

ASPEN COURSEBOOK SERIES

LAW SCHOOL AND EXAMS

> *Preparing and Writing to Win*
Third Edition

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Wolters Kluwer

Exercise 1. Excused from Contract Performance for Impossibility

A party can be excused from its obligation to perform a contract obligation in some circumstances if an unforeseen event, not within the risks assumed by the performing party, has made that party's performance impossible. Read the following two cases and explain in a few sentences why differences in the facts justify different results in the cases, even when applying the same legal rule.

**Ontario Deciduous Fruit Growers' Assoc.
v. Cutting Fruit Packing Co.**
134 Cal. 21, 66 P. 28 (1901)

Guo, C.

[A grower agreed in writing to the sale of peaches of a designated variety, grade, and quantity grown from specified orchards. The trial court found that the grower established an excuse for its failure to deliver the full quantity of the designated goods.]

... [I]n an ordinary year the orchards referred to [in the contract] would have produced sufficient fruit to carry out the contract, but before it was fully grown the season turned unusually dry and hot, and hot winds impaired the quantity and quality of the fruit to such an extent that it was impossible for plaintiff to furnish, from the orchards of its stockholders in the said districts mentioned in the contract, a quantity of fruit equal to one half of the minimum amount agreed to be furnished.

...
In the case at bar, the sale having been of specific varieties of fruit growing and to be grown on specific orchards, and the orchards having been so far affected by the extraordinary drought that they did not produce sufficient fruit of the varieties named to comply with the contract, the plaintiff could be compelled to perform the contract only so far as it was possible for it to do so. It could not be made to perform impossibilities, nor was it liable in damages, by way of counterclaim or otherwise, for a failure to comply with its contract resulting from [a force majeure] not attributable to any fault on the part of said plaintiff.

The judgment and order should be affirmed.

A.L. Jones & Co. v. Cochran
37 O.R. 431, 126 P. 716 (1912)

Hart, J.

[Cochran (Buyer) brought this action to recover damages against A.L. Jones (Seller), for damages sustained from Seller's breach of a contract to sell and to deliver a quantity of onion sets. Seller had agreed to sell] the following amount of onion sets for delivery January, 1909, 31st day: 100 bbls. Dark Red sets at \$1.20 per 32 lb. bu.; 100 bbls. yellow sets at \$1.10 per 32 lb. bu.; 25 bbls. white sets at \$1.50 per 32 lb. bu. . . .

[Seller] delivered 50 barrels of red onion sets, 60 barrels of yellow onion sets and 15 barrels of white onion sets, but failed and refused to deliver the balance under the contract [because of crop failures in the fields that served as Seller's usual sources].

There is no uncertainty or ambiguity in that portion of the contract which describes the property sold and to be delivered by plaintiff in error in the future. It definitely specifies the quantity and kind of sets and the price to be paid therefor, the place of delivery, the condition in which the sets are to be when delivered, and that they are to be screened. It is not specified that the property sold shall be sets raised by any specified person or upon any specified place. If plaintiff in error had on the date specified in his contract for delivery of these sets gone into the market and procured the kind of sets described in the contract in the quantity therein specified and offered to deliver them to defendant in error, he would have fully complied with his contract. . . .

There being no reversible error presented, the judgment of the trial court is affirmed.

compare your answer with the sample answer in Appendix D, and then identify and reflect on ways in which you can improve your performance on the next exam.

Summary of Common Law of Burglary and Larceny

Although U.S. jurisdictions have enacted criminal codes that largely supersede the early criminal common law, imagine a state that still applies the common law definition of burglary as:

- the breaking and
- entering of
- a dwelling of another
- at night
- with the intent to commit a felony.

The law relating to this crime reflected a concern about a serious invasion of the right of habitation during hours of darkness, when the inhabitants were most vulnerable to attack and the invader most likely to escape recognition. This element relates to the time of the invasion; it is irrelevant that the invader might be recognized in artificial light if sunlight had ceased.

The element of breaking does not require use of destructive force, just the creation of an opening through which to enter. It is not satisfied if the owner invited entry by leaving an opening, such as an open door or window. Moreover, under the traditional view, further opening a partially open door or window is not a breaking, although a minority of jurisdictions hold otherwise. Gaining entry through fraud is viewed as a breaking (constructive breaking) because it exceeds the range of entry invited by the owner. The element of entering can be satisfied by any degree of entry that would help to accomplish the intended felony.

A dwelling is a habitation, usually a home in which a person normally resides, but it can also apply to a house or apartment in which someone sleeps only occasionally, such as one weekend per month. It can also include non-habitation buildings that are connected to the house or are within the home's "curtilage" or immediate surroundings.

The burglar does not need to succeed in committing a felony; it is enough that the burglar entered with the intent to do so.

Larceny is a felony at common law. Its elements at common law are:

- The unlawful taking and carrying away
- of someone else's property

- without the consent of the owner and
- with the intent to permanently deprive the owner of the property. Many courts take the view that deprivation of the property for an unreasonable period of time satisfies this element.



Essay Question (60 minutes)

An attorney, Jan, was working late in the law office, located on the 5th floor of an office building. Jan was completing an appellate brief that was due for filing the next day. Just as the sun was disappearing over the horizon at 6:30 a.m., Jan's eyes were hurting and Jan's concentration was less than sharp, so Jan decided to take a quick nap on the couch in the office.

Unfortunately, Jan had a bad habit of procrastinating, so Jan occasionally but regularly pulled "all-nighters" at the office just before a deadline, rather than commuting home across town. Accordingly, Jan's office had a mini-refrigerator, microwave oven, small stock of food in an office storage room, toiletries in the office bathroom, and a couch suitable for short naps or a few hours of sleep in the waiting area.

Before the nap, Jan moved toward the big picture window to close the blinds but then decided that any remaining trace of light was already so dim that closing the blinds wouldn't make any significant difference. Jan glanced at the antique clock on a shelf to note the time, locked the door to the office, turned off the overhead light, and lay down on the couch with eyes closed. Jan soon dozed off. A janitor then entered the locked office with her keys to empty trash; noticing that Jan was asleep on the couch, the janitor crept out and left the office door halfway open to avoid making the noise of closing the heavy door.

In the meantime, Cleo, formerly Jan's client in a criminal case, entered the office building with the intent of taking the antique clock that Cleo knew was sitting on a shelf in Jan's office. Cleo needed some emergency cash before a check arrived in two weeks, so Cleo planned to obtain a loan by leaving the clock as security in a pawn shop, and then planned to retrieve and return the clock after the check arrived. If Jan noticed that the clock was missing, Cleo believed that Jan would be momentarily

angry but would forgive Cleo when Cleo returned the clock.

The private security guard on the ground floor buzzed Cleo into the building and activated the elevator because the guard recognized Cleo from Cleo's frequent visits to Jan's office, and Cleo falsely told the guard that Cleo had an after-hours appointment with Jan. Once on the fifth floor, Cleo intended to pick the lock to Jan's office door and was surprised to see the door unlocked and partly open, just wide enough to barely squeeze through. After noticing Jan asleep on the couch, Cleo carefully opened the door a few inches further to allow for easier passage through the doorway, and then crept over to the clock on the shelf. Cleo tucked the clock under one arm and was nearing the door to make an exit, when Jan awakened, discovered Cleo's actions, and persuaded Cleo to return the clock to the shelf.

Assuming all the facts are revealed, fully discuss whether Cleo has committed a common law burglary. Argue both sides of any debatable issue. If any elements are easily satisfied or clearly not satisfied, quickly explain why.

Practice Exam 5. Assault and Battery—Closed Book & Notes

Return to the Exercise in issue spotting at the end of Section I.B. in this chapter. Review the summary of the law relating to the torts of assault and battery, and then treat the facts of "Basketball Buddies" like an exam question. Take the exam without consulting the summary of law or any other notes. To practice under intense time pressure, allow yourself no more than 30 minutes to take the exam.

Separately address each event in the fact pattern. If any altercation between the parties undoubtedly falls short of assault or battery, briefly explain why the facts do not satisfy the requirements for either tort. With respect to any events that arguably amount to an assault, battery, or both, fully discuss each claim, arguing both sides to the extent possible. For any given event that arguably amounts to a tort, if one or more elements of a claim are clearly satisfied, briefly state them as premises, but use IRAC format to fully discuss any element that is debatable. Afterward, compare your answer with the sample answer in Appendix D, and then identify and reflect on ways in which you can improve your performance on the next exam.

Practice Exam 6. Homicide under Common Law—Open Book & Notes

Imagine that the criminal code in the fictitious State of New Maine adopts the following definitions of *actus reus* (action) and *mens rea* (state of mind) for several types of homicide. Although this state's criminal code is based largely on the common law, it has abrogated the common law felony murder rule. Study the summary of law below and then take the exam that follows. You may consult the following summary, or your notes from it, during the exam. Afterward, compare your answer with the sample answer in Appendix D, and then identify and reflect on ways in which you can improve your performance on the next exam.

Summary of the Law of Homicide in New Maine

Actus Reus—Criminal liability normally requires a voluntary act. An omission is insufficient unless the defendant had a duty to act, such as through a statutory or contractual duty or because the defendant helped create the mortal danger.

Mens Rea—

- **Murder**—The common law requirement of “malice aforethought” developed to include first degree and second degree murder in this state’s criminal code:
 - 1st degree: Intent to kill or to inflict serious bodily injury, with premeditation and deliberation.
 - 2d degree: Intentional killing, but without premeditation and deliberation.
 - 2d degree: Conscious disregard of a substantial risk to human life, by proceeding in the face of subjective awareness of the risk.
- **Voluntary manslaughter**—Mitigation of intentional murder to manslaughter when D kills in the heat of passion after a legally adequate provocation.
- **Involuntary manslaughter**—Criminal negligence based on a risk of which Defendant was not subjectively aware, but of which Defendant should have known, because a reasonable person in Defendant’s place, knowing the circumstances known to Defendant, would have appreciated the risk. With respect to the gravity of the risk, although some memorable cases require only the simple negligence required for civil liability, most states require gross negligence for criminal liability, but that’s separate from using the objective standard for constructive awareness of risk.

**Essay Question (60 minutes)**

The following facts are inspired by real events, but the exam is limited to the facts below; do not change or supplement them with your knowledge of actual events.

Bob Calas is the CEO and largest individual stockholder of Bong airlines, based in the fictitious State of New Mainz. By placing heavier and more powerful engines on the frame of an existing jet, Bong recently produced the Rambo 7 ("R7"), a passenger jet with improved range and speed. With this modified configuration, the R7 could climb too rapidly in some circumstances, creating a risk of the engines stalling. To counteract this risk, the R7's computer program automatically acted to pitch the plane's nose downward when sensors warned of a danger of stalling from excessive rate of climb.

The R7 was popular with airlines, many of which bought dozens of the R7s and placed orders for hundreds more. After the existing R7s were in use for a year without any problems, Bong engineers discovered a flaw in the plane's sensors. Tests in simulators showed that in rare circumstances, the sensors could provide continuously inaccurate data about a risk of stalling, and the computer software would then automatically pitch the nose of the plane downward into a dangerous dive. If pilots tried to counteract the dive with their controls, the software would prevail over their efforts within minutes, forcing the R7 into an irreversible dive and crash. Bong's contracts with the airlines included warranty obligations that would require such a defect to be remedied.

Engineers for Bong presented Calas with their findings and proposed solutions. The sensors could not be improved, but the engineers were developing a software fix that would direct the R7's computer to cross-check with other data whenever the sensors signaled the danger of a stall, so that the computer would recognize and ignore the rare case of an inaccurate warning from the sensors. The software fix would be ready in one month. In the meantime, the engineers recommended two interim measures: (1) disclose the problem to airlines who were operating the R7, to the traveling public, and to regulatory agencies, so that all those parties could make informed decisions, and (2) provide pilots of these airlines with special instructions, so that they could recognize the problem

if it occurred and could take designated steps to disable the sensors, allowing the pilots to control the plane's pitch manually.

Calas listened to the engineers' presentation, directed them to complete the software fix as soon as possible, and then decided to do nothing else. In light of the R7's perfect safety record after a year in operation, Calas determined that the probability of this rare malfunction occurring within the next month was small and that Bong could potentially lose billions of dollars in sales of the R7 if the defects in the sensor and software became public knowledge. He decided that it would be better to distribute the software as a routine upgrade, without ever explaining the defect in the R7, while hoping that the defect did not reveal itself in the meantime. Bong's contracts with the airlines included an obligation to distribute periodic updates for the software, so distributing this one would not appear unusual.

Unfortunately, one week later, the rare malfunction discovered by the engineers in flight simulations occurred during an actual flight of an R7 shortly after it took off from an airport in New Maine, resulting in a catastrophic crash that took the lives of all 180 people aboard the R7.

The District Attorney for the New Maine county in which the crash occurred is considering bringing criminal charges against Calas. New Maine has a homicide statute that has abrogated the felony murder rule but that otherwise largely codifies the state's common law, recognizing four levels of common law homicide:

- first degree murder,
- second degree murder,
- voluntary manslaughter, and
- involuntary manslaughter.

Discuss the likelihood that Calas committed each of the four offenses listed above. Do not discuss Bong's corporate liability. For any issues you identify, discuss them in separate IRACs.

If any of the listed crimes is clearly inapplicable, state the rule and quickly explain why the rule is not satisfied by the facts, and move on. If any of the crimes raises a debatable question of criminal liability, state the rule and

argue both sides of the facts to the extent possible. If any part of an analysis applies to a later issue, refer to the earlier statement rather than repeating it.

In New Maine, reckless endangerment is a misdemeanor, which the D.A. is assigning to another student to research, so do not discuss that crime. Other than the possible commission of misdemeanors or one or more of the homicide crimes listed above, you may assume that Calas has not committed any other crimes and that no other statutes govern his behavior in this matter.

III. The Next Step

Other types of exam questions await you. Continue to the next chapter to explore further.

D. The parties did not form a contract because Seller expressly conditioned its acceptance on Buyer's agreement to Seller's additional term, the arbitration clause.

14. During the COVID-19 pandemic of summer 2020, after initially requiring businesses to close, a state permitted bars and restaurants to reopen for indoor service, even though rates of infection with COVID-19 were still dangerously high, as reported daily by all media. The state governor issued nonmandatory guidelines to business owners encouraging them to limit attendance to 50-percent capacity and to enforce social distancing and the wearing of masks. Bob's Bar opened for indoor service, but its management did not instruct its staff about enforcing the governor's guidelines. Wearing a medical mask, Gayle arrived at the bar to meet friends for drinks. Looking from the sidewalk through the large front window, she noticed with alarm that the entire establishment was packed with patrons, with no social distancing and almost no patrons wearing a mask. As she was reconsidering whether to enter the bar, Gayle saw her friends inside, crowded around a table without masks and waving at her. Because her friends had seen her, Gayle realized it would be awkward not to join them. Gayle took off her mask so as not to feel out of place, entered the bar, and joined her friends at the table for conversation shouted over the noise.

Four days later, Gayle felt severe symptoms and tested positive for COVID-19, which required several days of hospitalization and which caused her to feel fatigue for more than a month. Gayle lives alone and had been safely sheltering at home for weeks prior to visiting Bob's Bar and in the days after, carefully handling home delivery of groceries. If Gayle sues Bob's Bar for negligence, which of the following is the best argument that Bob's Bar will not be liable to any degree? The state's highest court has adopted the defense of pure comparative negligence, applying only to careless acts other than proceeding in the face of a known risk. No statute absolved Bob's Bar from liability.

- A. Bob's Bar did not fail to use due care but ran the bar as it normally would, in a reasonable way.
- B. Factors that caused Gayle to contract COVID-19 did not include the conditions at Bob's Bar.
- C. Gayle assumed the risk of contracting COVID-19 when she entered the bar without wearing her mask.
- D. Approximately 50 percent of any negligence can be attributed to Gayle.
15. Which of the following most clearly expresses an illusory promise, so that an agreement would lack consideration even if the purported

- promise is exchanged with a reciprocal promise from another person?
- A. I promise to delay collecting my claim against you for one month.
 - B. I promise to pay you \$20,000 a year until you become eligible for any level of Social Security payments.
 - C. I will provide you with such consulting services as I desire to make available to you.
 - D. If you breach the agreement, you will be liable to me for my actual losses, plus an additional 50 percent as a penalty.
16. Which of the following is *not* a form of murder under common law?
- A. An intentional killing but without premeditation.
 - B. An intentional killing in the heat of passion after a legally adequate provocation.
 - C. An intentional killing with premeditation and deliberation.
 - D. A killing with conscious disregard for the substantial risk to the lives of others, proceeding with subjective awareness of the risk.
17. Sara and Lena happily reached the following agreement: "Sara will paint the exterior of Lena's house by the end of the month, and Lena will pay Sara \$2,000 after completion if she wants to spend that sum of money." Later that day, Sara wishes to withdraw from the agreement. Which of the following is the best argument that the agreement is not an enforceable contract so that Sara is not obligated to paint Lena's house?
- A. Lena's promise is illusory, so the agreement is not supported by consideration.
 - B. The agreement lacks reciprocal inducement because it contemplates a promise made in recognition of a past performance that does not give rise to a moral obligation.
 - C. Lena has materially breached, so that Sara can cancel the agreement.
 - D. The agreement amounts to a prohibited penalty for breach of contract.
18. When Alan's mother passed away, she left to Alan her fully paid but modest home on a small lot with a small backyard. She left some personal property and a small investment portfolio to Alan's half-brother Ben, her son from her first marriage.

Alan lives on the East Coast, and the inherited home is located in the West, near where Ben rents an apartment. When Alan traveled to the home to remove some personal property, he concluded that