

LAW 309: The Law of Evidence

Fall 2011

Professor Hamar Foster

Location: Room 158
Times: Tuesday and Thursday, 10:30a.m. – 12:30pm
Unit Value: 2 units

[Note: Our class on Thursday, Sept. 22nd, will be in Room 159, and our class on Tuesday, Nov. 8th, is cancelled. There will be a make-up class from 2:30 to 4:30 on Friday, Nov. 4th.]

CONTACT INFORMATION:

Office: 224
Office Hours: Any time (failing that, by appointment)
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REQUIRED TEXTS:

Stewart, et al. *Evidence: A Canadian Casebook*, 3rd ed. (Toronto: Emond Montgomery, 2011), which is available at the University bookstore.

The course website also contains this Course Description, the Course Outline (Syllabus) and links to statutes, a few additional cases, *etc.* These are itemized in the Course Outline.

Note as well that there is a document on the course website entitled *Evidence: A Selective Overview* that I have prepared for students to consult throughout the course. Please do so, and if you notice any typos, or have any questions or suggestions for improvements, pass them on. This is an ongoing process, and criticism is welcome.

RECOMMENDED TEXT:

Paciocco and Stuesser, *The Law of Evidence*, 5th ed. (Toronto: Irwin Law, 2008). This is a very useful resource, now only a little out of date. There should be some copies of it at the bookstore and on reserve in the Library. (There should also be a small number of used copies of the 4th edition available. The normal caveats about things being out of date apply.)

DESCRIPTION AND OBJECTIVES:

Evidence is one thing, the law of evidence quite another. In both common and scientific usage “evidence” means a fact (the *factum probans* in the old Law Latin) that tends to support or weaken inferences concerning the existence of another fact (the *factum probandum*) that one wants either to prove or disprove. The “law of evidence,” however, means the specialized body of rules developed by the common law to determine what facts may be presented to a court, and how. Put more simply, evidence is mainly about proof; the law of evidence is mainly about admissibility.

The rules that make up the modern common law of evidence are not very old. Most of the ones that apply today date from the mid- to late 18th century at the earliest, when lawyers began to involve themselves in ordinary criminal trials - which therefore became more adversarial - and when law reporting began to become much more common - thus increasing awareness of judicial rulings on points of evidence law. Another reason for the unique approach of the common law to evidence is that since the early 13th century most trials at common law were by jury, and over time jurors ceased to be quasi-witnesses who swore to the truth of what they knew and became judges of the facts presented before them. So decisions had to be made about what facts they could hear. This of course raises the question of what effect the decline of the jury has had on the law of evidence, and what effect it *should* have.

Most of the material that we cover in this course deals with the rules that determine admissibility. But some of it is concerned with the equally fundamental – and logically prior – question of how facts gathered by lawyers and police before trial become evidence at trial, and the further question of how the trier of fact decides which items of evidence become, in turn, *the* facts that form the basis of the trier’s decision and the foundation for appellate review.

Evidence is, in short, a fascinating, if occasionally frustrating, subject. Specifically, the objectives of this course are:

1. To introduce you to basic concepts in the law of evidence, including materiality, relevance, probative value and the exclusionary principle.
2. To examine the impact of statutory law and the Charter on the primarily common law of evidence, and the historical, political and social context in which the rules of evidence are applied.
3. To examine the respective roles of fact-gathering, advocacy and the rules of evidence in the trial process from pre-trial matters through to appellate hearings.
4. To consider and discuss issues of professional responsibility and ethics in the context of the trial process.

5. To enable you to analyze and resolve the sorts of problems that arise in practice and that may be characterized as “evidence problems.”

COURSE CONTENT:

This is described in the course outline (syllabus).

METHODOLOGY:

Both lecture and discussion methods will be used. **Students are expected to:**

1. Have read the assigned materials prior to class;
2. Be able to *identify* and state the *issues* presented by the assigned materials; and
3. Participate in class discussion of the assigned materials. The purpose of discussion is to develop an understanding of the issues presented by the materials; to develop the student’s ability to analyze, synthesize, and present legal material; and to enable the instructor to gain a sense of the student’s understanding of the materials and achievement of the objectives referred to above.

CLASSROOM CLIMATE:

The law of evidence involves cases and raises issues that are serious and the facts of these cases can be disturbing. This is partly what makes evidence both interesting and challenging, but it can also have a very personal impact, particularly on those among us who have been affected by crime or the criminal justice system in some way. In order to have the sort of thoughtful discussions of these issues that is critical to a university setting, an inclusive and respectful classroom environment is essential. To ensure that all class members feel welcomed and equally able to contribute to such discussions, explaining our own views and being open to the views of others, we must all endeavor to be respectful in our language, our examples, and how we engage with each other.

For a thoughtful perspective on how this should proceed, see Susan Estrich, “Teaching Rape Law,” 102 *Yale L.J.* 508 (1992-93) (also available on HeinOnline).

EVALUATION:

1. Final Examination..... [100% or 60%]
 - Currently scheduled for Thursday, December 8th, at 9 a.m.
 - If a student chooses to write the optional paper, the final examination will

be worth 60% of the final mark.

2. Optional Written Assignment.....[40%]

- Due Friday, Dec. 2nd, at 3:30 p.m. in the front office.
- Students who opt for the written assignment will write the same final exam as the students who do not. This exam will, however, be worth only 60% of the final grade.

The final examination will be open book (*i.e.*, students may bring in the required text, any relevant statutes, and any instructor handouts and student-prepared notes, but nothing else).

The Optional Written Assignment

Students have the **option** of writing a research paper on a question related to the law of evidence. The topic must be discussed with, and approved by, the professor. Although it is *strongly* recommended that students discuss a potential paper with the professor as early in the term as possible, if a student decides to write the optional written assignment, this decision must be communicated to the professor by no later than Friday, Sept. 30th. That is, if a student does not communicate the decision to write this optional assignment by this date, the final exam will count for 100% of the student’s final grade.

Once you have “opted in” for the optional written assignment, in the absence of extraordinary circumstances, **you are not permitted to “opt out”**. Students should speak with the professor or the associate dean as soon as possible if such circumstances arise.

Rationale: This assignment offers you an opportunity to investigate and analyze an issue in the law of evidence that is of interest to you and to engage with the scholarly study of the law of evidence. In addition to offering this opportunity, this assignment might appeal to those who feel that their writing skills are superior to their exam-taking skills and therefore wish to substantially shift grading weight away from the final exam; those students who want to have a substantial piece of writing in their dossier for the purposes of law firm and clerkship applications; and those students with an academic interest in the law.

The paper must be at least 15 and a maximum of 20 pages, and both of these limits must be observed. (Note: a “page” is 8.5 x 11 inch paper, 1 inch margins, 12 point font, Times New Roman; students who format their paper differently may be asked to submit an electronic copy of the paper to the main office to confirm compliance.)

The paper is due at **3:30pm in the front office on Friday, Dec. 2nd**. A late penalty of one letter grade per day (*e.g.*, a B+ will be reduced to a B) will be assessed unless the student has received **permission in advance** from the professor to hand the written assignment in late. Such permission will be given only in extraordinary circumstances.

The expectation is that an optional paper will carefully consider the social or policy context in which the case or issue is situated as well as the legal context, and will demonstrate a critical understanding of the principles and theories underlying the issue. The paper should also engage well with both the relevant jurisprudence and secondary literature.

The Calculation of Grades

The Law Faculty uses the following marking scheme to determine your final letter grade. The “narrative description” column reflects a rough general consensus among faculty members in regard to assessing student performance and will guide the grading in this course:

Letter Grade	Grade Point Value	Percentage Value	Narrative Description	
A+	9	90-100%	Exceptional	Grades in this range are normally achieved by a minority of students. These grades indicate a student who is self-initiating, exceeds expectation, and has an insightful grasp of subject matter.
A	8	85-89%	Outstanding	
A-	7	80-84%	Excellent	
B+	6	75-79%	Very Good	Grades in this range are normally achieved by the largest number of students. These grades indicate a good grasp of subject matter or excellent grasp in one area balanced with satisfactory grasp in the other area.
B	5	70-74%	Good	
B-	4	65-69%	Solid	
C+	3	60-64%	Satisfactory	These grades indicate a satisfactory performance and knowledge of subject matter.
C	2	55-59%	Minimally Satisfactory	
D	1	50-54%	Marginal	A student receiving this grade demonstrates a superficial grasp of subject matter.
F	0	49 and below	Unsatisfactory	

OTHER IMPORTANT NOTES:

Regulations:

University and Faculty of Law regulations governing academic matters are available online at <http://web.uvic.ca/calendar2008>). The UVic Undergraduate Academic Regulations (<http://web.uvic.ca/calendar2008/FACS/UnIn/UARe/PoAcl.html>) contain the University's expectations about attendance and assignments. Academic Regulations specific to the Faculty of Law are in the Calendar and can be found on line at <http://web.uvic.ca/calendar2008/FACS/FoLa/FARe.html>.

Academic Integrity:

Academic integrity is centrally important in the work of faculty and students. Please consult the University Calendar for policies respecting paraphrasing, plagiarism, and cheating. The University policy on academic integrity can be found on the web at: <http://web.uvic.ca/calendar2008/FACS/UnIn/UARe/PoAcl.html>

If you have any concerns or questions, or require clarification, do not hesitate to contact the professor or the associate dean.

Accommodation, Health Concerns, and Counseling Services:

If anything arises that may affect your ability to complete course requirements or meet deadlines, you should contact the associate dean as soon as possible to discuss available supports and possible accommodation. Students should also be aware of the services offered by the University of Victoria Counseling Services (<http://www.coun.uvic.ca/>) as well as UVic Health services (<http://health.uvic.ca/>).

Accommodation for Students with a Disability:

There are support systems, resources, and forms of accommodation available to students with a disability. For information and help, contact the associate dean or the Resource Centre for Students with a Disability (<http://rcsd.uvic.ca/>).

Accommodation of Religious Observances:

The University of Victoria and the Faculty of Law have policies guaranteeing accommodation for those students who are unable to participate in a class or an aspect of the course owing to a religious holiday or observance (<http://web.uvic.ca/calendar2006/GI/GUPo.html>). If you will be missing a class, know that you will be unable to complete an assignment or exam, or otherwise require accommodation on account of a religious holiday or observance, please speak with the professor or the associate dean to work out some satisfactory form of accommodation.