

5)

**1. What claims can H assert against D, and what are D's defenses?**

**Negligence**

To establish a cause of action for negligence a plaintiff must assert that (1) there is a duty to the plaintiff (2) the defendant breached that duty (3) the defendant's actions caused the damages and (4) there are damages.

**Duty**

A person owes a duty to act as a reasonable person. The reasonable person standard sets forth that a defendant should act as an person of ordinary intelligence. There are two jurisdictional approaches to whether a defendant owes the plaintiff a duty of care (1) the *Andrews* approach and (2) the *Cardozo* approach.

***Andrews Approach***

Under the minority rule of the *Andrews* approach, a defendant owes a duty to every person in the world.

Here, H can show that D had a duty to him under the *Andrews* approach because H is a person in the world, and D had a duty to him .

Thus, D had a duty to H under the *Andrews* approach.

***Cardozo Approach***

The *Cardozo* majority rule states that a defendant owes a duty to a plaintiff who is within the foreseeable zone of danger.

Here, D was driving his car while texting and crashed into an electric pole and subsequently caused damage to H's house. D can argue that H would not be in the foreseeable zone of danger because it would be unreasonable that by crashing into the pole it would cause his house to burn down. However, the pole was close to H's house because a spark that caused paper to burn and catch fire blew onto H's house. H will argue that this is enough to show that he is within the foreseeable zone of danger. The court would likely agree and find that any danger as a result of the down pole would be enough to create the foreseeable zone of danger. D should reasonably foresee that by downing an electrical pole, there could be electrical damage or in H's case, fire damage as a result of items catching fire from the electric.

Thus, D owes a duty to H under the *Cardozo* approach as well.

### Breach

A plaintiff must show that the defendant has breached the duty owed to him.

Here, D was driving while texting. H can argue that he breached his duty because he did not act as a reasonable person by texting while driving.

Thus, because D was not acting a reasonably prudent person because he was texting while driving, he breached a duty to H.

### *Negligence Per Se*

A defendant can be liable for breach of a duty if they violate a statute and the violation causes harm to the plaintiff. To prove negligence per se the plaintiff must show that (1) the defendant violated the statute and (2) the plaintiff was within the class of people that the statute intended to protect.

---

Here, the Legislature enacted a statute prohibiting drivers from texting while driving on a public road. The facts state that D was texting while the car was in motion, and further, it was on a public road because there were other drivers and there is no evidence to show the road was a private road. H can attempt to argue that D is liable for negligence per se because he violated the new statute. However, D can counter argue that the statute was not meant to protect homeowners such as H. While the statute is ambiguous on these terms, it can be construed that the Legislature enacted the statute for the purpose of making the roads safer. This would prevent injuries to other drivers and possibly pedestrians. Because H is neither of those, he is not within the class of people that the statute intended to protect.

Thus, H would not be able to hold D liable for negligence per se, but still under the reasonable person standard.

### Causation

A plaintiff must show that the defendant's actions were the cause of the injury. Courts will look to see if the defendant's actions were the (1) actual cause or (2) proximate cause of the damages.

#### *Actual Cause*

Actual cause is established if it is shown that but-for the defendant's actions the damages would not have resulted.

Here, D's breach of his duty to H was the but-for cause of H's damages because but-for D's breach of his duty to H and causing the pole to fall, the damage would not have occurred.

Thus, D's actions are the actual cause of H's damages.

### *Proximate Cause*

Proximate cause shows that the defendant would reasonably foresee the damages as a result of his actions.

Here, D can argue that it would not be reasonably foreseeable that by crashing into the electric pole H's house would burn down. However, H will argue that it is reasonably foreseeable that a downed electric pole would cause some damage to those within the area of the pole. Further, it is reasonable to foresee that an electric pole when downed, might send off electrical sparks and cause damage to people or property within the area of the pole.

Thus, D's actions were the proximate cause of H's house burning down.

### Damages

A plaintiff must establish that the defendant has caused actual damages for them to recover for a suit of negligence.

Here, H can show the actual damages because his house burned down.

Thus, H can establish actual damages.

### Defenses

#### *Superseding Cause*

A superceding cause severs the chain of causation and can relieve of a defendant of liability under a negligence suit. A superceding cause is one that



the defendant would not reasonably foresee (such as an act of God).

Here, D can argue that the fact that EC did not update their poles to include the new WBF technology, that this is superceding cause. D can further argue that it is not reasonably foreseeable that because of EC's failure to update would cause such damages. However, H will argue that this is not a superceding cause because regardless of what EC did, it is still reasonably foreseeable that a downed electric pole would cause damage to people or property who are within close proximity of it.

Thus, because it is reasonably foreseeable that a downed electric pole would cause damage, this would not be a superceding cause and D cannot sever his liability to H.

### *Intervening Cause*

A defendant may be able to limit their liability if they can show an intervening cause. An intervening cause is still reasonably foreseeable, but would limit the defendant's liability because the intervening cause also contributed to the plaintiff's damages.

Here, D can argue that while it is reasonably foreseeable that a downed electric pole would cause damage to people and property, the fact that EC did not update their technology also contributed to H's damages. If EC had updated their technology, then it's likely that the damage would not have occurred.

Thus, D can argue that EC's failure to update to safer technology would be an intervening cause and thus limit his liability.

### Conclusion

Based on the analysis above, D will be liable to H for the damages to his house for his negligent actions.

**2. What claims may Harry assert against Electric Company, and what defenses can Electric Company assert?**

**Strict Liability**

A defendant can be strictly liable for damages to a plaintiff if they are engaged in abnormally dangerous activity. The plaintiff must show that (1) the defendant was engaged in an abnormally dangerous activity and (2) that the injury occurred as a result of the defendant's dangerous activities.

Here, H can argue that EC is engaged in dangerous activity because it is responsible for providing electric to the community. Electric can be a dangerous activity if not handled in the correct manner, as evidenced by the fact that a downed pole caused H's house to burn down. Further, H can argue that EC's activity is the cause for his injury (his house burning down) because the electric pole caused the sparks that started the fire.

Thus, H can hold EC strictly liable for their activities for providing electric to the community.

**Risk Utility Test**

A defendant can limit liability for strict liability under the risk-utility test. The risk utility test weighs the risk that the defendant is engaged in with, the utility of the activity to the community. A court will also look to see if the defendant could have reduced this risk through reasonable means that would not be an undue economic burden.

Here, EC can argue that they are providing an important utility to the community by providing electric. However, the court will weigh whether the risk outweighs the utility. EC could have updated their electrical poles to be safer in case of a collision like the one D had. EC will argue that it would cause a substantial increase in electrical rates if they updated their system. This argument would fail because it has been shown in the facts that the WBF system would greatly increase safety and reliability of the system if implemented. While EC can argue that it has not been implemented throughout the entire industry, the studies would show that this is one way that they could reduce the risk of their electrical poles causing damage. Even if the rates went up a bit, it is not an undue economic burden on EC because they would not shoulder the cost because the customers would be responsible for the increase in rates. This shows that there is a reasonable solution for EC to increase safety and reduce damage to people and property.

Thus, the court will find that EC should have updated to the new WBF because it would not be an undue economic burden to EC and it would help lower the risk.

### Defenses

#### *Superceding Cause*

See rule above.

Here, EC can argue that D's negligence is a superceding cause that should sever liability. However, it would be reasonably foreseeable that drivers can crash into electrical poles and cause them to fall over.

Thus, D's action is not a superceding cause and would not sever liability.

#### *Intervening Cause*

See rule above.

Here, EC can argue that D's actions were an intervening cause and would limit their liability. This would be true because it is reasonably foreseeable that a car would crash into an electrical pole and cause damage.

Thus, D's actions would be an intervening cause.

### Conclusion

Based on the analysis above, EC would be liable to H for damages to his house under strict liability.

### **3. How should damages be apportioned?**

#### Joint and Several Liability

When there are multiple tortfeasors, the court will generally apply joint and several liability. This means that the plaintiff is entitled to recover the entire amount of damages from one tortfeasor in the suit, and the defendant who pays the entire amount can seek contribution from the other defendant.

Here, there are two defendants D and EC. If the court holds them joint and severally liable, H will be able to recover all the damages from either D or EC. After this, D or EC will be able to recover the other defendant's share of the damages. For example, if the court finds D mostly responsible (i.e. 70%) and EC less liable (30%), then H could seek the entire amount from D, while D recovers the remaining 30% from EC.

Thus, damages will be apportioned based on the amount the jury or judge finds

each defendant liable, and will be apportioned as such.

Pure Several Liability

If the jurisdiction applies pure several liability, then the plaintiff will only be able to recover from each defendant their proportionate share of the damages.

Here, if the same numbers are used from above, H would be able to recover only 70% from D and then would have to get the remaining 30% from EC.

Thus, similar to above, the damages will be apportioned based on the proportion of the liability imposed on the defendants.

-----  
Question #2 Final Word Count = 1998