Presenters: Bruce Maxwell- Selwyn House School Senior School Social Studies Teacher

Connor Munro- Selwyn House School- Class of 2014- Articling Law Student at Blake Cassels & Graydon llp Montreal

Nikolas De Stefano- Selwyn House School- Class of 2014- McGill University Third Yr. Law Student

If you wish to ask questions or contact us the best way is via e-mail and to contact Bruce Maxwell at maxwellb@selwyn.ca for any further communication.

The Power of Performance Pieces in Academic Settings: The Value of Mock Trials in Social Science Courses at Diverse Grade Levels incorporating Experiential Learning, all three PBL Methods, and seeing the value of having the boys perform in an academic setting.

Block 4 (Friday, June 28: 10:30 - 11:30 AM) (2019)
Room Location: Selwyn House School, F2

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Please note that some of these documents were used in a SHS Criminal Law Mock Trial, held on Dec. 10th, 2018, in the Westmount Courthouse.

1. **Courtroom Protocol Example. Provided to assist with the start-up of the trial!**
2. **Order of Presentations Example. Provided to structure the performance piece!**
3. **Legal Teams Example. (I set the teams as I look for balance, and good group dynamics. I usually allow the students to e-mail in private if there is anyone who they would not like to work with, but I always tell them that I reserve the right to listen or not).**
4. **PowerPoint Presentation from the Conference- Bruce Maxwell**
5. **Letter to SHS Community Old Boys Association Requesting Judges.**
6. **Judges List- The Power of a Mock Trial with Involving a Community. (Valuable for in-school community engagement).**
7. **SHS Class of 2014- Nikolas De Stefano and Connor Munro Presentation. Focus on the value of a law class in high school, and academic importance for those without a law background).**
8. **Mock Trial Advocacy Package: Included because it provides some great advice and direction to the boys with their preparation for the mock trial.**
9. **Example of a Case- Criminal Law- Two Witnesses. (Note depending on the size of the elective class, I may run two mock trials at the end of each class- same case- different groups. The trial may also involve three witnesses as well).**
10. **Evidence Item Package of Information from one of the SHS Legal Teams**
11. **Mock Trial Rubric**

Courtroom Protocol- Mock Trial

COURT BAILIFF: Welcome to the Selwyn House 2018 Mock Trial Court Sessions in Westmount, Quebec. Court is now in session.

PLEASE RISE!

His honour, or her honour depending on gender of your judge. I.e. His Honour Judge Mr. Ali Argun, His Honour Mr. K. Hamilton, and His Honour Mr. Tim Anderson presiding over this case.

JUDGES ENTER and are seated and STATES:

Good morning. Please be seated. Mister Court Bailiff, what is the first matter on our COURT docket for this morning?

BAILIFF: Good morning YOUR Honours. The first matter is the case of Regina vs. Brogue. The Judges have the case for review- this shouldn't be a concern as all of the judges have had a copy of the case for a period of time).

Judge: Does Wally Brogue have legal counsel?

DEFENDANT COUNSEL: "Good Morning Your Honour, my name is Mahutte, Initial I., and, Ingelmo, Initial M. and we are representing Wally Brogue in this matter.

Judge: Thank you Mr. Mahutte, and, Mr. Ingelmo. Who is representing the interest of the crown this morning?

Plaintiffs: Good morning YOUR HONOUR, my name is Di Berg, Initial G., and Carlier, Initial W.

Judge: Good morning Mr. Di Berg, and Mr. Carlier. I understand that the charges and sought after amount has not been read out. Mister Bailiff, please proceed with the case stipulated facts. At this time, page two of the actual mock trial should be read out word for word at this time. A judge can read this out if there is not a bailiff.

Bailiff: The bailiff will read the information presented on page two of the mock trial.

JUDGE: I understand that **Both** the Crown and Defense have agreed that all considerations for having this issue resolved through Alternative Dispute Resolution failed, and we will be proceeding directly to trial this morning. Is that correct? (Positive affirmation is expected from BOTH Counsels).

Plaintiffs and Defendants: Yes, we agree

Judge: Fine...now...counsel...please tell me has there been full disclosure by the Crown? (Positive affirmation is anticipated from both counsels).

Judge: And....has there been proper notice given of all physical evidence that will be tendered by both the Crown and the Defense? Please note that I do not like surprises and surprise evidence will not be admitted. Let's begin with the Opening Statements by the Crown.

Order of Presentations- Mock Trial- Monday, Dec. 10th, 2018- Term One- Speaking Times and Order of Speakers!

1. The Crown's Opening Statement will be first- Maximum Time= 10 Minutes (Lawyer William Carlier).
2. The Defences Opening Statement will be second- Maximum Time= 10 Minutes (Lawyer Marco Ingelmo).
3. The Crown will call their first witness for a Direct Examination= 8 Minutes (Lawyer William Carlier to Marcus De Silva to Crown Witness #1- Officer Low).
4. The Defence will cross-examine the Crown's first witness= 8 Minutes (Lawyer Marco Ingelmo to Crown Witness #1-Marcus Da Silva as Witness Officer Low).
5. The Crown will then have the opportunity for a Re-Direct Examination= 5 Minutes (Lawyer William Carlier will re-examine Marcus Da Silva as Witness Officer Low).
6. The Crown will call their second witness for a Direct Examination= 8 Minutes (Lawyer Gabriel Di Birt to Jordan Busner as Crown Witness #2- Richard Volsky).
7. The Defence will cross-examine the Crown's second witness= 8 Minutes (Lawyer Ian Mahutte to Jordan Busner as Crown Witness #2- Richard Volsky).
8. The Crown will then have the opportunity for a Re-Direct Examination= 5 Minutes (Lawyer Gabriel Di Birt will re-examine Witness #2- Jordan Busner as Richard Volsky).
9. The Crown will call their third witness for a Direct-Examination= 8 Minutes (Lawyer Gabriel Di Birt to Crown Witness #3- Louis Villemure as Peter Pomas).
10. The Defence will cross-examine the Crown's third witness= 5 Minutes (Lawyer Ian Mahutte to Crown Witness #3 – Louis Villemure as Peter Pomas).
11. The Crown will then have the opportunity for a Re-Direct Examination= 5 Minutes (Lawyer Gabriel Di Birt to Crown Witness #3- Louis Villemure as Peter Pomas).
12. The Defence will then call their first witness for a Direct Examination= 8 Minutes (Lawyer Marco Ingelmo to Defense Witness #1- Justin Belland as Tom Brogue).
13. The Crown will then Cross- examine the Defence's first witness= 8 Minutes (Lawyer Gabriel Di Birt to Justin Belland as Defence Witness #1 as Tom Brogue).
14. The Defence will then have the opportunity for Re-Direct Examination= 5 Minutes (Lawyer Gabriel Di Birt to Defense Witness #1-Justin Belland as Tom Brogue).
15. The Defence will then call their second witness for a Direct Examination= 8 Minutes (Lawyer Ian Mahutte to Colin Rolph as Defense Witness #2- Wally Brogue).
16. The Crown will then Cross-examine the Defence's second witness= 8 Minutes (Lawyer William Carlier to Colin Rolph as Witness #2- Wally Brogue).
17. The Defence will then have the opportunity for Re-Direct Examination= 5 Minutes (Lawyer Ian Mahutte to Defence Witness #2- Colin Rolph as Wally Brogue).
18. The Crown will then deliver their Closing Arguments= 10 Minutes (Lawyer Gabriel Di Birt).
19. The Defence will then deliver their Closing Arguments= 10 Minutes (Lawyer Ian Mahutte).

Grade 11 Criminal Law Mock Trial Case- The Legal Teams

Crown (5)	**Defence (4)**
William Carlier- Lawyer	Ian Mahutte- Lawyer*
Marcus Da Silva Rosa- Witness Office Paul Low	Marco Ingelmo- Lawyer
Gabriel di Birt- Lawyer*	Justin Belland- Witness- Tom Brogue
Jordan Busner- Witness Richard Volsky	Colin Rolph- Witness- Wally Brogue
Louis Villemure- Witness Peter Pomas	

*= Lead Lawyer for each side.

November 7th, 2018

Dear Old Boys Alumni and Friends of Selwyn House School,

It is fast approaching that time again where Mr. Maxwell, the SHS Law teacher for the grade 11 Criminal Law class elective, is looking for judges for the mock trial. **The date for the mock trial is Monday, December 10th, 2018**. Volunteer judges can expect to be occupied for the entire morning (8:30-1p.m.), and the trial will take place on the second floor courthouse of the Westmount Police Building located right across the road from the school. The boys will be working hard on their preparations and I am certain that previous judges can validate that they do a great job. It is a great opportunity for those in the Selwyn House School community to give back by coming back and overseeing a trial with other friends, classmates, or other. While it is usually recommended that those with a legal backgrounds are more encouraged to be involved; exceptions have been made in the past if there is enough interest by the individual. Perhaps previous SHS students who participated in the mock trial exercise and are now lawyers, studying law, or know that this is where their future lies would like to come back as a judge are welcome of course.

If anyone is interested in acting as a judge for the above mentioned trial date, then please contact Mr. Bruce Maxwell via e-mail at maxwellb@selwyn.ca to book your spot.

Thank you for your support as it much appreciated,

Mr. B. Maxwell

Senior School Law Teacher- SHS

Mock Trial Judge List- SHS- Mr. Maxwell

Criminal- add +; Civil- add *; Arbitration- add #.

Alumni

Otto Mok (+Dec-10')
Vince Guzzo (+Dec-10')
Michael Penner (+Dec-10')
David Skinner (+Dec-10'); (+Dec-11')
William Daly (+Dec-12'); (*May-14'); (#May-15')
Mike Avedesian (+Dec-14'); (+Dec-16')
Paul Mayer (+Dec-16')
Eric Sutton (+Dec-17'); (*May-18')
Charles Alexandre-Vennat (+Dec-16'); (+Dec-17'); (*May-18')
Vincent Prager (+Dec-14'); (+Dec-16'); (*May-18')
Yan Besner (*May-11)
J. Wisniewski (*May-11)

Ben Spencer (*May-12)
Kyam Shell (*May-12)
Marco Melnychuk (*May-14')
Lloyd Perry Feldman (*May-13')
Vinay Desai (*May-13'); (*May-14'); (*Dec-16'); (+Dec-17')
Ali Argun (+Dec-13); (+Dec-18')
Matthew Finn (+Dec-13')
Wassim Bedrounni (*May-14')
Adam Sternthal (*May-14')
Michael Cohen (*May-14')
Geoffrey Vendeville (+Dec-14')
Luca Pavlovic (+Dec-14')
Vincent Iacono (+Dec-14')
Tomek Nishijima (+Dec-16')
Salvatore Vaccarino (+Dec-16')
Daniel Budd (+Dec-16')
Alan Sarhan (+Dec-16')
Keeyan Ravinshad (+Dec-17'); (*May-17')
Charles McClusky (*May-17')
David McLeod (*May-17')
Richard Sabbagh (*May-17')
Alex Nikolopoulos (*May-17')
Andrew Osterland (+Dec-17')
John Sypnowich (+Dec-12')
Joseph Dydziak (+Dec-12')
Ted Claxton (+Dec-11')
Kieran Hamilton (+Dec-18')
Marco Melnychuk (*May-13')
Nikolas De Stefano (*May-17')
Matthew Shadley (+Dec-17')

Parents

Karen Skinner (+Dec-10')

Corrado De Stefano (+Dec-10')
Marissa Giannetti (+Dec-12')
Diane Tsonos (+Dec-12')
Andrèe Houle (+Dec-11')
Danielle Fournier (+Dec-12')
Howard Dermer (*May-13')
Maria-Senecal Tremblay (+Dec-11')
Tim Anderson (+Dec-18')
Daniel Tingley (+Dec-12'); (*May-14'); (#May-15'); (+Dec-16'); (+Dec-16'); (+Dec-17'); (*May-18')

Friends of the School

Ayse Dalli (*May-12')

SHS Faculty

Hal Hannaford (*May-11')
Brenda Montgomery (+Dec-17')

<u>Trial Advocacy Package- Grade 11 Law- Mr. Maxwell</u>

1. What is Trial Advocacy all about?

   <u>Persuasion</u> is what trial advocacy is about. Ultimately, that is all it is about- 60 minutes every hour. Your purpose for being in the courtroom is to persuade the trier of fact.

   Essentially, the trial lawyer is a "story teller". You are in the courtroom to tell the trier of fact your client's story. Ideally, this story will be presented so persuasively that the trier of fact will accept that story rather than one presented by your opponent.

   The courtroom presents a "triadic" (3 way) relationship. Unfortunately, young lawyers tend to see what is going on as "dyadic" (2 way) relationship. I.e. them (counsel) and the witness. "I am important because I am counsel and I am on show". "He/ She (the witness) is important, because he/she is the person testifying". They forget that the really important person in the courtroom is the <u>trier of fact.</u> Why you are in the courtroom is to persuade the trier. Trial counsel must develop a total sensitivity to the role and needs of the trier of fact. The following can assist in doing this:

   A.)Look at the witness and listen to the witness. If you do not do so (if you show disinterest) why should the trier be interested in the witness?

   B.)At all times, be aware of what the trier of fact is doing. Is he/she/they listening? Am I going too fast? In a non-jury trial, experienced counsel pace themselves by whether the judge can comfortably take notes (they often wait before asking the next question to see if the judge has finished taking his/her notes).

   C.) Listen to the witness's answers in order to hear what the trier is hearing (mentally after asking each question, put yourself in the jury box to listen to the answer). Often this will suggest the next question.

   D.)Exhibits are for the trier, not for private discussions between counsel and witness. If you are referring to an exhibit, or discussing it with the witness, make sure the trier can see it, has a copy and is following the discussion.

2. **<u>Mock Trial" What Mock Trial Judges Have Said In The Past?</u>**

<u>General- Trial Advocacy</u>

1. It is the judge's courtroom. NEVER question a judge's ruling, or argue with a judge. ALWAYS be polite and address a judge as "Your Honour". Ask the judge for permission for everything.
2. Always speak to the judge. Never speak directly to an opposing lawyer.
3. Never laugh at another lawyer. Refer to other lawyers as "my friend".

4. During the trial, lawyers should help each other with grounds for objections.
5. Don’t object to something that is not in dispute (i.e. for a leading question).
6. You can’t object to something in closing or opening arguments.
7. When objecting, stand and wait to be recognized by the court.
8. Be convinced of your position. Make your tone of voice confident.
9. Don’t worry about a language slip. Don’t draw attention to it by laughing or by showing embarrassment.
10. Don’t be afraid to pause. In fact, pauses are useful in helping to maintain pace, or as an effect. In the real world, pauses occur frequently.
11. Watch your body language.
12. Use correct English. Avoid “delaying” phrases such as “you know”, “um,” “uh”, “like,” and “okay”.
13. Don’t assume that, because someone enters a statement into evidence, that it is true.
14. Stay in role from the beginning of the mock trial to its conclusion. Be PROFESSIONAL.
15. SLOW DOWN.
16. RESPECT THE COURT.

OPENING STATEMENTS

Generally:

The trial will commence with an opening statement. The nature and length of the statement will vary, depending on the complexity of the case, but no case should commence without an opening statement of some kind.

The opening gives the Crown the substantial advantage of having the first word to the judge. This is perhaps the dramatic point in the trial. The judge is fresh and attentive. It is not an opportunity that should either be given up or frittered away.

The law relating to an opening statement is very sparse, partly because there is more to be said about techniques of advocacy than legal rules. The following is, however, a useful general statement as to the law relating to the purpose and limitations of an opening statement.

“Counsel in opening states the facts of the case, the substance of the evidence he has to adduce, and its effect on proving his case, and remarks upon any point of law involved in the case. Counsel may in opening refer to those facts of which the court takes judicial notice. Neither in the opening nor at any stage of the trial may counsel give his own personal opinion of the case nor mention facts which require proof, but which it is not intended to prove, or which are irrelevant to be tried.”

The opening statement is intended to be a general review of the evidence and a statement of issues. It may also be the occasion on which the Crown advises the judge of formal admissions. The preparation of an opening statement can only commence when counsel has familiarized himself with all the evidence he is going to call and has considered the law. Apart from its merits, as one of the aids to persuasion, the preparation of the opening statement forces counsel to go over his case with a view to determining what matters he must prove and how will he prove them. Good, practical advice is to create 3 or 4 "snapshots" which accurately illustrate or portray the most relevant facts or details that the trier of fact needs to know.

Opening Statements (Crown Prosecutor)

1.) Purpose: To inform the judge of the nature of the case and to acquaint the court with the essential facts. Argument, discussion of law, or objections are not permitted by Defence counsel.
2.) Include: Name of the case; your name and your colleague's name; opponent's name and counsel; the facts and circumstances that led to the change; conclusion.
3.) Avoid: Too much detail. It will only tire and confuse the judge. A run-down of the testimony of eye witness. Exaggeration and overstatement. Don't use such phrases as "prove it to a mathematical certainty", or "prove it absolutely beyond question." Argument- It violates the function of the opening and you risk rebuke from the bench; Anticipating the defence. It is important and might result in a mistrial; walking or pacing. It distracts and irritates judges.

Opening Statements (Defence Counsel)

1. Purpose: To deny that the Crown has a valid cause; and, in a general way, to outline the facts from the standpoint of the defendant. Objections by Crown are not permitted.

2. Give: Your name and your colleague's name; General theory of defence; Facts that tend to weaken the Crown's case; Conclusion.

3. Avoid: Repetition of facts that are not in dispute; a run-down of what each witness will testify to; Exaggeration and argument; Strong points of the Crown's case; walking or pacing- it distracts and irritates judges.

What Mock Trial Judges Have Said in the Past About Opening Statements!

A.) The judge is the trier of fact. Therefore, stay away from the appeals to emotion.
B.) Don't quote law in the opening.
C.) "Tell the story" in the first part of the opening, from your side's point of view. Then proceed to indicate what evidence your witnesses will enter and what their relevance will be.
D.) Use the future tense. For example, "It is anticipated that Bob will say ....". Instead of saying, "The Crown witnesses are unreliable", say, "Our testimony will show that ...."
E.) Put emphasis on important evidence.

F.) Avoid the appearance of nervousness. This is the first impression that your side makes.
G.) Speak directly to the judge.
H.) Try to not be overly dramatic.
I.) Don't simply read your opening.
J.) Vary your tone of voice.
K.) **SLOW DOWN**. A slow delivery is essential because the judge has to make notes.

DIRECT EXAMINATIONS

A.) **Setting the Scene**- Setting the scene is often not done well by young lawyers and it is important to understand why this is so. Beginning lawyers tend to forget that the trier is usually totally ignorant of the facts. While you have lived with this case and have become completely familiar with it, the opposite is true with regard to the trier. He or she will typically know nothing about the case and unless you set the scene carefully, the trier may well not understand the situation and hence, will not be receptive to being persuaded by your evidence. Failure to use available diagrams and to make sure that the trier has a copy and is following it, is a basic failure to persuade.

B.) **Transitions**- How do you get from "setting the scene" to the action, without asking the witness an open-ended question (which invariably invites a narrative regarding everything he or she knows about the event) or without leading?

A helpful way to do this is to use "headings" or "transitions". For example, "I would like to direct your attention to the evening of December 15th." "I would now like to discuss the events that took place at the Eastwing Plant." "I would now like to discuss with you the method by which you assembled the scaffold."

Using such headings or transitions in direct examination, performs two important functions. First, it directs the attention of the witness to the area you now wish to ask questions about. Secondly, (and equally important) it signifies to the trier of fact the next subject to be discussed.

C.) **Witness Control**- In direct examination, counsel is not permitted to ask "leading questions" (i.e. questions the form of which suggest the answer) except on introductory matters (i.e. the witness's qualifications). On direct, witness control (direction of the witness) is important and is achieved by the form of the question and its subject matter, i.e.:
What ...?
Where...?
When...?
How...?

Please describe...?

However, the "please describe..." form of questions is far from optimal because it is insufficiently directed and hence will often lead to the witnesses undirected description of the matter inquired about. This is undesirable because your client is paying you to persuade- not to abandon his or her case to some lay witnesses. Telling the story is your job (with the assistance of the witness) and should not be abandoned to the witness.

Rather than asking the witness "can you describe the claw for us?", consider how much more effective is the following line of questioning.

What material is the claw made of?
How big is it?
What is its shape?
Does it have any working parts?
Is it part of the braces?
Of the ladder?

Note that this is "directed" examination-in-chief- not leading, but also not wide open: it lets the witness know what it is you want to know. It should not be overdone, but it is the basic way that counsel, in examination-in-chief, directs and edits how the story is told. <u>It is one of the most important aspects of direct.</u>

This type of directed questioning is basic to any examination-in-chief and it is the way in which counsel elicits details, rather than general conclusions, and it is details not conclusions which persuade the trier of fact. Consider the following example:

How did he cross the street?
What do you mean by weaving?
How did he stumble?
How long did it take him to cross the street?
Did he eventually reach the other curb?

D.)**Form of the Questions**- The use and choice of language in framing questions is the trial lawyer's most important skill.

Often questions will be too long- make them short.

Frequently, they are too complicated-keep them simple.

Frequently, questions are imprecise because of the use of poorly chosen words- take care in choosing your words and make your questions precise.

Avoid the use of big words (lawyers talk) or police jargon (“did you exit the vehicle”: a much better form of question is, “Did you get out of the car?”).

E.)**Problem Analysis**- This is absolutely crucial because ultimately it is what wins and loses cases. Eventually, counsel learns to be effective interrogators. When this skill is mastered, what wins and losses cases are the subject matter areas that are covered in the examination. With regard to each witness, consider the following questions:

Why is this witness being called?
Where does he fit into my overall case?
What is it that I have to prove through him or her?
What is important and vital evidence, as opposed to background, etc.

F.)**Listening to what the witness said**- Most young counsel do not listen to what the witness is saying (they are too busy following their own script) and they thus miss what the trier of fact is hearing and fail to follow up, clarify, and qualify.

G.)**Physical and Verbal Mannerism**- These will be apparent in class, will be discussed, and you should attempt to rid yourself of them. The following are often encountered:

“Echoing”- counsel says “I see”, “Thank you”, etc., after every question, or repeats the witness’ answer.

Pacing around too much.

Fumbling with notes.

No eye contact.

Physical intimidation by counsel.

Overly aggressive or overly timid voice.

Most of the above will be pointed out and detail with in video review.

H.)**Speed/pace of the examination**- Frequently, counsel are simply “too fast” because they are nervous, because they already know all about the case, and because they are not yet sensitive to the needs of the trier of fact. In general, you must proceed at a pace which meets the needs of the trier of fact. Also, you should slow down the pace of your examination for emphasis when important parts are reached. Furthermore, pacing can be used to make short, but important events longer, i.e., a car collision or a person crossing the road (where that is an important event).

EXAMINATION-IN-CHIEF

1. Develop the theory of your case. Determine what is the underlying theme that gives people a coherent basis to this story, tying together the facts and the legal position advanced.

2. Have a clear purpose for each course of questioning of the witness, and ask only questions which bear on the purpose.

3. Control the topics covered in the testimony.

4. Organize the witness' testimony into an effective sequence, by topic chronologically, in mixed order.

5. The evidence given in the testimony should be relevant and clear.

6. Ask questions which are short and simple.

7. Begin with open questions, followed by narrow questions. Use the "I" or "funnel" method of exploratory questioning.

8. Listen to what the witness says. You react to and follow the testimony itself. You want the court and the witness to know that what is being said is important and interesting.

9. Control the pace of the testimony. Emphasize, speed up and slow down, as appropriate, what the witness is saying.

10. Ensure the evidence given by the witness is clear and complete and consistent with the theory. Clarify any confusion and fill in any gaps.

What Mock Trial Judges Have Said Re: Examination-in-Chief

1. Avoid long-winded questions. They take attention away from your witness.

2. Break up your questions into small answers.

3. Try to not repeat the answers of your witness.

4. Show friendship to your witness. You have a relationship with him/ her.

5. Keep eye contact with your witness. Be natural. Don't make the x-in-chief seem too scripted.

6. Ask command questions like, "Describe what you saw...", or "Please tell the court..."

7. Avoid who, what, where, when, why questions. If necessary, use this format: Instead of "Didn't you have any feelings for the accused", ask "What, if any, feelings did you have for the accused".

8. Leading questions are not allowed. However, they can be used in preliminary matters, and matters not in dispute.

9. The following are the most offensive types of leading questions:

   A.)Questions which directly suggest the answer. Example: "You heard the plaintiff say that she wasn't really hurt?"

   B.)Questions which invite the witness to agree with another witness or document. Example: "Don't you agree that what he said was accurate?"

   C.)Questions which assume a fact in dispute. Example: "When did your skis get stolen (When, in fact, the ownership of the skis is in dispute).

CROSS-EXAMINATION

A.) **Structuring of the cross-examination**.

Most young lawyers have a basic idea of what to do on direct examination and basically how to do it- have the witness tell the court the evidence that the witness has that is important to the case. But with cross-examination, young lawyers often have little idea as to what to do or how to do it. This is why you may find cross-examination difficult. Your feelings may be "this witness is killing me-has killed me-but what can I do about it?" Too often, the response is a.) invite the witness, on cross-examination, to repeat again for the trier, all the harmful things that he or she said in direct, or b.) to examine the witness "crossly" and in a hostile manner. Neither is a very good idea.

A basic starting point is to recognize that you do not have to cross-examine, and in some cases, you should not. Always, cross-examination should be kept to a minimum and therefore, you should select a few areas where you think you can help your case and deal just with those areas. Advance thought and planning is crucial, but it is just as crucial to listen carefully to listen to the direct and, unless you are a genius, to have taken notes.

In planning the cross examination, the basic questions to be addressed are a.)how can this witness help me (eliciting the favourable testimony), and b.)where does he really hurt me,

and how, if at all, can I deaden, qualify or discredit the testimony? (destructive cross-examination).

A useful approach is to start out by formulating your closing argument comments about the witness and then use these comments as the basis for deciding on areas of cross-examination.

Sequencing s important in cross-examination. Elicit favourable testimony first- this turns him or her into a witness for you. By doing this, you can hopefully get the witness to agree with you and give you admissions. The witness will be unlikely and unwilling to do this if you discredit (attack) him or her first and then seek to gain admissions. Do destructive examination only after have first elicited any favourable testimony.

B.)**Use only leading questions**:

This is the most important advice that you can be given with regard to executing successful cross-examinations. The basic technique of cross-examination is that you testify by putting propositions to the witness and having him or her agree or disagree. This is the medium of control on cross-examination. Be warned-until you become an experienced expert cross-examiner, use only leading questions.

The French term ("question suggestif") is much more descriptive than our phrase, "leading question". Both describe a question that suggests the answer. If you are effective in phrasing the question and delivering it, the witness will be more likely to agree.

Cross-examination is not "examining crossly". Many of the best cross-examiners are gentle and seductive, but they use highly controlled leading questions. Think of it- who wants to agree with a shouting, aggressive, overbearing counsel?

C.)**Pacing the Cross-Examination**:

A problem frequently encountered with young counsel is their belief that all cross-examinations have to proceed slowly, with the examiner taking tiny little steps with each question, slowly building to the conclusion desired to be reached. While there is sometimes a need to proceed this way (i.e. where you are trying to get a witness to say something that you are not sure he will say), in many areas there is no need to beat around the bush. If the fact that you wish to elicit is clear from the record, and particularly if it is clear from the witness's previous statements or testimony, simply put the proposition to the witness. If the witness denies the proposition, then you can direct the witness' attention to his or her previous inconsistent statement and impeach the witness on it.

Try to avoid “wandering” cross-examinations- cross-examinations the point of which is not readily apparent. There is a school of thought that believes that, particularly with young counsel, if the judge cannot see where you are going in the first few minutes, the judge or other trier of fact will simply turn out.

Where you are going and the point you are making, must emerge from the cross-examination. This is because a.)triers to do not wait until closing argument to decide, and b.)unless the point of your cross-examination is apparent (where it is going) the trier will simply turn off.

<u>Generally:</u>

1. Just as in examination-in-chief, develop he theory of your case and have a clear purpose for each course of questioning.

2. What is the purpose of your question? To:

   a.)Meet unfavourable testimony given by the witness in chief;

   b.)Stress what was favourable in the witness’ testimony;

   c.)Bring out new material favourable to you;

   d.)Present your theory of the case.

3. If it will not serve one of those purposes, do not cross-examine. Pointless cross-examination can be very counter-productive.

4. To meet unfavourable testimony:

   a.)Distinguish or limit the scope of what was said by the witness in chief;

   b.)Discredit the witness- the witness is mistaken or is not to be believed;

   c.)Discredit the testimony- that particular part of the witness’ testimony is not accurate or not reliable.

5. Organize the cross-examination effectively- it is generally better to stress favourable testimony from the witness and try to develop further evidence helpful to you, before dealing with what was unfavourable in the witness’ testimony.

6. Ask questions which are short and simple. On cross-examination, you should generally be asking closed questions, and tightly controlling the witness.

What Mock Trial Judges Have Said Re: Cross-Examinations

1. Indicate a sense of where you want to go and take your witness there.

2. Every cross should have a beginning, a climax and an end. Stop at a good point.

3. Decide what you want to accomplish in cross. Have a definite purpose.

4. Adjust to what is brought out in trial. Think on your feet. Listen to what your witness says and take advantage if he/she gives you an opening. Adjust the cross to reflect the reality of the direct, but don't repeat questions asked in direct.

5. In cross, it isn't so much the answer you get, but the idea you plant in the judge's mind.

6. Cross must be built up on probabilities. The x'er tries to foresee different answers that may be given and formats questions to meet them.

7. Try to put suggestions to your witnesses and get them to agree with you. Don't ask who, what, where, when, why questions because they give the witness an opportunity to "explain", and you run the risk of losing control.

8. Don't ask a witness to speculate, or ask open-ended questions.

9. Never argue with a witness. Control your witness, as opposed to antagonizing them, while still giving them a chance to answer. Don't cut the witness off.

10. Let go. Don't push if you don't get the answer you want.

11. Try to create an impression or atmosphere in cross.

12. Try to show possible inconsistencies in cross.

13. Cross-examine in plain English.

14. Keep your witness on track.

15. Doing a "cross" doesn't mean being "cross".

16. Don't draw conclusions in the cross-examination. That is the job of the closing argument. Give the judge credit for having a brain.

17. Skill- try to pick your stronger points and run with them. Let your medium and weak points go.

Controlling The Examination

Be well prepared.

Listen to and watch the witness.

Asking open questions invites the witness to say what they want in their own way- the witness controls the topic and the content of the testimony. ("What did you do that evening?"- "When you approached the cross-walk, what happened then?").

Asking directed questions focuses the testimony in a particular direction, specifying the topic, but otherwise leaves the witness in control. ("When you stepped off the curb, how far away from the cross-walk were you?")

Closed questions limit the range of the witness's testimony, by specifying the topic and the content of the appropriate answer.

Asking yes/no questions is a way of controlling the witness's testimony, by specifying the content and inviting a "yes" or "no" answer. ("Was the light at the cross-walk lit, when you approached it that evening?").

The testimony is even more tightly controlled by leading questions that indicate precisely what the answer should be. ("That cross-walk was the only lit part of the street that night, was it not?")

Compound, rambling, vague questions are confusing. They confuse your witness-in-chief- and give control to the witness being cross-examined. Questions should be brief, simple and clear, and on cross-examination should usually be closed.

To compel a reluctant witness to admit a fact, first let the witness know that they have no choice but to answer truthfully: You know the fact and could prove it.

To prevent the witness from coming up with an excuse or self-serving examination, "close the doors" – take away other possible explanations before asking the question.

Basic Problems in Examination-in-chief, Cross-Examination, and Re-Examination

The ability to examine and oppose the examination of witnesses in open court in an adversary setting is the most basic skill of the trial lawyer. Yet the most common criticism made of trial lawyers is their inability to conduct proper, intelligent, purposeful examinations and to oppose those examinations.

As with any skill, practice is the only sure way to achievement. The practice should be conducted with certain simple guidelines or rules in mind.

1. The purpose of any witness examination is to elicit information from the witness. But note that more is involved- it is to do so in a way that will persuade the judge or jury of the existences of a particular state of facts that is asserted by your client.

2. The basic format is an interrogative dialogue.

3. The witness is probably insecure. He appears in a strange environment and is expected to perform under strange rules. This is a handicap you must overcome on examination-in-chief and an advantage that you have (you may choose to exploit) on cross-examination.

4. Your questions should be short, simple and understandable to the witness and the judge and/or jury on both examination-in-chief and cross-examination.

   a.)It is imperative that your audience- the judge and/or jury-understand your question so that they can reasonably anticipate and comprehend the answer.

   b.)The insecurity (anxieties) of “your” witness on examination- in-chief will be increased if he does not understand your questions.

   c.)The complex, argumentative question provides a refuge for the witness on cross-examination.

5. As a general proposition you may not lead on examination-in-chief (nor on re-examination) except a.)as to preliminary matters or b.)to refresh the recollection of the witness. Both of these exceptions are discretionary with the trial judge.

6. In any event, on examination-in-chief, leading questions and the perfunctory answers they elicit are not persuasive.

7. On cross-examination you may lead and you should do so. Control of the witness on cross-examination is imperative.

8. At the outset of examination-in-chief have the witness introduce himself, then place him in the courtroom on trial, then elicit the who, where, when, how and why of the relevant data he has to offer. Then quit. Do not be repetitious.

9. If you believe that cross-examination that will elicit information that is unfavourable consider the possible advantages to be derived by eliciting it during the course of our examination-in-chief.

10. Do not conduct a purposeless cross-examination which does nothing other than afford the witness an opportunity to repeat his testimony-in-chief.

11. Do not conduct a purposeless cross-examination which does nothing other than afford the witness an opportunity to repeat his testimony-in-chief.

    a.)If there is nothing to be gained by cross-examination, waive it.

    b.)If you can accomplish something by cross-examination, get to it.

    c.)Be cautious about cross-examining on testimony elicited in chief which was favourable to your position, you may lose it.

12. Be cautious about asking questions to which you cannot responsibly anticipate the answer and be particularly cautious in those situations if the only evidence on the point and will be unknown answer.

13. Listen to (and do not assume) the answers of the witness.

14. Objections to the form of the question must be made before an answer is given. If the question reveals the answer so it would be inadmissible, then an objection must precede the answer. The grounds of the objection should be succinctly and specifically stated. If a question does not reveal the potential inadmissibility of the answer, but the answer is inadmissible, then an objection should be made as soon as the answer is given and again you should succinctly and specifically state your grounds.

15. If an objection is made to the form of the question, and it is sustained, then the examiner should rephrase the question to cure the objection.

Simplified Rules of Evidence/ Objections

Tournament procedures only permit the direct and cross-examination of each witness: no redirect examination.

Either the Crown Prosecutor or the Defence Counsel may object to a question or the admission of an exhibit. The judge may ask the person objecting, "on what rule of evidence are you relying?" Then the judge may either allow the objection, preventing the evidence from being introduced, or overrule the objection, allowing the questions to be answered or the exhibit to be admitted into evidence.

Reasons for objections (also known as grounds for objections or the rule the evidence being relied upon) are:

OBJECTION	**DEFINITION**
Immaterial or irrelevant	The question has nothing to do with the case.
Making speeches/ statement	The lawyer is not asking a question.
Badgering the witness	The lawyer is being hostile and trying to force an answer.
Leading the witness	The lawyer is asking a leading question that the witness is not qualified to give
Speculation	The question asks for an answer that the witness is not qualified to give.
Hearsay	Third party information
Assumes facts not in evidence	Talking about or questioning things that have not yet been entered into evidence.
Asked and answered	The witness has already previously answered the question.
Non-responsive answer	The witness's answer is not addressing the question asked.

Closing Arguments:

Here is the advocate in his final and finest hour! "She won it with her closing argument! She was magnificent!" Legion are the legends of summations.

A lawsuit is won during the trial, not at the conclusion of it. It is won by the witnesses and the exhibits and the manner in which the lawyer paces, spaces and handles them.

The likelihood of a lawyer snatching victory from the jaws of defeat with his or her closing argument is so slight as to hardly warrant consideration (Compare, last of the ninth game-winning home runs; but see, Bobby Thompson's shot heard 'round the world in Giants v. Dodgers (1951).

On the other hand, lawsuits are lost by fumbling, stumbling, incoherent, exaggerated, vindictive closing arguments.

This is not intended to minimize the importance of the closing argument. It is merely to relegate it to its proper position, which is a summation of the evidence that has preceded it and a relation of that evidence to the issues in the case.

Although the closing argument is not as controllable as the opening statement, it is very close to it, close enough that we can say that there is no excuse for a poor closing argument.

Many trial lawyers begin to prepare their closing arguments with their first contact with the case: as the facts make their initial impression on their minds. That is when they are as close to being jurors as they ever will be. From that first impression forward they shape and reshape their closing arguments as the facts develop. Finally, they shape the trial to what they believe their strongest arguments will be; they prove their arguments.

Thus, the closing argument has a considerable impact on the trial because an able trial lawyer knows that an argument without evidence to support it is no argument at all.

The basic guidelines for closing arguments are:

1. Think about, prepare and rehearse your closing argument before trial, leaving sufficient flexibility to meet the exigencies of trial.

2. Think about, modify, and rehearse your closing argument at each break in the trial in light of the record to date.

3. Think about, modify, and if time permits, rehearse your closing argument at the close of the evidence.

4. Base your closing argument on the issues, the evidence, the burden of proof in the cases, and your client's right to a verdict.

5. From the standpoint of format:

    a.)Address the court, the jury and your opponent.

    b.)Tell the jury your purpose- to summarize the facts and relate them to the issues in the case.

    c.)Make your argument.

    d.)Tell the jury what its verdict should be.

    e.)Sit down.

6. From the standpoint of delivery: do not shout, do not engage in personalities, do not tell the jury what you believe, but act and speak as though you do believe, to the depths of your soul, every word you are uttering. If you can't do the latter, don't argue.

7. As for some of the canned approaches:

    a.)Do not repeat in chronological order the testimony of each witness. Give the jury some credit; it has heard the witnesses. Put it all together.

    b.)Do not tell the jury what you say is not evidence. Why belittle your argument? The judge will do that for you.

    c.)Do not assume a burden of persuasion that is not yours.

<u>What Mock Trial Judges Have Said Re: Closings</u>

1. In a close, show structure. Be as linear as possible. First review the facts and each witness's contribution, or lack of it. Proceed to an analysis of the issues and then the applicable law.

2. **SLOW DOWN**- The judge is making notes.

3. Be matter-of-fact and sincere.

4. Speak to the judge.

5. Vary your tone of voice and the rhythm of your sentences.

6. Don't make it sound like a speech, or simply read your notes.

7. Be careful not to use points that have not been entered into testimony.

8. Stay away from appeals to emotion. The judge is the trier-of-fact.

9. Good closings are not totally pre-written, but also include references to the actual trial.

10. Ask the judge, as trier-of-fact, to disregard opposing witness testimony.

11. Distinguish between the “weighting” versus the “admissibility.”

Mock Trial-Witnesses

The quality of your team’s presentation centers on the quality of the witness’ testimony. Your credibility is the key to convincing the judge, as the trier of fact, that your lawyer’s arguments are the correct one. Portray yourself as a real person. Be confident and credible. You have to believe in your own arguments. Be polite. Keep your body language positive. Often we are not judged not just on what we say, but how we say it. A strong witness is a witness who has a sense of themselves and is not about to be manipulated by a lawyer, but rather one who wants to tell their story.

Know your script totally. You will have to fill in many gaps on your own. You cannot “deviate” from the script, that is, contradict something that is in it. If you are uncertain whether or not something qualifies as a deviation, check with your teacher.

<u>What Mock Trial Judges Have Said Re: Witnesses</u>

1. Be credible. Indicate that your actions are reasonable, as opposed to making it look like you are offering excuses.
2. Don’t be defensive on cross-examination. Stick to your position.
3. Make your tone confident. You are here to tell your story.
4. Don’t be evasive. Judges may interpret that badly.
5. Don’t be a “hostile” witness, but be strong. Believe in yourself to the extent that no lawyer is going to control you.
6. Watch your posture and body language. These are important parts of the communication process.
7. Go beyond the information given, and create a real person.
8. Don’t analyze. It is not your job.

Examination of Expert Witnesses:

As a conservative estimate, 80% of all trials conducted in courts of general jurisdiction involve the examination of skilled or expert witnesses (e.g. personal injury; medical and accident reconstruction; criminal; chemical; ballistics; fingerprint; handwriting; commercial: economists and market analysts). The opportunities for use of skilled or expert witnesses are limited only by man's knowledge and the trial lawyer's ingenuity. Accordingly, no lawyer is worthy of the name "trial lawyer" until he or she has mastered the technique which attend the examination-in-chief and cross examination of skilled or expert witnesses.

The function of expert witnesses is to bring to the trial of the case "knowledge beyond the ken of the average layman" and apply that knowledge to the facts in the case to the end that the lay fact-finder may better determine the issues in the case.

The basic guidelines are simply stated, but they are not so simple to apply.

1. **Qualifications**: The proposed expert witness must be qualified by training and experience in a recognized field of knowledge which is beyond the ken of the average layman. The test is whether the witness's knowledge training or experience will assist the trier of fact in understanding the evidence or determining a fact in issue.

2. **Explanation of Expertise**: If the field of knowledge is at all esoteric the expert witness should provide a brief explanation of it, particularly with reference to its application to the case at hand.

3. **Ruling on Qualifications as an Expert**: After the witness's qualifications are elicited, the witness is tendered to the court as an expert in the field of ___________, and the court either accepts or rejects the witness as an expert at that time.

4. **Cross-Examination on Qualifications**: The opposing counsel may cross examine the witness on his qualifications at the time the witness is tendered to the court as an expert witness.

5. **Basis of Opinion**: The examination-in-chief should elicit what the expert did with regard to the case and the facts which are the basis of his opinion.

    The facts which may be used as the basis for the expert's opinion and elicited on examination-in-chief are limited to those facts which

    a.)the expert personally observed
    b.)he heard elicited in the courtroom, or
    c.)were transmitted to him hypothetically, and

d.)those facts which were made known to the expert outside of court and other than by his own perception, if they are of a type reasonably relied upon by experts in that particular field.

The hearsay rule and the other traditional requirements for admissibility have been relaxed for expert testimony, and the expert may testify to, and have his opinion on, facts which are not admissible in evidence.

6. **Opinion**: The expert's opinion may not be speculation or conjecture, but rather must be an opinion to a reasonable degree of certainty within the expert's field or profession. Most courts require that the opinion be elicited in a two question sequence- 1.)Do you have an opinion as to ______________? and then, 2.)What is that opinion?- so that opposing counsel may have an opportunity to object before the opinion is heard by the jury.

   When the expert's opinion is based on facts which the expert did not personally observe or hear in the courtroom, the hypothetical question format for eliciting the expert's opinion is ordinarily required, unless counsel have agreed to the facts which are to be put to the expert witness.

   When a hypothetical question is used, it sometimes occurs that facts may be included in the hypothetical which would ordinarily be inadmissible. The presence of such facts is not grounds for an objection by counsel to the hypothetical question. However, the judge should warn the jury that the hypothetical question is not evidence, but rather merely the foundation upon which the expert has based his opinion. Any variance between the facts contained in the hypothetical question and the facts properly proven at trial ultimately goes to the question of the weight which should be attached to the expert's testimony.

7. **Cross-Examination**: The expert witness may be cross examined with respect to his opinion on the basis of,
   a.)His or her qualifications
   b.)Other facts in the case, or
   c.)the published opinions of other recognized authorities in the field (learned treatises).

   Note: The cross examination on qualifications discussed in paragraph 4, supra is a voir dire on the admissibility of the expert's opinion. The cross examination here goes to the weight of the expert's opinion. It is rare (and generally unwise) to cross examine professional experts as to their qualifications. However, watch out for situations in which the expert gives opinions outside of his or her area of expertise (e.g. medical specialists).

References:

Arthur Maloney, “Expert Evidence”, Special Lectures, L.S.U.C., 1955.

> In a complicated case, the hypothetical question can be quite cumbersome and even in anything but the most routine case it can be a delicate procedure with pitfalls to snare the unwary.

Court Clerk File

Grade 11 Selwyn House School Mock Trial- December of 2018

Regina vs. Brogue

INDICTMENT

File number

3270527098

Canada

Province of Quebec

Judicial District of Westmount

HER MAJESTY THE QUEEN

Against

WALLY BROGUE

INDICTMENT

Name of the Accused: Wally Brogue stands charged:

State of Offence: That in the city of Westmount, in the Judicial District of Westmount, Quebec, on or about the 14th day of July, he did unlawfully commit the murder in the first degree of David Benning contrary to the provisions of s. 229 and s. 231.

DATED this 10th day of December, at Westmount Police Station in the year of 2018.

____

Agent for the Attorney General of Canada

THE CASE OUTLINE

PLEASE NOTE THAT ALL WITNESSES IN THIS CASE ARE MALES. TEAMS ARE TO ALSO ASSUME THAT ALL CHARACTER ISSUES HAVE BEEN DEALT WITH PRIOR TO TRIAL AND SHOULD NOT BE RAISED AT TRIAL.

In this trial, the Crown will allege that Wally Brogue, a high school teacher, went to the apartment of David Benning, a former friend of Wally's 19 year old brother, Tom Brogue, with the intention of committing the First Degree Murder of David.

To present its case the Crown will call three witnesses: Officer Low, the police officer who attended the scene, Richard Volsky, David's live-in friend, and Peter Pomas, an inmate at a local Penitentiary.

Officer Low will swear that he found Wally brogue on the balcony of David's apartment; that a broken radio was beside Wally and that this radio, upon further examination, contained both Wally's and David's fingerprints. Further, he will swear that he found evidence of recent drinking and smoking in David's apartment- an empty beer bottle and some marijuana ash. He will also attest to administering the breath test on the accused and that Wally blood alcohol level reading was .06.

Richard Volsky will testify as to the events that occurred in the apartment up until the time that David disappeared over the balcony railing. She will also testify as to the physical state of David Benning at the time.

Peter Pomas will swear that he heard Wally threaten the life of David on the day before David was killed and he heard Wally state to his brother that he felt that David was responsible for Tom's incarceration. He will also state that Tom appeared very upset after this conversation.

Given these facts, explained in more detail, the Crown will allege that Wally Brogue intentionally caused the death of David Benning and did so with premeditation by pushing Benning over the railing; and that Wally was not so impaired at the time, due to his deinking earlier in the evening; that his earlier drinking did not affect his ability to form the necessary intent to commit first degree murder.

THE DEFENCE'S THEORY

The Defence will call two witnesses; Wally Brogue, the accused; and Tom Brogue, Wally's brother.

The defence will allege that Wally was very upset at the fact that his brother Tom was incarcerated for a crime that he did not commit; further, that Wally believed that David was responsible for setting up his brother. The defence will allege that on the day in question, Wally went to David Benning's apartment with the intention of pleading with David to tell the truth. Once inside the apartment, Wally tried to plead with David, who only laughed at him. Wally then went to turn down the portable radio, which was playing very loudly. He knocked it over in his haste. Wally will swear that David then rushed at him as he was picking up the radio. He will further testify that he stepped out onto the open balcony to avoid David and that as David continued to rush him, he (Wally) dropped the radio. He will finally testify that David's rushing momentum, coupled with his stoned state at the time (marijuana), and caused David to fall over the balcony as Wally stepped out of his way to avoid him. Wally also will swear that David was stoned at the time and his movements were uncoordinated.

Tom Brogue will testify as to Wally's state of mind on the day before and question Peter Pomas' motives for being a Crown witness. He will also corroborate Wally's story by describing the events he saw take place on the balcony. He was outside the building beside Wally's parked car waiting for him to return.

In summary, the defence will allege that David's death was an accident caused by David's lunging at Wally while he was obviously stoned; a situation that ultimately led to his death.

The Crown Witnesses

1. Officer Paul Low
2. Richard Volsky
3. Peter Pomas

The Defence Witnesses

1. Wally Brogue
2. Tom Brogue

Note: The Defence can use Bonnie Brager's pre-court statements, but will not be able to call her to the stand as she is medically unfit at the moment.

Witness Statement:

Crown Witness- Officer Paul Low

I have been on the local police force for eight and half years. During that time, I have been on general duties as a crime prevention officer, school liaison officer and two years ago, I was qualified by the Solicitor General to operate and interpret results of an Intoxilyzer 8000C breath instrument. On the night in question (July 14th), I was on general patrol in my police cruiser with my partner Officer Sandhu.

At 9:07pm, we received a call from dispatch that a man was reported to have fallen off a balcony at 4412 Saint Catherines Street West, #405, Westmount, QC. We immediately attended this scene where I noticed a small crowd had gathered. The crowd was around a body lying on the ground. We later identified the deceased as David Benning. Crouched over the body was a man later identified as his good friend- Richard Volsky.

Peter Volsky was screaming, "He killed David! He killed David!"

I interviewed Volsky, and he told me that Benning had been pushed from their balcony at the apartment 405 and that the assailant might still be in the building.

My partner stayed with the body and Richard Volsky. I went up to investigate the apartment. When I arrived I found the door of the apartment open. I went into the living room and noticed the smell of marijuana. I also noticed some marijuana ash in an ashtray and an empty beer bottle. Finally, I noticed an expensive- looking, but smashed, portable stereo radio- cassette/ c.d. tape player.

I made my way out to the balcony and I found a man looking over the edge of the balcony. He was later identified to me as Wally Brogue. He was looking at the crowd gathered around Benning's body.

Brogue started yelling, "It was an accident! It was an accident!"

Brogue was nervous and somewhat agitated. His eyes were red and there was a smell of alcohol on his breath. I noticed that he was approximately the same height and weight as Benning.

I started asking Brogue questions about the incident but he refused to answer any questions until his lawyer was present.

I took Brogue to the police station for questioning and for a breathalyzer test. The station was a ten minute drive from the scene. We arrived at the station at 9:30PM. Upon arrival I performed a breathalyzer test on the accused at 9:35PM using the Intoxilyzer 8000C.

The test result showed a level of .06 alcohol in his blood.

Later, the police investigation showed that fingerprints found on the radio included not only those of Volsky and Benning, but also of Brogue's. Also, the ash in the ashtray proved to be marijuana ash.

Officer Paul Low

Subscribed and sworn before me this day 27 July 2018

____

Raong Phalavong

Notary Public

Note: In a real trial, a police officer is not allowed to testify as to the statements of the accused without the Crown counsel asking the court to hold a trial within a trial. This is called a "voir dire". The voir dire

takes place without the jury. The purpose of the voir dire is for the judge to decide if the statements of the accused were made voluntarily, for example, without threats or promise of benefit.

To save time, we have eliminated the voir dire in this mock trial. Officer Low is permitted to testify to the accessed ‘s statements.

<u>NOTE</u>: THE BOOKING SHEET HAS BEEN REMOVED FROM THE CASE. AND IS NOT TO BE REFERRED TO BY EITHER SIDE IN THE CASE. TEAMS ARE NOT PERMITTED TO REFER TO IT OR USE IT AS A TRIAL TACTIC TO UNDERMINE OR BOLSTER THE CREDIBILITY OF THE OFFICER.

<u>NOTE</u>: WE ARE UNABLE TO FIX THE TYPO ON THE NOTATION AT THE TOP OF THE APARTMENT DRAWING (‘RICHARD VOLSKY’). TEAMS ARE NOT PERMITTED TOREFER TO IT OR USE IT AS A TRIAL TACTIC TO UNDERMINE OR BOLSTER THE CREDIBILITY OF THE OFFICER.

Witness Statement:

<u>Crown Witness- Richard Volsky</u>

I am 20 years old and I dropped out of school in grade 10. I moved in with David last January and we have been friends for the past two years.

I was with David Benning at our apartment located at #4412- Apartment 405 Saint Catherines Street West, Westmount, QC, during the evening hours of July 14th, 2018.

David and I were listening to music on our portable stereo radio- cassette tape c.d. player. We had been smoking marijuana and David also has some beer. I was feeling the effects of the marijuana and I think David was feeling it too.

At about 9:00pm there was a knock on the door, and I answered it. Our door does not have a peephole. When I opened the door, I saw that it was Wally Brogue.

He pushed me out of the way, and stormed into the apartment living room.

Wally saw David in the living room and went over to him and yelled, “You creep! You should pay for what you did to my brother!”

David just laughed and said, “You Fool! Your brother’s a druggie!” and demanded that Wally leave. Wally turned around, and turned off the radio and then picked it up. Taking it out to the balcony, Wally made a gesture as if he was going to throw it over the railing. David screamed, “Don’t, and ran after Wally onto the balcony and grabbed for the radio.

Then I saw Wally push David over the railing and the radio fell to the floor of the balcony and broke.

I screamed, “David!,” then turned towards Wally screaming, “You killed him! You killed him!”

I ran out of the apartment to where David fell. Then the police showed up.

____

Peter Volsky

Subscribed and sworn before me this day 27 July 2018

____

Raong Phalavong

Notary Public

<u>Witness Statement:</u>

<u>Crown Witness- Peter Pomas</u>

I am 24 years old and currently incarcerated at the local detention facility.

On July 13th I was in a jail visitation room with my sister. Tom Brogue was there for his brother, Wally. Wally has visited many times and Tom and I have discussed Wally on several occasions.

Wally was upset that his brother Tom was in jail. He was visibly angry and blamed David Benning.

I even heard Wally say that he would like to kill Benning because “that creep does not deserve to live!”

I know that even Tom was worried about Wally and his reaction because we talked about it later that day in the exercise yard. Tom seemed quite upset and worried. He said his was worried about what his brother might do, but also about what David might do to his brother.

I heard about David dying. I saw it in the newspapers.

I didn’t come forward at first because it was none of my business. But later my lawyer urged me to come forward and reminded me that I have an upcoming parole hearing.

That all I know dude.

I have the following criminal record:

1. When I was 18 years old, I was found guilty of Breaking and Entering; Possession of Stolen Property and received six months probation.

2. When I was 19 years old, I was found guilty of Breaking and Entering and was sentenced to 30 days in jail and six months probation.

3. When I was 23 years old, I was found guilty of Breaking and Entering and Possession of Stolen Property and sentenced to two years less a day in jail. This is the sentence I am serving right now.

____

Peter Pomas

Subscribed and sworn before me this day 27 July 2018

Raong Phalavong

Notary Public

Witness Statement:

Defence Witness- Tom Brogue

I am 19 years old. I am currently living with my parents at 319 Grosvenor Avenue- Apartment #2, in Westmount, QC, as I look for work.

I have a criminal record and I am currently on parole. At the time of David Benning's death, I was incarcerated and serving time for trafficking in narcotics. The drugs weren't mine. They were David's. I was holding them for him when the police found them on me. I took the hit for David and got convicted. I had served two months of my sentence when I heard about David Benning's death. I served 7 more months of my sentence after David Benning's death before I got paroled.

I am aware that my brother Wally Brogue has been charged with murdering David Benning.

My brother visited me at the jail on July 13th, 2018. Wally was upset and angry about me being in prison because he knew that I was innocent and that I had taken the rap for Benning. He was also worried that I might get hurt in prison. Our visit ended with the following conversation:

Wally: "A creep like that doesn't deserve to be alive."

Tom: “Don’t do anything stupid.”

Wally: “Look, I’m just interested in justice being done.”

I knew that Wally would never really do anything violent- he was just angry and saying things. I was more worried that he might get hurt if he confronted Benning. I was scared that Benning might get upset with Wally and do something to hurt Wally.

I told another inmate all about this- Peter Pomas. I told him that Wally hated David for framing me and that I was afraid that Wally might do something stupid as I had never seen my brother so upset or angry.

It is too bad about Benning falling off the balcony. I may have had problems with him but I never wished for him to have an accident.

____

Tom Brogue

Subscribed and sworn before me this day 27 July 2018

____

Raong Phalavong

Notary Public

<u>Witness Statement- Evidence Item Only as Bonnie will not be in court:</u>

<u>Defense Witness- Bonnie Brager</u>

I am 28 years old and recently engaged**.** I am employed as a real estate agent. I live at 4415 Saint Catherines Street West, Westmount, Quebec, apartment #308.

I met Wally Brogue through mutual friends we have been dating for one year. Wally and I have recently become engaged to be married.

I was at Wally’s apartment the night of David Benning’s death. Wally and I had dinner together. During dinner, we consumed part of a bottle of wine.

During dinner our discussion turned to Wally’s brother, Tom, who was in prison serving time for drug trafficking.

Wally told me he was very worried about Tom’s depressed state of mind. He was also convinced that David Benning had framed Tom and was responsible for Tom’s being in prison.

Wally abruptly got up from the dinner table and decided he was going over to Benning's apartment and try to convince him to admit that he had framed Tom.

I decided to go with Wally because he was quite upset and I hoped to persuade him to change his mind about speaking to Benning. On the drive over Wally admitted that there was not much chance of his visit succeeding but he said that he owed it to Tom to try anything.

When we got to Benning's apartment building, I decided to stay near the car. Benning's apartment was on the fourth floor facing the street where we parked. I know it was his apartment because I could see that the balcony doors were open and I saw some sort of scuffle between Wally and David. Wally was not holding a radio during this scuffle. I was startled by a car alarm and turned around to see where it was coming from. That's when I heard a scream. I turned back to see David falling in the air. I did not see what happened in the seconds prior.

I was a little light-headed from the wine but I was not intoxicated. The police didn't test my alcohol. I guess they could see I was not drunk. Wally could not have done this. I know him and he is not killer.

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Bonnie Brager

Subscribed and sworn before me this day 27 July 2018

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Raong Phalavong

Notary Public

Witness Statement:

Defence Witness- Wally Brogue

I am 28 years old and I work as a teacher and counselor at a local high school.

I have been charged with murdering David Benning.

On the night of the accident involving David Benning. I had dinner with my fiancée, Bonnie, at my apartment.

During dinner, Bonnie and I discussed Tom's plight. I could not live with the fact that Tom was wrongfully convicted and that it was all because of David. Tom was in prison serving time for drug trafficking. I was worried about Tom's depressed state of mind, and I know that David Benning framed Tom and was responsible for Tom's being in prison.

I decided that I wanted to try to talk to David and convince him to clear Tom's name. The truth is the drugs they found on my brother were David's. Tom took the hit for David and was now paying the price.

Bonnie tried to talk me out of talking with David but I was a little upset and convinced that I had to at least try to convince David to do the right thing. That I owed it to my brother to at least try. Bonnie and I drove over to David's apartment. I left Bonnie in the car.

Benning lived on the fourth floor facing the street we parked on.

Bonnie is so upset that she will not be able to attend court today because of the psychological trauma, but her statement can be admissible as to the events mentioned here.

Richard Volsky, Benning's friend, answered the door, and I guess I was so upset I pushed him out of the way and told him I had to talk to David.

David was sitting on couch drinking beer. Loud music was blaring from a radio and I could smell marijuana.

I could tell that David was really high on drugs. I had to shout at him to even get him to hear me.

I told him, "It's your fault that my brother's in jail. You've got to tell the truth about the drugs being yours!"

David just laughed at me and said: "Your brother's a druggie! Get lost!"

I went over to turn off the radio so I could get David's attention but by accident I bumped into the table and knocked the radio off the table onto the floor just inside the door to the balcony. I bent down to pick up the radio. At this time David just seemed to lose his temper and he rushed me.

I backed up away from him onto the balcony was open. I dropped the radio as I tried to get away from him. David went right for me, but then he sort of lunged past me, hit the balcony railing and fell over! I couldn't believe it.

Richard yelled: "You killed him!" and ran out of the apartment.

I called the police and an ambulance and waited for them to arrive.

I did not leave the apartment. I was in a state of shock and was stunned at this accident. I looked over the railing and David was not moving and I was sure he was dead.

I saw Richard crying hysterically. When the police arrived I told them what happened.

I told a police officer: "It was an accident! It was an accident!" I knew that I should talk to a lawyer so I did not want to answer any more questions.

I never intended to break anything or hurt anyone. David's death was an accident. He fell because he was obviously stoned and uncoordinated.

This is what happened.

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Wally Brogue

Subscribed and sworn before me this day 27 July 2018

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Raong Phalavong

Notary Public

APPLICABLE LAW CANADA CRIMINAL CODE MURDER 1, MURDER 2 and MANSLAUGHTER

In order to convict anyone of a criminal offence, there must be a law, which specifically covers the matter at hand.

Here are the relevant sections of the Criminal Code under which, Wally Brogue is charged:

Section 229 defines murder:

MURDER,

229. Culpable homicide is murder

a. Where the person who causes the death of a human being

i. Means to cause his death, or

ii. Means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

b. Where a person, meaning to cause death to a human being or meaning to cause him/her bodily harm that he knows is likely to cause death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or

c. Where a person, for a lawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to affect his object without causing death or bodily harm to any human being.

Section 231 defines the difference between first and second-degree murder:

231. (1) Murder is first-degree murder and second-degree murder.

(2) Murder is first-degree murder when it is planned and deliberate.

(7) All murder that is not first-degree murder is second-degree murder.

Murder becomes manslaughter if the evidence meets the requirements of Section 232 (1):

232. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self- control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

The important element of difference between Murder in the First Degree, Murder in the Second Degree and Manslaughter is the intent involved. First-degree murder is premeditated, that is planned and deliberate. Second-degree murder is deliberate but is not planned. Manslaughter is simply the killing of another person by an unlawful act such as an assault. It is not necessary to prove intent to kill another person or intent to inflict an injury likely to cause death in order to establish manslaughter. For manslaughter to be proved it is necessary only to prove that death resulted from an act of defence may, of course, be lawful if it is delivered in circumstances which justified the use of such force. Teams are reminded that the Crown must pursue the top count of Murder in the First degree (what Wally is actually charged with). To prove their case, they must prove BOTH the Actus Reus and Mens Rae elements of the crime. Teams are reminded that Murder in the second degree and Manslaughter are lesser-included offences to Murder 1.

Conclusion:

The sections of the Criminal Code, which defines murder and manslaughter and the sentencing guidelines for each, are complicated. In the case of Quebec vs. Brogue they can be summarized as follows:

a.) If it can be proven beyond a reasonable doubt that Wally Brogue went to David Benning's apartment with the intention of killing him, when Wally is guilty of first-degree murder.
b.) If it can be proven beyond a reasonable doubt that, even though he had not planned it, Wally Brogue pushed David Benning over the balcony with the intention of causing death or bodily harm, which could result in death, then Wally is guilty of second-degree murder.
c.) If it can be proven beyond a reasonable doubt that Wally was provoked into committing some act in the heat of passion that resulted in the death of David Benning, then Wally is guilty of manslaughter.
d.) If none of the above can be proven beyond a reasonable doubt then Wally Brogue is not guilty and the judge must let Wally go free.

Health and Welfare Canada **Santé et Bien- être social Canada**

Health Protection Branch **Direction générale de la protection de la santé**

CERTIFICATE OF ANALYST **CERTIFICAT D'ANALYSTE**

1. **LINDA BARTLET, being the person on the staff of the Department of National Health and Welfare duly designated as an Analyst under the Food and Drugs Act, and thereby also an Analyst within the meaning of and as defined by the Narcotic Control do hereby certify:**

   That at Westmount in the Province of Quebec ON or about the day of 15 day of JULY 2018 there was submitted to me By DEPOSITORY BOX by POLICE CONSTABLE LOW.
   A member of the Westmount Police Department.

   A sealed and unopened package, which bore the following identification marks, initials, or numbers:

   C.C. 584- AB- DAVID BENNING
   Je soussigné LINDA BARTLET, faisant partie du personnel du ministére de la Santé nationale et du Bien- être social étant dument nommé analyst en vertu de la Loi des aliments et drogues et par ce fait, agissant aussi àce titre aux termes de la Loi sure les stupéfiants atteste part les presents:

   Que, a Westmount dans la Province de Quebec

   Le ou vers le 15 jour de JUILLET 2018, il m'a été soumis

   Par DEPOSITORY BOX par POLICE CONSTABLE LOW

Membre de WESTMOUNT POLICE DEPARTMENT.

Un paquet scelle et non ouvert qui portrait e e'estampille, ou les nombres suivants:

C.C. 584- AB- DAVID BENNING

That I did open the said package and did remove there from a
Que j'ai ouvert ledit paquet et y ai enlevé

GREY ASH LIKE SUBSTANCE

From which I obtained a sample of a substance.
Don't j'ai obtenu un échantillon d'une substance:

That I duly analyzed and examined the said substance and I found it to contain a:
Que j'ai dument analyse et examine ladite substance et que j'ai constate qu'elle contenait un:

NARCOTIC

Within the meaning of the

Aux termes de la Loi

NARCOTIC CONTROL ACT **to wit**
A savoir

CANNABIS (MARIJUANA)

That this certificate is true to the best of my knowledge and skill
Que le present certificate est fidéle au mieux de mes connaissances et de ma compétence.

Dated at Westmount, QC this 17TH day of July 2018
Fait à Westmount, QC en ce 17 e jour de JUILLET 2018.

LINDA BARTLET

____

Analyst- Department of National Health
Analyste- Ministre de la Santé nationale et du Bien- être social

Westmount Police Department
Certificate of Analyses

I, Officer Low being a person designated as a qualified technician to operate an INTOXILYZER 8000C breath instrument by the Attorney General of Quebec, pursuant to Section 238 (1) of the Criminal Code of Canada.

DO HEREBY CERTIFY:

That, at the town of Westmount, in the Province of Quebec, pursuant to a demand under Section 254 (3) of the Criminal Code of Canada, I did take one sample of the breath of a person identified to be as WALLY BROGUE.

THAT I did perform a chemical analysis of the said sample by means of the said instrument in which a solution suitable for use in the said instrument and identified as Potassium Dichromate Solution, Lot 023851 was used;

THAT I performed the said chemical analysis at the City of Montreal in the province of Quebec.

THAT the taking of the said sample was commented at 21hr. 35 min. 08 sec and completed at 21 hr 35min 15 sec. On the 14th day of July 2018, and the result of the proper chemical analysis of this sample was 60 milligrams of alcohol per 100 milliliters of blood;

I FURTHER CERTIFY:

THAT this Certificate of Analyses is true to the best of my skill and knowledge.

DATED the 14th of July, 2018, at the City of Montreal, in the Province of Quebec.

OFFICER PAUL LOW

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NOTICE OF INTENTION TO PRODUCE CERTIFICATE

To WALLY BROGUE OF #2- 765 GREENE AVENUE., Westmount, Quebec. Take notice that pursuant to Section 238 (1) of the Criminal Code of Canada, it is intended to produce the above Certificate in evidence.

Dated this 14th day of July 2018.

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Mr. Maxwell -Grade 11 Law Rubric

CATEGORY	1	2	3	4
K/U - Legal Terms /10	Seldom uses appropriate legal terms	Sometimes uses appropriate legal terms	Often uses appropriate legal terms	Always uses appropriate legal terms
K/U - Court Procedure /10	Demonstrates little awareness of court procedure	Demonstrates some awareness of court procedure	Demonstrates considerable awareness of court procedures	Demonstrates a sharp awareness of court procedures
T/I - Relevant Content /10	Develops little of the required content; may provide content that is not relevant	Required content is evident, but not sufficiently developed	Develops relevant content to a considerable extent	Develops relevant content thoroughly and effectively
T/I - Logical Development /15	Questions, propositions, statements, or answers do not have a logical consistency or flow	Questions, propositions, statements, or answers follow a logical order some of the time, but may not be cogent	Questions, propositions, statements, or answers follow a logical order most of the time and are typically cogent	Questions, propositions, statements, or answers are logically structured and cogent
T/I - Use of Evidence /10	Provides few specific details and limited accurate evidence	Provides some specific details and accurate evidence	Provides several specific details and considerable accurate evidence	Consistently provides highly specific details and accurate evidence and shows an ability to address new information
C - Clarity of Ideas /10	Demonstrates limited ability to articulate ideas clearly and persuasively. Loses control of emotions.	Demonstrates some ability to articulate ideas clearly and persuasively. Seems to struggle with emotions	Demonstrates considerable ability to articulate ideas clearly and persuasively. Is typically calm and collected	Demonstrates superior ability to articulate ideas with purpose and persuasion. Reacts calmly and adjusts communication appropriately
C - Case Details /15	Communicates limited knowledge of details related to the case/Is unable to highlight several important case details	Communicates some knowledge of details related to the case/ Struggles to highlight important case details	Communicates strong knowledge of details related to the case/Is able to highlight important case details	Communicates excellent knowledge of details related to the case/ Highlights many important case details
A - Professional conduct	Limited respect for the mock trial exercise - May include evident	Shows some respect for the mock trial	Shows considerable respect for the mock	Shows a high level respect for the mock

/10	lack of preparation, lack of focus, frivolity	exercise	trial exercise	trial exercise
A - Character /10	Displays limited ability to define the character	Displays some ability to define the character	Displays considerable ability to define the character	Displays a superior ability to define the character