

**June 2005 Baby Bar  
Question 3 – Torts**

**In an action brought by Ned against Roofer for Negligence, what defenses might Roofer reasonably assert, and what is the likely outcome on each? Explain fully.**

**Ned v Roofer**

**Negligence**

Negligence requires a showing that a duty was owed, that the duty was breached, and that the breach was the actual and proximate cause of damages.

**Duty**

Defendant has a duty to act as a reasonable prudent person under the same or similar circumstances.

Roofer owes Hal a duty to clean up all the nails and other materials that were scraped off during the removal of Hal's old roof. A reasonable prudent person would take those steps reasonably necessary to assure that roofing materials scraped off during removal of an old roof would be confined and collected during the removal process.

Roofer will counter that his duty is owed to Hal only. The fact that Hal hired Roofer to fix his roof establishes a relationship creating a duty owed to Hal

Therefore, Roofer has a duty of care to Hal.

**Duty – Cardozo – Andrew View**

Ned will argue that under the Cardozo view Roofer owes a duty of care to foreseeable plaintiffs in the zone of danger.

Since Ned is a neighbor of Hal, Ned will argue that he is within the foreseeable zone of danger of Roofer's conduct.

Roofer will counter that although he did not have enough tarpaulins and failed to place one on the ground at the rear end of Hal's house, he did his best in cleaning up the debris. Further, the incident involving Ned occurred on Ned's property about six months later after one of the discarded nails was propelled into Ned's yard by Hal's mower. As such, Ned is not within the foreseeable zone of danger.

On the other hand, Ned will argue that Andrews' view of duty applies. Under the Andrew's view, Roofer's conduct would create a foreseeable risk of harm to Ned and he would be injured upon a nail propelling over the fence into his backyard. Further, Roofer knew that tarpaulins were to be used on

the ground to catch the nails and other materials. Thus, Roofer's conduct of not cleaning up all of the nails imbedded in the grass created a reasonably foreseeable risk of harm to others.

However, the only foreseeable harm was to those persons walking in Hal's backyard and not nails being propelled into a neighbor's backyard.

Therefore, the court will find that Roofer did not owe a duty of due care to Ned.

### **Breach**

In the event the court finds' that Roofer owed a duty to Ned, Roofer left some nails imbedded in the grass. Thus, Roofer's conduct fell below the reasonable person standard of care.

Therefore, Roofer breached his duty owed to Ned.

### **Actual Cause**

Ned would not have stepped on a nail and been severely injured "but for" Roofer not using a tarpaulin to catch all the nails from Hal's roof.

Thus, Roofer was the actual cause of Ned's injuries.

### **Proximate Cause**

It is foreseeable that leaving nails imbedded in the grass that someone may be injured by stepping on a nail. However, Roofer will argue that it is not foreseeable that Hal would run over a nail propelling it into his neighbor's yard in which his neighbor, Ned, stepped on the nail causing him injury.

### **Intervening, Superseding Cause**

An intervening cause is one that occurs after the negligent conduct of defendant but before the harm. An independent, intervening act is an abnormal response to stimulus created by defendant's negligence. The fact that the intervening force was not reasonably foreseeable does not excuse D from liability as long as result was foreseeable, such as a third person's negligent conduct.

Roofer will argue that his actions were indirect and independent of Hal's act of mowing the lawn, and running over the nail propelling it into his neighbor's backyard. Thus, Hal's act was an intervening act.

However, the negligence of a third person is always foreseeable and will not cut off Roofer's liability.

Therefore, Roofer was the proximate cause of Ned's injuries.

### **Damages**

Ned sustained injuries as a result of stepping on the nail. Therefore, he would be able to recover for his pain and suffering, as well as his medical bills.

### **Defense - Contributory Negligence**

Conduct of plaintiff which falls below the reasonable person standard of care, which if proven, is a complete defense to a negligence cause of action.

Roofer will argue if Ned had not been walking barefoot in his backyard he would not have stepped on the nail and been injured. The act of walking barefoot without determining the condition of the pathway is conduct falling below the standard of care to which Ned should have conformed to protect his own safety. Thus, he contributed to his own injuries.

However, the fact that Ned was walking barefoot in his own backyard in which he takes care of and would be aware of any condition is not conduct falling below the standard of care.

Therefore, contributory negligence is not a valid defense.

### **Defense - Comparative Negligence**

Where plaintiff's conduct falls below the standard of reasonable care such that liability, including the amount of plaintiff's negligence, is apportioned according to fault.

Roofer will argue since Ned's conduct fell below the standard of care owed, the court will apportion his own fault against Roofer's liability. However, since Ned did not fall below the standard of care owed, as discussed supra, the court will not apportion according to fault.

### **Last Clear Chance**

It appears from the facts that Roofer could have avoided the accident if he had used a tarpaulin to catch all the nails when removing the old roof.

Thus, Roofer had the last clear chance to prevent the injury.

### **Assumption of Risk**

One who assumes the risk when he has knowledge, comprehension and an appreciation of the danger and voluntarily elects to encounter it, cannot recover for Defendant's negligence.

Roofer will argue since Ned walked barefoot in his backyard he had knowledge that rocks, twigs or other materials could be in the grass and cause him injury. By walking barefoot Ned has comprehension and an appreciation of the danger and voluntarily elects to encounter that danger.

However, Ned will argue that there was no knowledge that nails were in his grass and that he could have stepped on the nail causing injury to his foot. Since Ned did not assume the risk, Roofer will be found liable.

Assumption of the risk is no defense.