

## PROBLEM 1 – TORTS

1. Potential plaintiffs: Pike (injured), his wife and family (loss of his income, consortium)
  2. Potential defendants: Hough, the manufacturer of the Paydozer. Note that the employer would not be subject to suit because of workers' compensation and the operator's negligence, if any, would be imputed to the employer under principles of vicarious liability. Thus, if this case came to you, you would focus on the claims re design of the machine. The suit would be Pike v. Hough Co.
  3. Duty: general duty of care
  4. Breach: P must show that this was a foreseeable risk and that the defendant acted unreasonably in light of the risk. The standard of care would be that of a reasonable person under the circumstances. It's foreseeable that if a big piece of construction equipment has a large blind spot behind it, and the operator is required regularly to back it up, someone could be in the blind spot and be hurt, so this is a foreseeable risk. Given size and amount of movement, P and L here, therefore, are pretty high. The nature of B will depend on how you define the untaken precaution. (use SAFETY to evaluate different untaken precautions.)
4. Breach claims: a. what's the untaken precaution here? Several possibilities:
- No side mirrors. The cost of adding mirrors would be small, although there would be a loss in maneuverability, but perhaps not enough to affect utility. Would the side mirrors be effective? Only if they left no blind spot, or if the P was standing in an area that would have been visible with the mirrors (otherwise there's a problem with causation). Perhaps an adjustable set of mirrors, so that the operator could look all around.
  - No audible back-up device. Again, low cost, no apparent loss of utility, D could argue a lot of them working at once create a cacophony, but, as in the Davis case, D would have to introduce evidence on how noisy (and therefore ineffectual) the device would be.
  - No collision-sensing device or TV camera. Here you'd run into problems of excessive cost, plus it's not clear a TV camera would be effective – it might quickly get dirty or smashed, or not be looked at.
  - No walkie-talkies. Cheap, but again query whether it could be heard.
- Notice that whatever theory(ies) of breach you choose, you then have to establish how they relate to causation. Easiest to do re the audible back-up device, unless there's some evidence P was deaf. Re mirrors, it'll depend on where the P was standing. Also notice the effect of comparative fault – was P also negligent for standing behind a moving machine with (obviously) no mirrors or (less obviously) no audible backup warning device?

You would also want to inquire into the role of industry custom. What do other construction machinery makers do? Note both the offensive (plaintiff) and defensive (defendant) use of custom.