

A View from the Bridge

The Newsletter from
The Conway Accident Law Practice

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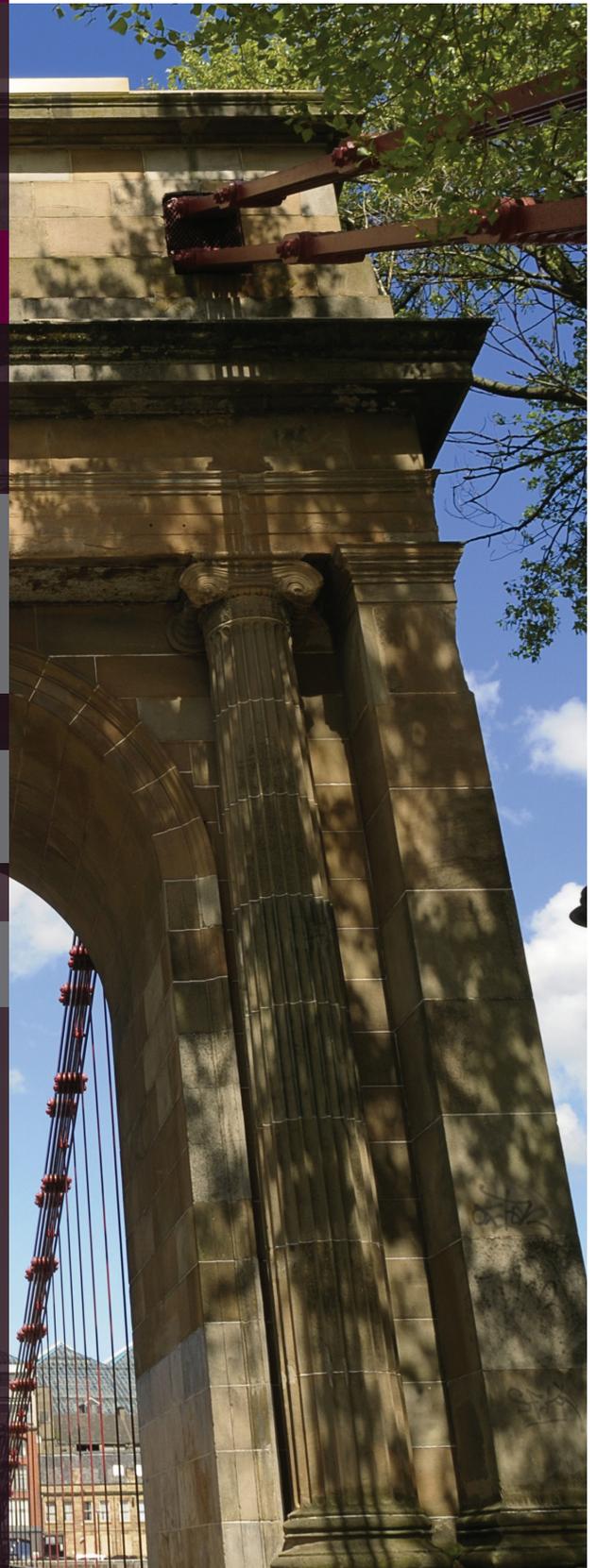
Confused? You will be

CASEWATCH 2016

Get in touch

Tel: 0141 319 8240

email: info@accidentlawscotland.com



Advocacy and the Hollywood Cross

In our secret hearts every court lawyer sees in themselves a little bit of Atticus Finch . Urbane, unflappable and impeccably dressed, the white suited Atticus dominates the Maycomb courtroom.



Quite apart from his Gregory Peck good looks, his polite Southern drawl and his shining integrity, he enjoys another significant advantage over us mere mortals. The witnesses he examines and cross examines are required to stick to the script, a convenience not routinely extended to practitioners at Glasgow Sheriff Court.

The following is a personal top 5 of Hollywood cross-examinations. Thanks to the wonder of the Internet and YouTube, both the clips and frequently the actual scripts are available to view.

5 To Kill a Mockingbird (1962)

Atticus Finch is given the job of defending Tom Robinson, a black man who has been accused of raping Mayella Ewell, a young white woman. The defence is that nothing took place, despite Mayella's invitation to Tom. Atticus accepts the job as a kind of buggins turn Public Defender. His cross examination of Mayella is studiously polite, but deadly. It illustrates one of the cardinal rules of effective cross examination. In every cross examination duel, the court's sympathy is initially with the witness until and unless

he or she forfeits their right to that sympathy. Mayella knows that she is being practised upon, and in fact gives a spirited response to Atticus's somewhat patronising superiority. No matter, all the coloured folks (and his daughter Scout) stand up in respect when Atticus is leaving the courtroom, completely unaware that some 50 years later he will be outed by Harper Lee as a closet racist and a Ku Klux Klan member in "Go Set a Watchman."

4 A Few Good Men (1992)

Aaron Sorkin (later of West Wing fame) wrote this courtroom drama based on incidents he had heard about in Guantanamo Bay. Tom Cruise is Daniel Kaffee, a priggish young lawyer charged with the defence of marines accused of carrying out the "Code Red" murder of a fellow marine. Jack Nicholson is the veteran Colonel Nathan Jessep. The trial is going badly for the accused, Kaffee tries a last throw of the dice, calling Jessep as a witness, despite having no real idea as to what he will say. There is not much legal reality in the screenplay. Kaffee's cross begins with a series of questions going to the state of mind of third parties about which Jessep can have no knowledge, and which would have elicited objections from any practitioner worth their salt. Kaffee later successfully

catches Jessep out in a contradiction of earlier testimony, goading Jessep to launch into his famous "You can't handle the truth" tirade. Jessep eloquently and passionately declaims that all the legal niceties, the luxuries of due process, and the sophisticated comforts of civilisation are privileges enjoyed only because of the courage of men like him, not afraid to break the rules for the common good. Jessep later angrily admits on oath that

"Goddamn right I ordered the Code Red."

Why does he do this? Because that's what it says in the script.

In the event Cruise wins the case for the accused, but for many in the United States, Nicholson won the argument.

Alberto R. Gonzales was appointed by President George W. Bush as United States Attorney General in 2005. He personally authorised the use of "enhanced interrogation techniques", including prolonged sleep deprivation and water boarding. This was later acknowledged as constituting torture, but justified by Gonzales on a war footing basis, surely one of the most shameful episodes in U.S. history. For an elegant riposte to the use of torture by the state, see the judgement of the House

Welcome to the second newsletter of The Conway Accident Law Practice.

Ronnie Conway is the author of Personal Injury Practice in the Sheriff Court and The Civil Advocacy Skills Book. He is a Fellow of the Association of Personal Injury Lawyers (APIL). Like all APIL members he believes in and benefits from the APIL open source mentality. All APIL lawyers freely exchange information with others, and assist and co-operate to help injured people.



of Lords in *A (FC) and Ors v Secretary of State* [2005] UKHL 71 where amongst others, Lord Hope says

“Once torture has become acclimatised in a legal system, it spreads like an infectious disease, hardening and brutalising those who have become accustomed to its use.”

3 Legally Blonde (2001)

Elle Woods (Reese Witherspoon) blags her way into Harvard Law School, in pursuit of her manifestly unworthy former boyfriend, Warner Huntington III. In marked contrast to her East Coast classmates, Elle lights up every room she enters. (even the Civil Procedure class!). In an unlikely series of events she manages to be catapulted into the role of defence attorney for fitness instructor Brooke Wyndham, accused of murdering her rich husband. Woods successfully undermines the prosecution theory that Brooke was having an affair with the pool cleaner, by managing to elicit an admission from the cleaner that he is in fact gay. She then conducts a masterful cross examination of Brooke’s stepdaughter Chutney, exposing the unlikelihood of Chutney having a shower after a recently permed hairdo. Chutney finally gives it all up, confessing that she was the murderer. The cross examination is founded on Elle’s insight into the world of shoes and fashion and in particular “the immutable laws of haircare.” The case does illustrate the golden rule that, even if it is only for the day, you must have a clear command of all the technical issues to be able to control and confront the witnesses.

2 My Cousin Vinny (1992)

Advertised as “There have been many courtroom dramas which have glorified the Great American Legal System – This isn’t one of them”, *My Cousin Vinny* is easily the most enjoyable legal film of them all. Once again we are down below the Mason-Dixon line. Two young Italian-American New Yorkers travelling through Alabama are put on trial for a murder they did not commit. They reach out to their newly minted lawyer cousin Vinny Gambini (Joe Pesci) who arrives with his glamorous fiancée Mona Lisa Vito (Academy Award winning Marisa Tomei). Vinny has been newly admitted to the New York Bar on his sixth attempt and has no actual trial experience. He is repeatedly held in contempt. When Mona Lisa tells him that it is clear that he doesn’t know what he is doing, she expostulates

“Don’t they teach you that in Law School?”

Vinny responds

“No, they teach you Contracts!”

This leads the cousins to sack Vinny and try out the public defender. No Atticus Finch, he is afflicted with a terminal stutter. It looks bad for the boys until Vinny is reinstated. Despite his inexperience, once the questioning starts it is clear that Vinny is a natural. His first master stroke is to call Mona Lisa as an expert witness on tyre marks, qualifying her to give opinion evidence by reason of her previous experience as a car mechanic. But it is his cross examination of the hapless and slow witted locals which turns the tide. Check out Vinny’s “Magic Grits” cross examination on YouTube. Note the bewildered witness’s final admission

“I may have been mistaken.”

This is the cross examination all courtroom lawyers dream about.

And the winner is...

1 True Grit (2010)

This is the Coen Brothers’ version from 2010, based closely on the wonderful book by Charles Portis. 14-year-old Mattie Ross’s father has been shot in cold blood by Tom Chaney. She is determined to bring him to justice and is looking to enlist the help of hard drinking, US marshal Rooster Cogburn (Jeff Bridges), to find him and settle with him. Unlike the others this is not a courtroom drama. But it does have the best cross examination in Hollywood history (taken almost word for word from Portis). The one eyed Cogburn is in Judge Parker’s court in Fort Smith, Arkansas in 1878. He is being cross examined on the details of a violent confrontation whilst apprehending thieves from the troublesome Worton clan. It would appear that they accidentally got killed. The one remaining Odus Worton is on trial for his life for the murder of Cogburn’s partner, Columbus Potter. Bridges is assured, self-confident and argumentative, a nightmare challenge for any cross examiner. The exchanges in the examination in chief between the prosecutor Barlow and the defence lawyer Goudy are a joy. After a particularly egregious leading question Goudy states

“If the prosecutor is going to give evidence I suggest that he be sworn.”

Barlow then asks

“Did you find the jar with the \$120 in it?”

This blatantly leading question is successfully objected to.

Undaunted Barlow follows up with

“What happened then?”

To get the answer

“I found the jar with the \$120 in it.”

The cross examination begins with Goudy insisting on an answer to the question

“How many men have you shot?”

Cogburn initially says that he never shot nobody that he didn’t have to. Goudy repeats the question but Cogburn seeks to limit it by saying

“Shot or killed?”

Goudy responds

“Let us restrict it to killed so that we may have a manageable figure.”

Cogburn is forced to admit that he has to date killed 23 people. Later Goudy has him concede that two of the Wortons were shot whilst threatening him with a “king bolt or a rolled up newspaper”. Cogburn is then manoeuvred into agreeing that on his version of the facts the dead man’s body must have been moved. Being unable to provide any kind of explanation, and hopelessly speculating

“Them hogs rooting around might have moved him” he collapses into *“I do not remember”*.

After the trial Cogburn is heard to describe Goudy as

“that pencil-necked son of a bitch”

surely the ultimate accolade for any cross examiner. Cogburn’s performance as a trigger happy sociopath does him no harm in Mattie’s eyes. He has the “true grit” she is looking for. The film then proceeds to its main theme, the chase and showdown with Tom Chaney. But this minor vignette of cross examination is a masterful and extremely realistic example of how to use your material step by step, leaving the witness no room to escape or quibble, and if you can, how to finish up on a guaranteed zinger.

These are my personal choices. I am sure that you will have others. Please send in your favourites to info@accidentlawscotland.com and we will publish the entry in the next Newsletter, and send the winner an Amazon Kindle Fire.

BJ v. SC [2016] CSOH 79

The action was based on medical negligence following reconstruction surgery. It was served on 18th July 2013 but it was accepted by both parties that it became time barred in terms of the primary limitation period contained in Section 17 of the Prescription and Limitation (Sc.) Act 1973, in February 2013. The question at the procedure roll was whether it should be allowed to proceed in terms of Section 19A and the exercise of the court's equitable discretion. The argument for the pursuer was that the period of time taken to obtain a supportive professional negligence report provided a basis for the equitable discretion. The court held that no relevant case had been pled, and the action was dismissed.

Amanda Foreman and Others v. The Advocate General for Scotland [2016] CSOH 94

John Foreman died in 2012. He had been adopted when he was 7 years old. The sixth and seventh pursuers in the case were biologically related to the deceased. The question for the court was whether biological relationship entitled the pursuers to claim as relatives in terms of the Damages (Scotland) Act 2011 Section 4(3)(b) or whether the adoption extinguished that right. Held that the underlying philosophy of the adoption legislation was to extinguish the biological claims, and the pursuers' claims were dismissed.

Shackleton v. M-I Drilling Fluids UK Limited [2016] CSOH 82

This is a tripper case precipitated by a chipped concrete floor in the workplace. The leading edge of the trip is stated in the report to be approximately one eighth of an inch. Unsurprisingly the court held that this configuration did not engage Regulation 12 of the Workplace (Health, Safety & Welfare) Regulations 1992, and the leading edge on the floor constituted neither an obstruction nor a hazard which rendered the floor unsuitable. Absolvitor was granted.

Kennedy v. Accordia Services LLP [2016] UK SC 6

This is probably the most significant workplace safety case in the past 10 years. The pursuer was employed by the defenders as a peripatetic carer to carry out a series of visits during a very severe winter. It was argued successfully at first instance that non slip footwear should have been provided. The Inner House gave this short shrift; the accident was basically a fact of life. The Supreme Court emphasised the importance of risk assessment. Once the risk of injury at work had been identified, protective measures were required to be put in place. The court also made observations about legitimate use of expert evidence. Space is restricted here to do the case full justice. There is a full discussion on our Legal Blog at accidentlawscotland.com

JURISDICTION CHEAT SHEET

Confused? You will be...

Personal Injury Cases

1. Claims with a total aggregate value of over £100,000.00 may be raised in the court of session in terms of the Courts Reform (Sc.) Act 2014 s.39 (exclusive competence of sheriff court.)
2. Claims with a total aggregate value of £5,000.00 and over and can be raised as an ordinary action in the local sheriff court based on the traditional grounds of jurisdiction e.g. domicile, place of harm, residence of consumer in consumer contract case.
3. Claims with aggregate value of £5,000.00 and over can be raised as an ordinary action in the Personal Injury Court in Edinburgh on the grounds of its all-Scotland jurisdiction. (Courts Reform (Scotland) Act 2014 s.42 and The All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015.)
4. Workplace claims of £1,000.00 and over can be raised as an ordinary action in the Personal Injury court relying on its all-Scotland jurisdiction. (The All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015.)
5. Claims of up to £5,000.00 must be raised as a summary cause in the local sheriff court on the traditional grounds of jurisdiction e.g. domicile, place of harm, residence of pursuer in a consumer contract case.
6. Claims of up to £5,000.00 can proceed as an ordinary action in the Personal Injury Court in Edinburgh on the grounds of its all-Scotland jurisdiction, but only if a sheriff certifies that importance or difficulty makes it appropriate. (The All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015.)
2. Claims with total aggregate value of £5,000.00 and over can be raised as an ordinary action in the local sheriff court on the traditional grounds of jurisdiction as above. (Courts Reform (Sc.) Act 2014 s39 exclusive competence.)
3. Claims of between £3,000 to £5,000.00 must be raised as a summary cause action in the local sheriff court on the traditional grounds of jurisdiction as above.
4. Claims of up to £3,000.00 must be raised as a small claim in the sheriff court on the traditional grounds of jurisdiction as above.

What's in Store?

In terms of the Court Reform (Sc.) Act 2014 s. 72, the Civil Justice Council is committed to replacing the Small Claims and Summary Cause procedure. There will be two sets of simple procedure rules namely the Simple Procedure Rules, and the Simple Procedure (Special Claims) Rules. The latter will cover personal injury actions, multiple poindings, furthcomings, recovery of heritable property and miscellaneous procedures. It is expected that the Special Claims Rules for personal injury actions will be modelled along the existing summary cause Chapter 4 rules for personal injury actions.

As from 28th November 2016 the existing small claims and summary cause procedures will be repealed. All claims (but not the Special Claims) with a monetary crave of up to £5,000.00 must now be raised in the sheriff court under simple procedure. It is expected that at some time in 2017 the new Simple Procedure (Special Claims) Rules will be put in place for personal injury actions and for some other actions. In the meantime the existing summary cause procedure has to be used for personal injury actions. ■

Money Claims in Non-Personal Injury Cases

1. Claims with total aggregate value of £100,000.00 and over may be raised in the court of session in terms of the Courts Reform (Scotland) Act 2014.



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www.accidentlawscotland.com

This Newsletter is published by
The Conway Accident Law Practice

71 Oxford Street
Glasgow G5 9EP

t 0141 319 8240

e info@accidentlawscotland.com



Ronald Conway is a Fellow of the Association of Personal Injury Lawyers