

QUESTION 5

Concerned about the dangers of texting while driving, the Legislature recently enacted the following section of the Motor Vehicle Code:

No person shall operate a motor vehicle upon a public road while using a mobile telephone to send or receive a text message while such vehicle is in motion.

Doug was driving down a busy street while texting on his cell phone. Doug lost control of his car, slipped off the road, and hit Electric Company's utility pole. The pole crashed to the ground, and the fallen wires sent sparks flying everywhere. One spark landed on a piece of newspaper, setting the paper on fire. The burning paper blew down the street, landing on the roof of Harry's house. The house caught fire and burned down.

A technological advance, the Wire Blitz Fuse (WBF), had made it possible to string electrical wires that would not spark if downed. Nevertheless, Electric Company had retained an old wiring system that it and other utility companies had used for years. Electric Company believed that adoption of the WBF system would require a significant increase in electrical rates, and that the WBF system had yet to gain widespread acceptance in the industry. Studies showed that utility companies that replaced their old wiring systems with a WBF system experience vastly increased safety and reliability.

Harry has sued both Doug and Electric Company.

1. What claims may Harry reasonably raise against Doug, what defenses may Doug reasonably assert, and what is the likely outcome? Discuss.
2. What claims may Harry reasonably raise against Electric Company, what defenses may Electric Company reasonably assert, and what is the likely outcome? Discuss.
3. If Harry prevails against Doug and Electric Company, how should damages be apportioned? Discuss.

QUESTION 5: SELECTED ANSWER A

H v. D

Harry (H) can bring a negligence claim against Doug (D)

Negligence

A negligence claim consists of duty, breach, causation, and damages. All elements must be present for a plaintiff to recover.

Duty

A person does not generally owe a duty to act. However, if a person acts, they owe a duty to act as prudently as the reasonable man would and is liable for harms that come to foreseeable plaintiffs for the failure to act with reasonable care. In the majority *Cardozo* view, a foreseeable plaintiff is anyone who is in the zone of danger. Under the minority, *Andrews* view, a foreseeable plaintiff is anyone who is harmed if the defendant could have foreseen harming anyone, even if the person harmed was not the type of plaintiff the defendant foresaw harming.

Standard of Care

Generally, people owe a duty to act with the care a reasonably prudent man would take. There are different standards for landlords or other special relationships.

In this case, D was driving. A reasonably prudent man would have foreseen that bystanders or property could be harmed by inattention to driving. H can argue that D could foresee that texting while driving could have caused him to crash into a person's property. It was foreseeable that he would have run into H's mailbox. Therefore, it was foreseeable that H was in the zone of danger. The fact that D did not in fact run into H's mailbox but instead hit the utility pole which caused a fire is not too remote. D could have crashed into the utility pole that snapped and fell directly into H's house, rather than sparked and caught fire. H will argue that under *Cardozo* he was a foreseeable

plaintiff in the zone of danger because a driver should have foreseen that distraction would cause him to crash into a person's property. D will argue that this is too attenuated. While H may have been in the zone of danger for his mailbox being smashed, H was not a foreseeable plaintiff for having his house burned down. The key question, however, is not whether D could foresee the type or extent of harm, but rather could D foresee H as a plaintiff. As long as H's house was on the road, H was a foreseeable plaintiff in the zone of danger.

D will argue H was not foreseeable because the burning paper "blew down the street," implying that the crash occurred far from where he texted. However, H was in the zone of danger because he was on the street where D was driving and texting. It will be a close call, and many courts will not find H was a foreseeable plaintiff in the zone of danger under the *Cardozo* view. Under the *Andrews* view, H will certainly be a plaintiff D owes a duty of care to, because D could have foreseen his texting while driving would injure someone.

Breach

Assuming D owes H a duty of care, there must be a breach. A driver owes a duty to others to drive responsibly and not be distracted. A reasonably prudent man would not text and drive. Therefore, H will successfully argue that D breached his duty of care.

Negligence Per Se

H can also argue D breached his duty of care under a negligence per se theory. Under negligence per se, a defendant has breached his duty if he violated a 1) statute addressed at the behavior 2) the statute was designed to protect against a specific type of harm 3) the statute protected a specific class of people, and the plaintiff harmed is in that class of people in a way the statute was designed to protect against. Defendants can argue that in the situation it was more reasonable to not follow the statute, because the statute was vague and overbroad, or it would have been more dangerous to follow the statute than to violate it.

In this case, none of the defenses apply. D violated a statute that addressed his behavior. It said that no one should operate a motor vehicle upon a public road while using a mobile telephone and to send or receive a text message while the vehicle is in motion. D was driving the car. He was texting on his cell phone while driving down the street. Because he texted while he was driving, he lost control of his car and hit the utility pole. D will argue that the danger the legislature was trying to avoid was running over people. H will argue that it was to protect against people being run over and against property damage. D will rebut that even if it protected against property damage, the plaintiff it sought to protect would be the owner of the property. It is too much of a stretch to say the legislature intended to pass the statute to establish that a person who crashed while texting is responsible for a burning house down the street. It is simply too attenuated from the likely purpose of the legislature. Therefore, his negligence per se claim will not be successful.

Causation

For a negligence claim to succeed, there must be both actual (but-for) and legal (proximate) causation.

But for (actual)

But for causation means that but for the defendant's action, the plaintiff would not have been harmed. In this case, but for D crashing into the pole, the pole would not have crashed to the ground. But for the pole crashing into the ground, the wires would not have sent sparks up, and the burning paper would not have landed on the roof of H's house. There is but for causation.

Proximate (legal)

The breach must also be the proximate cause of damage. Proximate cause are foreseeable causes. There can be intervening events between D's breach and H's harm as long as D's breach was still a substantial factor in causing D's harm. However, superseding events breach the chain of causation. Superseding events are unforeseeable events such as a criminal act or act of god.

In this case, H will argue that it was foreseeable that Doug texting while driving could result in his house being damaged. As stated above, he will argue it is foreseeable that a distracted driver will drive into another person's property. Even though H's property was damaged in a different way, D could have still foreseen that his actions would lead to this result. However, D will argue that the burning paper is an unforeseeable event, more similar to an act of God. The odds that he would hit the pole just right, the wires would spark, and the wind would take the burning paper down the street onto H's roof is unforeseeable. This is a close case, and different courts might come out differently on it. Under the Andrew's perspective, there would be proximate cause. However, under the *Cardozo* perspective, this would be similar to the explosion in the train station -- the harm is too attenuated from the breach.

Damages

The damages must have been caused by D's breach. If there was causation, then the court will find there are damages. H was damaged by D's breach of care. His house burned down because of D's action.

Defenses

Contributory Negligence

D can argue that H was contributorily negligent. Good roofs will not catch fire if a sheet of burning paper lands on top of it. Roofs are treated to ensure fire cannot spread. If H's house can be burned so easily, it may be because H did not build to code or maintain his roof as he ought to. D might be successful in arguing H was contributorily negligent. That will reduce his damages but not prevent him from paying, unless they are in a contributory negligence jurisdiction.

Abnormally Dangerous Activity

H could also bring an abnormally dangerous activity claim against D. This claim would be unsuccessful. Abnormally dangerous activities are those that 1) present a substantial risk of bodily harm or death 2) are uncommon to the area and 3) cannot be

mitigated by sufficient care. In this case, driving is a common activity. Texting while driving, even if a stupid decision, is a common activity in the area. It can be mitigated by only texting while stopped or in other ways.

2. H v. EC

Abnormally Dangerous Activity

H could bring an abnormally dangerous activity claim against EC. This claim would be unsuccessful. Abnormally dangerous activities are those that 1) present a substantial risk of bodily harm or death 2) are uncommon to the area and 3) cannot be mitigated by sufficient care. The courts often look to whether the value to society of conducting the activity outweighs the risk and probability of harm. In addition, courts do not hold utility companies strictly liable for activities they are engaged in that makes them public utility companies. This is a matter of public policy.

In this case, utility poles are common to the area. While transmitting electricity can present a substantial risk of bodily harm or death, it can be mitigated by sufficient care. In addition, the value to society outweighs imposing strict liability for any damages that arise from running the pole. The wires are also a part of the activity that makes the utility company a public entity: transferring of electricity in the community.

Negligence

H can bring a negligence claim against EC. He has a greater likelihood of success than against D.

Duty

See above.

Standard of Care

See above. That of a reasonably prudent man.

EC owes a duty to all foreseeable plaintiffs to conduct its activities with the same

prudence a reasonable man would have. H is a foreseeable plaintiff, because it is foreseeable that wires can break, causing sparks that create fire. Under both the *Cardozo* and *Andrews* view, it is foreseeable that a plaintiff's house may be burned down by such a spark. Thus, H is a foreseeable plaintiff.

Breach

H will argue that it has not breached its duty of care because it is using the same wiring system that other utility companies use. Defendants can look to industry standards to show that they have not violated the duty of care. However, industry standards are not dispositive. H can argue that WBF would have prevented the fire, it was not reasonable to rely on old wiring systems, and EC should have anticipated its wires sparking. EC will argue that WBF has not gained widespread acceptance among the industry and installing WBF would require significant increase in electrical rates. Ultimately, a court will have to apply Hand's theory to determine whether there was a breach. Hand's theory compares the burden against the probability and the risk. It will look at the expense of installing WBF and compare it to the risk of its wires being defective (and the cost of the resulting damage) against the probability that the wires would break. If the court finds installing WBF or something similar is less than the risk of the old wires causing a fire x the probability of the wires causing a fire, then EC will have breached its duty of care.

Causation

But For

See above. But for not updating the wire system, the wires would not have sparked and caused the fire that burned down Henry's house.

Proximate

See above. It was foreseeable that old wires could break and send sparks. It was foreseeable that sparks could catch fire and spread, causing property damage. EC can argue that the wind was a superseding cause. However, it is foreseeable that the wind would catch a spark and carry it.

Damages

The breach in the duty of care caused the spark to land on H's house which resulted in real property damage.

Defenses

Contributory Negligence

D can argue that H was contributorily negligent. Good roofs will not catch fire if a sheet of burning paper lands on top of it. Roofs are treated to ensure fire cannot spread. If H's house can be burned so easily, it may be because H did not build to code or maintain his roof as he ought to. D might be successful in arguing H was contributorily negligent. That will reduce his damages but not prevent him from paying, unless they are in a contributory negligence jurisdiction.

Defective Product

H can sue for a defective product. Products can be defective in design, manufacture, or label. For a company to be strictly liable, it must be a part of the distributor chain. It could be a manufacturer, distributor, or retail. Companies that do not regularly sell products cannot be held strictly liable.

In this case, EC does not sell its wires. It sells electricity, but that is not a product. Therefore, H's suit will be unsuccessful.

Warranty

N can sue for the breach of warranty of merchantability of fitness for the defective wires. However, to sue for breach of contract there must be privity or N must be a member of the household.

3. Damages

In the majority of states, plaintiff can recover from defendants in joint and several

liability. That means he can recover all of the damages from either of the defendants. However, he cannot "double dip" and recover anything more than 100% of his damages. A jury will apportion the fault. If the jury assigns 70% of fault to A and 30% of fault to D, and plaintiff recovers 100% from A, A can demand D reimburse him 30%. In the minority of states, plaintiff can only recover in several liability. That means he can only recover damages from the defendants in proportion to the fault they were liable for.

If the court does find that D and EC are both liable, then a jury should determine the fault. The jury may reasonably decide that the majority of the damages should be apportioned to D because without his negligence the pole would not have fallen down. His actions set it in motion.

QUESTION 5: SELECTED ANSWER B

1. H's claims against D and D's defenses

Harry (H) will file a claim for negligence against Doug (D)

Negligence

To successfully assert a negligence claim, the plaintiff must show that the defendant (i) had a duty, (ii) breached that duty, (iii) the breach of that duty was the actual and proximate cause of the plaintiff's injuries, and (iv) that the plaintiff suffered damages.

Duty

All defendants owe a duty of reasonable care to all foreseeable plaintiffs. The majority (Cardozo) view is that all plaintiffs are foreseeable if they are in the zone of danger. The minority (Andrews view) is that all plaintiffs are foreseeable.

Here, D was driving down a busy street, and therefore owed a duty of care to all foreseeable plaintiffs. H will argue that he is a foreseeable plaintiff because his house is on the street, and houses on a street are within the zone of danger if someone is not driving carefully.

Breach

A defendant breaches a duty of care if the defendant does not act as a reasonably prudent person would in carrying out an activity. Here, H will argue that a reasonable person would not text while driving on a busy street. H will argue that reasonable people know that texting is distracting, and driving a vehicle while distracted is dangerous, and a reasonably prudent person would not drive while distracted. On the other hand, D will argue that that many people text while driving, and since many people do it, he did not act unreasonably while texting. D's argument will probably fail, and D will be considered to have breached his duty.

Negligence Per Se

Negligence per se is a doctrine that replaces the standard duty of care with a statute. If the legislator has enacted a statute with criminal penalties, and the statute is designed to protect against the harm caused, and the injured plaintiff is of the class that the statute was intended to protect, then the statute replaces the duty of care standard. If the defendant breaches the statute, then the majority view is that that conclusively proves that the defendant had a duty and the defendant breached that duty.

Here, the legislator recently passed a section of the motor vehicle code that stated that no person shall operate a motor vehicle upon a public road while using a mobile phone to text while the vehicle was in motion. Here, D was driving down a busy street, which was presumably public, while texting. Therefore, H violated the statute.

The statute will only replace the duty if H can prove that it was intended to protect against the harm caused and that H was part of the class of people intended to be protected by the statute. The legislator passed the law because they were concerned about the dangers of texting while driving. Presumably, the dangers of texting while driving include the distracted driver hitting a pedestrian, or hitting something and causing property damage. H will try to argue that D hit the pole, which then caused the fire, and this was within the property damage the legislator intended to protect. However, D will argue that although the statute was probably intended to protect property damage such as hitting the pole, it was not enacted to protect against fires caused by faulty wiring of a pole. D's argument will probably prevail because it was not likely that the legislator intended to protect homeowners from fires when they enacted the statute.

Even if H could prove that the fire to his home was the type of damage the legislator intended to protect, he also needs to prove that he was of the class of people the statute was designed to protect. H will argue that as a homeowner on a busy street, he

is of the protected class because the statute was designed to protect against property damage by distracted drivers. On the other hand, D will argue that the statute is designed to protect pedestrians who might be hit, or maybe owners or passengers of vehicles struck by distracted drivers. Again, D will probably prevail on this point, because the statute was probably not designed to protect homeowners.

Therefore, H will not be able to establish negligence per se. However, as discussed above, even without negligence per se, H can prove that D had a duty and breached the duty.

Actual Cause

A defendant is the actual cause of a plaintiff's actions if but for the defendant's conduct, the plaintiff would not have suffered the harm. Here, D was the actual cause of H's damage. If D had not been distracted while driving, he would not have hit the utility pole, and the wires would not have sparked when they hit the ground, and the paper would not have lit on fire and therefore H's house would not have lit on fire.

Proximate Cause

A defendant is liable for all foreseeable incidents of his actions. If a defendant's actions combine with another force and then cause the damage, the defendant's action is only the proximate cause of the result if the intervening force was foreseeable. A dependent intervening force is a force that is foreseeable. For example, it is foreseeable that injury invites rescue, and therefore it is a dependent intervening force if someone tries to rescue someone injured by the defendant. On the other hand, an independent intervening force is one that is not foreseeable, and it cuts off liability of the defendant because the defendant was not the proximate cause of the injury.

Here, D will argue that Electric Company (EC)'s utility pole had old wiring, and that old wiring is not safe, and it was the old wiring that caused the fire. D will argue that the old wiring should be considered an independent intervening force, because it is not foreseeable that a company would use old wiring that would sent sparks flying

everywhere when it fell. He will argue that it is not foreseeable that the sparks would then light a piece of paper on fire, and then that paper would land on Harry's roof. However, D's argument will probably fail. H will argue that it is foreseeable that if you drive distracted and hit an electric company's pole that sparks would fly. H will point to the fact that the new Wire Blitz Fuse (WBF) systems have yet to gain widespread acceptance in the industry, and therefore most electric poles probably have old wiring. Further, H will argue that D was on a busy street, so it was likely that if D hit the pole and there were sparks, it was likely something would catch fire. H is likely to win this argument and therefore D's distracted driving will be considered proximate cause of H's injuries.

Damages

H will be able to show damages because his house caught fire and burned down as a result of D's actions.

Conclusion

H will be able to successfully assert a negligence claim against D, and all of D's objections will fail.

2. H's claims against EC and EC's defenses

H will assert a negligence claim and a strict liability claim against EC.

Negligence

To successfully assert a negligence claim, the plaintiff must show that the defendant (i) had a duty, (ii) breached that duty, (iii) the breach of that duty was the actual and proximate cause of the plaintiff's injuries, and (iv) that the plaintiff suffered damages.

Duty

All defendants owe a duty of reasonable care to all foreseeable plaintiffs. The majority (Cardozo) view is that all plaintiffs are foreseeable if they are in the zone of danger. The minority (Andrews view) is that all plaintiffs are foreseeable.

Here, EC has a duty to provide and maintain utility poles as a reasonably prudent electrical company would do.

Breach

H will argue that EC breached their duty in not using the new WBF technology, which made it possible to string electrical wires that would not spark if downed. H will point to the fact that studies showed that utility companies that replaced their old wiring systems with a WBF system experienced vastly increased safety and reliability. H will argue that a reasonably prudent electrical company would have replaced their wiring with WBF since it is safer and more reliable, and because EC did not, they breached their duty.

On the other hand, EC will argue that they did not breach their duty. They will argue that many other utility companies had used the old wiring for years, and the WBF system had yet to gain widespread acceptance in the industry. Although evidence of other companies' actions and industry customs can be used to determine whether a duty has been breached, it is not dispositive. The court will apply a balancing test when deciding whether a company breached its duty in not implementing new technology. The court will look at the cost of the new technology, the amount the new technology would decrease the risk of harm to potential plaintiffs, and the magnitude of the harm suffered by potential plaintiffs. EC will argue that adopting the WBF systems would be expensive and therefore require a substantial increase in electrical rates. On the other hand, H will argue that the WBF systems would vastly increase safety and reliability, and the risk of harm by not replacing (more fires when people hit electrical poles) is great. This is a close call and the court could come out either way, although the court will probably determine that EC did breach its duty because although the WBF technology would be expensive, it would significantly increase safety.

Actual Cause

But for EC's replacement of the old wires with new WBF technology, the electrical wires would not have sparked if downed and therefore H's house would not have caught fire and burned down.

Proximate Cause

EC will argue that they were not the proximate cause of H's house burning down. They will argue that D's negligent driving is an independent intervening force, and therefore they were not the proximate cause. However, it is foreseeable that a driver would drive negligently and hit a pole. Therefore, D's negligent driving was foreseeable, and D's actions do not cut off EC's liability.

Damages

H suffered damages when his house burnt down.

Conclusion

If the court determines that EC breached their duty in not using the new WBF technology, then H will be able to successfully assert a claim for negligence against EC.

Strict Liability

H will try to claim that EC was conducting an ultrahazardous activity, and H was harmed as a result. A company is strictly liable if the company is conducting an ultrahazardous activity and a plaintiff is injured by the dangerous propensity of that activity.

Here, H will argue EC was operating an electric company, which included stringing live electrical wires on poles, and electrical wires are dangerous because they can start fires. When the pole was hit by D's car, the wires fell and sparked and started a fire. Therefore, H's injury was caused by the dangerous propensity of EC's activity.

However, H's arguments will fail because the court will determine that EC was not conducting an ultrahazardous activity. An ultrahazardous activity is one that cannot be done safely, no matter how careful anyone is in conducting the operation, and it must not be of common usage. Here, every city has electrical companies that string electrical wires on poles. Therefore, the electric company's operation will be considered common usage and not an ultrahazardous activity. Therefore, H's strict liability claim will fail.

3. How damages should be apportioned

If actions by two different defendants combine to cause injury to a plaintiff, neither of which alone would have caused the injury, the defendants will be held jointly and severally liable. If defendants are held jointly and severally liable, then the plaintiff can recover the entire amount of damages from either or both defendants. (The plaintiff can only recover the damages once, but it can be from either defendant alone, or some from each defendant.) If the defendant pays more than their share of the damages, the defendant can recover that amount from the other defendant.

Here, D and EC's actions combined to cause H's injuries. H will be able to recover the damages for his burned down house from either D or EC or a combination of both. Depending on how the court rules, D and EC may be assigned different percentages of liability. D and EC will be responsible for paying the percentage of the damages proportional to their percentage of liability. If either D or EC pays H more than their share of the damages, the defendant who paid more can sue the other party for contribution.