

Mock Trial Manual 2023

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Mock Trial Competition Grand Final Winners

- 2022 Chevalier College, Bowral
- 2021 Loreto Kirribilli, Sydney
- 2020 St Catherine's School, Sydney
- 2019 Loreto Kirribilli, Sydney
- 2018 Saint Ignatius' College Riverview
- 2017 Radford College, Canberra
- 2016 St Gregory's College, Campbelltown
- 2015 Chevalier College, Bowral
- 2014 Barker College, Hornsby
- 2013 Chevalier College, Bowral
- 2012 Bega High School, Bega
- 2011 John Paul College, Coffs Harbour
- 2010 Knox Grammar School, Wahroonga
- 2009 Fort Street High School, Petersham
- 2008 Canberra Girls' Grammar School, Deakin
- 2007 Oxley High School, Tamworth
- 2006 Pymble Ladies' College, Pymble
- 2005 St Andrew's Cathedral School, Sydney
- 2004 Merewether High School, Hamilton
- 2003 Newtown High School of the Performing Arts, Newtown
- 2002 Tangara School for Girls, Cherrybrook
- 2001 Newtown High School of the Performing Arts, Newtown
- 2000 The King's School, Parramatta

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- 1999 MLC School, Burwood
- 1998 Warners Bay High School
- 1997 MLC School, Burwood
- 1996 Knox Grammar School, Wahroonga
- 1995 North Sydney Girls' High School
- 1994 Trinity Senior High School, Wagga Wagga
- 1993 Wenona, North Sydney
- 1992 Trinity Senior High School, Wagga Wagga
- 1991 Newcastle High School, Hamilton
- 1990 Blakehurst High School, Blakehurst
- 1989 The King's School, Parramatta
- 1988 Loreto College, Normanhurst
- 1987 Loreto College, Normanhurst
- 1986 Cheltenham Girls High School, North Sydney
- 1985 St Francis Xavier's College, Newcastle
- 1984 Sydney Grammar School, Sydney
- 1983 Kadina High School, Goonellabah
- 1982 St Leo's College, Wahroonga
- 1981 St Leo's College, Wahroonga

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1. Competition Conditions of Entry

1. The 2023 mock trial competition ('the Competition') is a game of skill
2. The promoter is The Law Society of New South Wales, 170 Phillip Street, Sydney NSW 2000 ACN 000 000 699, ph. (02) 9926 0333 ("Promoter").
3. By applying to enter the Competition, all applicants will be deemed to have accepted and agreed to be bound by these conditions of entry.

4. Who may apply to enter?

- a. The Competition is open to students in years 10 and 11.
- b. Each school may enter only one team of six students. The performance of each of the six students will contribute to the total score of the team, and for this reason it is suggested that teams prepare three reserves so that last minute stand-ins are available.

5. Application process. To participate in the Competition, applicants must:

- a. complete the nominated registration form by Monday, 27 February 2023; and
- b. pay the registration fee noted on the registration form for the Competition by Monday, 27 February 2023.

Whilst all efforts will be made to allow eligible applicants to participate in the Competition, the Promoter reserves the right to reject any entry for the Competition if there is an uneven number of schools or if a matching team cannot be found. Unsuccessful applicants will be refunded the registration fee.

The Promoter reserves the right to permit additional teams to participate in the Competition past the deadline of Monday 27 February 2023 in its sole discretion.

6. Disqualification. The promoter reserves the right to disqualify any applicant from participating in the Competition:

- a. if an applicant is in breach of these conditions of entry or for breaches of the rules (as stipulated in the Competition Manual) where disqualification is stipulated as a potential penalty;
- b. on reasonable grounds as determined in the Promoter's sole discretion; and/or
- c. if the promoter forms the reasonable opinion that an applicant is putting the integrity of the Competition at risk.

Whilst every effort will be made to ensure that during a trial there is no cheating, the responsibility

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for preventing its occurrence rests with the schools, and not the mock law coordinator or the magistrates.

'Cheating' in this context refers to participants reading unauthorised notes from a laptop/phone, witnesses reading from their statements rather than giving their evidence from memory, or coaches, teachers or other persons present at a mock trial giving direction or advice to the participants during the course of the Competition.

If a school is found to have cheated, the mock law coordinator can take action in their sole discretion to deduct points or to disqualify the team from further participation in the Competition for that year.

7. Logistics:

- a. Schools will bear all costs of participating in the Competition, including travel and accommodation expenses.
- b. Mock trials will be held virtually except for the grand final which will be held in person subject to any restrictions due to government regulations.
- c. If a school is unable to comply with these conditions of entry and wishes to withdraw from the Competition, it must do so within a week of registering to receive a full refund.
- d. Materials for the Competition are password protected and accessible on the Competition [website](#). All schools must provide an email address to receive this information. If a school has not provided an email address or has provided an incorrect email address, the promoter will not be responsible for that school missing out on updates and changes to scripts etc.
- e. Each round must be completed by the date nominated by the Promoter and the results forwarded to the Mock Law Coordinator on or before that date. Any team which does not complete a round by the due date, without prior permission from the mock law coordinator will be disqualified.
- f. The magistrate's decision is final and no correspondence will be entered into by the Law Society.
- g. During a virtual trial, witnesses must give evidence from memory and coaches, teachers,

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and other persons present at a mock trial must not give advice, direction or assistance to any of the participants. Mobile telephones, laptops and/or tablets must not be used by barristers, solicitors, or witnesses under any circumstance except to connect online in order to participate in a virtual trial.

- h. Any disputes between participants, which are unable to be resolved, will be determined by the promoter. The promoter's decision will be final.
- i. The Law Society may arrange for the mock trial to be video or audio recorded and will own the recording in perpetuity for use in all formats and media.

8. **Privacy:** The promoter respects the privacy and confidentiality of personal information applicants provide. How the promoter handles applicants' personal information is explained in its privacy policy at <https://www.lawsociety.com.au/privacy-policy> and its personal information collection notice at <https://www.lawsociety.com.au/privacy-policy/personal-information-collection-notice>.

9. **Force majeure:** If for any reason the Competition is not capable of running as planned, including by reason of epidemic, pandemic, computer virus, bugs, tampering, unauthorised intervention, fraud, technical failures or any other causes beyond the control of the promoter, the promoter reserves the right in its sole discretion to cancel, terminate, modify, postpone or suspend the Competition.

10. **Amendment and variation:** The promoter:

- a. reserves the right to amend these conditions of entry from time to time; and
- b. reserves the right to vary any element of the Competition at any point if deemed necessary and/or in the best interests of the Competition.

This includes varying the Competition timetable. If any changes are made, schools will be notified by email.

11. **Limitation of liability:** To the extent permitted by law neither the promoter, its employees, agents, contractors or sub-contractors will be liable to any school or applicant for any loss or damage (including any consequential loss) arising out of their participation in the Competition including but not limited to:

- a. late, lost or misdirected emails or mail;
- b. inaccurate or incorrect transcription of entry information;

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- c. non-receipt of entries for any reason;
 - d. problems or technical failures of any kind;
 - e. unavailability or inaccessibility of any service or website;
 - f. unauthorised human intervention in any part of the Competition;
 - g. electronic or human error; or
 - h. any damage or loss (direct or indirect) suffered by reason of any act or omission of the promoter, its employees or contractors in relation to entry into the Competition.
12. **Exclusion:** To the extent permitted by the law, the promoter excludes all conditions or warranties unless they are expressly set out in these conditions of entry.
13. **Indemnity:** Each applicant indemnifies and holds harmless the promoter, its employees, agents, contractors and subcontractors from any claim, cost, demand, liability or damage (including legal costs, professional costs and other expenses on a full indemnity basis) incurred by the Promoter, its employees, agents, contractors and sub-contractors arising out of or in connection with (but not limited to):
- a. any breach of these conditions of entry by the applicant;
 - b. the applicant's entry into the Competition;
 - c. any injury or damage sustained due to any act or omission by the applicant; or
 - d. any damage the applicant causes to the promoter.
14. **Governing law:** These conditions of entry are governed by the laws of New South Wales. The promoter and the applicants irrevocably and unconditionally submit to the non-exclusive jurisdiction of the courts of that state and courts entitled to hear appeals from those courts.

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2. Competition Structure

The case materials for each round will be emailed to the team coordinator on the first day of each round and will be available for download from the [Mock Law pages](#) on the Law Society website. All materials are password protected and schools will be emailed the password at the commencement of the round.

The competition consists of eight (8) rounds. The first three (3) rounds are scored and held on a Round Robin basis. The next five (5) rounds are conducted on a knock-out basis. The final round is the Grand Final. After round three, the top 32 schools will proceed to the first elimination round and the winners proceed to subsequent rounds on a knockout basis.

All trials apart from the Grand Final, are to be held over Zoom or any other video-conferencing software.

Each round must be completed by the date nominated by the Law Society and results sent to the Mock Law Coordinator on or before that date. Extensions of time will only be granted in extenuating circumstances. The competition timetable is published on the [Mock Law website](#).

Each round is generally held over four weeks – it is suggested that the first two weeks are used for preparation and the third week is used to hold the trial. Schools should arrange this date with the Magistrate as soon as possible, as *extensions will not be granted*. It is recommended that the trial be organised for the third week, so there is time for a postponement in an emergency.

In scheduling the mock trials, schools must take into account the Magistrate's availability. Magistrates are generally practising solicitors or barristers who have busy work schedules. In most cases, trials will be scheduled after 4pm in order to accommodate the Magistrates' professional commitments.

Schools are **not** permitted to substitute a Magistrate of their own choice for the allocated Magistrate. Each trial should take between two to three hours and no more than three hours.

Effective presentation requires adequate preparation of all facets of the team's case, including anticipation of the opponent's case, identifying likely issues and facts that may be raised in cross-examination of a team's witnesses.

When conducting a trial virtually, all pre-trial notes are to be emailed to the Magistrate *before* the trial and opposing witness statements should be made available to the opposing team by using the 'upload file' function on the videoconferencing software or emails to the other team before the trial commences.

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The first page of the score sheet, with the name of the competing schools and participating students, should be emailed to the Magistrate before the commencement of the trial.

Any team which cannot complete a round by the due date will forfeit the round. No points will be awarded for a forfeit. If a school must forfeit a round, the school must contact the Mock Law Coordinator, the opposing team, and their allocated Magistrate as soon as possible.

In the event that a school forfeits a third time, the team will be disqualified. Students on this team will not receive Mock Trial Certificates.

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3. Trial Organisation

The Mock Law Coordinator will email to the schools and make available details of the round allocations and scripts on the [Mock Law website pages](#) on the first day of each round. This will identify each school's opposing team and the roles each team is to play in the trial.

The Mock Law Coordinator will email the prosecution/plaintiff team the details of the allocated Magistrate during the first week of the round.

The team assigned the role of prosecution/plaintiff is responsible for coordinating the date and time of the trial with their opposition school and Magistrate.

The following procedure should be followed:

1. Upon receipt of the round material and Magistrate allocation, contact the Magistrate to check on available dates (if communication is via email, please copy the opposing team in on the correspondence);
2. Schools must attempt to organise the trial at a time suitable for the Magistrate. If the schools cannot agree on a time with the Magistrate, the Law Society should be notified immediately;
3. Contact the defence team, give them the Magistrate's available dates and agree on a mutually convenient date;
4. Contact the Magistrate and confirm the date. The arrangement must also be confirmed the day prior to the scheduled trial date.

Schools must be flexible as to trial dates and times. Volunteer lawyers have very busy schedules and students have many school commitments. Flexibility is the key in identifying convenient trial times.

In the event of a Magistrate becoming unavailable to judge the mock trial at the last minute, the Law Society will endeavour to find a replacement Magistrate; however, the trial may need to be postponed. If there is not time for a postponement, the two teachers will be required to judge the trial together. The Law Society should be contacted as soon as possible when this occurs so additional materials for the adjudicators can be provided.

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4. Roles and Responsibilities

4.1 Schools

One member of the school's staff must remain with the team at all times during the trial. It can be any member of the school's staff and does not have to be the staff member in charge of the school's Mock Trial team.

Prior to commencement of the trial, teachers have the opportunity to raise any issues with the Magistrate.

Teams must not access the witness statements of the opposing team prior to the trial. This action may lead to disqualification.

Both teams are limited to the script. No exhibits or extra case law is allowed unless given in the script. This allows a 'level playing field' between schools with or without legal resources.

Once the trial has commenced, students may not be assisted other than by the instructing solicitor and the second barrister. This includes verbal and non-verbal prompting.

When preparing the closing address, there must be no assistance from coaches, teachers, any other team member or members of the audience. The only people allowed at the bar table are the solicitor and the two barristers.

This is particularly important in the conduct of virtual trials. The Law Society will disqualify any school whose team cheats.

Disputes or arguments with Magistrates are not permitted at any time.

4.2 Magistrates

Magistrates are required to review the manual and case materials before each trial. Magistrates are required to refer only to the materials provided by the Law Society.

Magistrates will be allocated to schools in the rounds that they have indicated they are available. The Mock Law Coordinator will send allocated Magistrates a roster before the start of each round to confirm their availability for that round.

As trials will be taking place virtually, schools will be paired with a variety of Magistrates from across New South Wales and not necessarily from the schools' own regional area.

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Once confirmed, a final allocation will be sent containing the details of the host (prosecution/plaintiff) school, the Magistrate's script for the round and the scoresheet. The Magistrate's details will also be shared with the host school. The host school is responsible for organising the time and date of the trial with their allocated Magistrate.

Where possible, Magistrates are encouraged to conduct the trial in the last week of the allocated time. Schools must be flexible as to trial dates and times to accommodate Magistrates' schedules and trials can be held before, during or after school hours.

Magistrates are required to score each Mock Trial (please see "Scoring Each Mock Trial" for further information) and send the completed scoresheet to the Mock Law Coordinator at the conclusion of the Mock Trial and prior to the end of the round.

Magistrates are reminded that Mock Trials are intended to be educational and that any feedback they provide is to help build the students' confidence and to assist them to improve their performance in subsequent rounds.

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5. Mock Trial Team Participants

The Prosecution/Plaintiff team will consist of:

- 1st Barrister
- 2nd Barrister
- Instructing Solicitor
- Two witnesses
- Magistrate's Clerk

The Defence team will consist of:

- 1st Barrister
- 2nd Barrister
- Instructing Solicitor
- Two witnesses
- Court Officer

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6. Mock Trial Team Roles

6.1 Magistrate's Clerk

The Clerk is responsible for:

- Calling the case;
- Keeping the time sheet and noting the time when each cross-examination and examination-in-chief commenced, ended and its duration. The time-sheet should be emailed to the Magistrate at the conclusion of the closing addresses;
- Indicating to the Magistrate when the time limits have been reached - a bell or similar should be used;
- Keeping the list of objections made by each barrister and noting the objection, the nature of the objection and the Magistrate's ruling. The objection sheet should also be emailed to the Magistrate at the conclusion of the closing addresses;
- Exchange of the statements as each witness is called by the Court Officer.

The Clerk is judged according to his/her performance of these duties.

6.2 Court Officer

This role involves:

- Opening the Court;
- Closing the Court;
- Maintaining order in the Court;
- Calling the witness/s. The Court Officer must follow the order of witnesses as they appear in the script. There is no choice in the order of the witnesses; and
- Swearing the witness.

The Court Officer is judged according to his/her performance of these duties.

6.3 Solicitor

The role of the instructing solicitor involves coordinating the preparation of the case and assisting the barristers during the hearing of the case. The solicitor should also assist in the preparation of the closing address.

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The solicitor's pre-trial notes are to be a maximum of two single sided A4 pages, no smaller than size 11 font. Notes that exceed this size will be penalised.

As preparation for the case, the solicitor should show that they are well prepared by identifying the:

- Key facts;
- Relevant issues;
- Areas for cross-examination;
- Possible objections and responses (in brief); and
- Relevant legal principles.

The solicitor should assist the barristers during the trial by recording the evidence given and pointing out important matters to be covered in cross-examination and the closing address.

Solicitors are judged on:

- The quality of the pre-trial notes; and
- Their active participation in the proceedings.

The solicitor's notes must be prepared by the student/s.

6.4 Barrister

The first barrister for each team will announce their appearance and give the opening address. They will then examine-in-chief the first witness. The first barrister for the opposing team will then cross-examine.

Similarly, the second barrister will examine the second witness with the opposing second barrister cross-examining.

Once an objection has been made, and points awarded, if the objection is made correctly, the remainder of the evidence upon which the party relies is allowed to continue. However, in the usual course, if an objection is allowed (upheld) the evidence would not be admitted.

Barristers may make an objection if the opposing barrister is harassing or arguing with the witness. This usually occurs during cross-examination. Only the barrister responsible for examining-in-chief or cross-examining the witness may object to questions put to the witness or evidence given by the witness.

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The Magistrate will assess the barristers' performance on many aspects of their role, including:

- Clear and concise introduction to the case, including overview of the charge(s)/claim and the evidence to be given;
- Clarity of expression and voice, poise, confidence etc;
- Proper introduction of evidence;
- Questioning in accordance with rules of evidence during 'examination-in-chief';
- Cross-examination directed at relevant parts of evidence in chief and about relevant points of own case;
- Avoidance of unnecessary repetition of evidence in chief;
- Courteous and respectful questioning of the witnesses;
- Appropriate objections/making considered responses to objections;
- Summarising evidence and facts accurately in the closing address;
- Making appropriate submissions on issues of law in the closing address; and
- Persuasion.

6.5 Witness

A witness must appear in the order in which they appear in the script. There is no choice in the order of witnesses. They may act in character, but must stay in usual school attire.

Three copies of the statement of each witness should be prepared and available to be given to the opposing side so that each team has a copy in Court.

The witness gives sworn evidence for the parties to the action (prosecution/plaintiff or defence). The role of the witness is to give evidence relevant to the matter about what they have seen or heard, relevant to the case.

The witness statements are included amongst the material prepared by the Law Society and must be adhered to strictly. No deletions are allowed from the trial materials. Further, no additional material is to be used such as maps, diagrams, plans, or exhibits etc. Only the material provided by the Law Society is permitted.

In examination-in-chief the witness must strictly adhere to their statements. However, during cross-examination scope is given for the witness to expand upon the script.

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The witness/es provide most of the information to be used in the trial and their accurate recall is important.

During examination-in-chief the witness gives his or her evidence orally.

All witnesses, except for the Defendant in a criminal trial, must remain outside the court room until they are called to give evidence. Once the witness has given their evidence, they must not talk to or approach a witness who has not yet given evidence. The witness may remain in the court room in the visitors' gallery.

The assessment of the performance of the witness is based on the following:

- the accuracy and completeness of the recital of evidence;
- Presentation; clarity of expression, voice, poise etc;
- Ability to cope with cross-examination.

6.6 Scripts

Copyright in relation to the Scripts is held by the Law Society.

No amendments to any material can be made by either side, unless instructed by the Law Society.

Teams which excel in arguing the law, examining the witnesses competently, and presenting a very persuasive case, may appear to gain an unfair advantage. However, the team which succeeds in the case is not necessarily the winner of the Mock Trial.

The law to be applied in the Mock Trial is included within the script. The teams are not permitted to refer to, or to rely on, any legislation or cases which are not referred to in the script. The aim is to give the participants experience in the operation of the justice system, not to provide technical training in law.

If schools or volunteers find errors in the script, they are requested to contact the Mock Law Coordinator.

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7. Scoring

7.1 Scoring each mock trial

The judging of each Mock Trial is a two-fold process. It involves:

- A judgment as to the outcome of the criminal prosecution or civil claim and the reasons for the decision. This is generally quite brief, entailing a summary of the key facts, evidence and issues in dispute, and the basis upon which the Magistrate ultimately decided the case; and
- A decision as to the winner and runner-up of the Mock Trial based on the scores allocated to the teams throughout the hearing of the Mock Trial.

If teachers have any concerns about any issues that arose during the trial, they must raise their concerns prior to the Magistrate delivering judgment on the case and announcing the final scores of the teams. Once the decision is delivered, there will not be any opportunity for any school team to object or to seek alteration to the score sheet. The decision of the Magistrate is final, and no correspondence will be entered into by the Law Society.

Magistrates are encouraged to score conservatively, reserving scores of 7 or above for performance at a higher than average level. The scale for the awarding of points is set out below:

Not Effective		Fair		Good		Very Good		Excellent	
1	2	3	4	5	6	7	8	9	10

Points will be deducted if a:

- Witness adds, deletes or changes material in the witness statement
- Team/barrister goes beyond the time limits;
- Team member is prompted by another person;
- Team member argues with the Magistrate; and
- Teacher/coach/parent offers assistance at any time during the trial or while preparing for the closing address.

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The Magistrate is required to email the completed and signed score sheet to the schools and the Law Society at the conclusion of the Mock Trial.

7.2 Scoring the overall competition

During the Round Robin, teams will be awarded the following scores:

- 3 points for a win
- 1 point for a loss
- 2 points for a bye
- 0 points for a forfeit (if not disqualified)

No draws are allowed. Magistrates are required to use the “Team” box to give an extra whole point. Half-points are not allowed.

In addition to this score, both teams will have an overall score which is a total of their awarded points. The difference between this and their opposition’s score will form each school’s ‘for/against’ score for the round.

When a school is allocated a bye in the scoring rounds, 2 points will be allocated and 0 awarded for the ‘for/against’ score.

When a school forfeits it will receive 0 points and no ‘for/against’ score. The opposing team will be given 3 points for a win and 0 points for their ‘for/against’ score.

After the Round Robin – trials continue to be scored and schools move forward through to the next rounds on a knock-out basis.

Only the 32 highest scoring teams will progress after Round 3. In the event that the 32nd and 33rd schools end the Round Robin with the same overall scores, only one team may progress determined by how many trials the schools completed and won. If the schools completed and won the same number of trials, the school with the highest winning margin averaged across their scores in the Round Robin will progress to the Elimination rounds. Forfeits will not be treated as a ‘completed’ trial.

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8. Rules of Evidence and Grounds for Objection

a. Relevance

- i. Only relevant evidence is admissible. "Relevant" means the evidence proves or tends to prove a fact that is in dispute. For example, in a case involving a collision of two motor vehicles, the speed at which the vehicles were travelling would probably be relevant, but what the drivers ate for breakfast would probably be irrelevant.
- ii. All irrelevant material is inadmissible.
- iii. The mere fact that evidence is relevant does not make it automatically admissible. The application of the other rules of evidence may result in the evidence being ruled inadmissible.

b. Opinion

- i. This rule relates to conclusions or views formed by witnesses based on facts that they have observed. Opinions may not be given in evidence. For example, the observation by a witness that another person was red in the face and shaking his fists would be admissible, but the conclusion or opinion that the person was very upset or was angry with him would not be admissible.
- ii. Where an objection is based on opinion, the witness may give evidence about the facts, which lead to the opinion, if the witness is qualified to give the evidence.

c. Hearsay

Hearsay evidence is indirect evidence and generally inadmissible. Hearsay refers to evidence about what a witness heard someone else say. An example of hearsay evidence is: "I heard Mrs Hall say, 'I saw Jo Burns driving the car.'" This helps to illustrate the three reasons for the hearsay rule:

- 1) Hearsay is not the best evidence - Mrs Hall should give her own account to the court on oath upon which she can then be cross-examined;
- 2) It is "second-hand" evidence which may have changed in the re-telling; and
- 3) Hearsay evidence is easy to concoct and very difficult to disprove.

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d. Bad Character

Evidence of bad character by a defendant may not be led by the prosecution/plaintiff. Evidence of good character may be led by either party, but only if it is relevant. If the defendant raises his/her good character, or attacks the character of a prosecution/plaintiff witness, the prosecution/plaintiff may cross-examine the defendant on his/her bad character.

e. Direct Speech

- i. Conversation should be recounted as it occurred in direct speech and should not be summarised by the witness. For example: Brian said to me, "Could you please drive? I think I have had too much to drink". This is the correct way to give this evidence. It is not correct to give the evidence as: "Brian asked me to drive because he had had too much to drink".
- ii. Where an objection is based on indirect speech, the witness may convert the evidence to direct speech, but only after the objection is made. It is not necessary to convert indirect speech to direct speech in a mock trial.

f. Leading questions

- i. A leading question is one in which the form of the question suggests the answer. For example: "Was the car blue?";
- ii. Leading questions are only objectionable in examination-in-chief. They are permissible in cross-examination.

g. Double questions

Double or multiple questions are objectionable because they cannot necessarily be answered with a single answer. For example: The answer to the first part of the question might be 'yes', while the answer to the second part of the question might be 'no'.

h. Failure to comply with the rule in *Browne v Dunn*

The rule in *Browne v Dunn* requires that unless prior notice has been given as to the intention of the cross-examiner to rely on evidence which is contradictory to that given by the witness being cross-examined, the cross-examiner must first put the nature of the contradictory evidence to the witness. This gives the witness the opportunity to agree or disagree with the evidence.

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i. Harassment of the witness

Barristers may make an objection if the opposing barrister is harassing or arguing with a witness. This usually occurs during cross-examination.

j. Diversion from Script

Barristers may make an objection if witnesses omit key information from their witness statements. This can occur during examination-in chief and cross-examination.

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9. Hints

a) Opening Address

Before any evidence is taken each first barrister will make an opening address to provide the Magistrate with a general idea of the case.

The opening address is designed to identify the issues between the parties (by reference to the charge sheet in criminal cases or to the pleadings in civil cases). In the opening address it is usual to set out the matters to be proved and how they are going to be proved by briefly summarising the nature and extent of the evidence to be called.

The address should refer to any important facts and relevant background information which will assist the Magistrate to understand the evidence as it is presented. The opening address should not include references to any case law precedents, and a lower score will be awarded if case law is quoted in the Opening Address.

b) Examination-in-Chief

The first step in the taking of evidence is called examination-in-chief. This is often quite challenging.

The purpose is to get the witness to tell their story. This is done by trying to bring out all the evidence the witness can give about what occurred without suggesting to the witness what to say. One way to get the witness to tell his/her story without leading him/her, is to start your questions with words such as 'who', 'what', 'when', 'where' and 'how'.

Leading questions may be asked about matters which are not in dispute. For example, in a collision case, the time and place of the collision may not be in dispute. Such preliminary leading questions enable the witness to be taken quickly to the real matters in dispute.

c) Cross-examination

After a witness has been examined-in-chief by their barrister, the opposing barrister then cross-examines this witness.

The aim of the cross-examination is to test the accuracy of the evidence given by the witness or to establish facts which support the cross-examiner's client's case. The barrister can also test the credibility of the witness, that is, whether they should be believed. Testing credibility covers every aspect. In cross-examination, leading questions may, and in fact should, be asked.

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To be a successful cross-examiner, the barrister must have an objective. They must know why particular questions are to be asked. Merely to go on a 'fishing expedition' is time-wasting and damaging to your case.

In seeking to disprove the other party's case, the cross-examiner usually attacks two aspects of a witness's evidence:

- The competence of the witness to give the evidence, or the quality of such evidence. For example:
 - Lack of perception to be able to give the evidence of what was seen, such as capacity to see or opportunity to see;
 - Lack of accurate recall – due to the witness being affected by alcohol or drugs and therefore being unable to think clearly; and
 - Lack of narrative ability – due to belonging to a culturally and linguistically diverse group.
- The credibility of the witness, because of:
 - Bias, interest, prejudice – for example, as a result of the witness being a close friend of the plaintiff/defendant;
 - Prior convictions; moral character – if the witness has a reputation for lying or has a number of convictions for dishonesty; and
 - Prior inconsistent statements such as evidence given in a written statement which is different from the evidence now given at the trial.

It is not easy to get a witness to admit they are exaggerating, lying or could not see a certain event or to undermine the value of their evidence.

An example of how to do this can be seen in a 'driving in a dangerous manner' case. The witness gave evidence that the driver was driving very fast - about 100 km per hour. By asking a series of questions about weather conditions, volume of traffic on the road, lack of curves in the road, presence of stop signs, etc., the effect of the evidence of speeding might be minimised. This is because driving at 100km per hour at 3.00pm near a school is very different from driving at 100km per hour at 3.00am on a freeway.

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In cross-examination, the barrister should avoid:

- Quarrelling with the witness or bullying the witness to admit that they are wrong;
- Asking the witness a number of questions at the same time, without allowing the witness to answer each question one at a time; and
- Repeating the same question

Points will be deducted in a Mock Trial if a barrister is discourteous or disrespectful to a witness.

d) Closing Address

The purpose of a closing address is to summarise your case, highlight the evidence that supports your case, and make submissions on the principles of law that are relevant to the case.

A systematic way to do this is:

- Identify the relevant issues - a prosecutor/plaintiff will limit the issues to the bare minimum to be proven and then show how the evidence brought before the Court proves their case. A defendant's barrister might take the opposite position and create as many issues as possible therefore casting doubt on whether the plaintiff or the prosecution has proven their case.
- Make submissions on the relevant law - highlight prior decisions that support your case, and show how prior decisions apply to the proven facts of your case. Discuss the prior decisions that support your opponent's case and distinguish those decisions that show why those cases should not apply to the facts of your case.

It is not necessary to give case citations unless the Magistrate requests you to do so.

If there is conflicting evidence on a particular point from both sides which cannot be reconciled, the barrister must persuade the Magistrate as to why their witness/es should be believed in preference to the witness/s of the other party.

e) The art of persuasion

Persuasion in a court or tribunal depends on good communication. If you want to communicate effectively, you have to be able to convince a person to listen to you. Remember that first impressions are valuable, so start confidently - make sure your voice is well modulated and able to be heard - and do not speak too quickly. Try to maintain good eye contact with the witness and the Magistrate when addressing.

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It is important to:

- Make succinct arguments or submissions;
- Keep closely to what you are trying to prove or disprove;
- Do not repeat yourself so that you become boring;
- Do not argue with a witness; and
- Try not to develop irritating habits; for example: Saying, 'I see' every time a witness answers a question, or saying 'I put it to you'.

Show courtesy and respect to the Magistrate, witnesses and the lawyers on the other side.

f) Proving your case

Giving careful and close attention to the elements of an offence or claim in your opening and closing addresses will significantly improve their quality.

The strength of the evidence to prove or disprove a case is called the 'the burden of proof'.

In a civil case, the plaintiff is required to prove the case *on the balance of probabilities*, that is, by satisfying the court that their version of the facts is more probable than not.

In a criminal case, the prosecution has to convince the Magistrate that the defendant is guilty *beyond reasonable doubt*. The prosecution bears a heavier burden of proof than a plaintiff in a civil case.

The defendant sometimes has the burden of proving things.

For example, if a witness says they were somewhere else at the time the offence was committed, they have to prove this alibi; or if a statutory defence is provided for a breach of statute law.

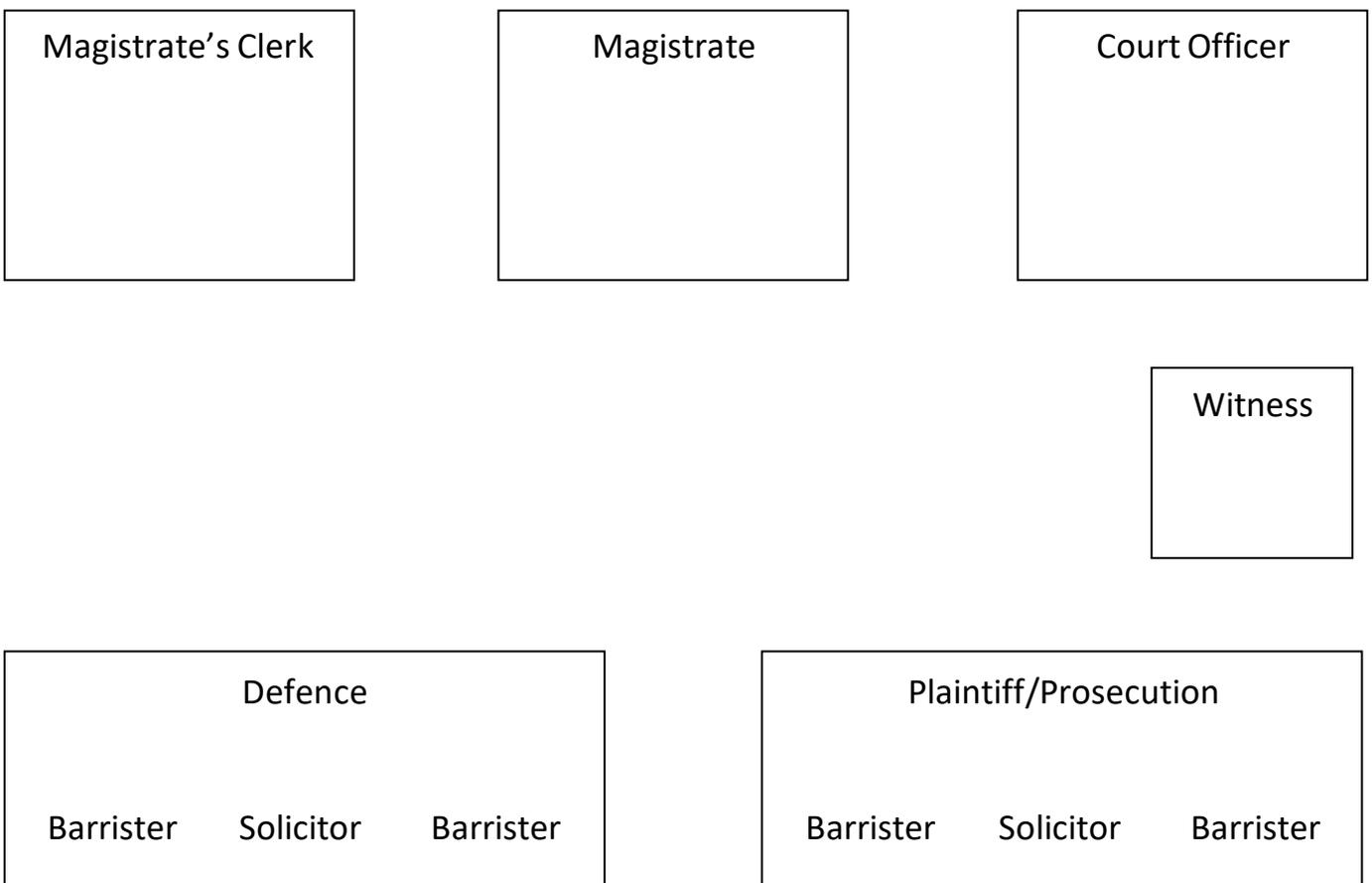
If the defendant only has to prove an alibi or statutory defence, they must do so on the balance of probabilities. It is only the prosecution in a criminal case, which must prove the case 'beyond reasonable doubt'.

What the prosecution (in a criminal case) and the plaintiff (in a civil case) have to prove are called the "elements". These elements are derived from particular Acts of Parliament or case law.

Matters for proof will be set out in the case materials for each round of the Mock Trial Competition.

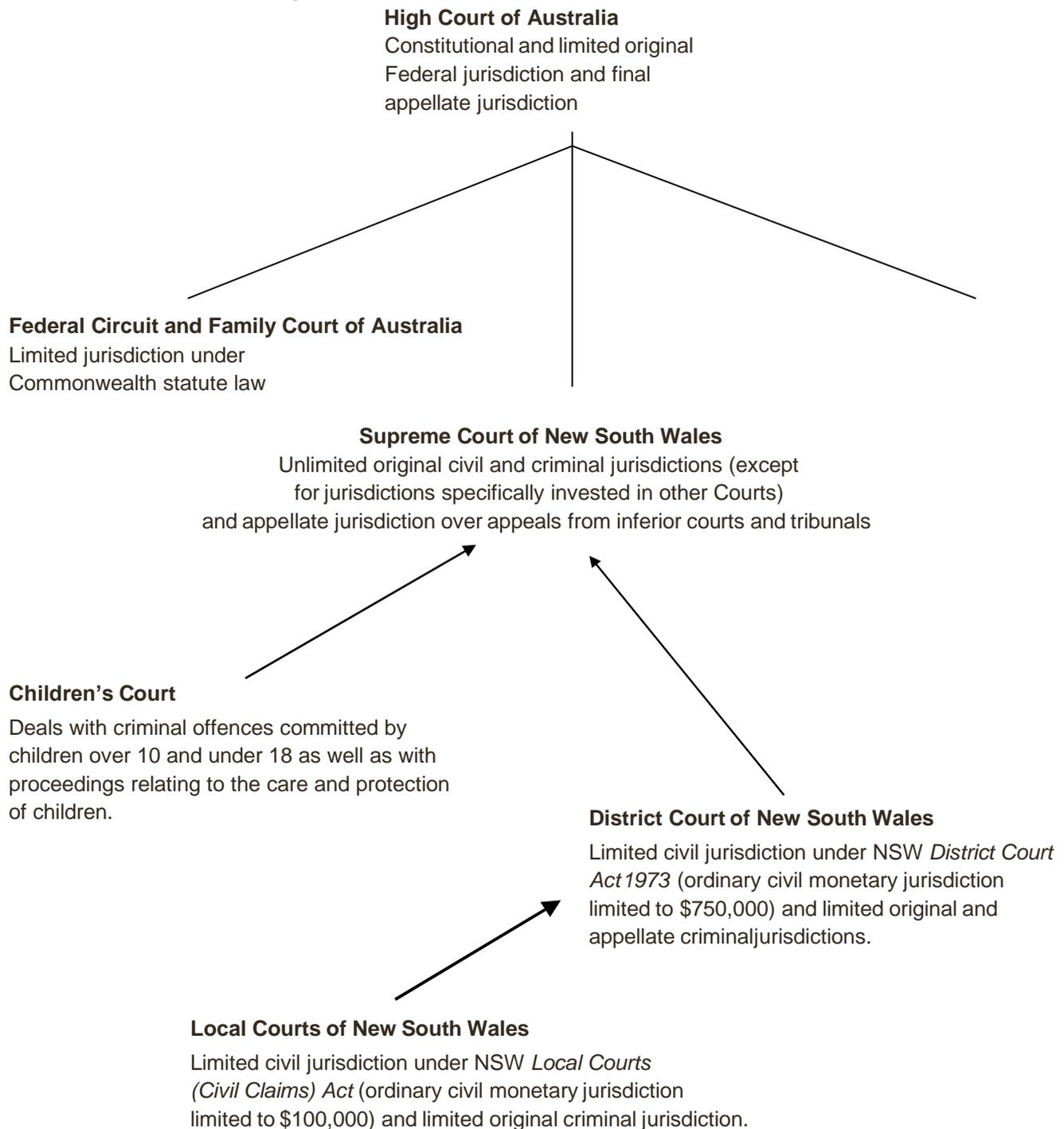
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10. Court Layout



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11. Court Hierarchy



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12. General Precedents

The following extracts of precedents and those provided in the case materials for each trial may be used. Only these extracts are allowed to be used in mock trials.

Browne v Dunn (1894) 6 R 67 is the leading case in relation to cross-examination and the requirement of giving witnesses an opportunity to respond to an allegation made against them.

Lord Chancellor Herschell said at pages 70 – 71.

... I cannot help saying that it seems to be absolutely essential to the proper conduct of a case, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, And then, where it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making an explanation which is open to him; and, as it seems to be, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.

On the application of the rule in *Browne v Dunn*, the following extract may be used: *Allied Pastoral Holding Pty Ltd v Commissioner of Taxation* (1983) 1NSWLR 1.

Hunt J said at page 16.

It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67.

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On the issue of the failure of a party in civil proceedings to call witnesses whose evidence is relevant or to produce material documents, the following extract may be used: *Allied Pastoral Holding Pty Ltd v Commissioner of Taxation* (1983) 1 NSWLR 1.

Hunt J said at page 13:

The inference available from such failure (where that failure is unexplained) is... that the evidence of such witnesses or the contents of such documents would not have helped that party's case: *Jones v Dunkel* (1959) 101 CLR 298 at page 321. That unexplained failure may also be taken into account in determining whether the tribunal of fact should draw any other inference which is otherwise open upon the evidence and which may have been contradicted by that witness or document; *ibid*, at pp 308, 312, 319. In either case, the result of such unexplained failure may well be fatal to that party's case. Particularly might this be so where ... the facts are usually peculiarly within the knowledge of that party. But the tribunal of fact is not bound to draw either inference.

On the issue of the burden of proof in criminal cases, the following extract may be used: *Woolmington v Director of Public Prosecutions* (1935) AC 462.

Lord Chancellor Sankey said at page 481:

Throughout the web of English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

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13. A Basic Guide to Professional Ethics, Courtesy and Conduct

Barristers and solicitors abide by standards of conduct, courtesy and ethics that must be observed for the proper administration of the legal system in New South Wales. Some of the more important ones are listed below.

- Barristers are required to assist the Magistrate honestly and must not mislead the Court by presenting evidence that they know to be untrue.
- A barrister should not argue with the Magistrate. They are allowed to make submissions firmly but must do so courteously. A common phrase used is 'with respect...I submit ...'
- A Magistrate in the Local Court is referred to as 'Your Honour'. It is common to use this method of address fairly frequently, for example, when beginning any statement to the Magistrate or when replying to a question.
- Whenever a barrister is speaking to the Magistrate they must stand. When the opposing barrister is speaking, the former barrister must sit. This is important but can be a little awkward when making objections during examination-in-chief or cross-examination.
- In New South Wales courts, barristers should remain behind the bar table and not wander around the court room (as is often seen on some television programs). Should a barrister wish to approach the witness in the witness box, permission should be asked of the Magistrate to do so.
- Barristers must accept the Magistrate's ruling even though they may disagree with it. If a reply is called for, it is usual to say, 'If your Honour pleases'.
- If you are quoting reports in cases, do not use abbreviations. If, for example you want to quote a case of *Smith v Jones* reported as (1942) 65 CLR 473 say, 'volume 65 of the Commonwealth Law Reports at page 473'. If barristers are referring to what a particular judge said in a case, they should refer to the judge by their full name, for example, 'Justice Williams', not 'Williams J'. In Mock Trials, case citations are not required unless requested by the Magistrate.

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14. Glossary of Legal Terms

a. Adjournment

When a case is not ready to proceed on the day that it is listed, it might be postponed ("adjourned") to another day. If court proceedings have to be stopped for any reason they are "adjourned". If a criminal matter is adjourned and the defendant has not been granted bail, he or she is "remanded" to appear on the adjourned day.

b. Bail

When a person is charged with a criminal offence he or she will usually remain in custody until the hearing of the case unless a Magistrate grants bail. This requires a formal promise that they will appear at the hearing. As a guarantee that they will appear, a sum of money may have to be paid to the court. This money is refunded if the defendant appears at the hearing but it is forfeited if he or she does not.

c. Barrister

In New South Wales, a barrister is a member of the Bar Association. Barristers specialise in the preparation and presentation of cases at court.

d. Civil Proceedings

Proceedings brought by the Crown or a private person to redress a wrong that has been suffered and is not covered by a law that imposes a penalty. The most common civil proceedings involve recovery of debts, claims for damages for injury to a person or property and claims relating to breach of contract.

e. Common Law

Law is made in two ways. The Parliament passes laws (which are known as statute law or legislation), and the law is interpreted and developed by judges based on previous cases (known as the Common Law).

f. Committal Proceedings

When a person is charged with a serious criminal offence a Magistrate considers all the evidence presented by the prosecution. The defendant does not usually present his or her side of the story at the committal proceedings, reserving his or her defence until the trial.

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g. Contract

A contract is an agreement between two or more parties which is enforceable. Generally, to be enforceable, there must be an offer by one party, an acceptance of that offer by the other party and "valuable consideration". Valuable consideration is what is given or done in return for the promise. The usual consideration given is money, goods or some promise to do something or refrain from doing something. A contract may be oral or in writing.

h. Criminal Proceedings

Proceedings usually brought by the Crown (often the police) where there has been a breach of the law; a penalty is imposed under an Act for that breach. The *Crimes Act 1900* (NSW) covers many crimes including murder, manslaughter, robbery, stealing and assault. However, proceedings may also be brought for a statutory offence (that is, breach of statute law).

i. Defendant

A defendant is a party against whom an action or charge has been brought. Once a defendant in criminal proceedings is committed for trial before a judge and jury, s/he is referred to as "the accused".

j. Equity

Historically, the common law (made by judges) became entrenched in formal rules that could give rise to injustice. A system of equity made by judges came into being which provides remedies where it would be unjust or unfair to attempt to enforce the common law. Cases now dealt within the Equity Division of the Supreme Court include claims against a person holding property for others (trustees), claims to stop a person invading another's legal rights (injunctions), and claims requiring a person to carry out their contract (specific performance).

k. Evidence

The information put before the judge or Magistrate, that supports the truth or existence of a fact, for the court to consider when making a decision. Evidence may be oral (from the witness) or contained in documents or objects.

l. Exhibits

Things (documents, articles of clothing, equipment, etc) that are tendered to the Court and admitted as evidence by the Judge or Magistrate.

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m. Judge

A person appointed to determine disputes between parties. In New South Wales judges determine disputes in most courts, which include the District Court, certain Tribunals and boards. Judges are addressed as “Your Honour”.

n. Jury

Members of the community who determine questions as to what happened (fact). There are twelve jurors in a criminal trial and usually four in civil proceedings.

o. Magistrate

A Magistrate is a person who presides over matters listed before the Local Court. Local Courts deal with small debts, less serious crimes, inquests into violent and unexplained deaths, and hearings as to whether a person may have committed a serious crime (see Committal Proceedings). Magistrates are addressed as “Your Honour”.

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q. Negligence

Negligence involves the failure of one party to exercise proper care towards another party; resulting in the other party suffering an injury or loss. The monetary compensation for the injury or loss is referred to as “damages”. Contributory Negligence refers to a situation where even though the first party has been negligent, the other party has not taken sufficient care to protect him/herself and by these actions contributed to his/her own injury or loss.

r. Plaintiff

A person who commences a civil action.

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s. Precedent

A principle established in a past case. A Judge or Magistrate is bound to follow a decision in a previous case (in which the facts are similar) where the court handing down the decision is higher in the court system. A hierarchy of courts is set out in Part 12. In some cases NSW courts follow English decisions or decisions of superior courts outside the New South Wales court system. Sometimes a precedent of another court that is not binding will be followed by the court on the basis that it is persuasive because of the status of the court or the similarity of the law.

t. Prosecutor

A person who presents evidence and conducts the case against an accused person in criminal proceedings. In the Local Court, s/he may be a lawyer employed by the Office of the New South Wales Director of Public Prosecutions, the Office of the Commonwealth Director of Public Prosecutions, or a specially trained member of the police force. In criminal trials s/he is called a 'Crown Prosecutor' appointed from the ranks of practising barristers and solicitors.

u. Solicitor

A person who is legally qualified, holds a practising certificate, and is trained to handle legal matters or instruct barristers. Some solicitors specialise in advocacy.

v. Trial

This word is commonly used to cover all legal proceedings. However, it generally refers to a criminal case, which is heard before a judge and jury.

w. Witness

A person who can give evidence in relation to the facts in issue during legal proceedings.