Elements of Negligence

• Duty

• Breach of Duty

• Proximate Cause
Defining Foreseeability

• What Foreseeability?
  Describes what one can see or know beforehand
  Emphasis is on the extent to which something can be known beforehand
  Foreseeability is primarily a question of the extent to which something is predictable or “occurable.”
  Foreseeability is determined before the fact.
Foreseeability Spectrum

• To assess the foreseeability of an event or result, you must pinpoint it on a scale or spectrum of foreseeability.
• Ask yourself....if the event or result was foreseeable in any shape, fashion, or form.
• If the answer is NO…the inquiry is ended.
• If the answer is YES…then the next and most important inquiry is *how* foreseeable was the event or result.
Foreseeability Spectrum

• The categories of the spectrum are NOT mutually exclusive.
• The categories are rough approximations on the higher-to-lower ranges of “occur ability.”
• Intent has two meanings in the law…
  • 1) the desire to have something happen;
  • 2) the knowledge with substantial certainty that it will happen from what you do or fail to do.
Objective Standard

- When foreseeability is an issue in the law what questions must you ask yourself?
- 1) was the event or result foreseeable to the defendant (subjective)
- 2) would the event or result have been foreseeable to a reasonable person (objective)
- In most cases...the 2nd question is asked only when the answer to the 1st question is NO
Subjective vs Objective

• What is the Subjective Standard? (96 dog)
  Subjective standard = measured solely by what the defendant actually knew or understood.

• What is the Objective standard? (96)
  It measures something by reference to what a reasonable person under the same or similar circumstances would have known or understood.

• Give me an example? (96)
  Ex: if the defendant did not foresee something that a reasonable person would have foreseen, we are able to say that the defendant should have foreseen it.
Phrasing the Foreseeability Question

- What are two ways to phrase the foreseeability question? (98) christmas tree
- 1) general
- 2) particular
- What is the general phrasing?
- What is the particular phrasing?
Foreseeability Determination
“Formula”

• The “formula” is designed to provide a framework for asking the right questions about foreseeability. (100)

• Consider the following eight factors…
  • 1) area analysis
  • 2) activity analysis
  • 3) people analysis
  • 4) preparation analysis
Foreseeability Determination “Formula”

- 5) assumptions about human nature
- 6) historical data
- 7) specific sensory data
- 8) common sense
Review of Steps to Determine Foreseeability

1) foreseeability is determined before the fact
2) decide how broadly you want to phrase the foreseeability question
3) apply the factors in the foreseeability determination formula that are applicable
4) from the range of “highly unusual” to “a certainty,” draw your conclusion in regard to spectrum
5) give a counteranalysis
THE END