

**TORTS EXAMINATION
PROFESSOR GILLES
May 1999**

1. *You have 2 ½ hours to complete this examination.*
 2. *This examination consists of one main fact pattern followed by four questions. Additional, alternative facts are then given, followed by question 5.*
 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 - use only 3 pages*
 - Question 2 - use only 1 1/2 pages*
 - Question 3a - use only 2 pages*
 - Question 3b - use only 1 page*
 - Question 4 - use only 1 page*
 - Question 5- use only 9 pages*
- You must obey the page limits given for each question. I will not read beyond the assigned page limit. **You do NOT need to use all the space to write a good answer.***
4. ***Answer the question asked.** Points will NOT be given for the “right” answer given in response to the wrong question.*
 5. *Make sure that you put your examination number on your blue book.*
 6. *This is a closed book examination.*
 7. *You may keep your copy of the examination.*

Good luck.

FACT PATTERN:

This fact pattern is set in Glaswega, a small town in the fictional, but beautiful, State of Scotia.

John decides to take up tennis. He joins Gilmark Tennis Club set in a rural area 5 miles outside of town. One Saturday he invites his estranged wife Veronica to join him hoping to win back her affection by a display of his new found tennis skills. John and Veronica had been married for 2 years, but had recently decided to separate and “just be friends.”

John and Veronica begin to play, but John’s serve becomes very erratic. The angrier he gets the worse his aim and by the end of the game he has hit 50 tennis balls out of the tennis club and onto the adjacent property. John asserts that he is going to climb over the large fence separating the club from the neighboring property and collect the balls. Veronica tells John “not to be an idiot,” pointing to the “NO ADMITTANCE” signs posted all over the neighboring property.

The neighboring property is an adventure park owned by “Big Cat Experience, Inc.” (BCE). BCE has three tame lions (Leo, Lenora and Lenny). It runs daily lion shows and as the climax of the show allows members of the public to pet the lions and have their photographs taken sitting on the lions. In its twenty years of operation none of these three lions have ever attacked a visitor. Between shows the lions roam freely in a fenced-in area in the back left-hand corner of the lot.

John scales the fence and begins to search for the tennis balls in the long grass. An employee of BCE spots John. John explains his quest and the BCE employee states, “O.K. you can keep looking here, but stay away from that area” - pointing to the back left-hand corner. He never mentions the lions.

John continues to search and, ignoring the employee’s admonition, enters the fenced-in area in the back left-hand corner of the lot. As he swings his racquet from left to right he hears a growl. He has hit Lenora, the tame lioness, who had been dozing in the grass. Angered by the severe blow to her nose, Lenora attacks John severely injuring his arm. John screams in agony. Veronica who is watching through the fence (about 100 yards away) is traumatized by the sight of John’s bloody arm and his pitiful moans. She faints.

John then manages to drag himself back over the fences to the tennis court where he lays injured for 5 minutes until Doctors Billy Jean and King arrive for their tennis game. Doctor King is a general practitioner in Glaswega and Dr. Billy Jean is an eye surgeon who is in Glaswega for a meeting (she practices in a similar small town, Edin, in Indiana).

Seeing both Veronica and John lying unconscious on the court, Doctor Billy Jean calls for help on her cellular phone. She then proceeds to tend to Veronica while Doctor King administers first aid to John. Unfortunately King bandages the arm far too tightly cutting off the blood

supply to John's hand and increasing the severity of the injury. Doctor Billy Jean shouts, "You moron, can't you see that the arm is turning blue – No one in Edin would tie a bandage like that."

Eventually an ambulance arrives and transports Veronica and John (both still unconscious) to hospital. Veronica is released the next day but continues to suffer from nightmares. After a series of surgeries John's arm is repaired, although three fingers are missing.

John has also begun to have mental problems and begins seeing Doctor Freud (a licensed psychiatrist). John at first asserts that he is fine, but in his second session he relates the details of the lion attack. He somewhat irrationally blames his injury on Veronica. He becomes hysterical and repeatedly shouts – "I'll divorce that bitch, no I'll kill her, I'll kill her." Doctor Freud is convinced that John's threats may well be serious. He notifies the Glaswega police of the threat, but does not ask them to contact Veronica and takes no further steps. No one warns Veronica. Two weeks later, John attacks Veronica stabbing her in the arm.

QUESTIONS:

Question 1. Does John have any claims against BCE?

Only discuss DUTY and BREACH. Do not address any intentional torts. Even if you conclude that John would prevail on one theory, this question calls for you to address any other theories. (*Limit of 3 pages*).

Question 2. Does Veronica have a claim against BCE for negligent infliction of emotional distress?

Presume that the courts in Scotia follow California law on NIED issues (and apply the *Thing* test). And for the purposes of this question you can presume that BCE breached a duty of care causing injury. (*Limit of 1½ pages*)

Question 3a. Does John have a negligence claim against Doctor King? Does he need an expert witness? Can he use Doctor Billy Jean?

Only discuss DUTY and BREACH. You should presume that the State of Scotia adopts the modified locality rule in medical malpractice cases. (*Limit of 2 pages*)

3b. How would your answer change if Scotia had a statute that provided:

"No doctor, nurse or other licensed medical professional who in good faith renders emergency care at the scene of an emergency occurring outside the place of that person's practice shall be liable for any civil damages as a result of any acts or omissions by that person in rendering the emergency care, unless said acts or omissions constitute wanton conduct or intentional wrongdoing."

(Limit of 1 page)

Question 4. Does Veronica have a negligence claim against Doctor Freud?

Only discuss DUTY and BREACH. (*Limit of 1 page*)

Question 5. *The following alternative fact pattern is applicable only to question 5.*

Presume instead that during his second tennis lesson at Gilmark with instructor Chrissy, John becomes frustrated. He slams his racket to the ground. The racket shatters and a splinter of graphite flies up and enters John's eye. John is partially blinded. An examination of the racket after the incident reveals no manufacturing defect.

John's racket is a "Le Speede Demonique" (or LSD), and is manufactured by a French company Le Tennis. The LSD racket was originally designed for professional players (who still make up 80 % of users), although the company is aware that some amateurs now use the racket. Le Tennis does not sell its rackets, but only offers them as part of a lesson package through registered tennis clubs such as Gilmark, and only from Le Tennis certified tennis professionals. This lesson package, called the "Le Tennis Advantage," for which John paid Gilmark \$1,950, includes the racket itself, a special video, a monogrammed shirt and fifteen lessons from Gilmark's Le Tennis certified tennis pro., Chrissy.

The package allows the consumer to select any one of three rackets – "Le Beginner," "Le Intermediate," or "Le Speede Demonique" (the LSD). When John purchased his package from Gilmark he had only been playing tennis for two months. Chrissy strongly advised John to select either the "Le Beginner" or "Le Intermediate." As an expert in Le Tennis rackets, she advised John that the LSD is made of highly brittle graphite, which can easily shatter if it hits the ground. She did not warn him of the danger of injury to the eye if the racket shatters, a warning that was included prominently and specifically in the "Le Tennis Pro Information" literature sent to Chrissy by Le Tennis as part of the 6-week certification course. In fact, all professional players are aware of the risk of eye injury from graphite rackets, although the general public is not.

Chrissy repeatedly recommended that John select the "Le Beginner" or "Le Intermediate" racket. These rackets are made of aluminum and so are much sturdier, can take far more wear and tear, and never shatter. The aluminum rackets cost the same, but Chrissy admitted that the aluminum rackets tend to take about 25 miles per hour of the speed of a player's serve (a critical difference for a professional player) and, because they are heavier, cause more minor bruises on the leg when players accidentally hit themselves.

John listened, but insisted that he wanted the LSD – he felt that he needed extra speed on his serve. Chrissy gave John the LSD as part of the package, but she specifically told him to watch the video before the first lesson.

John took his LSD racket and video home. He put the video in his VCR. However Chrissy had given him the French version of the video, so John did not understand the warnings contained on the video (which specifically, urgently, and repeatedly counseled against slamming the racket on the ground because of the dangers of splintering and resulting eye injuries).

Question 5: John files a products liability suit against Le Tennis. Discuss the strengths and weaknesses of his suit and any defenses. Do not discuss claims based in negligence or contract or fraud --- only products liability. Do not discuss other possible defendants.

This question is set in the fictional, but beautiful State of Scotia. Scotia follows the approach taken by a majority of modern courts on all issues of products liability. Scotia, however, only allows assumption of the risk as a defense to a products liability claim.

Limit of 9 pages.

Have a good summer.