
NTU
NOTTINGHAM
LAW SCHOOL

# NOTTINGHAM LAW JOURNAL

**VOL. 19(1)** **2010**



The *Nottingham Law Journal* is a refereed journal, normally published in Spring and Autumn each year. Contributions of articles, casenotes and book reviews to the *Journal* are welcomed. Intending contributors are invited to contact the Editor for a copy of the stylesheet, which gives details of the format which submissions must follow. Submissions and enquiries should be addressed to:

Mr Tom Lewis or Ms Jane Jarman, Nottingham Trent University, Burton Street Nottingham, NG1 4BU. Telephone 0115 9418418. They can also be contacted on the following e-mail addresses: **tom.lewis@ntu.ac.uk** and **jane.jarman@ntu.ac.uk**. Style notes and further details about the Journal are available on request.

Intending subscribers should please contact Ms Carole Vaughan at the above address. Intending subscribers in North America are advised to contact Wm W Gaunt & Sons. Inc, Gaunt Building, 3011 Gulf Drive, Holmes Beach, Florida 3417 2199.

**The citation for this issue is (2010) 19(1) Nott L J.**
ISSN No. 0965–0660

# NOTTINGHAM LAW JOURNAL

**VOL 19(1)** **2010**

## CONTENTS

NOTTINGHAM LAW JOURNAL

VOL 19(1) 2010

# EDITORIAL

Jane Ching and I formed the Nottingham Law School Legal Education Group in June 2008, with the aim of engaging in discussion and research in legal education to raise the profile, internally and externally, of the teaching quality within the Law School. This edition of the Nottingham Law Journal is dedicated to legal education and we are very grateful to Tom Lewis and Jane Jarman for giving us this forum to showcase some of the challenges, and some of the solutions, facing those who teach and learn law, at whatever level.

Nigel Duncan starts the ball rolling (and you will have to turn to page 1 to appreciate the awfulness of the pun) by analysing the nature of the legal services sector, historically known as the legal profession, echoing the oft-asked question: What is legal education *for*? Nigel suggests that whatever the answer may be, in a global legal market that bears scant resemblance to the traditional English two-branched organisational structure, a critical study of professional legal ethics should be an integral module on an undergraduate law degree to enable students to be equipped for the world of competitive, commercial and cross-cultural work. He concludes by inviting the reader to visit the open access web pages at www.teachinglegalethics.com. Michael Blissenden also advocates the use of open access internet resources in legal education. His story-telling methodology is designed to engage students in the study of the stories behind the law. He develops a space for the students in which they can reflect critically and simultaneously on the minutiae of the case as well as the wider context of the decision. This develops skills that students can use to inform their future working practices.

The pedagogy of working practice is examined by Jane Ching in respect of the work-based learning project. Her paper considers the nature of post-vocational education, a relatively unexplored sector of legal education in pedagogical circles. She defines, analyses and questions the concept of a competence framework; and this necessarily involves some examination of the nature of ethical competence, which brings us full circle.

In this edition's Nottingham Matters, Phil Knott, recently retired Emeritus Professor at Nottingham Law School, compares and contrasts the vocational stages of legal education in England and Wales; the Legal Practice Course (LPC) and the Bar Professional Training Course (BPTC); and John Hodgson and Professor Neil Peck add an international perspective in their comparison of vocational education in England and in the United States of America.

We are delighted include the entries to the student essay competition ''Legal Education: What I wish I'd known''. Judged in an entirely subjective and unscientific way by the Editorial Board, the winner is Nadine Evans, currently on the Distance Learning Graduate Diploma in Law. All four entries have been included, however, because each has such a strong tale to tell and it seems wrong to exclude any entry from publication given the very personal nature of the messages contained in each. It

is also telling of the breadth of programmes offered at Nottingham Law School that each of the students who entered the competition was on a different course of study, at a different level, using a different mode of learning.

REBECCA HUXLEY-BINNS, May 2010

NOTTINGHAM LAW JOURNAL

VOL 19(1) 2010

# ARTICLES

## BATTING FOR A FUTURE: AN ETHICS RESPONSE TO THE CHALLENGES FACING LAW SCHOOLS

*NIGEL DUNCAN**

Looking at the scene facing UK law schools in the near future made me feel a little like a batsman playing my favourite childhood game of French cricket. For any of you not familiar with this game the batsman plays solo, surrounded by a variable number of opponents who act both as bowlers and fielders. The object of the batsman is to stay 'in' for as long as possible. The object of everyone else is to get her 'out', which can be achieved either by striking her legs with the ball or catching the ball when struck by the batsman. When batting it is desirable to hit the ball, as one is then permitted to move one's feet to face the next bowler. Failure to hit the ball means that you must defend your legs against the next ball without moving the feet. This is difficult as the next bowler will probably be behind you and you have to twist round awkwardly, making it hard to defend your legs fully. Moreover, the distance one can hit the ball makes an accurate attack harder, as the bowler needs to bowl from the position where s/he stopped the ball. However, the further the ball is hit the greater the risk of a catch and the defence against a particular bowler may expose one to a catch from another. A 'safe' defence of one's legs (avoiding the risk of a catch but enabling a turn to face the next bowler) is likely to make the ball easy to stop very close, thus risking an easy attack the next time. I shall not try to push this analogy too far, but it gave me a flavour of the multiple challenges facing law faculties at this time.

Law faculties in the UK face a daunting set of challenges over the coming years. Faced with cuts in the unit of resource, they must respond to an increasingly consumer-oriented, fee-paying student body armed with the publicity generated by the National Student Survey. A newly-appointed Joint Academic Stage Board is looking afresh at the Joint Statement and what the qualifying degree will be expected to deliver. The demands of the Bologna Process will become more insistent, not only in forcing us to re-consider our credit frameworks and ensuring that our M-level work is fully compatible, but also with a developed European quality assurance regime.[1] Recruitment to our degrees faces conflicting pressures from the profession and from government. Our professional courses are in a state of flux as both professions introduce new programmes for design and delivery. The economic situation leads not only to government cuts but to great turbulence in the professions, with consequences

*Principal Lecturer, The City Law School, City University. N.j.duncan@city.ac.uk

[1] Peter Williams, "Quality Assurance: Is the Jury still out?" (2010), 44 *Law Teacher* 1 at 4.

for the career prospects of our students. The profession itself is faced with unusual ethical challenges as it moves into a globalised world.[2]

This article makes no attempt to provide solutions to these manifest difficulties, but makes one modest proposal which, it is hoped, will contribute to the variety of solutions with which ingenious law schools will respond.

## FUNDING AND PROGRAMME CONTENT

Government responses to the world banking crisis have left the UK economy in severe deficit, with the need to reduce government expenditure which will continue for the foreseeable future rather than being a brief period of temporary austerity. Tentative indications suggest that higher education will bear a higher proportion of these measures than most other sectors. The figures for 2010–11 are contained in the Secretary of State's Annual Grant letter. They show a reduction of a total of £398 million from the equivalent in the previous year.[3] At the same time, the letter requires enhancement of the student experience with an improvement in quality assurance to be implemented by 2011/12, developments in sustainability, continuation of the drive for wider and fairer access and development of universities' engagement at local, community and global levels. This was probably to be expected. However, a further demand which will be of concern to many is the letter's requirement to secure greater social and economic impact. In respect of research, the proposal for the Research Excellence Framework is that it should "provide significant incentives to enhance the economic and social impact of research. . . . especially in the high cost, scientific disciplines." [4]

In respect of teaching, HEFCE is required:

> to devise new funding incentives for higher education programmes that deliver the higher level skills needed. This will require a robust way of identifying those programmes and activities that make a special contribution to meeting economic and social priorities, and a mechanism to redeploy funds, on a competitive basis, to those institutions that are able and willing to develop new or expanded provision in these key areas.[5]

This should raise concerns of two kinds. One is a risk of focussing funding on the scientific disciplines regarded as most relevant to developing the UK economy. The other is pressure to design our courses with the narrow needs of employment in mind. Most university teachers would see the dominant purpose of universities as providing a liberal education to prepare students for membership of society, rather than narrowly for a specific economic role.

### *Maintaining the profile of our discipline*

If funding is to be concentrated on meeting economic and social priorities the humanities are bound to be affected. For this very reason the assumptions underlying the proposal should be challenged. It is necessary to emphasise the role of law in ensuring the economic and social benefits of other developments, in providing a

[2] Some of the challenges identified are specific to UK Law Schools, but many will apply equally, or be strongly resonant in other jurisdictions.

[3] Peter Mandelson, Annual Grant letter to HEFCE, http://www.hefce.ac.uk/news/hefce/2009/grant1011/letter.htm at para 10. (All website references last accessed on 12 March 2010).

[4] *Ibid* para 6.

[5] *Ibid* para 5.

foundation of trust which makes invention, production and commerce possible. The law schools and the professions should be working together to emphasise this point.

However, it may be realistic to recognise that there will be some move in the direction of a more utilitarian approach to the academy. This may or may not be damaging to the study of law. Law has always been caught in a characteristic tension:

> . . . a tug of war between three aspirations: to be accepted as full members of the community of higher learning; to be relatively detached, but nonetheless engaged, critics and censors of law in society; and to be service-institutions for a profession which is itself caught between noble ideals, lucrative service of powerful interests and unromantic cleaning up of society's messes.[6]

This remains true today and the tense relationship between the professions and the law schools finds expression through the work of the Joint Academic Stage Board. This has been described as "trench warfare"[7] with the possibility of the professions being about to establish a new salient. These questions will be addressed in the following section. However, the very fact of that engagement in potentially conflicting goals provides law with a *raison d'être* in this climate. We can see that the legal profession is key to the development of a service economy and to ensuring that the proceeds of scientific knowledge serve the economy well. As such, we have no problem with justifying the existence of our degree courses and their status as the academic stage of qualification for the profession provides us with an extra layer of security. But this is not as comfortable as we might hope. Approximately a quarter of entrants to the legal professions choose to study non-law subjects and then do the Postgraduate Diploma in law to meet the requirements of the academic stage.[8] Furthermore, the nature of the profession is changing. Increasingly the majority of those working in the law are paralegals who may not have law degrees and who are pursuing qualifications designed for narrower types of legal work.[9]

All these factors may place us under pressure to increase the relevance of our degrees to the profession. However, that brings the focus directly to the longstanding tensions in law schools which Twining identifies.

*Maintaining the academic quality of our discipline*

Few would want the university law school to become simply a trade school, concerned only with the narrow interests of preparing practising lawyers. Indeed, amongst the stated advantages of the PGDip/CPE route is that candidates using it come with a broader academic education than candidates with an LLB (and their knowledge of core law may be more current).[10] However, the tension is clear and regularly aired. One of the major exponents of the arguments that the law school should stand well back from the demands of the profession is Tony Bradney. He wrote: "It may be morally more worthy or socially more expedient to pursue other goals but the university, if it is to be a university, can have only one aim, the increase of knowledge."[11] Later, he clarified that he did not regard it as improper to prepare students for professional roles, but that it should play a secondary role: "it is not that a liberal education cannot provide

[6] William Twining, *Blackstone's Tower: The English Law School*, 1994, London: Sweet & Maxwell, at p 2.

[7] Andrew Boon, "Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus", (2002) 5 *Legal Ethics* 34.

[8] Email to author from Bar Standards Board, 19/01/2010 containing the most recent, currently unpublished figures.

[9] James O'Connell, "Climate Change: It's Happening in the Legal Profession Too", (2008) 42, *Law Teacher*, 219.

[10] Vera Bermingham and John Hodgson, "Desiderata: What Lawyers want from their Recruits", (2001), 35 *Law Teacher* p 1.

[11] Anthony Bradney, "The Place for Teaching Professional Legal Skills in UK University Law Schools", 5*, J. Prof. Legal Education*, (1987) 125 at 128.

technical or professional instruction . . . but technical instruction should not overbear the humane nature of the education".[12] This view is widely held and lies at the core of the legal academy's view of itself. It can, however, be used in many ways.

If one is concerned to defend what one does (whether in the general terms of "academic freedom" or to defend specific approaches) it might be used as a shield. It is thus used to resist increasing demands of content coverage by the professions, to protect "black-letter" or critical approaches to legal analysis or particular teaching or assessment methods. As such it can become positional.

Alternatively, it can be seen as a spur to find methods of achieving both goals. While recognising that it is unrealistic to deny tension between them I would argue that there are ways of combining both aims in ways which enrich both. My specific proposal would be for a course which looked critically at the role of the legal profession in society. My motive for proposing this is twofold. From the perspective of preparing professionals there is a real need to address professional ethics in the undergraduate curriculum. The professional courses (LPC and BPTC) take this subject seriously, but the assessments are really only concerned with Code compliance. The Codes contain inherent conflicts and cannot cover all situations, as is apparent from the very existence of the Solicitors' Regulation Authority's Professional Ethics Helpline[13] and the Bar Council's Ethical Queries Helpline.[14] Addressing Code compliance alone is quite inadequate.

Such a course would have knowledge content which looked at the way in which the professions operate within the legal system, the system of funding and the characteristics inherent in a profession. Developing this could be done in a number of ways, depending on the interests of the teachers concerned. A core approach which I would favour would be a critical study of the ethics of the profession. Such a module (or elements of sequentially-planned modules) would combine the desire for relevance with the most challenging and critical academic study. Any remaining tensions could be resolved by the preferences of the academic staff concerned, provided the relevance was not actively de-valued.

This would need to be a sensitive exercise. There are aspects of the behaviour of the legal profession which are unattractive. Harry Arthurs has warned that a contextual and critical teaching of legal ethics may lead to cynicism.[15]

> However, to contextualise is to subvert. To paraphrase, no one who sees food prepared or legal ethics administered is likely to maintain much of an appetite. Teaching ethics with a full awareness of how discipline is exercised will hardly reinforce professional solidarity or promote respect for the institutions and symbols of the profession, including its ethical code.[16]

This may be overly pessimistic. There is good as well as bad practice. There are heroes as well as villains. As, increasingly, the professions recognise the commercial value of clearly ethical behaviour a serious contextual study should promote a principled realism rather than cynicism.

[12] Anthony Bradney, "An Educational Ambition for Law and Literature" 7 *International Journal of the Legal Profession,* (2000) 343 at 346.

[13] http://www.sra.org.uk/solicitors/advice-support.page.

[14] http://www.barcouncil.org.uk/assets/documents/Ethical%20Helpline%20 Flyer%20-%20printable.pdf.

[15] See the interpretation of Arthurs' comments in Andrew Boon, *op cit* n 7 at 59.

[16] Harry Arthurs, "Why Canadian Law Schools do not Teach Legal Ethics" in Kim Economides (ed) *Ethical Challenges to Legal Education and Conduct*, (Oxford, Hart, 1998) 105 at 117.

## PROFESSIONAL BODY EXPECTATIONS

*Legal Services Act*

The professions are facing major change. The implementation of the Legal Services Act 2007 is likely to have a profound effect on the nature of legal professional practice. It will enable the opening up of new business forms, including multi-disciplinary practices allowing lawyers to work with, for example, accountants, and legal disciplinary practices in which solicitors and barristers can combine. This is likely to have a considerable effect on the training needs for the individuals working in those new organisations. At the same time the differences within the profession come into ever sharper profile. The small generalist High Street solicitor is faced with an increasingly bureaucratic and decreasingly lucrative future when undertaking a diminishing amount of publicly-funded work. Competition from enterprises which predominantly use paralegals, trained to undertake a narrow task and possibly developing high levels of expertise at it, may force a change of approach on traditional solicitors' firms. There may be a relatively small number of fully legally-qualified solicitors supervising this activity. This process has been happening for some time. As James O'Connell puts it:

> A few years ago, unheralded, solicitors and barristers became minority providers of legal services in this country. . . . in less than a decade almost 4,000 paralegal advisory firms (PAFs) have registered with government.
> Individual practitioner numbers are equally astonishing: circa 132,000 UK solicitors and barristers, but circa 500,000 paralegals.[17]

This suggests a real risk of reduction of demand for the conventional fully-qualified lawyer. The obvious opportunities to offer courses for the new aspirant paralegals has already been addressed by the University of West of England and Central Law Training, who offer a distance learning course as the mandatory course element of qualification with the Institute of Paralegals.[18] One of the routes to qualification permits an ''approved course'' to substitute for two years' practice experience. The list of approved courses includes a bewildering variety, varying from Level 3 BTEC programmes to M-level BVCs. Nevertheless a number of law schools have applied to have their courses recognised.

If we are to maintain a distinctive value for our undergraduate programmes and the professional programmes to which they lead for many of our students, we must make them distinctive in ways which will appeal to both the intellectual excitement of our most interesting students and to the professions which will continue to employ them. I suggest that a critical view of the real working of law in society with a focus on the behaviour of members of the legal profession is an important element of that endeavour.

*Law Society Reviews*

The direction of thinking may be seen from two recent reports commissioned by the Law Society. One source of an increasing professional interest in the student experience is the Hunt Review of the Regulation of Legal Services, undertaken for the Law Society between 2008 and 2009. The terms of reference for the Hunt Review were:

> In light of current and forthcoming changes in the Legal Services market, the differing needs of different types of client, current regulatory debates and the need to promote equality and diversity, to consider the appropriate regulatory rules, monitoring and

[17] James O'Connell, *op cit* n 9.

[18] See http://www.instituteofparalegals.org/.

> enforcement regime to ensure high standards of integrity and professionalism for solicitors and their firms in all sectors, and to make recommendations.

The recommendations include:

> 59. I recommend that the SRA should take a far more active and ongoing interest in the standards being demanded of law students in higher education and continuously assess how effective, relevant and practical their education is.
> 60. I recommend that, at the very least, Qualifying and Exempting Law Degrees ought to be subject to the same kind and level of scrutiny as that adopted for Graduate Diplomas in Law. This would involve, *inter alia*, the Joint Academic Stage Board itself determining, through procedures entirely separate from the provider-Higher Education Institution's own internal approvals system: whether a newly proposed degree programme should obtain Qualifying or Exempting status; and periodically whether an existing Qualifying or Exempting Law Degree should retain that status.
> 61. I recommend that the SRA should consider whether the standards it expects from a qualifying law degree are appropriate and enforceable. If it discovers that any university or college is failing to facilitate what is needed, the regulatory pillars of the Law Society and the Bar Council should remove qualifying law degree status and insist that all students, even those who have completed a law degree, must go on to complete the one-year graduate conversion course before taking an LPC course.[19]

The report also provides detailed recommendations for a more intrusive approach towards the running of LPC courses.[20] These are recommendations, and have not been accepted as yet by the professional bodies, but they are a clear warning of the type of pressure that will be placed on the JASB and, through them, on law schools.

The Hunt Report comments favourably on the second of these reviews: the Smedley Review of the Regulation of Corporate Legal Work.[21] This has proposed that different regimes be developed for the regulation of solicitors' corporate as compared with private client work. Smedley, in effect, recognises a clearly segmented profession and proposes that firms "which possess the necessary factors, including size, nature of client base, and infrastructural sophistication,"[22] should be subject to a new regime by a distinct group within the SRA which had much greater expertise in the regulation of corporate work. Greater responsibility would also be given to firms. As Smedley puts it:

> This style of regulation moves the SRA towards a combination of self-assessment by the firms (along the lines of the "ethical infrastructure" approach pioneered in New South Wales), segmentation (as practised by such other regulators as the FSA and the ICA), expert advice by the regulator, and an overall model of supervision which is closer to engagement and partnership.[23]

The approach is described as that of a "critical friend"[24] and is designed to improve practice rather than punish errors, although sanctions would still be available.

This new approach would commence by being "restricted to a small number of the largest corporate law firms"[25] and, once evaluated as a pilot, might extend to other firms:

[19] Lord Hunt, "Review of the regulation of legal services", Law Society, 2009, http://www.lawsociety.org.uk/regulatory-review.page.

[20] See *ibid* Recommendations 62–67.

[21] Nick Smedley, "Review of the Regulation of Corporate Legal Work", Law Society, 2009, http://www.lawsociety.org.uk/regulatory-review.page.

[22] *Ibid* recommendation 3.

[23] *Ibid* 4.10.

[24] *Ibid* 4.18.

[25] *Ibid* 5.13.

> if a firm can satisfy the regulator that it has suitable and sufficient arrangements in place, appropriate for its clients and its size and operational structure, it might be quite possible to expand the definition of corporate firms in due course.[26]

All this is likely to raise the significance of professional ethics. Firms which are not in the initial pilot will aspire to be included in the corporate sector for SRA purposes and to this end they will need to sharpen their internal procedures and structures, including the appointment of Risk and Compliance Partners. This will have an impact on what may be expected of legal education.

*Joint Academic Stage Board*

The Solicitors' Regulation Authority and the Bar Standards Board have recently recruited a new Joint Academic Stage Board (JASB) which has responsibility for the content and standards of qualifying law degrees. The Joint Academic Stage Handbook,[27] which contains those requirements, is being revisited. The professional regulators do not have the power simply to mandate change. For a start, the JASB has a number of academic members (three with their major experience of academic programmes and one of professional programmes) as well as members drawn from each branch of the profession. Any proposals for change then need to be the basis of consultation with bodies identified by statute: the Association of Law Teachers, the Conference of Heads of University Law Schools and the Society of Legal Scholars (the Associations). On 10 December 2009, the Secretary to the JASB wrote to the statutory bodies asking them for comments on the composition and format of the Handbook, and "on any areas of concern, *ie* if you think existing rules need to be amended or if there are areas where guidance is not currently published".[28] Replies were to be sent by 15 January 2010, a short period given that Christmas and the New Year fell within it.

The Law Society is currently surveying the profession to find out what practising solicitors want from the qualifying LLB degree. There is likely to be a request for extra required subjects, Company Law and Family Law being obvious examples. However, the Associations are likely to resist any such demands for a variety of reasons. There will be a general reluctance for more compulsion, given its restrictions on academic freedom. More specifically, academics will oppose the inevitable deadening effect it will have on creativity within the undergraduate curriculum and the increasingly limited scope for option subjects. It will make combined qualifying Honours degrees (such as Law and Languages) virtually impossible within the conventional time frame of three years. It will be hard to see how a one-year Post Graduate Diploma to convert students with honours degrees in other disciplines could possibly manage to shoe-horn in extra subjects. So the pressure from the professions may point in precisely the opposite direction (longer, more expensive courses) than that from the government. In other words, there is likely to be a battle ahead without some very creative thinking. Any substantial change is likely to have profound knock-on effects for the professional programmes and probably also for training contracts, pupillage and even continuing professional development requirements.

As indicated above, alongside the pressure for new substantive subjects, there is likely to be greater pressure to address professional ethics in a more thoroughgoing way. This has been articulated in The Law Society's report, *Preparatory Ethics Training*

[26] *Ibid* recommendation 2.

[27] http://www.barstandardsboard.org.uk/assets/documents/JAS%20Handbook%202010.pdf.

[28] Notice from Secretary of JASB: http://www.barstandardsboard.org.uk/Educationandtraining/whatistheacademicstage/JointAcademic/.

*for Future Solicitors,*[29] which recommends that professional ethics be incorporated into the content of qualifying law degrees. The report recommends that consideration be given to whether this should be mandatory.

At this point it is worth revisiting the ACLEC Report of 1996.[30] Andrew Boon observes how ambiguous the report's intentions regarding professional ethics were.[31] Referring to the analyses of Richard O'Dair[32] and Julian Webb,[33] he draws attention to the report's focus on "legal values" and its relative reluctance to require universities to address legal ethics. Legal values, however, mean "a commitment to the rule of law, to justice, fairness and high ethical standards".[34] Moreover, the requirements for a qualifying law degree should include that it be satisfactory to the professional bodies "with regard to the acquisition of . . . legal values and ethical standards".[35] All this is placed in the context of ACLEC's reluctance to prescribe the content of law degrees and to leave that as a matter for each university.[36] Boon makes the further interesting observation that Bob Hepple, probably the leading academic member of the Committee, expressed the view that "the teaching of professional ethics and conduct cannot simply be left until the vocational courses . . .".[37] The professional bodies have not, to date, required this and it remains to be seen whether the suggestions in the Economides and Rogers report and the current survey of practitioners will produce pressure for ethics to be a required element of the undergraduate curriculum.

While the outcome of these processes is uncertain, there is one major advantage if professional ethics were to become a required (or expected) element of the qualifying law degree. Although discrete courses addressing professional ethics can be an excellent way of introducing the relevant issues, it is perfectly possible to approach ethics in a different way. Indeed, many commentators have proposed that it should be a pervasive or continuing subject.[38] This can be approached in a variety of ways and could involve approaching existing subjects from a perspective that brings in a critical study of the ethical dilemmas which face legal professionals. Alternatively, the extra-curricular clinics which (in the form of student pro bono clinics) form part of the student experience in so many universities today can provide a powerful learning opportunity to address ethical issues.[39] Thus there may be means for university law schools to address some of the legitimate concerns of the profession without shoe-horning extra modules into an already packed curriculum and without sacrificing the critical educational perspective which should inform undergraduate legal education. The final section of this article proposes a new resource to assist with this.

[29] Kim Economides and Justine Rogers, *Preparatory Ethics Training for Future Solicitors,* 2009, Law Society.

[30] Lord Chancellor's Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training*, (London, ACLEC, 1996).

[31] *Op cit* n 7 at 39.

[32] "Recent Developments in the Teaching of Legal Ethics – A UK Perspective", in Economides *op cit* n 16.

[33] "Conduct, Ethics & Experience in Vocational Legal Education: Opportunities Missed", in Economides, *op cit* n 16.

[34] ACLEC, *op cit* n 30 at 2.4.

[35] *Ibid* at 4.33.

[36] *Ibid* at 4.19.

[37] Bob Hepple, "The Renewal of the Liberal Law Degree" (1996) 55 *Cambridge Law Journal* 470 at 484.

[38] Classically, Deborah Rhode in "Ethics by the Pervasive Method", 42 *Journal of Legal Education* (1992) 31. Her ideas are developed in Julian Webb, "Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England and Wales" 30 *Law Teacher* (1996) 270; and Michael Robertson, "Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective" 8, *Legal Ethics* (2005) 222 amongst others.

[39] Donald Nicolson, "Education, Education, Education: Legal, Moral and Clinical", 42 *Law Teacher* (2008) 145.

## GLOBALISATION

The increasing mobility of capital and labour has had a profound effect on the most lucrative sector of legal practice. Firms are international and face competition from other international firms. Their market position is influenced by their reputations in a number of ways, as is made clear by the Smedley Report:

> The English and Welsh solicitors' profession should aspire to be not just commercially successful, but also a role model and world leader in the ethical conduct of business – and the regulator should be helping the profession achieve this goal. In a time of ever-increasing ethical fragility, and a crisis in public confidence in the ethics of our business and political leaders, such a position would offer enormous market strength.[40]

Even firms situated entirely within the UK are dealing with international commercial contracts where the parties are situated in different jurisdictions. Here, an element of the negotiations will include which law will apply to the contract and which court system will have jurisdiction should a dispute arise. This affects the nature of the education and training these firms will expect their entrants to have in terms of what will be regarded as core content. As well as making some subjects appear more important and others of less significance, it may well have an impact on the approach adopted towards study. Might, for example, a comparative approach to existing subject areas help to meet some of these concerns (and are we as a body of academic staff ready to provide that perspective effectively)?

Working with lawyers trained in different jurisdictions automatically means that one encounters people from different legal cultures. This can have a clear impact on the ethical behaviour to be expected. For example, at the International Bar Association Annual Conference in Madrid in October 2009 the Professional Ethics Committee organised a panel session addressing ''hot topics'' in professional ethics. One of the topics chosen was the issue of how far lawyers could go in misleading an opponent in the client's interest. Although there was general agreement that one could not lie before a court, there was widespread disagreement as to whether one could lie in the course of negotiation. Panel members from common law jurisdictions agreed that although they were under no obligation to ensure that their opponent was not misled, they could not actively mislead. By contrast, those from Civil law jurisdictions accepted a certain degree of active misleading in the context of negotiation. When the question was put to the audience, the same distinction between common law and civil law jurisdictions emerged, with one delegate suggesting that negotiation would be impossible if one could not lie. This was a small group of lawyers with an active interest in professional ethics, and I would not suggest that it is necessarily representative. Nor does other evidence suggest that the legal profession in common law countries (particularly the largest) always displays the highest ethical standards. I simply use this anecdote to draw attention to the particular importance for global practice of having thought hard and critically about professional ethics, and to be self-conscious of the standards which one applied and could expect to meet from opponents. The variety of standards to be found in practice in any single jurisdiction, of course, demands caution in all circumstances.

[40] Nick Smedley, *op cit* n 21, 4.19.

## AN INTERNATIONAL FORUM FOR TEACHING LEGAL ETHICS AND PROFESSIONALISM

The challenges which face law schools over the coming years will only be satisfactorily addressed by a continuing programme of creative responses, both individual and collective, over a range of areas. However, I have sought to argue that the issue of students learning about legal professional ethics is a theme which is relevant to many of the areas of concern and one which is of inherent value to the education of our students. It is important that it is addressed during the undergraduate stage as the approach in the professional courses focuses on Code compliance and, given the shortness of those courses, allows little time for critical reflection.[41] Many different approaches to the learning of ethics have been developed by law teachers over the years. Classical approaches to the study of ethics as a branch of philosophy often arise in jurisprudence courses. Others have addressed these issues through law and literature[42] or using film and other popular cultural media.[43] The use of simulations has provided valuable experience both to address a critical understanding of the professions' ethical rules but also to address students' own moral development.[44] The clinical movement has provided many opportunities for learning in professional ethics[45] and clinical programmes specifically designed with learning legal ethics in mind have been developed.[46] The variety of approaches is considerable, but to date there has been no repository where different approaches can be presented, examples and materials provided and discussion facilitated. This is the object of the International Forum.

This is a website which has been developed from an original proposal of the author's with the assistance of financial support from the UK Centre for Legal Education and the (US) National Institute for Teaching Ethics and Professionalism. At the time of writing the site is a pilot, still under construction, but it may be visited at www.teachinglegalethics.com. It is currently planned that it will go fully live in September 2010 in an English language version. Future plans are to extend to other languages to make the site more genuinely international in nature. The site will have as its aims to:

1. consolidate and make easily available a wide range of materials, in both text and multimedia formats, on the teaching of legal ethics and professionalism, and organise these materials into a comprehensive, fully searchable bibliography
2. allow registered users to create their own webpages, upload both scholarship and teaching materials to the bibliography, download a wide variety of materials created by others (including webcasts and other audiovisual material), and post comments on their use of such material
3. provide a forum for original commentary and exchange of ideas for both teachers and practitioners on teaching ethics and promoting professionalism[47]

[41] Nigel Duncan and Susan Kay, "Addressing Lawyer Competence, Ethics and Professionalism" in Frank Bloch (ed) *The Global Clinical Movement: Educating Lawyers for Social Justice*, (Oxford, OUP), (forthcoming).

[42] The journal *Law and Literature* provides a significant source (Details available on http://ucpressjournals.com/journal.asp?j=lal). See also Patrick Hanafin, Adam Gearey and Joseph Brooker (eds): *Law and Literature*, (2004) 31, *Journal of Law and Society* (Special Issue), (Blackwell).

[43] See http://lib.law.washington.edu/ref/lawonfilm.html, which is a resource in its own right, and provides details of a number of other sources.

[44] Steven Hartwell, "Promoting Moral Development Through Experiential Teaching", (1994) 1 *Clinical Law Review* 505 at 511.

[45] Nigel Duncan, "Ethical Practice and Clinical Legal Education", (2005) 7 *International Journal of Clinical Legal Education* 7.

[46] Curran, Dickson and Noone, "Pushing Boundaries: Designing Clinical Programs to Teach Law Students an Understanding of Ethical Practice", (2005) 8 *International Journal of Clinical Legal Education* 104.

[47] Charlotte Alexander, Clark Cunningham, Nigel Duncan and Paul Maharg, proposal for workshop at LILAC 2010, http://lilac10.wetpaint.com/page/International+website+for+teaching+ethics+and+professionalism%3A+I.

The website will provide direct access to a variety of articles and other publications in the public domain, and provide full references to those not freely available. It will have a facility whereby registered users may add links to and details of newly-published articles. In a similar way, links will be available to official reports from government and professional bodies. There will be a section in which materials will be made freely available for colleagues to use or, if they wish, to adapt for their own circumstances. Similarly, ideas for how to address issues of legal ethics or how to fit such learning into the curriculum will be posted. There will be a facility for alerting colleagues to forthcoming conferences and other relevant activities. In addition, there will be a discussion forum and provision for users to set up their own blogs about specific topics.

Interest in participation has already been received from legal academics, practising lawyers, members of the judiciary and professional regulators in a number of jurisdictions. With this scope in mind it is intended that the Forum will become the primary international online community of ethics teachers, scholars, practitioners and judges. It will be a valuable resource for teachers of legal ethics and their students and will contribute to a positive development in legal education and in the preparation of students for practice as lawyers. Readers interested in the teaching of legal ethics are encouraged to visit the site and contact the author if you wish to become involved in its further development.

In any event I trust that this is a resource which will help colleagues to take some significant steps towards addressing some of the challenges which currently face us. It will not save us from being caught out in this game of French cricket in which we find ourselves, but it may help us to address attacks from a number of different directions.

# THE EMERGING USE OF STORYTELLING AS AN ALTERNATIVE TEACHING METHODOLOGY TO THE APPELLATE CASE LAW METHOD

*MICHAEL BLISSENDEN**

## INTRODUCTION

For students studying law through higher education institutions today there is an emphasis on extensive individual reading and analysing appellate case reports and legislative provisions. In addition class sizes are increasing and students are normally required to study on their own and then try and compete with other students in the classroom as part of their learning. The case law method relies on the teacher selecting the cases to be read, or selects the most appropriate casebook which has a collection of selected cases. The teacher then informs students of the cases that are to be read and analysed before the next class. The teacher than questions students during class time and this drives the discussion and engagement for students. However it should be noted that the reading of cases by students is itself a way of engagement as it allows for students to familiarise themselves with how the common law has developed. Even so in the teacher led method described here students learn about the facts of the case, the legal issues and the legal principle that arises from the teacher selected appellate decision. As the law develops through the doctrine of precedent, students learn the legal principle from the case and can then attempt to apply that principle to new factual situations to determine the legal outcome. However this method does not generally facilitate student engagement beyond responding to what the teacher expects them to achieve.

However in the context of providing students with a more engaged learning experience the question that needs to be asked is whether the case method is an effective method and does it facilitate active learning. Many law teachers are now using alternative teaching methods, with a particular emphasis on the use of technology to attempt fully to engage students.[1] In line with such moves in legal education I have introduced an additional learning activity, to support the traditional face to face teaching. Students study in groups outside the classroom and report their findings to the rest of the class during weekly class time. A key feature of this activity is the use of various technological tools to assist with the completion of set tasks allocated to the groups. The groups communicate amongst themselves, through various means, are assisted online by their teachers where necessary, and then report their research findings to the remainder of the class during the next face to face teaching session. Student interest in learning has increased, as illustrated by the eagerness of students to become involved, there is a sense of achievement of working as a group and the remaining members of the class are provided with alternative viewpoints on the understanding of the legal issues being studied. This teaching approach builds on the pedagogy of storytelling as discussed in the next section, where students themselves challenge the facts that are presented in the appellate decision and investigate the surrounding circumstances to build a story that can be told to the remainder of the class. This

*BA, LLB, LLM, Grad Dip in Tax Law, Senior Lecturer in Law, University of Western Sydney. 2009 Australian Learning and Teaching Council Citation award winner for outstanding contribution to teaching in higher education.

[1] N James, "The good law teacher: The propagation of pedagogicalism in Australian legal education" (2004) 27(1) *University of New South Wales Journal* 147–169.

article will explore the pedagogical issues involved with the storytelling methodology, the value for student centred learning, evaluate the three year program of utilising this storytelling methodology and consider the potential for its use across the law curriculum and in particular its use in the first year of a law degree.

## PEDAGOGY OF STORYTELLING

One of the aims of a law school is to train students to think about the law in analytical terms. So, students spend a good deal of their law school instruction attempting to dissect the rules from legal stories (judicial appellate decisions) with little attention given to the telling of stories which lawyers do on a daily basis as a manner in which to solve problems for their clients.[2]

In this context it is important to note that our legal system is an adversarial system so for every story placed before a court there will be a competing story or competing version of the facts. This is not to suggest that the stories will be made up by the respective lawyers. On the contrary, it is critical to appreciate that these stories will be advanced within the framework, that the conduct of the respective lawyers is governed by the balance of the ethical duties owed to the court and the duties to the client.[3] Within this framework of legal ethics there is a need to consider the principle of neutrality whereby lawyers should represent people regardless of their opinion with the result that the lawyer's moral views are irrelevant.[4] Seen in this light neutrality will manifest itself in the obligation of the lawyer to represent any cause, regardless of personal feelings and not taking into account the moral merit of the case.[5] On this basis the story told by the client, being their version of the event in question, will allow the lawyer to do what is expected of him or her, namely act as a lawyer. In the context of the storytelling model the lawyer will pursue the client's interests to the best of their ability without breaching any rules of conduct. So the telling of stories by lawyers on a daily basis is done so as to advance their client's interests, in light of the overriding concept that such storytelling is undertaken within a legally ethical framework.

The notion of an appellate judicial decision itself being a story provides the platform to view legal education from a different perspective. The decision is itself a story told by the judge where certain facts are selected as the preferred facts, from which the judge then makes a decision based upon the relevant legal rules known as precedent. As law teachers it is important to realise that the judicial decision is itself a storyline, told by the judge in the context of the legal dispute resolution process. If this is accepted then it becomes a little easier to appreciate the value of using storytelling within the framework of legal education.

Before seeing how storytelling can be used in the teaching of law it is important to examine the pedagogical basis for storytelling. Storytelling is used as a teaching technique in a number of disciplines including nursing, medical and teacher education. In the context of storytelling in nursing the literature suggests that such approaches can assist with developing skills in clinical settings.[6] Stories also assist with providing insights into the client's background and experience that may be associated with the

[2] S McKenzie, "Storytelling: A different voice for legal education" (1992–1993) 41 U Kan L Rev 151–269.

[3] G Nettle, "Ethics – The adversarial system and business practice" (2004) 10 (1) *Deakin Law Review* 67–82.

[4] L Corbin, A review of R Dwyer, *Legal Ethics: Text and Materials* (2001) 10(1) *Griffith Law Review* 192–196.

[5] A Boon and J Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, 1999), at 27.

[6] M Blissenden, "Legal education today: teaching to actively engage law students – new approaches to the use of decided cases" 62nd *Australasian Law Teachers' Conference*.

illness.[7] In the context of teacher education studies have shown that storytelling assists pre-service teachers to make necessary connections between lives of students and how this impacts on day to day learning in the classroom.[8] The use of stories has also been proposed to assist with the education of students in professions that will deal with complex workplace situations.[9] The essential concept behind this approach would appear to be to compile a series of stories from practitioners and then make the database available to learners as a form of instruction. Such storytelling can improve student learning and assist with the acquisition of relevant skills, both on an intellectual and emotional level, for their professional careers.

It would seem that storytelling can play a vital role in the learning process for students. How does this then relate to the teaching of law? Stories in a law class room could come from the experiences of the teacher providing insight as to the practical implications of acting like a lawyer.[10] Although this approach is useful it is again teacher driven and allows for the teacher to determine what aspects will be raised. The difficulty may be that students only consider what is told to them through this storytelling as the only important aspects to focus on.

The literature suggests that there should be a move away from teacher led instruction and instead there should be an emphasis on student centred learning. In this regard students need to be actively engaged in the learning process rather than through passive learning.[11] Actively engaged in this context means a student actually doing the learning rather than emphasising what the teacher does.[12] On this basis student centred learning will emphasise learner activity rather than mere passive learning.

On this basis the storytelling approach needs to be built around student centred learning; the students are able to be an integral part of the process that leads to an improvement in their understanding of the law and their role as lawyers. Such activities could include having students retell their experiences of how they have been affected by the legal process, or have students write a story covering some basic principles covered in the unit of study. These activities, although useful, may not provide sufficient coverage and legal content relating to what is needed and expected in a law course. It may be necessary for other narrative activities or storytelling exercises to be constructed to ensure students focus on legal elements of their role as lawyers, such as advocacy, trial process and ethics. Such exercises can be completed within or outside the classroom.

It should be noted that there are some difficulties with the use of student-centred learning. Students and teachers may be uncomfortable and unsure of how to proceed with the learning activities. Students may hold a perception that the teacher needs to teach and that the student is there to learn from the teacher. It may be that students do not know what is meant by the term student centred. Teachers may also take the view that it is their role to communicate and transfer the important content knowledge to their students. Accordingly it is important that teachers and students work together to design the appropriate learning activities.

[7] R Davidhizar and G Lonser, "Storytelling as a teaching tool" (2003) 28(5) *Nurse Educator* 217.

[8] C Coulter, C Michael and L Poynor "Storytelling as pedagogy: An unexpected narrative inquiry" (2009) 37(2) *Curriculum Inquiry* 103–122.

[9] D Jonassen and J Hernandez-Serrano, "Case based reasoning and instructional design: Using stories to support problem solving" (2002) 50(2) *Educational Technology Research and Development* 65–77.

[10] See footnote 8 at 103.

[11] P Spiller, "The journey of a law teacher" (2004) 14(2) *Legal Education Review* 239–256.

[12] G O'Neill and T McMahon, "Student-centred learning: What does it mean for students and lecturers?" in *Emerging issues in the practice of university learning and teaching* Dublin AISHE. R Harden and J Crosby, "The good teacher is more than a lecturer – the twelve roles of the teacher" (2000) 22(4) *Medical Teacher* 334–347.

The need for the teacher to be aware of the impact on students within these student centred activities is particularly the case where technology is involved.[13] In this regard it is important to be aware that students may be unsure of what is expected of them.[14] Although students use technology for information gathering and social activities it is not always clear that students will be able to translate those skills into an educational framework. There is therefore a need to encourage students to see the value of the learning activities through the use of technology. In this regard, it has been suggested that the technology acceptance model (where it is asserted that students will embrace the technology for educational purposes where there is a direct relationship to an assessment task) be adopted.[15] If there is a clear and tangible assessment benefit from undertaking the technology based learning activity then students will be more engaged in the process.[16]

## STORYTELLING METHODOLOGY IN THE LEGAL CLASSROOM

As was noted above, law students are normally taught to distil the legal principles arising from an appellate court decision and to postulate how such legal rules will apply to new factual situations for the development of the law. However this is not what lawyers do on a day to day basis. Although lawyers need to apply the relevant law to the situation that their clients have encountered, the essence of being a lawyer is more akin to acting for their client by presenting, arguing, persuading and negotiating the story that has been told to them by that client. Viewed in this light, the legal classroom should reflect these realities of legal practice.

During the period 2007–2009 I have utilised a teaching methodology centred on the use of stories to teach Revenue Law. This methodology was used in conjunction with the usual case law method and provided another avenue for students to become more actively involved in their learning in the classroom. The methodology was based on using the final appellate court decision as the foundation for introducing students to the concept of legal stories. Students were advised to read the judicial decision from the point of view that the judge was telling a story about the facts of the case, his or her acceptance of certain facts and how the legal principles were to be applied to those accepted facts to reach the judicial decision. Students were asked to reflect on the reality that the facts retold by the judge are those facts that the judge has concluded important for the judicial decision making to be finalised. In so advising students, it becomes clearer to them that these are not the only facts and circumstances that existed in the litigation between the parties. Rather it becomes clearer that the facts that are presented in the judicial decision are those facts selected and accepted by the court in allowing them to come to a conclusion and a resolution of the conflict between the parties. This approach requires students to view that final appellate judicial decision in an entirely different light. In essence the litigated matter is a reflection of a number of possible stories.[17]

[13] J Gilbert, S Morton and J Rowley, "eLearning: The student experience" (2007) 38(4) *British Journal of Educational Technology* 560–573.

[14] M Leese, "Out of class – out of mind? The use of a virtual learning environment to encourage student engagement in and out of class activities" (2009) 40(1) *British Journal of Educational Technology* 70–79.

[15] C Keller, "Virtual learning environment: three implementation perspectives" (2005) 30(3) *Learning, Media and Technology* 70–79.

[16] M Molesworth, "Collaboration, reflection and selective neglect: Campus based marketing students' experiences of using a virtual learning environment" (2004) 41(1) *Innovations in Education and Teaching International* 79–92.

[17] K Chestek, "The plot thickens: The appellate brief as a story" (2008) 14 *Journal of Legal Writing Institute* 127–169, at 145.

It is critical that the final appellate judicial decision is used as this means that there is no further avenue of review and so that decision stands, not only as a reflection of the common law, but also as the final determination of the facts as accepted by the judicial system. It is also useful to select a judicial decision that has stood for a legal principle for a number of years and there has been no doubt cast over its correctness. It is also critical that the judicial decision has not been overturned through legislative action. These matters are important as it allows for students to study the judicial decision, in the context of legal authority, from the storytelling methodology. In other words, it is still critical that students are studying the judicial decision within the context of their legal studies and in relation to the concept of binding legal authority. On this basis students are able to appreciate the importance of the legal implications of the case, while still analysing the judicial decision from the perspective of storytelling.

## APPROACH OF STORYTELLING FRAMEWORK TO ONE LAW SUBJECT–REVENUE LAW

The storytelling approach taken in teaching Revenue Law was to focus on major appellate cases that have been instrumental in providing a distinct line of legal reasoning that has been utilised by subsequent judicial decision making through the notion of precedent. The first case to be examined was the 1966 Australian High Court decision of *Scott v FCT* (1966) 117 CLR 514. The story is simple. It deals with a gift received by a solicitor from a client. The case examines the fine line between a gift given in a personal, friendship, point of view (not assessable income) and a gift given as part of, or in connection with the provision of professional services (assessable income). All students were asked to read the case for the following class, as would normally be the situation, while the assigned students were requested to prepare responses to set questions for the benefit of the remainder of the class. The questions were set by me as lecturer and were designed to introduce the storytelling notion to the students in a gradual manner. An important aspect of this exercise was to request that students were asked to read the full judgment of the High Court and not just the extracts from the judgment that were provided in the prescribed tax casebook. The prescribed casebook only provided those factual circumstances of the litigated case, and extracts of the judgment, as was considered important by the author of the casebook.

Students were placed into groups of 4–5 and provided with set instructions as to approaches to take to investigate the story behind the judgment. One group was requested to explore the factual issues, the relationship of the parties, how the conflict arose and how it became a litigated matter. The emphasis by this group was to examine the background and explore some of the underlying reasons why this particular matter was litigated and then report their findings back to the classroom, at the next face to face class. From the perspective of storytelling, it was important to emphasise to this group that there was associated information, apart from the reported judgment. This exercise was designed to enable students to see the case from the point of view of the respective parties. There was a need to investigate beyond the facts stated in the reported appellate judgment. Instead, this group was required to use those facts as a starting point to dig behind the scenes. Students needed to examine the judgment from a narrative perspective and see that the deciding judge was reporting his or her version of the facts that had been presented to the court. There were additional elements that the court drew out in retelling this factual story. This included the personal traits of

the donor of the gift, including her generous nature involving other payments of money to others. In addition there was an emphasis on her contribution to the community in relation to a memorial that was erected on land that had been purchased for that purpose and made available to the public.

These additional facts were part of the overall story being told. So instead of students just attempting to analyse the case in the normal way of the legal outcome (in this case that a mere gift is not assessable in the hands of the donee), students were able to see the associated human aspects of the matter and appreciate the point of view being expressed by the parties involved. In *Scott's* case, it was clear that the donor of the money was a very generous person, who also happened to be quite wealthy. So the giving of an amount to her legal adviser was seen as an extension of her generous nature and did not relate at all to the fact that the legal adviser was also paid for his professional services. The legal adviser was also a close personal friend of the donor and in line with her previous examples of making gifts to her friends, in addition to the community, the amount of money given to him was also to be regarded as a gift.

To investigate the surrounding background of these relevant relationships, students were able to use the wide resources of the World Wide Web (Web), where a good deal of associated legal and non legal information can be located. The Web now provides an opportunity for students to be able to locate information. One issue that arises though in relation to the use of the Web for information purposes is that there is a huge amount of information that is not necessarily helpful or even correct. Students need to be guided through to various websites and be given a platform from which they can operate. In the context of legal information one very helpful site is www.austli-i.edu.au which has the full report of appellate judicial decisions, legislative provisions and instruments in addition to journal articles. In relation to non legal information, students needed to be advised that this process could take some time and that it was necessary to follow the relevant hypertext links within documents so as to properly source their material. This also raises another issue with the use of the Web. Students are used to using the Web for information location but are not necessarily informed as to the value of the Web for educational purposes. So students can quite easily locate current news items, shopping information and interact through Facebook and MySpace but do not see the Web as a medium for educational purposes. It can be useful for teachers to illustrate the benefit of the Web in the classroom context before allocating set out of class tasks.

The first group then reported their findings back to the remainder of the class and presented the stories that were behind the taxpayer and any associated parties. This then enabled the class to be involved in a discussion of the particular views of these parties and to be able to relate to their situation. This then brought the case to life and the students became more actively engaged in discussing the outcome of the litigation.

A second group of students were asked to view the case from the point of view of a legal practitioner. In so doing students were asked to determine the legal principle of the case and its importance in the common law system. The story told by this group, to the remainder of the class, explained how the legal principle arising from the case had been accorded precedent value over the years. For those students that investigated the legal history of the application of the principle in *Scott's* case from the legal data bases available on the Web, would have discovered that the case had been referred to in seven High Court of Australia judgments, 23 Federal Court of Australia judgments and two Supreme Court judgments. Widening the search indicates that the judicial decision has been referred to in another 14 High Court of Australia transcripts and 57 Federal Court of Australia transcripts. Students would have also discovered the

comments made by Hill J in *Brown v FCT* [1999] FCA 563. Hill J briefly discussed *Scott's* case and then stated:

> *Scott's* case has been followed in many cases since. While some may think that Mr Scott (donee) was fortunate to succeed, there is no case which suggests other than the question whether a gift is income in ordinary concepts must depend upon a consideration of all the circumstances in which the so called gift is made. Should the so called gift be but a payment or transfer for no consideration in satisfaction of a right to commission, then without more the property or transfer would be income in ordinary concepts.

These comments by Hill J make it clear that *Scott's* case is the leading case in the area but the judge also noted that the question of whether a gift is income must depend upon a consideration of all the circumstances. In the context of the storytelling exercise all the circumstances included all the relevant stories concerning the parties involved. The students in this group are able to present these findings to the remainder of the class and illustrate the importance of the legal principle arising from the decision.

A third group of students were required to apply the legal principle to a new story involving an individual client wishing to structure an arrangement so as to give a gift to their legal professional. This exercise demonstrates the continued importance of *Scott's* case as there have been no legislative responses to the giving of unsolicited gifts. This group constructs a storyline, from the point of view of the client, to satisfy the legal principle arising from *Scott* to ensure that the underlying intention and objectives of the client are satisfied. This again is another important task of a legal practitioner, in being able to execute in an appropriate and lawful manner the wishes of their client.

The storytelling approach was used in one other Revenue Law class (three hour seminars) during the semester. Each time there were three groups and each group had specific tasks, based around the point of view perspective, and in creating or constructing storylines. Each time the case that was selected was a key case in the development of Revenue Law that needed to be addressed in depth for the topic being studied.

The storytelling methodology provided an opportunity for Revenue Law students to deconstruct the reported appellate decision and investigate the factual background of the parties to the litigation. The main benefit of this process was that it facilitated student engagement and stimulated students actively to immerse themselves in the case. In addition, the process allowed for students to see the human side of the factual stories of the parties to the litigation and to see that a litigated case is the result of conflicting views expressed by such parties in a legal context. The students are then able to relate to the feelings of the parties and see why and how the matter was resolved through the appellate process of the legal system. It is important though for the teacher to be able to direct students to the legal principle arising from the decision to ensure that students do not just view the exercise as a mere narrative exercise. It is always important to remember the context of the storytelling approach which is to determine the legal principle of the case and how that legal principle will be applied to new factual circumstances.

The storytelling approach provides a fresh way of analysing case law. Students are usually exposed to reading cases from the legal principle perspective and do not see the underlying human aspects of the litigation. On that basis, the storytelling approach can be more engaging for students, in contrast to such students trying strictly to apply legal principles from a case judgment to a factual situation, without thinking about the reasons why, and how, the litigation arose.

## APPLICATION OF STORYTELLING ACROSS THE LAW CURRICULUM

The storytelling exercises described above were used in conjunction with existing teaching approaches, mainly the case book method. The exercises can be best described as point of view exercises whereby students look at the selected case from different points of view. One point of view is related to the parties and associated person involved in the litigation, another relates to the point of view of the legal practitioner determining the legal standing of the case and a third point of view relates to how to implement the wishes of a client in a legal practice context. The positive reaction from students undertaking these exercises in Revenue Law indicates that the approach has been successful. Comments from students included:

> "Yes, the approach was more thorough than traditional explanation."
> "Yes, as part of an adversarial system, it is easier to relate to a client when fighting for them."
> "I would agree with this approach as it shows us why the facts are so fundamental, and gives a general framework in how to approach cases."

It is considered that the storytelling methodology can be applied more widely across the law curriculum. This has also been suggested in the literature that by recognising the lawyer's role as storyteller will bring an important to legal education.[18] In addition it is suggested that the storytelling approach should be introduced into first year courses so that students can see the value of alternative teaching methods, apart from the case law method, as early as possible in their legal education. As has been described with the storytelling methodology in Revenue Law (a final year subject), the cases in the prescribed case book can be utilised as a foundation for the student centred exercises in the first year courses. This will assist with the resource issue of using a new method of teaching.

It should be stressed though that this teaching methodology needs to be utilised in conjunction with the mainstream case method and other alternative teaching innovations. The reason for this is that the storytelling methodology focuses only on a selected number of the key cases, from all the cases required to be covered during the teaching semester, and in so doing consumes a good deal of face to face teaching time. As there are a number of exercises associated with the storytelling method each selected case could take up most of the allocated face to face teaching time allocated for that week. It is therefore important that only key cases are selected to be used for this teaching methodology, otherwise it would not be possible for a teacher to be able to cover the rest of the curriculum for that subject. On this basis the storytelling methodology should be used with other teaching approaches and is not to be seen as the only method to be used in the classroom.

This storytelling method of teaching does not have to be limited to first year students, although this would appear to be the most appropriate starting point. There are numerous opportunities to apply this approach across the various subjects in the law degree. If we accept that legal professionals listen to clients, construct and retell stories, then we can introduce such an approach into the law classroom, in addition to teaching students the legal rules arising from the cases and legislative provisions.

On this basis it is possible to consider the following teaching scenario: in subjects that have an emphasis on common law such as contracts, torts and crime, then the reported appellate case decision can be utilised as a basis for deconstructing the stories that represent the litigation between the parties and provide a platform for particular

[18] McKenzie, *op cit* 151.

points of view to be explored and expressed to the remainder of the class. In subjects that emphasise oral argument, such as advocacy and trial process, there could be an opportunity to use a series of factual circumstances that will enable students to construct a narrative story and persuade a judge or jury in a mock court situation. In subjects that emphasise a clinical class setting, such as pro bono or service learning placements, students could use the practical experience to reproduce the stories that are told to them concerning the particular circumstances of their clients. In so doing the students are acting in effect as legal professionals, where they hear and then construct narrative stories so as to best represent their client, bearing in mind any legal issues and ethical obstacles that might be encountered.

The reuse of stories told by clients to law students in a service learning environment has been experimented in an Advanced Revenue law subject that I teach. Students are allocated to community Tax Help centres, where assistance is given to low income earners in filling in their tax returns. Although communications between the students and these taxpayers are private and no names and specific details are able to be disclosed, students are requested to prepare a reflective diary outlining their experiences. Students are required to retell the stories told by these taxpayers about the taxation issues that arise. For instance the low income earner may try to tell the student that they have not derived any income or suggest to the student that certain amounts should not be disclosed. This of course raises ethical issues for the student and so this needs to be reflected in their diary. Students are required to recount the situations that arise when a client requests them to manipulate facts to suit the tax position. Students are aware that these versions of the stories/facts told by the client cannot be changed to suit the tax circumstances of the taxpayer. Students are required to note in their diary how this situation arose and reflect on how they dealt with the problem and how they we able to explain to the client that this type of behaviour was unacceptable.

The student needs to retell the story told to them by the taxpayer in their dairy and reflect upon how and what a professional legal practitioner would need to do to resolve the legal issues. This service learning program has been very successful and the reflective diary has encouraged students to address problems that can be encountered when clients attempt to tell stories that do not reflect their circumstances. Students then provide appropriate solutions to the issues raised by these low income taxpayers. Students also have to reflect on how they handled the ethical issues raised and how they might have used persuasion tactics to convince the taxpayer that the income has to be disclosed or that an expense could not be claimed as a deduction.

## CONCLUSION

Studying law is challenging. There is a heavy reading load, difficult legal concepts to comprehend and complex legal rules arising from legislative instruments and the common law. The life of a law teacher is also very challenging. There is a need to facilitate student learning within a law student body with high expectations. Law teachers need to reflect upon the manner in which they are teaching and be aware of the various ways in which students learn. It is clear that teaching law today is more than just providing a lecture full of content. It is more than just setting reading and written tasks and just working through those, without taking time to reflect on approaches that might facilitate deeper learning.

The storytelling methodology provides a pedagogically sound teaching approach to enable students to become more actively involved in their own learning and provide a platform for deeper learning, particularly as legal professionals. The three year trial of using this methodology in the teaching of Revenue Law has resulted in stimulating student interest and involvement in an area of the law that is usually considered to be dry and boring. The methodology was used in conjunction with the case law method and added to the mix of teaching approaches. However as has been demonstrated the methodology could be more widely used in the teaching of the law curriculum. If students are able to see the cases as embedded stories to be unravelled then the cases can come to life and stimulate student interest and in particular their emotional and personal interest. If students can see facts told to them in a clinical setting as stories that need to be retold by the legal professional to satisfy the goals of those clients, then students can become more aligned with the learning process.

The storytelling method of teaching is a fresh approach to enable students to see the human side of the legal system and to see that the law is not just about legal rules, principles and procedures. Clients have real legal problems that need to be solved: the factual circumstances provided to their legal professional are seen, by these clients, as important matters. Students are able to see that the stories that are told by clients may need to be repeated as legal stories and moulded to enable a persuasive legal case to be mounted. If this is seen to be the case then students can better relate to the learning process of being a legal professional.

This method of teaching may provide a new dimension to the training of law students and may produce better lawyers. Law students are able to see the emotional and human aspects of the client's situation and in so doing make a more meaningful assessment of how that situation can be resolved within the legal system. In this sense the lawyers produced may be better able to relate to their clients, better able to communicate with their clients and better represent their clients within the adversarial system. The method can be used to highlight the legal precedents of a case, to highlight the legal rules within the advocacy system and to highlight the views of clients in a clinical setting. The storytelling methodology is waiting to be introduced in a comprehensive manner in the teaching of law.

# "I INTEND TO DO VERY WELL IN IT": THE ROAD(S) TO COMPETENCE

*JANE CHING**

> I am pleased to inform you that I am out of my articles at Kenge and Carboy's and admitted to the roll of attorneys in my own right and I have taken a 'ouse in the locality of Walcot Square in Lambeth. In short, I am setting up on my own in the legal profession and I intend to do very well in it.[1]

## INTRODUCTION

Those who have heard me talk about the training contract and its proposed successor, the period of work-based learning for intended solicitors in England and Wales, will have experienced my fondness for Mr Guppy, Dickens' forensically gifted (if under-occupied at the office) articled clerk, whose major failing, in which he is hardly unique, is in pursuing a girl who is out of his league. He is pragmatic and disparaging of the vocational examinations required of him: "an examination that's enough to badger a man blue, touching a pack of nonsense that he don't want to know",[2] but determined to succeed. As an individual he is recognisable amongst our younger colleagues: what interests me is the extent to which his experience during his articles fits him for "setting up on [his] own in the legal profession" and his professional life thereafter. Accusations of "dumbing down" are rife at all stages of the educational process and are not exclusive to law and, given that a modern Mr Guppy would not be let out to set up on his own without a further three years of supervised practice,[3] it is already possible to suggest that something has changed, arguably for the worse, in the fit between the training contract and the competence of the individual at the point of qualification – let alone the degree of maintained or improved competence thereafter – which is ripe for remedy. The point is no longer confined to the pre-qualification stage: the Solicitors Regulation Authority ("SRA") has, as part of its continuing agenda in this direction ("Agenda for Quality"), now consulted on a "professional standards framework" which would apply *after* qualification.[4]

This paper seeks to contextualise the notion of competence frameworks which informs both the Agenda for Quality and the current proposal to replace the training contract and to explore some issues which may emerge around and in the piloting of the latter. Prior to doing so, some background is useful.

*MA (Cantab), Ph D, FHEA, Solicitor; Reader in course design and curriculum development (civil litigation) at Nottingham Law School; project co-ordinator for the NLS aspects of the SRA's national work-based learning pilot. Parts of this article are derived from a Ph D thesis entitled *Young Litigation Solicitors and their Perceptions of Movement from Qualification to the 3-Year Watershed* (unpublished, 2009, Nottingham Trent University). I am indebted to my supervisors and to the internal and external examiners of that thesis for their support and comments: all remaining errors are my own. I must also acknowledge not only the silent contributions of the candidates, employers, supervisors and NLS colleagues involved in the work-based learning pilot but also those of Tim Pearce (who kindly read this article in draft) and his colleagues at the SRA.

[1] Davies, A, *Bleak House* (BBC/WGBH Boston DVD, 2006), episode 15, quotation transcribed from the recording. Dickens' Mr Guppy expresses the same sentiment in the text with rather more prolixity.

[2] Dickens, C, *Bleak House* (Oxford: Oxford University Press, 1853, 2008 reissue), p 893.

[3] Solicitors Regulation Authority, *Solicitors' Code of Conduct 2007* (London: Solicitors' Regulation Authority, July 2007), r 5.02 2(b).

[4] Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services* (London: Solicitors Regulation Authority, 2009). Available at http://www.sra.org.uk/sra/consultations/agenda-for-quality-june-2009.page, accessed 8 January 2010.

## THE SHAPE OF LEGAL EDUCATION

Saunders[5] lists a series of reports of formal committees on legal education from 1971 onwards, the first of which (chaired by Ormrod J) established a three tier format:

i. academic;
ii. professional (currently the vocational stage represented by the Legal Practice Course ("LPC") and the training contract) and
iii. continuing education (*ie* CPD).

He also points out that it was not until 1979 that a university degree in law (as opposed to the "articles of clerkship" of up to five years combined with Law Society examinations familiar to Mr Guppy) was treated by the profession as anything more than an exemption from Part I of its own examinations; Part II representing roughly what is now covered by the LPC. The JASB recognition of some but not all law degree programmes and the route to qualification for Fellows of the Institute of Legal Executives (who need not be graduates) demonstrate the persistence of this approach. In 1979 Part II was replaced by a national "Law Society Finals" ("LSF") course with centrally-set examinations covering the seven "heads" of: Business Organisations and Insolvency; Consumer Protection and Employment; Conveyancing; Wills, Probate and Administration; Family; Litigation (Civil and Criminal); and Accounts.

Criticisms of that model, according to Saunders, resulted in two further reviews (the Marre Committee on the Future of the Legal Profession in 1988 and a solicitor-specific Law Society Review of Legal Education in 1988 and 1989) and work by the Training Committee of the Law Society then resulted in the current academic stage plus LPC plus two year training contract sequence. This has its own limitations, which are not unique to law:

> [Initial Professional Education] syllabi are notoriously overcrowded because they attempt to include all the knowledge required for a lifetime in the profession[6] . . . There is little sign as yet of IPE being conceived in a context of lifelong professional learning, in spite of increasing evidence that the frontloading of theory is extremely inefficient. Many IPE courses exacerbate this situation by frontloading theory within the IPE stage itself, thus maximising the separation between theory and practice.[7]

Solicitors' education follows this frontloaded model such that the "theory" is concentrated at the academic stage and the "professional practice" hived off to the separate LPC or "vocational stage".[8] The peculiarity of the law degree in not being exclusively regarded as preparation for professional practice[9] may, pragmatically, justify this approach: some, possibly even a majority of, students being interested in the theory alone in a way that will not be true for, for example, degrees in medicine or nursing. On the other hand, expectations of "law" as an activity involving substantial intellectual challenge inculcated perhaps without a clear practice-based context at the

[5] Saunders, N, "From Cramming to Skills – the Development of Solicitors' Education and Training since Ormrod", (1996) 30(2) *The Law Teacher* 168.

[6] The fact that the work-based learning outcomes describe the knowledge and skills acquired during the academic and vocational stages as "expertise" betrays such an assumption, Solicitors Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors' Regulation Authority, 2009).

[7] Eraut, M, *Developing Professional Knowledge and Competence*, (London: Falmer, 1994) pp 11–12.

[8] There are exceptions such as the "exempting law degrees" combining LLB and LPC offered by some institutions, including Nottingham Law School.

[9] See for comments on this topic: Bradney, A, "Raising the Drawbridge: Defending University Law Schools", (1995) 1 *Web Journal of Current Legal Issues;* Birks, P, "Compulsory Subjects: Will the Seven Foundations ever Crumble?", (1995) 1 *Web Journal of Current Legal Issues*; Bradney, A, "The Rise and Rise of Legal Education", (1997) 4 *Web Journal of Current Legal Issues*; Vollans, T, "The Law School with Two Masters?", (2008) 2 *Web Journal of Current Legal Issues.*

academic stage may have substantial implications for the satisfaction (or otherwise) of those subsequently entering the profession.[10] For those who intend to and do qualify, Boon and Whyte[11] found a desire for increased integration of the three stages and, in particular, a greater focus on practicality at an earlier stage.

Drawing on vocational courses then being developed particularly in Canada,[12] the LPC – additionally distinct from the LSF in being developed independently by different institutions (''providers'') within a common curriculum (the ''written standards''[13]) – was intended both to incorporate skills but also to allow for a level of optional study better reflecting the differences between legal practice in the high street and the City.[14] Workshop, simulation and role-play as well as individual and small group work were explicitly to be used and assessed.

In Boon and Whyte's survey of solicitors who had been part of the first LPC cohort in 1993, the interactive, group-work approach of the LPC produced mixed responses and indications of difficulty in adjusting from the academic stage:

> I was used to lectures and being, you know, talked at really. And then all of a sudden there you were being asked if you had an opinion on things, and you think wow . . . it was nice. But the first few weeks I thought ''no, I don't want to have to express an opinion, I'm used to hiding at the back of a lecture hall and sleeping'', you know, not having to say anything. [15]

including difficulties with simulation arising from this ''frontloading of theory''[16] and consequent lack of previous exposure of students to practice.

Subsequently, Fancourt, for the UK Centre for Legal Education, conducted a further interview study of 14 organisations seeking views on the adequacy of the LPC as preparation for the training contract, identifying – whatever might have been the intentions of those designing and running the course – a lack of perceived coherence in the other direction; between the LPC and the training contract, which Mr Guppy would have recognised:

> [m]any of the trainees interviewed did say the LPC did not prepare them for practice, but that was with the benefit of hindsight, and many of them also admitted they had seen the LPC as a series of assessment hurdles, and had not really engaged with the process.[17]

and uncovering a remarkable degree of lack of interest by employers in the content of the LPC (together with tension between the needs of a particular practice for

[10] See, for example: Benjamin, G A H; Kasniak, A; Sales, B and Shanfield, S B, 1986, ''The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers'' (1986) *American Bar Foundation Research Journal*, 225; Boon, A, Duff, C and Shiner, M, 2001, ''Career Paths and Choices in a Highly Differentiated Profession: the Position of Newly Qualified Solicitors'', (2001) 64(4) *Modern Law Review*, 563; Wallace, J E ''Work Commitment in the legal profession: a study of Baby Boomers and Generation Xers'', (2006) 13(2) *International Journal of the Legal Profession*, 137; Dinovitzer, R and Garth, B G, 2007, ''Lawyer Satisfaction in the Process of Structuring Legal Careers'', (2007) 41 *Law and Society Review*, 1.

[11] Boon, A and Whyte, A, ''Looking Back: Analysing Experiences of Legal Experience and Training'', (2007) 41(2) *The Law Teacher*, 169–190 at p 189.

[12] See Webb, J and Fancourt, A, ''The Law Society's Training Framework Review: On the Straight and Narrow or the Long and Winding Road'', (2004) 38(3) *The Law Teacher* 293 at p 295.

[13] Law Society of England and Wales, *Legal Practice Course, written standards, version 10* (London: Law Society of England and Wales, 2004).

[14] Slorach, S and Nathanson, S, ''Design and Build: the Legal Practice Course at Nottingham Law School'' (1996) 30(2) *The Law Teacher* 187.

[15] Boon, A and Whyte, A, *Legal Education as Vocational Preparation?: Perspectives of Newly Qualified Solicitors*, (London: University of Westminster, 2002) at p 16.

[16] Eraut, 1994, *op cit*.

[17] Fancourt, A, ''Hitting the ground running? Does the Legal Practice Course prepare students adequately for the training contract?'' (Warwick: UKCLE, 2004) at p 62. Summarised at: http://www.ukcle.ac.uk/research/ukcle/fancourt.html, accessed 18 January 2010.

knowledge or skills not covered on the LPC, or taught in a way different from the employer's "house-style"). Boon and Whyte[18] carried out interviews in 2001–2002 of 22 recently qualified individuals and found some positive approval of the course as preparation but, consistently with Fancourt, uncovered complaints about the extent and quantity of assessment and considerable potential for a mismatch between what was covered on the LPC and the needs of the subsequently employing firm. Even quite well-established firms[19] and from my own experience, sometimes express a lack of knowledge of what is covered in the LPC to an alarming degree, suggesting in my view that some firms may not perceive it as relevant preparation for or having any real connection with the training contract at all. Outside the realm of the bespoke LPCs which can be commanded by City firms with substantial resources, specialised topics which may be highly relevant to an individual in a particular practice will not appear in the LPC curriculum and there may be difficulty in transferring other knowledge and skills from it into the workplace context, particularly, I suggest, if the employing firm is not fully aware of the benchmark set by the LPC.

## THE TRAINING CONTRACT

Following successful completion of the vocational stage, the student currently seeks employment as a "trainee solicitor" (previously, as for Mr Guppy, "articled clerk"). The trainee is, at present, an employee of an individual firm; local authority; the Government Legal Service or in-house legal department authorised by the SRA to take trainees. Following the Legal Services Act 2007, this may begin to include "Alternative Business Structures" not confined to the conventional law firm model and including non-lawyers as owners of the business. The purpose of the "training contract" over what is normally two years is expressed as being to "give trainees supervised experience in legal practice through which they can refine and develop their professional skills";[20] placements in different departments within the overall contract generally being described as "seats". The experience of a trainee in a large corporate practice in the City will, however, be very different to that of a trainee in a general practice in Nottingham, or in a niche practice specialising in clinical negligence litigation.[21]

Whilst a trainee solicitor is required to keep a record or log of activities undertaken during the training contract, this is at present, at its minimum, a means of tracking that the individual has been exposed to particular experiences ("it is used to record the experience that the trainee is getting and the skills that the trainee is developing"[22]) although of course much more developed versions are available. Although "practice skills standards"[23] are provided, they are comparatively passive in comparison with the outcomes proposed for the replacement period of work-based learning, frequently phrased as "understand the importance of" or "understand the need to" rather than requiring or assessing actual performance. There is, nevertheless, an expressed

[18] Boon, A and Whyte, A., "Looking Back: Analysing Experiences of Legal Experience and Training", (2007) 41(2) *The Law Teacher* 169–190.

[19] Boon and Whyte, *ibid.*

[20] Solicitors Regulation Authority, *Training Trainee Solicitors; The Solicitors Regulation Authority Requirements* (version 1, London: Solicitors' Regulation Authority, July 2007) at p 3.

[21] See, for example, on differing career paths for young lawyers: Boon, A, Duff, C and Shiner, M., "Career Paths and Choices in a Highly Differentiated Profession: the Position of Newly Qualified Solicitors", (2001) 64(4) *Modern Law Review*, 563.

[22] Solicitors Regulation Authority, 2007, *op cit* at p 15.

[23] Solicitors Regulation Authority, 2007, *ibid* at p 9.

aspiration that trainees will use the record as "an opportunity to reflect on what they have learnt and where there may be gaps in their experience and skills".[24]

| *Practice standards*[25] | *Work based learning outcomes*[26] |
|---|---|
| **Interviewing and advising**<br>Trainees should understand the importance of identifying the client's goals along with the need to take accurate instructions. They should be given opportunities to observe and to conduct interviews with clients, experts, witnesses and others.<br>They should be given work that helps them *understand the need to* | By the end of the period of Work-Based Learning, a successful candidate should *be able to*<br>1.3 exercise effectively, both separately and in combination, relevant skills in areas of practice including areas of practice including … |
| • prepare for an interview<br>• allow clients or professional advisers to explain their concerns<br>• identify the client's goals and priorities | 1.3.3 interviewing and advising,<br>3.2 identify clients' needs, objectives and priorities with clarity, and take accurate instructions which reflect those needs, objectives and priorities |
| • use appropriate questioning techniques<br>• determine what further information is required | 2.4 elicit relevant information through effective questioning |
| • identify possible courses of action and their consequences<br>• help the client decide the best course of action<br>• agree the action to be taken | 3.3 exercise effective judgement in evaluating alternative courses of action or possible solutions in the light of clients' needs, objectives and priorities |
| • accurately record the interview, confirming the instructions and the action that needs to be taken | 5.7 record accurately his or her work to a level of detail appropriate to the work and the organisation. |
| • establish a professional relationship with the client, and deal with any ethical problems that may arise | 3.1 promote clients' confidence and trust through an organised, focussed and professional approach to the relationship with clients<br>8.1 interpret any situation in the light of solicitors' core duties and any other relevant professional conduct requirements, and act accordingly<br>8.2 exercise effective judgement in relation to ethical dilemmas and professional conduct requirements. |

**Figure 1:** A comparison of some existing training contract practice standards against proposed work-based learning outcomes

Although many employers will expend considerable care on providing a structured and supportive environment for the training contract experience so as to build on the academic and vocational stages and to permit the trainee to socialise into the profession and also to consolidate skills in a "real" context within the practice standards,[27] Boon and Whyte suggest that "from the views expressed to us, it appears

[24] Solicitors Regulation Authority, 2007, *ibid* at p 15.

[25] Solicitors Regulation Authority, *Training trainee solicitors: The Solicitors Regulation Authority Requirements* (London: Solicitors Regulation Authority, 2008) at p 13.

[26] Solicitors Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors' Regulation Authority, 2009) at p 14ff.

[27] See Boon and Whyte, 2007, *op cit* at p 177.

that some employers expect trainees on day one to be consummate solicitors".[28] The impact of the proposal to replace the training contract with a period of work-based learning[29] which will not only require exposure to certain experiences but also assessment of skills represented by profession-wide competences acquired through or demonstrated in those experiences is, therefore, a major paradigm shift for the profession, but one which has its genesis in a major investigation into legal education for the profession as a whole, seeking to embed the training contract period as a distinct learning period with both input and measurable output.

## THE TRAINING FRAMEWORK REVIEW

A principal internal driver of the Law Society's Training Framework Review from 2001 (a project inherited by the Solicitors Regulation Authority) has been that of promoting equality of access to the profession, particularly by under-represented groups[30] and compliance with the Disability Discrimination Act 1995 and Race Relations (Amendment) Act 2000.

In 2001, a consultation paper was issued by the Law Society's Training Framework Review Group suggesting the development of:

> a framework or grid of competencies around which it will be possible to identify what should be required of the training process at every stage of a solicitor's career . . . once the framework has been established the next stage will be to consider the standards and outcomes of individual parts of the process both pre- and post-qualification . . .[31]

I discuss the post-qualification phase, particularly in the context of Agenda for Quality, separately. A particular difficulty even for the pre-qualification phase, however, remained the problem of the wide diversity of practice:

> . . . the nature of practice is so diverse that some newly admitted solicitors might be expected to conduct a whole case, . . . while others, such as those engaged in large commercial transactions, would only ever be responsible for part of the whole. Thus, there are difficulties in specifying a common level of outcome that could be expected from all solicitors in areas such as communication skills.[32]

Following consultation, a report was commissioned[33] reviewing the wider educational literature as well as competency frameworks for lawyers in, for example, Australasia (the APLEC outcomes[34]). A second consultation paper[35] raised a number of possible pathways to qualification including most controversially, a "continuous pathway integrating academic, vocational and work-based learning",[36] and a series of individual reports was then commissioned on aspects of the proposals.[37]

[28] Boon and Whyte, 2002, *op cit* at p 32.

[29] Solicitors Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors' Regulation Authority, 2009).

[30] Law Society of England and Wales, *Training Framework Review Consultation Paper* (London: Law Society of England and Wales, 2001).

[31] Law Society of England and Wales, 2001, *ibid* at p 2.

[32] Law Society of England and Wales, 2001, *ibid* at p 6.

[33] Boon and Webb, 2002, *op cit*.

[34] Australasian Professional Legal Education Council, *Competency Standards for Entry Level Lawyers* (Melbourne: APLEC, 2000, updated 2002). Available at http://www.aplec.asn.au/aplec/dsp_resources.cfm, accessed 8 January 2010.

[35] Law Society of England and Wales, *Second Consultation Paper on a New Training Framework for Solicitors*, (London: Law Society of England and Wales, 2003).

[36] Law Society, 2003, *ibid*, annex 3.

[37] Brayne, H, *Assessment of legal dispute resolution and legal transaction skills, flexible pathways and assessments* (London: Law Society of England and Wales, 2004); Grace, S, Thomas, H, and Butcher, C, *Project to support implementation of*

In parallel with this internal review a number of concerns were being expressed externally about competence in the profession,[38] particularly in client care and client communication; complaints and complaint management[39] followed by an independent review of the regulatory system of solicitors in particular[40] which resulted in the removal of self-regulation (through the creation of the SRA in 2006) and the Legal Services Act 2007. The regulatory provisions of the Act, together with its widening of the legal services market, create demands in respect of demonstration and maintenance of quality and competence which, I suggest, inform much of the current approach of the profession (see, for example, the SRA's proposals in respect of post-qualification CPD) which I discuss further below.[41] In addition, the ruling by the European Court of Justice in 2003 in *Morgenbesser v Consiglio dell'Ordine degli Avvocati di Genova*,[42] that EU professionals wishing to work in other member states could not be required to attend a specific course (such as the LPC) as a condition of doing so created confusion and potential for additional routes to entitlement to practise in this jurisdiction. The impact of both internal and external factors can be seen in a further consultation paper about qualification,[43] maintaining the focus on diversity of access to the profession (including that of recognition of EU qualifications) but demonstrating the principal concern of the Law Society Regulation Board (precursor of the SRA), to be precisely those matters of demonstrable standard and quality, when:

> . . . at the end of the current training contract period, individuals can be signed off by their training principal regardless of the standard of their performance in practice. As the gatekeeper to the profession, the LSRB has a responsibility to ensure that those entering the profession are competent to do so. With no formal assessment of trainees' performance in practice, the LSRB cannot currently be confident that trainees completing the current two year training contract have reached an appropriate standard.[44]

Despite its controversially liberal beginnings, which caused the head of one LPC provider – ironically echoing Twining[45] – to compare proposals for qualification as a solicitor unfavourably with the qualification requirements of plumbers,[46] the Training Framework Review finally concluded that:

*a new training framework for solicitors qualifying in England and Wales* (London: Law Society of England and Wales, 2004); Johnson, N and Bone, A, *Project to support implementation of the Law Society's new training framework review for solicitors qualifying in England and Wales* (London: Law Society of England and Wales, 2004); Webb, J, Maughan, M and Purcell, W, *Project to support implementation of a new training framework for solicitors qualifying in England and Wales, Review of the Training Contract and Work-based Learning* (London: Law Society of England and Wales, 2004).

[38] As, for example, consumer and governmental interest in quality of service: Office of Fair Trading, *Competition in Professions* (London: OFT, March 2001); Farrar, J, "Arrogant, incompetent, negligent and unprofessional . . .", (August 2001) *Which?,* 8–11; Clementi, D, *Review of the Regulatory Framework for Legal Services in England and Wales: a consultation paper* (London: Department for Constitutional Affairs, March 2004); Clementi, D, *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*, (London: Department for Constitutional Affairs, December 2004). Available at: http://www.legal-services-review.org.uk/content/report/index.htm, accessed 18 January 2010; Department for Constitutional Affairs*, The Future of Legal Services: Putting Consumers First* (Cm 6679, Norwich, HMSO, October 2005).

[39] Farrar, *op cit*; Paraskeva, J, *Blueprint for Change* (London: Law Society of England and Wales, 2001).

[40] Clementi, 2004, *op cit*.

[41] Solicitors' Regulation Authority, *Education, Training and Development for Solicitors: The Way Ahead* (London: Solicitors' Regulation Authority, February 2007). See also Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services,* 2009, *op cit*.

[42] See Law Society of England and Wales, *Paper on the Training Framework Review*, (London: Law Society of England and Wales, 19 January 2005); *Morgenbesser v Consiglio dell'Ordine degli Avvocati di Genova* 2003, Case C-313, [2003] ECR I-13467, ECJ.

[43] Law Society of England and Wales, *A New Framework for work based learning consultation paper*, (London: Law Society of England and Wales, 2006).

[44] Law Society, 2006, *ibid* at p 3.

[45] Twining, W, "Pericles and the Plumber" (1967) 83 *Law Quarterly Review* 396.

[46] Gibb, F, "Solicitors face tough drive over competence", *The Times*, 1 August 2006.

> . . . most students would wish, and would need, to complete a structured programme of vocational training in order to achieve the full range of outcomes required.[47]

This is true of the LPC, where, although the written standards have been replaced by learning outcomes, the prescription as to content (in particular as to the proportion of time allocated to different subjects) and as to delivery (as to the number of required classroom contact hours and the possibility of studying the core subjects in one tranche of activity with the electives studied later perhaps even at a different institution) has been relaxed from 2009.[48]

## THE POST QUALIFICATION POSITION

From 1 November 2001, all solicitors and registered European lawyers practising in England and Wales have been required to undertake 16 hours of CPD in a year, *pro rata* for part-time staff. This is at the lower end of the time commitment spectrum, Madden and Mitchell finding, in their survey of 20 professional organisations (of the 65% who prescribed a number of hours) a median of 30 and modes of 20 and 30.[49] At least 25% must be satisfied by attending accredited courses. The type of CPD offered is market-led and the archetype is the talk and chalk model of the updating lecture on a technical area identified by Cruickshank:

> [t]he primary method for delivering continuing legal education is still the "talking head". From a panel, experts speak to their written papers in sequence. Audiences of up to 200 have little input except for a handful of questions at the conclusion of each panel. In some courses, this goes on for two days, seven hours each day . . . Nevertheless, lawyers attend these courses in large numbers, give them good evaluations . . . and are satisfied with one or two practical insights that can be applied on the job. But the course format may be what lawyers are used to, not necessarily what they want or need.[50]

The remainder may include writing books or articles, coaching and mentoring (this is not uncommon),[51] reading journals or viewing DVDs.[52] The CPD scheme now falls within the overall quality assurance remit of the SRA, the relevant part of whose strategy, articulated prior to Agenda for Quality, is to "set standards for . . . continuing professional development so as to maintain and enhance the competence, performance and ethical conduct of solicitors and uphold the rule of law".[53] The SRA has recently identified, as one of a number of matters to be addressed "the small number of CPD hours required each year".[54]

Provided the individual complies with the minimum participation requirement, it is for the solicitor him- or herself to decide in which CPD activities to participate, although a short "Management Course Part 1" is mandatory during the first three

[47] Webb and Fancourt, *op cit* at p 27.

[48] Solicitors' Regulation Authority, *Information for Providers of Legal Practice Courses* (London: Solicitors' Regulation Authority, 2008).

[49] Madden, CA and Mitchell, VA, 1993, *Professions, Standards and Competence, a Survey of Continuing Education for the Professions*, (Bristol: University of Bristol Department for Continuing Education).

[50] Cruickshank in Webb, J, and Maughan, C, *Teaching Lawyers' Skills*, (London: Butterworths, 1997) at p 227.

[51] Friedman, A and Phillips, M, "The Role of Mentoring in the CPD programmes of professional associations" (2002) 21(3) *International Journal of Lifelong Education* 269–284.

[52] Solicitors Regulation Authority, *Training Regulations 1990* (London: Solicitors' Regulation Authority, November 2000).

[53] Solicitors Regulation Authority, *Education, Training and Development for Solicitors: The Way Ahead* (London: Solicitors' Regulation Authority, February 2007) at p 4.

[54] Solicitors Regulation Authority, February 2007, *ibid* at p 12.

years. More recently, any member of the profession with supervisory responsibilities is required to undertake a minimum period of appropriate learning activity (at present self-determined by the individual and with no obligation to demonstrate any particular competence as a result): Solicitors' Code of Conduct 2007, rule 5. The suggestion of "solicitors' practice diplomas" amounting to 25% of a masters' degree for those wishing to pursue specialisms[55] has not been implemented to date, although additional single level accreditations for membership of specialist panels do exist.[56] Despite the SRA's objective in Agenda for Quality to demonstrate and improve the operational standards of the profession (an "output" of CPD activity), the profession's definition of CPD remains at present one of input alone:

> "continuing professional development" means a course, lecture, seminar or other programme or method of study (whether requiring attendance or not) that is relevant to the needs and professional standards of solicitors and complies with guidance issued from time to time by the Society.[57]

After qualification, then, there is no need at present (and therefore no necessary impetus or expectation of funding) for the individual to achieve any further qualifications or – except as required by his or her employer – to demonstrate any higher competences beyond what might soon be represented by the "day one outcomes" representing the point of qualification (see further below).

Roper points out the quantitative importance of the CPD context in comparison with the pre-qualification period on which most discussion is focussed but recognises a lack of coherent theoretical underpinning:

> [b]ut, after [qualification] . . . there are another 40 years or so of working life awaiting the new lawyer . . . So we can contrast the framework which supports the first 20 years or so [of life] with that supporting the remaining 40 years . . .
> There is considerable development of theory in a number of areas related to CPD, . . . What is lacking, so far as CPD for lawyers is concerned, is the bringing together of these various elements in some cohesive and useful way to provide a conceptual framework.[58]

The SRA's attitude[59] pursued in Agenda for Quality, gives greater importance than hitherto articulated to the output, particularly in what I will describe below as the "bottom-line" sense of maintaining "standards of service". Nevertheless, in the proposals for work based learning and in the new LPC with its focus on "learning outcomes" rather than "written standards", and, implicitly in Agenda for Quality, the phenomenon of "competence" in an educational sense, arises.

## COMPETENCE

The concept of "competence" pervades much of the discussion surrounding the pre-qualification development of solicitors as well as forming a principal component of

[55] Eccelston, S, "Continuing Professional Development", (1994/5) *Holdsworth Law Review,* 184.

[56] Solicitors Regulation Authority, *Professional Accreditation Schemes, Application Criteria and Guidance Notes* (version 1, London: Solicitors' Regulation Authority, July 2007).

[57] Solicitors Regulation Authority, November 2000, *op cit* at p 4.

[58] Roper, C, "The Need for a Conceptual Framework for Continuing Professional Development for Lawyers", (1997) 15(1) *Journal of Professional Legal Education*, 169 at p 172. See also Roper, C, *Foundations for CLE: a guide to research theories and ideas underlying continuing education for lawyers* (Sydney: CLE, 1999). For further comment on what is desired in CPD provision, see the Irish study reported at McGuire, D, *et al,* "Learn your lesson. How legal CPD really works – first ever survey", (January 2002) *Axiom*, 1012 and "Careering ahead. How legal CPD works – part two", (January 2002) *Axiom*, 1016.

[59] Solicitors Regulation Authority, February 2007, *op cit*.

the ongoing debate about overall quality of service by the profession as a whole. Possible alternative meanings of the term "competent" include:

a) Properly qualified[60] – a *normative and political* meaning;
b) Mid-way on a scale from novice to expert[61] – an *aspirational* meaning;
c) As a more pejorative version of b), "only competent"; "not negligent" – the *bottom line* meaning (to be distinguished from the aspirational meaning in its suggestion that there is no need or expectation to move beyond it);
d) That of a "meta-outcome" linking all the stages of, in this context, pre-qualification legal education[62] – the *holistic* meaning (neutral as to its aspirational sense):

One potential difficulty is that the meaning which initially seems to have preoccupied the profession, particularly given the Legal Services Act 2007 and criticisms which led to it, was a combination of a) and c). More recently, however, both the SRA, as regulator, in Agenda for Quality[63] and, for the Law Society as representative body, Lord Hunt of Wirral[64] have explored a more holistic or aspirational meaning:

> . . . there is a potential role for the professional body in encouraging solicitors to aspire to levels of professionalism that significantly exceed those set by the statutory regulator.[65]

Competence as an over-arching concept in educational terms also exhibits two further facets: that of the *range* of activities in which an individual is competent, and the *level* of their performance in such activities, or, as Eraut succinctly puts it, "two dimensions, scope and quality".[66] Quality occupies a spectrum from incompetent to expert and it is, of course, the incompetent to which Agenda for Quality is addressed. So Eraut – supporting an aspirational argument that competence as a bottom line description cannot by definition apply to a beginner – indicates that:

> [a] competent professional is no longer a novice or a beginner and can be trusted with a degree of responsibility in those areas within the range of his or her competence, but has not yet become proficient or expert. This contrasts with those definitions of competence adopted by most competency-based systems of training and education, which assume a binary scale by confining assessment decisions to judging whether a candidate is competent or not yet competent. . . . binary scales [are] inappropriate for assessing most areas of professional knowledge and . . . [are] incompatible with the notion of lifelong learning.[67]

However, within the range of activities in which lawyers engage, there may be some ("form filling", for example) in which there is an absolute standard – right or wrong – whilst in other tasks the quality of a beginner's work is expected to be less (less innovative, less effective, considering less of the "big picture", less speedy or cost-effective) than that of the expert, whilst maintaining a "bottom line" of competence, that is, non-negligence. One might, for example, compare the standards

[60] Eraut, 1994, *op cit* at p 164.

[61] Dreyfus, H L and Dreyfus, S E, *Mind over Machine*, (New York: The Free Press, 1986).

[62] Sherr, A, "Legal Education, Legal Competence and Little Bo Peep", (1998) 32(1) *The Law Teacher* 37.

[63] Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services,* 2009, *op cit*.

[64] Hunt, D, *The Hunt Review of the Regulation of Legal Services*, (London: Law Society of England and Wales, 2009). Available at http://www.legalregulationreview.com/home.html. accessed 8 January 2010.

[65] Hunt, 2009, *ibid* at p 88.

[66] Eraut, 1994, *op cit* at p 167.

[67] Eraut, 1994, *ibid* at p 215.

required to obtain rights of audience in the higher courts[68] against the competence framework for QCs[69] as indicating increments in both scope (range, complexity) of work and in its quality (the level assessed). In criminal cases, indeed, the Legal Services Commission has suggested four levels of advocacy competence, of which level 1, as it involves some Crown Court work, includes but exceeds the rights of audience acquired by a solicitor on qualification. Level 4, in the same framework, encompasses QC-level performance.[70]

A competence framework, particularly if, as is not the case with the advocacy examples described above, there is only a single level of articulation,[71] does not of itself encourage development beyond the benchmark set whether as to scope or as to quality; the "lifelong learning" to which Eraut refers. Indeed, insofar as the purpose for adoption of any such framework is that of public confidence in the profession, the priority might be perceived to be to ensure standards of performance at the static level of existing activity (quality), rather than to encourage practitioners to extend the scope of their activity into new fields in which they stand at greater risk of making mistakes. The more recent explicit recognition in Agenda for Quality of the need not only to secure the bottom-line benchmark but also to embed an expectation of aspiration to improve and extend beyond it – here by means including an enhanced and output-focussed CPD system – is, therefore, to be applauded:

> We could explore an approach which links inputs and outputs by requiring solicitors to use the professional standards framework to plan and undertake CPD to reflect the level at which they were working, or to which they aspire, and to identify any aspects of their performance that could be enhanced. The current (or modified/enhanced) CPD input requirements could be retained, as a simple to understand and monitor "safety net".[72]

*Competences*

The difficulty of setting out and working with a competency framework, in the professional context, lies in the diffuse nature of professional activity where tasks and performance are often cerebral or verbal and the underlying attitudes and personal qualities impossible to detach or to assess summatively where, as with the work-based learning outcomes, such assessment is required. Although the Training Framework Review first introduced the idea of an enforceable competence framework applied across the board to the profession in England and Wales, competence frameworks for lawyers are by no means new.[73] In a meta-survey of several jurisdictions, Gasteen concludes that:

[68] At the time of writing (January 2010), governed by Solicitors Regulation Authority now replaced by Solicitors Higher Rights of Audience Regulations 2010, *Higher Courts Qualification Regulations 2000* (London: Solicitors Regulation Authority, 2008). Available at http://www.sra.org.uk/sra/regulatory-framework/higher-courts-qualification-regulations-2000.page, accessed 8 January 2010.

[69] Queen's Counsel Secretariat, *Queen's Counsel for England and Wales Competition 2009: the competency framework 2008*, (London: QC Appointments, 2009). Available at http://www.qcapplications.org.uk/competencyframework, accessed 8 January 2010.

[70] Devereux, A, Tucker, J, Moorhead, R and Cape, E, *Legal Services Commission "Quality Assurance for Advocates"*, (Centre for Professional Legal Studies, Cardiff Law School, November 2009).

[71] Effectively defining a sequence of such frameworks, particularly if the increments relate to increased quality or complexity of performance in similar tasks rather than an increasing range of different tasks, is a challenge: Devereux *et al*, *ibid*, 85.

[72] Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services* 2009, *op cit* at p 16.

[73] For example, Boon, A, "Assessing Competence to Conduct Civil Litigation: Key Tasks and Skills", in Boon, A, Halpern, A, Mackie, K, *Skills for Legal Functions II: Representation and Advice*, (London: Institute of Advanced Legal Studies, 1992); Fitzgerald, M F, "Competence Revisited: a summary of research on lawyer competence", (1995) 13(2) *Journal of Professional Legal Education*, 227; Winter, R, "Outline of a general theory of professional competences" in Webb, J, and Maughan, C, *Teaching Lawyers' Skills*, (London: Butterworths, 1997).

> . . . although the research indicates very similar skills and knowledge are required of practising lawyers, the way in which these skills and knowledge are described and categorised are very different. Many of the differences in the definitions of competence are attributable to semantics or categorisation. While the majority of researchers seem to agree on a comprehensive or "thick" description they differ on how this description is divided and categorised.[74]

Proponents of competence frameworks, particularly in the professional sphere, suggest that they promote:

a) public confidence in the profession;[75]
b) homogeneity and normatisation within the profession;[76]
c) clarity and transparency;[77]

and that the individual competences are susceptible of both identification and categorisation as well as being objectively measurable.[78] A contrary and more political view of point b) is that a "competence" approach, in restricting entry to and practice within the profession, may be "derived from the perceived need of a relevant group to occupy and defend for its exclusive use a particular area of competence territory"[79] or even that such an approach permits state control:[80] painful in the context of the Legal Services Act 2007 and the state's dilution of the profession's self-regulation. Others, however, recognise that individuals develop skills and attributes at different stages.[81]

Criticism of the competence movement within a professional context can be grouped into three arguments:

a) That prescription of defined competences inhibits, rather than promotes, innovation, aspirational and metacognitive development (the *inhibiting* criticism); the very notion of a defined series of indicators – consistently with a bottom-line concept of overall competence – suggesting exclusion of others:

> . . . outcomes and competence approaches are inadequate for the epistemological task . . . They can lead us to focus on low-level procedures and attributes that are easy to define, at the expense of developing and assessing the higher skills of critical thinking, judgment and evaluation . . .They encourage us to focus too much on the behavioural outcomes of learning, . . . Both [outcomes and competence] approaches tend towards assessing understanding by looking at observable competences and outcomes . . . competence approaches in particular can dehumanise learning . . .[82]

b) That competences, in prescribing a minimum and bottom-line standard, create the inference, as I have indicated above, that improvement beyond the bottom line is not required or perhaps even positively not to be encouraged (the *mechanistic* criticism);

[74] Gasteen, G, "National Competency Standards: are they the answer for Legal Education and Training?", (1995) 13(1) *Journal of Professional Legal Education*, 1 at p 248.

[75] Gasteen, 1995, ibid at p 13.

[76] Eraut, 1994, *op cit* at p 169.

[77] Solicitors' Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors' Regulation Authority, 2009).

[78] For example, Hogan, LK and Hort, AE, "Setting Objectives and Assessing Competence in Professional Legal Education" (1988) 13(2) *Assessment and Evaluation in Higher Education* 92; Edwards, A and Knight, P, (eds), Assessing Competence in Higher Education (London: Kogan Page, 1995). A detailed exploration of defining and assessing competence on a number of levels appears in Devereux *et al*, *op cit*.

[79] Eraut, 1994, *op cit* at p 165.

[80] Jones, L and Moore, R, "Education, Competence and the Control of Expertise", (1993) 14(4) *British Journal of the Sociology of Education*, 385.

[81] Crebert, G and Smith, A, "Firming up the Framework: Untangling the Web of Confusion over Competency Development in Entry Level Lawyers", (1998) 16(1) *Journal of Professional Legal Education*, 1 at p 5.

[82] Webb, in Webb and Maughan, *op cit* at p 35.

> . . . the pejorative epithet of ''the 3 Rs'' – Reductionist, Restrictive and Ritualistic.[83]

Where Agenda for Quality focuses on the definition of competences for specific roles undertaken after qualification[84] there is, therefore, a risk of its overall aspirations being dislodged by inhibiting constraints and mechanistic definition of competence.

c) That – an argument raised, as we have seen, in the context of the Training Framework Review – the diversity of professional work makes it impracticable to define meaningful competences (and/or to assess them) in any event (the *impracticability* criticism). It is apparent from Agenda for Quality that even defining the overall objective of ''a good service'' as a starting point is not without considerable difficulties.[85]

This is not to say that proponents of competence frameworks are entirely utilitarian in their approach. Hager, *et al* suggest that professional competence frameworks adopted in Australia[86] succeed in dealing with the ''atomistic'' (closely defined task analysis-based competen*cies*) and the ''holistic'' (competenc*es*), the *impracticability* criticism:

> . . . these professional competency standards strike a balance between the misguided extremes of fragmenting the occupation to such a degree that its character is destroyed by the analysis or adhering to a rigid, monistic holism that rules out all analysis. . . . these professional competency standards are quite consistent with one practitioner having, say, a strong commitment to social justice, while another is just as strongly committed to excellence of practice.[87]

As an alternative to competence approaches, the concept of capability is advocated by some to promote the reflection, innovation and creativity thought to be absent from what may be a relatively static competence model.[88] This approach deals most effectively with the *inhibiting* criticism by embedding aspiration as to scope and enhancement of quality as essential components:

> . . . capability can be said to provide a basis for developing future competence, including the possession of the knowledge and skills deemed necessary for future professional work.[89]

The way in which this is approached in the proposed work-based learning outcomes in discussion is by way of inclusion of what I will call a ''competence for development''.

A professional obligation only to take on work in which one is ''competent'' (in the bottom-line sense of ''not negligent'') appears in the domestic Solicitors Code of

[83] O'Reilly, D, Cunningham, L and Lester, S, (eds), *Developing the Capable Practitioner, professional capability through higher education*, (London: Kogan Page, 1999) at p 55.

[84] Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services*, 2009, *op cit* at p 15.

[85] Solicitors Regulation Authority, 2009, *ibid* at p 5.

[86] See APLEC, *op cit*.

[87] Hager, P, Gonczi, A and Athanasou, J A, ''General Issues about Assessment of Competence'', (1994) 19(1) *Assessment and Evaluation in Higher Education*, 3 at p 5.

[88] See O'Reilly *et al*, 1999, *op cit*.

[89] Eraut, 1994, *op cit* at p 208.

[90] Solicitors Regulation Authority, *Training trainee solicitors: The Solicitors Regulation Authority Requirements* (London: Solicitors Regulation Authority, 2008) at p 13.

[91] Solicitors Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors' Regulation Authority, 2009) at p 14ff.

[92] Solicitors' Regulation Authority, *Day One Outcomes For Qualification As A Solicitor* (version 2) (London: Solicitors' Regulation Authority, April 2007).

*Competences for development*

| *Practice standards*[90] | *Work based learning outcome*[91] | *Day one outcome*[92] |
|---|---|---|
| You must ensure that you … <br>• take responsibility for your own self-development (completing and reviewing your training record, and reflecting on your experiences and what you have learnt are important aspects of this) | **1 Application of Legal Expertise** <br><br>1.4 Keep up-to-date with changes in law and practice relevant to his or her work. <br><br>**7 Self Awareness & Development** <br>7.1 evaluate accurately the strengths and weaknesses of his or her professional skills and knowledge | **E Personal development and work management skills** <br><br>The ability to: …. <br>• Recognise personal and professional strengths and weaknesses; |
| | 7.2 identify situations where the limits of his or her abilities are reached, and the next steps in such cases, in clients' best interests | • Identify the limits of personal knowledge and skills; |
| | 7.3 reflect on experiences and mistakes so as to improve future performance | • Develop strategies to enhance professional performance |
| | 7.4 identify areas where skills and knowledge can be improved, and plan and effect those improvements | • Recognise personal and professional strengths and weaknesses; <br>• Identify the limits of personal knowledge and skills; <br>• Develop strategies to enhance professional performance |

**Figure 2:** A comparison of the proposed work-based learning outcomes in respect of personal development with the equivalent "day one outcomes" proposed for the point of qualification

Conduct 2007, para 1.05[93] glossed in the notes as "[y]ou must provide a good standard of client care and of work, including the exercise of competence, skill and diligence" and in para 2.01, "you must refuse to act or cease acting for a client . . . where you . . . lack the competence to deal with the matter" and may have informed work-based learning outcome 7.2.

In a review of similar professional requirements in the USA, Sabis and Webert identify the dilemma as "[w]ith little or no experience, is there any case a new lawyer can accept and believe that she [*sic*] is competent?"[94] The bottom-line concept of competence, however, requires only that the individual identify him- or herself as *not* competent for a particular task; imposing no necessary obligation to aspire to become

[93] Solicitors' Regulation Authority, *Solicitors' Code of Conduct 2007* (London: Solicitors' Regulation Authority, July 2007).

[94] Sabis, C and Webert, D, "Understanding the 'knowledge' requirement of attorney competence: a roadmap for novice attorneys" (2002) Georgetown Journal of Legal Ethics, 915 at p 924. See also Mudd, J O and La Trielle, J W, "Professional Competence: a study of new lawyers" (1988) 49 *Montana Law Review*, 11.

competent at it. One can nevertheless, as does Nelson, see an aspirational obligation as implicit in the avoidance of negligence:

> . . . competence is an elusive notion and, when definitions are attempted, they tend to be expressed as generalisations . . . What is clear is that, as Bushman (1979:55) points out, professional incompetence can be the result of several factors:
>
> - part of the knowledge, skills and attitudes professionals acquired during their academic education or in practice has been forgotten or declined;
> - some of the knowledge and skills have become useless through obsolescence;
> - some services they are asked to perform require knowledge, skills and attributes they never owned;
> - new information, skills and attributes have emerged and have become part of the profession's current standards of competence.
>
> Of these four factors, the one which is most likely to influence the levels of competence of the beginning solicitors who are the subject of this study is the third. It is clear that their pre-admission preparation cannot hope to cover the full spectrum of what they will be called upon to perform in the workplace, especially if they engage in specialised areas of practice.[95]

An ability to take deliberate responsibility for one's own learning, or, in Eraut's terminology, to be "'professional learners' in order to become more effective 'learning professionals'"[96] might however be seen as inherent in a philosophical concept of professionalism. Whilst the work-based learning outcomes and day one outcomes are consistent with a bottom line concept of competence, both extend further into this aspirational sense than the APLEC standards appear to do, embedding a "meta-competence" promoting capacity to move beyond and above the basic framework and involving a degree of metacognition: an ability to transfer, to understand one's own learning.

Just as Cheetham and Chivers[97] combine the reflective practitioner with the competence model; Winter[98] in his "general theory of professional competences" goes further, showing categories (usually identified as competences to be achieved in their own right) essentially in their relationship to development of practice and expertise such that the task-based competences inform and are aspects of an overall commitment to development. Lester,[99] similarly, develops a constructivist framework that seeks to smooth out "the distinction between learning processes and process of practice" by inculcating "engagement with practice" and use of reflective techniques from the outset; retaining only by way of guidance some form of "minimum standards" as a benchmark:

> [t]he broad map structure is not a syllabus to cover or set of standards to achieve, but one way of representing a territory of which exploration is encouraged until sufficient experience and confidence are gained to redraw the map or extend its boundaries.[100]

[95] Nelson, J W, *A study of the Continuing Legal Education Needs of Beginning Solicitors*, (Sydney: CLE, 1993) at p 15.

[96] Eraut, 1994, *op cit* at p 14.

[97] Cheetham, G and Chivers, G, "Towards a holistic model of professional competence", (1996) 20(5) Journal of European Industrial Training, 20–30; "The reflective (and competent) practitioner" (1998) 22(7) *Journal of European Industrial Training* 267–276.

[98] Winter, *op cit*.

[99] Lester, S, "Beyond Knowledge and Competence: towards a framework for professional education", (1995) 1(3) *Capability*, 44–52. See also Carter, R, "A taxonomy of objectives for professional education" (1985) 10(2) *Studies in Higher Education* 135.

[100] Lester, 1995, *op cit* at p 7.

This (meta)competence for development straddles the boundary of the normative and political meaning of competence and the aspirational meaning. The competence for development in the solicitors' context, however, is open-ended. The day one outcomes seek to determine the benchmark at qualification *from* which one is to aspire, but no specific guidance is given as to what one is to aspire *towards*. Analysed cynically, when one takes into account the prohibition on individual practice prior to the three-year post-qualification point, it is possible to conclude that a solicitor is not regarded as "fully" qualified in the real normative and political sense until those three years have passed and the individual is permitted to take on (largely) whatever work he or she chooses and to conduct it with no supervision.

Eraut suggests that objective and external models of professional development – such as competence frameworks – should:

> . . . take into account during the period before and soon after qualification the following kinds of progress:
>
> - extending competence over a wider range of situations and contexts;
> - becoming more independent of support and advice;
> - routinization of certain tasks;
> - coping with a heavier workload and getting more done;
> - becoming competent in further roles and activities;
> - extending professional capability; and
> - improving the quality of some aspects of one's work.[101]

Put more emotively, the distinction is between survival and competence at a single level which merely avoids negligence in comparatively straightforward tasks and the ability (or metacompetence) to develop to a new level involving more complex tasks and more reliable quality of performance and ultimately into the "swampy" problems which demand creativity in their solution.[102] Post qualification, whilst not explicitly re-defining CPD, the SRA has set out[103] a series of expectations for the post-qualification period which bears comparison with the competence for development derived from the work-based learning and day one outcomes but betrays an assumption that there will be (measurable) output, at least in terms of bottom-line competence. Agenda for Quality, however, with a more consciously bottom-line approach, envisages "standards frameworks" for specific roles that an individual might take on,[104] treating CPD as only one of a number of factors which promote quality of service, the others being effective office management and supervision.[105] As shown above at Fig 2, it is at the stage of the day one and work-based learning outcomes that it is initially and explicitly sought to embed such a "competence for development" as a responsibility of the individual solicitor.

[101] Eraut, 1994, *op cit* at pp 218–219.

[102] Schön, D A, *The Reflective Practitioner*, (Aldershot: Ashgate, Arena, 1983).

[103] Solicitors Regulation Authority, February 2007, *Education, Training and Development for Solicitors: The Way Ahead*, *op cit* at p 11.

[104] Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services*, 2009, *op cit* at p 13.

[105] Solicitors Regulation Authority, 2009, *ibid* at pp 9ff, 11ff.

## THE DAY ONE AND WORK-BASED LEARNING OUTCOMES

Three groups of outcomes or competences emerged from the Training Framework Review: new learning outcomes for the LPC; proposed outcomes for the period of work-based learning to replace the training contract and an umbrella set of outcomes intended to represent all the skills that a solicitor will possess on their first day after qualification (the "day one outcomes").[106] The latter, therefore, draw on the academic stage and vocational stage as well as the training contract/period of work-based learning.

Initial plans for the period of work-based learning involved the gathering of a portfolio of evidence of those of the day one outcomes best "developed and demonstrated in the workplace"[107] with a limited (500–1000 word) reflective element, all centrally assessed. A further external assessment, possibly online, would cover ethics, client care and similar issues now covered by the PSC. By 2007, further consultation had taken place[108] and the day one outcomes refined. The proposed outcomes for the period of work-based learning were also redrafted in 2008 and it is this iteration which is in the course of piloting at the time of writing.

Despite the difficulties of some firms in supplying sufficient contentious seats, a requirement to cover both contentious and non-contentious practice is retained although assessment may be either by the employer or by external assessment organisations (allowing individuals unable to obtain a conventional "training contract" to contract externally for their mentoring and assessment with the consent of their employers).[109] The author and colleagues at Nottingham Law School are contracted to the SRA to test this aspect of the proposals with a number of candidates working in legal firms; in local government and other contexts including in-house legal activity. Whether this latter permission is able to deal satisfactorily with the question of increased access to the profession remains to be seen.

### *Scope and Quality*

A notable distinction between the day one and work-based learning outcomes (I now refer to their 2008 iteration[110]), as competences, is that the former are, likely the majority of their Australasian counterparts, related to identifiable tasks to be performed in particular fields of activity (litigation, business transactions and so on). The latter, however, are consciously generic and, with the possible exception of an outcome relating to the exercise of skills in advocacy, could be acquired and exercised in any field of legal practice and (as many relate to activities such as communication skills and workload management) in work outside legal practice. There are, in fact, 37 proposed work-based learning outcomes (although in the author's view several overlap) grouped into eight sections:

1. "application of legal expertise" (relating to identification and application of the law to client's problems and the exercise of the LPC skills of writing and drafting, interviewing

[106] Solicitors Regulation *Authority, A New Framework for Work Based Learning Consultation* (London: Solicitors' Regulation Authority, February 2007).

[107] Law Society of England and Wales, *Training Framework Review Consultation Paper* (London: Law Society of England and Wales, 2001) at p 15.

[108] Solicitors' Regulation Authority, *A New Framework for Work Based Learning Consultation* (London: Solicitors' Regulation Authority, February 2007).

[109] Solicitors' Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors' Regulation Authority, 2009).

[110] Solicitors Regulation Authority, 2009, *ibid.*

and advising, research and advocacy as well as a developmental commitment to keeping up to date)
2. Communication
3. Client relations
4. Business awareness
5. Workload management
6. Working with others
7. Self-awareness and development (the "competence for development" I have referred to above)
8. Professional conduct.

Neither set of outcomes contains a statement of an explicit level to be achieved although in its 2007 iteration, the work-based learning outcomes were to be achieved in "straightforward/typical work" and the SRA's material for the pilot of the work-based learning outcomes refers to a decreasing need for supervision as the end of the period is approached.[111] Some outcomes refer to the candidate's being able to "exercise effective judgment" whilst some others only require "awareness". Even so, a particularly good example might be found in outcomes 8.1 and 8.2 which require the individual to identify, exercise effective judgment and act on "ethical dilemmas and professional conduct issues" where, whatever one conceives an "ethical dilemma" to be, a consensus may be emerging from discussion with those involved in the pilot that exercising judgment and acting appropriately in the circumstances may well, at this level, require the candidate only to pass the problem on to someone more senior.[112] By implication, however, the level of advocacy should be at or approaching that which would allow the individual to exercise the rights of audience automatically acquired at the point of qualification: sufficient to conduct a county court trial.

One approach to level would be to employ an existing framework such as those used in the educational and skills sector. There is already, of course, a set of National Occupation Standards for Legal Advice, albeit targeted perhaps more at the advice centre than the law firm.[113] Johnson and Bone, however, suggest that NVQ level 7 is too high in terms of skills to be expected of a newly-qualified solicitor (or at least one without prior experience in a workplace):

> . . . as at day one the solicitor appears to stride two levels – he or she has the graduate level (and on occasion master's level) of knowledge and understanding but his or her skills are not yet high enough to warrant the label of "manager" for which the NQF level 7 is primarily designed.[114]

Nevertheless, the work-based learning outcomes in particular, because they relate more obviously to interaction between lawyer and client and to efficiency of service, than to specified legal tasks, operate perhaps more clearly than the day one or LPC outcomes as a set of desiderata representing what the profession would like its members to be seen to be in the context of the current "Agenda for Quality".[115] Even so, the pilot will no doubt help to illuminate whether or the extent to which it may be difficult for some individuals to demonstrate the achievement of some of the work-based learning outcomes in any meaningful way within their work.

[111] Solicitors Regulation Authority, 2009, *ibid* at p 10.

[112] Nevertheless, the corresponding day one outcome requires individuals to be able to "recognise and resolve ethical dilemmas", Solicitors Regulation Authority, April 2007, *op cit* at p 3.

[113] Skills for Justice, *National Occupational Standards for Legal Advice* (2006). Available at http://www.skillsforjustice.com/template01.asp?PageID=356, accessed 18 January 2010.

[114] Johnson and Bone, 2004, *op cit* at p 4.

[115] Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services*, 2009, *op cit*.

## THE WORK-BASED LEARNING PILOT PROJECT

The Work-Based Learning pilot project is currently approximately half-way though, involving a number of law firms and two educational institutions: Nottingham Law School (''NLS'') and Oxford Institute of Legal Practice. The law firms, and a group of law firms working in conjunction with Oxford Institute of Legal Practice, are working with individuals employed under training contracts, testing achievement, monitoring and assessment of the 37 outcomes. All participants have to demonstrate that they are having experience, at a trainee-equivalent level, of three distinct areas of work (in some cases in the NLS part of the pilot, this is being achieved by secondment within or outside their organisation, whilst for other participants it requires delineation of their existing workload into differing work-types). All have to demonstrate experience of both contentious and non-contentious work. Those involved in the NLS part of the pilot are, however, emphatically not employed under ''training contracts'': they may have been employed in the first instance as paralegals, or as legal officers or are working in-house or in organisations that might someday become Alternative Business Structures but carrying out distinctly legal tasks even if as unreserved business. As successful participation in the pilot will, by waiver of the Training Regulations, permit them to qualify, participants in the NLS part of the pilot have everything to gain and much to lose. Many, however, have been working in the legal sector or elsewhere for substantial periods, and bring their prior experience with them permitting, in principle, a high level of achievement of those outcomes which are not confined to legal practice. A second cohort of those working part-time (or full-time but completing the LPC part-time) has just commenced. All have named supervisors in their workplace and all have access to a ''nominated solicitor'' (who may or may not also be the day to day supervisor) responsible for reviewing their development plan and facilitating their collection of evidence. This exposure to a very deliberate and focused form of developmental supervision, I suggest, could found a basis for the measurement of the ''effective supervision'' envisaged by Agenda for Quality.

In addition, however, each participant has a nominated ''reviewer'' selected from a group of hardworking and committed qualified NLS teaching staff. Each reviewer works with the candidate to consider his or her ongoing development plan and the material accumulated within the candidate's portfolio through four meetings (after each of which formative feedback is provided) during the work-based learning period. The portfolio is critical as it is the means by which the candidate shows, not only that he or she is meeting the threshold criteria of work in three areas of law and participating in both contentious and non-contentious work, but it also contains the candidate's evidence of his or her growing capacity to perform, and achievement of, each of the 37 outcomes. Those outcomes are assessed, in the NLS part of the pilot, against a set of marking criteria linked to NVQ/HE standards but subject to the overriding criterion that, by the end of the project, the summative assessor should be able to say that he or she has confidence that ''achievement of [the pass] level of performance can be expected from the candidate as the norm in the new situations he or she will encounter in practice''.[116]

## CONCLUSION AND IMPLICATIONS

Whilst it is too soon to attempt to provide conclusions from the pilot project, I suggest that such conclusions will include views about:

[116] Solicitors Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants*, 2009, *op cit* at p 10.

a) the nature and demonstration of the thresholds that an appropriate amount of time should be spent working in different distinct areas of law and in both contentious and non-contentious work;
b) articulation of the outcomes;
c) the relationship between the scope of those activities included (or indeed activities not explicitly included such as negotiation skills) and the realities of a wide range of types of practice;
d) an appropriate level (or levels) for summative assessment;
e) the logistics of evidencing outcomes, particularly perhaps where those carrying out assessment are more distant from the candidate and
f) ultimately, I suggest, the effect of use of such a framework, with its emphasis on personal development, on the individual's attitude to aspiring beyond a merely "bottom line", non-negligent, level of performance.

What is apparent, however, is that the work-based learning candidate does require, over and above support both internally and, in the case of the NLS candidates, externally, drive, commitment and responsibility to learning and to evidencing his or her achievement. Mr Guppy, as one of those pioneers, would do well. As far as Agenda for Quality is concerned, however, it is Mr Kenge himself, who "appeared to enjoy beyond everything the sound of his own voice . . . it was mellow and full, and gave great importance to every word he uttered",[117] whose own competence, operational acuity and effective supervision, rather than his personal charisma, is, I suggest, as or more critical to the overall post-qualification quality of the profession's actual performance in the new, infinitely more competitive world of the Legal Services Act 2007.

[117] Dickens, C, *op cit* at p 30. A necessary factor in implementing Agenda for Quality, I suggest (*op cit* at p 7) will be in detaching effective "organisation or management of the environment in which legal services are provided" from the superficially or cosmetically impressive.

NOTTINGHAM LAW JOURNAL

VOL 19(1) 2010

# NOTTINGHAM MATTERS

*This section documents major developments and research projects within Nottingham Law School together with responses to public consultation exercises and other public contributions made by its staff.*

## BECOMING A LAWYER: ENTRY LEVEL TRAINING FOR THE LEGAL PROFESSION

*PHILIP KNOTT**

### INTRODUCTION

From September 2010 entry-level training for both barristers and solicitors will undergo substantial change. This makes it an opportune moment to reflect on the direction that each is taking, particularly as scarcely a decade ago there was speculation about whether entry-level training for the two branches of the legal profession should be harmonised, or even fused.

Entry-level training is a vital component in evaluating the trainee's competence to practise. Such training is also a significant indicator of the nature and standing that the profession strives to attain. Indeed, the very definition of a ''learned'' profession will often refer to ''specialised educational training''.[1] Law has the added dimension that it is often dealing with those in conflict (including conflict with the State) and that many of its clients are particularly vulnerable.

In this paper I will review and compare the educational stages that form a bridge between academic study and professional practice of the law. For the bar this is the (newly penned) Bar Professional Training Course (BPTC), under the aegis of the Bar Standards Board (BSB). The equivalent Legal Practice Course (LPC) for solicitors is governed by the Solicitors' Regulatory Authority (SRA).

### COURSE COMPARISONS

Before embarking upon a detailed comparison, a stark (and explicit) contrast can be drawn between the two new vocational courses. The reviewed LPC from 2010 is based on ''light-touch'' regulation designed to achieve a minimum acceptable threshold,[2] whereas the BPTC requirements are far more prescriptive, and aim

*Solicitor, Emeritus Professor, Nottingham Law School.

[1] See for example ''. . . the three learned professions of law, theology, and medicine'' in the Oxford English Dictionary.

[2] See note 5.

for new entrants to provide a "high quality professional service to their future clients".[3]

The courses have a common basic aim of preparing students to enter their profession. However, the manner in which this is achieved varies substantially, as can be seen from this table:

| Feature | BPTC[4] | LPC[5] |
|---|---|---|
| Entry requirements | 1. Minimum 2nd class qualifying degree (or CPE)<br>2. Aptitude test | Qualifying degree (or CPE) |
| Validation | Three years, following on-site visit<br>Prescribed physical resources | Five years, following off-site visit<br>No specified resources |
| Monitoring visits | Annual visits in a three-year cycle of pastoral and full monitoring (the latter including extensive class observation)<br>External examiners also review the quality of teaching | None specified<br><br>External examiners review the quality of teaching |
| Length | Minimum 30 weeks | None specified |
| Class contact | No overall requirement<br>Preponderance in small groups (maximum 12) | 140 hours (in small groups - undefined) |
| Attendance requirements | 90% minimum | None specified |
| Staff: student ratio | Initially 1:12.5 (1:16 for excess over 125 students) | None specified |
| Skills feedback | Oral: 12 practices<br>Written: 10 assignments | None specified |

On the face of it, it is surprising to find that two professional bodies regulating inextricably linked legal services should come up with such starkly contrasting approaches to their core vocational training. Underlying the disparities are two very different approaches to professional education. The BSB articulates in its aims that "the public is entitled to expect standards of excellence from barristers in the execution of their duties, and the (Board) is committed to promoting excellence and quality within the profession".[6] In contrast, the SRA sets out a much less ambitious aim in its LPC outcomes: they "specify the 'irreducible minimum' that all students completing the LPC need to be able demonstrate in order to pass a course".[7]

Professions like the law face a difficult balance in framing their entry requirements. They want to ensure high entry standards to protect the public from unethical behaviour and incompetence, while at the same time deflecting the accusation that the professions have created artificial barriers to restrict entry. The bar's entry requirements clearly emphasise the rigorous (and arguably rigid) standards designed to ensure public protection. In contrast, the SRA's focus is more on setting minimum standards in order to facilitate access, and to give course providers the flexibility to encourage innovation and competition.

[3] Bar Standards Board Review of the Bar Vocational Course (The "Wood Report"), 3 July 2008, at paragraph 49: www.barstandardsboard.org.uk//Educationandtraining.

[4] Bar Standards Board Bar Professional Training Course Handbook: www.barstandardsboard.org.uk//Educationandtraining.

[5] The Solicitors Regulation Authority's Information for Providers of Legal Practice Courses, LPC Outcomes, at Annex 13: www.sra.org.uk/lpc.

[6] Bar Standards Board Bar Professional Training Course Handbook, *op cit*, note 4, at 12.1.

[7] LPC Outcomes, *op cit*, note 5.

## BEYOND THE VOCATIONAL COURSES

Looking at the vocational courses in isolation then, the BPTC is tougher. However, if we look beyond the courses themselves, we can discern what is arguably a more profound difference in the roles that the BPTC and LPC play in the overall attainment of full professional status:

| Feature | BPTC[4] | LPC[5] |
|---|---|---|
| Status | Non-practising barrister | none |
| Further pre-qualification requirements | Limited practice after 6 months<br>Full practice as a sole practitioner after 12 months | Practising solicitor after 2 years as a trainee.<br>Sole practitioner after a further 3 years |
| Further evaluation/ assessments | Advocacy | Professional Skills Course<br>Detailed training contract learning requirements |

This wider comparison throws a whole new light on the relationship between the LPC and the BPTC. We can now see that to attain the full status of a solicitor, the aspirant must also pass through a comparatively lengthy and very structured work-based learning programme that should ensure that all learned capabilities are practised and reflected upon before being let loose independently on the public.

This time the contrast is just as stark, but in the opposite direction: a barrister can in theory appear in the Supreme Court just six months after leaving law school. No wonder the BPTC aspires to move the student "...from the classroom to the courtroom".

## CONCLUSION

The often-made comparison between the apparently higher standards that aspirant barristers must achieve through the BPTC can only therefore be evaluated through the broader perspective of the overall qualification process. Yes, the BPTC is more rigorous than its LPC counterpart for solicitors. But so it should be, because the ultimate professional status of practising barrister is then within far easier reach than for trainee solicitors. Perhaps we finish with a score-draw.

The final message here is for the solicitors' profession. If, as has been suggested,[8] the LPC should in future become much closer to the point of qualification, then the rigour of the LPC will need to be enhanced in order to ensure that the public is adequately protected.

[8] Legal Services Policy Institute (September 2009): Training for the Future: The Professional Preparation of Lawyers for the Commercial and Regulatory Environment after the Legal Services Act 2007.

# HOW "VOCATIONAL" DO LAW SCHOOLS WANT TO BE? A BRIEF COMPARISON OF ENGLAND AND THE USA

*JOHN HODGSON* & NEIL PECK**

English legal education and US legal education are very different, and prepare students for practice in a very different environment.

To state only the most obvious points:

1. In England, most students of law enter on their studies immediately after completion of their secondary or further education, and start with an undergraduate qualifying law degree recognised by the professional bodies[1] as complying with the joint statement on such degrees.[2] A sizeable minority opts to do a non-law degree and then a conversion course, the Common Professional Examination (CPE)/Graduate Diploma in Law (GDL), but this usually follows directly on from degree studies. This comprises the "academic stage" of study. It is followed by the vocational stage, which is the Legal Practice Course (LPC) for solicitors and the Bar Professional Training Course, (BPTC) for barristers.[3] There is then a period of practical training, two years in a training contract for solicitors and one year of pupillage for barristers after which initial qualification is complete.[4]
2. In the United States, law is a post-graduate discipline. Students may opt for a "pre-law" undergraduate programme, but this is not required. Students are often older, coming to law as a second career to a greater extent, and, as post-graduates are in any event older and more mature. The three year Juris Doctor (JD) programme covers all aspects of legal study. After completing it, students sit the Bar examination for the state(s) where they wish to practise, and on passing, are admitted as attorneys.

If any aspect of law or legal skills is to be part of the required curriculum in the USA, it must therefore be addressed in the JD programme. In England, it can, in principle, be allocated to any one of the three stages, although, in practice, the academic stage is expected to deal with knowledge and understanding of substantive law, and research and communication skills, while the later stages concentrate on the specific attributes expected of solicitors and barristers respectively.

The current focus of the English professional bodies is on 'outcomes', so the Solicitors Regulation Authority (SRA)[5] concentrates on the 'day one outcomes' it has identified through research and consultation:

> Legal Practice Course Outcomes
> At the end of the course, successful students should be able, under appropriate supervision, to:
> 1. research and apply knowledge of the law and legal practice accurately and effectively
> 2. identify the client's objectives and different means of achieving those objectives and be aware of
> • the financial, commercial and personal priorities and constraints to be taken into account

*John Hodgson, MA, LLM (Cantab.), Solicitor, FHEA, Learning and Teaching Co-ordinator, Nottingham Law School; Neil Peck, LLB (Yale), Attorney (US District & Appeals Courts, New York & Colorado) of counsel, Snell & Wilmer LLP, Denver, Colorado. Visiting Professor, Nottingham Law School.

[1] Solicitors Regulatory Authority (SRA) and Bar Standards Board (BSB), acting through the Joint Academic Stage Board.

[2] http://www.barstandardsboard.org.uk/assets/documents/Joint%20Statement0210.doc.

[3] As from September 2010, until then the Bar Vocational Course.

[4] There are alternatives – some students qualify as legal executives, or licensed conveyancers, there is an alternative 'work-based learning' route to replace the training contract, and some barristers work in solicitors firms rather than independent practice, but the outline above represents the 'usual' routes.

[5] LPC – outcomes 2007, available at http://www.sra.org.uk/lpc/.

- the costs, benefits and risks involved in transactions or courses of action

3. perform the tasks required to advance transactions or matters
4. understand where the rules of professional conduct may impact and be able to apply them in context
5. demonstrate their knowledge, understanding and skills in the areas of:

- Professional Conduct and Regulation
- the core practice areas of Business Law and Practice, Property Law and Practice, Litigation and the areas of wills and administration of estates and taxation
- the course skills of Practical Legal Research, Writing, Drafting, Interviewing and Advising, and Advocacy. Students should also be able to transfer skills learnt in one context to another;

6. demonstrate their knowledge, understanding and skills in the three areas covered by their choice of electives, and
7. reflect on their learning and identify their learning needs.

The Bar Standards Board (''BSB'') has based its own equivalent outcomes on the results of the Wood Review[6] in 2008. They are expressed as:[7]

> Aims and objectives
> The overarching aims of the BPTC are:
>
> to prepare students of the Inns of Court for practice at the Bar of England and Wales
>
> to prepare students for pupillage
>
> to enable students of the Inns from overseas jurisdictions to acquire the skills required for practice at the Bar of England and Wales, thereby assisting them to undertake further training or practice in their home jurisdiction.
>
> Specific objectives of the course are:
>
> to bridge the gap between the academic study of law and the practice of law
>
> to provide the foundation for the development of excellence in advocacy
>
> to inculcate a professional and ethical approach to practice as a barrister
>
> to prepare students for practice in a culturally diverse society
>
> to prepare students for the further training to be given in pupillage
>
> to equip students to perform competently in matters in which they are likely to be briefed during pupillage
>
> to lay the foundation for future practice, whether in chambers or as an employed barrister, and
>
> to encourage students to take responsibility for their own professional development

This focus on ''outcomes'' as opposed to ''content'' as *the*, or at least *a*, main framework for legal education is a more recent development in the USA. The year 2007 saw the publication of two major documents which have stimulated a re-examination, at least in certain quarters, of how law schools should prepare young lawyers for practice. These are the *Carnegie Foundation Report*[8] (Carnegie) and *Best Practices for Legal Education*.[9] (Stuckey)

Carnegie assesses the present state of US legal education as follows:

> Law schools use the Socratic, case-dialogue instruction in the first phase of their students' legal education. During the second two years, most schools continue to teach, by the same

[6] Bar Standards Board Review of the Bar Vocational Course (The ''Wood Report''), 3 July 2008. Acopy of the report can be found on the Bar Standards Board's website, http://www.barstandardsboard.org.uk/assets/documents/BVC%20Report%20with%20annexes.pdf.

[7] http://www.barstandardsboard.org.uk/assets/documents/BPTC%20-%20handbook%20version%2001-08-08.pdf.

[8] The Carnegie Foundation for the Advancement of Teaching http://www.carnegiefoundation.org/publications/educating-lawyers-preparation-profession-law.

[9] Stuckey, R *et al* http://law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf.

> method, a number of elective courses in legal doctrine. In addition, many also offer a variety of elective courses in seminar format, taught in ways that resemble graduate courses in the arts and sciences. What sets these courses apart from the arts and sciences experience is precisely their context – law school as apprenticeship to the profession of law. But there is room for improvement. The dramatic results of the first year of law school's emphasis on well-honed skills of legal analysis should be matched by similarly strong skill in serving clients and a solid ethical grounding. If legal education were serious about such a goal, it would require a bolder, more integrated approach that would build on its strengths and address its most serious limitations. In pursuing such a goal, law schools could also benefit from the approaches used in education of physicians, teachers, nurses, engineers and clergy, as well as from research on learning.[10]

It goes on to identify two major limitations in the current practice:

> 1. Most law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients. Neither understanding of the law is exhaustive, of course, but law school's typically unbalanced emphasis on the one perspective can create problems as the students move into practice.
> 2. Law schools fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills. Students need opportunities to learn about, reflect on and practice the responsibilities of legal professionals. Despite progress in making legal ethics a part of the curriculum, law schools rarely pay consistent attention to the social and cultural contexts of legal institutions and the varied forms of legal practice. To engage the moral imagination of students as they move toward professional practice, seminaries and medical, business and engineering schools employ well-elaborated case studies of professional work. Law schools, which pioneered the use of case teaching, only occasionally do so.[11]

Stuckey endorses these observations, and in the course of a lengthy review of the existing practice and criticisms thereof identifies professional competence, or the lack of it, as a significant feature:[12]

> Most law school graduates are not sufficiently competent to provide legal services to clients or even to perform the work expected of them in large firms. The needs and expectations of the workplaces awaiting law school graduates have changed since the traditional law school curriculum was developed, even in the large law firms that serve the legal needs of corporate America. Research conducted by the American Bar Foundation in the early 1990's reached the following conclusion:
>
> > The [hiring] partners today, in contrast to the mid-1970s, expect relatively less knowledge about the content of law and much better developed personal skills. It appears that the law firms in the 1970s could afford to hire smart, knowledgeable law graduates with as yet immature communication and client skills, place them in the library, and allow them to develop. Today there is much less tolerance for a lack of client and communication skills; there is perhaps more patience with the development of substantive and procedural expertise in a world of increasing specialization.[13]

[10] See Carnegie, Summary of the Findings and Recommendations at p 4.

[11] *Ibid*, p 8.

[12] *Ibid,* p 19.

[13] Bryant G Garth & Joanne Martin, *Law Schools and the Construction of Competence* 27 (Am. B. Found. Working Paper No. 9212, 1992).

> Potential clients should be able to hire any licensed lawyer with confidence that the attorney has demonstrated at least minimal competence to practice law. Doctors' patients reasonably expect that their doctors have performed medical procedures multiple times under the supervision of fully qualified mentors before performing them without supervision. Clients of attorneys should have similar expectations, but today they cannot.
>
> Legal education today is effectively an indoctrination into the ideology of the rule of law, seen as the law of rules. Maybe that was fine fifty years ago. Maybe then, a time that Anthony Kronman unaccountably waxes romantic about it didn't matter what students were taught. Like some students today, they could ignore the normativity, keep their nice doctrinal outlines, and pass the bar. Thereafter they would find someone who would teach them to practice law. But, as Kronman recognizes, today the world where new associates were getting patiently taught how to practice law is long past, if it ever existed for those at the bottom of the profession. Today's world is one where, even in the biggest firms, mentoring is hit or miss at best, and associates are hired in quantities and put to work in ways that ought to remind one of riflemen at Gettysburg or Paschendaele. In less fancy practices, conditions are even worse, if that is possible.[14]

Stuckey acknowledges the move in England and elsewhere to "outcomes-focused instruction"[15] which is seen as the way forward in the USA as well. However, if it is to be introduced, it must be into the existing JD programme, or some extension of it, and any extension would have serious consequences because of the very high cost of tuition. This is not the first time that consideration has been given to incorporating skills in US legal education. The American Bar Association MacCrate Report[16] advocated this, but it was heavily criticised:

> Because it focused on "skills," it was not well received by some in the legal academy. Having fought hard against the perception of legal education as a "trade school," many law school academics did not welcome the Report's emphasis on skills.[17]

The elite law schools, while arguing that most of what they do is "geared to preparing students for practice" would disavow any directly vocational intent or orientation. In this respect Yale and Harvard resemble Oxford and Cambridge.[18] It is instructive of the 20 law schools represented on the Steering Committee for the Best Practices Project, only one was from the "top tier". It would seem that, while in England the pressure to revise the LPC has come from the "Magic Circle" and other elite firms, in the USA at present it comes from less prestigious firms, who hire the products of the less highly ranked law schools, and are looking for a more "oven ready" body of recruits.

This is, interestingly, one area where the UK[19] appears to be ahead of the USA. It is also an area where the professional bodies have a greater influence over the content of at least certain stages of legal education. The American Bar Association approves law schools, based on compliance with published standards[20] but these are almost entirely unprescriptive in terms of curriculum and educational approach:

[14] Mary C Daly, The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization, 52 *Journal of Legal Education*. 480, 484 (2002).

[15] Stuckey, *op cit* at 32ff.

[16] 1992 http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html.

[17] Penland, L What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyershttp://www.alwd.org/JALWD/CurrentIssues/2008/Penland_1.html#.

[18] In 1992 the Policy Studies Institute longitudinal survey of law students found that 72% of Oxbridge students considered their course too theoretical (27%) or slightly too theoretical (45%). The overall figure for other 'old' universities was 53% and for polytechnics/new universities 40%. Interestingly 41% of Oxbridge students, 30% at old universities and only 18% at new universities reported regretting choosing their programme of study.

[19] The Scottish professional bodies have also undertaken similar reviews.

[20] http://www.abanet.org/legaled/standards/standards.html.

> Standard 301
> A law school shall maintain an educational program that prepares its students for admission to the bar,[21] and effective and responsible participation in the legal profession.
> Standard 302
> A law school shall require that each student receive substantial instruction in:
> (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
> (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
> (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
> (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
> (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.
> (b) A law school shall offer substantial opportunities for:
> (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;
> (2) student participation in pro bono activities; and
> (3) small group work through seminars, directed research, small classes, or collaborative work.

This contrasts with the prescription by the JASB of the foundations of legal knowledge, and detailed prescription of content for both the LPC and BPTC. In part, this reflects the fact that there are multiple state jurisdictions, and many law schools attract students who will wish to join the bar in different states, so there is more emphasis on generic studies.

If it be right, as the research in both the USA and the UK appears to indicate, that a more vocational, problem-solving oriented initial legal education and training is more appropriate, it will be interesting to see how this plays out in the future in relation to recruitment into the major international law firms, in particular those with Anglo-American roots.

[21] This is assessed by periodic evaluation of success rates of alumni in state bar exams.

NOTTINGHAM LAW JOURNAL

VOL 19(1) 2010

# STUDENT ESSAY COMPETITION 2010

*This section contains essays submitted by Nottingham Law School students to the Nottingham Law Journal on the topic, "Legal Education: What I wish I'd known. . ."*

## WINNING ESSAY

**Nadine Evans, GDL Distance Learning (2008–2010)**

As I sit here with my hot water bottle and I try and remember the colour my carpet once was (it is now adorned with various papers and law books), I think back to my first year of the GDL programme and have mixed feelings.

I began in September and, after my first weekend, felt positively buoyant at the thought of the GDL . . . I was ready for it! I would take it by the horns and wrestle it into submission, after all I was "mature" now so I was ready for the challenge . . . or was I? Although I had researched the programme and realised that it was not to be taken lightly, those words were never so apt, I would shortly become immersed in a world where Latin was still used and where simple sentences didn't seem quite so simple anymore. My imagination and inventiveness would be stretched to that of an advertising executive working for Saatchi and Saatchi as I tried to come up with more and more imaginative ways to memorise cases and jingles about psychiatric harm (that sounds a lot sicker than it actually is!). Still – I digress.

Studying law places you in the strangest of time warps. Events such as Christmas and Easter come and go and you watch from the sidelines as friends on various social networking sites count the days religiously, wishing for them to progress when all you want to do is slow things down! However, there is an up side. You learn to do everything in double time. Christmas decorations are put up in a day, and down in the same expeditious manner, and Christmas dinner is followed not by the ubiquitously normal game of charades but by 'legal' charades (miming Lord Keith of Kinkel stretches the imagination beyond what would be considered appropriate for inclusion in this article) and a moot on the semantics of the contents of a Christmas cracker . . . yes it is fair to say that studying law changes everything.

Like a blind man, gradually your eyes are being opened and things that you used to do with gay abandon are now perilous and subject to scrutiny. Simple snow ball fights have to be approached with fresh caution as you find yourself saying "I remember a case about that and I am sure they were sued!" You see cases everywhere and feel a sense of frustration that you never felt before as you simply have to get home from the supermarket to find the name of that case that you have just been reminded of! Random phrases invade your mind as you are shopping and see some spillage on the floor without a warning sign. The feeling of excitement, smugness and fear begins to well up inside you and all you want to do is shout "OCCUPIER'S LIABILITY 1957!!!"

Friends start to come to you with obscure problems about issues that you have not yet studied and even if you have, you are not remotely qualified to give advice on and you find yourself saying words like, ''Caveat, I am not legally qualified in any way, shape or form''. This use of archaic language is perhaps the biggest thing to be aware of and in conversations you must be prepared for a heartfelt 'ripping' from friends as you no longer have an opinion, but ''respectfully submit'' that you would rather go to Pizza Hut than McDonald's often followed by yells of ''Ohhhh hark at Judge Judy!!!'' from friends. You don't say ''despite'' anymore but ''notwithstanding'' and gradually, unless checked, you turn into that potential lawyer that (*inter alia*) you swore you would never be!

Still, it surely can't be all bad can it? Well then there are the exams. Come May, the local Travelodge sees a stream of panic looking students only distinguishable by the copies of Blackstone's Statutes (unmarked!) under their arms leaving silently in the morning and returned around lunch time to vanish into their rooms only to return the next day. After the end of the exams you realise you have developed a certain degree of agoraphobia and that your social skills have regressed to someone who has been lost, presumed dead, on an uninhabited desert island. You have to learn to speak again and to try and fend off the constant dreams where you either remember every case or sit looking at an exam that you haven't studied for . . . The dreams are a constant source of both fear and amusement for your partner and you are reminded, most embarrassingly, of the night you sat bolt upright and shouted ''YOU CAN'T!!!! IT'S A DIRECTIVE!!!'' looking panic stricken and then flopping back to carry on mumbling in your sleep about various articles.

The exams really are like nothing you have experienced, even at first degree level. No one wants to talk about the impending paper and, as you wait nervously outside, you notice that the female members of the group tend to have a thicker layer of foundation and concealer applied under the eyes to hide the bags and the redness. Who would have thought that one of the things I wished I had known when contemplating legal studies was to stock up on makeup! After the exams and results, although you had every intention of slumping back and ''chilling out'', you find that instead you start to get twitchy. Your routine is not right, you have to read something but paradoxically, although reading academic works greatly improves your vocabulary and should make reading a novel a more pleasurable experience, that Harry Potter book you have been itching to read seems to now be riddled with imagined inconsistencies and is fertile ground for legal litigation (''You can't do that Hagrid . . . that would have tortious liabilities!''). The spells are reminiscent of many a Latin maxim and you find yourself able to translate many ''spells'' as your Latin has improved beyond recognition! Nothing seems to satiate your newly acquired legal appetite and so you appease yourself with trying to find work experience or summer internships within the local legal sector.

Summer passes and as sure as the swallows leave for Africa and with the same feeling of inevitability, your books arrive (I am a distance learner). The postman cheerily greets you with the words ''Can you manage love? It's a heavy one!'' as he clasps your box of books. The irony is my postman always assumes it is a present or filled with the most fantastic goodies . . . I wish I'd known about the feelings of panic/excitement/apprehension and a myriad of other emotions as you tear open the box and then sit for the remaining afternoon meticulously ordering your schedule of work and looking at the pristine books.

All of the above seems to paint a poor picture but what I didn't expect, as a distance learner, is the high degree of camaraderie I have experienced on the programme. We

only meet four times a year for exceptionally packed weekends of learning and, being one of the older members of my group, I expected that there would be little opportunity for "fun". I was very wrong. One of the biggest "What I wish I had known about legal education" is that you can still enjoy studying and have a good laugh; in fact it is highly recommended. You can be studious but don't be too keen to race into the legal profession with a scowl on your face and taking yourself far too seriously. The stakes are high as training contracts are few and far between and the initial outlay for the academic stage is not to be taken lightly but, notwithstanding the high price and high risk, look for the fun in everything you do. Your colleagues come from a wide range of experience and knowledge and have much to bring to the weekends. In my own group there are graduates who are far younger than myself and have superb intellects that they are willing to share. Having the humility to listen to them and sharing all you can with your fellow students is possibly one of the most rewarding things about the course. It is amazing to think that in only eight weeks (the amount of times we all meet apart from the exams on the two year distance learning programme) you can have made some good friends and hopefully your next meeting may well be in the practicing legal forum.

In conclusion, in all honesty if you research the course you want to do well and read around the subject prior to application, there is little that is obvious that will surprise you about your legal education. It is expensive, hard work and risky, you can expect the clichéd responses of hard work is rewarding but what you won't expect, and what I wished I had known, is just how rewarding and how 'thrilling' a legal education can be. I have now passed the embryonic stage of legal studies but still consider myself to be "foetal" both in the fact that I am not considered a legal person as yet and that I still have a long way to go. I am also excited, anxious and driven as to what the next stage will bring (if indeed I make the cut). So leaving this cathartic missal, it's back to the books despite being New Year's Day and, before you think I am ultra studious, there are only so many Muppet Christmas films you can watch!

## FIRST RUNNER UP

**Peter Bridgeman, LLM (2008–2009)**

As management consultants we know there is a problem or the client would not be willing to pay our fees. The exercise is therefore to provide a simple solution, which can be demonstrated and accepted by management[1].

There is no requirement to reference the recommendations to other peoples' conclusions in similar exercises. The length of the report specifying the problems, the opportunities for their removal and the action programmes to implement the recommendations must be a size to accommodate them.

In answering a legal question or preparing a dissertation there is a need to analyse the question to provide the framework of an academic argument. A legal academic argument is like a spider's web – it must be anchored at each point. These anchors can either be case law, statute law or previous analysis. This all may seem obvious, but having taken a consultancy approach in a dissertation it is difficult to prove the hypothesis as stated in the proposed legal methodology by the introduction of footnotes, which provide the supporting references, after you have written ninety pages.

[1] Mckinsey management consultants fees are based on value pricing, *ie* the benefit gained by the client out of the worked done.

So I wish I had learned the technique of the spider, anchoring my web of argument and structure to solid references as I went along.

As a child I never learned the proofs of the various theorems in geometry, but I still had to provide a legitimate proof even if it was my own. In law we can only predict the future of a case or set of circumstances by reference to what has gone before. Everyone of us is different and learning within each of us may be a different process. Therefore you need to tailor the approaches discussed below to suit your personality and ability.

In the accountancy profession although annual textbooks are the normal approach to preparing tax arguments to the Inland Revenue, many tax specialists only use the annotated statutes; therefore avoiding the failure of the textbooks to pick up the subtleness of a specific case. Textbooks are often difficult to read and can cram too much information into a single volume. No matter which textbook is recommended there is a need to enjoy the book of your choice and obtain a personal understanding of the subject matter it contains. If your university library does not have the book you want, your local council library will go out of the county to provide you with the textbook you need, if they do not have it on their shelves. The other books that you will need are a good English dictionary, a simple law dictionary and even today, a cheap Latin dictionary may come in handy.

The fundamental question relates to what you believe your degree is going to provide you with. The first fundamental is the ability to understand the law by reference to statute, case law, and commentaries. The second is the application to specialist subjects within the law. Is there a third, a way of thinking which you will adopt whether you are in the legal profession or not? Most postgraduates will claim this to be true. In Rumpole[2] the famous fictional Old Bailey hack, when Portia, the female barrister of the chambers, is asked whether Rumpole could undertake a lecture tour of the USA on the subject of law, she states Rumpole knows little about the law other than how to handle judges, witnesses and when to spill his glass of water during the opposing counsel's speech. Rumpole could not exist in the real world of the legal profession and its need for continuous professional education (CPE). So if the student intends to join the profession his current method of study must last him for the rest of his life.

Many students take down copious notes dictated by the lecturer. Many students are like priests undertaking their daily "office[3]" reading, but not "inhaling" the various psalms or cases. They read textbooks as divine essential literature, rather than reading to understand. They feel that if they do not have large lever arched files they are failing in their duty as a student. Masters degree students accept they have to carry out internet research, knowing that even if they wanted to use specialist textbooks the cost would be prohibitive. There are specific textbooks on how to conduct research.[4]

"In our experience students undertaking a research project have most difficulty deciding which approach or strategy to use to address the research problem they have set themselves."[5]

A research project needs to be thought out before starting and carrying out the gathering of data.

The analogy of the spider's web can be used not only on the preparation of dissertations, law essays and opinions, but also in the initial study of the law and it can

[2] Rumpole is the product of John Mortimer who was a practising barrister.

[3] Office – a sacred ritual reading undertaken by Roman Catholic priests.

[4] John Gill and Phil Johnson-Research Methods for Managers.

[5] *Ibid.*

provide you with a life time mental discipline. There are a number of computer packages, such as "mindjet[6]" or "mindgenius",[7] which force you to regiment your thoughts and provide a revision facility prior to examinations.

If you use the spider's web approach you can divide your legal subject into main headings, these can be subdivided into as many levels as you require. Memorable facts about an interesting case can be included on a yellow sticky[8] at the appropriate point. Articles can be found and a link made within the spider's web or where a note is too large for a yellow sticky, a link to a "word"[9] document can be made. These systems are flexible, so that revision can be achieved by uncovering only a level at a time, forcing the student to predict the next level in the spider's web.

You may need an A3 printer, but you can contain the basics of any subject on one diagram, which you can continually amend. The links to other external information such as articles, extracts from statutes or specific notes are shown as graphic paperclips within the diagram. One touch of any of these graphic paperclips will automatically provide the information through the link. The simple way to build a spider's web below may be a contradiction in the argument above regarding the use of textbooks. First of all name the MAP,[10] *eg* the law of evidence. The second task is to take a simple textbook and lay in the first layer from the centre outwards, possibly the textbook's chapter index. As you read the book you can add additional layers. If you read another book, other thoughts can be overlaid, which would be a difficult task if manual notes are used to record the information. As you research cases, put in a graphic paperclip link to the law report and add a yellow sticky with a sensational note on the case, only, say, two lines long.[11] You may consider reading specific books on areas of the law of evidence and the Map can be amended accordingly. The approach is forcing you to see the law in the context of an overview of the law of evidence. It removes the need to take endless notes as you can link to the specific part of a case or statute and therefore provides the student with time to carry out essential research to understand the deeper aspects of the law.

In the same way that you have built up the spider's web to learn and revise the law you can answer legal questions or produce a legal dissertation.

Most of the spider's web type computer systems can convert the Map into a word[12] document. This enables a Map to be used to either answer a legal question or structure a dissertation. In a dissertation you need a question or subject, an introduction, a methodology, the research, the analysis of the research and therefore the validity of the criteria laid down in the methodology, *eg*, hypothesis. The headings required change in each of the textbooks and the university requirements on the preparation of dissertations. The universities use differences systems for referencing, i.e. Harvard, OSCOLA 2006[13] and others. These main headings above become the level one of the MAP, *ie* the spider's web. The detail is gradually attached until precedents are provided under case law. Arguments can be cross referenced within the appropriate section. Many students go through many rewrites without having a formal structure. The logical process encourages the student to think through the arguments although they

[6] Mindjet is part of Mindmanager Software.

[7] Mindgenius claim that this software's approach can save up to 70% in the time used to carry out tasks.

[8] Stickies are a computer graphic equivalent of the 3 m paper product.

[9] Word is the copyright of the Microsoft Corporation.

[10] MAP the Mindjet name for the web or diagram.

[11] Case details in Criminal Law the Dyson case 1908 would have a yellow sticky "killed him even though dying of meningitis".

[12] Word is a word-processing product of the Microsoft Corporation.

[13] The Oxford Standard for Citation of Legal Authorities.

may end up disproving the hypothesis provided originally in the methodology. In addition to the structure level by level plus the paperclip links and yellow ''stickies'', most systems allow dotted lines to connect thoughts between the structure. Once the Map is complete it can be converted to a structured word document and revised as such.

What I had wished I had known before studying the law can be summed up in two words; self organisation. The law is a jigsaw puzzle where each piece must fit with another except for the exceptions[14]. The square pieces on the outside are easily found such as statutes and the major cases, but to understand these, the reasons for the statute expressed in, say, the legal commissions or the decisions in specific cases, the judge's summing up and basis of the Court of Appeals' decisions, must be studied. As time is limited it is not possible to read very case on every subject in the student's course, but to limit yourself to details of the cases provided by the lecturer misses the purpose and content of any law course.

Research projects require discipline in their approach and gathering and analysing data whether it is qualitative or quantitative and the use of computer maps will avoid straying into areas which are not relevant to the project in hand.

If this paper achieves one thing, it should be to make you find a fellow student, who at present is using the mind mapping process. He will be able to show you what benefits he has achieved and will be able to teach you how to start. Most Universities or student software resellers will be able to provide the software of your choice at a student discount rate. There is software claiming to help in the preparation of dissertations and the necessary references. These software packages should be avoided as they do not help in regimenting the thinking process.

## SECOND RUNNER UP

**Candice Manifold, Work Based Learning Training Contract Pilot. Due to complete in August 2010**

I am now 25 years old, 6 years into my Legal Education, and just 8 months away from what will be one of the most important events in my life . . . ''Admission to the Roll as a Solicitor''. Ooh, that sentence, it sounds so commanding, a sentence that demands the upmost attention and respect. I'd be lying to you if I was to say that I am not excited; finally, the 7 years I have spent reading Law, the debt that I have incurred as a student, all of it will be made worthwhile.

I say 6 years 'into' my Legal Education, because what I certainly have learnt is that although I will be qualified in just under a year's time, your Legal Education as a Solicitor is continuous, what with CPD, changes in legislation and developments in the Law.

*What I wish I'd known?*

I wish that when I started this journey I'd known that it was going to be challenging at times, that the legal world is a very small one, that ideally I needed to start applying for Training Contracts at the beginning of Year 2 and that there are environments other than the traditional Law Firm in which one can practice. It's not that I hadn't known, I think I just under-estimated or misunderstood.

[14] Lord Denning often ignored case law and used his ''common sense'' in a number of his decisions.

Challenging in respect of the fact that there's been times during the last 6 years where I've found the studying demanding, and a struggle trying to balance with work. My dissertation, paper based research and referencing spring to mind as having been sticking points for me; I wish I'd have given the dissertation the time and dedication it deserved and wish I'd have chosen a topic that was of more interest to me. I wish I'd have listened more attentively to the lectures given in referencing and paper based research; that way I could have probably had a few more nights' sleep, instead of being sat up trying to get my head around it all.

Even though I live in the 2nd biggest city, the legal world here is a very small one. Everyone knows everyone and so even as a young Trainee Solicitor I can see that your success depend heavily on your reputation, your contacts and your ability to network. 'Networking'. . . Ah yes, a key word for any 21st century Solicitor based in a Private Practice. I've made use of the contacts my older brother, he himself a Solicitor, has. I have maintained good working relationships with Court and Tribunal staff. I have maintained relationships with a set of Chambers in London, so much so that the Barristers and I are on first name terms – the clerks will often just drop me a line to see how I am and where I'm working now. In the past, I have also gone to functions organised by Solicitors' Firms and Chambers. However, so far as networking for the purpose of actively raising my profile or finding out more about a prospective firm that I wished to apply to for a Training Contract, I think I could have done more. I wish I'd known more about the importance of the Firm Open days, and I wish I'd been a bit braver and used my time in Private Practice to attend more functions.

Training Contract! To a lot of graduates out there struggling to get one, the words "Training Contract" probably draw striking similarity with words of profanity. I'm lucky in that I do have a Training Contract, and that I only had to make a handful of applications before I was successful. However, what I wish I'd known is that ideally, I needed to start making applications at the beginning of year 2 of my Degree if I wanted to secure a Training Contract and have the firm pay for the LPC. Like many of my colleagues, I left it to the last minute, I started to apply towards the end of year 3 and during my first year of the LPC; on reflection, it didn't affect me too much because I did the LPC part time over 2 years and commenced my Training Contract at the end of that. All the same, I do wish that I'd made more applications sooner, if nothing else the application and interview process would have been good experience.

When I set out on this journey in 2006, I think I was naïve in the sense that I hadn't realised how many other settings one could practice as a Lawyer, other than in the setting of a traditional private practice Law Firm. I now work for the largest Local Government Legal Team in Europe, Birmingham City Council Legal Services, and to be honest I never pictured myself as a Local Government Solicitor. In my 6 year journey, I worked for a small criminal High Street practice, acted on behalf clients at the Citizen Advice Bureau, worked at a medium sized international firm, worked as an Employment Consultant, and now work in-house for Local Government. The variety of settings in which one can practice are vast, each different, each with its own advantages and disadvantages. I don't wish I'd known this for any particular reason other than I think it would have been helpful to know if I'd have known this earlier on.

So, that's '*What I wish I'd known*'. Would I change anything from the past 6 years of my Legal Education? No, I wouldn't. My past experiences are what have moulded me into the person I am today, and also where I am today in terms of my career and so good or bad, rough with the smooth, I am grateful to it all.

## THIRD RUNNER UP

**Daniella Mandel, LLB (full-time), 2nd year (2009–2010)**

It is my deepest desire to practise law. I have had a love affair with the court room from the first time I ever visited one, when I was twelve years old. I love everything about court, from the rich smell of the wood; to the leather bound law books; to the role of an advocate. But, my favourite thing about a court room is the sanctity of equality, justice and equity principles that it should represent. I knew that I would be an advocate years before I could understand the sacrifice, determination, imagination and hard work it would take to get there. There are many ways in which my legal education has surprised me, enthralled me and then others where it has severely disappointed me.

The truth is that there has never been, nor will there ever be anything or anyone that could alter my desire to practice law. For this reason, I am not going to attempt to dissuade anyone or describe the lowest points in my educational experience. Instead, I'd like to prepare you for the journey, and inspire you to push forward no matter how many obstacles you face. My obstacles are indeed specific to my journey but there is still hope that they might be useful to all those who share my passion for law and intend to pursue a legal education. I am going to give you the facts that I wish I had been aware of before I embarked upon my LLB degree at Nottingham Trent University. Had I been made aware of this information sooner, I might have been better equipped to dodge the curve balls that have been thrown my way.

Legal education is expensive. Despite the fees that law schools charge there are all of the hidden costs associated with law that can take their toll on even the most prepared student. You could argue that any degree at university today is going to be expensive, however with law, there is far less guarantee of a training contract or a pupillage to illuminate the end of the dark tunnel. Additionally the Legal Practice Course or Bar Vocational Course is another twelve to fifteen thousand pounds on top of your undergraduate fees. For International students, like myself, I will be in forty five to fifty thousand pounds of debt before I even apply for a training contract or for a pupillage, both of which are rare commodities in the present economic conditions.

Fees and job prospects aside, the extra-curricular activity of a law student requires us to be the perfect all rounder. We are expected to maintain a solid 2:1 academic record as a minimum from GCSE's all the way through higher and tertiary education. In addition to this, it is imperative that we build impressive curriculum vitae that boast experience in law related projects and pro bono activities, as well as provide evidence of unique qualities that separates us from the rest. In order to transform and blossom into the perfect all rounder, it is crucial to learn to fit 36 hours of work into a 24 hour day.

There are countless debates in the legal environment concerning 'the glass ceiling' and whether it is merely a fallacy. I can only relate to my experiences thus far, and I can assure you that it not only exists but it is entrenched within our society and indeed the wider legal environment including law firms, chambers, and even amongst the judiciary. Before I embarked upon my LLB degree I was uninformed of the raging war between the so called Red Brick and the [other] Institutions like Trent. I was even more oblivious to the fact that I would have to put on a soldier's uniform and defend my institution and the knowledge and tools that it would furnish me with. It became evident almost immediately that there is a massive stigma attached to those students who do not have the opportunity to attend a Red Brick institution or even private schooling. Every application form that you fill in, whether it is for work experience

placements, mini pupillages, training contracts or pupillages, all require one crucial element. They require information about whether you are attending or have graduated from a Red Brick Institution or what they deem to be a lower value institution. The odds are against you before you have even filled out the information on an application form. Currently, the art displayed on my wall is made up of all the rejection letters that I have received from law firms and chambers alike.

Sadly, it does not get any easier when you are looking for experience in the voluntary sector. This alternate route of acquiring law related experience has quickly become saturated. Although voluntary organisations always need volunteers, they have to ensure that they too choose quality over quantity, making it exceedingly difficult for those that wish to start building the vital skills and wider knowledge necessary to practise law. To make matters worse, law schools and universities are not always willing to make exceptions regarding university timetables so that students can attend the necessary training and commitment required by these organisations. Law students have to be prepared from the very start to become overly familiar with sacrifice and prioritising their precious time.

The statistics in relation to the amount of law students graduating from the Legal Practice Course or the Bar Vocational Course are disappointing with regards to the amount of training contracts and pupillages available. Year in and year out, this gap gets larger. The legal world can be categorised by three sentences: who do you know; what university did you attend and what is your surname? Although this is harsh, it is unfortunately a reality that current law students face. It is imperative to accept this and then to move on from it. Legal education is only the beginning. It is imperative to take initiative and to set achievable goals. The obstacles do not make a legal career any less worth pursuing. If anything, they make a career in law all the more gratifying.

# TABLE OF CASES

# TABLE OF STATUTES