# PEARCE MICRO REVIEW Torts

#### I. Intentional Torts

- A. To Establish a Prima Facie Case for Intentional Tort, Plaintiff must show:
  - 1. Act by Defendant (Volitional Movement)
  - 2. Intent
    - a. specific intent act with goal of causing the consequence
    - b. general intent act with substantial certainty that the act will cause the consequence
    - c. transferred intent applies to assault, battery, false imprisonment, and trespass to land and chattels

# B. Harms to the Person

- 1. Assault
  - a. act causing reasonable apprehension in plaintiff
  - b. of immediate harmful or offensive contact to plaintiff's person
  - c. intent
  - d. causation
- 2. Battery
  - a. harmful or offensive contact
  - b. to plaintiff's person
  - c. intent
  - d. causation
- 3. False Imprisonment
  - a. act or omission by defendant that confines or restrains plaintiff

- b. to a bounded area
- c. intent
- d. causation
- 4. Intentional Infliction of Emotional Distress
  - a. extreme or outrageous conduct by defendant
  - b. intent or recklessness
  - c. causation
  - d. severe emotional distress
- B. Harms to Property Interests
  - 1. Trespass to Land
    - a. physical invasion of plaintiff's real property
    - b. intent
    - c. causation
  - 2. Trespass to Chattels
    - a. act by defendant that interferes with plaintiff's right of possession
    - b. intent
    - c. causation
    - d. damages
  - 3. Conversion
    - a. act by defendant that interferes with plaintiff's right of possession
    - b. interference serious enough to require full value as damages
    - c. intent

- d. causation
- C. Defenses to Claims for Physical Harms
  - 1. Consent
    - a. express
    - b. implied e.g. sports, rescues
    - c. one cannot consent to a criminal act
  - 2. Privileges and Immunities
    - a. protection of self or others
    - b. protection of property interests
    - c. parental discipline
    - d. protection of public interests includes arrests
    - e. necessity
    - f. incomplete privilege
- II. Negligence
  - A. Duty General Principles
    - 1. Failure to Act
    - 2. Unforeseeable Plaintiffs
      - a. Cardozo View (majority) Foreseeable Zone of Danger
      - b. Andrews View (minority) No Unforeseeable Plaintiffs
    - 3. Obligations to Control the Conduct of Third Parties
  - B. Duty the Standard of Care
    - 1. The Reasonably Prudent Person

- Common Carriers and Innkeepers A Higher Standard of Care
- 3. Children Like Age, Education, Intelligence and Experience
- 4. Physically and Mentally Impaired Individuals
- 5. Professional People Community Standard of Care
- 6. Affirmative Duty to Act
  - a. assumption of duty by acting
  - b. peril due to defendant's negligence
  - c. special relationship between the parties
- C. Breach Defendant's conduct falls short of the applicable standard of care
  - 1. Custom or Usage (keep in mind that an industry custom is negligent)
  - 2. Negligence Per Se Violation of a Statute
  - 3. Res Ipsa Loquitor
    - a. accident would not normally occur without negligence
    - b. instrumentality within sole control of defendant
    - c. no fault by plaintiff
- D. Causation But For Causation
  - 1. Multiple Causes Substantial Factor Test
  - 2. Alternative Causes Burden of Proof on Defendants to Prove Which One Caused the Plaintiff's Harm
  - 3. Multiple Defendant Issues
    - a. joint and several liability
    - satisfaction and release

- c. contribution apportions responsibility among those at fault
- d. indemnity shifts the entire loss between or among tortfeasors

#### E. Causation – Proximate Cause

- 1. Legal (Proximate) Cause
  - a. proximate cause is a limitation on liability
  - even negligent defendants are not liable for unforeseeable risks
- 2. Intervening and Superseding Cause again, Foreseeability is the Key
- 3. Claims against Owners and Occupiers of Land
  - a. duty of possessor to those off premises attaches to artificial conditions on the land, not natural ones
  - b. duty of possessor to those on premises
    - 1. no duty to undiscovered trespasser
    - must warn or make safe from known or anticipated trespassers concealed unsafe conditions known to the landowner
    - 3. attractive nuisance infant trespassers
    - duty owed to licensee: warn of dangerous conditions and otherwise exercise reasonable care
    - 5. duty owned to invitee: same as for licensee, but must also make reasonable inspections
- 4. Intangible Injuries, such as Claims for Mental Distress Not Arising out of Physical Harm
- 5. Claims for Pure Economic Loss

- F. Liability for the Negligent Acts of Others
  - 1. Employees or Other Agents Respondeat Superior
    - a. frolic and detour
    - b. intentional torts
  - 2. Independent Contractors and Non-delegable Duties
  - 3. Partners and Joint Venturers
  - 4. Parent for Child

## G. Damages

- 1. Personal Injury Past, Present and Future damages, both General and Special
- 2. Property Damage Cost to Repair or Fair Market Value, depending on the extent of the harm
- 3. Punitive Damages Only available where defendant is reckless, malicious, or "wanton and willful"
- 4. Duty to Mitigate
- 5. Collateral Source Rule Damages not reduced where Plaintiff received benefits from other sources, such as health insurance

## H. Defenses

- 1. Contributory Fault
  - a. Common Law Contributory Negligence a Bar to Recovery
  - Last Clear Chance an Exception to Contributory Negligence
  - c. Comparative Negligence Apportionment of Fault
- 2. Assumption of Risk Plaintiff must have Known of the Risk and Voluntarily Proceeded in Spite of the Risk

# III. Strict Liability

- A. Claims Arising from Abnormally Dangerous Activities
  - 1. Activity Involves the Risk of Serious Harm to People or Property
  - 2. Activity Cannot be Performed Without Risk of Serious Harm
  - 3. Activity is not Commonly Engaged in the Community

## B. Animals

- 1. Strict Liability for Wild Animals
- No Strict Liability for Domestic Animals Absent Knowledge of Risk

## C. Defenses

- 1. Assumption of Risk
- 2. Many Comparative Fault Jurisdictions Reduce Plaintiff's Recovery
- IV. Products Liability Claims against Manufacturers and Others
  - A. Most Liability Theories are Based on Negligence; if Intent is Present, usually the Theory is Battery
  - B. Defects in Manufacture
  - C. Defects in Design
  - D. Defects in Warning
  - E. Strict Products Liability
    - 1. Strict Duty Owed by a Commercial Supplier of a Product
    - 2. Breach
    - 3. Causation
    - 4. Damages

- F. Warranty
  - 1. Warranty of Merchantability
  - 2. Warranty of Fitness for a Particular Purpose
- G. Defenses
- V. Other Torts
  - A. Nuisance
    - 1. Private Nuisance
      - a. substantial interference
      - b. unreasonable interference
      - c. with the use and enjoyment with plaintiff's property
      - d. trespass interferes with possession, nuisance interferes with use and enjoyment
    - 2. Public Nuisance
      - a. unreasonable interference with the health, safety or property rights of the community
      - b. a private party seeking relief for public nuisance must show a unique harm
    - 3. Remedies Damages, Injunctive Relief Available where Damages are Inadequate
    - 4. Defenses
      - a. legislative authority, such as zoning
      - b. coming to the nuisance
      - c. conduct of others
  - B. Defamation
    - 1. Defamatory Language

- 2. Of or Concerning Plaintiff
- Publication
- 4. Damages
- 5. Slander vs. Libel
- 6. First Amendment Defense Public Figure or Public Concern
  - a. falsity of the defamatory statement
  - b. fault on the part of defendant (malice with public figure)

## C. Invasion of Privacy

- 1. Commercial Appropriation
  - a. unauthorized use of name or image
  - b. commercial advantage to defendant
- 2. False Light
  - a. views or actions are falsely attributed to plaintiff
  - b. objectionable to a reasonable person
  - c. malice required if matter is in the public interest
- 3. Public Disclosure of Private Facts
  - a. private information disclosed to the public
  - b. objectionable to a reasonable person
  - c. malice required if matter is in the public interest
- 4. Intrusion on Seclusion
  - a. prying or intruding into privacy
  - b. objectionable to a reasonable person

#### D. The Business Torts

- 1. Misrepresentation (Fraud Deceit) and Defenses
  - a. misrepresentation of a material fact
  - b. scienter (defendant's knowledge of falsity)
  - c. intent by defendant to induce reliance by plaintiff
  - d. causation actual reliance by plaintiff
  - e. justifiable reliance need statement of facts by defendant, not mere opinion
  - f. damages pecuniary loss
- 2. Intentional Interference with Contract
  - a. existence of valid contract between plaintiff and third party
  - b. knowledge of the relationship by defendant
  - c. intentional interference inducing breach by the third party
  - d. damages
- 3. Intentional Interference with Prospective Advantage same elements as intentional interference, but plaintiff loses a business expectancy, rather than a contract
- 4. Business Privilege Defense
- 5. Wrongful Institution of Legal Proceedings
  - a. malicious prosecution (government prosecutors are immune)
    - 1. institution of criminal proceedings
    - 2. termination in plaintiff's favor
    - 3. no probable cause to believe plaintiff was guilty

- 4. improper purpose
- 5. damages
- b. abuse of process

# VI. Remedies

- A. Damages
  - 1. Compensatory
  - 2. Punitive
  - 3. Nominal
- B. Restitution
  - 1. Replevin
  - 2. Ejectment
  - 3. Quasi Contract
  - 4. Constructive Trust
  - 5. Equitable Lien
- C. Equity Temporary, Preliminary and Permanent Injunctions
  - 1. Inadequate Remedy at Law
  - 2. Property
  - 3. Feasibility
  - 4. Balance Hardships
  - 5. Defenses
    - a. laches
    - b. unclean hands
    - c. 1st Amendment

Peter carelessly left his wallet containing \$100 lying on the cashier's counter in Jim's restaurant and walked away. Jim observed the wallet but neglected to call it to Peter's attention. Immediately thereafter, David, another restaurant patron, paid his bill and picked up Peter's wallet by mistake, thinking it was his own.

As David left the restaurant, Peter saw the wallet in David's hand and recognized it as his own. Before Peter could call out, David boarded a bus owned by Busco. Peter followed and managed to board the bus just as it started to move. He skinned his knee in so doing. He yelled, "Stop thief!" and worked his way around other passengers to where David stood.

The loud accusation angered David, who, even after he noted that the wallet was not his own, retorted, "Don't you call me a thief! Take your wallet and get out of here." He hurled the wallet at Peter. It struck Peter's face, glanced off and flew out the bus window. Peter attempted to get off the bus, but the bus was so arranged that passengers were required to pay fares as they left. Peter had no money with him and argued with the operator of the bus while the bus traveled several blocks. When the bus was stopped by traffic, Peter jumped out and ran back. He was unable to locate his wallet.

- 1. What are Peter's rights against:
  - A. Jim? Discuss.
  - B. David? Discuss.
  - C. Busco? Discuss.
- 2. Does David have any right against Peter? Discuss.

- I. Peter v. Jim
  - A. Negligence
    - 1. Duty: Innkeeper
    - 2. Breach: Failure to warn
    - 3. Causation: Intervening forces analysis
    - 4. Damages: lost wallet, skinned knee, battery, false imprisonment
    - 5. Defenses: Contributory and Comparative Fault
  - C. Conclusion: Jim is liable for the wallet, but nothing more.
- II. Peter v. David
  - A. Trespass to Chattels / Conversion
  - B. Assault / Battery
  - C. Conclusion: David is liable for conversion and battery.
- III. Peter v. Busco
  - A. Negligence: common carrier standard
  - B. False Imprisonment
    - 1. Confinement
    - 2. Defense
  - C. Conclusion: Busco is liable for negligence.
- IV. David v. Peter
  - A. Defamation
    - 1. Statement
    - 2. Publication
    - 3. Damages
    - 4. Defenses: Privilege, First Amendment
  - B. Conclusion: Peter's defense prevails.

Owner hired Plummer, a plumbing contractor, to repair the plumbing in a store that Owner planned to lease. In performing the repair, Plummer used a connector on a hot water pipe made of a different metal than the pipe itself. As a result of the incompatibility of the two metals, the connector corroded and weakened. This condition was not obvious because the weakened connection was located within a wall. After the repair was completed, the store was leased to Amy's, a swimwear retailer.

Two years after Plummer finished the repairs, the connector burst. Hot water broke through the wall and sprayed into the store, scalding Carrie, a customer who was in the store at the time. The water also ruined swimsuits on display in the store. While repairs were being made, Amy's had to close for two months during the summer, causing significant financial loss. Emma, an employee of Amy's, lost her job because of the closure.

- 1. What rights, if any, does Carrie have against Owner and against Plummer? Discuss.
- 2. What rights, if any, does Amy's have against Plummer? Discuss.
- 3. What rights, if any, does Emma have against Owner and against Plummer? Discuss.

- I. Carrie v. Owner
  - A. Negligence
  - B. Vicarious Liability
  - C. Conclusion
- II. Carrie v. Plummer
  - A. Negligence
    - 1. Duty and Breach
    - 2. Causation and Damages
    - 3. Defenses
  - B. Conclusion
- III. Amy's v. Plummer
  - A. Negligence The key issue here is damages.
  - B. Damages
- IV. Emma v. Owner
  - A. Negligent Interference With Contract
    - 1. Emma may not be able to show a breach of duty.
    - 2. Emma may not be a foreseeable plaintiff.
    - 3. Emma's injuries may not be foreseeable.
    - 4. Emma's lost wages are pure economic damages.
- V. Emma v. Plummer:

No recovery; incorporate by reference of Carrie v. Plummer for duty and breach, and Emma v. Owner for causation.

Bayban is an oral contraceptive manufactured by Drugco. Unlike some other birth control pills, it has no known undesirable side effects. However, it is completely ineffective with about 0.4% of all women. Bayban could not be made 100% effective without creating a risk of side effects. Bayban is advertised only through circulars mailed to doctors and is sold only on a doctor's prescription. Its label does not mention that it is ineffective with some women, although Drugco so informs the physicians to whom its promotional literature is sent.

Albert and Amy Able had three minor children. Albert's salary, their only source of income, was \$28,000 a year, and was not likely to increase significantly. In June 1984, Albert and Amy concluded that three children were as many as they could hope to raise and educate adequately. They decided to have no more children. Accordingly, Amy consulted her physician, who prescribed Millpill, another contraceptive which she took regularly until October 1984.

In October 1984, the Ables spent two weeks with their friends the Bakers in a nearby city. When she unpacked her bag, Amy discovered that she had forgotten her Millpills. Mrs. Baker, informed of the problem, told Amy that she would give Amy some Bayban pills which the Baker family physician had prescribed.

Although her doctor had warned her that Bayban was not 100% effective, Mrs. Baker did not mention this when she gave the package to Amy. Amy took the pills as directed on the package during the two-week visit. In December 1984, she learned she was pregnant.

Since they learned of Amy's pregnancy, the Ables have suffered from severe insomnia caused by economic worries, and as a result Amy has been treated by a psychiatrist. Their 17 year-old daughter, Dora, has also been emotionally upset and under psychiatric treatment since her parents told her that they now could not afford to send her to college.

Amy refused to consider an abortion even though her doctor assured her that it would present no danger to her health. Both the pregnancy and the birth were normal and uneventful. Thomas Able, a healthy baby, was born on July 10, 1985. Thomas was conceived during the time Amy was taking Bayban.

On what legal theory or theories, and for what injuries, might Albert, Amy and Dora might recover from Drugco? Discuss.

- I. Amy v. Drugco
  - A. Strict Products Liability
    - 1. Defective Product: no warning on consumer package
    - 2. Foreseeability / Proximate Cause
    - 3. Damages
    - 4. Defenses
  - B. Negligence
  - C. Warranty
  - D. Damages
  - E. Defenses
  - F. Conclusion
- II. Albert v. Drugco
  - A. Products liability theories of liability.
  - B. Defense: Foreseeability
  - C. Conclusion
- III. Dora v. Drugco
  - A. Products liability theories of liability
  - B. Defense: Foreseeability
  - C. Conclusion

For seven years, Refin has been operating a smelter within Zone A of City. A major portion of Refin's operations is the crushing of ores, which produces considerable noise and dust. City's zoning ordinance permits a smelter to operate in Zone A. Last year, several residential subdivisions, the nearest a mile from the smelter but all inside Zone A, were developed and occupied.

Residents of the new subdivisions are concerned because Refin trucks haul granular toxic chemicals in covered drums from a supply depot to the smelter on a regular basis. The only reasonable route to the smelter from the depot is over a street which borders the residential subdivisions. Recently, a cover on one of the drums was blown off by a strong wind; chemicals were scattered, and, while causing no personal injuries, badly burned the lawns of four homeowners.

Refin's procedures for disposing of chemical residue also concern the residents. Employees bury the residue in containers which, because of internal chemical action, will decompose after 10 to 15 years. Chemically active materials could then invade a nearby lake, the course of the subdivision's main water supply. The residue containers used by Refin are the most durable that are available for sealing the chemical residue.

Residents have urged City to bring suit against Refin, but City has not yet acted. However, Howard, one of those who urged action by City and whose lawn was damaged by the chemicals blown by the wind, has sued Refin seeking damages and equitable relief.

What are Howard's rights and remedies, if any? Discuss.

# I. Howard's Rights

#### A. Public Nuisance

- 1. Standing: Howard's damages are different then those suffered by the general public.
- 2. Balancing test.
  - a. Zoning permits a smelter in Zone A.
  - b. Howard came to the nuisance.
  - c. The risk to the water supply
  - d. Refin used due care.
- B. Private Nuisance
- C. Strict Liability
- D. Negligence
- E. Trespass to Land
  - 1. Volitional Act: transporting the chemicals.
  - 2. Intent is problematic.
- F. Conclusion

## II. Howard's Remedies

- A. Damages
  - 1. Nuisance Damages
  - 2. Strict Liability and Negligence Damages
  - 3. Trespass Damages
- B. Injunction
  - 1. Legal remedy is inadequate: land is unique.
  - 2. Feasibility is not a problem.
  - 3. Balancing the hardships
  - 4. Property right is present.
  - 5. Refin does not have any strong defenses.
- C. Conclusion

Abel and Baker were working on a scaffold lawfully erected over a public sidewalk. Abel, contrary to an express rule of his employer, was note wearing a hard hat.

While trying to park her automobile near one of the supports of the scaffold, Diana maneuvered it into such a position that she knew there was a risk of knocking the scaffold down if she backed without someone to guide her. She appealed for help to Sam, a stranger who was passing by. Sam just laughed. Angered, Diana proceeded to back her automobile without assistance and knocked a support out from under the scaffold, causing Abel and Baker to fall.

Abel severely fractured his skull and was taken unconscious to a hospital. If he had been wearing his hard hat, he would have suffered only a slight concussion with minimal disability.

Baker sustained a fracture of a vertebra, but he was able to walk and felt only slight pain. The fracture could have been easily diagnosed by x-ray, and a medical doctor of average competence could have successfully treated it by immobilization. Instead of visiting a physician, Baker worked the rest of the day. While driving his car home later that day, Baker stopped at an intersection and his car was struck from the rear by a car driven by Ed. The collision caused only slight damage to Baker's car, but it was sufficiently severe to aggravate the fracture in Baker's back, resulting in paralysis.

Diana and Sam settled Baker's claim against them and received general releases from him. Abel sued Diana and Sam. Baker sued Ed. Assume that Diana, Sam and Ed raise all appropriate defenses.

- 1. What rights, if any, does Abel have against Diana? Sam? Discuss.
- 2. What rights, if any, does Baker have against Ed? Discuss.

- I. Abel v. Diana:
  - A. Negligence
    - 1. Duty: ordinary care
    - 2. Breach: backing up with knowledge of the risk
    - 3. Causation: intervening act analysis
    - 4. Damages: fractured skull
    - 5. Defenses: contributory or comparative fault
  - B. Battery
  - C. Conclusion: Diana is liable to Abel for negligence.
- II. Abel v. Sam
  - 1. Abel has no theory of liability against Sam, who had no duty.
  - 2. Conclusion: Sam has no liability.
- III. Baker v. Ed
  - A. Negligence
    - 1. Duty: ordinary care
    - 2. Breach: res ipsa
    - 3. Causation: thin skull doctrine analysis
    - 4. Damages: paralysis
    - 5. Defenses
      - a. Contributory and comparative fault
      - b. Avoidable consequences
      - c. Settlement with Diana and Sam
- IV. Conclusion: Ed is liable to Baker for negligence.

Peters, a suburban homeowner, decided to resurface with bricks the concrete area surrounding his pool. He purchased from Homeco, a local home improvement store, a concrete cutter manufactured by Conco, which had a blade manufactured by Bladeco. He then took the concrete cutter home and assembled it following the instructions provided by Conco.

The blade that Peters purchased was clearly labeled "Wet." Although no instructions or warnings came with the blade, Conco included several warnings throughout the instructions to the concrete cutter stating, "If using a wet blade, frequently water the blade and surface being cut to avoid risk of blade degradation." No other warnings relating to the blade were included with the concrete cutter.

Peters began cutting the concrete with the concrete cutter without using water. Less than five minutes into the job he noticed that the cutter was vibrating excessively. He turned the machine off by hitting the "kill switch" located near the blade at the bottom of the cutter, with his right foot. The cutter's handle did not have a "kill switch." After carefully examining the concrete cutter and blade, Peters became convinced that nothing was wrong and continued to operate it. Nevertheless, within seconds, the concrete cutter again began vibrating violently.

As Peters reached with his right foot to hit the "kill switch" again, the blade broke into pieces, forced off the cutter's safety guard, spiraled into Peter's right foot and caused permanent injuries.

On what theory or theories might Peters recover damages from and what defenses may reasonably be raised by:

- 1. Conco? Discuss.
- Bladeco? Discuss.
- 3. Homeco? Discuss.

- I. Peters v. Conco: Products Liability
  - A. Strict Liability
    - 1. Design or Manufacturing Defect
    - 2. Inadequate Warning
    - 3. Damages
    - 4. Defenses
  - B. Negligence
    - 1. Duty
    - 2. Breach
    - 3. Causation
    - 4. Damages
    - 5. Defenses
      - a. Contributory or Comparative Negligence
      - b. Assumption of Risk
  - C. Warranty
  - D. Conclusion
- II. Peters v. Bladeco
  - A. Strict Liability
  - B. Negligence
  - C. Warranty
  - D. Defenses
  - E. Conclusion
- III. Peters v. Homeco
  - A. Strict Liability
  - B. Negligence
  - C. Warranty
  - D. Defenses
  - E. Conclusion