

### Question 3

Roofer contracted with Hal to replace the roof on Hal's house. The usual practice among roofers was to place tarpaulins on the ground around the house to catch the nails and other materials that were scraped off during the removal of the old roof. On this occasion, Roofer did not have enough tarpaulins, and he failed to place one on the ground at the rear of Hal's house. As a result, many nails and old roofing material fell into the grass of Hal's back yard. At the end of the job, Roofer did his best to clean up the back yard but missed some of the nails that were imbedded in the grass.

About six months later, as Hal was mowing his back lawn, his lawnmower ran over one of the nails and propelled it over the fence into the back yard of Ned, his neighbor. A few days later, as Ned was walking barefoot in his back yard, he stepped on the nail, which pierced his foot, causing him severe injury.

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.

### ANSWER A TO QUESTION 3

3)

Ned v. Roofer

A prima facie case of negligence requires a showing of a duty to exercise reasonable care, that the defendant breached the applicable standard of care[,] and that the breach was the actual and proximate cause of the plaintiff's injury. To defend against a negligence cause of action, Roofer may assert passive defenses challenging the negligence elements as well as active defenses including assumption of the risk, or comparative fault/contributory negligence depending on the jurisdiction.

1. Did Roofer owe Ned a Duty?

a. A duty is a legal obligation to exercise reasonable care to prevent foreseeable harms to foreseeable plaintiffs. In a leading case (*Palsgraf v. LIRR*), Judge Cardozo detailed that a foreseeable plaintiff is one who is within the zone of danger; however, in the same case, Judge Andrews argued for the minority opinion that if a defendant owes a duty to anyone, he owes a duty to everyone. In appropriate cases, a duty may arise as a result of a statute, contract, special relationship between the defendant and the plaintiff, where the defendant assumes a duty, or where the peril to the plaintiff is caused by the defendant.

b. Here Roofer will argue that he owes no duty to Ned given that Ned was not a foreseeable plaintiff. Ned was a neighbor an[d] outside the area where Roofer was dropping items from the roof and there is minimal possibility of direct harm. However, Roofer clearly owed a duty to Hal and his family and under the Andrews view would therefore owe a duty to Ned.

c. Ultimately this will be decided by the jury; however, under the Cardozo view, Roofer would appear to have a defense. Under the Andrews view, a duty is apparent.

2. Did Roofer breach the standard of care?

a. The standard of care is generally an obligation to exercise a reasonable amount of care under the circumstances. Breach can be demonstrated where there is a violation of a statutory standard of care (Negligence Per Se), under the Learned Hand Calculus, or by making an inference of breach under the doctrine of *Res Ipsa Loquitur*. In this case the Learned Hand Calculus is appropriate and is expressed in the following formula. ( $B < P * L$ ) where B is the burden of conforming conduct to an appropriate standard [of] care sufficient to avoid harm, P is the probability that a harm[-]causing event would occur, and L is the magnitude of the harm/loss should the anticipated harm[-]causing event occur. Analysis is perceptual as opposed to mathematical and where the burden is less than probability and magnitude of the loss, the act of the defendant shall be deemed to have breached the standard of care.

b. Here the burden on Roofer is to have done a better job of picking up the nails (possibly using a magnet if the nails were ferrous) or simply to have gotten sufficient tarps. The burden of conforming his conduct would not have involved significant expense or effort and is therefore low. The probability of the type of harm, a nail in the foot or that the nail would be picked up by the lawnmower[,] is significant while the magnitude of loss, puncture, pain and the need for a tetanus shot as well as limping for a few days or weeks is low. Roofer will argue, however, that his efforts to pick up the nails were reasonable because he “did his best”. Further, it is not clear that he warned Hal that he missed some nails and to be careful.

c. As such, it is clear under the Learned Hand Calculus, given that the burden is exceeded by the probability and magnitude of loss, a breach is likely to be found and Roofer will not escape liability on this basis despite his best efforts.

3. Was the act of Roofer the actual and proximate cause of Ned’s injury?

1. For negligence liability, the act of the defendant must be the actual (factual) as well as proximate (legal) cause of the plaintiff’s injury.

a. Actual Cause?

1. Actual cause is based on whether the harm would have occurred without the act of the defendant and is measured using the “But For” Test or the substantial factor test. The “But for” test poses the question “but for” the act of the defendant, would the plaintiff [have] been injured? The substantial factor test requires only that the act of the defendant be a substantial factor in the harm that resulted.

2. Here, but for Roofer not picking up all of the nails, Ned would not have been injured. Roofer will argue that the lawnmower was the actual cause; however, an injury is not restricted to one cause. In any event, the substantial factor test would demonstrate that Roofer’s failure to recover all of the nails was a substantial factor in Ned’s harm.

3. Roofer’s act was the actual cause and he will not likely be able to defend on this basis.

b. Proximate cause?

1. Proximate cause is the legal cause of injury. A showing of proximate cause requires that the injury sustained be not so distant [sic] in time, place and effect from the act of the defendant that a court would refuse to assign liability. Additionally, a showing of proximate cause requires that there must not be an independent (unforeseeable) intervening event that occurred between to [sic] act of the defendant and the harm suffered by the plaintiff such that is [sic] would break the chain of causation.

2. Here, Roofer will argue that the six month intervening time period was too distant in order to establish proximate cause. Additionally he may attempt to argue that the use of the Lawnmower by Hal was an independent intervening cause. This defense is not likely given that Hal's need to mow the grass was foreseeable. It is further foreseeable that if the lawnmower hit a nail, that it might cause it to be deposited in the yard of a neighbor. While the act of using the lawnmower was an intervening cause, it was not independent because it was foreseeable. Since the use of the lawnmower is foreseeable, it would not appear likely that when it was used would be relevant to the occurrence of the harm[-]causing event. An additional intervening act was Ned's decision to walk barefoot in the yard. It is not clear that this will be seen as a foreseeable event although it is likely since it was Ned's yard and it is presumed that he would walk in it from time to time.

3. Based on the discussion, Roofer has plausible defense here, but it is unlikely that this defense will prevail.

#### 4. Did Ned Sustain Damage?

a. For negligence liability, the plaintiff must suffer actual damage. Damage includes pecuniary (medical, lost wage[, ] etc[.]) and non-pecuniary (pain and suffering generally).

b. Here the facts are clear; the nail punctured Ned's foot and he suffered severe injury.

c. Ned sustained damage sufficient to sustain his cause of action and Roofer will not be able to defend on this point.

#### 5. Can Roofer Raise Affirmative Defenses?

##### a. Did Ned Assume the Risk?

1. Assumption of the risk requires a showing that the plaintiff knew of the risk of harm and voluntarily encountered the risk. Where proven, it is a complete bar to recovery.

2. Here Roofer will argue that Ned likely knew of the work being performed on Hal's house and the possibility of nails in the yard. His decision to walk barefoot in the yard therefore evidenced his assumption of the risk that his foot would be punctured if not by a nail, a sharp stick or twig in the grass.

3. It is not likely that this defense will succeed but if accepted, it would allow Roofer to completely avoid liability.

##### b. Contributory negligence of Ned?

1. In a contributory negligence jurisdiction, any negligence on the part of the plaintiff is a complete bar to recovery. A negligent plaintiff may still recover provided that the defendant had the last clear chance of avoiding the harm to the plaintiff and knew that his act placed the plaintiff in danger.

2. Here, Ned's decision not to wear shoes, especially after roofers were tossing nails off of Hal's roof, might be viewed as being contributory negligent. There is no evidence, since it was 6 months later, that Roofer was aware of the potential harm to Hal or that he had any chance to avoid it.

3. If accepted that Ned's decision to walk barefoot was negligent, it will completely bar his recovery from Roofer.

c. Comparative Fault of Ned?

1. In a pure comparative fault jurisdiction, the liability for damage of the defendant is reduced in proportion to the fault of the plaintiff. While not a complete bar to recovery it will reduce the potential award if the plaintiff's negligence is proven. In a modified comparative fault jurisdiction there are two approaches. In one, the plaintiff's award is reduced in proportion to his fault but is eliminated completely where the plaintiff's proportion of fault exceeds 50%. The other provides that the plaintiff's award is reduced in proportion to his fault but is eliminated completely where the plaintiff's proportion of fault is equal to or exceeds 50%.

2. Ned's negligence discussed supra at contributory negligence.

3. If Roofer prevails with a showing that Ned was contributorily negligent, it is likely to reduce the award that Ned will be entitled [to].

Conclusion:

A prima facie case of negligence likely exists. Roofer has a potential defense on the basis of proximate cause; however, should this fail, he will have to apply an affirmative defense. If a contributory negligence jurisdiction, a complete bar to recovery is likely. If a comparative fault jurisdiction, he can likely rely on some diminishment in the award in proportion to the fault attributed to Ned.

### ANSWER B TO QUESTION 3

3)

#### NED V. ROOFER

##### Negligence

Negligence is the breach of a duty owed which is the actual and proximate cause of the plaintiff's injuries.

##### Duty:

A duty is owed to foreseeable plaintiffs.

Cardozo view (majority) - Anyone in the zone of danger created by the defendant's negligent conduct is a foreseeable plaintiff.

Andrews view (majority) - Anyone is a foreseeable plaintiff.

Here, Ned is an occupant of a neighboring house to Hal's where Roofer replaced the roof. Because he is physically close to where the roofing was going on and if the houses are spaced close by, as shown by the facts because the nail propelled from Hal's lawnmower went over the fence and into Ned's backyard, Ned is in the zone of danger.

And[,] in any case, under Andrews anyone is a foreseeable plaintiff.

Therefore Ned is a foreseeable plaintiff.

##### Standard of care

##### Reasonable person test

A person is held to the standard of conducting himself as a reasonably prudent other person would do in the same or similar circumstances.

##### Special duty - Professionals

A professional is held to the standard of care of another professional in the same community who holds the required credentials, skill[,] and competency of the profession.

Roofer will be held to the standard of a professional roofer.

##### Custom in the trade

Custom in the trade will be considered as evidence of what a reasonable professional's duty is. If he does not live up to the standard it will be considered evidence of a breach. However even if he does conduct himself to the customs of the trade it is not always proof that he acted with due care because due care may require a higher standard than produced by following customer[sic].

Here the custom in the roofing trade is to place tarpaulins all around the ground around a house where the roofing is being replaced. The purpose of the tarpaulins is to catch old nails and other materials that get scraped off when the old roof is removed.

Here Roofer had a duty at a minimum to place tarpaulins all around Hal's house when he removed the old roof and replaced the new roof.

### Breach

Is an unjustified failure to perform the duty as set out above.

Here, when Roofer showed up for the job without enough tarpaulins to cover the ground and failed to place one at the rear of Hal's house he breached his duty because another professional roofer would have made sure he had enough tarpaulins before starting the job. Although Roofer "did his best" to clean up, he missed some nails that were imbedded in the grass in the backyard.

Roofer will argue that missing some of the nails is not a failure of his duty because there are a lot of nails in a roof and even with the tarpaulins in place it is possible that old roofing materials and nails could be scattered anyway even with due care, making reasonable efforts to catch them on the tarpaulins[,] and to clean up.

However, Roofer's failure to provide enough tarpaulins is a breach of duty. He did not conduct himself to the standards of another professional roofer with credentialed expertise in the community.

Therefore Roofer is in breach.

### Actual cause

The defendant is said to be the actual cause of the plaintiff's injury if it can be said "but for" the defendant's negligence the plaintiff would not have been injured.

Here it is possible that the nail that Roofer missed was not one of the nails that would have been caught by the missing tarpaulin. However not having the tarpaulin was a substantial factor in not catching all the nails and the facts are that the nail that injured Ned was one from Hal's backyard and that was the area not covered by a tarpaulin.

Therefore Roofer is an actual cause of Ned's injury.

### Proximate cause

Is a policy limiting liability to those injuries which are foreseeable at the time of the defendant's negligent conduct. We look to see if there are any intervening acts and if so if [sic] are they [sic] foreseeable.

Here, Ned was severely injured by a nail piercing his foot. The nail came from Hal's backyard, the area which Roofer had failed to cover. The act of Hal's running over the nail with [h]is lawnmower and propelling the nail into Ned's yard is an intervening act. We look to see if it is foreseeable --- and it is foreseeable that if nails are left on the lawn of a homeowner that he will mow the lawn and the mower will kick up a nail. Therefore the kicking up of the nail is foreseeable.

It is at issue whether it is foreseeable that not using a tarpaulin on a roofing job would cause a neighbor to be injured by an errant nail kicked up by a lawnmower?[sic] One way courts have looked at the injuries is that if the type of injury is foreseeable, the exact manner in which it occurred is irrelevant[;] it will not break the chain of causation from the defendant's initial negligent act.

Another issue is if the injury from the nail was too remote in time from the roofer's negligence. This injury happened six months after roofing was done and it may be too remote in time for the courts to consider that the injury was proximately caused by the roofer's negligence. Six months later if proper yard maintenance was being done or Hal was more observant perhaps any remaining nails would have been discovered.

Roofer is the proximate cause of Ned's injury.

### Damages

In order to prove prima facie cause of negligence, the plaintiff must suffer damages.

Here, Ned suffered a severe injury to his foot and this is a personal injury sufficient to show damage.

Ned will recover general damages for his pain and suffering and special damages for his medical, hospital bills and for lost wages.

### Defenses

#### Contributory negligence

The plaintiff fails to conduct himself as a reasonable prudent person in order to prevent injury to himself.

In a contributory negligence jurisdiction, contributory negligence is complete bar to plaintiff's

recovery.

Here, Ned was walking barefoot in his back yard and stepped on the nail. Roofer will argue that Ned contributed to his own injury because he should have been wearing shoes. However it is common for people to walk in their own backyards with bare feet and it is not at all unreasonable to do so.

Roofer will not have the defense of contributory negligence.

### Comparative negligence

In a comparative negligence jurisdiction the plaintiff's recovery is reduced by his degree of fault. In a pure comparative negligence jurisdiction, the plaintiff will recover no matter how great his degree of fault. In a modified comparative negligence jurisdiction the plaintiff can only recover if his negligence does not equal or surpass the defendant's percentage of negligence (depending on if a 49% or 50% jurisdiction.)

Therefore even if Ned is found slightly contributory negligent he will be able to recover his damages less his degree of fault.

### Assumption of the risk

A person voluntarily assumes a known risk.

Here Ned is simply walking barefoot in his own backyard, something which he likely does often and from which he has received no injury. Therefore he is not assuming a risk of anything by being barefoot. He of course knew that nails and roofing material were coming down from Hal's house when he saw Hal's house being re-roofed but Ned saw the tarpaulins and the cleaning up and would not have expected any nails in his yard[;] therefore he could not have voluntarily assumed any known risks.

Therefore assumption of the risk is not a valid defense.