**LAW 435C.001: PERSONAL INJURY ADVOCACY**

**WEEK 9 and 10 – Trial: Openings, Evidence and Closing**

* 1. **Teaching Objectives – Review of outstanding issues from previous classes**
* Direct and Cross examination - techniques, strategies and preparation for introducing evidence at trial
* Openings – boundaries (case law review) and use of the Ball approach in BC.
* Closing submissions – tying it all together.
  1. **Housekeeping**
* March 28, 2016 - no class next week (Easter Monday).
* April 4, 2016 - we have an optional class that is a review of the course and exam preparation – feel free to show up if you have any questions or concerns.
* April 13, 2016 – the exam is scheduled for 9:00 am.
* Materials required for exam:
  + Motor Vehicle Act – Part 3 (sections 119 to 214.6)
  + Insurance (Vehicle) Regulations - Part 7
  + Negligence Act
  + Occupier’s Liability Act
  + Class papers posted on the website
  + Cases posted on website
  + Lecture notes posted on the website and your own notes.
* Papers – I received a litany of questions this past week and will provide a detailed reply to those emails tomorrow.
  1. **Introducing evidence at Trial**
* How is evidence introduced at trial: oral evidence from witnesses (lay and expert), documentary evidence, read-ins from discovery transcripts, admissions, demonstrative evidence (photographs), and lastly, judicial notice.
* We are focused on oral evidence from witnesses which consists of: direct, cross, and redirect.

1. Direct Evidence

* Direct evidence is relatively straightforward – this is where you tell the plaintiff’s story through the witnesses that you decide to call at trial.
* The types of witnesses relied upon at trial: liability witnesses, emergency witnesses (police, ambulance, fire), collateral witnesses (friends and family), work witnesses (co-workers, supervisors, etc..), and most importantly the plaintiff.
* The limits of lay evidence – which is essentially a review of the law of evidence and includes the prohibition against hearsay, oath helping, and no expert evidence unless properly qualified.
* The limits of expert evidence – must provide written opinion and testimony is limited to an explanation of the technical terms in their report.

1. Cross Examination

* Cross Examination – this is the only opportunity we have to challenge the defendant’s case.
* Scope of cross examination – how far is too far in cross examination and are their limits to the questions you can ask in cross examination.
* Style of questions – open ended versus closed questions.
* The rule – keep control of the witness.
* The sub rule – do not ask a question that you do not know the answer to.
* The sub rule – one fact per question.
* Preparation for cross examination, and fruitful areas of cross examination with respect to lay witnesses, liability witnesses and experts.
* We will use a case example (Fabretti) to explore the cross examination of a defence psychiatrist.

1. Reply

* Reply – very limited scope to prevent splitting of case
* We will review the limits of reply evidence and the rule against splitting the plaintiff’s case. Reply evidence is only meant to address new issues that are raised in cross examination and cannot deal with issues that we previously covered in direct or entirely new issues that were not covered in cross.
  1. **Openings – see the Mike Slater article**
* Opening Statements - Purpose
* Jurors will not be persuaded which way to decide a case in an opening. They will develop a belief about what the case is about
* Give the jury an idea of what will be given in evidence
* Frame legal issues
* Avoid
  + Giving personal opinions
  + Discussing any evidence other than what will come from the party’s own witness (or which the court takes judicial notice).
  + Irrelevant facts
  + Prejudicial remarks, sarcasm, derision, argument
  + Appeal to the sympathy of the jury
* David Ball Approach
  + Liability
  + Rules of the Road: What are the rules and how did the defendant break the rules
  + EXAMPLES
  + Focus on the defendant’s conduct
  + Damages
  + Describe the case in terms of harms and losses
* *Brophy v. Hutchinson* (2003), 9 B.C.L.R. (4th) 46, 27 C.P.C. (5th)14,2003 BCCA 21:

[24] The opening’s purpose is to outline the case the party bearing the onus of proof (usually the plaintiff) intends to present. Counsel’s goal in opening is, or should be, to assist the jury in understanding what his or her witnesses will say, and to present a sort of “overview” of the case so that the jury will be able to relate various parts of the evidence to be presented to the whole picture counsel will attempt to present.

. . .

[41] In an opening statement, counsel may not give his own personal opinion of the case. Before any evidence is given he may not mention facts which require proof, which cannot be proven by evidence from his own witnesses, or which he expects to elicit only on cross-examination. He may not mention matters that are irrelevant to the case. He must not make prejudicial remarks tending to arouse hostility, or statements that appeal to the jurors’ emotions, rather than their reason. It is improper to comment directly on the credibility of witnesses. The opening is not argument, so the use of rhetoric, sarcasm, derision and the like is impermissible.

* 1. **Closings**
* Generally counsel is offered greater latitude in closing argument than in an opening statement.
* *Cahoon v. Brideaux*, 2010 BCCA 228:

In contrast to an opening statement, which should be purely informational, a closing jury submission is argument (see Brophy, para. 41) and the object of argument is persuasion. Thus, counsel should state her client’s positions as forcefully as the evidence reasonably permits and without fear of offending the sensibilities of witnesses and other parties. Drama and pathos are permissible, though their use may be risky before modern sophisticated juries who may resent theatrical attempts to divert them from a reasoned analysis. Competent counsel will marshal the evidence in as favourable a light as possible for her client, analyze the evidence, relate the evidence to the law, and suggest inferences while leaving it to the jury to draw the desired inferences. She will not make irrelevant and prejudicial appeals designed to provoke hostility to or prejudice the jury against her opponent

* *Walker v. Doe*
* Attack on opposing counsel - Cannot be justified even if opposing counsel attempts to paint a party in a harsh light or as a retaliatory measure for other conduct by opposing counsel.
* Counsel cannot misrepresent the issues or the position taken by another party. At paragraph 36:
* Mischaracterization of issues before the jury
* Counsel should not accuse an expert of dishonesty unless it is put to the expert in cross examination