

**TORTS EXAMINATION**  
**Professor Gilles**  
**May 2001**

1. *You have **2 hours and 40 minutes** to complete this examination.*
2. *This examination consists of one main fact pattern followed by four questions (one with subparts).*
3. *You may **ONLY** use the following number of pages (writing on **EVERY LINE**). A “page” is **ONE SIDE** of each leaf of a blue book:*

*Question 1(a) - use only 2 pages*  
*Question 1(b) - use only 4½ pages*  
*Question 2 - use only 3 pages*  
*Question 3 - use only 1½ pages*  
*Question 4 - use only 2 pages*

*You must obey the page limits given for each question. I will not read beyond the assigned page limit.*

4. ***Answer the question asked.** Points will **NOT** be given for the “Aright” answer given in response to the wrong question.*
5. *Make sure that you put your examination number on your blue book and on this examination: exam no. \_\_\_\_\_*
6. *This is a closed book examination.*
7. *Hand in your copy of the examination with your bluebook.*

*Good luck.*

*FACT PATTERN:*

*[This fact pattern is set in the fictional, but beautiful, State of Scotia.]*

In spring 2001, Peter moves to Columbus and consults a new doctor, Doctor Cureit, a general practitioner. Peter explains that, while he keeps in shape by working-out regularly, the stress of his new job (as an attorney at a large law firm) has caused his hair to start falling out. Peter comments, “What can we do, doctor? I don’t want to be bald before I am forty.” Cureit thoroughly examines Peter and correctly concludes he is suffering from anxiety-induced hair loss. Cureit prescribes Hairgrow, a new anti-baldness drug. “Is this stuff safe?” asks Peter, “I want to know everything about my condition and any treatment.” “Don’t worry,” responds Cureit, “I have hundreds of patients on this.”

The drug company, Hare, introduced the prescription drug Hairgrow in 1995 and it has been a stunning success. Hare’s television ads note the prevalence of baldness in the United States and then switch to a picture of a smiling man with a gorgeous woman, who runs her fingers through the male’s hair. A voice states, “Are you suffering from premature hair loss? Ask your doctor about Hairgrow. For you, it could be the answer.”

As the literature sent to all doctors explains, Hairgrow is unique because it is a new synthetic steroid. Hare conducted thorough testing of Hairgrow, both before and after its release (from 1993-2000). Hare’s studies revealed the following:

1. While baldness is not harmful, about 100,000 men per year go bald. Of these, about 100 suffer severe depression as a result of their hair loss.
2. Hairgrow is the most effective drug on the market for curing male hair loss. 80% of users experienced no further hair loss and a further 10% saw new hair growth.<sup>1</sup>
3. Hairgrow has no side effects unless it is combined “Stendron,” an illegal steroid widely used by male amateur athletes to increase muscle size. Clinical studies in 1993 and 1994 revealed that the combination of Stendron and Hairgrow causes extreme aggression, and might, potentially, cause death through over-stimulation of the heart. From 1995 to 2000, only 10 cases of extreme aggression (from combined use of Stendron/Hairgrow) have been reported and none resulted in serious harm or death to anyone.

From the date of the drug’s introduction in 1995, Hare has repeatedly notified all doctors of Hairgrow’s potential to cause aggressive behavior or death when combined with Stendron. Hare’s instructions to all doctors state in bold lettering: “**All patients MUST be expressly informed of the possibility of side effects, including aggressive behavior and possible death, when Hairgrow is used in combination with Stendron.**” Hare did not include this warning in the TV ads or the drug packaging – and was not required to do so by state regulations on drug warnings.

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<sup>1</sup> The only product that competes with Hairgrow is Nobald, a non-prescription, non-steroid lotion that is simply rubbed on the hair to strengthen the hair follicles. It is half the price and has none of the side effects of Hairgrow. However, Nobald has proven far less effective and studies report that it only stops further hair loss, and only in 30% of users.

The medical profession has split on what information to provide to patients about Hairgrow. The National Society of Sports Doctors, concerned about the wide, although illegal, usage of Stendron by amateur athletes, recommends informing all patients of the danger of side effects when Hairgrow and Stendron are combined. In contrast, the American Association of General Practitioners has not adopted any formal policy, and general practitioners nationwide take differing positions. About 59% of general practitioners warn **all** patients of the danger of using Hairgrow in combination with Stendron; but about 41% of general practitioners do not warn patients of the danger, unless the patient reveals he is using steroid drugs.

Doctor Cureit's asks Peter if he is taking any other drugs. When Peter says no, Doctor Cureit decides not to inform Peter of the dangers of using Hairgrow with Stendron. Cureit's only comment is, "This will make your hair grow in no time at all." Cureit writes a prescription for one tablet a day and asks Peter to check back in about 2 months.

Peter gets the prescription filled at a local pharmacist and takes the Hairgrow as prescribed. Two weeks later, when Peter's workload finally eases, he returns to the gym where he is a member. During a workout one day, Peter notes the stunning physique of Karr. Karr explains that he supplements his diet with "Studdust" which he describes as a "muscle builder."

Peter starts taking Studdust on a daily basis. Unfortunately "Studdust" is the street name for Stendron and after a week of taking Hairgrow and Studdust, Peter becomes very aggressive. Peter shouts at his secretary and argues with his boss. Peter also throws furniture around his apartment, and threatens his neighbors (Ned, Nelly and Nancy) when they object, causing each of them to complain about Peter's "dangerous" behavior to the landlord, Secure Properties.

Peter is fired from his job. Peter blames his secretary, Frank, for his firing and begins to place harassing and threatening phone calls to Frank. Every night for three weeks after his firing Peter calls Frank and screams "You got me fired you rat. I'm going to get you. Don't go out alone at night or you will be sorry." Peter continues these calls despite the fact that Frank repeatedly breaks into sobs on the phone and cries, "Please, please leave me alone." Unknown to Peter, Frank suffers from emotional problems because when Frank was a child his parents were brutally murdered at night. During a final threatening phone call, Frank has a panic attack, suffers severe emotional distress, and has to return to psychiatric care.

Peter's condition continues to deteriorate. Peter is in the lobby of his apartment building. Peter's neighbor, Ned, again confronts Peter about the loud noises. Peter "loses it" and begins to beat Ned. While pummeling Ned, Peter suffers a heart attack (caused by the Hairgrow/Stendron's over-stimulation of his heart) and drops dead. Ned is severely injured by the attack. There was no way for Ned to summon help during the attack because the landlord, Secure Properties, provides no security guards, alarms or telephones in the lobby, despite the fact that there have been twenty-four petty thefts (of lamps, pictures, etc.) from the lobby over the past year.

QUESTIONS:

**Question 1. Peter’s estate files a products liability suit against Hare. The suit contains two claims: one for a design defect and one for a warning defect. You clerk for Judge Judy who has been assigned the case. She asks you to address the following issues.**

{It is advisable to read both Questions 1(a) and 1(b) because points will not be given for the “right” answer given in response to the wrong part of the question}

**Question 1(a): Can Peter’s estate prove that the drug was defectively designed?**

- Note: The Supreme Court of Scotia has not yet decided what approach to take on the issue of **design defects in prescription drugs**. The Court is considering adopting a standard risk/utility analysis, the position taken by California, or that proposed in the 3<sup>rd</sup> Restatement, for design defects in prescription drugs. It would be wise to discuss each of these three approaches **and** how each approach would apply to the facts here.
- Only discuss the issue raised by the question. Do **not discuss** other elements of a products liability case or possible defenses.

*(Limit of 2 pages)*

**Question 1(b): Can Peter’s estate state a products liability claim against Hare based on a warning defect?**

- Discuss **all the elements** of such a claim.
- Discuss the only affirmative defense recognized in Scotia, which is assumption of the risk. Also discuss those so-called “defenses,” which are in fact arguments that go to whether plaintiff has stated a prima facie case.

*(Limit of 4½ pages)*

**Question 2. Can Peter’s estate state a claim against Dr. Cureit for negligence for having failed to notify Peter of the risks of using Hairgrow in combination with Studdust?**

- **Only discuss duty and breach.**
- You should presume that the State of Scotia adopts a professional standard in informed consent cases and uses a national standard of care.

*(Limit of 3 pages)*

**Question 3. Can Frank state a claim for intentional infliction of emotional distress against Peter?**

*(Limit of 1½ pages)*

**Question 4. Can Ned state a claim for negligence (based on the attack) against his landlord, Secure Properties?**

- **Only discuss duty and breach.**

*(Limit of 2 pages)*

-- The End --