I. This question is worth 150 points.

David was driving home from work at 5:30 p.m. when he decided to stop at his favorite bar, the Call Me a Cab Cafe, for a few beers. He drank four 16 oz. beers in thirty minutes and left. That is a lot of beer in a short time and had a detrimental effect on David’s driving ability. He was not, however, particularly visibly intoxicated when he left the Cafe. He was spotted by a local Police Officer for driving erratically. The officer recognized David, knew him, had arrested him before for driving while intoxicated (though David has never been convicted of it), but decided to let it go this time since it was so early in the evening and the officer, too, was about to go off duty. The City Police Department generally has a rather lax approach to enforcement of traffic violations, including drunk-driving. The local County Council has been asked to review the policies of the Police Department for years in this regard but has refused, saying it is a matter within the discretion of the Police Chief and his staff.

On the way home, David, who was not speeding, ran off the road in his neighborhood and killed Peter, a 7 year old who was playing in his yard. David was driving his 2006 Saab.

The following news article provides information about a new device that can be incorporated into automobiles which will identify drunk drivers before they operate the vehicle and disable the automobile’s ignition system. This article provides information you will need to answer this question.

IN-CAR ALCOHOL SENSORS COULD BECOME NORM.
By Matthew Walters.

Deterrence, the tactic of choice against drunken drivers for two decades, is no longer working in the struggle to reduce the death toll, say private and government experts, and today they will propose moving toward alcohol detection in every vehicle.

In the first phase, Mothers Against Drunk Driving, backed by a national association of state highway officials and car manufacturers, plans to campaign to change drunken-driving laws in 49 states to require that even first offenders be required to install a device that tests drivers and shuts down the car if it detects alcohol.

Many states already require the devices for people who have been convicted several times. Last year New Mexico became the first to use them after a first offense. With that tactic and others, New Mexico saw a 12 percent drop in alcohol related fatalities last year, while the number nationwide was essentially unchanged, according to federal figures.
The next step would be a program to develop devices that would unobtrusively test any driver for alcohol and disable the car to thwart drunken driving. The automaker Saab and a medical equipment firm already have devices that can be adapted for that job.

About 13,000 people will die this year in car crashes in which a driver was legally drunk. “We’ve seen no progress in 10 years; we’re completely stalled,” said Sal Ferguson, a highway safety researcher at the Insurance Institute for Highway Safety. Ferguson said the most promising new technologies would work automatically, like air bags. The automatic sensors might be used first in corporate fleets, and eventually insurance companies might give discounts on coverage to drivers who had them.

The Alliance of Automobile Manufacturers supports early use of Breathalyzer interlocks for first offenders but is balking at requiring manufacturers to include automatic sensors in all automobiles. The AAM supports the long-term goal of unobtrusive alcohol sensing in cars but only with a government mandate that carries with it protection from civil tort liability.

Peter’s parents have come to you for advice. They wish to know whether they have a negligence claim against the Cafe and the City. They also wish to know whether they have a strict product liability claim against Saab, the automobile manufacturer, for failing to incorporate the alcohol sensor device in the design of David’s Saab.

An applicable statute abrogates local government immunity and states the following:

§ 1. Local courts shall have jurisdiction of civil actions on claims against Local Governments for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his or her office.

§ 2. Civil actions against Local Governments shall not be permitted when based upon an act or omission of an employee, exercising due care, in the execution of a statute or regulation, or based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a local government agency or an employee of the Government.

There is no statute that makes restaurant/bar operators criminally or civilly liable based on the serving of alcohol.
II. The following question is worth 100 points.

The State of Confusion enacted a state statute entitled: "The Environmental Protection and Safety Act." One of the provisions of this act prohibits the manufacture and sale of cans on which the flip top is able to become separated from the can.

Drink Bottling Company ("DBC") is located in the State of Confusion. DBC manufactures and distributes Perky-Cola in cans with flip tops that can become separated from the can.

Pamela, a successful professional tennis player, was drinking a can of Perky-Cola when the flip top separated from the can. Before drinking, Pamela noticed the flip-top and commented to her friend, “I didn’t think they made drink cans like this anymore.” She was not particularly adept at removing the flip top and began to drink from the can with the flip top only partially removed. While drinking, the flip top came off and she swallowed it. She began choking. Pamela’s friend rushed her to the hospital where Norm Nurse administered the Heimlich maneuver. Norm was able to dislodge the flip top but in his overzealousness, and excitement at treating a famous tennis star, he broke Pamela’s ribs. The ribs punctured Pamela’s lungs and she was rushed into the operating room for emergency surgery.

Sandy Surgeon attempted to repair Pamela's lungs but half-way through the procedure, through no negligence of Surgeon, Pamela's heart stopped beating as the result of a congenital heart defect. After several attempts to revive Pamela, Surgeon believed, based on reasonable medical protocol, that Pamela was about to die, so she removed one of Pamela’s kidneys to be used in her ground-breaking research into kidney disease. Pamela had not made any decision about organ donation in the event of her death. Just as Surgeon finished the successful removal of the kidney, which was performed with due care, Pamela's heart began beating.

Pamela survived the surgery and her ribs and lungs have properly healed. She has permanent damage to her vocal chords from swallowing the flip top. Due to the kidney removal, she is unable to engage in any strenuous activities and can no longer compete on the professional tennis circuit.

The following statute is applicable in Confusion:

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery.

“Fault” includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability, including implied and express assumption of the risk.
The trier of fact shall determine the percentage of total fault of the parties to each claim, considering both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed. The court shall determine the award of damages on the basis of joint and several liability, identifying in the judgment the percentage of fault allocated to each party.

Evaluate Pamela’s negligence (not strict liability) claims against DBC (worth 75 points), and intentional tort claims against Surgeon (worth 25 points), including an assessment of applicable defenses.
III. A. Analyze whether negligent infliction of emotional distress is available based on the facts of the following news report. This question is worth 25 points.

A California woman who found a condom in her bowl of clam chowder has sued the upscale restaurant that served it to her – saying she has suffered depression and anxiety from the shocking discovery. Smith, 48, and her three female companions are suing the restaurant for negligent and intentional infliction of emotional distress.

“I thought it was calamari or shrimp or something so I chewed one more,” Smith told the local television station. “It felt rubbery. I told my friends, ‘My God, there’s something in my mouth.’” Smith said she spit the offending object into a napkin and at first thought it was a latex glove. Then her friend realized what it was.

“I said, ‘Oh, my God,’ and ran into the bathroom with another friend of mine and I started throwing up,” she said. “I threw up everything I ate there, every single thing.”

A spokesman for the restaurant told the local paper that its staff had no idea how the condom got into the chowder, adding: “It’s as big a mystery to us as it is to anybody else. There is absolutely no evidence to suggest the restaurant was the source of the condom. Either it came from the four women or it was thrown as a practical joke by another patron in the restaurant.”
IV. This question is worth 25 points.

Al owns a home next to the Springfield Mall, owned and operated by Mallco. The Mall’s primary stores are a very large liquor store, a bookstore that specializes in adult literature and a gun shop. The Mall is very profitable. The neighborhood is not a particularly desirable place to live and, indeed, Al is fearful for his safety, as are his neighbors. Crime has increased in the neighborhood in the 20 years that the Mall has been there. A recent rash of auto thefts has led Mallco to hire extra security at the Mall, but the crime rate continues to skyrocket. Al’s home has recently been broken into and he has installed a security device as well. Nevertheless, Al has now been robbed and beaten.

Does Al have a cause of action based on the Mall as an abnormally dangerous activity?