CHAPTER SIX
Logic and Argument

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INTRODUCTION

"You can't argue with logic." At least that's what one of our friends is fond of saying. And we couldn't argue with her statement once we understood what she was saying. A "logical" argument is an extremely compelling argument. If we accept the premises of an argument, it becomes difficult to disagree with its conclusions. As mentioned earlier, the California Bar Examiners require that an applicant demonstrate an ability to "reason logically" in answering law questions. Indeed, if we were to attempt to identify the one characteristic that everyone agrees lawyers should have, it would probably be an ability to think logically. However, all of this agreement is encouraging without being enlightening. While we may agree on the importance of logic, it is much more difficult to define what we mean by logic.

Logic, as lawyers and law professors use that term, involves a kind of problem analysis that we call "linear," a kind of argument that we call "law structured," and the observation of certain conventions of rhetoric and language. These conventions require the

avoidance of certain common "fallacies" of argument and the ability to recognize slanted language.

In this chapter we describe linear analysis to provide you with an approach that will help you analyze legal questions, whether they occur in an exam, memo, brief, or practice. We dissect and examine the law-structured argument, so that you can reproduce it when necessary or use it as a tool to discover the flaws in your opponent's arguments. We delineate the conventions that you must observe to avoid making your argument an easy target for your opponent. Finally—and this can be fun—we explore slanted language so that you can recognize it when it is used against you and skillfully employ it as you present your own arguments.

LINEAR ANALYSIS

While the term may seem a bit forbidding, all we mean by linear analysis is the taking apart of a law problem, dividing it into its constituent parts (e.g., torts or crimes), further subdividing those parts into their elements, and, finally, deciding whether each of those elements is present. The process is similar to what a computer programmer does when writing a program for a computer. Let us consider that analogy for a moment, because it may be instructive.

Computers, as you probably know, are basically a series of on/off switches. A computer "decision" is reached on the basis of many smaller decisions, each of which amounts to no more than yes/no, on/off. What is crucial for a programmer is to design a series of questions that can be answered yes or no so that a computer can "reason" its way through these questions to a final answer. While the concept may seem too mechanistic for the law (and we don't mean to suggest that computers could make legal decisions), an analogous method is useful for students who are faced with a complicated law question.

There is a need for linear analysis because complex fact situations often bring near-paralysis to many students. The question seems so difficult that they don't know where to start. Crucial questions occur in profusion, recollections of vital bits of law pop into mind, and all the while—especially in an examination—time is flying swiftly past. But if you will learn to think like a computer programmer and take problems a step at a time, even the most challenging law problem will resolve itself into a series of decisions that can be reasoned through with relative ease.

Consider the following example.

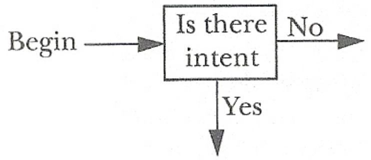
> Werner was standing at a bus stop when Ken came up beside him. "I don't like your looks," Ken said. Werner ignored him. "So, you're trying to start a fight, are you?" Ken continued. Werner ignored him. Ken punched Werner in the nose and then calmly walked away. Werner now wants to know if he can sue Ken for battery.

Your first reaction is probably, "Of course he can sue for battery." But how did you reach that conclusion? If you are like most people, you reached that conclusion through a process we might call "informed intuition." Knowing the requirements for battery and having then read a fact situation in which it seems clear that Ken did something "wrong," you quickly put them together and arrived at the conclusion that a battery had occurred. You are right, of course, but your "right" answer doesn't provide a methodology for those times when "informed intuition" just doesn't seem to be working. Let us look at how a computer might be programmed to handle that same problem.

To program a computer to solve the problem of whether Ken committed a battery, we would first have to have a working definition of battery. The definition we have used consists of six elements. Battery is (1) an intentional, (2) harmful, or (3) offensive (4) touching of another that is (5) unconsented and (6) unprivileged. Having broken this definition down into six elements, we could then ask whether each element is present in the fact situation. For the purpose of this analysis, we will allow ourselves only two possible answers, yes and no. Either an element is present or it is not.

Now at first glance this might seem absolutely wrongheaded. After all, part of being a good lawyer is the ability to argue either side of a case. True enough. But notice that no matter how elegantly you argue, to continue your analysis and reach a resolution of the problem, you must ultimately decide whether an element is present. If you are unable to decide if the element is present, you must assume either that it is present or absent to complete your analysis. On a law examination, if you had time, you would also analyze the problem in light of the other assumption.

Look at our facts and our definition again. Element (1) is "intent"; was there an intentional act on Ken's part? We could represent this question and its potential consequences in the chart shown below.

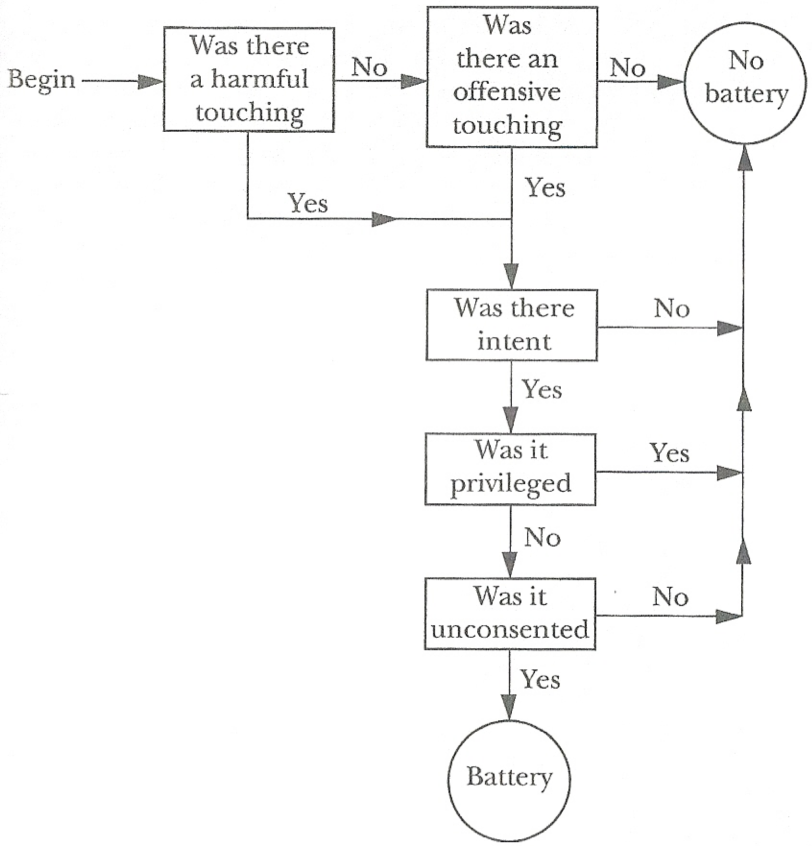


If we say that there was no intent on Ken's part (perhaps using the low-probability inference that he was the victim of a posthypnotic suggestion that rendered his will subject to someone else's control), we would arrive at the conclusion that there is no battery, because without intent there can be no battery. (In a law answer we would still consider the other possible elements conditionally, but for purposes of this illustration we will answer only yes or no.) If we answer yes, there was intent—and we probably will—then we must ask further questions, as illustrated in the chart on p. 109.

As you can see from the chart, sometimes the order in which we must ask the pertinent questions differs from the order in which we arrange an English sentence. Thus, before we can ask whether the touching was harmful or offensive, we must ask whether there *was* any touching. Notice that for the first two questions, if you answered no, you were forced to conclude that there had been no battery. However, our definition was worded disjunctively as to the nature of the touching. That is, there could be a battery if the touching was either harmful or offensive. Thus, if you found that there was a touching but that it was not harmful, you still would have to ask whether that touching was offensive, because that would be enough for there to be a battery.

Be careful, however, not to take yourself out of the problem. Most professors expect you to continue your discussion even if you believe that the answer to one of the questions might be no. Continue conditionally. "If there *were* intent . . ." You don't want to miss a chance to discuss an issue by concluding prematurely.

The charts we just examined dealt with only one tort, battery. However, in a model of your thinking for a law question you might well have a series of such flow charts, each dealing with a separate tort. Furthermore, the discrete flow charts might well be connected



to one another by the logical relationships between the torts you are discussing. Remember that in discussing legal relationships in Chapter 2, we noted that sometimes the existence of one legal fact is a prerequisite for the existence of another. Thus, as we mentioned there, for someone to be liable as an accomplice, there must have been someone else who perpetrated the "target" crime. If we were creating a flow chart to "program" our way through a problem that potentially involved accomplice liability, we would have to note at each point where we reached a conclusion that the target offense had not been committed that there also could not be accomplice liability. It would only be at those points where we decided that the target offense had been committed that we could logically go on to discuss accomplice liability. Let us look again at the problem we discussed in Chapter 2.

> Stan was a member of the Middletown Police Department working as an undercover policeman. He was contacted by Ollie, who suggested that they hold up the neighborhood liquor store. Both men entered the liquor store together. Stan pointed a gun at the owner of the liquor store and handed him a note that read "I am a police officer. Hand me your money and pretend this is a robbery. I will return the money later." The owner did as he had been instructed and the two men left. Half an hour later Stan came back and returned the money. Was Ollie guilty of being an accomplice to a robbery?

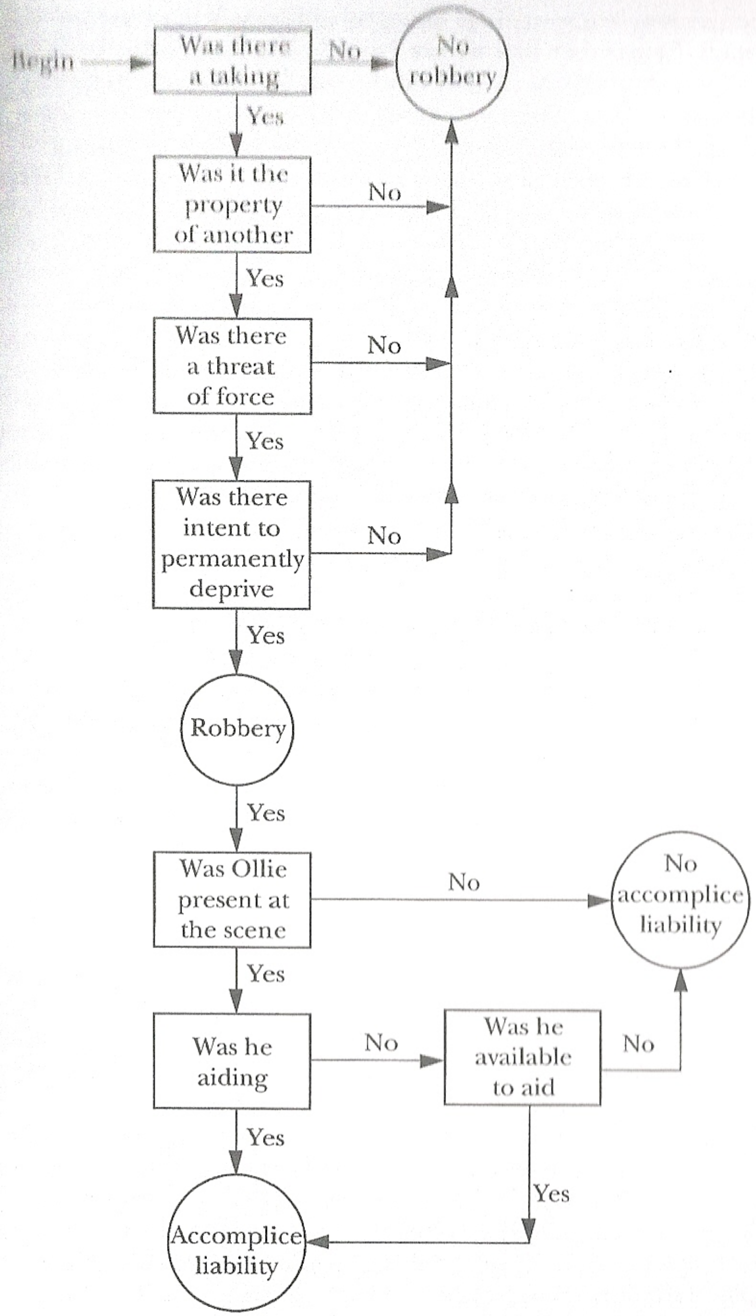
To see how we would use linear analysis to work our way through this problem, we should establish some rules. First, let us say that an accomplice is someone who is (a) present at the scene of a crime and (b) aiding or (c) available to aid the perpetrator of the crime. Let us also define "robbery" as (a) the taking of (b) the property of another (c) through a threat of force (d) with the intent to deprive him or her of that property permanently. (These definitions are simplified for the purpose of illustration.)

As you can see from the definitions, there must be some crime that is occurring for an alleged accomplice to have been present at the scene of a crime. Let us see how our flow chart would look.

As you can see from the flow chart on p. 111, the question of whether Ollie could be guilty as an accomplice cannot be adequately analyzed until you have attempted to determine whether there was a robbery by Stan. While we will be talking about how to use qualifiers in your answers (and therefore take care of the problem of being unable to say *absolutely* whether an element was or was not present), you can see that this particular problem can be solved if you apply linear analysis.

By now you're probably getting a little skeptical. We have used fairly simple problems to illustrate our point, and you may wonder if the same analysis can work for complex problems. It can indeed. All you need to realize is that most complex problems are really just a series of finite, solvable, small problems intermeshed. Once you decide on the constituent torts, crimes, or other legal elements that must be considered, you can lay the problems out in your mind as we have done with our flow charts. We say "in your mind" because you probably have another objection.

When will you possibly have the time to prepare a flow chart as well as do everything else that we have suggested is necessary



before you begin writing? You probably won't have the time in an exam. Remember that we are considering models for logic in this chapter. And this particular model can be extremely helpful in two situations. First, when you are not doing a timed writing exercise, it can help clarify your thinking before you begin outlining. When you have enough time, you can make up flow charts and experiment with alternative ways of analyzing a problem. Second, before you are required to write any answers, in or out of class, you can use this model to dissect the various theories of law you are learning about. It will help you to discover what a plaintiff would have to prove in a particular case, or what a defendant could use to defeat a plaintiff's case. It will focus your attention on the constituent elements of the law while allowing you to see how each element relates to those that come before or after it. If you practice analyzing legal problems with this model in mind, you will no longer have to rely on "informed intuition." You will be well on your way to thinking like a lawyer.

LAW-STRUCTURED ARGUMENTS

We have said it before, but it bears repeating. It's not the conclusion you reach that is vital, but how you got there. In law there are very few "right" answers. There are always uncertainties, contingencies, and unforeseeable consequences in any decision. That's why even the United States Supreme Court sometimes overrules an earlier decision. It is not that the earlier decision was reasoned incorrectly or even that new facts have come to light. It may simply be that times, and the composition of the Court, have changed.

If even the United States Supreme Court cannot always reach the elusive "right" decision, you shouldn't spend too much time worrying about whether you reached the right conclusion in a law problem. What you should worry about is how you reached your conclusion. To illustrate a model for a legal argument, let us construct a model by going through the process one step at a time.

First, we must attempt to identify exactly what we are doing in a legal argument. At the most basic level we are tying facts of legal significance to a legal conclusion. For example, "Penny punched Fran in the nose; therefore, she is liable for battery." The missing link in this argument should be fairly obvious. It is the legal theory