Podcast 14 – The Paperchase – Researching Your Way to Legal Success

PROFESSOR FORCESE: Welcome back. In this podcast, I interview Professor Melanie Mallet about legal research, and the importance that that skill has both in your success in law school, and, more generally, once you leave law school and enter practice. I asked Professor Mallet to begin by introducing herself and describing her career and teaching at the University of Ottawa.

PROFESSOR MALLET: I am Melanie Mallet, a graduate of the Faculty, and I have a Master’s in Law from Osgoode. I have been teaching variously full-time and part-time and as a sessional since 2005, and then I got hired to basically stick-handle the first-year legal research course. So, it’s my second year doing that. I also teach the kind of complement to the first-year course, which is an upper year research and writing course, and I’ve been doing that part of it since 2008-2009, and I teach the upper year division of powers constitutional course.

PROFESSOR FORCESE: Great. So, legal research is one of the things that you do, of course that’s an area where first-years are going to encounter you for the first time.

PROFESSOR MALLET: Every single one of them, yes.

PROFESSOR FORCESE: Every single one of them. So, maybe you could describe for our listeners, exactly, what is legal research?

PROFESSOR MALLET: Legal research isn’t subject-specific; it’s a skills-based course. I kind of describe it as the key to unlocking the answer to any question you’re going to encounter in law. What we do in legal research is, first, to try to orient students to the legal system in which they’ll be doing legal research, the institutions of government that make laws that they’ll be looking for. So, there’s a bit of context, but it’s more learning a methodology within that context for finding the tools that will provide the answers, and, as you say, to be able to provide legally coherent and defensible answers to questions across a myriad of subject matters.

PROFESSOR FORCESE: So, what are some of the things that they’ll be looking for in their legal research?

PROFESSOR MALLET: Well, the order in which I teach it is secondary sources – so, I have a Constitutional Law book right now on my desk by Peter Hogg – so that sort of authoritative secondary source – and it’s just one of many – basically to give students an overview of an unfamiliar area of law. I always would advise students to start with that, because none of them, and, even 10 years on, few will be bullet proof subject matter experts in any field.

From there, legislation and different types of legislative instruments. So, delegated legislation, like regulations, statutory instruments. Case law, obviously. But then there are a number of skills and different tools you need to be able to work with legislation. So, for instance, you need to know how to interpret legislation, you need to know whether legislation has been amended, whether you’re working with the most current version of legislation. You need to see whether courts have considered legislation and interpreted it. You need to see whether legislation has been expanded upon through regulations. You need to know how regulations are enacted, you need to know whether they are in force, you need to know how to determine, by using official copy, whether legislation has been commenced, brought into force, as legal consequences can bind you.

Likewise, with cases, you need to know whether cases still represent good law – relevant, accurate descriptions of the state of the law. You need to know how, if you start with Case 1, how was that interpreted by Case 2, how it goes up, not only the appeal chain, but also how subsequent cases have interpreted a case. So, once you have that sort of understanding of different skills, you can apply them – it doesn’t really matter if you’re dealing with a constitutional question or a trade law question. The skills are the same, and are transposable.

So, I try to instill an organized, systematic methodology that students can apply across a range of disciplines. At the end of the day, I don’t want any student to walk out of here not being familiar with those sorts of basic concepts, tools, institutions I’ve just mentioned, but also feeling antsy in a summering or articling position. You’re going to get handed something you know nothing about – it’s inevitable – and I don’t want students to feel that they don’t have a hot clue where to start. You might not know the answer, but at least you’ll know how to go about finding the answer.

PROFESSOR FORCESE: What are some of the tools, in terms of the actual resources you rely on. Are you relying on hard copy materials in the library? Electronic sources?

PROFESSOR MALLET: I’m a bit of an outlier, or a hanger-on to the old regime, particularly with secondary sources. Logistically, I can’t show every single first-year student all the hard copy resources, but I think it’s important to know what exists in hard-copy form, particularly with textbooks or legal encyclopedias, like Halsbury’s. A lot of these are available online, but I do show students where they can at least find them in the library if the computer system fails, if the law firm you’re working at doesn’t subscribe to a certain service. Most of what we do is online – that’s just the reality of it. So, for government sources – I’ll just speak to federal government sources – you can get official copy of legislation online at the Justice website, so we deal with that, and likewise the Gazette. The Gazette will contain orders in council and those sorts of thing in official copy. For case law, I do point out the hard copy reporters, but realistically, a lot of students search for things online, and that’s fine – there are limits about what you can use in court, and what systems you should prefer, but students are going to learn about QuickLaw, WestLaw, CanLII, all those sorts of online legal research databases as well.

PROFESSOR FORCESE: Question about reading cases. A lot of the cases in the official reporters have something called a headnote. What’s your view on the research use of a headnote?

PROFESSOR MALLET: A couple of things. A headnote is not officially part of the case – it’s introduced by some sort of editorial intervention. Very handy to get a quick sense of what the case is talking about. I find them useful as a preliminary sorting tool, but you should never rely absolutely. First of all, you shouldn’t cite to headnotes. It just gives you a sense of what the case is dealing with. But also, because it’s a product of editorial intervention as I said, there are limits in what’s in the headnotes. So, if you don’t read the case – which some students like to round the corners, take shortcuts – you’ll probably miss a lot if you rely on the headnote. So, it’s just useful as a synopsis of what you might find in the case; it’s not the complete picture of what you’ll find in the case, but can be useful for preliminary sorting. That said, you’re going to miss all sorts of nuggets and nuances to the argument and the development of the law if you just rely on the headnote.

PROFESSOR FORCESE: I remember working on cases where the case turned on a footnote in some upper court decision. That footnote, of course, would never have been reproduced in a headnote.

PROFESSOR MALLET: Absolutely, as with anything else – the editor is going to select what he or she thinks is important, which might not be the reason you’re after the case. And so much of the development of the law turns on things you can’t capture in a paragraph, like the interaction between the majority and the dissenting judgment that you just can’t – and I say this to students too – there’s things you can do to make yourself more efficient, and with experience comes some speed, but there’s just no way around the fact that you’re going to have to do a lot of reading and can’t rely on those sorts of shortcuts, because you’re going to make mistakes if you do it, kind of like what you just pointed out.

PROFESSOR FORCESE: What about this concept of noting up? What does it mean to note up a case, or in the American parlance to Shepardize it?

PROFESSOR MALLET: That just means to – let me back up a little bit. Obviously, our system is built on precedence, so there’s, kind of, Case 1, if you will, but the law evolves through subsequent judicial interpretation and reliance on that case. So, to note up a case is to take Case 1 and see how it’s been treated by subsequent courts. I would also include in that concept to take a Statute – say the Divorce Act – and see how courts have interpreted different provisions of the Divorce Act.

PROFESSOR FORCESE: So, if you note up a case, there is different terminology you sometimes see referenced in describing the reliance on that case by subsequent courts. You see terms like mentioned, and distinguished, and followed. What do those terms mean?

PROFESSOR MALLET: As you say, it refers to what the court subsequently relying on, say, Case 1, what it’s actually done with that case. If a case has mentioned it, the subsequent court has done precisely that – mentioned it in passing as some sort of fleeting authority for a proposition. Where a case has considered it, or applied, it’s really engaged with the reasoning in the original case. Equally important to know is whether a subsequent case has distinguished a case – found some sort of distinction between the cases, which means that it’s not bound in our system of precedent to follow the original case for some reason.

If I can reference back to all these online sources – QuickLaw, WestLaw, not so much CanLII, but certainly the commercial databases which students will learn about – they provide this sort of description – and the paper copies as well, so the Abridgment for instance – provide subsequent treatment of cases. Again, useful as a sort of preliminary sorting tool, but students always want to engage with the case themselves to see what has actually happened in the case. It’s another example of these editors or commercial services provide you with tips and shortcuts, but I find they’re not always perfectly accurate in terms of describing subsequent treatment of cases, and it doesn’t really help you understand how or why, or the basis on which a subsequent court has, for instance, distinguished the original case. It doesn’t mean it’s not relevant to your research – it might have been distinguished on other grounds, for instance. Again, perhaps helpful as a preliminary sorting tool, but the student needs to engage for herself or himself with the subsequent treatment of the case.

PROFESSOR FORCESE: Let’s talk a little bit about Statutes now. Of course, Statutes are enacted at a particular point in time, but then are often amended – in fact, some Statutes are amended on an annual basis. So, what sort of safeguards should a student, and then a practicing lawyer, employ to make sure that the Statute they have in front of them is actually the current version?

PROFESSOR MALLET: In that sense, they are assisted a lot by recent online developments. The Justice website – again, never rely on anyone else’s work as an absolute bullet proof answer to your own – but Justice in the past 2 years, particularly, has quite current, up-to-date, consolidated laws.

Consolidated law is one that incorporates changes and commencement events right into the text, and you can find that free of charge online. Consolidated acts are official, but, something I try to teach the students is how to do that backstop check. So, again, that involves looking at the Gazette, just to make sure that there have been no subsequent legislative events which will affect, or in 1 or 2 days will affect, the currency of the Statute with which you’re working.

PROFESSOR FORCESE: You mentioned the concept of coming into force with reference to Statutes. What does that mean?

PROFESSOR MALLET: Coming into force means – many students will be familiar with this, but a lot of student won’t – it speaks to when the law has the status to bind or to create legally binding obligations. So, a bill, which is draft legislation, can go through all the necessary steps and have Assent, so regal sanction, but not have the capacity to bind citizens or corporations or governments. So, coming into force gives legal vigour, if you will, legal effect to a law. Royal Assent can have commencement effect, but not always. It’s important to distinguish between those two steps and be able to verify that both steps have happened.

PROFESSOR FORCESE: So, presumably, if royal assent is not sufficient to bring a Statute into force, there’s some other provision in the Statute that prescribes a given event that will bring it into force or a particular date.

PROFESSOR MALLET: That’s right. A couple of things. If nothing is specified in the Statute, by virtue of provincial and federal interpretation law, the date of assent is the date of commencement. Often, and you look to the back end or the bottom of the Statute for specific commencement information, and that will either specify, sometimes, in an abundance of caution, indicates the date of assent is the date of commencement, or it will specify a specific date at which the Statute or specific provisions are to come into force. Or, it will specify that the Statute, or provisions of it, will come into force at a date to be announced.

That’s where you can fall into a hole, and that’s why it’s important to know – I talked about orders in council, these kind of trait that express government decisions about when a Statute will come into force at a perspective date – and that’s why you need to know how to use the Gazette. The reason governments do that is often because of the infrastructure they need to move to be ready to start implementing the law.

PROFESSOR FORCESE: One of the things I’ve noticed is that with the consolidated version of an Act that’s been in force for some time, some transitional provisions which might include a specific admonishment as to when a particular statute comes into effect, those are sometimes dropped from the consolidated version. And so, in some circumstances, you’re left wondering if a given law was in effect at a particular time that might be material to your client. So, you can’t always rely on those consolidated versions, would you agree with that?

PROFESSOR MALLET: I think if you’re doing anything that turns on different versions of Statute, or if as you said your client’s conduct was captured under a past version of a statute you want to find, sometimes, when you’re dealing with old legislation, there’s no way other than to pull the hard stack off the shelf in the library and comb through every version of the Statute spine by spine. The Department of Justice website is quite good at offering point-in-time versions of Statutes, but it’s often a matter of lining up pieces of paper against each other with the necessary orders in council just to see what the evolution of the legislation has been.

PROFESSOR FORCESE: We’ve been conversing enough now that I think students have some sense as to why legal research is important. Maybe though, just to put it squarely, why is it important for them to acquire these skills?

PROFESSOR MALLET: Well, let me appeal to their bottom line. I was visiting my own lawyer about a property transaction, and had mentioned to her, she was asking about my course load, and I mentioned that this was what I was doing, and she said “Tell your students that that’s the only thing that I look at when I’m hiring students.” And she’s a Senior Partner, so she’s quite high up the food chain. She said, “We only look at their legal research marks.”

Again, as I said at the outset, I think why it’s important is because it’s this transposable skill that will set you on the right path to find the answers to anything. We can’t possibly teach students all the substantive content of the law that they’ll need to know – partly because we just don’t have enough time, partly because the law changes – so it’s a mechanism, it’s a methodology, so students can teach themselves how to find the answer.

PROFESSOR FORCESE: I remember as a junior associate that that’s the principal task that I performed, which is legal research, and in part because it was much more economical to have junior associates do the research than to have the Senior Partners, many of whom, frankly, weren’t familiar with the more recent, especially computer-based, search techniques.

Is there anything else that you would advise to students coming into the program about means by which they can, over the course of three years, improve and hone their legal research skills?

PROFESSOR MALLET: As with anything, I think a bit of independent initiative is required. If I can go back in terms of talking about why legal research is important, I think it’s complementary to understanding the context in which law operates, and it explains things about different organs of government. It’s holistic in terms of your understanding of law. If you come in and you’re not a Poli Sci major, which many of our students are not, and we don’t expect that they are, but you can take a bit of time acquainting yourself with how government works. Obviously, law isn’t solely about that, but in terms of how law is promulgated – Statute, case law – that affects corporations, that affects interactions between private citizens. I would probably spend a bit of time acquainting myself with that if I wasn’t familiar with that.

Your book that you wrote with Aaron Freeman – The Laws of Government, Second Edition, Irwin – that’s a book I often recommend to students just to kind of immerse themselves a bit more in the context. There’s an increasing number of research and writing courses available at the Faculty and I would certainly – I think writing is a complementary skill to legal research; the fruits of your labour really are only as effective as your communication of them. When students get into upper year courses, I teach an upper year research and writing seminar, but basically, any course where you have to, say, write a paper, engage in some sort of research project where you apply these skills.

To some extent, talking about legal research is like telling someone how to drive a car by talking about it. You need to get in the car and drive, just like you need to get your hands dirty with these different research tools, whether it’s Canadian, whether it’s International. I think that’s probably the best advice I could give.

PROFESSOR FORCESE: Thank you very much.

PROFESSOR MALLET: You’re welcome.