Chapter 4

Using mock *voir dires* to assess the Law of Evidence

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Introduction

Evidence is my favourite! This is what I tell the students at the start of my Law of Evidence course at Dublin City University (DCU) each year. And it is true. I really enjoy teaching this course, above Criminal Law, Constitutional Law, Moot Court, or any of the others that I have taught over the years. There is something different about the Law of Evidence. It is fascinating, engaging, and very real. Because this course focuses on the rules of engagement, both in the pre-trial investigative stage of the criminal process and at trial, it exposes in a very concrete way the policy tensions which exist within the law, as well as the real people at the heart of legal disputes.

To illustrate this one could think about the law on improperly obtained evidence: the police have collected strong evidence against an accused, but they did so in a manner which breached their rights. The question of admissibility arises. The accused may be guilty, the victim needs to see justice done, but the police have breached a person's rights, and by admitting the evidence, the court may be compounding that breach, though a refusal to admit it might lead to the collapse of the case. The perspectives of the central actors in the issue are clearly apparent, and the policy tensions crystallised. The opportunity for students to consider the issue from all angles is wonderful. Taking a step back, students are also exposed to the impact of history and politics on the law, as the applicable rules in any given jurisdiction on an issue such as this are likely to be shaped by a variety of factors, including its legal culture and

heritage, as well as past experiences, both legal and political, such as, for example, high profile miscarriages of justice.

Highlighting ways in which traditional legal education falls short, Maranville, an expert on legal education at the University of Washington School of Law, has suggested that there is often a failure to:

> provide the context for doctrinal learning that will both engage students and help them learn more effectively. We focus on heavily edited appellate cases without linking those cases to the people, institutions, and lawyering tasks involved in the disputes. The result is that our students quickly forget much of what we teach them and often cannot apply in practice the information that they do retain (Maranville 2001, p. 52).

While the Law of Evidence, like other courses in a common law system, is, of course, centred on relevant legislation and the decisions of appellate courts, by its very nature it is closer to the people, institutions and lawyering tasks involved in disputes than more substantive courses such as Criminal Law, Contract Law, or even Family Law. In examining appellate decisions in this course, we are delving down through them into the actual *evidence* given at first instance: what it is, how it was gathered, whether or not it should have been admitted, the weight that should have been given to it, any warnings that the jury ought to have been given about it. This course is deeply concerned with the people affected by the criminal process (specifically accused persons and victims of crime), but also with the institutions (the police, prosecutors, the judiciary, and the state), and the lawyering tasks involved (cross-examination of the accused as a witness, for example, or the presentation of similar fact evidence). Furthermore, the legal rules that we examine have often been developed over many years on the basis of judicial experience of human shortcomings, such as, for example, the ability to observe, understand, or remember. Perhaps this is why I find the Law of Evidence so interesting – it gives life to the

substance of the law, which is covered in other courses, and it requires both teacher and learner to engage in a very direct manner with the experiences of the actual people whose real lives have caused them to become characters in the appellate case-law.

To make matters even more interesting, and to bring students even closer to the people, institutions and lawyering tasks involved in disputes, I have, since 2012, used a mock *voir dire* to teach and assess the Law of Evidence. The value of experiential simulations, such as moot courts or mock trials, in legal education has long been recognised (Feinman 1995; Hernandez 1998; Knerr *et al* 2001; Daly & Higgins 2011). Maranville (2001, p.74). has suggested that the integration of experiential education into the doctrinal legal curriculum can "play an important role in generating passion among students and enriching their learning by placing it in context" Discussing her use of mock trials in an advanced criminology class, Shepelak considered that four major educational objectives could be achieved:

> Students can learn substantive material in a broad, applied learning framework, can apply important critical thinking skills, can appreciate the issues facing the criminal justice system, and can enjoy the material as it is brought to life (Shepelak 1996, p. 398).

The value of experiential learning methods to students' broader skillset has also been recognised, with Turner, Bone and Ashton stating that 'experiential-based teaching and learning methods can meet the needs/views of both those advocating an increasingly employability centred law education and those pursuing a liberal legal education' (Turner, Bone and Ashton 2018, p. 4). Twining observes that there is general consensus, in relation to initial legal education, that 'abilities to read, write, analyse, listen, speak, argue (and possibly count) are key elements of graduateness' (Twining 2018, p. 245). I believe that participation in an experiential simulation such as the mock *voir dire* within my Evidence course enhances

these general skills as well as assisting students in comprehending, understanding, remembering and applying the law of evidence itself.

Mock *voir dire* assessment: the logistics

The Law of Evidence course at DCU is an optional 5-credit, one-semester course for final (third) year students on the BCL (Law and Society) degree, which is a pure law degree, and the BA in Economics, Politics and Law (EPL). These degrees are academic undergraduate degrees, not vocational qualifications for practice. While some of the students in the class may go on to practice, many will not. The mock *voir dire*, which requires both a group written memorial and an individual oral submission, accounts for 50% of the overall grade for this course. The other 50% is based on a 2-hour end-of-semester examination.

> While traditional moot courts involve legal submissions before imagined appellate courts, and mock trials involve the examination-in-chief and cross-examination of "witnesses" before an imagined trial court, the assessment method which I employ, the mock *voir dire*, sits somewhere between the two. It involves legal submissions on the admissibility of a particular item, or items, of evidence before the 'trial judge' at first instance.

Students form their own groups of three for the mock *voir dire*. While numbers vary, given the optional nature of this course, there are usually approximately twenty groups. Each group undertakes the same problem question. Once the question has been revealed these groups can choose, on a first come first served basis, whether they wish to act for the prosecution or the defence. Allowing the students to choose gives them more ownership of the arguments on their side. The written memorial (2,000-2,500 words) is awarded a group mark, which is worth 25% of the course total. Students submit one copy of this memorial to me for marking, and one is provided to the opposing team to allow them to prepare for the upcoming oral hearings. The

oral hearings are held in the grand surroundings of the DCU Moot Courtroom, so as to enhance the real-life feel and formality of the occasion. Though not required to do so, students often dress appropriately for the occasion, which also adds to the atmosphere and experience. I sit as the sole judge, asking questions throughout each oral submission. Submissions of five minutes' duration are initially made by each student, with an additional two minutes each for rebuttal arguments at the end. The oral submissions, marked individually, account for another 25% of the overall total course mark. While I sit in judgment, and assessment, alone, each oral hearing is recorded and made available to the course external examiner for verification of the marks awarded.

Designing the problem question

Designing the mock *voir dire* problem question is a tricky task. There needs to be fodder for argumentation enough to sustain three team members, and the issues need to be finely balanced such that there are arguments to be made on both sides, and one side is not clearly advantaged over the other. Gaubatz has noted, in the context of moot courts, the importance of using realistic scenarios, suggesting that those who design problem questions 'seem to delight in the hypothetical – ignoring the real cases occurring daily in nearby lawyers' offices' (Gaubatz 1981, p. 88). While I do not base the mock *voir dire* entirely on a real case, as has been done in other assessments at Melbourne Law School for example (see Chapter 3), I strive to provide students with realistic problem questions, grounded in existing case-law but exposing an as-yet-undetermined legal issue or an arguable fact scenario. For my undergraduate students, many of whom will not go on to practice law, let alone criminal law, this approach is less complex and therefore, overall, more effective. Within the problem pack I provide both a written outline of the problem question, and some evidential materials. I have, in the past, for example, provided a search warrant (including a misspelled address and incorrect designation

of the issuing authority) and transcripts from police interviews with the accused (including police statements which could arguably amount to inducements, poor explanations of inference-drawing provisions, and ambiguous suspect statements). One could also include photographs of physical evidence, such as clothing, for example, or a still photo said to be taken from relevant CCTV footage. Even if not wholly relevant to the legal arguments at the heart of the problem question, the provision of extrinsic material such as this adds to the real-life feel of the exercise.

While the design of the problem question is time-consuming, it can be quite enjoyable too. On occasion I have gotten rather carried away with myself, adding layers of background detail, creating characters with real depth, indulging my inner best-selling novelist! I have often had to pare things back a little, in order to clarify the fundamental issues. Having said that, some depth of detail, and indeed some red herrings, add to both the real-life feel for students and the test of their ability to find the central issues, prioritise the legal grounds of contestation, and formulate a clear argument. Maranville notes the balance that needs to be achieved between providing detail so as to enhance the authenticity of the problem question, and distilling the issues so as to make the simulation workable:

> Typically there is a trade-off between detail and manageability, in the form of narrowing the issues and the complexity of the simulation. Detail can play an important role in creating a sense of reality that will engage the students and provide a useful level of lawyering-task context (Maranville 2001, p. 68).

The thematic focus of my problem questions to date have been grounded in my own area of research expertise, with an emphasis on the pre-trial investigative stage of the criminal process and the courtroom consequences thereof. The mock *voir dires* have, for example, centred on inculpatory statements made by a detained suspect who had, arguably, been denied access to legal advice; extensions of detention time made by an arguably biased garda (police officer in

Ireland); the potential drawing of adverse inferences at trial from the alleged failure of a detained suspect to account for certain items in their possession under garda questioning, and so on. On one particularly memorable occasion, in 2015, the problem question centred on the potential exclusion of significant evidence of drug production which had been obtained pursuant to an arguably defective search warrant. Since 1990 in Ireland a very strict rule of exclusion was in operation in relation to evidence obtained in breach of constitutional rights. In certain circumstances, this rule would operate to exclude evidence obtained in breach of the constitutional right to the inviolability of the dwelling (Article 40.5 of *Bunreacht na hÉireann*, the Constitution of Ireland) on the basis of a search warrant which had not been properly issued. Exactly one week before the students in my Evidence course were due to argue on either side of the application of this quarter-century old rule, the Supreme Court handed down judgment in *DPP v JC* [2015] IESC 31, overtly overruling 25 years of its own jurisprudence, and altering the exclusionary rule which had existed throughout that time (see further Daly 2015). Despite my strong belief that experiential simulations in legal education are enhanced by problem questions and materials which are as realistic as possible, I made the executive decision on that occasion to ignore the honourable justices of the Irish Supreme Court and the 153,000 words of their combined judgments for the purposes of the Evidence assessment, and to proceed as if the law was as it had been all along!

Benefits and challenges of the mock *Voir Dire* assessment

The mock *voir dire* is a challenging assessment for students. It requires solid understanding of relevant topics in order to spot pertinent issues; high-quality research and preparation; good writing skills for the memorial; strong oratory in order to be persuasive in oral submissions; and, ongoing critical thinking and subject-knowledge in order to respond to 'judicial' enquiries and the arguments of the opposition. Put in those terms it sounds quite daunting! But the

benefits to students from engaging in this exercise are as manifold as the requirements for success. Students gain a deeper knowledge and understanding of the substantive legal issues in the case, as well as an improved ability to remember and apply the relevant law; their research skills are challenged and ultimately enhanced as they must approach the problem question in a different manner to a regular essay; their ability to think critically, to categorise and distinguish cases in order to accentuate their arguments or diminish those of their opponents, is enriched; and their interest in the subject matter is heightened due to a greater sense of investment in the experience of 'their client.' Many of these benefits will be sustained in students beyond the Law of Evidence course, and perhaps even beyond their undergraduate degrees.

Below I discuss a number of specific benefits and challenges posed by the mock *voir dire* assessment, for both students and lecturer alike. Students taking this course in the Spring Semester of 2018/2019 were asked to complete three surveys in the course of the semester, so as to provide insight into the student experience of being assessed by way of mock *voir dire*. Ethical clearance was provided by the DCU Ethics Committee and students were clearly informed that they could take part, or not, in any or all of the three anonymous online surveys without any impact on their course mark. The first survey (S1) was completed early in the semester, after the concept of the mock *voir dire* had been explained to the class. The second survey (S2) was completed following submission of the written memorial, and the third survey (S3) was completed once the oral hearings had concluded and students had received their marks. The response rate on these surveys ranged from a low of 28% (S2) to a high of 58% (S3). It was not possible to track individual students through the assessment process by way of these surveys, which were anonymously completed. Nonetheless, the commentary provided is enlightening and I use it within the discussion below as a qualitative illustration of the issues highlighted, along with my own observations over the years.

Research and preparation

Preparation for the mock *voir dire* has significant benefits for students' research skills. The requirement to submit a written memorial means that students must prepare their arguments clearly in advance of oral submissions. Having opponents exchange memorials brings a realistic feel to the assessment, but also affords students the opportunity to prepare for the arguments which will be made on the other side. This forces students to evaluate their own planned arguments, accentuate those where possible, prepare responses to claims of weakness, and spot the limitations of their opponents' claims. The depth of engagement with opposing arguments required in this exercise differs significantly from more traditional forms of assessment such as essays or examinations.

One student, in the initial survey, considered that the mock *voir dire* 'is a good way to make students grapple with the law and entices them to learn as opposed to just write about it' (S1:Learner (L)8). The distinction between *learning* the law and *just writing about it* is an interesting one. When we set written assignments or traditional examinations for students does it help them to learn the law, or are they merely complying with the requirement to write about it, without any further depth of edification? Certainly, in undertaking the written memorial and preparing for oral submissions in the *voir dire* students grapple with the law in a very real sense. One student reflecting, in the final survey, on the distinction between writing an essay and preparing for the mock *voir dire* said that:

> [B]eing assessed in this way has helped me to understand and get to grips with the relevant law better than simply writing an essay on the subject. Having to be prepared for questions from the judge and rebuttals from the opposition means you have to really understand the issues you are talking about rather than just memorising a chunk of information (S3:L2).

The same student considered that they had learned to '…carry out more in-depth research since we not only had to research our own arguments but also make sure we had covered all relevant research from the opposing counsel's point of view' (S3:L2). The scholarship of Maranville is again instructive here. She observes that:

> [B]y actually performing the lawyering task…the student will engage in the thought processes by which an attorney must use the legal rules and doctrinal knowledge to complete the lawyering task. This…provides a level of lawyering-task context than cannot be obtained any other way (Maranville 2001, p. 59).

In that context, another student felt that the nature of the *voir dire* led to a different research approach, as compared with a more traditional assignment: "I usually back up my information with articles so it was a step out of my comfort zone relying on only legislation and case law. I improved on my research in the relevant law due to the lack of articles" (S2:L10). One of the central benefits of this assessment method, then, is that students engage with primary source materials and really probe those so as to build their own case, and contest that of their opponents.

Oral submissions and answering questions

In advance of the oral *voir dire* submissions, some student unease tends to centre on public speaking in and of itself. However, many are more concerned about being put on the spot in answering questions. In the first survey, students were asked to rate their own competence in a number of skills, including ability to research the relevant law, ability to construct legal argument, ability to give an oral presentation, ability to answer questions during the oral presentation, ability to be persuasive, and so on. They were then asked to elaborate on any expressed lack of confidence in such areas. One student observed that 'in a voir dire context, it involves thinking on your feet and having to problem solve very quickly' and said 'I don't have

a problem with giving presentations as such, it's more the fear of follow up questions or being challenged by other students that leads to my lack of confidence' (S1:L2). Another expressed anxiety about potentially being 'put on the spot and possibly freezing' (S1:L12). By the time that written memorials had been submitted, a quiet sense of confidence had begun to grow in most survey respondents, who said things like 'I am nervous as I would be before any oral presentation but I am ready to go' (S2:L5); 'I am nervous but happy to do it' (S2:L7); and, 'I'm worried but also think it'll be fine with some practice' (S2:L8). Nonetheless, even after writing the memorial, some concern about the questions which might arise during the *voir dire* continued. For example, one student said 'The prospect of answering the questions is what scares me the most purely because I may not be able to answer them sufficiently' (S2:L2).

Students were concerned that their performance on the day of the *voir dire* might hinder their marks. This very insightful concern about the impact of nerves on the day was put forward: 'Those who suffer with public speaking anxiety may do a lot more work for the mock *voir dire* than others but it will not show on the day and nerves may come across as under preparedness (S1:L3). Weighing all of this up another student said 'I think such a form of assessment isn't great for people who aren't good at public speaking or confrontations in general, but I feel the benefit and importance of this assessment outweighs any such negative factor' (S1:L11). Other students were similarly inclined to see the benefits of this type of assessment as outweighing their discomfort with public speaking. One student, who had previously referenced mental health issues and anxiety, said that '…overall, despite my personal fear toward this manner of examination, I do believe it is a very good way of assessing students and despite my hesitation I'm sure I will find it beneficial in the long run' (S1:L16).

In the final survey, following the *voir dire*, a number of students mentioned the ability to think on one's feet as an area of increased confidence. One said 'My ability to respond to arguments of opponents during oral presentation has increased, as I was very happy with how

the rebuttals went and how I thought on my feet'(S3:L11). Others had gained confidence in relation to answering questions: 'I was extremely afraid of answering questions … however, I was calm in answering them and [from] doing the *voir dire*…my confidence has definitely grown in regards to questioning by a judge which will stand to me in my future career choices' (S3:L16).

Acknowledging the real challenge which public speaking presents for some students is the reason that an equal percentage of marks are available in this assessment for the written and oral submissions. The fact that the written mark is a group one presents other challenges (discussed below), but the aim is to allow students who struggle with oral presentations to mitigate this by, hopefully, doing well in the written work. Relatedly, and perhaps even more importantly, the emphasis in the oral submissions is on the students' knowledge of the Law of Evidence and their ability to use the law to substantiate their arguments, rather than any focus on mooting etiquette or performance style. Twining notes that:

[S]ometimes the central learning objectives of [moots, mock trials etc] are undermined by premature vocationalism, as when a major emphasis in mooting is placed on etiquette and correct forms of address rather than on careful preparation and arguing persuasively (Twining 2018, p. 255).

The mock *voir dire* seeks to enhance and then assess a student's substantive knowledge of Evidence law rather than his/her ability to very properly read a case citation, or to frequently intone 'may it please the Court', or to say 'Thank you, Judge, for your very insightful question' in response to my every query! Clearly, a student whose knowledgeable presentation flows well, who makes good eye-contact, and responds well to questions will receive a good mark. However, a student who is full of apparent confidence and style with little case-law, legislation, or legal doctrine to ground their arguments, will not do as well as a nervous student who lacks flair but has a strong handle on the relevant law and draws thereon to make and defend their

his/her claims and to answer questions. In this context one student said 'I liked how we weren't expected to be mooters - it was a lot more relaxed and I actually learned MORE this way, rather than being all stressed in a moot!!!' (S3:L12). On the other hand, another student said 'I still think it was a novel way to examine the topic but if there was [sic] no real marks going for actual advocacy I am not sure how much better it would be then a written assignment [sic]' (S3:L9). While such a view overlooks the many significant benefits of this method of assessment which are outlined within this chapter, it is an important reminder to the lecturer to give clear guidance to students on the fact that advocacy is secondary to knowledge and application of the law in the mock *voir dire*.

Group work

Group work is a perennial challenge for university students (Boud 2001; Chavkin 1994; Weinstein, Morton, Taras and Reznik 2013). Along with concerns about public speaking and answering questions on the spot, group work brought some unease to the surveyed students. This unease seemed particularly acute because of the fact that the Law of Evidence is a final year course, impacting on students' graduating grades. One student, commenting in advance of working on the memorial, said that '…in a final year course where it is extremely result focused I would rather not rely on the work of others' (S1:R6). Responding to the final survey, another said that 'having a group project as part of our final grade in final year [was] quite stressful. I found that the person who is motivated to get the best grade ends up doing most of the work so it almost feels like helping other people get a free grade for minimal work' (S3:L13).

My efforts to circumvent the difficulties sometimes involved in group dynamics by allowing students to arrange their own groups - given that by final year they should know each other well enough to know with whom they wish to work - appear to not necessarily avoid all

difficulties. One student said that 'the fact that people choose their own teams for this subject is simply a matter of who jumps on who to be on their team fast enough...Hence if you don't get to your friends fast enough to make sure you're on a team together, then you are suddenly very stuck and could end up with people who will detriment your grade *[sic)]*' (S3:L15). Another student commented on the potential for the group dynamic to influence the arguments which would be made in the *voir dire*: 'There is the potential for group conflicts which may lead to some ideas or arguments being used that you may not have included if it were an individual assignment, especially if some group members are more vocal than others'(S1:R2).

Part of the real-life nature of the mock *voir dire* assessment is working in a team to discuss and distil the legal issues. I have some sympathy, however, with the challenge posed by group work, and plan to incorporate self and peer assessment of effort and input into the mock *voir dire* in the future, so as to promote equal participation and enhance student satisfaction with group work (Elliott and Higgins 2005).

Conclusion: Make Evidence fun again!

Maranville observed that:

> By integrating experiential education into the doctrinal curriculum, law teachers can play an important role in generating passion among students and enriching their learning by placing it in context (Maranville 2001, p. 74).

While students tend to generally approach the mock *voir dire* assessment with some level of trepidation, given the mix of competencies necessary for success along with concerns around group work and public speaking, one of the most pleasant outcomes from my perspective is that most ultimately enjoy the experience. A number of responses to the third survey bear witness to this. One student said 'I thoroughly enjoyed it, I believe it was very beneficial and of great practical experience. It was the first occasion I have done something like this and hope

more courses would follow suit' (S3:L5). Others said 'I learned a lot from it and actually enjoyed being able to explain my arguments' (S3:L12) and, 'I thought that doing the *voir dire* was a great way to analyse our knowledge of evidence law and I thoroughly enjoyed participating in it' (S3:L16). Another student summed up their experience in the following terms:

> [T]he *voir dire* showed me how to work as a team and think on my feet. I gained valuable critical thinking experience from this aspect. Not only being academically beneficial, it was a lot of fun. It was a different experience and was a nice change from the usual forms of continuous assessment (S3:L10).Perhaps most refreshing are the responses which noted the student's own journey through the process, such as this student who said 'Initially I was dreading the *voir dire* but I would gladly do another one as it was a great experience and further enhanced my confidence in the area of legal argument' (S3:L6).

The many benefits which accrue to students through participation in a mock *voir dire* have been detailed within this chapter, along with some of the challenges encountered. However, it is nice to end on this particular, positive note: the students, overall, enjoyed the experience. I can but hope that, at least for some, Evidence may now be their favourite!

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