ARKANSAS BAR EXAMINATION
FEBRUARY, 2000

2 Pages
30 Minutes

TORTS

(15 Minutes)

1. Joe Jones let Sam Smith borrow his car. Smith got into a wreck with Debbie Deaver. Smith suffered $10,000 in personal injuries. The car, worth $2,500, was a total wreck. You are instructed (and may not therefore question the fact) that the accident was 40% Smith's fault, and 60% Deaver's.

Jones and Smith sue Deaver: Jones for the value of his car ($2,500) and Smith for the value of the car ($2,500) and his personal injuries ($10,000).

Jones was not independently negligent in entrusting his car to Smith; in fact, Smith just won the Careful Driver Award given to 5 drivers in the State each year by the State Police.

How much, if anything, can Jones recover from Deaver? Why?

How much, if anything, can Smith recover from Deaver? Why?

(5 Minutes)

2. On January 1, 1999, Jones smacks Smith on the head and knocks him unconscious for 11 months. Smith wakes up and goes to a lawyer who files suit for battery against Jones on Thursday, January 6, 2000. Will Jones prevail on a defense of statute of limitations?

(10 Minutes)

3. Dave tells Mark that there is an ocean of oil underneath his land (a knowing falsehood), intending to defraud Mark into buying the property for $20,000. Unbeknownst to Dave and Mark, Peter overhears Dave's statement. The next day, believing the statement to be true, Peter makes an unsolicited offer to Dave to buy the land from him for $25,000, far more than it is worth ($5,000). Dave sells him the land. Nothing is said in their "negotiations" about oil, it was a simple offer that

was immediately accepted. Six months later, and after drilling 3 dry holes at a total cost of $100,000, Peter discovers that Dave's story was a big lie when Sally, Dave's ex-employee, told him that she had heard Dave brag that he was "really gonna put the britches on Mark" by telling him there was (snicker, snicker) "an ocean of oil beneath that worthless hardscrabble crust." She related that she heard this the night before Pete overheard Dave's statement to Mark.

Peter sues Dave for fraud and deceit, what result? (Give amount of damages recoverable, if any.)

ANSWER
ARKANSAS ESSAY
TORTS
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1. Jones recovers $2500 from Deaver. Jones was, by hypothesis, not negligent and Deaver was. I presume from the facts stated that Deaver was negligent and that her negligence (along with Smith's) was a proximate cause of all damages mentioned. She may have an action over against Smith to recover from him the damages attributable to his negligence under the law governing contribution between joint tort feasors, but that is not Jones' problem. Even if Deaver gets contribution from Smith, as to Jones, she is liable for the whole amount.

Smith recovers $6,000 from Deaver. Smith was less than 50% at fault and is therefore entitled to recover under Arkansas'comparative fault law. Under that law, his recovery is reduced proportionally to his fault. His careful driver award does not shield him. Smith has no claim for the value of the car. It's not his car, so it's not damage to him.

2. Truth to tell, I would have to look up the Arkansas statute of limitations for intentional torts. The question is phrased to suggest a one-year limit, and I will assume that to be the case. The suit will not be barred by the statute of limitations. The time to bring suit was tolled during Smith's incapacity. He gets another 11 months to make up for the time he spent in his Jones–induced coma. Had Smith been able to consult with counsel during those 11 months there would be a different result. Here, however, the statute was tolled.

3. Peter may not recover from Dave for fraud and deceit because Dave never made any deliberately false statement to Peter with the intent that Peter act to his detriment on the falsehood. By hypothesis, Dave and Mark do not know Peter overhead the falsehood. Dave was certainly not required to investigate why Peter would want to offer such a large amount of money for the land - he never said a false word to Peter nor to anyone with the expectation that it would get to Peter. This is an intentional tort, and Peter cannot on these facts transfer Dave's intent to defraud Mark over to an intent to defraud him. (Contrast the possibility of transferred intent for, say, a battery.)

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CONTRACTS

John told Bob that he would lease him his farm for the next three years. Prior to entering into possession of the farm, Bob asked John if he could purchase the farm. John agreed to sell the farm to Bob for $500,000. Later in the conversation, John asked Bob if he would agree to pay off a $10,000 debt owed to John by Bob's brother, Andy. Bob agreed. Bob said that he would have his lawyer prepare the agreement for the farm purchase and that he would deliver it.

Bob brought by the written agreement a few days later. Before John had signed the agreement, Mary learned that the farm was being sold to Bob and the terms of that transaction, and she called John and made an offer of $600,000 for the farm on the condition that John repaint the main house and erect a fence around the shop on the farm prior to closing. John accepted, and a written agreement was signed which contained a provision requiring the main house to be repainted prior to closing. John's lawyer had prepared the agreement. After the written agreement with Mary was signed, she asked John if he would also paint the storage shed, and he agreed that he would.

At closing, neither the house nor the storage shed had been painted and the fence had not been erected. However, the transaction was closed and deed delivered. Bob, upon learning what had occurred, filed suit for specific performance of the written agreement that he had delivered to John asking in the alternative that he have specific performance of the oral lease agreement. John answered denying Bob's claims, and he filed a counterclaim against Bob for the amount of the debt Andy owed John. Mary, who had been named a defendant, answered, denying Bob's claims, and asking the court to affirm her agreement with John and further order that John repaint the main house and the storage shed and erect the fence. What issues do you see, and who will prevail on those issue?

ANSWER
ARKANSAS ESSAY
CONTRACTS
February, 2000

John would want to claim that since no written agreement was ever signed and that contract for the sale of land must be in writing, Bob has no claim for breach of contract. Furthermore, since Bob never took possession or made any valuable improvements on the property he has no claim for taking the agreement out of the statute of frauds for part performance and his claim for specific performance should be denied. Also John would want to claim that since Bob learned of the agreement between him and Mary this operated as a valid revocation of the offer to Bob and the offer was no longer viable.

Since the debt owed to John by Andy would be a debt of another this would also come within the statute of frauds so a writing that is signed is required here as well. Since the writing was never signed Bob does not have a claim against John for the debt owed by Andy.

Mary should have a valid breach of contract claim for the house not being painted since this was in the agreement. She would also want to argue that the contract was not an integration since they intended to put the fence erection in the agreement as well so therefore the parol evidence rule should not bar the addition of the fence erection. John would want to counter that this was an integrated agreement and the parol evidence rule would bar them adding the fence erection to the agreement. Since the fence erection was not put into the agreement Mary would counter with since John's lawyer drew up the agreement this should be construed against the drafter. She may also want to claim that failure to put the fence erection into the agreement was an omission and the court should amend the agreement. She may also claim that this was a mutual mistake since it concerns a basic assumption on which the contract was made, that she did not bear the risk, and it was due to John's fault that this provision was not put in the written agreement.

Going back, the oral lease agreement, John would want to argue should also not be subject to specific performance because again Bob never took possession or made improvements constituting part performance to take it out of the statute of frauds. And the agreement was within the statute of frauds because it was for an interest in land, and it was not capable of being performed within one year so therefore since no written agreement was ever signed John is not liable for breach of contract.

Mary would want to claim that the storage shed and the fence erection, although not in the writing, were valid oral agreements and she should claim that John is liable for breach of contract on these claims because it was a valid oral agreement. John would want to counter that although these may have been discussed, their intent was to incorporate the agreement into a writing and since the fence and shed were not in the integrated writing these never became part of the contract.

Mary would want to counter that the storage shed agreement was made after the integration and was a valid oral contract that John agreed to so he is therefore liable for breach of contract. She should argue that parties are always free to orally modify agreements after the integration and they made a valid modification orally and John agreed and the parol evidence rule doesn't bar subsequent agreements.

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CRIMINAL LAW AND PROCEDURE

On or about April 15, 1998, four men engage in a night of drinking alcoholic beverages and card playing. At 5:00 a.m. they drive to the IHOP for breakfast.

Upon arriving, Jim Driver, Front seat shotgun passenger, and Backseat right passenger exit the car. Backseat left passenger is intoxicated and decides to stay in the car and sleep. As the three enter the IHOP, they notice a number of nice fishing rods and reels in the back of a pickup truck parked nearby.

While eating, the three joke about taking the rods and reels. Upon exiting the IHOP the gentlemen again notice the fishing equipment and after getting into the car in the same seating positions they drive to the back of the lot to continue their discussions. Back left passenger is still asleep and Back right passenger wants to go home.

Jim Driver moves his car close to the pickup truck and Shotgun passenger jumps out, grabs the fishing equipment, sticks them through the back window of the car into the back seat and gets back into the car.

About this time Fisherman, who owns the equipment, comes out of the IHOP, sees what is happening and runs into the middle of the parking lot driveway facing the car in an attempt to stop the car from exiting the lot. Backseat right passenger yells for Driver to stop.

Jim Driver panics, stomps on the gas pedal and swerves to his left to avoid Fisherman. Fisherman jumps to his right to avoid being hit but having guessed wrong is struck by the car, rolls over the hood and onto the paved parking lot.

Jim Driver and all passengers proceed to the Backseat passengers' apartment. They discuss the events of the early morning. Jim Driver and Shotgun passenger leave and go to their home and get some sleep. Backseat passengers panic and hide the fishing equipment out in the woods behind their apartment.

Fisherman sustained a broken arm, severe abrasions and bruising all over is body. He did not get to compete in the fishing tournament that day.

A waitress at the IHOP just happened to recognize Backseat right passenger and reported this information to the police.

After taking their time, Police arrive at Backseat passengers' apartment and Mirandize the two men, who both promptly "spill the beans" and tell all, taking police to the hidden equipment.

Police arrive at Jim Driver and Shotgun passenger's home sometime later. They see damage to the front of Driver's vehicle. Jim Driver and Shotgun passenger deny everything and state that Backseat passengers had borrowed the car.

Fisherman values his equipment at $1,800; a pawn shop dealer places the value at $485; and replacement cost is $3,750.

Discuss the crimes, if any, each of the four men in the car may have committed and any factual arguments or defenses, if any, available to each party. Include in the discussion the relevant facts that support your conclusions.

ANSWER
ARKANSAS ESSAY
CRIMINAL LAW AND PROCEDURE
February, 2000

Under Arkansas law all of the men, except backseat left passenger have committed theft of the fishing equipment. Theft is the taking of another's property with the intent to deprive the owner of the property. Although Shotgun actually took the equipment, Driver and Backright passenger discussed taking the equipment in the IHOP. The discussion, i.e., agreement to take the equipment and, an act in furtherance of the agreement would constitute a conspiracy. In Arkansas,, the conspiracy merges into the completed crime.

Jim Driver can also be charged with some degree of battery. Battery is the injuring of someone with an intent to harm or while committing or fleeing a crime. Since Jim Driver hit the fisherman while attempting to flee from the theft of the fishing rod, he has committed battery. His defense could be that he did not intend to hit the fisherman. This would serve to reduce the crime to some lesser charge. Also, the fact that Backseat right passenger yelled for the Driver to stop would be a defense to him being charged for the injury to Fisherman.

Although Backseat left passenger was asleep during the commission of the initial crimes, and this would be a defense to the crimes, he may be charged with theft after the fact since he hid the equipment along with the other backseat passenger. They both were mirandized before they talked to the police so there should be no problems with the admissibility of their confession.

Jim Driver and Shotgun, although they deny the crimes can still be arrested. The damage to the Driver's vehicle is probable cause to arrest them.

Finally, all men could assert voluntary intoxication as a defense to their crimes. Voluntary intoxication would be a defense to any specific intent crimes and could reduce the crimes to a lesser offense.

Jim Driver can also be charged with driving while intoxicated.

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2 Pages
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CONSTITUTIONAL LAW

On November 3, 1999, Mrs. Teacher was employed as an eighth grade civics teacher at a public junior high school, in the State of Arkansas. While she was in the process of attempting to initiate a classroom discussion on the differences in the political platforms of the Republican Party versus the Democratic Party, Mrs. Teacher just happened to catch one of her 13 year old students, Tommy Wonder, looking out of the window and apparently not paying attention. In an effort to get Tommy Wonder focused on the class discussion, Mrs. Teacher spoke to Tommy Wonder as follows: "Tommy, what do you think?" Embarrassed by the sudden attention, and in a clear but calm and non-threatening manner, Tommy Wonder responded as follows: "I think that you are overweight and not very smart." Mrs. Teacher responded, "I feel abused and insulted."

Outraged by Tommy Wonder's comment, Mrs. Teacher immediately reported Tommy to the school's principal. Since the school had embarked on a policy of zero tolerance for student misconduct, Mrs. Teacher swore out a citizen's complaint against Tommy Wonder under an Arkansas statute which provides in relevant part as follows:

> 6-17-106. Insult or abuse of teacher
>
> (A) Any person who shall abuse or insult a public school teacher while that teacher is performing normal and regular or assigned school responsibilities shall be guilty of a misdemeanor and upon conviction be liable for a fine of not less than one hundred dollars ($100) nor more than one thousand five hundred dollars ($1,500).
>
> (B) Each school district shall report to the Department of Education any prosecutions within the school districts under this section.

Tommy Wonder is now facing a criminal charge in juvenile court for the offense of insult or abuse of a teacher, an alleged violation of the Arkansas statute quoted above. Assume that you are the law clerk for the attorney that has been retained to defend Tommy Wonder against the above referenced charge. For purposes of this problem, assume further that there are no other statutory provisions which bear upon the charge.

Defense counsel, your boss, has directed you to prepare a legal memorandum discussing the best federal constitutional arguments that can be made, to attack the constitutional validity of Arkansas Code Ann., § 6-17-106, in an effort to get the charge dismissed or thrown out on constitutional grounds. Fully state your legal argument(s) and the facts which support your argument(s) and rate Tommy Wonder's chances of prevailing on each such argument(i.e., strong possibility of success, some possibility of success, little or no possibility of success).

ANSWER
ARKANSAS ESSAY
CONSTITUTIONAL LAW
February, 2000

There are two constitutional problems with application of this statute to Tommy Wonder. It may violate the First Amendment's freedom of speech provisions made applicable to Arkansas through the Fourteenth Amendment, and may also be unconstitutionally vague and uncertain, in violation of the due process clause of the Fourteenth Amendment.

A. Free Speech

At least as applied here (and probably on its face), the statute is a restriction by the state on the content of Tommy Wonder's speech. As such, it is subject to the strictest of scrutiny by the courts. The burden is on the government to show that this is the least restrictive means to meet some vital governmental interest. It is a test that is almost never met, and I do not believe the government could meet it here. Presumably the purpose of the law is to permit orderly functioning of schools. It may be argued that this is a vital governmental interest and perhaps it is.

The statutes problem is that restricts speech that would not interfere with the school's orderly operation. It prohibits a stray catty remark in the hall between classes, where there would be no effect I can see on operation of the school. Indeed, a criminal prohibition on speech is probably not needed at all. A rule calling for suspension or expulsion of disorderly students and exclusion of disorderly non-students would probably meet the government's objectives as well as this statute. Chances of success on this ground are good.

B. Vagueness

The statute may fail to give fair notice of what is allowable and what is prohibited. That is illustrated by the facts presented here. Tommy actually answered the question he was asked, and did so "in a clear but calm and non-threatening manner." This is arguably insulting. It is also arguably <u>not</u> insulting. Closer is the question whether the comment was abusive. It appears that this prosecution is going to depend on whether Mrs. Teacher <u>felt</u> insulted or abused. The subjective reaction of another to arguably innocuous comment is not a sufficiently predictable basis to give fair warning to those speaking to public school teachers. If the statute fails to give fair notice, it may not be applied even if this defendant's conduct clearly fell within the prohibition. Tommy Wonder need not show that it was vague as applied to him, nor that it is vague in all its possible applications.

Chances of success on this ground are good but not assured.

NOTE: limitation of the statute to public schools does not create any equal protection issue. The possible <u>defendants</u> include "any person." The government is not required to address order problems in all schools simultaneously, but may go one step at a time. There is a rational basis for focusing on public schools, run by the state, before considering extending the approach to all schools.

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EVIDENCE

Jack and Jill, two nine-year old children, were trick-or-treating on Halloween night when they came to the house owned by "Old Crabby Appleton." Jack said to Jill, "I'm afraid to get anything from him. I've heard that he put a razor blade in Bo Peep's apple last year." Jill said that she wasn't afraid and went to Appleton's house. She came back shortly with a candy apple, looked it over closely and said, "No razor blade in here." Then she took a bite and said, "this tastes strange, sweet but bitter." Jill took two more bites and threw the apple down. About two minutes later Jill complained to Jack, "My stomach hurts. I'd better go home." Jill went home and her mother asked her, "What is wrong?" Jill replied, "My stomach started hurting right after I ate Old Crabby Appleton's apple." Then she vomited. Jill's mother took Jill to the emergency room of the local hospital. Jill's mother told the doctor who admitted Jill, "my daughter told me that her stomach began to hurt right after she ate an apple which Crabby Appleton had given her. She started throwing up so I brought her here."

Assume that Crabby Appleton is charged with attempted murder for poisoning Jill; that all events occurred in the State of Arkansas and that the charges are pending in circuit court in Arkansas. Will any of the following testimony offered by the prosecution be admitted at trial to prove the facts asserted or for some other purpose:

(1) Jill's testimony about what Jack said about his reason for not going to Appleton's house?

(2) Jack's testimony about what Jill said about the taste of the apple and about her stomach hurting?

(3) Jill's mother's testimony about what Jill told her when Jill's mother asked what was wrong?

(4) The doctor's testimony about what Jill's mother told him when Jill was admitted to the hospital?

ANSWER
ARKANSAS ESSAY
EVIDENCE
February, 2000

#1

Jill's testimony of Jack's statement regarding his fears will probably be inadmissible. Jack's statement lends itself to fall under the hearsay exception of state of mind. Jack's statement indicates what his state of mind was at the time of the statement. But the statement is arguably not relevant. All evidence which is relevant should be admissible unless excluded under a rule of evidence. Relevant evidence is that which tends to prove or disprove a material fact. This hearsay statement (out of court declaration) is irrelevant as it does not matter to the state's case whether Mr. A put razor blades in Bo Peep's apple. It could go towards motive or common plan but the substance of the two bad acts (razor blades and poisoning) are too unrelated to show Mr. A's culpability for poisoning. Even if shown to be relevant the statement is unfairly prejudicial and should be excluded under Rule 403 which excludes relevant evidence which would unfairly prejudice the defendant.

#2

Jack's testimony regarding Jill's statement is admissible under the hearsay exception present bodily condition. Jill's statement is hearsay as it is an out of court statement offered for the truth of the matter asserted. Under a hearsay exception statements describing a person's present physical state are admissible when made regarding their condition whether or not made to a physician and made on impulse. Jill was describing her physical condition without any reflection, therefore its truthfulness is not questioned and is admitted as a hearsay exception.

#3

Jill's statement to her mother is also admissible as a present bodily condition, but the entire statement will not be included. The portion naming the source of the condition (apple from Mr. A) is not admissible as it is not relevant to her physical condition. It is hearsay falling under no exception. The statement also contains serious 403 implications.

#4

The doctor's testimony of Jill's mother's statement will be admissible, but probably not in its entirety. Again the statement is clearly hearsay. Under the medical treatment exception statements made in the course of treatment which are made to a Dr. are admissible to show the medical condition of the patient if they are used for treatment purposes. The stomach hurting, the fact she ate an apple and the throwing up are relevant to the medical treatment. The source of the injury is also admissible but it must withstand a 403 argument. Here the source is the apple but where the apple came from is not relevant to treatment. Statements by parents on behalf of their children have been admissible under the residuary clause of the hearsay exception. The statement must be extremely indicative of truthfulness to fall under the exception. It has been limited more to cases involving child abuse or sexual assault and would not be extended to encompass the source of an attempted murder. It is an argument to be made though since the statement came from a child.

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PROPERTY

Percy Gaddy and Beula Gaddy were married in 1965. In 1968 they acquired clear, fee simple title to a house on a two acre lot which they paid for with the cash that Beula had inherited from her parents. The deed conveyed good title to "Percy and Beula Gaddy, husband and wife" and was duly executed, acknowledged and recorded. Percy and Beula have two adult married children, Adam and Ruth (Married, respectively to Eve and Boaz), and one adult, unmarried, and unquestionably incompetent son, Caleb, who lives with Percy and Beula. In the year 1999, without legal advice and believing they might later avoid estate taxes they deeded this property to their three children. The deed was duly executed, acknowledged and recorded and all the substantive provisions appear in Exhibit A. All persons mentioned above are alive and all married parties are still married and living together, with the exception of Ruth and Boaz who are legally married but are currently experiencing marital difficulties and are separated.

Exhibit A

"... we Percy Gaddy and Beula Gaddy (hereinafter called "Grantors") for and in consideration of the love and affection we have for our three children Adam Gaddy, Ruth Gaddy, and Caleb Gaddy, (hereinafter called "Grantees") do hereby grant and quitclaim unto Grantees the following tract of land located in Lee County, Arkansas:

> Lots 1 and 2 of Four Corners Subdivision according to the Plat thereof as contained in Plat Book 1130 at Page 471 of the Records of Lee County, Arkansas, containing 2 acres, more or less, with all appurtenances thereunto belonging.
>
> Grantors reserve unto each of them a life estate in and to said lands.
>
> To have and to hold unto the Grantees, their heirs and assigns forever.
>
> Witness our hands and seals this 9th day of September, 1999."

Point out what interests Percy and Beula have in the property before and after the deed to the children. What interests, if any, do Adam, Ruth, Caleb, Eve, and Boaz have? Discuss the issues that you deem most important.

ANSWER
ARKANSAS ESSAY
PROPERTY
February, 2000

Before the deed is executed, Percy and Beula have a fee simple absolute interest in the property. This is the largest estate that can be owned, and it is of potentially infinite duration. Percy and Beula most likely hold title as tenants by the entirety. Even though the property was purchased with money Beula had inherited, there is a presumption of tenancy by the entirety when land is granted to persons as husband and wife. It also appears that the parties intended to hold the property as tenants by the entirety, since they hold the property jointly and conveyed it jointly.

After the deed to the children, Percy and Beula probably have a life estate in the property. The deed contains all necessary provisions to be valid. It contains the names of all parties, states the consideration, provides a description of the land, and it is signed by the grantors. The life estate gives Percy and Beula the right to live on the property until both die, and they can receive income from the property during their lifetime.

The three children all have indefeasibly vested remainders. Upon the death of their parents, the children will hold as tenants in common. There was no language that indicated any right of survivorship, so there is probably not a joint tenancy. A guardian or conservator may need to be appointed to watch for Caleb's interests. Eve and Boaz do not have a tenancy by the entirety interest in the property with their husbands, because the deed did not mention them. Should Adam and/or Ruth die intestate, however; Eve and Boaz could have a dower or curtesy right. A spouse has a dower or curtesy right to property owned or seised during marriage of an estate of inheritance. If Adam or Ruth decease leaving no descendants, Eve or Boaz, respectively, could receive a 1/2 life estate interest in the portion owned by their deceased spouse. If there are descendants, the surviving spouses could take a 1/3 life estate. As of now Ruth and Boaz's separation would have no legal effect on the property.

The interests that the children currently have a fully devisable, descendible, and transferable.