

MASSACHUSETTS SCHOOL OF LAW

MASSACHUSETTS EVIDENCE PRACTICE

Winter/Spring 2012
Judge Agnes

FINAL EXAMINATION

Roger Williams is charged with operating a motor vehicle on a public roadway while under the influence of alcohol and possession with the intent to distribute cocaine.

On January 1, 2012, Roger was operating a motor vehicle on Route 93 South in Andover-Essex, Massachusetts. He was traveling in the right hand lane when, according to Officer Strict Enforcement, his front and rear passenger side tires crossed over into the breakdown lane. It was 2:30 a.m. Officer Enforcement activated his blue lights and pulled Roger over. Roger brought his vehicle to a stop as directed without incident. Officer Enforcement approached the driver's side window which Roger had rolled down. Roger had his driver's license in his hand. Officer Enforcement asked Roger to show him the vehicle's registration. Roger dropped the license as he was trying to open the glove box. Roger appeared to fumble around in the glove box and but after a few moments handed a paper to Officer Enforcement which indicated the vehicle was registered to Gayle Jenkins of 25 Main Street in Andover-Essex. Roger said Gayle was his office manager and that he was using her vehicle while she was in the Virgin Islands on vacation because his vehicle was being repaired.

Officer Enforcement detected an odor of an alcoholic beverage coming from Roger and thought he was slurring his speech. He asked Roger "Have you been drinking?" Roger replied that he had been at a New Year's party in Andover-Essex, but had only drunk 2 beers. When asked for the location of the party, Roger said "you know that Elks Hall downtown." Officer Enforcement knew there was no Elks Hall in Andover-Essex. He asked Roger to exit his vehicle. As Roger did so, he suddenly broke free of Officer Enforcement and ran into a wooded area.

Officer Enforcement reported the incident to his dispatcher and called for backup. Officer Enforcement also learned that the vehicle had been reported stolen. A few moments later, a state police cruiser with a K-9 in it pulled up and asked Officer Enforcement if he needed assistance. After hearing a brief account of the facts, Trooper Iron looked inside the suspect's vehicle and found a sport jacket on the front seat. He removed it and then brought his k-9, Trooper Mike, out of the back seat. After Trooper Mike smelled the jacket, he and Trooper Iron entered the woods in pursuit of Roger. At the same time, Officer Enforcement conducted an inventory search of the vehicle. He found

a plastic bag containing 12 individually wrapped twists of what later was determined to be crack cocaine inside the trunk and underneath the spare tire in a tool kit. Each twist weighed approximately .75 grams. He also found a plastic bag containing a green vegetable material later found to be 1.5 ounces of marijuana underneath the front seat. Inside the console, the police found various papers belonging to the owner, women's cosmetics and a box of long wooden matches like those used to light charcoal grills.

Roger was located after a pursuit that lasted for about 35 minutes by Trooper Mike and Trooper Iron about one mile from where he had fled. He was placed under arrest, returned to the scene, and then brought to the Andover-Essex Police station by Officer Enforcement for booking. On his person, the police found a wallet, pocket change, keys, and a flashlight.

On the way to the police station, Roger asked Officer Enforcement if they could have a confidential discussion. Officer Enforcement replied "About what?" Roger started to cry and stated that "I really only had two beers. When she called I got scared. I know I'm in real trouble. I can't stand the thought that I might not see my kids every day." Officer Enforcement said "I don't know what you're talking about. Maybe you should just wait until you see a lawyer." Roger then stated "what does it matter; I'm screwed."

At the police station, Roger was read his Miranda warnings, booked, and placed in a holding cell.

At 2:58 a.m., a call to the Fire Department about smoke pouring out of the third floor of the Andover-Essex Widget Company on East Main Street was placed by the building's night watchman who had returned from a break. At about 3:00 a.m., a passing truck driver reported that he saw smoke and then flames coming out of several locations in the building. It turned out to be a major fire which totally destroyed the 125 year old manufacturing plant. The Company was owned by the Roger Williams trust and managed by Roger Williams for his family. Roger owned 65% of the equity in the Business.

Roger Williams was brought before the Andover-Essex District Court the following day and arraigned on charges of operating a motor vehicle while under the influence of alcohol, and possession with intent to distribute cocaine, a Class B controlled substance. He was released on \$5,000 cash bail. Roger's lawyer has filed a pretrial motion to suppress his statements and to suppress the physical evidence seized from the vehicle.

Meanwhile, further investigation of the fire scene was conducted by the State Fire Marshall's Office. State Police Trooper Never Rest was assigned to the case. She had been a trooper for 12 years and had been

assigned to the Fire Marshall's office for the past six years. She had received training in the cause and origin of fires at Massachusetts State Police Academy, through programs operated by the Massachusetts State Fire Marshall and the New England Fire Chiefs Association, and attended the National Fire Science Center operated by the United States department of Justice. She had previously investigated 150 suspicious residential and commercial fires and had been qualified as an expert witness in court on 26 prior occasions.

Trooper Rest along with an expert, T.F. Hire, of the Mutual of Andover-Essex Insurance Company, the insurer of the building, examined the scene and had physical items from 25 different locations within the structure's remains sent to the Massachusetts State Fire Marshall's Crime Laboratory. An examination of the physical evidence revealed no evidence of any accelerant. Both Trooper Rest and T.F. Hire determined independently that the origin of the fire was a storage locker on the third floor of the five story building. They based their decision on the witness reports that the first flames were seen emerging from the third floor, southern corner of the building as it faced Main Street, especially the reports supplied by the night watchman who was out of the building and on break from @:00 a.m. until he returned at 2:55 a.m. to find smoke pouring out of the third floor windows in the area of the storage locker. They also considered a videotape of the fire taken by news outlets, reports of the fire fighters who responded, and conducted a careful examination of the scene after the fire including patterns of charring. The storage locker contained a substantial quantity of paper supplies and specialized lubricating fluids used to maintain some of the machinery used on that floor. Their reports indicated that other than the items located in the storage locker there were no explosives, highly flammable solvents, smoking material or air conditioning, heating or evaporation units in the vicinity. When firefighters arrived at the scene at 3:07 a.m., the building was locked and secured from the outside. It was already engulfed in flames. T.F. Hire, an electrician by trade, found no evidence of electrical faults which could have caused the fire. The night watchman, who had left the building at 2:45 a.m. to make his rounds of the second warehouse about one mile away, reported no suspicious activity from 7:00 p.m. when he arrived until 2:00 a.m. when he left. No One entered the building during his watch. He did report a telephone call from Mr. Williams about 8:00 p.m. which he said was not uncommon. When asked about their conversation, the watchman said Mr. Williams asked if everything was ok, whether he (the watchman) expected to lock up at 2:00 a.m. as usual to take his break and then return again at 3:00 for the second shift. The watchman replied "I expect I will do that Mr. Williams; it's my normal routine."

The only people with keys to the building were the watchman, two senior managers, and the defendant. There was no evidence that anyone who

worked on the third floor was a smoker. T.F. Hire reached the conclusion that the fire was incendiary in nature based on the lack of any other explanation. He based his opinion on the National Fire Protection Association Codes and Standards NFPA 921 (2004 edition) along with his training and experience. The report of T.F. Hire also indicates that in his opinion the fire was consistent with the use of a match and some quick igniting fuel such as paper, to, in turn, ignite the lubricating fluids that were stored in the Storage Locker. He also opines that the rapid pace of the fire is entirely consistent with his hypothesis as to its cause and origin. Finally, Hire indicates that while some experts have abandoned the methodology he uses, it is still regarded as reliable and standard in the field. Trooper Rest's report concludes with this assessment: "It appears likely that the origin of the fire was in the storage locker on the third floor. I know of no known natural cause for this fire and can rule out an act of God. Although I do not believe this fire has a natural cause, and suspect it was incendiary in origin, I cannot reach this conclusion with scientific certainty and thus classify it as suspicious in nature, probably incendiary."

The two senior managers have solid alibis for the evening in question. One was attending New Year's Eve celebrations in New York City with a group of friends and the other was at family gathering in New York.

Additional police investigation indicates that Roger Williams and his wife Cindy lived in Andover-Essex but have been having marital difficulties. Cindy suspected Roger was involved with another woman who lives at 23 Main Street in Andover-Essex which is close to the factory in Andover-Essex. Cindy also told the police that Roger confided in her several weeks before her arrest that the plant was in serious financial trouble due to a combination of overseas competition and the high cost of financing its outstanding debt, and that if he could not restructure the debt and obtain a cheap line of credit, the business would probably "go under" within the next six months. On the night in question, Roger told Cindy who did not like to go out on New year's Eve, that he was attending a Bachelor party in Andover-Essex and would be "late." Cindy suspected he was with another woman, Mary Major, who worked as a secretary at the plant. On the night in question, Cindy telephoned this person and told her that she (Cindy) suspected her husband was there and she was on her way over. Mary Major reportedly told Cindy "My parents are visiting. Can't we discuss all of this tomorrow. It's New Year's Eve." The box of matches that was found in the console cannot be located but its existence is noted on the inventory form for Gayle's vehicle and in the police reports. Gayle is a smoker, but Roger is not. Gayle gave a statement to police investigators in which she denied having a box of wooden matches in the console and in which she stated she never uses matches at all but instead always uses a Bic lighter. Gayle's workmates confirm these statements. Gayle has a prior criminal

conviction for possession with intent to distribute cocaine for which she received a one year sentence to the House of Correction suspended for two years in 2008 and is currently on probation for unlawful possession of cocaine. Gayle's live-in boyfriend, Amos Adams, has a long record of criminal convictions and is currently under investigation for cocaine selling in the Andover-Essex area. Roger has a prior conviction for operating under the influence of alcohol which was continued without a finding and then dismissed pursuant to G.L. c. 90, sections 24 and 24D in 2009.

Assume there are written police reports containing all of the above facts and audio recorded statements of what Cindy and Gayle told the police. District Attorney Honest Able has asked you, one of his most experienced prosecutors, to prepare a memorandum of law on the legal issues in this case and, in particular, whether Roger should be charged with Arson. The Fire Marshall's office and the insurance company have pledged their full cooperation to assist the government. D.A. Able wants to know what evidence would be admissible against Roger if he is indicted for Arson, and whether they would have a strong or weak case. Roger's attorney, Morris Maple, has informed the District Attorney's office that his client is willing to plead guilty to possession of marijuana and operating under the influence of alcohol and enter a rehabilitation facility, but that Roger had no knowledge of the cocaine and had nothing to do with the fire. Further, Mr. Maples indicates that Roger and Cindy are back together again. Gayle and her boyfriend have moved and their whereabouts are unknown.

Your Memorandum should be no longer than 10 double-spaced pages.

MASSACHUSETTS SCHOOL OF LAW
MASSACHUSETTS EVIDENCE
FINAL EXAMINATION
Judge Agnes
Fall/Winter 2009

You are the Law Clerk to the Honorable Sandra Wisdom of the Superior Court of Andover-Essex County Massachusetts. Judge Wisdom has been assigned to conduct the trial in the case of Passenger v. Aircraft Maintenance Company. The case involves the crash of an Avid Heavy Hauler aircraft in Fitchburg, Massachusetts on May 27, 2004. Upon crashing, the plane burst into flames. The pilot and the plaintiff, Mr. Passenger, were pulled from the wreckage just before it exploded. The plaintiff was severely burned and suffered multiple fractures and a dislocation of his pelvis and a broken neck. The plaintiff was airlifted to the University of Massachusetts Trauma Center. His treatment included ten surgical procedures. Currently, the medical expenses incurred by the plaintiff are 1.6 million dollars.

Based on the joint pretrial conference report submitted by the parties, the plaintiff's theory is that the defendant was negligent because six months before the crash it issued a Certificate of Air Worthiness as required by federal law in circumstances in which it should have been aware that the steel push-pull rod that connects the control stick in the cockpit to the ailerons or elevators on the tail section of the plane was corroded which led to it fracturing prior to or during flight. The defendant is a federally licensed aircraft repair and inspection service which contracted with the owner of the plane, Mr. Bramich, to conduct an air worthiness inspection in November, 2003. Under federal regulations, an air worthiness inspection requires the licensed entity to visually inspect the push-pull rod and the certify that it is in good and operable condition. The regulations also provide that "it is the duty of the inspecting entity, upon the discovery of any crack, fracture, or break in the push-pull rod assembly or any evidence of corrosion, to document and photograph the evidence, issue a certificate of non-air worthiness, and notify the Federal Aviation Administration in writing within 24 hours" The plaintiff alleges that the defendant violated this regulation and that its negligence led to the crash. At the time of the inspection the aircraft was owned by a person who lived on a lake in Vermont and who landed the plane on the lake and stored it in a boat house on the lake. The defense maintains that the plane crashed as a result of a stall induced by pilot error.

Judge Wisdom has requested that you evaluate and make recommendations to her about how to decide a number of pretrial motions filed by the parties. Judge Wisdom wants you to cite and apply the relevant portions of the Mass. Guide to Evidence whenever possible. The decisions made by Judge Wisdom must be in accordance with applicable Massachusetts law.

The first motion is a Motion in Limine by the defendant to admit the report of Massachusetts State Police Trooper Robert Smith who arrived at the scene about two hours after the crash and along with the NTSB Inspector conducted a visual inspection of the wreckage. The trooper passed away six months ago. His report includes a general description of the wreckage and, among other things, a statement as follows: "I was able to grasp the control rod inside what was the cockpit area and saw that was still connected to the push-pull rod and appeared to be intact all the way to the ailerons on the tail. When I manipulated the control stick the ailerons moved up and down." According to a regulation of the Massachusetts State Police, "the first hand, factual accounts of state police troopers investigating the crash of non-military and non-federal aircraft crashes shall be a public record, and, unless a written objection is filed by the Attorney General, available for use in all civil and criminal proceedings. The plaintiff counters by arguing that this is a civil case and thus there is no right to confrontation. The report in question is a public record and admissible as an exception to the hearsay rule.

The second motion is also a Motion in Limine filed by the defendant to exclude the contents of the four page NTSB Factual Report prepared by the NTSB Inspector who responded to the scene and examined the wreckage about two hours after the crash. The plaintiff maintains that under federal law such reports are admissible. The parties have both cited 49 U.S.C. Section 1154 and 49 C.F.R. Section 835.2. The four page Factual Report is attached as Exhibit A.

The defendant also has filed a motion in limine to exclude the four page F.A.A. Accident/Incident Report by excluding section 21A where it is stated that "component failure" was a cause of the crash. This report is attached as Exhibit B.

The defendant also has filed a motion in limine to exclude a portion of the audio-visual deposition of the owner and pilot of the aircraft, Mr. Thomas Bramich, who now lives in Florida. The portion in question consists of three pages and is attached as exhibit C. The defendant claims that it is barred by Section 802 of the Mass. Guide to Evidence (2008-09). The plaintiff claims that it is admissible under Rule 30A of the Massachusetts Rules of Civil Procedure.

The plaintiff has filed a motion in limine to admit the testimony to Dr. Jerome Quotidian a full Professor at the Northwestern University Graduate School of Applied Sciences where he has taught undergraduate and graduate courses in basic and advanced industrial applications of metals and metal compounds for 27 years. has served as an expert witness in both state and federal courts on the identification of metals. His area of research is in the metallurgical analysis of impurities in industrial grade steel. He has published numerous articles in peer reviewed journals on the use of microscopic, nuclear and chemical techniques for the detection of impurities in industrial grade steel used in both consumer, manufacturing and military products. Professor Quotidian has conducted testing on the push-pull mechanism removed from the wreckage of the aircraft. Professor Quotidian has detected what he has described as a fracture in a joint connecting the push-pull rod to the alleron mechanism in the tail of the plane and evidence of corrosion surrounding it that is visible as large, irregular white dots on a microscopic image of a cross section of the steel rod as it connects to a joint that in turn operates the allerons. Dr. Quotidian's report also states that based on chemical testing he performed on the surface of the push-pull rod it is his opinion that the corrosion is the result of the infiltration of water into the housing within which the push-pull rod is contained. Dr. Quotidian opines that the fracture in the push-pull mechanism is consistent with the pilot's description of how control of the aircraft was lost during flight and was serious enough to cause the alleron mechanism to become inoperable. Dr. Quotidian also prepared digital photographs that he maintains show evidence of corrosion (which appears as a distinct pitting of the surface of the metal which Dr. Quotidian has stained a bright red to help make it appear more distinct). Dr. Quotidian's report also states that based on the extent of the corrosion, the depth of the corrosion, and the existence of the fracture, the corrosion would have been visible to the defendant when it conducted its inspection seven months before the crash. The defendant opposes the admission of the expert under Section 702 of the Guide on grounds that he is not qualified to offer the opinions sought by plaintiff, that the methods he has used to reach his opinions are not valid and that the photographs should be excluded under Section 403.

The defendant also has filed a motion in limine to impeach the testimony of the plaintiff with three prior criminal convictions. One conviction is for receiving a stolen motor vehicle in 2004 for which the plaintiff received a sentence of six months to the House of Correction suspended for two years and the others are for operating under the influence of alcohol in New York, one in 2001 and one in 1995 for which the defendant was placed on probation and ordered to attend an alcohol education program.

Plaintiff's counsel has filed an affidavit of the lawyer who represented the plaintiff in the 2004 case to which he has attached a copy of the police report. The report states that plaintiff was only a passenger in that vehicle and the affidavit states that the driver told the police and the prosecutor that he had picked up the plaintiff shortly before the police stopped the car and that the plaintiff had no reason to suspect it was stolen. The affidavit also states that plaintiff took the prosecutor's plea offer only because he was afraid of what might happen if he was convicted after trial. Plaintiff's counsel in this case argues that these convictions have no bearing on plaintiff's character for truthfulness or his honesty and should not be admitted. Defense counsel states that the court should not consider the affidavit or the police report and that "a conviction is a conviction and if it fits under G.L. c. 233, section 21 it should come in."

Judge Wisdom also has asked you to offer your thoughts on whether she should allow jurors to ask questions during the trial under Section 614(b).

Your Memorandum should not exceed 12 double spaced pages.

NOTE: This question is based on a hypothetical case. The characters are not real and any resemblance to real people or events is purely coincidental.

MASSACHUSETTS SCHOOL OF LAW
MASSACHUSETTS EVIDENCE

FALL/WINTER 2008
JUDGE AGNES

The "Wayfarer Pub" is owned and operated by Mac Johnson. It consists of a dining room and bar. Mac has owned the establishment for 12 years. Both Mac and the pub enjoy a good reputation in the community of Andover-Essex. The hours of the Pub are 12:00 noon until 1:00 a.m. Mac is usually on the premises seven nights a week working as the bar tender.

During the first two weeks of May, 2008, Mac was on vacation to celebrate his 25th wedding anniversary. Mac left Donna Day, his longtime assistant manager in charge of the Pub. Mac told Donna that he had set up the schedule for the 2 weeks and that she should follow the established procedures at all times. One of the procedures was that no one was permitted to work at the Pub unless he or she had been interviewed and approved by Mac.

On the evening of May 4, 2008, Donna arrived at work at 11:30 a.m. as she customarily did. As she was preparing for the day, she learned that the two dishwashers had called in sick. There was a banquet scheduled for that evening that would bring a large number of patrons to the Pub in addition to the regular customers. Mac had planned for such a contingency by having some part-time staff available to fill in when needed. However, when Donna called the three people on Mac's list of backup personnel she was told that in each case the person was not available. Dave Donut, the second chef, overheard Donna's conversations and told her that he had a nephew, Fred Fink, who was looking for work and was a "good kid." Donna told Dave that Fred could come in and work for the evening as a substitute dishwasher on the condition that agreed to remain in the kitchen for the entire evening. Dave agreed to keep his eye on Fred.

On the evening of May 4, 2008, the banquet took place as planned. Everything was going well until about 10:30 after the meal had been served and all the tables had been cleared. As patrons were dancing and conversing in the ballroom, Fred left the kitchen area to get a drink at the bar. Fred walked behind the bar and took a glass off the shelf. As he was pouring himself a drink, Ernie Egbert, a regular patron, said, "Wait a moment sonny; Donna will be right back." According to other patrons, Fred turned to Ernie and said "Who the fuck do you think you are grandpa. Go fuck yourself!" As Fred poured his drink, Ernie got off of his stool at the end of the bar and took several steps in Fred's direction. Fred, in turn, put down his glass and walked toward Ernie. Fred was inches from Ernie's face and had an empty glass in his hand. Heated words were exchanged. Witnesses later reported that Ernie put his hands out to push Fred away from him. These witnesses reported that Fred responded by smashing the glass against Ernie's head. Before Fred was pulled off of Ernie, Ernie had suffered severe head wounds. Two days later Ernie died from his injuries. Subsequently, Fred Fink is charged with Murder in the First Degree under G.L. c. 265, § 1.

According to the discovery in the case, Fred Fink has a lengthy criminal record involving

distribution of drugs, operating under the influence of alcohol, and assault and battery by means of a dangerous weapon. He also has three separate convictions in the past 2 years for firearm violations including illegal possession of handguns and rifles. He also has four G.L.c. 209A restraining orders issued against him for violent acts committed against four different women over the course of the past three years. Finally, there is evidence that he sexually assaulted a fifth woman who never reported the crime to the police but who has now come forward in light of the publicity given to the case. Also, discovery indicates that Ernie Egbert is well known to the Andover-Essex police as a result of several domestic violence incidents over the past year in which he is alleged to have physically abused his live in girlfriend. Ernie has had to be driven home from the bar several times for getting in fights with patrons about five years ago at a time when he was drinking heavily after the death of his wife.

You are the law Clerk to Justice Jerome Wisdom who has been assigned as the trial judge in this case which is pending before the Andover-Essex Superior Court. Judge Wisdom has asked you to prepare a Memorandum of Law, not to exceed 10 typewritten pages, that addresses the issues that may arise at trial based on the Adjutant case. Also, if Fred testifies at trial, will the Commonwealth be permitted to impeach his credibility by using his prior criminal convictions? Assume that Massachusetts law is controlling.

**MASSACHUSETTS SCHOOL OF LAW
MASSACHUSETTS EVIDENCE**

**FALL/WINTER, 2006
JUDGE AGNES**

FINAL EXAMINATION

Prepare a legal brief (not to exceed 20 pages) for the Massachusetts Legislature which is considering the adoption of Senate Bill 2663 titled "An Act Providing Protection Against Compelled Disclosure of Certain Information by the News Media," filed by Senate President Travaglini on behalf of Paul LaCamera. You should discuss previous efforts to adopt a "shield law" in Massachusetts as well as leading decisions of the Supreme Judicial Court and the United States Supreme Court, and include a discussion of the manner in which the Supreme Judicial Court has considered privilege questions..