

EVIDENCE 476 / 507

COURSE OUTLINE – SUMMER 2017¹

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Required Materials

Text: Delisle et al., *Evidence: Principles and Problems*, 11th Edition, Carswell
Supplemental Case Book (E-mailed)
Canada Evidence Act: <http://canlii.ca/t/7vf5>

Recommended Materials

Paciocco and Stuesser, *The Law of Evidence*
McWilliams, *Canadian Criminal Evidence*

Introduction to Course

Evidence is the means by which parties attempt to prove or disprove the facts in issue in a proceeding. Evidentiary rulings are a critical part of trials, and in many instances determine the outcome. Errors and mistakes on issues of evidence have profound impacts, including wrongful convictions and perpetrators not being brought to justice. The central objective of the rules of evidence is to facilitate a reliable search for the truth. However, the rules of evidence also engage other objectives, such as protecting privacy rights, preserving certain societal relationships, and deterring state misconduct. The rules of evidence are largely based on determining:

- whether or not the evidence will assist the search for the truth; and,
- the circumstances in which another value must take precedence over the search for the truth.

This Term's Learning Objectives

The main concepts we will consider over the semester are:

- the sources of the rules of evidence;
- whether the law of evidence should be based on broad principles or strict rules;
- how to categorize evidence and the significance of those categories;

¹ This Course Outline is an approximation of the materials we will be covering, as certain alterations or editing of the Outline may occur during the course. We will generally be covering two lectures worth of material for each day of the summer course.

- the tests for determining the admissibility of various forms of evidence;
- whether evidence can be admissible for some purposes and not others;
- whether some forms of evidence require special instructions to the trier of fact;
- the areas of evidence which have a higher probability of error; and,
- how to lead and challenge evidence in a courtroom.

Teaching Methods

Most classes will involve a lecture for at least part of the class, but students will be regularly encouraged to participate in class discussions. Those discussions will not only focus on the content of the readings and materials, but also on a critical analysis of the subject matter. Students should think about whether the cases and rules we study are just, and if not, what alternatives should be considered. We will also regularly consider how broader societal issues such as access to justice and bias impact evidentiary rulings.

Many of our readings will be from the course text, but we will also read supplemental cases for purposes such to cover a recent development in the law or to summarize the law in a complex area. We will also use class exercises during semester to practice applying rules of evidence to fact scenarios. (see attached)

Evaluation

100%, 3 Hour Closed Book Examination. Students may only bring to the exam two double sided or four single sided pages of their own notes. Students will be provided in the exam with the course outline and the table of contents of the course text.

E-Mails Re Course Material

Should be in reasonable proximity to the relevant lecture. No e-mails regarding course materials after the last lecture.

Lecture Recording

Lectures may not be recorded without prior permission from Professor Harris.

Lecture I

Introduction to Evidence

- A Qualified Search for the Truth: pp. 1-14
- The Adversarial System of Trial: pp. 1-14

PBS Frontline Documentary “Death By Fire” found at <http://www.pbs.org/wgbh/pages/frontline/death-by-fire/>

Lecture II-III

Critical Contexts for Determining Evidentiary Issues

- Assessing Probative Value and Prejudicial Effect: pp. 156-158, 187-189; *R. v. Arp*; *R. v. F.F.B.*; *R. v. Badgerow*
- The Burden of Proof: pp. 61-65, 71-74; *R. v. Plewes*
- Judicial Notice: *R. v. Daley*

Lecture III-IV

Types of Evidence

- Direct / Circumstantial: 75-80
- Real Evidence: Objects, Photos, Videos, Documents: pp. 395-408; *R. v. Black*; *R. v. Penney*; *R. v. Kinkead*

Lecture V- VI

Extrinsic Misconduct Evidence: Bad Character of the Accused

- General Inadmissibility: pp. 237-241; *R. v. Cuadra*
- Evidence of Habit and Similar Acts: pp. 217-224, 266-278, 281-284, 190-193; *R. v. Dent*; *R. v. Edwards*

Lecture VII-VIII

Bad Character of the Witness

- Bad Character of Witnesses: *Canada Evidence Act (CEA)*, Section 12; pp. 606-607; *R. v. Cullen*
- Opening Door: *R. v. Hankey*
- The *Vetrovec* Witness: *R. v. Murrin*; pp. 648-655

Lecture VIX

Post Offence Conduct: *White v. The Queen*; *R. v. Peavoy*; *R. v. S.B.C.*; pp. 80-88

Lecture X

Identification Evidence: *R. v. Gonsalves*; *R. v. Hay*; pp. 112-115

Lectures XI-XII

Opinion Evidence

- **Statutory Rules:** pp. 981-982
- **Common Knowledge:** pp. 877-881
- **General Rules for Experts:** pp. 885-897, 906-908
- **Necessity:** pp. 958-964, 920-922
- **Ultimate Issue:** pp. 970-972, 977-978; *R. v. Llorenz*
- **Foundation:** pp. 972-976
- **Review of Principles:** pp. 897-906

Lectures XIII-XIV

Witnesses

- **Assessing Credibility and Reliability:** *R. v. Parent, R. v. Perley*

Ability to Testify

- **Competence, Oaths, and Compellability of Witnesses:** *CEA*, Sections 13-16.1, pp. 431-433

Direct Examination

- **Leading Questions:** pp. 507-514
- **Refreshing a Witness's Memory:** pp. 514-521

Lecture XV

Cross-Examination: *CEA*, Section 10; pp. 532-537, 550-554

Re-Examination: *R. v. Sipes*

Collateral Facts / Rebuttal Evidence: pp. 554-558

Lectures XVI-XVII

Statement Evidence

- Prior Inconsistent Statements and Prior Consistent Statements: CEA, Section 10; pp. 530-532; 622-624; 627-635
- Attacking Credibility of Own Witness: CEA, Section 9(1) and 9(2); pp. 577-582; *R. v. Milgaard*; *R. v. Cassibo*; *R. v. Malik*

Lectures XIII-XX

Hearsay

- What is Hearsay: pp. 669-681
- Non Hearsay Uses: *R. v. Baltzer*

Traditional Hearsay Exceptions

- Declarations Against Interest, Dying Declarations, Declarations in Course of Duty: pp. 759-769
- Spontaneous Declarations: 789-797
- State of Mind, Statements of Intent: *R. v. Panghali*; 785-788
- Oral History in Aboriginal Title Cases: pp. 415-418

The Principled Approach: pp. 690-722

Statutory Exceptions

- Business Records: CEA, Section 30; *R. v. Wilcox*
- Prior Testimony

Lectures XX-XXI

Admissions and Confessions

Formal Admissions: pp. 349-353

Informal Admissions

- Probative Value: pp. 196-198, 740-742; CBC documentary “The Interrogation Room” at <http://www.cbc.ca/fifth/episodes/2014-2015/the-interrogation-room>
- Voluntariness Rule: 815-826; *R. v. C.T.*
- Revisiting Probative Value: *R. v. Hart*; CBC Documentary “Mr. Big” at <http://www.cbc.ca/fifth/episodes/2014-2015/mrbig>
- Admissions of Co-Accused: *R. v. Grewall*

Lecture XXII

Exclusion of Evidence Under *the Charter*

- Section 24(2) of the *Charter*: *R. v. Grant*

Lectures XXIII-XXIV

Privilege Against Self-Incrimination

- Police Custody: pp. 827-839
- Out of Custody: pp. 484-490
- Witnesses: pp. 465-476
- Statutory Obligations: pp. 481-484; *Application Under Section 83.28 of the Criminal Code*

Privilege Based on Confidential Relationships

- Class Privilege - Solicitor-Client: pp. 989-996; Spousal, Section 4, *CEA*
- Other Confidential Relationships: pp. 984-989
- Exceptions: pp. 1011-117, *R. v. Brown*; 1022-1024
- Litigation Privilege: *Raj v. Khosravi*

HARRIS EVIDENCE

FACTUAL OUTLINE RE SIMILAR FACT

John Roper is charged with assault of Fred Banks for an incident which occurred on November 15, 2015. Fred Banks' anticipated testimony at the trial is as follows:

On November 15, 2015, I was playing softball in a recreational league. I was pitching, and I was striking out most of the other team's players. John Roper was on the other team, and I struck him out three times. Roper is their best hitter, and he seemed to be getting more and more frustrated each time he stuck out. He came up to bat a fourth time, and just as I struck him out again, I saw Roper deliberately throw his bat at me. It hit me in the head and now I have a major concussion. As I was lying on the ground in great pain, Roper ran up to me and said this was all an accident and asked me please to not make a big deal of it because he really had a lot of stress in his life at this time.

The Crown wishes to call Alice Granger as a similar fact witness. Granger's anticipated testimony at trial is as follows:

Fred Banks and I are both volunteers at a community garden. On November 17, 2015 Banks came to the garden with a black eye, and I asked him what happened. He told me that he was hit by a bat which John Roper threw at him. I told Banks that I used to work with Roper at a technology firm four years ago. During a December, 2011 holiday party Roper had quite a few drinks and was becoming rude to others. Later that evening, the firm announced the "top employee of the year" and I received the award. Roper seemed upset at my award, and then became really angry when I also won the "most creative employee" award. An hour later, I left the party and was going to my car. Suddenly Roper appeared and he started screaming that he should have won the awards. He then slammed into me and my award trophies were knocked out of my hands. Roper said to me that he slipped on some ice in the parking lot. There was some ice, but it seemed all too convenient that his "slip" caused me to drop my awards. Roper then suddenly started weeping and said that nobody in the company appreciated all his work and that he was worried about his future there.

Does the similar fact evidence have sufficient similarities to the charged evidence to be admitted?

HARRIS EVIDENCE

FACTUAL OUTLINE RE EXPERT EVIDENCE

In a murder case, the Crown theory is that the accused killed the victim as revenge for the victim killing his character in the on-line game “Planet Massacre 2: The Violent End”. There is evidence that in the time period of the killing, the accused and the victim were playing this online game for 10-15 hours a day. They were jointly conducting various missions on the on-line game when the victim suddenly had his character kill the accused’s character. The position of the accused is that he was playing the on-line game with the victim, but that he had nothing to do with the victim’s murder.

The Crown wishes to call Dr. Peters who has a doctorate in computer science and has done some research in the area of video game addiction. The Crown wishes to lead evidence from Dr. Peters that some persons can get irrationally attached to their characters in video games and can become extremely distraught if their character is “killed” in a game. He has published a study on the on-line game, “Planet Massacre 1”: The Beginning of the Violence”, and states that this type of game has a number of features which may cause a person to be particularly attached to their character. He says that given that the accused was playing a similar game for 10-15 hours a day, he may have been extremely attached to his character.

Dr. Peters will further testify that, based on two recent journal articles, there is a growing link between persons who play violent video games for many hours a day and persons who become involved in violent activity themselves.

Consider:

- 1. Attacks that could be made on the admissibility of the expert evidence;**
- 2. How the Crown might respond to such attacks; and,**
- 3. Whether the opinion could be edited in any manners in order to increase its chances of being admissible.**

HARRIS EVIDENCE

FACTUAL OUTLINE RE HEARSAY

The accused, Jack Spinner, is charged with fraud in relation to his play at a No Limit Texas Hold'em tournament. The tournament was covered live by a television station which used the format of showing the viewer the cards of each player. The Crown is alleging that Spinner was wearing a small earpiece which permitted him to gain information about the hands of other players. Spinner won the tournament, and won most of the hands he played at the final table. Further, as was described by the tournament commentators, he had a number of "spectacular lay-downs" at the final table, including one instance where Spinner had pocket kings, but threw those cards away to another player who had pocket aces and had made a large initial bet.

Billy Springs played in the tournament and sat beside Spinner at the final table. Springs placed second in the tournament, and received one fifth of the prize money provided to the first place winner. Springs and Spinner are both active on the tournament circuit, and Springs has placed second to Spinner on a number of occasions.

Directly after the tournament, there was a reception put on by a tournament sponsor. Springs had a number of drinks, and then approached a gaming reporter for RoyalFlush magazine, Jenna Sears, who was at the reception. Springs told Sears that during the play at the final table, he noticed that there was a tiny earpiece in Spinner's ear. He stated that at one point he put his ear very close to Spinner's ear, and that he heard a voice stating "fold this hand", and that Spinner then threw away his cards. Sears told Springs that it might be important to document what he had happened, so she recorded him providing this information on her i-phone.

When tournament officials were cleaning up after the reception, they found a small earpiece on the floor. The earpiece was forensically tested, but there was no evidence which could link it to any particular person. Springs died in a car accident a month after the tournament.

What submissions could the Crown use to attempt to get Springs' statement to Sears entered for the truth of its contents?

What submissions could the defence make to oppose the admissibility of the statement?