

ARKANSAS BAR EXAMINATION  
JULY, 1998

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30 Minutes

**CONTRACTS**

Elbonia, a new Balkan republic, has adopted the Patent Law of West Upper Ben-deezing, and the Contract Law of Arkansas. Under the Patent Law of West Upper Ben-deezing, the first party to submit a qualified engineer's drawing of an invention to the Patent Commissioner gets the patent.

On July 3, Plantev, an Elbonian tinkerer, invented a transmission pressure plate with a Lippolis Shunt. The invention allows motors to run at peak efficiency in all gears and speeds. Fuel savings will be considerable--20% or more--a critical consideration in oil-poor Elbonia, not to mention smog-rich America.

Plantev paid Qualified Engineer Fyodor Defendovich 20,000 Elbonian droogles to produce engineering drawings of the plate and Lippolis Shunt. The due date for submission of the drawings to the Commissioner is July 15.

"Is wery important these drawings be done on time," says Plantev.

"Ja, I know," says Defendovich, "I'll have them done. I never leave work hanging for July 16, because that is Elbonian Soccer Day. It is very important for me to have these drawings done on time. Besides, you want to get patent as quickly as you can so you can use your royalties and go to American Disco in Nurjansk, har har har."

On July 15, Defendovich's mother had a heart attack. He did not return to his office until 8:00 p.m. He worked through the evening and completed the drawings, submitting them to the Commissioner at 10:09 a.m. July 16. Unfortunately, Lucky Lermontov had the very same idea and submitted his drawings of a plate and Lippolis Shunt twenty-three minutes earlier. Lermontov got the patent, and in the first year collected royalties of 500,000 Elbonian droogles, which he spent in the Nurjansk Disco. Outside, Plantev wept and gnashed his teeth.

Plaintev decides to hire an Arkansas lawyer (you) to sue Defendovich "for 500,000 droogles, at least." Plaintev says that the patent lasts 12 years, and he'd really like 6 million droogles, although he has been told by a law student in southeastern Albania that Arkansas courts would make you reduce your 6 million droogles to "peasant value," or 5.21 million droogles.

"Wot is dis 'peasant value?' I thought Arkansas was demokrazy."

"No, that's present value," you tell him. And he says "Ahh!"

How many droogles will Plaintev win: zero? 20,000? 500,000? 5.21 million? 6 million? Some other figure? Why?

## ANSWER

### CONTRACTS

The goal of remedies for breach of contract is to put the parties in as good of a position as they would have been in had the contract been performed. To that amount, a court will add foreseeable consequential damages and incidental damages. The court will then subtract any damages the plaintiff could have avoided (mitigation).

Generally, a plaintiff may only win a breach of contract action on a services contract if the breach is "material." In usual circumstances, a breach in which a party is only one day late in performing would not be considered material. However, there is an exception for "time is of the essence" contracts. Where the parties have contracted and stated that "time is of the essence" or words to such effect, late performance will be considered a material breach.

In this case, the enormous consequential damages may or may not have been foreseeable to Defendovich. When Plaintev told him it was important that the drawings be done on time, Defendovich mentioned soccer day. The facts do not state that Defendovich knew the date for submission was July 15. If he did know that the date was July 15 and that the consequential damages sustained here were possible, he will be liable for consequential damages.

To award damages of 6 million droogles would probably be too speculative. There is no guarantee that an invention will not come about that will make this invention obsolete sometime during the next twelve years. plaintev is therefore most likely to win the 500,000 droogles he would have earned during the past year had he received the patent.

Defendovich may try to argue impossibility or impracticability as a defense since his mother died the day the drawings were due. This defense should not be applied. It was still possible for the drawings to have been completed prior to the due date.

If the court decides not to award consequential damages because of lack of foreseeability, it may still decide that the parties should be put back in as good of a position as they would have been in had the contract never been entered into. This is a general fall back position when the parties cannot be placed in the position they would have attained had the contract been performed. This rule prevents unjust enrichment by allowing restitution. If the court takes this position it will award Plaintev the 20,000 droogles he paid Defendovich for his services.

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**TORTS**

Sam was late for an important meeting across town. He hurried down the steps of the apartment house where he resided with his wife. A young child who lived in the same apartment complex had left a roller skate on the landing and Sam fell, injuring his back. Sam had talked to his landlord and to the father of the child on three prior occasions about the fact that the child left toys on the landing almost every day and that someone was going to fall over them and hurt themselves if they did not stop him.

Sam got up and hurried to his car, deciding to go to the doctor after his meeting. He got in his car, turned on the radio and the air conditioner, and sped away. As he approached a railroad crossing he slowed down and looked to his left. He was unable to see very far as the Best Furniture Company truck was parked by its store in a "No Parking" zone and furniture was being unloaded. But for the truck, he would have had a clear view down the track. Sam looked to the right, and seeing or hearing nothing he proceeded on across the track. Just as his front wheels reached the main track he heard the train whistle and saw the train approaching from his left around the furniture company truck. There was no way to avoid the collision.

Witnesses at the scene stated that they did not hear any signal or whistle until immediately before the accident. (Arkansas law requires a train crew to sound its whistle or bell beginning 1/4 mile prior to a crossing.) Sam's legs were broken, his back was injured, and his car was destroyed. He was hospitalized for two weeks and unable to return to work for 90 days. Sam and his wife have come to you for advice. What issues do you see, and how would you advise them?

## ANSWER

### TORTS

Generally, a landlord is not liable or responsible to the tenant for torts committed on the premises unless: the lease specifically states; there is an unreasonably dangerous condition on the premises of which he is aware and the tenant is not; he is required by law to maintain; or the landlord fails to maintain a "common area." A father is generally not liable for the torts of his child unless he was possibly acting at his father's behest in which case he could be held vicariously liable. Generally, a child's negligence will be compared to that of children of like age and maturity. In order to establish a claim (prima facie) for negligence a plaintiff must prove a duty was owed; he must establish a standard of care; a breach of that duty; the breach of the duty was the cause in fact and proximate cause of his injuries; and he must establish damages.

In the case of the landlord, there could be some question as to whether the plaintiff (Sam) was owed a duty, whether he was in the foreseeable zone of danger. There may also be a question of whether the father or child owed a duty of care to Sam. The fact that the accident occurred in a "common area" (steps) and that Sam had notified the landlord and father could help.

Generally, Arkansas follows the modified comparative fault system, so Sam's negligence (if any) could determine the outcome against the father and landlord.

Sam might also pursue a course of action against the Best Furniture Company and train company. Generally, in Arkansas violation of a statute or law does not raise a presumption of negligence, however it can be used as evidence at trial. Sam would have to prove by preponderance of the evidence each element of negligence, and with evidence that the furniture violated the "no parking" zone and that the train possibly violated a statute for sounding a whistle, Sam could have a fairly strong case. However, his cause of action against the furniture store and train could adversely affect his cause of action against the landlord, father and child because his injuries seem to have been caused by the train accident not the fall. In other words, there may be a question as to whether the train or fall was the cause in fact of his injuries to his back. The train may be considered a supervening event that broke the natural and probable sequence of events following Sam's fall.

It appears that there may be question as to whether Best Furniture was the cause in fact of Sam's train accident. The train hit him thus causing his injuries, Best Furniture did not. It does appear that Best was the proximate cause of Sam's accident, "but for" their parking there, Sam would have had a clear view. Best may be able to defend on the grounds that Sam "assumed the risk" by entering the track without seeing down both ends.

Generally, special damages must be specifically plead, general damages do not. Damages such as lost wages, medical expenses and bills are special damages. Pain and suffering are general damages. Sam might be able to assert a claim against the landlord, the father, the child, the train company and operator and the Best Furniture Store and truck driver. Both the operator and driver, if negligent could lead to liability against their employers under the doctrine of respondeat superior for which the employers could be jointly and severally liable.

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**PROPERTY**

During their marriage A and her husband B acquired a prime tract of land within the city limits of a growing Arkansas town. The granting clause of the Warranty Deed stated that the Grantor did "grant, bargain, sell and convey unto A and B" but did not mention the fact that they were married. The habendum clause stated, "to have and to hold unto A and B, their heirs and assigns forever with all appurtenances thereunto belonging." During a later marital dispute A deeded the property to C (who at all times acted in good faith) by Special Warranty Deed in an arms-length transaction for a fair and valuable consideration. B was not aware of this transaction and did not sign the deed. A and B soon reconciled and lived happily ever after. After the closing of the transaction from A to C, C immediately commenced to build a strip shopping center on the property and soon thereafter leased the suites to tenants X, Y and Z. Eight years later C and D discovered that the rear ten feet of C's buildings were innocently but erroneously built on adjoining lands owned by D. Succinctly address the rights and interests of the parties and the status of the title to the lands.

ANSWER

**PROPERTY**

The land acquisition by A and B during their marriage will either be owned by A and B as tenants in the entirety, joint tenants, or tenants in common. In Arkansas, the presumption is that any land acquired by a husband and wife during the marriage is owned by them as tenants in the entirety. The language of the deed does not create such an ownership but it can be presumed by the marriage and from the intent of the parties. The existence of the four unities creates a joint tenancy or tenancy in common but Arkansas courts tend to focus on the intent of the parties. The language of the habendum clause could be read to express their intent to create a tenancy by the entirety.

The type of ownership is significant because it determines the rights of survivorship and severance of the owners. The owners in a joint tenancy have both right of survivorship and right to sever. Owners of a tenancy in common have right to sever but not a right of survivorship. And owners of a tenancy by the entirety possess the right of survivorship but not severance.

The validity of the conveyance to C depends upon the type of ownership. If A & B are joint tenants, A's conveyance destroyed the joint tenancy and made C & B tenants in common. If A & B are tenants in common, B & C are tenants in common. If A & B are tenants by the entirety, C's conveyance is likely voidable and would disappear if A should die, B would succeed to full ownership of all of the land. Regardless of C's ownership interest, C is liable to B for any waste to the land. B still had ownership rights in the land. C is also responsible to B for any rent on the leased premises from the tenants X, Y, and Z. B is not, however, liable for any improvements made to the land by C, only for land maintenance (such as property taxes) upon sale of the land.

C might have gained title to the ten feet of land belonging to D upon which the buildings reside by adverse possession. Adverse possession is the hostile, adverse, open and notorious, exclusive continuous use of the land of another. Arkansas has added to this common law definition that the person claiming ownership by adverse possession must have color of title, used the land for 7 years, and paid taxes on the land. Alternatively, the person may assert title if he or she claims ownership over land adjacent to his or her property and has been paying taxes on it for 7 years. The public policy behind the common law rule was to make land productive. Here, if C has paid taxes on the land for 7 years, has color of title, and has been using the land hostile to the ownership rights of another, adversely, visibly/openly and notoriously, exclusively, and continuous for 7 years, C can go to chancery court to quiet title. The second statutory option is not available to C because she has not been in control of or paying taxes on the land for 15 years.

If C is unable to gain ownership by adverse possession, D can have her remove the buildings jutting onto his land.

C might also try to claim a construction easement for use of the land on which the building sits because of the hostile, continuous, open and notorious use of the land for the buildings. D will be found to have constructive notice in terms of the adverse possession claim and the constructive easement claim.

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**CONSTITUTIONAL LAW**

The State Legislature, with the purpose of insuring that all children in the State are computer literate, has passed a bill which provides funds to buy a computer for every child in every school in the State, from kindergarten through the last year of high school (the "Bill").

The Board of the state chapter of the Guardians for Separation of Church and State are considering filing a lawsuit in Federal Court to challenge the Bill as unconstitutional. The Board retains you as its attorney to advise them. They ask you to make a short presentation addressing the constitutionality of the Bill.

Will the Bill withstand a constitutional challenge? Why or why not?

ANSWER

**CONSTITUTIONAL LAW**

The Bill will probably not withstand a constitutional challenge.

The facts raise an issue under the Establishment Clause of the First Amendment to the U.S. Constitution. The Establishment Clause ("Clause") prohibits government from establishing religion. The Clause was made applicable to the states through the Due process Clause of the Fourteenth Amendment. Here, we have state action by legislative act of the state.

At the outset, it is important to note that the Board of the State Chapter of the Guardians for Separation of Church and State will have standing. Taxpayer standing is permitted in Establishment Clause cases where taxpayers are challenging the use of their tax money for religious purposes.

The United States Supreme Court has established a test for clause cases. In Lemon v. Kurtzman, the court said a law will withstand clause challenge if (1) it has a secular legislative purpose, (2) it neither advances nor inhibits religion, and (3) it does not cause an excessive entanglement between religion and government. Under the first element, it appears the Bill is permissible. The state legislature's purpose was to insure that all children in the state are computer literate. The courts give deference to a legislature's stated purpose. The purpose is secular -- it is not based on religion.

The second element is more problematic. Because the Bill provides aid to all schools in the state, this will mean that religious schools will receive the aid. Some types of aid to religious schools have been permitted by the court. For example, textbooks to all schools are permitted. The textbooks are secular in nature and really cannot be used for religious purposes in religious schools. On the other hand, audio-visual aids, such as tape recorders, given to religious schools are impermissible. Here, the aid can be used as an instrumentality for religion. With a tape recorder, religious messages can be conveyed. This enhances religion and is unconstitutional. This is analogous to the computers. While certainly computers can be used to teach secular subjects (math and science, for example), they are instrumentalities that can be converted to religious purposes. Imagine, for example, a christian school using the computers for bible classes. This enhances religion and is unconstitutional aid.

The third element is also problematic. Assuming the aid were permitted the government would have to monitor the use of the aid as well as the use of the computers. This extensive oversight would cause an excessive entanglement between the State and religious schools.

Because the Bill cannot withstand all elements of Lemon, it will be struck down as an impermissible establishment of religion. Even though the aid will go to all schools -- public, religious-private, and nonreligious-private -- it is still unconstitutional under the clause.

Even though Lemon has been of questionable validity in recent years, this result seems clear under the "aid to schools" cases. Instrumentalities for religion are impermissible, and the federal court will likely strike down the Bill.

NOTE: This essay assumes that the Bill was in fact enacted into law. If not, the Board could have a ripeness problem in that there is not a threat of immediate harm.

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**EVIDENCE**

M and W, a married couple, often became intoxicated and fought with each other. M has injured W on several occasions to the extent that medical treatment was necessary.

During one particularly severe beating a neighbor called the police. A police officer responded to the home of M and W with lights and siren activated. When M heard the police car pull up he told W, "You tell the police these injuries came from an intruder who I then chased out of our home. If they charge me with this one, I'm a goner for sure."

When the policeman came to the door, M was waiting for him and said, "Now I may have put her in the hospital beating her in the past, but I didn't do this one!"

M was arrested, posted bond and was released having been charged with First Degree Domestic Battery. Paul, M's employer and minister, called M to determine if the allegations he had heard about the domestic battery were true. If the allegations were true, Paul intended to fire M. M told Paul "Well, we got drunk and I hit her, but she just pushed me too far."

Paul is a minister and associate pastor of New Providence Baptist Church. He also is a carpenter and employs M. Thirty days prior to Paul's conversation with M, Paul had invited M to attend his church. Although not a member, M had attended church there on several occasions.

In a pretrial motion, M's attorney asked to have M evaluated by a psychiatrist in preparation of a defense of diminished capacity due to M's alcoholism. The Court ordered an evaluation of M by a competent psychiatrist. During the examination conducted by the psychiatrist, M told the psychiatrist everything that had happened, including previous beatings administered by him to W and the fact that he had, in fact, beaten W on the instance in question.

Question #1: What privileges, if any, can be raised by M's lawyer to keep out any statements made by M? What success, if any, would M's lawyer enjoy on any motions based on privilege?

Question #2: M's attorney, by motion in limine, seeks to keep the prosecution from using M's statement "Now I may have put her in the hospital beating her in the past, but I didn't do this one!" As the prosecutor, what is your response to convince the Court to allow you to use this statement?

## ANSWER

### EVIDENCE

#1 M's first statement was to his wife. Arkansas recognizes spousal immunity in criminal cases. A spouse may prevent her spouse from testifying in regards to confidential marital communications. There are two exceptions to this rule which apply in the instant case. First of all, a communication is NOT privileged if it was intended to be communicated to a third person. Also, the privilege does not apply in cases of domestic abuse. Therefore M will not be able to prevent wife's testimony re: this statement.

M's second statement was to police officer. This statement would appear to constitute an admission by a party opponent and would therefore be admissible as nonhearsay. However, there would also appear to be a 403 argument to be made. Arkansas (and FRE) basically provides that all relevant evidence is admissible. Evidence is relevant if it has ANY propensity to make a fact that is at issue either more or less likely. 403 provides that a trial judge may, at his discretion, deny the admission of any evidence for which its prejudicial effect substantially outweighs its benefits. M's statement would appear to be relevant under these standards but it is also highly prejudicial. The 5th Amendment right against self incrimination would not apply to this statement as M was not subject of a custodial arrest when the statement was made. he apparently blurted the statement out unsolicited.

M's 3rd statement was to his employer/minister. Although Arkansas recognizes a priest/penitent privilege, said privilege applies only to confidential statements made during the active engagement of that relationship. M was not a member of Paul's church although he attended on several occasions. Primarily, Paul was M's employer and contacted M in regards to M's employment, not as his minister. Arkansas court held in one case that priest/penitent privilege does not apply to communications that are employment related. In this case the confession of a church counselor, junior to the priest, made to that priest, was admissible since the purpose of the conversation/communication was to determine employment status of the counselor and not to seek redemption. It would therefore appear that the communication between M and Paul is not privileged in this case.

The next communication was between M and the psychiatrist. Although Arkansas has recognized a dr./patient privilege between psychiatrist and patient, I'm not sure such a privilege applies in this case as the evaluation was court ordered AND M put his mental condition at issue. Maybe the conflict here would be avoided by adopting a bifurcated criminal trial where the charges were tried first, and the defense of diminished mental capacity second.

#2 Although prior bad acts or crimes are inadmissible to show that the defendant acted in conformity therewith, they may be admissible to prove motive, common plan or scheme, knowledge, or lack thereof, or mistake. The prosecutor should therefore argue that the statement is being admitted for one of these other purposes.

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**CRIMINAL LAW AND PROCEDURE**

Tony, Ron and Joe entered a room at the Red Roof Motel that was occupied by Sam. Joe picked up a chair and hit Sam in the head and took his wallet with \$500.00. Tony took the key to Sam's room and put it in his pocket. Tony, Ron and Joe drove away from the Red Roof Motel in a 1976 Cadillac with dark tinted windows and made a left turn onto Poplar Street. A city police officer noticed that Tony did not use his signal light before making the left turn. The city police officer put on his blue lights and stopped Tony. The police officer asked the occupants to step from the vehicle and to empty their pockets. Tony had the key to a room from the Red Roof Motel and Joe had the wallet with \$500.00 that belonged to Sam.

The officer discovered that the identification in the wallet did not belong to Joe. The officer then radioed headquarters and was informed that a report of a robbery had been called in by Sam from the Red Roof Motel. The officer arrested the three men for aggravated robbery and theft of property, but no miranda rights were read to the three suspects. Ron made a statement that it was Joe's idea to rob Sam and hit him over his head. Tony was put in a lineup with his Chicago Bull's cap and the other persons in the lineup did not have on caps. Sam identified Tony from the lineup.

DISCUSS:

1. The culpability of each suspect for the crimes of aggravated robbery and theft.
2. Whether the search and seizure of the three suspects was constitutional and whether any evidence obtained as a result of the search is admissible.
3. Whether the statement of Ron can be used against him and his co-defendants.
4. Whether the prosecution can use the lineup identification of Tony in their case in chief.

ANSWER

**CRIMINAL LAW AND PROCEDURE**

1.) Tony, Ron and Joe can be charged with the crimes of aggravated robbery and theft. The first important element in analyzing the culpability of each suspect with respect to these crimes is to understand that they are intent crimes. The crime of robbery is the (intentional) taking of the property or personal belongings of another through the use of force. Theft is the taking of another's personal property or possessions with the intent to permanently deprive.

Here, Tony, Ron and Joe entered Sam's motel room (the facts do not stipulate whether or not Sam let them in or they broke in). We'll just stick to what the facts present to us, that nevertheless, they entered Sam's room and hit him in the head and stole his wallet with \$500.00. Thus, the crimes of aggravated robbery and theft were allegedly committed. The weapon and force used to overtake Sam was using the chair to hit him in order to take and permanently deprive him of his wallet with \$500, therefore just through analysis of question one - the three committed the acts which fall under the culpability of aggravated robbery and theft. Tony, also I might add took the key to Sam's room, thus taking property from the motel. Although the facts do not indicate that Ron stole anything, he can still be charged with aggravated robbery and theft along with Tony and Joe, since he broke into the room with them and was with them the entire time the alleged crimes were taken place. Bottom line: Tony, Ron and Joe allegedly committed aggravated robbery against Sam, took the wallet with the money and stole the hotel key which was the property of the motel.

2.) The search and seizure of the three suspects was unconstitutional. The 4th Amendment of the U.S. Constitution guarantees citizens the right to be free from warrantless search and seizures and search and seizures not consented to by the person being searched. There are exceptions to this rule: school searches, searches where exigent circumstances may be involved, searches incident to an arrest, plain-view searches, Terry stop and frisk searches, consent searches.

Here, the officer did have reason to stop the men, the turn signal was not used to make a left turn, thus the officer saw a traffic violation being committed. However, when the officer pulled the car over and asked the gentlemen to step from the car and empty their pockets, this is where the constitutional violations occurred. There was nothing in the facts to indicate that there was anything in the car in the officer's plain-view to give him reason to believe exigent circumstances were present and that he needed to completely search the men. Furthermore, this was more than a "stop and frisk" which was defined in the Terry case. It was not a simple "pat-down" of the men, they were asked to completely empty their pockets. The prosecution might argue that this was consent, but the facts don't indicate whether or not the officer asked if he could search them, it indicates that they were told to empty their pockets. Because, none of the exceptions for an individual to be searched were present here, the search and seizure was unconstitutional.

Under the fruit of the poisonous tree doctrine, any evidence obtained as a result of an unconstitutional search and seizure is inadmissible. Therefore based on this doctrine and the exclusionary rule of the 4th Amendment, the wallet and the key are inadmissible evidence. They were obtained through an unconstitutional search and seizure of the suspects and thus, the defense has an excellent argument that can be made here as to why they should not be admitted.

3.) The 5th Amendment of the Constitution gives citizens the right to be free from self-incrimination. Although, no one invoked their 5th Amendment rights here, they were never given any opportunity to do so. Ron's statements cannot be used against him because his miranda rights were not read. The three suspects weren't told that they had a right to remain silent and that anything they said could be used against them in a court of law, that they had a right to an attorney, and if they couldn't afford one, one would be appointed to them. This is very crucial in an arrest proceeding. Because their rights were not read to them taking the totality of the circumstances, once again the defense counsel for the men has an excellent argument that can be made for excluding Ron's statement. if an officer fails to read a defendant his miranda rights any statement made henceforth after the fact or proceedings taken could be excluded.

4.) The prosecution may not be able to use the lineup identification in his case in chief. The main deciding factor here is the Bull's cap. In a lineup, identifiable, similarly situated looks or characteristics of the suspects should be present. It is prejudicial to allow one outstanding feature (or should I say article of clothing) to remain on an individual and not on the others). If Sam said he believes that one of his assailants had on a Chicago Bull's cap and that's what he distinctly remembers, it's difficult to say whether or not the identification should be allowed in. Were the other individuals in the line-up a similar height and build as Tony? Was Tony ever asked to remove his hat? Because he was the only one in the line-up with a cap on the defense can probably argue that the identification of Tony should not be admitted.