

# A LEGAL PRIMER FOR DOCTORS

---

CARRIE HERMAN  
CROWN ATTORNEY

1

## INTRODUCTION

---

- Who am I?
- What will this talk cover?
  - 1) the types of criminal cases for which a doctor might be required to give testimony
  - 2) distinctions between eyewitness testimony and expert testimony
  - 3) how to gather information after receiving a subpoena, in order to prepare for trial
  - 4) basic courtroom procedure
  - 5) the types of questions asked during direct examination and cross-examination.

2

## INTRODUCTION

---

- Legal topics we will not be covering today:
  - Negligence and the standard of care
  - Independent medical exams for personal injury cases
  - Interacting with police officers in the ER
  - Patient confidentiality

3

## DISCLAIMER: LEGAL INFORMATION, NOT LEGAL ADVICE

---

- Advice is tailored to the individual person's circumstances
- Advice arises out of a privileged lawyer-client relationship
- Information is of a general nature and is for educational purposes

This presentation does not constitute advice.

4

## EXAMPLES

Legal Information	Legal Advice
<p>Legal definitions: what the words mean</p> <p>Matrimonial property actions are civil claims that will divide the property obtained during a marriage between divorcing spouses.</p>	<p>Legal interpretations: how the statutes and case law apply in a specific case</p> <p>When we go over your list of assets I can explain which would be considered matrimonial property and which would not.</p>
<p>Procedural definitions, such as who the people are in court and what steps take place</p> <p>There are different reasons why you, and/or the other party may want to adjourn the application. Some of these are...</p>	<p>Procedural recommendations, such as what type of application to make or which level of court to use</p> <p>At the next court appearance we should ask for an adjournment because...</p>
<p>How to find legislation, court rules and cases, as well as other online and print resources or workshops that explain the law</p> <p>This booklet explains the guidelines for child support.</p>	<p>Research of legislation, court rules and cases; applying the law to the facts of a given situation</p> <p>There are a number of cases that would support your claim of \$X for damages for personal injuries.</p>
<p>Providing samples of court forms and instructions; telling you if required sections of a form have been filled out</p> <p>I have marked the three places on this form where you have not yet filled in the required information.</p>	<p>Filling out forms or telling you to put in a form, e.g. specific people against whom to file pleadings or types or amount of damages to seek</p> <p>In this section of the form we will ask for...</p>

5

## INTRODUCTION overview

- 1. What does a Crown Attorney do?**
- 2. Fact Witness or Expert Witness?**
- 3. The Subpoena**
- 4. The Day of Trial**
- 5. The Direct Examination**
- 6. The Cross Examination**
- 7. Helpful Information**

6

## INTRODUCTION

### In-depth overview

---

#### 1. What does a Crown Attorney do?

- a) Description of the role
- b) Contents of a crown file
- c) Possible outcomes
- d) Duties to the public
- e) Goals
- f) Essential elements of an offence
- g) Common offences which might require a doctor's testimony

#### 2. Fact witness or Expert witness?

- a) The basics
- b) Distinctions

- c) Special steps for expert witnesses

#### 3. The Subpoena

- a) The basics
- b) What to do when receiving a subpoena?
- c) Information contained in a subpoena
- d) What to do after receiving a subpoena?
- e) Questions to ask the crown
- f) Special issues to raise at your meeting

#### 4. The day of trial

- a) Before the trial begins
- b) Who will be present?

- c) What will happen in the courtroom?

- d) What to do, what to expect

#### 5. The Direct Examination

- a) The basics
- b) How to respond
- c) Demonstration of a direct examination

#### 6. The Cross Examination

- a) The basics
- b) Demonstrations of a cross-examination
- c) How to respond

#### 7. Helpful information

7

## 1. WHAT DOES A CROWN ATTORNEY DO?

### (a) description of the role

---

- Handles the prosecution of criminal files in provincial and supreme court
- A crown attorney file will be generated when a police investigation leads to a person being charged criminally
- Crown's involvement begins when police investigation is complete or nearly complete

8

## 1. WHAT DOES A CROWN ATTORNEY DO? (b) contents of a crown file

---

- Crown receives the complete investigation file from the police
- Complete investigation file contains:
  - the “Information” or “Indictment” sworn by the officer
  - the criminal charge
  - name and identifying details of the person who is charged
  - a synopsis of allegations
  - a list of complainants and witnesses

9

## 1. WHAT DOES A CROWN ATTORNEY DO? (b) contents of a crown file, continued

---

- Investigative file contains:
- statements from complainants and witnesses
  - photos and videos
  - list of officers involved
  - expert reports, if requested

10

## 1. WHAT DOES A CROWN ATTORNEY DO?

### (c) possible outcomes

---

- Crown will be present in court conduct the prosecution from
- Every prosecution ends one of three ways:
  1. Guilty plea;
  2. Termination or withdrawal;
  3. Trial

11

## 1. WHAT DOES A CROWN ATTORNEY DO?

### (d) duties to the public

---

- Represents the public interest – NOT the complainant
- Will only proceed where there is a reasonable prospect of conviction
- Held to the highest ethical standards
- Presents the best available evidence
- Does not have a stake in the outcome

12

## 1. WHAT DOES A CROWN ATTORNEY DO? (e) goals

---

- The goal is to offer reliable and credible evidence to the court
- Promote faith in the administration of justice
- Prove all “essential elements” of the offence as alleged

13

## 1. WHAT DOES A CROWN ATTORNEY DO? (f) “essential elements”

---

- The sections of the *Criminal Code of Canada* describe the criminal offences
- Each offence has basic components or “essential elements” of the act
- Crown must prove every component beyond a reasonable doubt

14

## 1. WHAT DOES A CROWN ATTORNEY DO? (f) “essential elements” - example

---

### *Criminal Code of Canada*

#### **Section 267(a) - Assault with a Weapon or Causing Bodily Harm**

Every one who, in committing an assault,

(a) carries, uses, or threatens to use a weapon or an imitation thereof, or

(b) causes bodily harm to the complainant,

is guilty of an ...offence [.]

15

## 1. WHAT DOES A CROWN ATTORNEY DO? (f) “essential elements” - example

---

### *Criminal Code of Canada*

#### **Section 267(a) - Assault with a Weapon or Causing Bodily Harm**

Every one who, in committing an **assault**,

(a) carries, uses, or threatens to use a **weapon** or an imitation thereof, or

(b) causes **bodily harm** to the complainant,

is guilty of an ... offence [.]

16

## 1. WHAT DOES A CROWN ATTORNEY DO? (e) “essential elements” – example - in depth

---

**Assault** – “the application of non-consensual force”

**Weapon** – “any thing used, designed to be used or intended for use in causing death or injury to any person, or for the purpose of threatening or intimidating any person.” (Will include the obvious, such as firearms, brass knuckles, or knives, but will also include any ordinary object if used as a weapon)

**Bodily harm** – any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature

17

## 1. WHAT DOES A CROWN ATTORNEY DO? (f) “essential elements” – example – putting it all together

---

Therefore, to prove assault with a weapon and/or causing bodily harm,  
Crown must prove:

- which involved a non-consensual application of force
- which involved an item designed to be used as a weapon or actually used as a weapon and/or
- which resulted in harm that is more than transient or trifling.

A doctor’s opinion is often needed to explain the severity of the harm.

18

## 1. WHAT DOES A CROWN ATTORNEY DO?

### (g) common offences which might require a doctor's testimony

---

- 267(a) or (b) - assault with a weapon or causing bodily harm
- 268- aggravated assault
- 271- sexual assault
- 273- aggravated sexual assault
- 320.14 – impaired driving
- 239- attempt to commit murder

Section numbers current as of March 14 2019

19

## 2. FACT WITNESS OR EXPERT WITNESS?

### (a) the basics

---

- Ordinarily, witnesses can only testify on what they know first-hand
- Opinions and speculations are not normally allowed
- Expert opinions are the exception
- Some trials require expert opinion evidence:
  - DNA analysis
  - Firearms testing and ballistics
  - Forensic toxicology
  - Mechanism and severity of an injury
- “Experts” have training, experience, and expertise in a particular area
- This allows them to offer opinions in their testimony, to assist in deciding the issues of the case

20

## 2. FACT WITNESS OR EXPERT WITNESS? (b) distinction

---

- Sometimes, the line between fact and opinion is unclear
- A diagnosis is technically an opinion, though an obvious one will sound like a fact
- Medical doctors might be subpoenaed as “fact witnesses” or as an “expert witnesses”

<b>FACT:</b>	<b>OPINION/DIAGNOSIS:</b>
“The patient came to the emergency room to be treated for a laceration to his arm.”	“The patient’s clinical history, neurological findings, and CT results led to a diagnosis of a traumatic brain injury.”

21

## 2. FACT WITNESS OR EXPERT WITNESS? (c) special steps for expert witnesses

---

- If the Crown intends to rely on an expert to offer opinion evidence at trial, the Crown has a duty to notify the accused and defence at least 30 days in advance of trial
- In the notice, the Crown must:
  - identify the proposed expert
  - give a statement of his or her qualifications as an expert,
  - describe the proposed witnesses' area of expertise
  - Explain what the expected testimony will be
  - Provide a copy of the experts CV

22

### 3. THE SUBPOENA

#### (a) the basics

---

- A subpoena court order compelling a witness's appearance
- Attendance is a mandatory public duty
- Risk of an arrest warrant if witness does not attend

23

### 3. THE SUBPOENA

#### (b) what to do when receiving a subpoena?

---

- Be co-operative with the sheriff
- If accepting your own subpoena, identify yourself (Sheriff may ask to see photo ID)
- If accepting on behalf of someone else, explain how you intend to give it to the recipient
- Make sure that you do!
- Ask for sheriff's contact information

24

### 3. THE SUBPOENA

#### (c) information contained in a subpoena

---

- Title of document: “Subpoena to a Witness”
- Your name
- The name of the accused person
- The court location
- Date and time of court appearance
- The criminal code section number

25

### 3. THE SUBPOENA

#### (c) information contained in a subpoena, continued

---

- Purpose of appearance, such as:
  - Trial in provincial court
  - Trial in a superior court
  - “Preliminary inquiry” in provincial court (not a trial, but very similar)

26

**PROCESSEUR, COURTIER, RÉGÉNÉRATEUR ET AGENT D'ASSURANCE**  
**COÛTEUR CRIMINEL**  
**LES PROSECUTEURS ET PROCUREURS GÉNÉRAUX**

**COÛTEUR**  
 Procureur de la Cour Supérieure et de la Cour  
 Procureur de la Cour Supérieure et de la Cour

**Subpoena to a Witness**  
**Assignation à un Témoin**

To: **DR. CHRISTIAN WYATT**  
 of **186 RIVERDALE DRIVE**  
 Address: **THOMAS PRIGONS**  
 Has been charged for: **HE DID COMMIT A BREACH OF SECTION 261(4) OF THE CRIMINAL CODE**

Trial Date: **Wednesday**  
 At: **10:00 AM** on **April 10, 2019**  
 At: **10:00 AM** on **Wednesday**  
 111 Water Street, Toronto, Ontario, M5E 1B5

Signed at: **ST JOHN'S** File **19-14275**  
 By: **Natalie Mitchell**  
 My Commission Expires: **March 31, 2019**

**AFFIDAVIT OF SERVICE**  
 I, **NATALIE MITCHELL**  
 a process server of the **ST. JOHN'S** Office  
 do hereby certify that I have served the within named party a true copy of the within subpoena on the within named party at the within address on the within date.

**AFFIDAVIT DE SIGNIFICATION**  
 Je soussigné(e) certifie par le présent que j'ai servi(e) au témoin nommé dans le présent avis de comparution une copie vraie de la citation en témoignage au témoin nommé dans le présent avis de comparution au domicile du témoin nommé dans le présent avis de comparution le jour et à l'heure indiqués dans le présent avis de comparution.

27

### 3. THE SUBPOENA (c) information contained in subpoena, continued

Curious, and want to look up your section number?

Go to Justice Laws Canada

“Criminal Code of Canada”

<<https://laws.justice.gc.ca/eng/acts/C-46/page-259.html>>

28

### 3.THE SUBPOENA

#### (d) what to do after receiving a subpoena?

---

- Alert your supervisor at work and arrange for coverage
- Cancel appointments, arrange child care, transportation, etc.
- Call the crown attorney's office in your area
- Find the name of the complainant
- Review medical records thoroughly
- Request a meeting with the Crown prior to trial

29

### 3.THE SUBPOENA

#### (e) questions for the Crown at your meeting

---

- Will I be needed as a FACT WITNESS or EXPERT WITNESS?
- Do you need a copy of my CV? When?
- Who is the complainant? (the person you know as the patient)
- Do you have the patient's consent to view the medical file?
- What evidence are you hoping I can offer?
- Does defence counsel consent to me being qualified as an expert?

30

### 3.THE SUBPOENA

#### (e) questions for the Crown at your meeting, continued

---

- Is this trial set for multiple days?
- Which day(s) will I be needed?
- Morning or afternoon?
- How many people will testify ahead of me?
- Would you like me to bring anything with me?
- What time would you like me to arrive?
- Are you expecting any delays in starting? (pretrial issues, Charter challenges, unavailability of a/v equipment)

31

### 3.THE SUBPOENA

#### (f) special issues to raise with the Crown at your meeting

---

- Let the Crown know if...
  - You require a translator or sign language interpreter
  - You would prefer to testify in French
  - You are too frightened of the accused to be in the same room
  - You want a support person there with you
  - You will be out of the area during the trial

32

### 3. THE SUBPOENA

#### (f) special issues to raise with the Crown at your meeting, continued

Problem	Solution
translator or sign language interpreter needed, or you would prefer to testify in French	Crown can request an interpreter to be hired to assist your testimony
You are too frightened of the accused to be in the same room	Crown can ask the court to permit you to testify with a "testimonial aid", such as a partition between you and the accused, or via a CCTV in another room, or with a support person present.
You will be out of the area during the trial	Crown will assess whether you are required to attend in person. If not, he or she can request that you testify remotely via videolink from a court in your area.

33

### 4. THE DAY OF TRIAL:

#### (a) before the trial begins

- Dress professionally
- Arrive early
- Go through the security checkpoint
- Check the docket for your courtroom (can be done in advance online)
- Choose a visible place to wait **outside** the courtroom
- Do not discuss trial evidence with any other witnesses
- Review your notes

34

## 4. THE DAY OF TRIAL: (b) who will be present?

---

- the accused person who is standing trial
- the accused person's defence lawyer
- the crown
- the judge (+/- jury)
- the court clerk
- the investigating police officer
- the officers who assisted
- civilian witnesses, such as yourself
- the complainant
- possibly members of the media

35

## 4. THE DAY OF TRIAL (c) what will happen in the courtroom?

---

- **Crown presents its case first**
  1. Direct examination of first crown witness
  2. Cross examination of first crown witness (by defence lawyer)
  3. Direct and cross examination of all subsequent crown witnesses -- steps 1 and 2 repeat
  4. Crown concludes its evidence and "closes" its case.
- **Defence presents its case second**
  1. Steps 1-4 repeat for defence witnesses with cross-examination by Crown.
- **Both sides present their submissions and ask the judge for the decision they want.**
- **Trial concludes. Judge makes a ruling of guilty or not guilty.**

36

## 4. THE DAY OF TRIAL

### (d) what to do, what to expect

---

1. You will be required to wait outside the courtroom until it's your turn to testify
2. When it's your turn, you'll be invited in by a sheriff or you'll be paged to the courtroom
3. Enter and acknowledge the judge politely and silently.
4. You'll be directed to the witness box.
5. Enter and stand quietly.
6. A clerk will ask you to swear or affirm to tell the truth.
6. Introduce yourself when asked, and wait for the Crown's questions to begin.

37

## 5. THE DIRECT EXAMINATION

### (a) the basics

---

#### Goals:

- to facilitate the witness telling his or her story from memory in his or her own words
- to elicit reliable evidence that supports the Crown's theory of the case
- to tender exhibits into evidence through people who are familiar with them

38

## 5. THE DIRECT EXAMINATION

### (a) the basics, continued

---

- Examination consists of open-ended questions
- Questions posed are non-leading; they cannot suggest the correct answer
- Non-adversarial process
- Memory can be refreshed if needed

39

## 5. THE DIRECT EXAMINATION

### (b) how to respond

---

- Remember– the judge doesn't know anything yet!
- Try to tell your story clearly
- Organize it in a way that makes sense to you
- Make sure you understand the question that's been asked before answering it
- Ask for clarification or repetition when needed

40

## 5. THE DIRECT EXAMINATION

### (b) How to respond, continued

---

- If you don't know or don't remember, say so. Don't guess or speculate
- Answer the question that has been asked and then wait for a follow-up
- If offered an exhibit to review, take your time to look carefully before agreeing

41

## 5. THE DIRECT EXAMINATION

### (c) demonstration of a direct examination

---

#### Scenario:

The complainant, Daniel Latimer, presented to the emergency room upon being hit in the eye with a beer bottle in an allegedly unprovoked attack. A police investigation followed and the accused, Jonathan Parsons, has been charged under sections 267(a) (assault with a weapon) and 267(b) (assault causing bodily harm). At the trial, the Crown hopes to demonstrate that injury to Mr. Latimer was caused by the weapon (the beer bottle) and that it was serious enough to constitute bodily harm. The Crown now calls the treating emergency physician, Dr. Thomas Wyatt, as a witness.

42

## 6.THE CROSS EXAMINATION

### (a) the basics

---

- Goals:
  - to test the witness's story
  - to expose weaknesses which undermine the witness's reliability or credibility
  - to demonstrate that alternate explanations exist
  - to help raise the "reasonable doubt"

43

## 6.THE CROSS EXAMINATION

### (a) the basics, continued

---

- Opposite of direct examination
- Questions are posed by defence counsel to the Crown witness (or vice versa)
- Process is adversarial in nature
- Leading questions are permitted and expected
- Examiner wants to control the witness's answers
- Questions are usually narrow and phrased as "yes" or "no" questions
- Technique often consists of making proposals to bolster alternate theories or explanations

44

## 6.THE CROSS EXAMINATION

### (b) demonstration of a cross examination- Example 1

---

#### Scenario

Dr.Thomas Wyatt has finished answering the Crown's direct examination questions.

Defence counsel begins a cross-examination to see whether the story is as straightforward as it seems.

We will now see a polite cross-examination.

45

## 6.THE CROSS EXAMINATION

### (b) demonstration of a cross examination- Example 2

---

#### Scenario

Dr.Thomas Wyatt has finished answering the Crown's direct examination questions.

Defence counsel begins a cross-examination to see whether the story is as straightforward as it seems, and to suggest Dr.Wyatt's version cannot be trusted.

We will now see an aggressive cross-examination.

46

## 6.THE CROSS EXAMINATION

### (c) how to respond

---

- Don't worry about loyalty to the Crown
- Your responsibility is always to tell the truth, no matter who is asking the questions
- Listen to the question that has been asked
- Make sure you understand the question fully before you answer
- Give an accurate and complete answer but don't deviate from what's been asked unless you need to offer a correction or qualifier

47

## 6.THE CROSS EXAMINATION

### (c) how to respond, continued

---

- Questions might be phrased as having "yes" or "no" answers, but remember the usefulness of "but"
- It's okay to say "I don't know" or "I don't remember" if you genuinely don't
- Do not guess or speculate
- If a question is uncomfortable or embarrassing, you must still answer it unless there is an objection

48

## 6. THE CROSS EXAMINATION

### (c) how to respond, continued

---

- Beware of false assumptions hidden in questions
- If inaccuracies are built into a question, correct them
- If you agree with what defence counsel proposes, feel free to say so (Be fair and be truthful)
- Don't take the process personally
- Stay calm and be polite, no matter what

49

## 7. HELPFUL INFORMATION

### find your local crown's office

---

Toronto ON	(416) 327-5990
Montreal QC	(514) 872-2554
Halifax NS	(902) 424-8734
St. John's NL	(709) 729 2897
Charlottetown PEI	(902) 368-4595
Saint John NB	(506)-658-2580
Regina SK	(306) 787 5444
Calgary AB	(403) 297 8444

Current as of March 2019

50

## HELPFUL INFORMATION

### online resources

---

1. **“Justice Laws Website”**: access to all federal legislation in Canada in both English and French

<<https://laws-lois.justice.gc.ca/eng/>>

51

## HELPFUL INFORMATION

### online resources

---

2. **Canadian Legal Information Institute (or “CANLII”)** : access to Canadian legislation and regulations, both provincial and federal. Also contains reported court cases interpreting and applying Canadian legislation. Can search by jurisdiction, level of court, keyword phrase, and year.

<<https://www.canlii.org/en/>>

52

## HELPFUL INFORMATION

### online resources

---

#### 3. Videos on courtroom questioning

##### **Direct examination**

<http://petersankoff.com/16-rules-of-direct-examination/>

##### **Cross Examination**

<http://petersankoff.com/18-cross-examination-basics/>

##### **Experts and Opinions**

<http://petersankoff.com/category/evidence-opinion-and-experts>

Note: I relied on these videos when developing the following sections in today's presentation: "Direct examination: The basics", "Cross-examination: The basics" and "Fact or Expert? The basics"

53

## HELPFUL INFORMATION

### online resources

---

#### 4. CMPA Medical-Legal Handbook

[https://www.cmpa-acpm.ca/static-assets/pdf/advice-and-publications/handbooks/com\\_16\\_MLH\\_for\\_physicians-e.pdf](https://www.cmpa-acpm.ca/static-assets/pdf/advice-and-publications/handbooks/com_16_MLH_for_physicians-e.pdf)

54

## RESOURCES CONSULTED

---

- David Watt “Watt’s Manual of Criminal Evidence” Thomson Reuters 2018
- Finlay et al. “Witness Preparation: A Practical Guide” The Cartwright Group Ltd. 2010
- *Criminal Code of Canada* (R.S.C., 1985, c. C-46)
- Peter Sankoff <<http://petersankoff.com/>> videos on Direct Examination, Cross Examination, and Opinions and Experts