
  + CONCLUSION: Because Plaintiff was negligent in failing to ride his horse with ordinary care, he is not permitted to recover for his injuries. Plaintiff’s contributory negligence caused the accident. Defendant was negligent, but there would not have been an accident had Plaintiff exercised ordinary care. Contributory negligence prevents Plaintiff from recovering from Defendant.
  + FROM CLASS
    - She asked what “action on the case” is
      * It is Trespass on the Case…this is the original rule
      * Negligence…..
    - Start at the beginning…Is there any negligence? What did the defendant do and was it a risk?
      * D left pole in the road. What did he risk?
* Notes (pg. 244)
  + Contributory Negligence – after this the courts developed an all or nothing view that barred recovery.
  + Justifying Butterfield
    - Fault Principle – should the plaintiff lose because the defendant mulcted?
    - Proximate Cause – could the plaintiff be treated as a proximate cause?
    - Negligence – did defendant have a duty and a breach?
  + FROM CLASS
    - What was going on in England? Industrial Revolution. This doctrine was to limit liability when couched that way.
* Comparative Fault Rules
  + New York McKinney’s Civ Practice Law §1411
    - Culpable conduct attributable to the claimant shall reduce by the percentage
    - Pure comparative negligence statute and will not bar recovery.
  + Wisconsin Stat. Ann §895.045
    - If that negligence is not greater than the negligence of defendant?
      * Is this 50%? Rule?
  + FELA
    - Railroad workers and seafarers…
  + FROM CLASS:
    - The adoption of the harshness of the contributory negligence led to comparative negligence. This came from the states.
    - TERMINOLOGY VERY IMPORTANT – use contributory negligence for the common law rule all or nothing. Comparative negligence if talking about the reduction of damages.
    - Jury determines percentage of fault.
    - Went over note 5…the percentages…
      * Joint and several - $95k
      * Several – B=$10k, C=$40k, D=$45k.
    - Changed facts and now C is the plaintiff. Assume the Wisconsin system (Plaintiff with greater negligence will be barred).
      * Joint and Several - $60k will recover from D only.
      * Several - $45k.

Page 252-260

* FROM CLASS pg. 252
  + She started on Note 7
    - Should the plaintiff’s fault be considered at all in tea case in which that fault poses no risk?
  + Restatement three – apportionment. Not on fault, but on responsibility.
  + Note 2 on pg. 253
    - Why is RS using comparative responsibility instead of comparative fault?
    - Comparison of negligence which is fault to other forms of liability: intentional, willful and wanton…
* Factors for assigning shares of responsibility
  + The nature of the person’s risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct; and
  + The strength of the causal connection between the person’s risk-creating conduct and harm.
* Comparison of plaintiff and defendant fault only an issue when both parties are negligent.
* FROM CLASS
  + All or nothing judgments….must know comparative negligence reduces plaintiff’s recovery.
  + Other all or nothing rules….
  + These remain
    - Plaintiff not negligent – YES – either yes or no
    - Plaintiff not actual cause – YES Note 2…
    - Plaintiff not within scope of risk of plaintiff’s negligence – YES – Note 3
    - Sorting claims – Note 5
    - Plaintiff as a superseding cause – YES – nothing…Note 7
    - Mitigation of damages (Note 9) – she commented it is a doctrine and excludes a specific item of injury that could be avoided by the plaintiff.
      * Excludes recovery for a specific item of damages that could have been avoided by the plaintiff.
      * Example was the antibiotic.
* **CASE: Bexiga v. Havir Manufacturing (pg. 256)**
  + PURPOSE: illustrate where fault of plaintiff is against public policy
  + FACT: Bexiga (P), a minor, was operating a power punch press for his employer when his right hand was crushed by the machine, resulting in the loss of fingers and deformity of his hand. Bexiga (P) mistakenly placed his hand under the ram at the same time the foot pedal was depressed, and no safety devices were in place to prevent this action. He did so, to clear a piece of metal and simultaneously activated the machine. Expert witness testified this was a booby trap machine without the proper safety devices.
  + COURTS: Bexiga (father) brought suit. Appeal from the Appellate Division’s affirmance of the trial court’s dismissal of the action at the close of the plaintiff’s case. The judgment of the Appellate Division is reversed and the cause is remanded for a new trial.
  + ISSUE: Can contributory negligence be used as a defense in a case where the injury was the very eventuality the duty owed was designed to protect against?
  + RULE: No. In negligence cases the defense of contributory negligence has been held to be unavailable where considerations of policy and justice dictate. We think this case presents a situation where the interests of justice dictate that contributory negligence be unavailable as a defense to either the negligence or strict liability claims.
  + ANALYSIS: This was the very type of situation where the plaintiff’s negligence is was designed to protect against. The asserted negligence of Bexiga (P) placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against.
  + FROM CLASS
    - Duty is to protect plaintiff workers from their negligent fault.
    - This is based on policy. Not grounded on contributory negligence but based on a special duty.
    - Notes pg. 257
    - NOTE 2 – Judge notes mentally ill people can be comparatively negligent but not where the defendant’s duty of care includes protection of the plaintiff from the negligence of plaintiff.
    - NOTE 3 – these are based on policy reasons and giving all to defendant.
    - REITERATED: Duty of the defendant to protect plaintiff from the plaintiff’s foreseeable fault

Stop. We will do assumption of risk for next chapter. Do not have to brief the Moore case on pg. 271. Start on Note 5 next class.

* NOTE 5 – Other statutes. Example, seat belts can be considered comparative fault. Damage reduction would occur on no seatbelt usage.
  + Damages are reduced.

Plaintiff is traveling on a road and TF1 has negligently blocked the road. Leaving one alternate route. Plaintiff takes alternate route which has been negligently maintained byTF2. Plaintiff hits a rut in the road swerves into a ditch. She breaks her leg getting out of ditch.

P-Road

Tf1 Blocks Road

* NOTE 6 – Nonreciprocal risk – in each of these cases the defendant imposes a risk upon the plaintiff.
  + The defendant knows of the plaintiff’s disability which prevents or inhibits the plaintiff’s care for himself
  + The plaintiff’s risky conduct endangers himself but not others.
    - Case 1 – mentally disabled adult sticks hand in grinder.
  + CASE 4 RECIPROCAL RISK
* NOTE 7 – Policy factors in allocation of risks. Barring the plaintiff fault defenses finds that court created limits are grounded in identifiable and consistent issues of principle.
* FROM CLASS
  + Factors Limiting Con/Com Negligence
    - Vulnerability of the Plaintiff
    - Defendant Knowledge of Vulnerability
    - Defendant in a Caretaker Role
    - Non-Reciprocal risk of Plaintiff
  + Plaintiff incapacity
  + Structure Safety
  + Role Definition
  + Process Value
  + Fundamental Values

Page 264 – plaintiffs will have rights or entitlements.

* Stacking flax….Not giving up your rights on anticipating someone else’s wrongs
* Plaintiff has an entitlement to use property
  + Shop at night even though it might be dangerous to do so
  + You can stack your flax

**Traditional Exceptions to the Contributory Negligence Bar (pg. 265)**

* Cases allocating full responsibility to the defendant even after a shift to comparative fault may draw on traditional exceptions.
* The Rescue Doctrine
  + UNLESS the rescuer acted negligently
  + Rescue doctrine: one who rescues a person in imminent danger caused by the negligence of another cannot be charged with contributory negligence unless the rescuer acted recklessly.
  + **CASE: Ouellette v. Carde (Pg 266)**
    - PURPOSE: illustrates rescue doctrine
    - FACTS: Defendant pinned in a closed garage under a car. Gasoline on the floor. Called for help. Friend activated electric garage door opener the gas ignited. She sued the defendant (guy under car).
    - ANALYSIS: He asked for a comparative negligence instruction (meaning she was also at fault, negligent). Trial court denied and it was upheld on appeal.
* Last Clear Chance or Discovered Peril
  + Courts allowed the negligent plaintiff a full recovery when the plaintiff was left in a helpless position by his own negligence and the defendant, who had the last clear chance to avoid injury, negligently inflicted it anyway.
  + ***If the defendant discovered or should have discovered the plaintiff’s peril, and could reasonably have avoided it, the plaintiff’s earlier negligence would neither bar no reduce the plaintiff’s recovery.***
  + ***FROM CLASS – “Defendant should have discovered”***
  + **CASE: Davies v. Mann (Pg. 266)**
    - FACT: Left his ass fettered in the road eating grass. Defendant drove a team and wagon down the hill and ran over the animal.
    - ANALYSIS: Plaintiff’s contributory negligence was no defense. “a man might justify the driving over goods left on a public highway, or even a man lying asleep there.”
  + In states with comparative fault systems the last clear chance and discovered peril doctrines have been discarded.
  + CLASS REVIEW
    - Defendant to Defendant apportionment
      * Negligent defendant will be comparative fault
    - Intentional defendant – jointly and several liable and seek contribution

**Defendant’s Reckless or Intentional Misconduct Pg. 267**

* Contributory negligence was traditionally no defense to an intentional tort. Courts held that contributory negligence was no defense to willful, wanton, or reckless torts.
* FROM CLASS
  + General rule – most states allow plaintiff’s comparative negligence when wanton

Plaintiff’s Illegal Activity

* **CASE: Barker v. Kallash (pg. 267)**
  + PURPOSE: Illustrate plaintiff’s illegal activity
  + COURTS: Held: NO RECOVERY.
  + FACTS: 15 year old plaintiff making a pipe bomb from firecrackers he got from 9 year old defendant. It exploded. Sued the 9 year old, his parents, and many others.
  + ISSUE:
  + RULE: When plaintiff’s act is a direct result of his knowing and intentional participation in a criminal act he cannot seek compensation for the loss, if the criminal act is judged to be so serious an offense as to warrant denial of recovery.
  + ANALYSIS: A distinction must be drawn between lawful activities regulated by statute, in which violation of the statute is negligence or contributory negligence under the rule in Martin v. Herzog and those activities that are prohibited.

Read all of Chapter 10 except the Moore Case..

**Assumption of the Risk Chapter 10 – Pg. 269**

FROM CLASS: Four assumptions of risk

1. Express or with consent
2. Traditional Implied
3. Sports Risks
   1. Primary
   2. Secondary

* **CASE: Stelluti v. Casepenn Enterprises (pg. 269)**
  + PURPOSE: Illustrate exculpatory contracts.
  + COURTS: The lower court granted summary judgment based on waiver and release she had signed. The appellate division affirmed. On appeal the Supreme Court affirmed.
  + FACTS: Stellutti joined the gym and attended a spinning class. During class the handlebars dislodged and causing her to fall and suffer injuries.
  + ISSUE: Does an exculpatory clause relieve liability
  + RULE:
  + ANALYSIS: Exculpatory clauses are historically disfavored by courts. However, there is an assumption of risk. Had the gym been aware of the situation then it could not exculpate itself for reckless or gross negligence.
* **CASE: Tunkl v. Regents of University of California (Pg. 270).**
  + PURPOSE: illustrates assumption of risk by plaintiff.
  + COURTS: Trial court entered judgment for the defendants. Held, Reversed.
  + FACTS: Tunkl brought suit for injuries he suffered at hands of an orderly working within defendant’s hospital. He had signed a release to release the hospital from any and all negligence of its employees.
  + ISSUE:
  + RULE:
  + ANALYSIS: In this situation the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk. Public policy – cannot shift the risk.
  + NOTE 1
  + NOTE 2
  + NOTE 3
  + NOTE 4
* Notes pg 273
  + Types of limitations – typically not allowed if the waiver offends public policy
  + Contractual Limits – An assumption of risk is a contract. The waiver must be conspicuous.
  + Oral contracts – not excluded.
  + Public Policy Limits – Will not allow offense to public policy
  + Tunkl Factors –

**Implied Assumption of the Risk (pg. 275)**

* Traditional Assumption – when the plaintiff, knowing of the risk, chose to confront it voluntarily.
* Doing away with Assumption of Risk can now be handled by:
  + Applying the comparative fault rules
  + Holding the defendant had no duty of care
  + Holding the defendant did not breach a duty
* **CASE: Betts v. Crawford (Pg. 276)**
  + PURPOSE: Illustrate the assumption of risk
  + COURTS: Trial judge did not give defendants instruction. Jury found for plaintiff, 15% negligent. Appealed and judgment affirmed.
  + FACTS: Housekeeper tripped on items left on the stairs.
  + ISSUE: Was the plaintiff to assume risk?
  + RULE: There is no distinction between contributory negligence and assumption of risk when raised as a defense to an established breach of duty.
  + ANALYSIS: Homeowners must use reasonable care to avoid injury to those permitted on the premises
  + NOTES 1 – Implied assumption of risk was once a complete defense to negligence liability
  + NOTES 2 – Betts as a contemporary view – if this plaintiff is reasonable in facing a risk, she is not negligent, but that when she unreasonably confronts a known risk her negligence in doing so reduces her recovery of damages.
  + NOTES 3 – Qualifications of the rule
    - If the defendant reasonably believes the plaintiff has accepted the risk the defendant may not be negligent in relying on the plaintiff to achieve safety
    - Defense based on a contractual, express, assumption of the risk
  + NOTES 4 – Risk seeking Behavior – Plaintiff has three options:
    - Not engage in an activity
    - Engage in the activity and encounter a tortuously created risk
    - Engage in an activity and not encounter the risk
  + NOTES 5 –

Applied Assumption of Risk in Sports Cases (Pg. 278)

* **CASE Sunday v. Stratton Corp**
  + PURPOSE: Illustrate negligence in a sports case
  + COURTS: Trial court found for the plaintiff, $1.5MM, and it was upheld on appeal
  + FACTS: Plaintiff skiing at defendant’s ski lodge. Smooth novice trail but plaintiff struck a bush in the snow, injured and became permanent quadriplegic.
  + ISSUE: Can plaintiff recover where he assumes the risk?
  + RULE:
  + ANALYSIS: If the fall had been due to no breach of duty that risk would be assumed by the plaintiff and he could not recover.
  + NOTES 1- primary assumption of risk and duty?? – duty falls upon the defendant and if not breached then we can assume plaintiff assumed the risk. Indicates the no-duty no-breach conception and its attendant complete-bar effect.
  + NOTES 2 – Secondary assumption – used to indicate contributory negligence.
  + NOTES 3 –
  + NOTES 4 – Statutory Rules
* **CASE: Avila v. Citrus Community College District (Pg. 279)**
  + PURPOSE: Sports illustration and assumption of risk
  + COURTS: The district demurred, claiming it owed no duty of care to the plaintiff. The trial court sustained the demurrer and dismissed. The court of appeal reversed. The California supreme court then reversed the court of appeals. In other words, the district prevailed on its demurrer.
  + FACTS: Prior to Avila coming to bat, prior inning, one of the opponents batters was hit by a pitch thrown by Avila’s team (the Road Runners). Avila was up, top of the next inning, he was then hit by a pitch thrown by the Citrus College pitcher. Cracked his helmet. He staggered, felt dizzy, was in pain. He kept playing. Suffered unspecified serious personal injuries.
  + ISSUE:
  + RULE: The doctrine of primary assumption of the risk bars any claim predicated on the allegation of negligent or intentional throwing of the pitch.
  + ANALYSIS:
  + NOTES 1- Recklessness – personal injury cases arising out of an athletic event must be predicated on reckless disregard of safety.
  + NOTES 2 – Sanctioning
  + NOTES 3 – Defining inherent risks
  + NOTES 4 – Increased risks
  + NOTES 5 – Reasonable Expectations
  + NOTES 6 – Rules of Sport
  + NOTES 7 – Sports Participants
  + NOTES 8 – Spectators
* CLASS REVIEW 11/14
  + Plaintiff defendant – what is the general
    - Most states will allow the plaintiff’s negligence to be comparable
  + KEY SLIDE
    - Plaintiff’s comparative negligence is NOT A DEFENSE to intentional tort
    - Plaintiff’s comparative negligence IS A DEFENSE to willful, wanton, reckless
  + Contributory negligence is a defense
  + KEY SLIDE
    - Defendant and Defendant Apportionment
      * Negligence: D is responsible for comparative fault share
      * Intentional: D is jointly and severally liable
  + Plaintiff’s illegal activity – recover is barred if it is serious.
  + Assumption of risk
    - Express – complete bar
    - Traditional
      * Knowledge of risk
      * Plaintiff appreciated the risk
      * Plaintiff voluntarily exposed himself to risk
  + Sports Negligence
    - Primary – an inherent risk of a sport
      * Inherent risks cannot be avoided by reasonable care
      * Ski resort – no duty
    - Secondary
      * Coparticipants must avoid recklessness
      * Organizers do not increase risks