

## Question 1

Peter, a twelve-year old, was playing with his pet pigeon in a field near his home, which is adjacent to a high voltage electricity power substation. The substation is surrounded by a six-foot tall chain link fence topped with barbed wire. Attached to the fence are twelve 10 inch by 14 inch warning signs, which read "Danger High Voltage."

Peter's pigeon flew into the substation and landed on a piece of equipment. In an attempt to retrieve his pet, Peter climbed the surrounding fence, then scaled a steel support to a height of approximately ten feet from where the bird was stranded. When Peter grasped the bird, it fluttered from his hand, struck Peter in the face, causing Peter to come into contact with a high voltage wire, which caused him severe burns.

Peter's father is contemplating filing a lawsuit on Peter's behalf against the owner and operator of the substation, Power and Light Company (PLC), to recover damages arising from the accident.

What causes of action might Peter's father reasonably assert against PLC, what defenses can PLC reasonably raise, and what is the likely outcome on each? Discuss.

## Answer A to Question 1

The following courses of action might reasonably be asserted against PLC by Peter's father on behalf of his son:

### I. Strict Liability for Ultrahazardous Activity

A defendant ( $\Delta$ ) can be held strictly liable for damages caused to a plaintiff ( $\pi$ ) where the  $\Delta$  is engaged in an ultrahazardous activity. An ultrahazardous activity is one that is 1) inherently dangerous, 2) uncommon to the geographic area, 3) cannot be made safe and 4) whose risk outweighs its social utility.

- A. Inherently dangerous. Electricity is inherently dangerous. In this case, the substation was a high voltage station. This element is met.
- B. Uncommon to the geographic area. Substations are often located in neighborhoods or near them. In this case, the station was located in a field near  $\pi$ 's house, not close where it might be uncommon, for example, next to his house. Arguably, a substation in a field near a residential community is not uncommon. This element weighs against finding an ultrahazardous activity. This element [sic.]
- C. Cannot be made safe. Arguably, high voltage electricity cannot be made safe.
- D. Social utility vs. risk. The social utility of providing electricity to homes is clear. People need electricity for everyday purposes. Moreover while the activity cannot be made safe, the related risks can be lessened. In this case, fences, razor wire and signs were posted and used to prevent people from coming into contact. Therefore the social utility outweighs the risks.

On whole, the factors weigh against finding an ultrahazardous activity and holding  $\Delta$  strictly liable.

### II. Negligence

In order to find  $\Delta$  liable for negligence,  $\pi$  must prove duty, breach, causation, and damages.

A. Duty

1. Foreseeable  $\pi$ ? Here, a child from the houses near the station is certainly within the zone of danger presented by a high voltage station.

2. Standard of Care. Absent a special relationship, the  $\Delta$  must use reasonable care. Here, there may be a special relationship with the  $\pi$ .

a) Anticipated Trespasser. Where a landowner foresees trespassers, the landowner has a duty to warn of known artificial conditions that present serious risks of bodily harm. In this case, the high voltage electricity is an artificial condition that presents a risk of serious harm. Therefore,  $\Delta$  had the duty to warn.  $\Delta$  met this duty by posting 12 signs to the fence warning of danger.

b) Attractive Nuisance. Where a landowner has an attractive nuisance on his land, the landowner may have the duty to make the artificial condition safe or have a greater duty than to just warn the trespasser.

1. Foreseeable to have children trespassers. Since the station is near his home it is foreseeable that children might trespass.

2. Unlikely to appreciate the danger. It is arguable that a 12 year-old boy is unlikely to appreciate the danger that high voltage electricity presents; however, younger children might not.

3. The cost to make safe outweighs the risk of harm. The risk of harm in this case is death from electrocution. However, given the social utility of the activity and the steps taken by  $\Delta$  (fence, warnings, razor wire) one could argue that the appropriate actions were taken to satisfy the landowner's duty.

Taller Fence?  $\pi$  might argue that a taller fence was not that costly in

comparison to the risk. Here the fence was only 6 ft. Arguably a taller fence may have prevented  $\pi$  from entering the station.

Assuming the special duties of a landowner were satisfied,  $\Delta$  only owed a duty of reasonable care to  $\pi$ .

#### B. Breach of Duty of Reasonable Care in Operating Substation

Here,  $\Delta$  posted danger signs, enclosed the station in a fence; however, it only used a 6 ft. chain link fence. Kids climb fences often; therefore, reasonable care would dictate that a higher fence made of something less “climbable” was necessary to prevent entry to the substation. Arguably, therefore,  $\Delta$  breached its duty to  $\pi$ .

#### C. Causation

1. Actual Cause. But for  $\Delta$ 's failure to erect a more formidable barrier,  $\pi$  would not have been able to come into contact with the electricity.
2. Proximate Cause. Where another force intervenes,  $\Delta$  is only liable if the force is merely intervening and not superseding.
  - a) Intervening. Here, the pigeon struck Peter in the face and caused him to make contact with the wire. This is intervening.
  - b) Superseding. Acts of God, intentional torts, and crimes are intervening acts. Here, the flight of a pigeon could arguably be superseding, however, where  $\Delta$ 's negligence creates the situation which gives rise to the act,  $\Delta$  can still be liable if it was foreseeable. Once a child is inside a substation, many acts could cause the child to become electrocuted. Therefore, perhaps this will be held to constitute proximate cause.

#### D. Damages

$\pi$  sustained burns and undoubtedly related expenses. These damages were foreseeable, unavoidable, certain and [sic.]

## E. Defenses

1. Assumption of the Risk. Here  $\pi$  scaled a fence posted with 12 warning signs and scaled a steel support. Arguably, a 12 year-old comprehended the risk of high voltage electricity and assumed that risk when entering the station. This would, if successful, preclude  $\pi$ 's recovery.
2. Comparative/Contributory N.  $\pi$  could be held N. for failing to heed the warnings posted. This would preclude (contrib. N.) or reduce (comparative N.) his recovery.

## **Answer B to Question 1**

### **Strict Liability**

Peter's father (Father) can assert a claim of strict liability against Power and Light Company (PLC) to recover damages arising from Peter's accident. To establish strict liability, (i) the defendant is engaged in abnormally dangerous activity, (ii) no amount of due care can eliminate the dangerous conditions, and (iii) the activity or conditions are not common in the community.

### **Abnormally Dangerous Activity**

Father can argue that PLC is engaged in abnormally dangerous activity on its property. In this case, PLC operated a high voltage electricity power substation. Father can argue that the substation is a participial condition created by PLC that is inherently dangerous. The high voltage substation is continuously conducting high amounts of electricity. Upon contact with the electric substation, a person can be shocked with a deadly amount of voltage. Furthermore, the operation of a high voltage power substation is not a low risk activity. The possibility and likelihood of injury due to electric shock is extremely high. Therefore, regardless of the utility of the substation, the operation of the substation is an abnormally dangerous activity.

On the other hand, PLC can argue that the operation of the electric substation is not an abnormally dangerous activity. The substation, while producing high voltages of electricity, is in a controlled, secure environment. The electricity is used to power the community, and it is not being used for any type of dangerous purpose other than to provide electricity. PLC can argue that providing electricity to a community is not an abnormally dangerous activity. Furthermore, while the high voltage substation is inherently dangerous, it is not abnormally dangerous. The substation is operated safely by PLC, and the risk of harm or danger only arises when a third party fails to observe the danger warnings and acts without regard to their safety when near the substation.

The court will likely agree with Father and find that the operation of the high voltage electric substation is an abnormally dangerous activity. Simply operating such a substation carries with it the high risk of danger. PLC's argument that the power is being used to benefit the community will not outweigh the risk that the substation poses to the general public.

## Due Care Will Not Eliminate Danger

Father can argue that regardless of the due care the PLC may have used in securing the high voltage electric substation, the danger of electric shock was not eliminated. Although there was a fence around the substation, and warning signs posted on the property, the substation was still producing high voltages of electricity. The dangerous conditions were still present even though there were warnings. Father can argue that the only way that the risk of electrocution could be eliminated was to shut down the substation so that it would no longer produce high voltages of electricity. Therefore, regardless of any amount of due care by PLC, the substation was still extremely dangerous and capable of electrocuting people who came in contact with the substation.

On the other hand, PLC can argue that the danger in operating the substation arose from third parties who ventured onto the property and came into contact with the substation. The substation was inside a fenced area. The fence was six feet tall with barbed wire on top. PLC can argue that it completely restricted access to the substation to third parties. Therefore, since the substation was in a secure area, the risk of harm to those outside of the secured area was eliminated. By eliminating free access and contact with the substation, the substation posed no harm to the third parties not authorized or legitimately inside the secured fenced-in area near the substation.

The court will likely agree with Father and find that regardless of the erection of the fence and warning signs on the property, PLC still could not eliminate the danger of electrocution to persons coming into contact with the substation. Therefore, no amount of PLC's due care could eliminate the danger posed by the high voltage electric substation.

## Not a Common Activity

Father can argue that operating a high voltage electric substation is not a common activity that occurs in the community so close to a residential area. Father can argue that while electric substations are common, they are not erected and operating near residential areas. In this case, PLC operated the high voltage electric substation adjacent to Father and Peter's home. The substation should have been operated in a remote part of the community where it would not pose a danger to the public. Furthermore, if PLC was to operate a substation near a residential area, it should only operate low voltage substations that do not have deadly amounts of electricity being produced from them. Therefore, PLC's operation of the substation next to Father's home was not a common activity.

PLC can argue that it had numerous substations situated throughout the community. The only way PLC can deliver power consistently and reliably to the whole community is to have high voltage substations near residential areas, where power consumption is high. Furthermore, PLC can argue that power companies throughout the area commonly place high voltage substations near densely populated areas. PLC can argue that by placing the substation in a

remote area, it would defeat the purpose of providing electricity directly to the areas that have high power consumption and electricity needs. PLC may even argue that the residential area was constructed after PLC built and began operating its substation. Therefore, operating the substation next to Father's home is common practice in the power generation industry and PLC commonly practices placing such substations near residential areas.

The court will likely agree with Father that PLC's operation of the high voltage substation near a residential [community] was not a common activity. Furthermore, even if Father's home was built after PLC began operation of the substation, PLC's operation of the substation was still not a common activity, and the operation should have ceased.

### Assumption of the Risk

PLC can argue that Peter assumed the risk of electrocution. PLC can argue that a 12 year-old child of like mind and intelligence would not have ignored the warning signs posted on the fence and attempted to climb a fence topped with barbed wire. PLC can argue that a reasonable 12 year-old can read and understand warning signs, and would appreciate the danger posed by the substation.

### Contributory Negligence

Contributory negligence is not a valid defense in strict liability cases.

### Conclusion

Father will not prevail against PLC for strict liability since Peter assumed the risk of electrocution by climbing onto the substation. However, if the court finds that Peter did not assume the risk of electrocution, then Father may recover on Peter's behalf since PLC was engaged in abnormally dangerous activity by operating the high voltage substation, no amount of care by PLC could eliminate the harm of electrocution to third parties, and the operation of the substation was not a common activity. Father can recover compensatory damages from the injuries sustained by Peter as a result of being electrocuted by PLC's substation.

### Negligence

Father can assert a claim of negligence against PLC for negligently operating the substation. A claim of negligence requires that (i) the defendant owed a duty to the plaintiff, (ii) defendant breached this duty, (iii) the breach was a cause-in-fact of plaintiff's injury, (iv) the breach was a proximate cause of plaintiff's injuries, and (v) plaintiff suffered damages. In this case, Father is bringing a claim of negligence against his son and injured party, Peter.



## Duty

A defendant is liable for negligence only to those plaintiffs to whom they owe a duty. Under the Cardozo test (majority view), a plaintiff has a duty to all foreseeable plaintiffs who may be injured as a result of defendant's negligence. Under the Andrews test (minority view), a plaintiff has a duty to all plaintiffs who are injured as a result of defendant's negligence. In this case, Peter was injured as a result of being electrocuted by PLC's high voltage substation. Under the Cardozo test, Father can argue that Peter is a foreseeable plaintiff because it is foreseeable that children living near the substation would climb on the substation or otherwise come into contact with the substation, and be electrocuted. PLC can argue that it is not foreseeable that someone would climb over the six foot high fence with barbed wire, and ignore all warning signs posted by PLC. The court is likely to find that Peter was a foreseeable plaintiff, since PLC was aware of the danger posed by the substation, and it is foreseeable that children in the residential area near the substation would sneak into the secured area and be harmed. Therefore, under the Cardozo and Andrews tests, Peter is a foreseeable plaintiff, and PLC owed a duty of reasonable care to Peter.

## Attractive Nuisance

Father can argue that PLC's substation was an attractive nuisance, and PLC breached its duty of care to Peter by failing to eliminate the harm posed by the substation. For a defendant's activities to be an attractive nuisance, (i) defendant must know that children frequent defendant's property, (ii) defendant is aware of dangerous conditions existing on the property, (iii) defendant failed to eliminate the dangerous conditions, and (iv) the cost of eliminating the dangerous conditions is outweighed by harm.

### PLC Must Know that Children Frequent the Property

Father can argue that PLC knew, or should have known, that children play on the substation. Father can argue that the substation is in a field adjacent to the residential area. Therefore, children from the area could easily play near the substation, or inside the fence by sneaking into the property. On the other hand, PLC argues that it was not aware that children have entered the fenced-in area of the substation. PLC has not received any warnings of children sneaking into the secured area, nor had there been any past incidents of children being harmed by sneaking into the fenced-in area. Furthermore, PLC can argue that it was not aware that children lived in the residential area. The court will likely find that absent any evidence that PLC knew children had been sneaking into the fenced-in area, or that PLC should have known that children live in the neighborhood and play near the substation, PLC did not know that children frequented the property and played near the substation. However, in the event that Father prevails in showing that PLC was aware that children snuck into the

fenced-in area of the substation, we can continue the analysis for attractive nuisance below.

#### PLC is Aware of the Dangerous Conditions

Father can argue that PLC was aware of the danger posed by the high voltage substation. PLC was aware of the danger since it had posted signs stating "Danger High Voltage." PLC can argue that while it was aware that its substation posed the danger of electrocution to third parties, it was not aware of the danger being posed to any children in the area. However, Father will easily prevail since PLC did know that the substation was capable of electrocuting persons who came into contact with the substation.

#### PLC Failed to Eliminate the Dangerous Condition

Father can argue, as above with strict liability, that PLC failed to discontinue operating the substation. Thus, the risk of electrocution remained, despite the erection of a fence and posting of warning signs by PLC. The court will likely find that PLC did not eliminate the dangerous conditions since the harm of electrocution remained.

#### Cost Outweighed by Benefit

Father can argue that the benefit of eliminating the risk of death to children in nearby residential areas greatly outweighs any costs associated with discontinuing operation of the substation. Father can argue that PLC can simply move the substation operation to another less densely populated part of the community. On the other hand, PLC argues that the substation is strategically placed to provide reliable power to the community and its residents and businesses. The cost of discontinuing the substation would be great, and the adverse effects of unreliable power would be felt throughout the community by everyone. Furthermore, PLC would suffer a great financial hardship by having to shut down one of its high voltage substations.

#### Conclusion

The court will likely find that PLC was not aware that children frequented the property; thus, PLC did not breach any duties owed to Peter under the attractive nuisance doctrine. Even if Father proves that PLC was aware or should have known that children frequented the property, PLC may have a strong argument in showing that the cost of shutting down the substation is outweighed by the financial hardship it will face, as well as the hardship to the community for the loss of reliable power.

### Breach – Reasonable Care

Father can argue that PLC breached a duty of reasonable care in failing to erect a more protective fence around the substation. In this case, the fence was six feet tall and had barbed wire around the top portion. Father can argue that since the substation was extremely dangerous since it produced high voltage power, a higher fence should have been erected. However, PLC can argue that it acted as a reasonable substation operator would have acted. It erected a high fence, with barbed wire at the top; thus, reducing the chance that even if someone climbed the fence, they would not be able to scale the top of the fence. Furthermore, the PLC posted conspicuous 10 inch by 14 inch warning signs which clearly stated “Danger High Voltage.” The court will likely find that PLC acted reasonably, since it did construct a reasonable protective fence and posted warning signs advising of the danger posed by the substation.

### Cause-in-Fact

Father can argue that but-for PLC’s operation of the high voltage substation, Peter would not have been harmed. PLC can argue that but-for Peter chasing his bird into the substation area, Peter would not have been electrocuted. The court will likely find that PLC’s operation of the substation was a cause-in-fact of Peter’s injuries, since a defendant’s conduct need only be one cause of the plaintiff’s injuries.

### Proximate Cause

Proximate is legal cause, and the plaintiff’s injuries must have been a foreseeable result of the defendant’s conduct. In this case, Father can argue that it was foreseeable that a child could sneak into the substation area, and be electrocuted while climbing the substation. On the other hand, PLC can argue that it is not foreseeable that a child would scale the six foot high wall, climb over the barbed wire at the top of the fence, then scale a ten foot high steel support in order to catch a bird, and in the process of doing so, be electrocuted by falling onto the substation. Father can argue that all that is necessary is that it was foreseeable to PLC that if someone was to enter the fenced-in area, they could be harmed by electrocution, regardless of how that electrocution came about. The court will likely find that Peter’s electrocution by the substation was a foreseeable injury. Therefore, PLC’s operation of the substation was the proximate cause of Peter’s injury.

### Intervening Cause

PLC may argue that Peter’s chasing the bird was an intervening cause which cuts off PLC’s liability. However, an intervening act must be unforeseeable

to cut off liability. In this case, Father can argue that it was foreseeable for a child to chase a pet into the fenced-in area. Thus, Peter's chasing his pet bird was not an intervening cause of Peter's injuries which cuts off PLC's liability.

### Contributory Negligence

PLC can argue that Peter was contributorily negligent for chasing his bird into the fenced-in area, and that his injuries were due in part to his own negligence. PLC can argue that a 12 year-old child of like mind and intelligence would not have ignored the warning signs posted on the fence, and attempted to climb a fence topped with a barbed wire. PLC can argue that a reasonable 12 year-old can read and understand warning signs, and would appreciate the danger posed by the substation.

The court is likely to find that Peter was contributorily negligent since he failed to heed the warning signs posted by PLC. In a contributory negligence jurisdiction, Father will not recover at all since Peter's negligence cuts off recovery. In a pure comparative negligence jurisdiction, Father's recovery on behalf of Peter will be reduced by Peter's percentage of his own negligence. Finally, in a modified comparative negligence jurisdiction, Father will only recover on Peter's behalf if Peter's negligence is not more than 50%.

### Assumption of the Risk

Similarly as above, PLC can argue that Peter assumed the risk by ignoring the warning signs and scaling the fence. Unless Peter could not read or was otherwise not mentally competent to appreciate the risk, Father will not be able to recover on Peter's behalf since Peter assumed the risk of electrocution.

### Conclusion

The court is likely to find that PLC was not negligent in operating the substation. Furthermore, Peter most likely contributed to his own negligence, and he assumed the risk of electrocution. However, if they are found to be negligent, Father may recover damages for injuries sustained by Peter, including medical bills and pain and suffering.