Simplified critical path diagram of the elements of negligence in tort law
Class #6 (and review again in classes ##22-23)
LL&V §K-O // Prof. Garet // Fall, 2016

YES (D liable)

YES — 3. Was D’s failure to take reasonable precautions the legal cause of harm to P?

NO (D not liable)

YES — 2. Did D breach that duty by failing to take reasonable precautions?

NO (D not liable)

YES — 1. Did D owe a duty of care to P?

NO (D not liable)

1. Did D owe a duty of care to P?

NO (D not liable)

Note: On the diagram, “D not liable” means “D not liable to P for the tort of negligence.” D might be liable to P on some other theory.

In a typical suit in which P sues D to recover for injuries caused to P by D’s negligence, P meets his or her step 2 burden by pointing to a particular precaution that a reasonable person would have taken but that D failed to take.

This “reasonable precautions” or “failure to take a precaution that a reasonable person would have taken” analysis figures in Vance v. Ball State University, class #6.

- If Davis is Plaintiff Vance’s mere co-worker (not her supervisor for Title VII purposes), then the burden will be on Vance to point to a particular precaution that a reasonable employer would have taken, but that Ball State failed to take, to prevent racial harassment (a racially hostile work environment). E.g., Vance might point to awareness training or safe complaint mechanisms in place at comparable employers.

- If Davis is Vance’s supervisor for Title VII purposes, and since Vance was not demoted or terminated etc. (subjected to a tangible employment action), then the burden will be on Ball State to show that the burden is on the employer to establish, by affirmative defense, that (1) employer exercised reasonable care to prevent and correct any harassing behavior (e.g., employer had an active harassment prevention program and complaint procedure), and (2) plaintiff unreasonably failed to take advantage of corrective opportunities that the employer provided. (This is the Ellerth-Faragher affirmative defense, p. 596.)