

Special Issue: Problematising Assessment in Clinical Legal Education

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Editorial

The Special Issue: Problematising Assessment in Clinical Legal Education

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On 4th June 2015 Northumbria University hosted an interactive seminar and discussion forum, *Problematising Assessment in Clinical Legal Education*¹, featuring Professor Judith McNamara (Queensland University of Technology), Professor Donald Nicholson (Strathclyde University), Professor Jose Garcia Anon (Valencia University), Richard Grimes (University of York), Cath Sylvester (Northumbria University) and Carol Boothby (Northumbria University). This seminar was supported by the Association of Law Teachers and their journal *The Law Teacher* as the recipient of their Seminar Prize.

The participants, representing legal educators from across the UK but also from Finland and Indonesia, explored the theme of how experiential learning in law is assessed. The international move towards an increasingly outcomes based approach to legal education and training has raised the profile and encouraged the development of a wide range of experiential learning practices in legal education. A

¹ <https://www.northumbria.ac.uk/about-us/academic-departments/northumbria-law-school/law-research/legal-education-and-professional-skills/problematising-assessment-in-clinical-legal-education/>

key area of scrutiny for us at the IJCLE is the extent to which these practices evidence the multiple and complex competencies they lay claim to. The challenge of how to assess and what to assess in work integrated learning, problem and enquiry based learning, clinical legal education and simulated learning is emerging as an important and developing issue and was eagerly and critically discussed by our speakers and participants, addressing the following key questions:

Why has experiential learning (and clinic in particular) historically been a voluntary element in legal education?

What are the implications of making CLE and experiential learning assessed options?

Where CLE is assessed, what is the nature and (implied) purpose of that assessment?

Can the reflective and experiential elements of CLE be codified into assessment rubrics that provide guidance to students without reducing their depth and complexity?

How is the clinical training and assessment of students linked to the wider discourse of what a lawyer is and can do?

The presenters all made use of the work on constructive alignment by Cees van der Vleuten² and we were delighted and honoured that he agreed to act as discussant for this special issue. The papers presented at the seminar were revised in the light of the discussion and challenge from the participants and then reviewed and responded to by Cees. His contribution takes us beyond the legal education context and into wider debates about education and professional competence.

² <http://nrl.northumbria.ac.uk/21582/>

The papers represent honest and transparent reflections on the limitations and potential of current practice. There are strong pragmatic and ethical themes about the virtues of experiential learning and the ways in which such experiences can be assessed. In particular, the claim that experiential work and clinic in particular are more 'real': this is attractive but also perilous, for if the student must be real and seen in the whole then the stakes for assessment are very high indeed, as Cath Sylvester emphasises with her title: *"For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known"* (The Bible, 1 Corinthians 13:12, King James Version). The papers therefore represent the opening of a complex and fascinating discussion about assessment, to which I hope many of you will add your own contributions in future issues.

Here is the reminder of upcoming events in the CLE world: there is still time to submit a proposal for two conferences.

Firstly, (1-3 APRIL 2016) our colleagues in South Africa host the *Ed O'Brien International Street Law and Legal Literacy Best Practices Conference*, which will honour our late colleague Ed O'Brien and celebrate the 30th Anniversary of the First International Street Law Programme established at the University of KwaZulu-Natal (formerly the University of Natal), South Africa. The conference will be preceded by a three day Ed O'Brien Memorial Safari (29-31 March 2016) to the world famous Hluhluwe-Imfolozi Game Reserve where the white rhinoceros was saved from extinction.

Secondly, the *International Legal Ethics Conference VII* (ILEC VII), which Fordham Law School will host in New York City on July 14-16, 2016 focusing on legal education, ethics, technology, regulation, globalization and rule of law (www.law.fordham.edu/ilec2016). This conference follows hot on the heels of *The Risks and Rewards of Clinic*, the IJCLE conference in partnership with the Association for Canadian Clinical Legal Education (ACCLE) Conference, hosted by the University of Toronto from 10-12 July. Submissions are now closed and we have a fantastic range of papers, seminars and symposia with Sarah Buhler and Adrian Evans as keynote speakers. Registration for this event is now open! <https://www.eventbrite.com/e/the-risks-and-rewards-of-clinical-legal-education-programs-a-joint-ijcle-accle-conference-registration-20017850931>

Evaluation of Collaborative Assessment of Work Integrated Learning

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INTRODUCTION

The international trend towards an increasingly standards-based approach to higher education and the resultant focus on the assurance of learning in tertiary programs have generated a strong emphasis on the assessment of outcomes across the higher education sector. In legal education, curriculum reform is highly prevalent internationally as a result of various reviews of legal education, including the publication in 2007 of the report by the Carnegie Foundation, *Educating Lawyers: Preparation for the Profession of Law*, and more recently, the 2013 Review of Legal Education and Training (LETR) in England and Wales. The report of the LETR included a recommendation to: “enhance consistency of education and training through a more robust system of learning outcomes and standards, and increased standardisation of assessment” (Legal Education and Training Review, 2013). The shift in focus of legal education has resulted in a reconsideration of the way in which outcomes are assessed. Traditional assessment in legal education involves a mix of essays, case notes, problem solving tasks, research assignments and examinations which have targeted assessment of the understanding of the core areas

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of legal knowledge and legal reasoning skills. More recently assessment techniques have been broadened to include a range of instruments, such as role plays and simulations, for the assessment of legal skills. These assessments may lack authenticity in that they are decontextualised, restricted to defined knowledge, tasks and settings, and are subject to other constraints such as time limits in examinations (Hughes, 2009). As legal education focuses more on the attainment of a broader set of outcomes encompassing soft skills, capabilities and attributes, more authentic assessment will need to be developed appropriate to this new environment, meaning that modes of assessment with strong application in real-life settings should be preferred.

In designing new assessment frameworks, legal educators can draw upon the body of literature around the assessment of professional competence in medicine and other professional education. Professional competencies in the context of medicine are well defined through a multi-dimensional model encompassing a broad range of knowledge, skills and attributes including soft skills, professionalism and meta-competencies (Epstein and Hundert, 2002). The existence of these competencies has driven more innovative approaches to medical education and assessment of outcomes (LETR, 2013, p.142). For example, a commonly used assessment technique in medical education is the objective structure-clinical examination (OSCE) which is a “form of practical, usually simulation-based, assessment” (LETR, 2013, p.142). This form of assessment corresponds to “showing how” in Miller’s model. In the model

there is a movement upwards and increase in complexity from the cognitive “knowing” and “knowing how” to the behavioural “showing how” and “doing”.

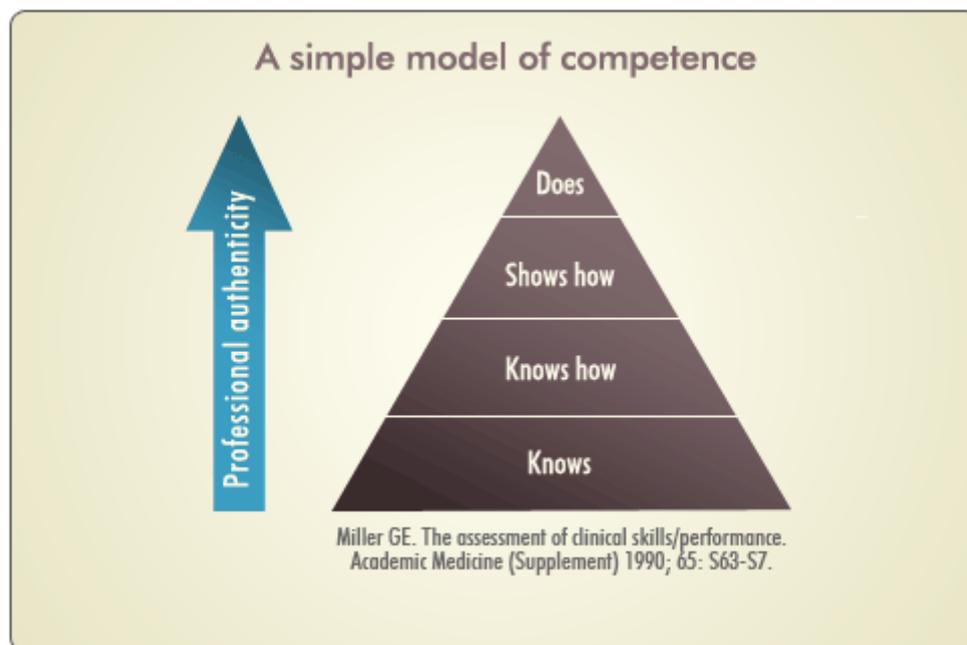


Figure One – a simple model of competence

From: www.faculty.londondeanery.ac.uk/e-learning/workplace-based-assessment/what-is-workplace-based-assessment

The assessment of medical undergraduates (and legal undergraduates) has tended to focus on the triangle base: “knows” – i.e. the straight recall of knowledge; and “knows how” – the application of knowledge to problem-solving and decision-making. Assessing “shows how” is challenging but achievable through OSCE in the medical context. Nonetheless with OSCE validity risks being lost at the expense of reliability, since complex skills, requiring an integrated professional judgment, become fragmented by the relatively short length of time assessors are able to spend at each station (Van der Vleuten, Shatzer and Jones, 2001, p. 646). The real challenge lies in assessing a student’s actual performance on the wards/in the consulting room

(or with the client/in court). Composite medical examinations and portfolio assessment have been recommended to assess “doing” in the medical context although this can be time-consuming and costly (Van der Vleuten, Shatzer and Jones, 2001, p. 649).

In the light of the shift in emphasis in legal education to a more outcomes-based approach, the unique capacity of experiential learning in law, including clinical legal education, to contribute to and enliven the development and assessment of outcomes has come to prominence. Experiential learning provides “rich contexts” for the implementation of more authentic forms of assessment (Hughes, 2009).

Assessment of clinical legal education (CLE) has unique insights to offer in relation to ways in which the legal curriculum might develop robust and academically accepted ways of assessing competence more generally. As new assessment instruments are developed it is indispensable that they be evaluated to ensure they satisfy the basic principles of assessment such as validity, reliability and fairness. In this regard Van der Vleuten proposes a “utility model” offering a framework for the evaluation of assessment instruments. The model is said to be useful in helping “educators make considered choices in selecting, constructing and applying an assessment instrument” (Van der Vleuten, 2005, p. 310).

The paper will foreground the advantages of work-integrated learning (WIL) for the assessment of professional judgment and demonstrate how such an impetus accords with Van der Vleuten's approach to assessment. WIL is defined as an “umbrella term for a range of approaches and strategies that integrate theory with the practice of

work within a purposefully designed curriculum” (Patrick, Peach et al 2008, p. iv) and subsumes CLE and other types of work-based, experiential learning. The paper proceeds to explain the distinction between the learning outcomes versus professional competencies curricula, where WIL belongs to the latter and where WIL assessment has strong potential to incorporate multiple viewpoints and be discerning about the development of the student’s professional judgment. Part of the WIL assessment approach will be articulated with Van der Vleuten's position on validity, reliability and educational impact, with WIL being well-placed for demonstrating emerging professional judgment because of the strong dimension of reflection and reflective writing on the WIL learning experiences which occurs therein.

LEGAL EDUCATION IN AUSTRALIA

In Australia, the advent of the new standards-based regulation of the higher education sector, including the Australian Qualifications Framework, and the Threshold Learning Outcomes for Law, are key drivers for reform. Since the 1980s, Australia has gradually shifted to a more outcomes focussed legal education regime. While the principal requirement for the academic qualification for admission to legal practice remains the prescribed areas of knowledge known as the ‘Priestley 11’, this is supplemented by the regulatory framework for higher education incorporating the Threshold Learning Outcomes for Law.

The educational requirements for admission as a legal practitioner in Australia consist of an approved academic qualification and practical legal training. The academic requirements are constituted by an approved course of study representing at least three years full-time study of law and a satisfactory understanding and competence in the prescribed areas of knowledge.² There are eleven prescribed areas of knowledge: criminal law and procedure, torts, contracts, property, equity (including trusts), company law, administrative law, federal and state constitutional law, civil procedure, evidence and ethics and professional responsibility.³ Generally the course of study is a university Bachelor's degree, Bachelor Honours or Juris Doctor. As tertiary qualifications, such courses are regulated by the Australian Qualifications Framework (AQF) which provides a comprehensive, nationally consistent but flexible framework for all qualifications in post-compulsory education and training in Australia. Comprising fifteen qualifications, ranging from Certificate I to Doctorate, the AQF specifies the relevant skills, knowledge and application of skills and knowledge as well as volume of learning for each qualification. The AQF Guidelines articulate the main criteria for defining qualifications based on the specific characteristics of education and training at each qualification level. These characteristics are expressed principally as learning outcomes. Law qualifications in Australia are typically either level 7 Bachelor, level 8 Bachelor Honours or level 9 Juris Doctor.

² For example refer to rule 6 *Supreme Court (Legal Practitioner Admission) Rules 2004* (Qld).

³ For example in Queensland see Attachment 1 to the *Supreme Court (Legal Practitioner Admission) Rules 2004* (Qld).

For example, Bachelor Honours degree qualifications must be designed and accredited to enable graduates to demonstrate the learning outcomes expressed as knowledge, skills and the application of knowledge and skills specified in the level 8 criteria and the Bachelor degree descriptor.

Graduates at this level will have advanced knowledge and skills for professional or highly skilled work and/or further learning.

Knowledge: Graduates at this level will have advanced theoretical and technical knowledge in one or more disciplines or areas of practice.

Skills: Graduates at this level will have advanced cognitive, technical and communication skills to select and apply methods and technologies to:

- *analyse critically, evaluate and transform information to complete a range of activities;*
- *analyse, generate and transmit solutions to complex problems; and*
- *transmit knowledge, skills and ideas to others.*

Application of Skills and Knowledge: Graduates at this level will apply knowledge and skills to demonstrate:

- *autonomy, well-developed judgment; and*
- *adaptability and responsibility as a practitioner or learner.*

In addition to complying with the descriptors for the relevant qualification, the outcomes for the qualification must reference the Threshold Learning Outcomes (TLOs) developed for the discipline of law and implemented in 2013. The TLOs were developed by discipline scholars appointed by the national Office of Learning and Teaching and are defined in terms of minimum discipline knowledge, discipline-specific skills and professional capabilities, including the attitudes and professional

values expected of a graduate from a specified level of program in a specified discipline area. One set of TLOs pertains to both level 7 and 8 qualifications whilst a separate but comparable set exists for level 9 qualifications. The TLOs for level 7 and 8 qualifications comprise TLOs including: TLO1 Knowledge, TLO3 Thinking Skills, TLO4 Research Skills and TLO5 Communication and Collaboration but for this discussion the focus falls particularly on TLO2 and TLO6.

Typically law schools in Australia have developed and articulated program learning outcomes which reference, incorporate or in some cases directly mirror the TLOs.

For the purposes of this paper, the TLOs will be treated as if equivalent to program learning outcomes. Different approaches might be taken however, in accordance with the principles of whole-of-course design, and in order to provide assurance of learning, the TLOs would usually be developed throughout the course and mapped to assessment in individual units. In addition to the academic requirements, an applicant for admission to legal practice must also have completed the practical legal training requirements. The completion of an award which includes the Competency Standards for Entry-Level Lawyers, along with a minimum of fifteen days supervised experience in a law or law-related work environment, serves to fulfil the practical legal training requirements. The prescribed competencies comprise *Skills* (lawyer's skills, problem solving, work management and business skills, and trust and office accounting), *Compulsory Practice Areas* (Civil Litigation Practice, Commercial and corporate practice, and property law practice) *Optional Practice Areas* (any two of various practice areas) and *Values* (ethics and professional

responsibility). Each practice area includes a number of specific descriptors in addition to a number of elements for which relevant performance criteria are defined. These criteria in turn list specific tasks that the student must be able to perform in order to demonstrate competencies.

Accordingly, it is apparent that in Australia, there is an epistemological divide between the assessment of outcomes for the purposes of academic qualifications in undergraduate law and the assessment of specific competencies, broken down into specific tasks in the Graduate Diploma in Practical Legal Training, completed after the undergraduate qualification. In the Australian system legal clinics and other WIL subjects such as externships are generally completed in the undergraduate qualification. The placement component of the Practical Legal Training (PLT) is largely assessed on a pass/fail basis upon completion of the required hours rather than the demonstration of specific competencies or outcomes, unlike undergraduate WIL placements.

This renders the assessment approaches for practical legal training somewhat at odds with Van der Vleuten's recommended model, which advocates the assessment of integrated competencies. The whole-of-task approach is foregrounded in the competency emphasis presently receiving endorsement. Assessment in WIL is particularly wont to capture the performance of integrated competencies through the demonstration of whole tasks or a series of associated tasks and evidence of associated judgments made and attitudes revealed. WIL assessment is also liable to encode the perspectives of multiple assessors in the workplace, utilise different

weightings of criteria, negotiated criteria and a more 'qualitative' approach than is available in other contexts, as per the above model (Van der Vleuten and Schuwirth, 2005).

WIL IN LAW

WIL implicates learning in three domains: learning theory (understanding how to learn), critical reflection and capability (Brodie & Irving, 2007). Capability involves transferrable skills and know-how, and discipline specific knowledge and skills, essentially, professional competence. "Capability" is used here to signify the ability to apply different professional skills and knowledge in the workplace in a general sense rather than a particular sense. Given these components of WIL, the relevant TLOs that might particularly be assessed in WIL include:

- TLO 6(b) Reflect on and assess their own capabilities and performance, and make use of feedback as appropriate, to support personal and professional development.
- TLO 6(a) Learning and working independently;
- TLO 2(d) A developing ability to exercise professional judgment.

While the capability outcomes learned and assessed in WIL might include a range of knowledge, skills and professional judgment (Maurer and Cole, 2012), WIL is particularly well placed to assess professional judgment because it "can offer an efficient method of teaching students about professional values and identity essential to becoming effective lawyers" (Maurer and Cole, 2012, p. 143).

TLO 2(d) requires law graduates to be able to demonstrate a developing ability to exercise professional judgment. Professional judgment generally has been defined as the “ability to use knowledge, skills and judgment to perform effectively in the domain of possible encounters in professional practice”.⁴ According to the commentary on the TLOs, it includes ‘the application of knowledge, skills and professional values to serve the interests of clients, justice, the profession and the public good’ and ‘an understanding of the consequences of professional decisions’.⁵

This current investigation is thus particularly concerned with the assessment of the developing sense of professional judgment in general in the student and even though this has chiefly been interpreted to relate to ethics and professional responsibility (e.g. Evers, Houston and Redmond, 2011), the approach adopted here is to consider professional competence more generally. Professional competence includes the exercise of professional judgment, discretion and reasoning in the application of knowledge and skills in a professional context. It is posited in this paper that professional competence in this sense cannot be dissected into a series of knowledge propositions or professional skills; professional competence is dependent on the understanding of the importance of the context in which knowledge and

⁴ Kane, MT, 1992. *The Assessment of Professional Competence*, SAGE. 163-182.

⁵ Kift, S, Israel, M & Field, R. 2010. *Threshold Learning Outcomes for the LLB*. ALTC.

skills are applied and requires the exercise of judgment and discretion (Cooper and Ord, 2014).

The importance of experiential learning in the development of professional competence is highlighted by the Carnegie Report, which suggests that legal education “should seek to unite the two sides of legal knowledge: formal knowledge and experience of practice” (Sullivan, Colby, Wegner, Bond and Schulman, 2007, p. 8). It has been advanced that clinical legal education and experiential learning are the most favourable environments for students to learn about and practise professional judgment. The Good Practice Guide for the teaching of TLO 2 Ethics identified as areas for further investigation (Evers, Houston and Redmond, 2011):

- best practice for learning and teaching professional judgment, including clinical and experiential legal education; and
- the design of effective feedback and assessment methods for determining students’ developing ability to exercise professional judgment.

WIL ASSESSMENT

Assessment practices in WIL might be said to be more concerned with assessment *for* learning, than is more traditional assessment which focuses on assessment *of* learning. This diverges from traditional legal assessment such as essays and examinations which effect the assessment of knowledge of legal doctrine and theory and where law is taught in a traditional academic environment. Such a situation offers limited opportunity to assess the application of knowledge and skills in a

professional context (Hewitt, 2008). In contrast to traditional forms of assessment, WIL assessment tends to highlight the centrality of the learner as an active participant in the assessment process. Assessment is critical to how students make sense of their experience, elevating the learning experience from considerations of process or the application of specific knowledge and skills, to the understanding and exercise of professional judgment. This centrality of the learner is evident in common forms of assessment in WIL which include learning plans, reflective journals, reports, student presentations, classroom discussions (or “rounds”), oral questioning, portfolios, supervisor’s assessment and career plans. Assessment of performance in the workplace can occur through observations, extracted examples of performance of workplace tasks, and various forms of simulation.

In WIL it is difficult to predict the learnable moments that will present during the experience, and accordingly, assessment of WIL is generally holistic, focusing on the development of the student’s level of self-understanding, efficacy in the workplace, and awareness of career options rather than on the attainment of particular knowledge or skills (Bates, 2003). After Sylvester, the legal clinic’s context is unique in that it uses a “real client/real emotions, has an unknown dynamic/ changing and evolving factual perspectives, has an unknown outcome/uncertain content and is delivered through a distinctive working relationship with a supervisor” (2015, work-in-progress). With this dynamic in mind this paper focusses on assessment of professional competence in the clinic generally rather than on the specific knowledge and skills that may be developed during the experience. While these may be

incidentally assessed, the key emphasis of the assessment falls upon the student's individual learning strategies and their transformational learning through the reflective process. (These relate to learning to Miller's "showing how" and "doing"). Despite the student-centred nature of the various WIL assessment methods, they nevertheless might be limited in assessment of professional competence where they rely on the student's own claims of learning, rather than demonstrated competence (Brodie and Irving, 2007). Engaging the supervisor in the assessment can provide a direct assessment of professional competence. However it is important that where a workplace supervisor is involved in the assessment process they clearly understand what it is they are being requested to assess and that well-defined criteria addressing the required learning outcomes are developed.

An emerging interest in collaborative assessment which combines input from the student, workplace supervisor and academic supervisor seeks to find alternative ways of involving supervisors in the assessment process. Collaborative assessment involves the active participation of both the student and the workplace supervisor in the assessment, in addition to the academic supervisor. For example, Zegwaard, Coll and Hodges (2003) propose a framework for workplace assessment mediated by academic supervisors and workplace supervisors. Bates, Bates and Bates (2007, p. 127) suggest that: "University and workplace staff should also supervise student assessment collaboratively, negotiating the detailed requirements with each student and ensuring that appropriate personal reflection on the experience has occurred".

According to Ram, 2008, the use of a portfolio assessment which requires students to provide evidence of learning is a means of supplementing collaborative assessment to ensure that the learning outcomes of WIL are accurately assessed. It is recognised, however, that there can be some limitations to portfolio assessment. Portfolios also have the advantage of fostering learner-centred education and active learning as the students take on their own learning responsibility and effectively manage their own learning. Other advantages include the easily shared dimension of electronic media (in ePortfolios) which enable the students' learning to reach a wide audience in a meaningful way. In addition, the program of learning for students is evaluated in ePortfolio using pre-determined criteria, thus obliging students to devise a specific plan and generally adhere to the plan (Tosun and Baris, 2011, 47-8)). Further, the ability to present oneself in a professional manner, which the usage of portfolio affects, is an important skill to be acquired by the emerging professional. Some of the disadvantages of portfolios and ePortfolios, however, carry the risk that if academics do not model, direct and support the students sufficiently in learning how to reflect, the students tend to find this process overly challenging and come to resist reflective assessment whenever possible, thus failing to develop adequate reflective skills with sufficient confidence (p.48). Formal assessment of reflection is recognised as contributing to a more profound learning experience for students, raising what might otherwise merely be considered to be work experience to a transformative learning experience from an academic point of view.

The author has previously proposed a collaborative model for the assessment of WIL that is reliant on evidence from a mix of sources to ensure professional competence is assessed. The assessment model proposed was: a placement plan individually negotiated between the academic, student and supervisor; a student portfolio or journal which includes student assertions as to capability and direct evidence of work undertaken in the placement, and a supervisor's report. More recently Cooper and Ord, 2014, have proposed a collaborative assessment implicating a three-way critical review of practice which focusses on the planning, delivery and evaluation of a specific project undertaken by the student during the placement. The utility model suggested by Van der Vleuten provides a framework within which to evaluate the collaborative model of assessment.

UTILITY MODEL

The utility model proposed by Van der Vleuten (1996) holds that methods of assessment of competence can be evaluated using a framework to weigh the utility of the assessment method according to certain criteria: validity, reliability and educational impact. The framework also implicitly addresses two further variables, acceptability and cost/practicality. The model was developed in the context of assessment of clinical competence in the health sciences.

Competence as referred to by Van der Vleuten designates an “aggregate of different components or latent attributes” where expertise in a component allows a person to act professionally regardless of the particular nature of the situation or circumstances. (1996, p. 42) For the purposes of this paper, professional competence refers to the emerging exercise of professional judgment, which cannot necessarily be fragmented into specific, demonstrable competencies. In this regard, competence as defined by Van der Vleuten and assessed in the health sciences may be more closely aligned to the particular competencies which are the domain of practical legal training than it is to the intellectual competencies and emerging professional judgment that more appropriately belong in the domain of the undergraduate law degree. However, this distinction only serves to heighten the importance placed by Van der Vleuten on assessment being holistic rather than being reduced to assessment of the component skills and knowledge that students are required to perform. After Van der Vleuten, it is important to verify that those assessment approaches and instruments adopted are characterised by validity, reliability and educational impact or consequential validity, acceptability and feasibility (Messick cited in Van der Vleuten and Schuwirth, 2005, p. 314).

VALIDITY

Expressed simply, validity of assessment refers to whether “the assessment measures what it purports to measure” (Hewitt, 2008, p. 145). An assessment

method might be shown to be useful if results of the assessment correlate highly with subsequent student performance (Van der Vleuten, 1996, p. 51). Van der Vleuten acknowledges the deficiencies in much of the research in relation to assessment validity; however trends are emerging from the literature. Studies reveal an unexpectedly high correlation between different methods of assessment, e.g. between free response tests and multiple choice questions. (See also Driessen, E., Van der Vleuten C. and Van Berkel, H., 1999) It is contended that the content of the assessment is more relevant to the validity of the assessment than the format of the assessment (p. 51). For example, the validity of a multiple choice quiz is not fixed but depends on the content of the questions. Further, particular assessment types might be more valid in measuring some outcomes than others. Van der Vleuten posits that “what is being measured is not dictated by the method but rather what is put into the method” (p. 51).

In the context of a portfolio assessment, it might be argued that the validity will be closely linked to the assessment encoding precise task descriptions and specific criteria for assessment. If the assessment is of specific skills or capabilities then these would need to be the specific criteria for the assessment. More general criteria will not result in the assessment of specific skills and capabilities. Similarly in relation to a supervisor’s report, if specific skills or capabilities are not specified, the supervisor’s assessment of competence in the work placement will not provide any measure of any particular outcome. Van der Vleuten warns against breaking

capabilities down to behavioural components in order to promote objectivity as this may lead to the assessment instrument not assessing what is intended as it will not reflect the complexity of the skill being assessed (p. 51).

Accordingly, in order for the WIL collaborative assessment model to be considered to be valid, it would be a pre-requisite that the particular outcomes being assessed are specified, either in the subject learning outcomes, or negotiated in the placement plan. The criteria for the portfolio and the supervisor's report would then need to refer specifically to these outcomes. In the proposed law WIL assessment model the outcome being assessed is professional judgment rather than particular skills or knowledge and as such it may not be necessary for specific outcomes to be established. It will be necessary, however, to be explicit in establishing what is meant by professional competence, and the criteria and standards that must be met. The need for consistency is paramount.

A further issue that might impact on the validity of collaborative assessment is that the assessment might arguably be assessing the ability of the student to articulate professional competence rather than the demonstration of competence. However, as argued by Cooper and Ord, 2014, the ability to articulate one's competence is more important than merely being competent. In this regard the "think aloud interviews" proposed by Krieger and Martinez, 2012, call for assessment of experiential learning that focusses primarily on reasoning rather than performance. Inspired by the medical domain's "think aloud" protocol, this experimental assessment method has

been developed to identify the different kinds of cognitive processes used by students as they solve problems in practice. According to such an approach, students in a clinical program are allocated a hypothetical problem that is typical of work they have undertaken in the program. They are then recorded as they talk through the problem, with the hypothesis being that by prompting students to talk about a problem without a filter, a great deal can be ascertained about what they are thinking “in practice”. (In certain domains, however, “think aloud” is only used for research).

RELIABILITY

Assessment can be said to be reliable if it is “objective, fairly administered, and consistently marked” (Hewitt, 2008, p.145). In the field of the health sciences and many other disciplines, assessment of professional competence has been found to present reliability issues demonstrated by variable performance of candidates across tasks. The reliability of assessment is said to increase with the number of items being assessed; assessments that contain only a “small sample of items ... produce unstable or unreliable scores.” (Van der Vleuten, 1996, p. 48) Further, the reliance on a single assessor is also said to reduce reliability; reliability is increased where various assessors are used for each item of assessment.

Van der Vleuten suggests that clinical ratings used in clerkships in medical schools are “hopelessly unreliable” (1996, p. 49) as they are based on unstandardised performance and are not on direct observation. Other issues impacting on reliability in WIL are the close relationship between the assessor and the student, and the need to assess performance over an extensive period in the past.

For these reasons, the reliability of the workplace supervisor’s assessment in the WIL law model might be questioned. The portfolio assessment is intended to address this issue; the notion of evidence from a mix of sources resembles Van der Vleuten’s support of sampling of a range of assessors’ professional perspectives on the item being assessed.

Further, Cooper and Ord’s study indicates that the provision of relatively detailed grading criteria supports the supervisors in making reliable assessments of the students’ performance. However, it may not be reliable if the samples of work provided are not sufficient to disclose the student’s capability in the workplace, particularly if the outcomes assessed are broad and not specific. The issue of reliability of a participatory collaborative assessment in a professional placement is examined by Cooper and Ord. The study concluded that the reliability of the self-assessment and supervisor assessment was improved by the use of more detailed standardised criteria. There is some discussion about inter-rater reliability or a measure of reliability used to assess the extent to which different raters agree in their assessment decisions in this study. Mostly, however, it is the phenomenon of proportionately higher marks being globally awarded to critical reviews as opposed

to those allocated to essays which is more intensively emphasised by these authors with reasons for this being suggested (Cooper and Ord, 2014, p, 524).

The issue of reliability may not be as of much a concern in the assessment of outcomes in an undergraduate program, which is not assuring attainment or particular competencies, however it remains an issue to be weighed in evaluating the assessment model. Hewitt, 2008, argues that subjectivity is an issue in any skills assessment because of the degree of subjectivity that is inherent in the assessment process. While explicit marking criteria which break skills down into specific components can improve reliability, this strategy has the drawback of trivialising and atomising the complexity of the skills being assessed (Van der Vleuten, 1996, p. 51). However, as Cooper and Ord demonstrate, it is possible to design explicit criteria which retain the holistic assessment of professional competence. Further collaborative assessment which engages all three parties in the WIL relationship actively participating in grading improves validity as it is not limited to the exercise of judgment by a single marker.

EDUCATIONAL IMPACT AND ACCEPTABILITY; FEASIBILITY

The Van der Vleuten model also includes consideration of educational impact or “consequential validity” (Van der Vleuten and Schuwirth, 2005, p. 314); given that assessment drives learning, the impact of assessment on learning should be considered (Van der Vleuten, 2005). It might be argued that the WIL collaborative assessment model addresses this factor positively because it is based on Biggs’

constructive alignment theory. Hence learning activities and assessment tasks are designed to align to the learning objectives of the subject. The authors acknowledge, however, that there is a dearth of literature sharing such insights and suggest that this might be related to the near-impossibility to: “study the impact of assessment on learning without knowing about the context of the assessment” (Van der Vleuten and Schuwirth, 2005, p. 314).

The provision of feedback to students on their performance in the placement is another significant educational matter. In this instance, Stuckey et al (2007) argue that recording student performance, providing prompt feedback and training students to receive feedback are key principles that should be met by WIL in law. Involving the supervisor in the assessment is a means of ensuring that feedback is provided. However, the need to provide regular feedback throughout the WIL experience also needs to be addressed. This might be an issue in relation to the overall design of the WIL subject rather than necessarily an assessment issue.

Acceptability, an associated concept, is where students’ perceptions of the assessment process are positive and where they believe that the assessment has been conducted according to the stated procedural guidelines; they have obtained valuable insight into their current level of attainment and they have received useful feedback as to how to rectify their shortcomings and enhance their strengths (McKinley, Fraser, Van der Vleuten and Hastings, 2000, p. 574). An issue emerging in relation to acceptability is the common feedback from students about the difficulty they frequently experience in regard to carrying out reflection. Feasibility

refers to the quantum of assessment and assessor training deemed sufficient and necessary to facilitate the conduct of a valid and reliable assessment at the relevant level, together with the provision of structured verbal and written feedback on student performance, with specific prioritised strategies for improvement which students perceive to have high educational impact. Feasibility is therefore what is considered reasonable and cost-effective to meet the purpose of the assessment. (McKinley et al, p.578). It is acknowledged that more could almost always be done but that it is necessary to put limits somewhere.

CONCLUSION

The current international trend towards a more outcomes based approach to legal education has prompted legal educators to reconsider assessment and other educational practices more generally. The investigation of a kind of epistemological divide between assessment *of* learning (e.g. in the LLB) and assessment *for* learning (eg WIL in particular), with practical legal training sitting perhaps somewhere in the middle, may lead to progress in this regard. Assessment techniques currently utilised in WIL in legal education and other disciplines suggest possible approaches that are more focussed on the assessment of outcomes or capabilities than other more traditional methods. Despite the innovative approach taken in assessment in WIL in law, there has been limited research into the effectiveness of such assessment to date. The utility model proposed by Van Der Vleuten provides a positive framework within which to evaluate assessment practices in order to provide

continual improvement both in the assessment of WIL and of other aspects of legal education. The application of the model to an existing assessment approach in a WIL subject in law suggests that further refinement of assessment could lead to improvements in assessment validity and reliability as well as impacting positively on the educational impact of the assessment, its acceptability, cost and feasibility. Exploring issues related to assessing the developing sense of professional judgment and professional competence in the student, CLE offers unique models of assessment that might also be adapted to the legal curriculum more generally to unite the dimensions of discipline knowledge and the experience of practice. The augmentation of reflective processes in both realms might further make a positive contribution to the holistic development of the legal practitioner through the various aspects of Australian legal education.

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*Through a glass darkly: Assessment of a real client, compulsory clinic
in an undergraduate law programme.*

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At Northumbria Law School the real client clinic (the Student Law Office) is an integrated capstone experience in the four year Masters in law course. The programme's integrated approach with assessed clinic, was introduced in 1992 and drew on the teaching hospital model in medical education where no distinction is made between education and training. The programme was designed to meet the requirements of the Quality Assurance Framework for UK Undergraduate programmes, the professional body requirements for subject knowledge² and the procedural and legal skills knowledge required by the vocational Legal Practice Course³. Students acquired an academic qualification and met the competence standards required for day one of a training contract. At the time it was unique, in 1996 the ACLEC⁴ report referred to the Northumbria model as "allowing for progressive learning of analytical skills and conceptual understanding of both

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² The requirements for the Qualifying Law Degree were set out in the Joint Statement on the Academic Stage of Training, 2002

³ The Legal Practice Course is the vocational course required by the Solicitor's Regulatory Authority for those wishing to qualify as a solicitor in England and Wales

⁴ACLEC First Report of Legal Education and Training 1996 para 2.2, Lord Chancellor's Advisory Committee on Legal Education and Conduct

substantive law and procedure, and the acquisition of basic professional skills and values.”

However, the academic/vocational divide has persisted and whilst the model has been replicated it has not proliferated. In the recent LETR review⁵ it was identified as one of the examples of ‘considerable flexibility’ in the system of legal education and training. There are many reasons that Law Schools may not wish or be able to deliver a similar model and as part of the flexibility agenda no one would want uniformity. However one of the prevailing misconceptions of the integrated approach is that it is only relevant for those wishing to become lawyers and therefore by implication the skills required to become a lawyer are in conflict or detract from the skills acquired as part of the academic study of law. As Bradney⁶ succinctly states “being a lawyer is not the same as studying law and being a lawyer is what only a minority of law students will be”. Taking this to its logical conclusion Van der Vleuten’s longitudinal utility model for assessment of medical training would appear to have limited relevance in the non-vocational law degree where the mastery of the subject is evidenced by traditional undergraduate methods. Nevertheless few students would consider an undergraduate programme that did not equip them with anything other than core discipline knowledge and the ability

⁵J. Webb, J. Ching, P. Maharg and A. Sherr, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (London, Legal Education and Training Review, 2013) (LETR Report). Available at: <http://letr.org.uk/the-report/index.html>.

⁶ Anthony Bradney SPTL (Society of Public Law Teachers) Reporter 21, Winter 2000

to study law as a useful investment. In the light of the year on year increase in numbers of students studying law as a discipline⁷ there would seem to be a perception that the range of intellectual and other skills developed by the study of law are worth having as useful preparation for employment. Whilst the Northumbria Degree is designed to meet the existing professional body requirements its central epistemology is that by embedding propositional knowledge⁸ in a practice orientated setting, students would develop more sophisticated skills for using their knowledge. Broudy adopted a four stage model of knowledge use; replication, application, interpretation and association. Students using their knowledge in the clinical setting or other enquiry based exercise are required to go beyond application of knowledge and to interpret their knowledge so that it can be applied in a different factual settings⁹. As Eraut identifies when discussing professional expertise “The process of using knowledge transforms that knowledge so that it is no longer the same knowledge”¹⁰.

The QAA subject benchmark for undergraduate law programmes in England and Wales has recently been substantially revised and marks a significant move away from predominantly prescribing discipline knowledge towards a broader use of skills approach. It states “We have made considerable changes to the structure of the

⁷ The Law Society Entry Trend records show that in 2012, 32,345 students applied to study law at University in the UK, of these 20,070 accepted places.

⁸ M.Eraut, *Developing Professional Knowledge and Competence* (London, Falmer Press, 1994), p103. Eraut uses the term propositional knowledge to describe discipline based theories and concepts and practical principles in the applied field.

⁹ H.S. Broudy, *Personal Communication* (1980) as referred to by Eraut (supra n7) p26

¹⁰ Eraut, supra n7, p 25

statement. We have done so to reflect the panel's view that a law graduate is far more than a sum of their knowledge and understanding and is a well skilled graduate with considerable transferable generic and subject-specific knowledge, skills and attributes"¹¹. The benchmark specifies generic skills linked to broader professional expertise for example "self-management, including the ability to reflect on their own learning, make use of feedback. A willingness to acknowledge and correct errors and an ability to work collaboratively". This approach is mirrored by the growing use of generic graduate attributes in some universities. Such attributes are incorporated into programme outcomes for all undergraduate programmes offered by the University¹². At the other end of the training process the SRA has recently revised its competency statement for solicitors¹³ and has adopted an approach of focussing on "the activities that all solicitors need to be able to do competently, rather than describing the attributes that solicitors require in order to be competent". It sets out four domains of solicitors' competence; ethics, professionalism and judgement, technical legal practice, managing themselves and their own work, working with other people.

As the language of professional competency and academic programme aims and objectives come closer together and our module, year and programme outcomes and

¹¹ The Quality Assurance Agency for Higher Education, Subject Benchmark Statement, Law, July 2015 Section 2 available from www.qaa.ac.uk.

¹² Northumbria University Graduate Attributes, 2015

¹³ Solicitors Regulation Authority, *Training for Tomorrow: A Competence Statement for Solicitors*. 20.10.14.

graduate attributes start to sound very like some of the professional body competencies it is a good time to review assessment and its place in the law curriculum as a whole and to consider how we can effectively assess these attributes, align them to the objectives and measure them.

Currently the majority of undergraduate law provision has its emphasis on measuring the student's ability by subject matter or skills area rather than their reliability as competent practitioners¹⁴. Adopting the language of competency does not, on its own, ensure programme design and assessment to deliver competency. Eraut refers to the assessment of competency as requiring a change in emphasis; instead of making 'separate judgements about each piece of evidence; judgements of competence have to rest on separate decisions about each element of competence, taking into account all relevant sources of evidence. Thus assessment criteria "belong to the elements of competence not to the pieces of evidence"¹⁵. This echoes Van der Vleuten's longitudinal approach to assessment which should theoretically fit well with the constructively aligned curriculum through which competencies can be tracked at different levels. For example in year three of the Northumbria programme, students' interviewing skills are assessed using a standardised client process, in the year four clinic interviewing is assessed in a real client setting however each of these individual assessments are lost in the overall degree

¹⁴D. Newble, B. Jolly and R.E. Wakeford, *The Certification and Rectification of Doctors. Issues in the Assessment of Clinical Competence.*(Cambridge, Cambridge University Press, 1994)

¹⁵ Eraut, *supra* n7, p 207

classification which remains the primary concern for students, employers and universities.

Nevertheless, on a module level, the embedded clinical programme in the curriculum has the potential to assess the development of professional competency and use of knowledge skills and offer an alternative to the measurement approach. By taking assessment seriously in clinic and being able to articulate and justify our approach and grading process we achieve a number of very significant benefits. These include providing a measure of competence which informs students of their strengths and weaknesses as they progress through the clinical module. It also provides a more nuanced and authentic reflection of students' achievements for external purposes as well as building up a level of expertise amongst assessors in the assessment of broad based professional competence rather than the components of competence. The use of a range of more innovative methods of assessment in clinic adds depth to the range of largely traditional assessment methods elsewhere in the curriculum and the intense scrutiny of clinical work lends itself very well to repeat sampling which impacts on the reliability of clinical marks.

Clinic is a constructivist teaching methodology – it can deliver discipline and procedural legal knowledge but more often its role is emphasised in terms of teaching legal and intellectual skills and as a method of inculcating professional values and ethics through its traditional involvement in social justice. In the SLO we draw on the transformational qualities of the method and the impact of the real

client on student learning. Whilst the knowledge may be delivered in the classroom, the context of clinic is unique in that it uses a real client/ real emotions, has an unknown dynamic/ changing and evolving factual perspectives, has an unknown outcome/ uncertain content and is delivered through a distinctive working relationship with a supervisor. This is a powerful methodology and students will have variable experiences and construct their knowledge accordingly. Standardising assessment in these circumstances takes it out of the clinical setting. Eraut argues that the combination of using propositional knowledge and process knowledge (by which he means skills such as how to acquire information and deliberative processes such as planning or problem solving) constitutes professional knowledge “although knowledge may be included in the curriculum because somebody else has deemed it relevant to professional practice, it does not become part of professional knowledge unless and until it has been used for a professional purpose”¹⁶. Van der Vleuten’s utility model ¹⁷ offers reassurance that we can assess what is unique about clinic without disassociating the assessment from the clinic or limiting assessment to specific tasks within clinic. In addition by assessing the real clinical process we require students to focus on developing these complex competencies. As Biggs and

¹⁶ Eraut, *supra* n7, p 119

¹⁷ C. Van Der Vleuten, L W T Schuwirth, *Assessing professional competence: from methods to programmes* 2005, Medical Education 39

Tang state “Assessment is the senior partner in learning and teaching. Get it wrong and the rest collapses.”¹⁸

One of the most complex tasks for clinical providers is that of deciding what learning outcomes will be assessed. This process has often been influenced by a desire to assess only outcomes that can be standardised. Van der Vleuten warns against the risk of atomisation of competencies which has the capacity to “trivialise content and threaten validity”¹⁹. With multiple sampling opportunities the constraints of standardisation are reduced. Nevertheless the first step of the assessment design process in clinic is to ensure that the outcomes/competencies to be assessed are expressed in such a way as to embrace the range of experiences and to fit the type of clinical programme on offer. Clinical programmes vary in length and content, students in an advice only, short optional clinic may experience only one client so the concept of sampling across a range of client contact experiences is not realistic. A recurring and legitimate question from students in the live client clinic is how can they be assessed fairly when every student in clinic has a different experience? Can we be sure that the student who has a difficult, demanding and disorganised client is assessed on interviewing skills in the same way as the student who has the organised, articulate and accepting client? To some extent these issues can be addressed by carefully worded outcomes. There is a need to share and develop the language of competencies and outcomes in the clinical setting. In the

¹⁸ John Biggs and Catherine Tang, *Teaching for Quality Learning at University*, 4th Edition, Society for Research into Higher Education and Open University Press, 2011

¹⁹ Van der Vleuten, *supra* n16

UK the time is ripe for this with the SRA recent statement of solicitor competency and the QAA guidance on levels providing a frame for this discussion.

At Northumbria the clinical module is the largest credit bearing module in year four. Seventy per cent of the clinic mark is attributed to the practical work in clinic and the remaining thirty per cent to two pieces of reflective writing. The practical work is assessed with reference to a set of criteria, each one being described at a range of levels which equate with degree classification. The criteria are evidenced by the collection of the students' clinical work in a portfolio which is marked by the supervisor and moderated by other members of the team. The criteria for the practical work are not treated as distinct components of the assessment and include professional attributes, intellectual qualities as well as the more predictable tasks associated with work in the clinic such as client interviewing and advising. The student's portfolio submission is not structured by criteria or competencies and its content is not prescribed. Supervisors will have given feedback on students' work through the year but draw on it to remind themselves of the entirety of the student's work and are asked to indicate broad grade bandings for each of the criteria by way of explaining their grade and also to focus their minds on the specified elements that make up the assessment for the practical work. This is not a mathematical formula and by necessity expert judgement is called for. Applying the validity element of the utility index to this approach concerns may arise over the way the assessment criteria are broken down and then reconstituted into a single mark for 'practical

work' by the supervisor at the end of the module. In some ways this is a longitudinal approach drawing on the full range of the student's clinical experience. However, there is no formal *process* of measuring the various outcomes during the programme. There is a risk that the balancing act carried out by the supervisor is not transparent and when applied to broadly worded assessment criteria lends itself to a middle ground approach. The risk is that students will interpret this for themselves and do only what is needed to achieve what they require. A non-aligned assessment regime has capacity to undermine the effectiveness of the method. Driessen and Van Der Vleuten described this tussle effectively when discussing the use of examinations in a problem based learning law programme: "As usual the assessment programme gained the upper hand and slowly but progressively undermined the problem based learning approach"²⁰.

Viewed through the lens of van der Vleuten's utility index there may also be an issue with reliability. The students are learning by doing and as a consequence their learning will be in response to what they are doing and will be varied both in the nature of the task and its complexity. In addition their work is supervised by a single clinical supervisor. Van der Vleuten's evidence that reliability is predominantly a consequence of adequate sampling is of great significance in the clinical setting. It is inevitable that real casework will require every aspect of practice in clinic to be supervised by a qualified practitioner. Whilst these supervision processes may not

²⁰E. Driessen & C. Van Der Vleuten, *Matching Student Assessment to Problem-based Learning: Lessons from experience in a law faculty*, *Studies in Continuing Education*, 22:2, 235-248

take the form of a summative element of assessment, students receive extensive feedback on their efforts. In many settings the prospect of multiple sampling is a stumbling block from the cost effective aspect of the index. In Northumbria's year long in house clinic this level of scrutiny is already in place and with some careful consideration can easily be adapted to provide multiple points of sampling without turning every task into an assessment point. At Northumbria students receive a mid-year appraisal and are assessed on certain discrete skills for LPC²¹ purposes. In addition feedback rubrics/guidance may be developed which tie into discrete SLO outcomes. What may be lacking in terms of sampling practice is a range of different types of assessment and different assessors. Multiple small conversations take place between supervisor and clinic students on a daily basis about strategies on cases and how to respond to developments; it is a short step to use these in a more strategic way. Whilst oral assessment and presentations are used in the law curriculum in a variety of formats, clinic provides a wealth of opportunity for developing more practice orientated versions, informed by the experience of other work based assessments. By developing a range of assessments and a community of experienced assessors, clinic has the potential to offer new insights into assessment methodology in the wider law curriculum.

²¹ The Legal Practice Course currently requires students to pass assessments on specific legal skills including client interviewing and legal writing. These are assessed on a competent / non competent basis.

In one significant respect the sampling evidence relating to reliability of a discrete SLO module may require significant change in assessment; Amsterdam²² argues that the relationship between student and supervisor is a key requirement of the clinical method. Typically the supervisor takes primary responsibility for assessment of their supervisees. Whilst the normal checks are in place for consistency through the moderation and external examiner's review of marks, these are hard to achieve effectively on the review of the portfolio alone. One of the ways repeat sampling improves reliability is as a result of the involvement of multiple assessors. The in house clinic is not the same as a teaching hospital where students will learn from many different experts as they rotate through different specialisms. Typically the SLO supervisor works on a mainly one to one basis with a small group of students throughout the entire clinical programme. This is to facilitate learning, particularly through the process of reflection and feedback, but also as a practical measure to enable supervisors to easily monitor cases within their specialism. However, there are benefits in involving other supervisors both for students and for clinic. The clinical methodology should be the constant here not the practice of the supervisor. Facilitating other supervisor involvement may result in students benefitting from a range of practice as well as further developing core principles of approach in both clinical method and assessment.

To some extent the expert judgement approach to assessment of the practical work at Northumbria is counter-balanced by the assessment of the two reflective reports

²² A. Amsterdam, *Clinical Legal Education – A 21st Century Perspective*, 34 J. Legal Education 612, 1984

submitted at the end of the module. The compulsory report is on skills in practice and the other can be selected from a range of optional subject areas including clinic and my career, clinic and legal education, justice and ethics, clinic and public discourse and law in action. Within these broad areas students can select any subject matter for discussion although there is an expectation that it relates to some experience they have had through clinic. Reflection is an integral part of clinic. Eraut includes it in his definition of experiential learning: "experience is initially apprehended at the level of impression, thus requiring a further period of reflective thinking before it is either assimilated into existing schemes of experience or induces those schemes to change"²³. Students are provided with reading lists and lectures on the theory of reflection during the course of the module, they will undertake preparatory exercises in firm meetings and the content of the firm meeting itself will frequently focus on reflection although not necessarily categorised as such. A practice reflective piece is submitted as part of the mid year appraisal process and students are encouraged to keep short reflective records on all they do in the SLO and are provided with a journal for this purpose (this is not part of the assessment). Nevertheless students are resistant to the assessment on reflection. As one of our students reflected, "Reflective practice is and should be personal; what is valuable reflection will be different for each individual. As such it is difficult to understand how a mark can have any significant meaning and how marking reflection can aid the learning process. "

²³ Eraut, *supra* n7, p107

Ledvinka states that the purpose of assessing reflection is to 'assess the learning journey'²⁴. Moon refers to reflective practice as a form of 'mental processing'²⁵ or as Race puts it a way of making "sense of what we've learned" and to "link one increment of learning to the wider perspective of learning - heading towards seeing the bigger picture"²⁶. It is also a process for learning which is central to continuing professional development. Whilst the student above cannot see beyond the content of reflective reports being right or wrong the purpose of assessing reflection is to communicate the value of the ongoing process of assimilating new learning and to instil it as a lifelong approach to learning. The 'one off/ end of year' nature of the reflective report would appear to conflict with the utility approach primarily in terms of reliability which is increased with the additional number of samples but also on the grounds of validity, the current assessment is more likely to assess a snapshot of reflection than evidence of a reflective practice. Whilst we might be able to assess the degree to which the student sees the links to the bigger picture it is considerably harder to draw from these isolated examples of reflection an approach to mental processing in line with the learning cycle.²⁷ The process of reflection does not always occur through a written process – a more authentic place for reflection might be as part of an assessed interview or presentation around a case. Within clinic we can introduce reflection as a routine part of the clinical process, a sort of think

²⁴ G. Ledvinka, *Reflection and assessment in clinical legal education: Do you see what I see?* 9 Int'l J. Clinical Legal Educ. 29 2006

²⁵ J. Moon, *Reflection in Higher Education Learning*, PDP Working Paper 4, LTSN (2001)

²⁶ P. Race, *Evidencing Reflection: Putting the "w" into reflection*, ESCALATE Learning Exchange (2002)

²⁷ D. Kolb, *Experiential Learning; Experience as the source of learning and development*. Englewood cliffs, NJ: Prentice Hall (1984)

aloud commentary on the dilemmas faced when encountering day to day SLO work. We may also consider assessing reflective work at other points in the curriculum. At Northumbria we have a number of modules delivered in a problem based learning format which use reflection but only one of which currently assesses it on a pass/fail basis.

The problems surrounding the assessment of clinical work have to some extent been aggravated by the difference in approaches between assessment of academic work (essays, coursework, dissertations meeting grade descriptors) and of assessment of skills (portfolios and competencies). It is not surprising that clinical modules delivered within an undergraduate programme have struggled to find appropriate assessment methodologies. In many cases clinic has remained outside the curriculum entirely, open to self-selecting students and as a methodology that generally engages students without the need for the motivating factor of an assessment process, and some argue that this is where clinic should remain. However, for the reasons explained above clinic has a lot to contribute to the changing regime of legal and professional undergraduate education. Van der Vleuten urges us to look at the value of the assessment method outside of traditional academic assessment boundaries and focus on their reliability, validity and educational impact. In one significant respect clinic lends itself to a range and number of assessment methods in that the level of scrutiny and feedback on the students' clinical work is so extensive that formative assessment is taking place on a task by task basis. With some consideration and imagination assessment points can

be incorporated into the year to address the full range of criteria and to reinforce the learning delivered as part of the case work. In addition processes can be designed to ensure consistency when marking portfolios²⁸. It is not a major departure from the normal day to day work of the clinic to utilise oral presentations or feedback on letters and research reports in a way that feeds in to the students' grades in a more transparent way. We have only just started to explore the assessment toolbox and each clinical programme will have its own aims and limitations but we can start to draw on this widening pool of experience. Whilst the utility index does not introduce us to new concepts it might give us confidence to use a range of assessment activities in a combination which is designed to support learning as well as to measure it.

²⁸ E. Driessen, C. Van Der Vleuten, L. Schuwirth, J. Van Tartwijk and J. Vermunt (2005) *The Use of Qualitative Research Criteria for Portfolio Assessment as an Alternative to Reliability Evaluation: a Case Study*, *Medical Education* 39 (2) 214-220

How do we assess in Clinical Legal Education? A “reflection” about reflective learning

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Abstract

I suggest this hypothesis and these premises from the perspective of my experience in Clinical Legal Education and the use of experiential learning methods in other “traditional” courses.

Firstly, institutional assessment must be distinguished from the assessment of learning. Traditionally, assessment is reduced to institutional assessment: that is, to give a mark depending on the achievement of knowledge instead of focusing in the student’s learning. However, I propose (to remember) that: 1) (Formative) assessment is part of learning; 2) Reflective learning (and reflective skills) is/are a part of assessment. This implies a process of continuous evaluation instead of summative evaluation, for example, through an exam or a similar procedure.

So, I agree with the idea that assessment “is not a measurement problem but an instructional design problem.” (Van der Vleuten & Schuwirth).

To clarify what assessment is, we have to discuss several interlinked aspects (validity, reliability and fairness), which are connected to questions that must be answered: When is the assessment considered valid...? How do we assess...? What do we assess...? Some ideas to answer these questions may include the need to provide space (s) and time (s) to reflect on the learning (as a way of learning and as a skill to be acquired), which in turn implies a multiplicity of assessments and/or reflection about learning. This should also include a variety of assessments: self-assessment, peer-assessment, team-assessment, and (external) assessment. And last, but not least: as it is said, reflection should be considered not only a skill but a part of learning. Reflection about learning is an exercise that promotes life-long learning (including that among future lawyers). A reflection about context and experience is the first step for future professional action. The benefits of experiencing autonomy and reflection are the same in a real or in realistic environments. But the experience of responsibility requires a real environment.

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1. INTRODUCTION

Assessment, supervision, giving feedback, and (non) directiveness have been identified as perpetual challenges for new and experienced legal clinicians alike (Dunlap, 2004:60 and 61). Indeed, accurate assessment of the process of learning is in and of itself a complex task. The ideas and comments presented in this article derive from the experience and practice not only in our clinic² but also from other “traditional” courses in which I have used experiential learning methods³: *Basic Legal Skills*⁴ and *Legal Ethics*⁵.

² In our clinics we use a problem based learning methodology, as a part of our training program at the beginning of each term, and at the same time the students work with real cases. Legal Clinic for Social Justice, Universitat de València (www.uv.es/clinica). The *Legal Clinic for Social Justice* is a university project running from 2006 at the School of Law in the University of Valencia. (www.uv.es/clinica), recognized as an educational innovation project and a Consolidated Group for Innovative Teaching. In this academic year (2014-2015) we have around 50 students, 3 pro bono lawyers and 30 professors supervising from 9 different areas of law. We develop a variety of activities and methodologies across five different clinics: Penitentiary Clinic, Public Interest Law Clinic, Private Interest Law Clinic, Migration and Foreigners’ Rights Clinic, and International Human Rights Clinic. We work in several areas (disabled people, prisons, human rights, migration...) giving advise and support to NGOs, organizations, associations and non-profit entities. Our students learn through clinics as a part of compulsory credits in the Law Degree, Criminology Degree, Double Degree in Law and Business, and the Master Degree on Human Rights. We have volunteers too. The aim of the legal clinic is to train law students with real cases. Students provide free legal advice under the supervision of teachers and professionals connected to the University. Students provide assistance with legal research, drafting legal arguments, and meeting with clients. Previously they have been trained in client interviewing exercises, simulations, research, drafting, legal ethics and professionalism and other contents not developed in the curricula.

³ I have used a problem based learning methodology based on Font Ribas 2004, 2009, 2013 and Grimes, 2013.

⁴ *Legal skills* is a basic course of first year in the Law Degree with a load of 6 ECTS (European Credit Transfer System). The course aims to introduce students to university life from a legal point of view It provides tools that can help to study Law and to work with the Law: legal research, oral skills, writing skills... The subject is an approach or introduction to the legal methods and the fundamental legal skills that can be developed in the years of Degree and Post-graduate studies and that will be used in the professional or academic life. Since 2013-2014 I use a problem based learning methodology to teach.

⁵ *Legal Ethics in the criminal justice program and in the undergraduate Criminology Degree*. It is a Legal Ethics mandatory course of 4.5 ECTS (European Credit Transfer System) for private detectives in the Criminology Degree. I have taught these courses using different active

While it will be described in greater detail later, it should be noted at the outset that our approach to assessment is based on several methods: (1) supervision (giving feedback, advising and assessing), (2) weekly reflective journals using portfolios in a *Virtual Platform* (reflective learning and self-assessment), and (3) monthly rounds (peer assessment). This means that we apply several different approaches in assessing: self-assessment, peer-assessment, team-assessment, and (external) assessment. Our goal is to promote responsibility through experience and reflective learning not only as a skill but also as a tool for life-long learning. At the same time, we use rubrics⁶ as grading tools to ensure that standards of performance are based on concrete, objective, and well-defined competences/learning outcomes.

As a starting point, in our view, clinical legal education (CLE) should be defined as a space of active learning, in which law students' training experience is designed and planned, in a real or realistic context, in such a way that they are able to take responsibility for the outcomes of their learning through a process of reflection (García-Añón, 2014a, 2014b).

Whereas the real context is developed in the clinic by working with real cases, a

learning techniques: problem based learning, collaborative learning and creative writing (with micro-stories). However, last two years (since 2013-2014) I introduced a pure problem based learning methodology.

⁶ A rubric, as a "a standard of performance for a defined population", is a scoring tool that lists the criteria for a piece of work, articulates the expectations for an assignment and describes its levels of quality. (Andrade, 1997). See <http://rubistar.4teachers.org>

realistic context is developed in the other courses (*Basic Legal Skills* and *Legal Ethics*) or in the first stage of clinical training using *Problem Based learning* methods of teaching.

If we focus on the general scope of our inquiry, we have to answer the question: why assess? The obvious answer should be to know what students are learning; however, the reality is that most of us have in mind assessment which is not centred on the student's learning, but rather on institutional goals. In my opinion, this is part of the problem that I'll try to explain. We are going to start from the following premises: first, assessment cannot be reduced to *institutional* assessment; and second, a *competence approach of learning* better reflects the connection between learning and assessing.

If we were asked about what the nature and (implied) purpose of that assessment is, the answer should be to understand assessment of learning. Institutional assessment (that is, to certify a level of knowledge) must be distinguished from assessment for learning (that is, whether the student really learns). Traditionally, assessment is reduced to institutional assessment: that is, to give a mark depending on the achievement of knowledge instead of focusing on student's learning. As it is said: "... assessment is not merely a measurement problem, as the vast literature on reliability and validity seems to suggest, but that it is also very much an instructional design problem and includes educational, implementation and resources aspects." (Van der Vleuten & Schuwirth, 2005:309)

But we don't have, as law professors, strong evidence about what the relationship between learning and assessment is. In fact, in our years of experience teaching by using traditional methods and preparing exams, it is our conviction that we are not doing things in the wrong way, although other alternatives in teaching and assessing exist.

A second premise is that a *competence approach of learning* better reflects the connection between learning and assessing and provides for more effective learning. Learning is improved when all tasks are integrated: "... This 'whole-task' approach is reflected in the current competency movement. A competency is the ability to handle a complex professional task by integrating the relevant cognitive, psychomotor and affective skills. In educational practice we now see curricula being built around such competencies or outcomes." (Van der Vleuten & Schuwirth, 2005:312-313)⁷.

That is, learning is better-served when there is an alignment between learning outcomes, teaching activities and assessment. As it is stated by Biggs in his *theory of constructive alignment*: "When there is alignment between what we want, how we teach and how we assess, teaching is likely to be much more effective than when it is not (aligned)... Traditional transmission theories of teaching ignore alignment." (Biggs, 2003) Or, put in another way: "The best teaching practices include regular assessments that are carefully tied to clearly

⁷ "Competence for the purposes of this report has been defined primarily as the cluster of knowledge, skills and attributes necessary for a person to function effectively in a legal role." (Webb et al, 2013:274)

articulated teaching goals.” (Barry et al 2008: 226; Stuckey, R. et al, 2007, pp. 235-264).

If this is the point, we should focus on how we learn. And according to the level of learning that we intend to foster, we should propose a corresponding kind of assessment. And “...choosing an assessment method inevitably entails compromises and that the type of compromise varies for each specific assessment context.” (Van der Vleuten & Schuwirth, 2005:310). It is not only important to decide what the learning objectives and learning outcomes of a course and its design are, taking into account abstract levels/areas of knowledge in the process of learning, but also their relationship with the methods of teaching used and their evaluation.

I think this is a training process in which professors and supervisors of our clinics have participated--thinking about and designing the main learning outcomes, the learning activities and the assessment rubrics.

For this reason, in CLE, as in other parts of the curricula: 1) (Formative) assessment is part of learning, 2) and reflective learning (and reflective skills) is/are a part of assessment.

Only to clarify concepts, it should be mentioned that *formative assessment* is a systematic and systematized reflection that aims to improve student learning: “it has been described as assessment that “refers to all those activities undertaken by teachers, and by the students in assessing themselves, which provide information to be used as feedback to modify the teaching and learning

activities in which they are engaged" (Black and Williams, 1998)." (Kennedy, 2007:20)

To explain what assessment is implies discussing the different interlinked aspects: validity, reliability and fairness (LETR, 2013:4.123), all connected to questions that must be answered: *When is the assessment considered valid...? How do we assess...? What do we assess...?*

First, the question, when is the assessment considered valid...? This refers to the aspect of *validity*. That is, it must be capable of assessing that which it sets out to assess. The problems to be discussed focus on the dilemma of the assessment's context: what are the best conditions for doing assessment. For example, a controlled place through simulations, or the experiences of the real world.

Second, the question about how do we assess...? This refers to the aspect of *reliability*. That is, the assessment must produce consistent and replicable results. The problems are related to the *objectivity/subjectivity standards* or the (lack of) consistency of results.

Third, the question stated is what do we assess...? This refers to the aspect of *fairness* treatment. That is, it must assess against the syllabus and learning outcomes that have been set out, as well as the problems that are related to the (lack of) transparency or the clarity of outcomes.

Aspect			Problem/dilemma	Proposal
<i>Scope of assessment</i>	To know what students are learning	Why assess?	Institutional assessment/student's learning assessment	No reduction to institutional assessment. Provide the possibility of reflection about learning.
Validity	Authenticity and realism. <i>It must be capable of assessing that which is set out to assess</i>	When is the assessment considered valid...?	<i>Real environment/ realistic environment (real world, simulations...)</i> <i>Direct assessment?</i>	Provide scenes for responsibility/autonomy Link learning outcomes with what the learner should be able to do at higher and complex stages of learning.
Reliability	<i>It must produce consistent and replicable results</i>	How do we assess...?	<i>Objectivity/subjectivity standards</i> <i>Reproducibility of scores?</i>	Use methods of assessment focused on the student's learning and give the possibility of reflection about learning.
			<i>(Lack of) consistency</i>	Variation in assessment methods and practices. Sampling: quantitative and qualitative information.
Fairness	It must assess against the syllabus and learning outcomes that have been set out	<i>What do we assess...?</i>	<i>+(Lack of) transparency</i>	Rubrics with clear learning outcomes and performances to be achieved provide trust

Below, I will try to develop some of these aspects introducing why reflective learning is needed as part of this process of assessment.

2. VALIDITY: WHEN IS THE ASSESSMENT CONSIDERED VALID?

In CLE if we have to assess that which we set out to assess, we should do so in a real environment. Some clinics around the world do it, others do not. And some

academics discuss that legal clinics should be developed only with real cases and clients (for example, Wilson 2004).

As Van der Vleuten & Schuwirth explain, it is not important if the assessment is developed in the *real world or with simulations...* (Van der Vleuten & Schuwirth, 2005:312) Even though the setting is not (entirely) significant, it is important to create a situation in which the student becomes autonomous and responsible.

But in CLE, the final goal should be learning with real clients. In this sense, learning with simulations should be a preliminary step in training with real cases.

For this reason, what matters is linking learning objectives as concrete elements of what is required at any stage of the formation. *Miller's Pyramid of Assessment* provides a framework for *assessing clinical competence* in education and can assist clinical teachers in matching learning outcomes (clinical competencies) with expectations of what the learner should be able to do at any stage. CLE provides opportunities for performing the skills and competencies required to be a lawyer. In fact, in the 30s, in the legal realist challenge to the case method and formalism tradition, Jerome Frank said that it was important to understand the "atmosphere of a case" or "cases as living processes" *vs.* the case method because "the practice of law and the deciding of cases constitute not sciences but arts -**the art of the lawyer and the art of the judge**. Only a slight part of any art can be learned from books. Whether it be painting or writing or practicing law, the best kind of education in an art is usually through **apprentice-training**

under the **supervision** of men some of whom have themselves become skilled in the actual practice of the art.” (Frank, 1933a:923) We are interested in his emphasis of the importance of lawyering tasks as a part of how students should learn law and how “the law school would resemble a sort of sublimated law office” (Frank, 1933b:723-724).

Moreover, the development of the CLE movement from the 1960s onward focuses on the connection between learning and the provision of a service to society (Spiegel, 1987: 589-590). This activity can hardly be achieved without a connection with reality, and with the needs borne out of the difficulties of accessing justice. For this reason, CLE “seeks to relate the teaching of legal skills to the social justice issues that law students experience through dealing with indigent and marginalized clients” (McQuoid-Mason, 2008:2; McQuoid-Mason et al, 2011:23) and “to make students socially aware of the problems faced by poor people in society and how these can be addressed.” (McQuoid-Mason & Palmer, 2013:81)

3. RELIABILITY: HOW DO WE ASSESS? METHODS OF ASSESSMENT(S) IN CLE

Reliability means that assessment methods must produce consistent and replicable results. It is true that no method has an inherent or immutable value: “The degree to which the various quality criteria are attained is not an inherent,

immutable characteristic of a particular instrument. (...) There is no such thing as *the* reliability, *the* validity, or any other absolute, immanent characteristic of any assessment instrument." (Van der Vleuten & Schuwirth, 2005:310, 312) That is, objectivity is one sort of influence in the measurement because some subjective exams could be reliable too. So what is needed is the use of methods of assessment focused on the student's learning and that give the possibility of reflection about learning.

First, this means to provide space(s) and time(s) to reflect about learning (as a way of learning and as a skill to be acquired) in real or realistic contexts and provide tools for transparency in the discussion about learning. And although objectivity and subjectivity are not the point of discussion, to develop reliability it must imply to develop public possibilities to discuss about the learning got.

Second, it means to use methods of assessment focused on the student's learning and that give them the possibility of reflection on learning.

And third, from the point of view of the professor, it implies multiplicity of assessments or reflections about learning. Various sources of information or evidence of learning are necessary to evaluate complex competencies: "...Assessment ... complex competencies... requires quantitative and qualitative information from different sources as well as professional judgement." (Van der Vleuten & Schuwirth, 2005:309)

As has been noted, our experiences about assessment are based on several methods: supervision (giving feedback, advising and assessing⁸), weekly reflective journals using portfolios in a *Virtual Platform* (reflective learning and self-assessment) and monthly rounds (peer assessment). That includes self-assessment, peer-assessment, team-assessment, and (external) assessment⁹.

The use of a reflective journal as portfolio is the main tool we use as a part of the continuous assessment¹⁰. The *portfolio* is a weekly individual report to be uploaded in the Virtual Classroom platform. The *content* of this report is, first, a description of the activities that the student has done that week in this subject (in class and outside class). All of them are evidence of a student's learning that must be shown at the end of the term. Second, it must include the report done by the team on the delivered scenario they have been working on or the activities carried out in the clinic. And third, a reflection and assessment of everything the student has learnt or thinks that he has to learn. It must include

⁸ It is true that engaging in formative assessment in clinical practice with a genuine impact on learning is complex. It is shown that the factors to be taken into account are individual perspectives on feedback, a supportive learning environment and credibility of feedback. (Dijksterhuis et al, 2013)

⁹ In the health domain you can see the same kind of experiences in Schuwirth et al, 2011; Van der Vleuten et al, 2012; and Van der Vleuten et al, 2015. It is shown in the "Programmatic assessment" as an integral approach that maximization of learning is achieved with the aggregation of several methods of assessment including the value of feedback.

¹⁰ "Journal writing provides a space for personal, declarative discourse that is stifled in most law school writing assignments. The second contribution that journals can make is to help the law student to maintain a sense of self throughout the process of professional socialization that takes place in law school. By using the journal to relate the values that she brought to law school to the methods and materials of law study, the student can appropriately evaluate what is being taught and learned. Journals provide a space for students to work through how they feel about the roles that they are asked to assume in the law school, whether in the traditional classroom of the clinic." (Ogilvy, 1996:81)

the problems and difficulties found in this process. For this reason, a portfolio designed as a “programmatically assessment” of an integrated clinical placement, as proposed by Van der Vleuten & Schuwirth (2005, 2011) has sufficient evidence of validity to support a specific interpretation of student scores around passing a clinical placement, although with some modest precision in some competencies that could be reduced focussing more on feedback and supervision. (Roberts et al, 2014)

Additionally, each month we hold a “round” in which students talk and discuss their cases together, and show the problems they had, including ethical issues. Rounds in law clinics are meetings in which all the students discuss their real work with their classmates and professors. Participants exchange information about what they have done, discuss issues they are working through, identify next steps, and ask their classmates for assistance in thinking through the issues in the scenario.

4. FAIRNESS. WHAT DO WE ASSESS...? RUBRICS IN CLE

The third question was about what do we assess...? It refers to the aspect of fair treatment. It must assess against the syllabus and learning outcomes that have been previously set out, as well as the problems related to the (lack of) transparency of these tools.

Learning outcomes specify the minimum acceptable standard to enable a student to pass a module. *Grading criteria* are statements that indicate what a student

must demonstrate to achieve a higher grade. These statements help to differentiate the *levels of performance* of a student. By making these *criteria clear* to students, it is hoped that students will aim for the highest levels of performance.

For us, the use of general rubrics previously published is a good tool for students and professors. Students don't usually know what their performance levels are. They only want to know what has to be written in a final exam. With the rubrics and samples provided they could know what is expected of them in the activities that require different levels of performance and that cannot be "measured" in an exam.

In the case of professors, we use rubrics for two reasons. First, to avoid a complete "subjectivity" in the assessment and as a tool that lets to justify and to give reasons about a decision. And second, in supervising tasks we work with professors of different departments and styles, and a common base that shows a fair treatment to the students is needed. It should be shown as a minimum of what is intended.

5. CONCLUSIONS

It is not decisive if the assessment is developed in the *real world or with simulations...* However, it is important to create a situation in which the student becomes autonomous and responsible. In CLE the final goal should be learning

with real clients, so learning with simulations should be a preliminary step in training with real cases.

Various sources of information or evidence of learning are necessary to evaluate complex competencies. Our experiences about assessment are based on several methods: supervision (giving feedback, advising and assessing), weekly reflective journals using portfolios in a *Virtual Platform* (reflective learning and self-assessment) and monthly rounds (peer assessment). That includes self-assessment, peer-assessment, team-assessment, and (external) assessment.

The *Problem Based Learning* method, combined with others, benefits an effective learning in an interactive environment and "It is based on constant feedback to the student." (Font, 2013) Benefits of the experience of autonomy and reflection are the same in a real or in realistic environments. However, the experience of responsibility requires a real environment.

Students complain about the lack of a "text-book" to consult and see all the contents of each part of programme. But, at the same time, they recognize they are putting in practice most of the theoretical contents they have studied in other subjects. With this method Law is "integrative": you can analyse and define what the problems are, as well as links with legal institutions or legal subjects, because most of the problems can include different perspectives of Law and permit different ways to solve them.

Through the process of reflection about learning students become aware of what they have learned and do this from the first moment: a) they are working

with all the tools needed and all parts of syllabus, b) they are learning from their mistakes, c) they are reflecting about the learning. And reflection about learning is an exercise for life-long learning.

The use of rubrics is a good tool for students to understand what the highest levels of performance are. For professors rubrics are a common base, a minimum of what is intended.

By these reasons the described methods of assessment and the “programmatic assessment of performance” provide a more valid, reliable and fair tools for learning than traditional methods.

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Problematising Competence in Clinical Legal Education:

What do we mean by competence and how do we assess non-skill competencies?

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“Techniques without ideals is a menace; ideals without techniques are a mess.”

Karl Lewellyn (1952)

INTRODUCTION

The special issue of this journal is about problematising assessment. However, in this article I want to start further back and problematize what is meant by competence. I think it is fair to say that when law clinicians speak about assessing competence they usually have in mind the assessment of skills. By contrast, I will argue that competence goes well beyond skills, at least if we understand skills in the narrow sense of technical legal skills, and includes in addition a values dimension. Moreover, if this dimension is added to the notion of skills, and clinical legal education (CLE) is expanded to include an understanding of how lawyers' skills are used, for whom and to what end, it might help reverse the traditional and still continuing antipathy in many law schools to CLE. For those like myself, who see law clinics as more about contributing to social justice than legal education (Nicolson

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2006), the reluctance to embrace CLE is rooted (rightly or wrongly) in a political and moral stance. But for most academics, the antipathy - or, at best, apathy - towards CLE might be more to do with its association with skills training and the consequent assumption that it is unintellectual, unfit for the lofty heights of a liberal legal education and thus best left for the grubby business of preparing lawyers for practice (see eg Bradney 1995, 2003, Brownsword, 1999; Guth & Ashford, 2014).

To the extent that CLE is confined to training students in legal skills, I have some sympathy with this view, though it's questionable whether skills training is any less intellectual than the sort of repetitive, decontextualised and atheoretical teaching of black-letter law which often passes for a liberal legal education. However, in a recent article (Nicolson 2015), I joined a number of others who have argued that there is nothing necessarily anti-intellectual about a focus on practice in a liberal legal education. Thus, like Goldsmith and Bamford, I do not see engagement with practice in purely vocational or technocratic terms, but as providing opportunities for connecting the "aspirations of law students with professional ideals (justice, service, fairness) and the goals of a university-based education" (Goldsmith and Bamford 2010, p. 163; see also Goldsmith 1999, 2002; Boon 1998, 166).

In this article, I first flesh out this argument and justify the focus on ethical as well as skills competence in clinical legal education. I then turn from problematizing the concept of competence per se to problematizing its assessment. This will be done via a critical analysis of the forms of assessment used in the clinical programme offered in the University of Strathclyde Law Clinic (henceforth, the USLC). These include the

assessment of simulated training exercises, work on actual cases, reflective essays on aspects of law, legal ethics and law's justice and reflective diaries on all aspects of clinical experience. Drawing on my experience with these different forms of assessment, I will consider their comparative merits in contributing to the two classic goals of clinic assessment, namely reliability – whether the scores obtained from an assessment are reproducible - and validity - whether the assessment does in fact measure what it is intended to measure (van der Vleuten and Schuwirth 2005). Finally, drawing on the assessment regimes in the relevant clinical classes, I will seek to provide some food for thought about alternative means of assessing clinical teaching.

PROBLEMATISING THE NOTION OF COMPETENCY

Most people think of competent lawyers as those who are knowledgeable and technically skilled at using law in the service of clients. Assessment of competence is thus not made in terms of ethics and values - indeed they suggest a perceived mutual exclusion of technical and ethical competencies. Such a dichotomy is, however, both dangerous and false. It can be seen to be dangerous when we ask ourselves the question – do we really want lawyers who are highly skilled at achieving client goals when it is those with power and money who can afford such lawyers, while their opponents either have lawyers who are overworked and underfunded or have no lawyers at all?

The dichotomy between skills and values is, in addition, false because lawyers with ethical competency may in fact be more effective lawyers than those who are merely technically competent. Indeed, this is at least implicitly recognised by those (cf Chavkin, 2003-4, 254) who seek to train students in client-centered lawyering (see eg Binder, Bergman, & Price 1991) in that always seeking clients' informed consent to actions on their behalf helps to promote their autonomy and avoids the paternalism which is inherent in more traditional approaches to client relations in which lawyers make all decisions about how to achieve client ends (see eg Nicolson and Webb, ch 5). Ostensibly, the traditional approach leaves clients free to set their own ends, but this means-ends distinction is unsatisfactory for a number of reasons.

One is the fact that power and (at least, assumed) knowledge asymmetries between lawyer and client may encourage the latter to defer to the former on issues regarding ends as well as means, especially if clients interpret a lawyer's suggestions as to what they should seek to achieve as technical advice. Another reason is that some decisions as to means might be so significant that the client really should take them rather than the lawyer. For instance, the most effective means to win a child access dispute might be to attack the opposing parent's character but - and especially if this is done using information provided by the client - this might not accord with the client's best interests or even his or her wishes (let alone those of the children), given that they are likely to benefit from an ongoing amicable relationship with the opposing parent. But even under the client-centered approach, unless they are exposed to the full range of issues relevant to the issue of paternalism, students

might not become aware of their ability to sway clients even while affording them the power to decide (see eg Ellman 1987). This may occur through decisions as to which of the (sometimes myriad) options on offer to put to the client, the way that the choice of alternatives are structured and/or merely by tone of voice in presenting options (Simon 1991).

Improved client service can also be achieved by challenging the standard conception of lawyers' role morality in terms of which lawyers are expected to pursue their client's goals irrespective of how immoral they might be or how immoral the means to those goals. Such a stance – often called that of neutral partisanship (see eg Nicolson and Webb 1999, ch 6) not only poses dangers for opponents, third parties or the public interest, but arguably it may also result in inferior services to the client. If lawyers see issues of morality as off-limits, they will not engage their clients in what ethicists call a moral dialogue in which they explore whether certain courses of action are moral and can justifiably be pursued. Such moral dialogue is not just a necessary component of what is called moral activism (see Nicolson and Webb, ch 8), as opposed to neutral partisanship, but it may provide a better service to the client. For instance, in one case the USLC was acting for a trainee solicitor made redundant by a law firm while pregnant. She mentioned in passing that the same partner responsible for this decision has been accused of sexual harassment. But instead of just going ahead to use this information as a bargaining chip, having studied ethics, the student asked the client how she felt about using this information and surprisingly learnt that she was not prepared to stoop to using this "dirty trick"

(see Nicolson 2010 for this and other examples; Aiken, 2000-1, 304 for a similar example).

Encouraging students to abandon the stance of neutral partisanship may also lead to more empathetic and zealous services for those who do not have the financial resources to buy maximum lawyer zeal. There is a strong argument (see Nicolson and Webb, 1999, ch 6) that neutral partisanship leads to moral detachment, in terms of which lawyers seek to psychologically distance themselves from their moral feelings and beliefs. But this can be argued to hamper the development of the Aristotelian quality of *phronesis* (practical wisdom), in terms of the lessons of past experience equip lawyers to instinctively know how to respond to practical and ethical issues which arise in practice. According to Postema, *phronesis* is rooted in “ordinary moral beliefs, attitudes, feelings and relationships” (1980, 78; see further Postema, 1980, 68ff; Postema, 1983, 306ff) and is extremely useful in professional contexts where novel situations arise (see also Kronman, 1987 and 1993). Moral detachment may also hamper effective lawyering in the sense that moral arguments may play important roles in legal argumentation (cf Postema, 1980, 79). Lawyers who have shut off their moral faculties are less able to manufacture such arguments than are those with deep moral sentiments.

The neutrality aspect of neutral partisanship may also undermine the principle of partisanship which requires lawyers to represent their clients zealously. While written discourses on professional legal ethics certainly encourage lawyers to exercise the utmost zeal, the rules allow them a broad discretion to exercise greater or lesser zeal

(Nicolson and Webb 1999, ch 6). Such zeal can be so fierce as to run the risk of breaching professional norms on proper behaviour, or it can be so minimal as to come close to incompetence. However, according to the neutral partisanship conception and its allied strategy of moral detachment, the question as to how much zeal lawyers should exercise in particular cases ought not to be answered by considerations of morality.

Moreover, with the shutting down of moral feeling may also come a shutting down of related feelings of empathy, sympathy and concern. Having detached themselves from moral sentiments, lawyers can no longer see clients in their full humanity. The lawyer becomes interested only “in that part of the client that lies within his or her special competency” (Wasserstrom, 1975, 21). The plight of clients and the possibility of them possessing the moral high-ground are unlikely to lawyers who come to see clients as “the divorce”, “the taking without owner’s consent” or “no.20, Queens Road”. This situation is given bathetic force by the comment of Paul Hill, one of the Guildford Four who spent years in jail following his wrongful conviction for murder, that he “got the impression that any of our barristers could easily have...taken over the running of the prosecution.” (*Stolen Years* (with Ronan Bennet), 1990, 126, quoted in Pannick, 1992, 132.)

Having detached themselves from feelings of morality and humanity, it is likely lawyers will ration zeal according to more material considerations: by the client’s status, whether they are one-off or regular clients, by the need to maintain salubrious relationships with those with whom they regularly deal, etc, but above all by their

ability to pay. A lawyer's time and energy are not infinite and given the pressures to provide legal services as a profitable business, money is likely to be the *quid pro quo* for zeal, and the more *quid*, the more *pro*.

We thus see that the competent lawyer is also an ethical lawyer who displays both technical competence and a concern for values. Ethics have a role to play in providing a good service to the client – including care, consideration and respect for clients' autonomy (as well as maintaining confidentiality and acting in their best interests). In this first sense, it is not too much of a stretch to see these attributes as matters of lawyering skills in that the good lawyer is not just technically skilful but has what might be called personal or even emotional skills.

However, the importance of ethics also has a second, wider (if you like, public as opposed to private) dimension. Thus, it can be argued that the good lawyer is not just good *at* their job. They are also good *in* their job (or just good full stop) in the sense of being aware of the wider moral dimension of being a lawyer. They are not simple amoral technicians prepared to do everything legal and not prohibited by their professional codes for their clients, but take account of the harm they might do to others, to the legal system and to the public interest.

Before looking at the role of law clinics in helping to develop this wider conception of competence, it must be stressed that even an expanded notion of competence which goes beyond knowledge, skills and ethics in the sense discussed above, does not go far enough because it does not extend to what I see as perhaps the most important ethical value. This is the sense of obligation to ensure that competent and

ethical services are not just received by those with enough money to pay for them or fortunate enough to qualify for the constantly shrinking legal aid pot. As I have recently argued (Nicolson 2013, 2015), notions of reciprocity or gratitude towards the community which through its taxes pays for school education and, still in Scotland, for much of the cost of legal education suggest that lawyers have a moral obligation to contribute in some way to enhancing access to justice. Public investment in their education enables law students to enjoy substantial financial rewards. However, only those fortunate enough to afford lawyers or qualify for legal aid benefit from this investment. Moreover, a major obstacle to access to justice is the high fees charged by lawyers. Consequently, it can be argued that these lawyers have a moral duty to take some remedial action to repay those who helped put them in their privileged position, but do not benefit from this investment. Two further arguments support a moral obligation on lawyers to enhance access to justice. One is that their earnings are partly – albeit decreasingly – protected by state limitations on who can practice law and access legal processes. Secondly, many access to justice problems, especially of a relative nature, stem from often unnecessary and difficult to understand legal complexities created by lawyers serving their clients (and indirectly themselves by making legal assistance more necessary). Here, lawyers can be said to have a moral obligation to help remedy the resultant access to justice obstacles.

Indeed, by analogy with Rawls's argument that "[j]ustice is the first virtue of social institutions" (Rawls, 1999, 3), it can be argued that the first virtue of the ethical

lawyer is to ensure access to justice. It seems obvious to me that ethically aware lawyers who either devote their career to those most in need of legal services or provide pro bono legal services are an improvement on those who provide ethically aware services to the shrinking group of those who can afford to pay or obtain legal aid. In addition, the goal of making practitioners aware of problems with neutral partisanship, confidentiality, conflicts and client autonomy is undermined where their scope for moral manoeuvre is highly constrained by financial considerations which cast morality as an unaffordable luxury or where responsibility for ethics tends to fall into the cracks because of the increasing specialisation of legal work or completely out of sight because of its increasing routinisation (see Nicolson and Webb, 1999, ch. 3).

Accordingly, while it is difficult to stretch the concept of values-based competence to include the notion of an altruistic duty to enhance access to justice (except by unrealistically stretching the concept of competence to something like altruistic competence), I would argue that we are failing in our role as educators if we do not give due weight to this aspect of being a good lawyer.

THE GOALS OF CLINICAL LEGAL EDUCATION

Having problematized the notion of competence, I turn now to the possible role clinical legal education may have in instilling this expanded sense of competence and the expanded notion of the good lawyer. Van der Vleuten and Schuwirth correctly argue that choosing assessment always involves compromises (2005), but

the same applies to CLE. Broadly speaking, CLE can be designed to serve four broad goals:

- skills development, both in narrow technical and broader values-infused sense;
- teaching substantive law in context;
- ethical education – sensitising students to issues of legal ethics, providing them with the relevant tools to resolve them, and hopefully also encouraging them to care about being ethical and developing the moral courage to resist competing pressures (see generally Nicolson, 2008);
- ensuring “justice readiness” – exposing students to social and legal injustice, including inequalities in access to justice and helping them to understand its causes and to care about addressing these causes (see Aiken, 2012; Wizner and Aiken, 2004; Nicolson 2015).

If all law teaching was conducted clinically, then it might be possible to achieve and give equal weight to all four goals, but resource implications mean that most law schools restrict clinical legal education to a term or two, and/or only to a limited number of students. This restricts what can be achieved. Consequently, most clinicians need to make choices as to which of the goals to prioritise when they clash. For instance, if one’s goal is to maximise justice readiness then exposing students to as many vulnerable clients as possible broadens their perspectives on the injustice of the world they live in and the extent to which law is either unable to rectify these injustices or is even responsible for them. Thus, drawing on educational theory, many clinicians claim that student exposure to clients may cause “disorienting moments” (Quigley, 1995) whereby their pre-existing assumptions about the world

clash with their observation of social deprivation, unequal access to justice and substantive legal injustice. Moreover, when the experience is that of someone in dire need and it is realised that they may have no source of assistance, knowledge may be transformed into empathetic care and hopefully into a commitment to enhance access to justice on graduation. However, for these insights to go deep, exposure to the problems of social and legal injustice need to be repeated - with the greater the exposure the more varied are the problems students will encounter and the more they will realise that these problems are endemic rather than exceptional (Aiken, 1997; Wizner, 2000-1; Nicolson, 2008; Brodie, 2008-9). Clinics with a high volume of cases are thus better suited to ensuring justice readiness. By contrast, if the focus is on skills development (and possibly also substantive law teaching), students will benefit from a close relationship with clinic supervisors who can guide their learning and skills development and allow them to experiment with different ways of practising law so that they can help them to learn from their mistakes as they make them. This is why the Clinical Legal Education Organisation suggests a staff-student ratio of 1: 12 (CLEO, 1995, cited in Brayne, Duncan and Grimes 1998, 120-135), while the average in US is between 1:6 to 1:10 (McDiarmid 1990, 254-55)

At the USCL, however, we have a ratio of around 1:150! This is largely because most students' involvement is voluntary. In fact, while the Law School wanted the clinic to be used for teaching the Diploma in Professional Legal Practice, I insisted that it be offered primarily to undergraduates and solely on an extra-curricular basis. At the time, I had a number of reasons for insisting on an extra-curricular clinic which

prioritised enhancing social justice over legal education (see Nicolson, 2006), though these were not as thought through as they are now.

- Perhaps the most immediate was the concern, prompted by the apparent experience of other UK clinics, that students might abandon clients or de-prioritise their needs once they have received the required credit for their work.
- Closely related to this, was the worry that the prioritisation of legal education over serving the community by the law clinic itself and its staff conveys an implicit message to students that their interests - now education, later commercial - trump those of clients and the community. In my view, there is also something inherently morally problematic about practising law on the poor (rather than for the poor) – even if the latter do benefit from such practice.
- More recently, I have formed the view that all those who benefit from legal education – including those who make their living by teaching law - have a moral obligation to ensure that these benefits extend to all in society, not just to those who can afford lawyers' fees or qualify for legal aid (see Nicolson 2013, 2015). Students can volunteer to provide free legal services to those in need while at university and subsequently either continue to volunteer or better still devote their career to assisting the most vulnerable rather than the most wealthy in society. Staff can help run or support law clinics and/or sensitise students through their teaching to issues of unmet legal need, and wider legal social and injustice.

This last point shows that law clinics can play both a direct and indirect role in promoting justice: directly by providing legal services to those most in need; and indirectly by developing in students a commitment to do so after graduation or at least sustaining a pre-existing commitment to do so (see Nicolson 2006, 2010).

Moreover, if both these roles are going to be maximised, then it follows that clinics should seek to maximise both the number of students involved and the length of their involvement. More students mean more cases or other forms of community service (law reform work, street law, etc). And the longer the student involvement, the greater their exposure to both the problems of justice and the satisfaction of helping others, and hence, according to educational theory (Nicolson 2006), the greater the possibility of them developing the habit of helping others. Obviously, these two desiderata are in conflict - all things being equal, increasing the number of students involved means that the involvement of each students will be reduced, and vice versa. At USLC we balance these two considerations by providing places for about a third of all undergraduates to serve in the clinic for the duration of their studies (anything from three to five years for full-time students). Thus, we currently have 280 clinic students (though only 225 are trained to engage in face to face client work as opposed to online advice, law reform, public legal education and investigating alleged miscarriages of justice).

However, after the USLC's launch in 2003, I gradually came to realise that its entirely extra-curricular nature meant that it was not fully realising the potential of its "justice mission". This was not so less so as regards the more direct means of enhancing justice through providing legal services to those most in need. In order to maintain the quality and not just the quantity of service to the community, students undertake intensive induction training, have all letters, pleadings and other documents and case strategies checked and are encouraged to attend regular

optional training sessions on substantive areas of law and advanced skills like body language interpretation and dealing with vulnerable clients. And it seems to work – over the last few years over 90% of cases going beyond mere advice led to client goals being fully or partly met.

On the other hand, reference to the CLE literature (eg Aiken 2000-1; Wizner & Aiken, 2004; Adcock 2013) suggested to me that without a teaching programme, the USLC was not meeting its potential as regards the indirect means of enhancing justice through educating students to be “justice ready” (cf Aiken 2012). According to educational theory, the value of all forms of experiential learning lies, not just in the experience of putting knowledge into practice, but also in the reflection on that activity. As is so well-put in Brayne, Duncan and Grimes, learning from experience “occurs not in the doing but in the reflection and conceptualisation that takes place during and after the event.” (1998, 47). For instance, according to Kolb’s well-known learning circle (see eg Kolb, 1984), reflection may lead to the adoption of new, or the adaptation of existing, theories about how to handle issues which can then be put into practice when similar situations arise. It helps “build the skills, values and modes of critical thinking required to frame and solve complex problems.” (Casey, 2013-14, 320).

Reflection can be unconscious and subliminal (Calmore, 2003-4, 1172). But it is likely to be more profound and long-lasting if time is set aside for the process and reflection is guided by the views of others, especially those experienced in the relevant activity or steeped in the relevant theoretical knowledge (Morin and

Waysdorf, 2013, 606). Such guidance can be provided via feedback on written reflection or face to face in supervision meetings or in those attended by colleagues as well as teachers where all provide feedback, ask questions and make suggestions and generally deepen the dialogue (what some call "reflection circles": Morin and Waysdorf, 2013). Conscious reflection is also likely to be taken more seriously if assessed and particularly if this is done for marks (Van Tartwijk & Driessen 2009).

Clinical Legal Education and Assessment at the University of Strathclyde

I only discovered the value of experiential learning after establishing a clinical class as a reward to final year clinic students for their voluntary work. It was initially called Clinical Legal Practice, and involved a mixture of classes by practitioners on advanced clinical skills and classes on legal ethics and access to justice, but slowly the skills elements were dropped both because the students took to the other aspects especially legal ethics which they had never encountered and because of the difficulties discussed below with assessing skills through case work. Thus case work assessment was dropped in favour of greater emphasis on student reflection in a weekly diary on issues of ethics and justice arising in their cases, clinical experience more generally and in class seminars, and on a reflective essay in which students explore in more depth the issues arising in one of their cases. As a result of the shifted emphasis, the class was renamed Ethics and Justice.

However, the experience of seeing students integrate reflection and background reading on issues of ethics and justice persuaded me about the value of experiential

learning as the best means of teaching ethics and seeing its potential to strengthen the indirect impact of clinics on social justice through fostering and sustaining “warriors for justice” (Nicolson, 2015). By not formalising what students learn from their case experience, I realised I was wasting valuable educational opportunities as regards ethics and justice teaching. No doubt the same applies to exploiting clinic work to develop skills and teach substantive law. However, I am not convinced that the academic stage of legal training should be required to produce practice-ready lawyers. Otherwise, there would have to be the resources to provide all students, many of whom will not go on to practice, with enough clinical and reflective opportunities to fully develop their skills. By contrast, not least because this task is not currently being carried out at the professional stage of legal training, I do think that it is the job of law schools to strive to make students justice-ready or, to put it in the language of liberal legal education, to help develop good citizens (eg Brownsword 1999). If successful, this will mean that those who do enter practice, will do so willing and able to contribute to redressing social injustice and practice in an ethically informed way. As stated earlier, I do not favour producing highly skilled and knowledgeable lawyers if those attributes are reserved for those who can afford to pay and used to cause even more social injustice on behalf of the powerful in society.

But as also stated earlier, I was also initially concerned that providing students with credit for their clinic work would lead to them prioritising education and assessment marks over social justice and clients thus undermining the contrary message

conveyed by the USLC's goals of directly and indirectly enhancing social justice. However, after being in operation for a number of years I was convinced that the USLC's strong social justice orientation was being passed on from one generation of students to the next through an appointments procedure, supervision, mentoring and informal socialisation. As long as this ethos remained and participation was largely extra-curricular, I became confident it would be possible to maximise the potential for students to learn about ethics and justice from their raw clinic experience without undermining the clinic's message about social justice.

Consequently, from October 2011, Strathclyde law students have had the option of enrolling on a Clinical LLB (CLLB), albeit only if they first gain admission to the USLC through an interview which assesses their commitment to social justice. The CLLB integrates and assesses students' clinical training, case work and reflection on their clinical and educational experiences. It is not a totally separate degree to the standard Strathclyde LLB. Instead, students take all the standard LLB classes except for Law and Society which is replaced by Legal Theory (thus negating any suggestion that CLE is anti-intellectual). However, at least a third of the classes taken by CLLB students must have a clinical element. Four of these are compulsory:

- Legal Methods (Clinical) adds training basic legal skills (client interviewing, letter writing, case and data management) as well as an introduction to legal ethics to the standard legal methods class;
- Voluntary Obligations (Clinical) augments the standard contract class with training in the skills of advanced legal research, negotiation, advocacy and pleadings drafting in the second semester of the first year;

- Ethics and Justice, taken in the first semester of the final year, involves the renamed Clinical Legal Practice class;
- The new Clinical Legal Practice does not involve any teaching but gives students marks for case performance and for reflective diaries which they must write in the second and third years of the CLLB.

In addition students must take at least two² “clinically available classes”. These are standard compulsory or optional classes whose subject areas are likely to arise in clinical cases. Where a student has a case relevant to one of the clinically available classes they can opt to replace a portion of the assessment for the standard class with an essay in which they explore the legal, practical, factual, ethical, justice and/or political issues arising in one or more of their past or current clinical cases.

Thus, apart from the various forms of assessment in the standard LLB, the CLLB has a variety of forms of assessment, both in terms of what is being assessed and the manner in which it is assessed. The rest of this section will provide a critical evaluation of each in turn.

1. General Skills – Case Performance

One obvious, but as I shall argue, problematic form of assessment involves performance in case work. Thus, 50% of the mark for the compulsory Clinical Legal Practice course is devoted to assessment of the student’s performance in five of their cases. Where, as is usually the case, students have conducted more than five, they

² Or one if they are doing the two-year accelerated version taken by non-law graduates. To avoid undue complexity in the following discussion, I will henceforth only refer to the standard three year CLLB. In addition most of those taking the latter degree will go onto an Honours year where they take at least another two clinical classes and/or write a dissertation on a clinical topic.

will choose which to have assessed. Given that the CLLB is aimed at integrating clinical training and experiential learning into the law degree, it seems to make sense to assess students on what they have learnt from their training, supervision and reflection on how to conduct cases.

Assessing casework, however, raises three problems in my view. The first is that it is difficult to specify the standard against which students are being marked (see Appendix A for an attempt to do so). This might arguably be a general problem of putting conventionally accepted academic standards into marking schemes in order to guide their behaviour of students. However, having marked for years with other colleagues at a number of institutions, being subjected to externals and having acted as an external at different institutions, I am fairly confident about the consistence of my judgment of academic work (though only about the consistency with other markers when we have jointly marked over a number of years). Consequently, I now rarely refer to marking schemes and am pretty sure that such references functions more at the level of justification rather than discovery of the “correct” mark. But marking according to conventions within a particular marking community is infinitely more difficult, if not impossible, in regard to assessing case performance for three reasons:

- There are usually few clinicians involved in marking within any one institution and so there is less chance of a strong sense of "we all do it this way".

- There is also relatively speaking a much smaller clinical educators community in the UK and certainly in Scotland, as compared with the US, Australia and South Africa, for instance.
- It is difficult if not impossible to get appropriate moderation or even feedback from other supervisors and from externals on the marks allocated to a particular case if as is certainly the case with externals, they have not been involved in observation of the case performance.

Colleagues and externals can of course review the written file, but not any other aspects of case performance. This highlights two other main problems with assessing case performance. The first is that, unless the supervisor attends every single client interview, negotiation and court appearance (which in my view would lead to an unwelcome reduction in the quantity of clients served), they cannot assess overall case performance except in terms of how successful the outcome was. Even then, there may be no way of knowing whether this was due to luck or the student's ability when the case was successful and whether the student still performed well despite a disappointing result. Given this difficulty, students who keep an impeccable file and produce impressive documents may get a high mark despite an otherwise poor performance, and vice versa.

This obviously leads to arbitrariness in marking – a problem exacerbated by the huge role fate plays in terms of what sort of cases are allocated to students. Thus, cases allocated to students range from the very simple, when clients need only to be interviewed and given advice on simple matters to month-long disputes ending in litigation and even an appeal. How does one compare the perfect performance of a

few simple tasks with the competent, but inevitably not entirely perfect, performance in a case involving complex law, procedure and facts, well-resourced professionally legally represented opponents prepared to pull every trick in the book to win, and a possibly fractious court? To some extent one can apply a tariff approach as in sports like diving where simple dives performed perfectly do not receive full marks but very difficult dives can still get high marks despite not being perfect. But it seems unfair not to give full marks to students who do a perfect job given that they have no choice in what cases they receive.

One could of course abandon marking case performance and merely ascribe a satisfactory/unsatisfactory judgment to performance. But this would be unfair under current CLLB rules because one unsatisfactory decision would mean that the student fails Clinical Legal Practice and cannot graduate until they can gain another case and perform to a satisfactory basis. It also seems unfair not to reward students who have put in an enormous effort to assist clients in a caring and competent fashion. Accordingly, students tend to get very high marks for case performance, leading to high overall marks for Clinical Legal Practice and eyebrows being raised at examination boards!

Admittedly, the significance of these problems is reduced by the fact that the mark for case performance is limited to only 1/36th of their assessment for the CLLB (they take six classes each year) – or even 1/48th if they go on to the Honours year (where another six classes are taken). Moreover, the extent of the problems of idiosyncratic case performance and the role of fate in obtaining cases, as well as the lesser problem

of variance in marking standards between different markers,³ is reduced by the fact that students are assessed on their performance in five rather than one or two cases and hence disparities tend to even themselves out to some extent.

2. Specific Skills – Simulated Exercises

Nevertheless, I remain very ambivalent about marking case performance in live cases. I feel far more comfortable about marking performance in simulated exercises, even though live cases are likely to provide deeper (albeit less controlled) learning experiences than simulated ones. I am also persuaded, at least in theory, by van der Vleuten and Schuwirth's argument that it is better to assess overall performance involving a variety of skills than the separate assessment of discrete skills (2005, 312-13). In practice, however, it seems easier and fairer to assess carefully controlled simulated exercises involving one or only a few skills. And this is what we do in the initial two classes in the CLLB.

In Legal Methods (Clinical) a statement of facts based on a simulated interview are each given a mark out of five, with a further five marks for reflection on the client interview (rather than for performance of the interview itself)⁴ and fifteen marks for a report on ethical issues arising out of the interview (the remaining 75% of the assessment comprising an assignment testing standard legal methods issues). In

³ Cf Govaerts, Van der Vleuten, & Schuwirth, 2002, 139-40 whose study suggests that students vary in case performance far more than markers vary in assessment performance and hence that being assessed on multiple cases reduces problems with both.

⁴ This is because students interview in pairs but such pairs often involve a mix of CLLB and non-CLLB students, meaning that they cannot be marked as a pair or individually. Plans are however being made to get round this problem and to assess performance rather than reflection, given that reflection on an interview tends to be rather formulaic and unrevealing.

Voluntary Obligations (Clinical), the 50% of class assessment devoted to clinical training comprise of: an in-depth research exercise on the sort of contractual issues that arise in clinic cases (25%); the drafting of pleadings based on the research (10%); and participation in either a simulated negotiation or advocacy exercise based on the same case (15%). Compared to the assessment of general case performance, we are able to give quite specific guidance on what is expected, can ensure fairness between students because of the simulated nature of the exercise and can ensure moderation by colleagues and externals as all exercises are either written or video-recorded. The only slight concern is that, once again, students tend to do better in such practical exercises, though this is offset by the fact that the clinical assessments replace aspects of the standard classes in which students also tend to do well.

3. Learning about Law - Reflective Essays

For their clinically available classes, students write an essay on a topic based on a relevant ongoing or past case which they set in consultation with me as the CLLB Director. Here, assessment guidelines are broad⁵ because the idea is that the students take an issue or issues which they find interesting, challenging, surprising and/or on which they have already done some detailed research and would like to do more. In

⁵ For instance, the Legal Process (Clinical) Handbook states: "The aim of this assessment is to test student's ability to evaluate aspects of the legal process raised by a case they are undertaking or have completed in the Law Clinic. They are expected to reflect on what the case illustrates and says about relevant aspects of legal processes, whether it shows these processes in a good or bad light, whether and in what way matters could be improved, and what implications there are for any suggested reforms. The student can discuss any issue or issues relevant to the Legal Process (Clinical) syllabus, as long as they first get permission of the Class Co-ordinator. Once you have permission to write an essay reflecting on a Law Clinic case, you should research it using the reading referred to in the reading materials accompanying the class and any suggestions from the Class Co-ordinator or class lecturers."

subjects like Legal Theory or Legal Process, the topics tend to be quite broad and not unlike an essay set by an academic except that they are sparked by an actual case.

For instance students might explore in Legal Theory what they have learnt from an employment case or cases about the alleged neutrality of law and in Legal Process whether mediation is always an appropriate means of dispute resolution. Topics in substantive law subjects can also be broad, such as the common topic of evaluating the effectiveness of a new rent deposit scheme, but very often they are more narrow, reflecting the actual substantive law question the student had to research in the case.

For instance, a recent essay in property law explored “the extent to which consent of a co-owner is a necessary requirement in the area of law concerning repairs and alterations?”, whereas in employment law a student asked “Is the band of reasonable responses still effective as the determining test in unfair dismissal cases? If not, is there a better alternative?” In this way, these essays reflect to a far greater extent the sort of enquiries lawyers have to make in practice as compared to the often artificial and unrealistic tasks involved in traditional problem questions in law.

But apart from the possibility that, as befits the more instrumental nature of research in actual cases, such essays are narrower than the standard essay questions in the class, there are only two real differences between reflective and standard essays. One is that students might already have commenced research on the topic in their clinical reflective essay and hence will benefit from doing additional deeper research. The second is that they have chosen the topic out of interest or in order to assist the client and thus tend to put more effort into the essay. Both of these give CLLB students an

advantage over other students, but this needs to be offset against the fact that they often have very large burdens imposed on them by their case work. Moreover, unlike other students on the class, they have to devote time to thinking of an appropriate essay topic and in most cases engaging in a number of exchanges with myself to ensure an appropriate essay topic.

4. Learning about Ethics and Justice - Reflective Essays

Similar considerations apply to the very similar reflective essays which form 50% of the assessment in Ethics and Justice where students are simply instructed to discuss “the relevant various justice and/or ethical aspects of a case undertaken by the student”. However, before the student commences the essay, they will have first presented the case at one of the weekly one hour “case surgeries” that are held alongside more formal two hour seminars. In such surgeries students present a case that they think raises issues of ethics and/or justice and the discussion ensues on how the case might be resolved, what further issues are raised and what reading might be helpful in discussing the case. A topic is then set at the surgery or subsequently once the student has had time to conduct more research and reflection. But apart from this, reflective essays on ethics like those on substantive law topics are not that different to standard essays or, more accurately, the dissertations which students have to write in their Honours year. Indeed, this gives CLLB students a head start in the art of choosing a workable research question for this dissertation.

5. Learning about Law, Life and Legal Practice – Reflective Diaries

What is even more novel for students and what they most struggle to get to grips with is writing a reflective diary – often called a journal or even turned into the horrible gerund “journaling”. Diary writing starts in the second year of the CLLB after initial training is over. Students must produce a (roughly⁶ 500 word) entry every fortnight in each semester (except in the semester when they take Ethics and Justice when entries are produced weekly). Half way through each semester, they are encouraged to hand in their entries for the first six weeks in order to obtain feedback. I read them and respond with the aim of getting them to think more deeply, raise related issues or suggest relevant reading. The students can then respond to these comments (in roughly 200 words) ensuring both a limited dialogue between us and that students take reflection more seriously knowing that it is being read and responded to (cf Van Tartwijk, & Driessen 2009).

For all semesters other than those in which they take Ethics and Justice, the issues on which they can reflect are very broad. Thus the Handbook states:

Relevant experiences on which you can reflect will include, most obviously, any case work, but also Clinic training, attendance at an IAC [Initial Advice Clinic],⁷ and attendance at surgeries. As long as it somehow illuminates one of your various clinic activities, you may even reflect on what you have learnt in the standard LLB from, for example, classes in Legal Process on access to justice, classes in Legal Theory on substantive justice or ethics, and any class in which you learn law relevant and helpful to the conducting of one of your cases.

⁶ This used to be a maximum, but following feedback a maximum for each entry (and response to entries – see below) was replaced with an overall word limit so that students could tailor the depth of discussion to the significance of the issue.

⁷ These are run by USLC but advice given by pro bono solicitors, usually USLC alumni.

For Ethics and Justice, students are told the diary should cover “the student's activities in handling cases and participation in case surgeries, as well as reflection on the student's performance, what they are learning from the class and from their clinical experience, and how they might improve their performance”.

Given that reflection is for most students a novel experience, many struggle to know what to write about and how to go about reflection. As Morin and Waysdorf also found, “meaningful and effective reflecting requires that we teach students the process of reflection.” (2013, 603). To this end, the CLLB commences with a session on the theory of clinical legal education which specifically focuses. In addition, fairly detailed guidance on reflection is provided in the CLLB handbook (reproduced in full in Appendix B, below and repeated in a session just before students commence writing diaries for the first time. In addition to this guidance, students are provided with a number of diaries from previous years which received high marks, are invited to submit a diary entry as a dry run and are given face to face feedback after their first submission.

But it is clear that reflection is an art which is learned from practice and with the help of comments on diary entries, marks and general comments at the end of each semester. Many students comment on their difficulties they have at the beginning of the process, but equally many also comment on how they have come to appreciate the task and have learnt from being required to reflect on their experiences. This was particularly so with those students who took the option of providing an introduction to the diaries pulling together themes and providing a retrospective analysis of their

growth. For example, one student provided the following overview of her years doing the CLLB:

The process of keeping a diary and reflecting on case work has been a very helpful one in monitoring my development and learning. By taking time out to think about what I have done and how I have done it has helped to prepare me for what lies ahead in the legal world. I can see legal problems now as a mix of different issues which may all need some attention or at the very least some consideration as potentially significant factors in whether we will act or how we do act if we decide to.

I found that at the beginning of my Law Clinic experience I was concerned about client interactions and making sure that I was representing the client's best interests, and not acting in a paternalistic manner. As my experience grew in this area, and I began to get involved in cases which required representation, my focus turned to the myriad of issues which present themselves when a court or tribunal hearing looms. First of all is the thorny issue of who out of the co-advisors is going to do the representation. This is left to the co-advisors to resolve, and needs to be dealt with delicately.

Preparing and representing at the hearing is obviously a highly stressful time, and it tests your strength of character and ability to relate to your co-advisor as well as the client. Dealing with clients in these stressful situations is also challenging, and this is where a good relationship with your co-advisor is essential. The importance of investing in establishing those relationships early on cannot be underestimated, and this made a big difference to me when I was faced with the challenge of representation.

As I have become more established in the Law Clinic I find that my reflections have turned to some of the more perplexing aspects of practitioner work: viz. what is substantive justice? and; can it be achieved? I am not convinced that I have found the answers to these questions, but what I have discovered is that there are many different ways of considering these questions, and that each case needs to be considered on its merits. I believe that the merits of a case go beyond what the black letter law says and extend to a consideration of the fairness of the situation, and the ease with which the client can advocate on their own behalf and represent themselves in a formal setting. I have discovered tensions around this issue given the finite resources that we have at our disposal. This means that tough decisions need to be made about who we do and do not represent.

In summary, the reflective process has caused me to consider some of the wider issues of client representation. It has opened my eyes to potential problem areas and

constraining factors which could jeopardise a client's case. Time will tell, but I believe this has had a major influence on my development as a learning lawyer.

From this it can be seen the wide range of issues on which one student reflected – teamwork, ethics, justice (legal, substantive and access). To these can be added myriad others – from more practical issues of how to effectively represent clients, the values of clinical legal education, career choice to highly personal experiences such as being the victim of a sexual assault or witnessing a murder. The opportunity for reflection thus prompts students to prepare for their future careers and for the rest of their personal life.

The above extract from a student's introduction to her diaries also shows the value of students not just reflecting on experiences as they occur, but also on looking back to see how their views and behaviour have changed and how they now see themselves as persons and potential professionals. Indeed, it is now compulsory rather than merely optional to provide an introduction to each semester of diaries in which they take a more holistic view of their development. The other insight I have gained about reflection from my students' diaries is the value of the dialogue between myself and the student which results from my commenting on their entries.

Such academic intervention can:

- alert students to potentially problematic ethical and practical issues which they had not noticed or which if they noticed, had regarded as unproblematic;
- expose them to new issues through imagining alternative versions of the facts of their cases or by asking whether a possibly immoral or impractical solution which they had not contemplated might ever be justified;

- require students to clarify for themselves the exact nature of their stance on particular issues;
- refer students to relevant reading to enhance their understanding of issues;
- encourage students to adopt new perspectives in dealing with issues, think more deeply and in a more sophisticated way about issues they had raised or justify ethical or practical positions they had taken.

As an aside it can also be noted that reading the diaries has proved incredibly valuable, not just in aiding student development, but also in terms of running the Clinic and CLLB. For instance, having repeatedly read about the benefit of having to attend evening advice session staffed by pro bono solicitors, it was decided to make these compulsory for all first year Clinic – and not just CLLB – students.

A final point about the diaries is that, while marking them was at least initially unfamiliar, it gave rise to fewer problems than marking case performance. Although there is no core of knowledge to be conveyed as in more standard forms of academic work, like traditional academic assessments one is looking for insights and the use of existing learning and additional research. Consequently, although it has taken a while to put into words, I found it relatively easily to get a feel for what is poor, competent, good, etc work and have subsequently, with the help of external examiners and others who assess diaries, developed the marking scheme set out in Appendix B. Ensuring reliability of assessment would be helped enormously by having clinical staff co-marking with me (currently I mark all diaries). This is I think is one of the most effective means of ensuring reproducibility of results. In my experience, when markers discuss with and justify to each other the marks they give

to the same assessment, they relatively quickly come to a fairly uniform standard.

However, short of this, this assessment method is about as reliable as one can get in the context of any marking which involves making subjective evaluations.

Moreover, it should be clear that, whatever the problems with reliability, assessment on the CLLB must score high in terms of validity, given that, as espoused by van der Vleuten and Schuwirth (2005, 312-3) clinical elements assessed are largely based on real-life activities or, failing that, simulated exercises based on real-life activities. In addition, when it comes to case performance we are interested not in discrete skills but in a student's ability to competently perform all those skills in which practitioners should be competent – both technical legal skills as well as softer skills such as the display of empathy, care and consideration for clients. And then when it comes to such reflection, we are looking for student insights into an even wider sense of competency which extends beyond both types of skills to an awareness of the role of ethic and justice in the practice of law and to the development of the individual student's sense of professional identity.

CONCLUSION

In this article, I have argued that legal competence should be about values as well as skills, and about ethics as well as knowledge. Similarly, CLE should aim to assist students become effective and ethical practitioners, and to develop their own style of practice and own sense of professional morality – in short their own professional identity. While various individual exercises and examinations can help them in this

regard and certainly with the acquisition of knowledge, it is reflective diaries which are most important in this regard. Perhaps most importantly, the diaries encourage students to develop the habit of being a reflective practitioner – in other words lawyers who constantly reflect on what they are doing both after and also, later as they become more experienced, during behaviour (see eg Schön 1983, 1995). This process is enhanced by the fact that reflection on the CLLB occurs over a period of years rather than months. This opens up the possibility of students returning to issues they had previously encountered with similar but often subtly different experiences. This in turn ensures repeated circles of Kolb's learning circle and this may lead to the development of an increasingly nuanced "theory" of how to act in the future as subtle differences in the context in which an issue arises encourages adaptations to the initial theory of how to respond. I see this regularly in relation to ethical issues relating to the lawyer-client relationship. Indeed one student's experience in trying to negotiate an appropriate course between paternalism, which she first unwittingly displayed before being exposed to ethical theory, and acting in the client's best interests, which she completely ignored in her next case due to the desire to prioritise client autonomy, led her to write, part-time while working as a lawyer, a dissertation on the subject - surely a supreme example of life-long learning! In any event, even if such repeated reflection on the same issue does not occur, the process of regular reflection throughout the law degree is likely to make reflection a habitual aspect of the student's make-up which in turn is likely to enhance their

competence in both its traditional narrower manifestations as limited to skills and its wider manifestations as argued for in this article.

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Appendix A - Marking Criteria for Cases

Your case should be conducted and your files maintained in accordance with the rules and guidance contained in the Law Clinic Handbook, in particular the Practice Rules and the Law Clinic Guide. These documents contain a step by step guide on how to handle a case including, for example, the requirements relating to communication with your client, how your paperwork should be managed and what should be recorded on the electronic case management system. The table below gives an indication of the criteria used for marking your files.

	Unsatisfactory	Competent	Excellent
Communication	Infrequent, lacking in clarity and inappropriate. Failure to respond within reasonable time	Regular, clear and appropriate with reasonable response time	Frequent, clear and appropriate with quick response time
File Management	Poor record of work undertaken with no evidence of research, failure to print e-mails etc., missing papers from file, papers not kept neatly or in proper order, failure to record work on CMS, poor communication with co-advisors and/or staff.	Accurate record of work undertaken with some evidence of research, paper files adequately maintained, CMS up to date and accurate and good communication with co-advisors and staff.	Clear, accurate and up to date record of all work undertaken including research, calls, e-mails etc., all papers filed correctly and neatly, CMS up to date and accurate, excellent communication with co-advisors and staff.
Legal Knowledge and Skills	Little or no evidence of relevant research, poor understanding of law with poor analysis of legal position, poor explanation of law to client and little or no awareness of practical and procedural matters, poor advocacy and/or negotiating skills	Evidence of relevant research, good understanding of law and good analysis of facts and application of relevant law, good explanation of law to client and good awareness of practical and procedural matters, good advocacy/negotiation skills	Evidence of extensive and thorough relevant research, excellent and accurate analysis of facts and application of relevant law, very clear explanation of law to client and excellent awareness of practical and procedural matters, excellent advocacy/negotiation skills.
Drafting	Poor drafting of letters, summons, ET1's and other legal documents lacking in clarity, containing irrelevant material and factual inaccuracies	Clear, concise, accurate and relevant drafting of letters, summons, ET1's and other legal documents	Very clear, concise, relevant and accurate drafting of letters, summons, ET1's and other legal documents
Relationship with Client	Uncaring, insensitive, and/or unprofessional	Professional and competent service provided	Professional and competent service provided, but also caring and sensitive to their needs, and prepared to go the "extra mile"

Ethical Awareness	Unaware of any relevant ethical problems	Aware of most ethical problems but simplistic solution to the problems provided	Aware of all relevant ethical problems and sophisticated and nuanced solutions to the problems provided
Reflection on performance	Poor awareness or insight into difficulties presented in case, personal performance or any ethical issues arising	Good awareness of difficulties presented in case, personal performance, any ethical issues arising.	Excellent awareness of difficulties presented in case, personal performance, any ethical issues arising.

Note:

1. The above categories of “unsatisfactory”, “competent” and “excellent” broadly translate into a mark of, respectively, less than 40%, between 40-69% and over 70.
2. You will not be marked equally on each of the criteria; some are more important than others, and some, such as ethical awareness, or negotiation or advocacy skills, may be inapplicable.

Appendix B – Guidelines on the Reflective Diary

Introduction

Writing a Diary is an exercise in extended reflection on experience. It involves at least three aspects of Kolb’s learning cycle:

- having a *concrete experience*,
- *reflection* on that experience
- the development of a new, or adjustment of an old, theory (what he calls *abstract conceptualisation*)

Moreover, if similar experiences are repeated within relevant period of reflection it might also involve a fourth – *active experimentation*. This involves the application of a new theory of action, thought, feelings or values to a new experience relevant to the first one. Accordingly, a diary entry should involve at least three elements (with active experimentation possibly coming up in a late entry, allowing for further reflection, abstract conceptualisation, etc).

What?

Here you want a clear, focused and engaging description of experience or at most two experiences. Relevant experiences on which you can reflect will include, most obviously, any case work, but also Clinic training, attendance at an IAC, and attendance at surgeries. As long as it somehow illuminates one of your various clinic activities, you may even reflect on what you have learnt in the standard LLB from, for example, classes in Legal Process on access to justice, classes in Legal Theory on substantive justice or ethics, and any class in which you learn law relevant and helpful to the conducting of one of your cases. If you are unsure whether a particular experience is worthy of reflection for the purpose of writing a diary entry, you should contact the CLLB Director.

Choose an experience/experiences which most engage you and/or are which lend themselves to deep reflection and theory development: something that was, for example, shocking, pleasing, embarrassing, disappointing, unexpected, etc and/or which made you change your views, values, ways of doing things etc; something that lead to self-appraisal, some form of change and/or personal growth (in emotions, understanding, values, experience, etc). You are

strongly advised to discuss one or two issues in great detail rather than skate over a few in superficial detail.

So what?

This involves deep reflection on what the experience(s) meant in terms of ideas, emotions, skills and capacities, and/or values. Ask yourself what did the experience mean to you, what did you learn, how did you feel before, during and after the experience, what went well or less well than you expected or could be expected. In short, ask yourself how has the experience changed me, my ideas, my values, my future plans, etc? What did you think/feel before and how do you think/feel now; how does it compare with what you already know from previous experiences, what others have told and what you learnt through study, how did such learning help you understand (or not understand) your experience? Here you can reflect on the implications for further study, for your clinic experience, future career, etc. In other words, what does the experience(s) tell you about legal education, legal practice, justice, ethics, society, other people, etc.

Now what?

What does your reflection means for the future:

- what will you do, think or feel differently?
- how can you go about making further improvements or changes:
- what literature can you read, course go on, what person can you speak to – or indeed what do these already consulted sources tell about what you need to do?

General

Ensure that the dairy entries are well-written, well-punctuated, grammatical, clearly structured, free of typos, etc. You should strive for the same levels of written communication as is required in essays, clinic letters, pleadings, etc.

Ensure that diaries are submitted for comments, that you respond to comments and that invitations to read further or otherwise gain information are taken up.

Ensure consistency in quality and quantity of reflection.

Favourable Features of Diaries

Discussion of experiences that lends itself to deep reflection on relevant topics

Honest, open and non-defensive self-appraisal

Curiosity

Awareness of and thinking through perspectives other than one's own

Signs of personal growth – change in thoughts, feelings and values as well as knowledge

Symbiosis between experience, theory and learning

Use of what taught and what read in reflection

Strong sense of how experiences lead to new outlook on law, society, other people, being a lawyer, and being a human being

Unfavourable features

Badly written, e.g. unclear, ungrammatical, stream of consciousness writing, repetitive and waffly

Bland and descriptive

Over or well-under the word limit

No submission for comments

No response or very thin response to comments

Marking the Diaries

In marking diaries, the following matrix will be used:

	Unsatisfactory	Satisfactory	Competent	Good	Excellent
Length	Very brief, no response to comments	Mostly uses full word length in initial entries and provides some responses	Mostly uses full word length in initial entries and responses	Use full length, full response to all comments	Use full length, full response to all comments
Style	Very Bland, highly descriptive, opaque	Mostly bland description, not very clear	Clear but mixture of bland description + more engaging writing	Clear and mostly engaging	Crystal clear and highly engaging
Presentation	Ungrammatical, littered with spelling mistakes, typos	A substantial number of typos, and grammatical, spelling errors	A few typos, and grammatical, spelling errors	No grammatical, spelling errors, and only a few typos	Free of all errors
Structure	Stream of consciousness, repetitive	Some structure but mostly stream of consciousness and some repetition	Largely well-structured, with some lapses	Well-structured, albeit occasionally a bit "flabby"	Clear narrative structure, concise and succinct
Analysis	Description only, no attempt to learn from experience	More description than analysis	Mixture of description & analysis	Good balance between analysis & description; some use of learning from other sources (eg reading, other classes)	Deep analysis and very insightful; excellent use of learning from other sources
Reflection on personal development,	Description only	Mostly descriptive one or two insights into personal development, but largely rigid and defensive attitude to change and no self-disclosure	Fair amount of reflection on personal development, with a few good insights and some openness to self-disclosure and change	Some good insights into personal development and openness to change	Extremely insightful about personal development, open to change
Reflection on	Description	Mostly	Fair amount of	Some good	Extremely

law, justice, ethics, professionalism and future career	only, no reflection	descriptive but one or two insights into law, justice etc	reflection on law, justice etc	insights into law, justice etc	insightful about law, justice etc
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Note:

- the above categories of unsatisfactory, satisfactory, etc roughly correspond to a fail, 3rd, 2.2, 2.1 and a first.
- the various elements are not equally weighted. For instance, elements relating to substance (analysis and reflection) are far more important than those relating to presentation. Thus really insightful entries with a few typos and even grammatical and spelling errors may still gain a first class mark; on the other hand, even well structured, perfectly written and lengthy entries which are bland and purely descriptive will struggle to fall into more than the “satisfactory” category, unless there is at least some reflection.

Further Reading

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Gibbs, *Learning by Doing: A Guide to Teaching and Learning* (1998) (electronic access)

Maughan and Webb, *Lawyering Skills and The Legal Process* (2005), Ch. 2 esp, pp. 44-46

Assessing experiential learning – us, them and the others

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INTRODUCTION

This paper looks at the assessment of experiential learning primarily in the context of the learning and teaching of students using ‘hands-on’, interactive and reflective methods. It will, at various points, also refer to the evaluation of programmes and modules in terms of their impact and where improvements, in pedagogic terms, can be made.

The ‘us’ here are the teachers/tutors who are employed to promote, support and otherwise facilitate the advancement of the students’/learners’ education. The ‘them’ is the student body on a particular course of study. The ‘others’ are those who have a vested interest in the form, content and means of measuring achievement of and in legal education – be they professional regulatory bodies, employers or the wider public.

The term ‘experiential learning’ refers in this setting to an approach to education in which students are exposed to real or realistic legal issues and problems. In this

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process they are required, in a structured way, that may or may not lead to the award of academic credit, to apply theory to practice and then deconstruct and analyse what took place (or did not as the case may be) and why. In the world of legal education an experiential approach to study is often termed 'clinical' and the word 'clinic' will appear frequently throughout this paper in referring to the vehicle through which experiential learning may be presented and delivered.

Finally, by way of introduction, the word 'assessment' is intended to include the measurement of both the quality and extent of student learning (regardless of whether academic credit is gained) and the perceived value of what is being delivered from a learning and teaching perspective, by the 'us', the 'them' and the 'others'.

A STARTING POINT

Unless one is talking about 'right' and 'wrong' answers as determined by the assessor and measured by pre-defined criteria, for example in a multiple choice test, we maintain that there is little or no precise science in assessment. Rather there are processes and systems aimed at establishing what has been termed elsewhere as validity, reliability and impact.³ We also suggest that assessment in an experiential

³ See Cees PM Van Der Vleuten and Lambert WT Schuwirth, *Assessing professional competence: from methods to programmes*, *Medical Education* 39, 309-317, 2005. The same authors make the important point that there are no inherently good or bad means of assessment. We suggest whilst this is an important observation there are certainly better and worse ways and will explore this in the context of clinical legal education shortly.

or clinical setting is no different, other than the nature of such study perhaps more readily lends itself to innovative methods of assessing. This will be explored more fully later.

If there are no definitives or absolutes on how we assess, we must seek the means by which to establish and ensure the applicability, value and credibility of the relevant process if we wish to justify and monitor what is taking place. In our experience this inevitably means devising a set of guidelines and safeguards starting with an explicit iteration of what is expected, in terms of student performance (typically what the student is intended to achieve). This begins, at least in educational parlance, with what are commonly termed 'learning outcomes'. We suggest that it is not possible to assess any aspect of a module, course or programme, either student performance or the effectiveness of the teaching and learning, unless clear learning outcomes are set in advance of the period of study and that these are made apparent to and/or by both student and tutor at the outset. The importance of the learning outcome as a pre-requisite to effective assessment is well documented elsewhere and we wish to simply underline its significance here.⁴

The second of our essentials in terms of a starting point can be summarised by the often quoted acronym SMART.⁵ Although this has had term has assumed various

⁴ See: Claus Nygaard, Clive Holtham and Nigel Courtney, *Improving students' learning outcomes*, Copenhagen press, 2009. For a wealth of resource materials and instructive discussions see: www.learningoutcomesassessment.org and in particular the transparency framework, accessed 15 October 2015

⁵ For a useful and very well-referenced discussion about SMART principles in general and the link with learning outcomes in particular see: K. Blaine Lawlor and Martin J. Hornyak, *Smart goals: how the*

incarnations it is normally taken to stand for Specific, Measurable, Appropriate, Relevant and Timely (or time-bound).

We maintain that both module/programme outcomes and assessment tasks should be SMART. What does this mean in practice? A range of pertinent questions arise:

- Having set clear learning outcomes, do the means used for assessing whether they have been achieved relate specifically to each of the relevant outcomes?
- Are the outcomes and is the assessment regime fitting in terms of the level of the student's study, the juncture at which the outcome is expected to be achieved and when the assessment is to be carried out?
- Are the outcomes and means of assessment likely to be perceived by the tutor and student as applicable to the relevant study?
- Can the outcomes and assessment be logistically fitted into the period of study and any assessment slot that may follow it?
- Does the whole have credibility for tutor and learner? In other words is there 'buy-in' or ownership by all concerned?⁶

The third point concerns feedback – an essential component and potential complication in any form of learning and teaching. This too can be dealt with, in part, under the SMART umbrella. Whether or not the students receive marks or grades we suggest that feedback is, unless we are concerned only with the immediate demonstration of competency (such as a driving test), a vital component

application of smart goals can contribute to achievement of student learning outcomes, Developments in Business Simulation and Experiential Learning, volume 39, 259, 2012

⁶ For a very clear explanation of the importance of shared ownership between learner and teacher (albeit in a school context) see: Cheryl A Jones, *Assessment for learning*, Learning and Skills Development Agency, 2005, and in particular pp 7-8

of the learning process.⁷ It is sometimes suggested, implicitly at times, that feedback itself is formative assessment whereas the allocation of a number or letter is summative.⁸ We dispute this. Feedback without a mark or grade, be it oral, written and provided by self, tutors and/or peers may be taken to mean 'formative' assessment. Typically end of module/course/programme assessment, where students receive their results, coupled possibly with inter-year ranking, is termed 'summative'. In our view however there is no reason why assessment cannot serve both purposes at the same time and indeed, unless we are solely measuring competence at a defined moment in time, there is every reason why it should.⁹ The 'us' and the 'them' are likely to find the formative/summative assessment hybrid has most value when used for the dual purpose of measuring performance and enhancing learning whereas the 'others', notably regulators and perhaps the wider public interested in the quality of what is emanating from our universities and colleges, may be more interested in a demonstration of competency at the point of exit from or entry to the various stages of the professional education progression

7 See also: Harrison, C. J., Könings, K. D., Molyneux, A., Schuwirth, L. W., Wass, V., & van der Vleuten, C. P. (2013). Web-based feedback after summative assessment: how do students engage?. *Medical education*, 47(7), 734-744.

8 For a discussion of the relationship between formative and summative assessment see: Kay Burke, *Balanced assessment: from formative to summative*, Solution Tree Press, 2010 and M. Taras, *Summative assessment: the missing link for formative assessment*, *Journal of Further and Higher education*, Vol. 33, 2009, 1

9 See also: Van der Vleuten, C. P. M., Schuwirth, L. W. T., Driessen, E. W., Dijkstra, J., Tigelaar, D., Baartman, L. K. J., & van Tartwijk, J. (2012). A model for programmatic assessment fit for purpose. *Medical Teacher*, 34(3), 205-214.

map. Passing a bar examination as required in many countries, (notably US states) and possibly to become the norm in the UK, is an example of such.¹⁰

The importance and value of assessment from both formative and summative perspectives is stressed by a number of writers and the desirability of a balance (or at least extensive use of both to enhance learning) is powerfully made by Sambell *et al.*¹¹

Our final comment under these basic principles concerns the means by which assessment is carried out. For tutors and students this normally takes one or more of the following forms: written examinations (seen or unseen; open or closed book), course work (essays and other written tasks), oral presentations – including reports, role-play and the *viva voce* (although in our experience these are means that are largely under-used in legal education outside perhaps of clinical skills and overtly vocational courses), portfolios (ranging from collections of students' work to reflective submissions), entry and exit questionnaires and attendance/class contribution. One developing area of practice is the use of on-line tools for assessment, which we would suggest certainly have their place in a clinical context.

¹⁰ The most recent consultative document by the solicitors' regulator in the UK, the SRA, suggests that testing competency at the point of admission may well be required in future. (Training for Tomorrow: A Competence Statement for Solicitors, 2014 – we are awaiting the outcome of this consultative process). At the time of writing it is unclear if the barristers' regulator, the BSB, will require a similar provision. The BSB already has centralised examination components for the relevant vocational course (the Bar Professional Training Course or BPTC). For admission into legal practice in the UK there are currently a series of hurdles starting with undergraduate qualifications and progressing through a required vocational course and finishing with the completion of an apprenticeship although this, too, is under review.

¹¹ Kay Sambell, Liz McDowell and Catherine Montgomery, *Assessment for learning in higher education*, Routledge, 2013, 32-48

A fuller picture of the means by which assessment can be carried out is usefully listed elsewhere.¹²

It is entirely justifiable in our view that, providing the means by which assessment is carried out are clearly articulated and aligned with learning outcomes, then any or all of the means listed or referred to above may have their place. Clearly some may be more appropriate than others, given context, and in a clinical setting, for example, it is unusual to have a written examination. That said each format for assessment may be appropriate and the combination used in any particular module or programme should surely be structured to both best assess the level of performance and to provide students with the opportunity of maximising their learning opportunities (and end result capacity)?

As indicated above the often intimate confines of experiential work, where students may be exposed to regular and frequent tutor contact and on-going feedback lends itself to particular assessment forms. This is explored below.

THE COMPLICATIONS

So far so good. The basics outlined above are, we think, clear and applicable across a range of learning situations, experiential and otherwise.

Let us now turn to learning in an experiential clinical setting. First, some definitions:

¹² See: Sue Bloxham and Pete Boyd, *Developing effective assessment in higher education*, OUP, 2007, 205

As suggested already, by experiential we mean exposing students to learning and teaching situations where they are expected to apply theory to practice in some guise. This may be through role-play, through simulated case studies or, as we focus on below, in 'live-client' work. This exposure provides both an opportunity to experience the application of knowledge and (depending on outcomes set) related skills and values and to deconstruct and reflect upon the experience gained.¹³

We use the word 'clinic' or 'clinical' at various junctures in this paper. Here we mean the use of real or realistic situations where students engage in legal casework or address and analyse legal issues based on the exposure to such. This inevitably means that the learning is experiential but can be distinguished from the generic term in that clinic, in its various forms, involves both the experience and a structured facility for reflection and (possibly) re-application. The clinical models in which this learning can take place are well documented elsewhere and range from simulation through legal advice and representation to campaigning work and legal literacy programmes.¹⁴

One final defining term relates to the importance of the compliance of all parties with professional standards within clinical legal education. By professional

¹³ For a discussion of the role of learning and teaching through simulation see: Caroline Stevens, Richard Grimes and Edward Phillips *Legal education: Simulation in theory and practice*, Ashgate, 2014 and for the live-client dimension see: Hugh Brayne, Nigel Duncan and Richard Grimes, *Clinical legal education: active learning in your law school*, Blackstone Press, 1998

¹⁴ The models of clinic are set out and analysed in: Kevin Kerrigan and Victoria Murray (Eds), *A student guide to clinical legal education and pro bono*, Palgrave Macmillan, 2011 and for a more international view see: Frank S Bloch, *The Global Clinical Movement: educating lawyers for social justice*, Oxford University Press, 2011

standards we mean the knowledge of (and more importantly the practice and application of) concepts such as conflicts of interest, client confidentiality and professional values. It also includes procedural matters such as keeping client files in order and working with deadlines. For the 'us' this is for our own professional credibility and to satisfy the compliance requirements of the 'others'. For the students this is an important aspect of their learning in relation to professional standards and professional values, and it compliments other parts of the curriculum where these issues are taught often in the abstract.

The first complication comes with the reflective nature of experiential learning. Kolb's well-known (if much critiqued) learning cycle sums up the process well, even if it may not be as simple as the graphics Kolb uses suggest.¹⁵ If students are in a state of constant or at least regular application, abstraction and re-application and much of this involves using teaching staff and co-students as sounding boards, whose work in the end is being assessed? In some ways those who suggest that clinic is problematic because of the influence of tutors in the students' final products are perhaps being disingenuous as would they fail to respond to a student enquiry at the end of a lecture or seminar on the basis that it may skew what the student

¹⁵ A new edition of Kolb's book – David Kolb, *Experiential learning: experience as the source of learning and development*, Pearson Education, 2014 – has recently been published in which he helpfully addresses the criticisms levelled against the initial iteration that the original theory was rather one-dimensional.

eventually produces in the exam room or in an essay?¹⁶ Presumably not. The 'us' amongst readers surely intend to assist students and influence, in terms of the progression of their learning, their understanding, assessed or otherwise. On the other hand the extent of tutor input in most clinical settings is often extensive and therefore, understandably, open to suggestions of significant impact on the students – out of alignment with contact that those students (and importantly others without such exposure) may have in the rest of their studies.

This clearly raises a subjectivity issue, one that in fairness runs through the world of assessment and can only be answered satisfactorily when considering the individual assessment regime and any related moderation processes – see below.

The next challenge is associated with the teaching environment – one where the role of the student group is often to the fore. Where students work intensively with each other as a structured part of the programme how do the assessors determine who is responsible for what work that has been done? Also, should assessment reflect the group's input or that of the individual?

Of course the simple answer is to be found by asking and answering: what are the learning outcomes? If effective group work is one of them is the evidence of performance how well the group functions and, if so, therefore should all members share in the same level of relative success?

¹⁶ Lest it be thought that our own, admitted, enthusiasm for experiential learning blinds us criticism see a powerful critique of the notion and practice of clinical legal education in Robert J Condlin, *Tastes great, less filling: the law school clinic and political critique*, *Journal of Legal Education*, 36 (1), 1986, 45

The final difficulty here is the fact, in live-client clinical work at least, that students will inevitably have different clients with different problems. If we are assessing how they perform does the varying experience make a difference in terms of validity and reliability?

To bring some of these issues together let us take an example...

Imagine a law school clinic where students operate in groups (or as it is often termed 'firms'). Group 1 under this model has an interview with an emotionally upset client in a sensitive family law case. The interview lasts over an hour and litigation looks to be a likely course of future action. The client has never been to court before and she is very uncertain of the process and anxious about the consequences. The students work particularly hard to extract the case details and to reassure the client.

By contrast Group 2 have a client who is seeking advice on a small business set up. She is relatively experienced in matters commercial and brings to the interview a set of papers and questions she feels she needs assistance with. The interview is over in under half an hour and the students feel they were provided with most of the information they needed without detailed questioning of what turned out to be a very informed and at ease client.

The fictional (but we suggest, realistic) module that both sets of students are taking here is credit-bearing. What is the significance of their differing experiences? Of course the answer depends primarily on what learning outcomes have been set – is

interviewing competence being 'tested'; is it the professionalism of the students in client-care up for examination; or, is the interview merely a vehicle for other outcomes such as applied legal research, subsequent drafting skills or a critique of the adequacy of the law in relation to client/societal needs? The module involved may, of course, have a combination of learning outcomes to be achieved covering a mix of legal knowledge, lawyering skills and/or professional values, personal attributes and broader ethical concerns.

In terms of purely formative assessment (in the sense of assessing their work with the sole purpose of enhancing learning – typically through oral or written feedback) the difference is probably very slight. Yes, the experience has been different but through probing a tutor could establish what happened, what could have happened (for example by asking 'what if your client had been less responsive or more confident?'), what might be done differently next time and what the wider implications are in terms of shaping policy and possible law reform?

When it comes to allocating marks or grades in a more traditional summative assessment model the situation could be very different especially if the nature and extent of the interviewing experience affects the opportunity for the student to meet the established assessment criteria. So how can these potentially significant challenges be addressed to ensure, so far as is possible, Van Der Vleuten's call for validity, reliability and impact?

A MODEL FOR EXPERIENTIAL ASSESSMENT

We suggest, based on the literature (albeit primarily in a non-legal education context) and from personal experience in hands-on learning situations, that particular forms of assessment have a certain resonance in experiential learning in general and in 'clinic'. In particular we consider that these are the learning portfolio, tasks based on simulation, oral examinations (*viva voce*) and the on-line assessment of the appreciation of applicable professional standards.

Whatever form of assessment is used the charge of subjectivity raised above needs to be addressed. We suggest that this is done through a robust moderation process – both in-house and externally. Let us now turn to these identified assessments' formats:

The learning portfolio

By 'learning portfolio' we mean a document produced by a student that catalogues the key elements of their learning experience and which includes reflective content. This latter point is what differentiates a learning portfolio in experiential learning from a portfolio produced in other subjects, most notably art; that is a collection of student generated work. The use of learning portfolios in clinical legal education is not a new idea, and there are an increasing number of resources available to help the 'us' to guide the 'them' in how to document and evidence their learning

experience.¹⁷ We do not intend to replicate any of the 'how to' guidance here. Our focus here is on the 'why'.

From our day-to-day interactions with students in clinic it is clear that for the majority of them it is a transformative experience. In all stages of the process, from evaluating the basic case, to preparing for interview, identifying the clients' needs, researching the legal issues, drafting the letter - and beyond - the students readily articulate in conversation that they have learning from the experience. The learning portfolio as an assessment task is a way for the students to capture and express the extent of this learning and receive credit (either formal or not) for the way they articulate this developmental process.

There is scope for a learning portfolio to demonstrate whatever aspects of the experience is required by the learning outcomes and the assessment framework. We would suggest that the scope of the content can be very broad, for example it can include discussion on the types of cases undertaken, the substantive law, the procedural rules, the legal skills involved and the professional and ethical issues encountered. The reason the content can be so broad, is that the assessment is of the students' reflection on their experience, rather than the actual experience itself. The experience is therefore a vehicle for the reflection.

¹⁷ For useful guidance on the use of reflective portfolios see the work of Moon, most notably, Jennifer Moon, *Learning Journals: a handbook for reflective practice and professional development*, Routledge, 2006

How to facilitate reflective practice is another topic in itself and that will not be explored here. It is however widely accepted that reflection is an important component of experiential learning and comprehensive guidance can be found elsewhere.¹⁸ The discussion here is on why the reflective element of a learning portfolio is of such benefit to students in a clinical context, and for this we can link back to the example set out above.

In the Group 1 example, the firm has had a particularly rich, if demanding, experience in terms of the skill of interviewing, and in their need to understand and explain the substantive and procedural rules of family law. However, even within the firm possibly only two or three of the students will have conducted the interview and not all of the students might have undertaken the consequent research or drafting required. Where a learning portfolio is an assessment item this lack of equivalence is of limited concern as it is for the students to decide which aspects of their experience they focus upon within their critical analysis of that experience and the framework set by the outcomes expected and assessment tasks set.

The rationale for the use of learning portfolios is even stronger when you consider the Group 2 example. Although on the face of it their experience of clinic has been less intense and possibly 'poorer' as a result, there is still a wealth of material they can explore within the learning portfolio. For example, they could critique the relationship between a client and a lawyer, or reflect upon any shortcomings in the

¹⁸ See for example, Anne Brockbank and Ian McGill, *Facilitating reflective learning in Higher Education* OUP 2007

law in relation to setting up small businesses. The flexibility of the learning portfolio as an assessment item ensures that it is the quality of the reflection on the experience is of more importance than the experience itself. The students could also reflect on the 'what if', for example where a client may not have been so forthcoming. This all sounds great for 'them', but how about 'us' and the 'others'?

For 'us', we (as academics and legal practitioners in an institution driven by problem-based learning and where assessment is dominated by reflective submissions) initially found the marking of learning portfolios particularly problematic. How is it possible to mark fairly the submission from a Group 1 student and the submission from a Group 2 student when they are so different in content and where we are working with prescribed marking criteria? We have found our way through this by the adoption of a range of techniques. For example we give clear instructions about the task in a group plenary at the beginning of clinic where we make explicit the link between the assessment tasks and the learning outcomes. We also provide ongoing feedback in our conversations with students, and actively encourage them to create a personal reflective journal or diary during their time in clinic. Finally, and perhaps most importantly, we utilise a robust moderation process in an attempt to try and eliminate the inherently subjective nature of the assessment of reflective writing. Here two of 'us' independently mark submissions and an

external examiner reviews a sample of work across the marking spectrum together with the feedback given to the students concerned.¹⁹

What is the view of the 'others' on learning portfolios and reflective writing? In other disciplines, most notably medicine and social work, such assessments are highly valued but this does not seem to play out in legal education. It is perhaps inevitable that regulators, the profession, other employers and the wider public are more concerned with demonstrations of competence rather than the production of an erudite 'academic' treatise. This is an area where we have a role in changing the perceptions of the 'others' by evidencing the impact of reflective practice in the students' ability to obtain the requisite competence. This is a work in progress. For those (apart from us) interested in developing thoughts around experiential learning and competency, Miller's work on measuring competency may be helpful in shaping assessment policy.²⁰

Tasks based on simulation

As we have identified above, live-client clinics do not necessarily provide students with equivalence of experience. This can be problematic if you have learning outcomes that require students to, say, demonstrate legal knowledge. One useful

¹⁹ Something similar has been proposed, using strategies from qualitative research. See: Driessen, E., Van Der Vleuten, C., Schuwirth, L., Van Tartwijk, J., & Vermunt, J. D. H. M. (2005). *The use of qualitative research criteria for portfolio assessment as an alternative to reliability evaluation: a case study*. *Medical Education*, 39(2), 214-220.

²⁰ Miller GE. *The assessment of clinical skills/competence/performance*. *Acad Med*1990, 65

way to assess students that is designed to mitigate against this problem is a task based on simulation.

Simulation is well used in experiential learning and, for many providers of clinical legal education, simulated clients are the only clients the students encounter.²¹ Our position is that there is space for tasks based on simulation even when working in a live-client environment. The use of simulation can help to minimise the three key complications referred to above and is, in any event, valuable preparation for handling real clients and the related casework at some later stage.

The first complication we have raised is the influence of tutors in the students' final products in clinic, which is most likely to be a letter of advice to a client. For the 'us' amongst the readers, we know all too well that the level of personal input into advice letters varies widely between types of cases, and the ability or effort levels of student groups. The second complication links to the first and is based on the important place of group work within experiential learning. The third of our complications is lack of equivalence. If a clinic assessment was based on the 'real' letter of advice to the client it would be very difficult to evaluate the impact of the supervisor's involvement, or attribute marks in accordance with contribution. It would also be unfair on students who had been allocated particularly easy or difficult live-client cases.

²¹ The use of the 'standardised client' as a vehicle for simulated clinical work in a legal context is discussed at length in Adrian Evans, *Assessing Lawyers' ethics: a practitioner's guide*, Cambridge University Press, 2011 and in Paul Maharg, *Transforming legal education: learning and teaching the law in the early Twenty First Century*, Ashgate Publishing, 2007

An assessment item based on a simulated client is a way around these complications. All of the students in a clinic cohort can be given the same client instructions, the same fact pattern, the same precedent documents and the same time limits. If the task is presented to students after they have completed their live-client cases it can be treated as the final case, and given the same level of focus and attention as the real clients. The students can then use their real life experience to inform them when they carry out the simulation-based assessment task. Simulation can, of course, stand alone as a means of teaching and learning as well as assessment. We suggest however that linking the real and the simulated provides rich material for learning and helpful assessment opportunities.²²

The 'others', in this case University employers, may question the legitimacy of this assessment item and the potential for collusion between students, as the final advice letters can be near identical in both style and content. We maintain that this is not a problem as we actively encourage students to work together in preparing the advice for this client as they would for a live client. As with all experiential learning, the learning is in the doing – in this case legal research and drafting. The final letter (and possibly underpinning research findings) is merely the evidence of this process and it is assessed accordingly, subject to the usual rules to preserve academic integrity.

²² For a more detailed discussion of the opportunities provided by effective simulation see: Caroline Strevens et al (op cit) and in particular chapters 1 (Paul Maharg and Emma Nicol, *Simulation and technology in legal education*, 17) - a meta analysis and chapter 4 (Susan Marsnik, *Setting the stage: using simulation as a first day of class exercise*, 87) – for an overview of what is needed for simulation to work well.

Oral examinations

The third in our suggested package of assessment is the group oral examination (*viva voce*). At undergraduate level this is an innovative and unusual assessment in clinic but, if module feedback is anything to go by, popular with students in the clinic. As set out above, group work is an important element of experiential learning and most students in clinic would be expected to work as part of a group. Groups are responsible for the allocation of tasks and work together to create outputs, such as client advice letters. As so much of the learning in clinic takes place in groups we believe that this dynamic should be recognised in assessment. In our example the assessment is conducted as a group conversation, with individual marks being given to each of the participants.

When most people hear the expression '*viva*' they think of an individual oral assessment such as the final element of a doctoral programme. It evokes images of an intimidating and unbalanced dialogue between the expert and the novice. As such, the use of individual oral assessments is not without its critics. To use the terminology from Van der Vleuten above, there are questions about its validity as there is the potential for variation in content and emphasis and possible misalignment of outcomes and assessment tasks. There are also studies setting out its low reliability in that the individual examiner's active participation in the examination can introduce bias. The effect of this is that each candidate may actually

undertake a different assessment.²³ Studies have also found evidence that the assessment tends to be more of a candidate's personality than their knowledge, and that the assessment is at a low taxonomic level in that it is a test of recall, rather than analysis.²⁴

We are very mindful of these criticisms, but believe that the use of a group, as compared with an individual, *viva* goes some way to mitigate against the shortcomings of the individual *viva*. For example, we address the validity concern by giving clear instructions about what will be assessed in the *viva*, and aligning the questions asked in the *viva* with the learning outcomes. The reliability concern can be countered by the presence of two or more assessors, at least four students (to provide the group dynamic) and video recording equipment in every assessment.

Including a group oral examination within the assessment package of a credited clinic module is not without its problems. Colleagues (and students) have flagged up concerns such as the potentially negative influence of particularly dominant or reserved participants, resourcing issues such as the over-dependency on specific staff members, and the potentially intimidating effect of an unfamiliar assessment format. The biggest issue for the university level 'others' is measurability. For example, are assessors grading by comparison, or on the merits of an individual?

²³ For a useful discussion on oral assessment in higher education see Gordon Joughlin, *Dimensions of Oral Assessment* *Assessment & Evaluation in Higher Education*, 23(4), 1998, 367-378.

²⁴ For a brief overview of the research on oral examination in medical education see Margery H. Davis & Indika Karunathilake *The place of the oral examination in today's assessment systems* *Medical Teacher* 27(4), 2005, 294-297

Our experience of conducting group *vivas* certainly proves that the positives outweigh the negatives, and we continue to be strong advocates of the academic benefit of creating a natural style conversation to assess students learning. As with the learning portfolio, we believe that a group *viva* could be used to capture and discuss a wide variety of clinical experiences. Within our package of assessments, we have decided to focus on the students' understanding of the nature and extent of the skills necessary to be an effective lawyer.

To give a flavour of how this might play out, we can return to the Group 1 firm set out above and explain what would happen in an oral assessment. For the purposes of this illustration the learning outcome on which assessment is based here is the extent of the students' appreciation of the range and nature of skills used by lawyers in carrying out their work for clients.

Following the formalities of explaining the format and setting up the recording equipment, one of the assessors asks an opening question such as "what are the principal considerations a legal adviser must take into account to ensure effective communication with whoever he or she has to deal with during the progress and management of a case?" In our experience this quickly turns into a conversation about the experiences the students have had, with relevant issues such as interview skills, legal and factual research and letter drafting discussed within the context of the client cases. The assessors ensure that all students are involved in the conversation by asking direct or follow-on questions. In most instances one or both

of the assessors are familiar with the case under discussion and can make reference to specific learning events to facilitate greater reflective or analytical discussion.

Depending on the responses given the assessors can drill down into the depths of a student's knowledge and understanding including their familiarity with the relevant published literature.

During the assessment the assessors have a sequence of suggested questions that can be asked, but there is no prescribed format or order for these. The initial question is merely the trigger for discussion, and we try and keep naturally evolving conversations going. For example, it is not uncommon for students to start asking each other questions, or comparing their reflections on particular events with very little assessor involvement. One of the most refreshing aspects about this assessment is its authenticity – plagiarism or other academic misconduct is not possible, and there is less room for 'retro-fitted' (or even worse falsely fabricated) and hence unreliable evidence as is sometimes apparent in reflective writing.²⁵

The assessment can be timetabled for longer than is needed so the conversation usually ends when the assessors indicate that they now have sufficient evidence upon which to determine marks/grades. Students may be given a final opportunity to add anything else that they think the assessors should hear. Feedback can then be given either orally (although the conversation will probably have produced feedback

²⁵ See for example S. Wellard and E. Bethune, *Reflective journal writing in nurse education: whose interests does it serve?*, *Journal of Advanced Nursing*, 24 (5), 1077-1082

during the discourse in exchanges between students and assessors) or provided after the event. The assessors need to maintain notes on each student's contributions during the *viva* and/or can rely on the recording that has been made.

On occasion, time permitting, the conclusion of the formalities has led to a further unassessed conversation about the clinical legal education more generally as most clinical programmes encourage dialogue and constructive critique.

Once the students have gone, the assessors then discuss the assessment and collectively allocate individual assessment marks then, or at some later stage.

The organisation and conduct of the *viva* is admittedly time-consuming. The flip side of this is that the assessment is over and done with (possibly including feedback) in one sitting. Evidence (based on student feedback – oral and in exit questionnaires) suggests that the assessment experience is viewed positively by all concerned.

This may be an example of the classic case of less being more in terms of the assessment input/output discussion.

On-line assessment of professional standards

Experiential learning has, at least until relatively recently, been predominantly face to face. There are many reasons for this and we are in no way advocating a radical overhaul of the community aspect that makes clinic so enjoyable, but it is inevitable and perhaps sensible with the advance of technology to harness the learning potential presented.

There are a number of technology-based initiatives that could be mentioned here ranging from the use of recorded material which students can watch and comment on, to virtual, simulated and interactive case studies.²⁶ It follows that if use can be made of the computer and internet to provide the source material for learning and teaching than this can also be turned into the means of assessing student (and other) performance and engagement with all aspects of their learning in clinic.

We want to provide what we think is a useful, if relatively unsophisticated, example of using e-technology for the assessment of one important aspect of clinical legal education. We have found that one of the key challenges in live-client work is ensuring that the required professional standards are met. Most, if not all, clinical programmes dealing with real clients will have some form of induction and training programme usually carried out in advance of the module or programme commencing. This explains to all concerned what is necessary to make the clinic run effectively and ensure compliance with professional standards. In our experience starting the first session by giving the students a hefty handbook and a set of rules can lead to many students being less than inspired, and can run the risk of the students starting the first interviews without knowing these important points as they have not had time to digest them.

²⁶ A useful introduction to the use of e-technology in law schools in general and clinic in particular, focusing on the SimPLE e-learning platform can be found in Wilson Chow and Firew Tiba, *Professional legal education reviews: too many 'what's, too few 'how's*, *European Journal of Law and Technology* 4 (1), 2013

One way of encouraging the students to take this seriously and to focus on the content is to assess their understanding. This could, of course, be done in a number of ways. We suggest that a simple and effective method is to introduce a multiple-choice test that the students complete on-line. This can address the relevant general rules of professional conduct as well as the operation of the specific clinic. In our example there are 10 questions (some with sub-sections) that look at issues such as conflicts of interest, client confidentiality and the supervisory arrangements within our clinic. In our particular example students can take the assessment a number of times until they achieve the 100% success rate required. The clinical staff can see, on-line, who has done and completed the test and the students are told they cannot progress to seeing clients until they have passed. Other than the design of the exercise the resource input for the institution is minimal and the outcome at least shows that the students have had to consider key issues underpinned by the induction, training and feedback that they receive prior to and after the test is completed. Although this is most obviously a summative piece of assessment with no or limited feedback we believe it adds to the overall learning experience through increasing familiarity with operational and professional rules. The submission could be marked/graded but we feel that its real value is in focusing the students' mind on how they need to work in the clinic. We therefore make the jumping of this assessment hurdle a pre-requisite to module participation rather than a credit-bearing component of the whole.

ASSESSING OURSELVES

Having considered a range of different ways to assess 'them' one final point we would like to address is the assessment of 'us'. How do we evaluate our own contribution to experiential learning, and who are we evaluating this for? This topic is so rich that it could be the focus of another paper, but suffice to say here that an awareness of what we aim to achieve, what regulatory provisions we must satisfy and how we might improve what we do to enhance learning are crucial to curriculum design and review.

In the clinic, where real clients are concerned, one measure of assessment is our compliance with professional standards. The operation rules should provide the framework and these need to be monitored to make sure that any relevant changes to professional practice are taken into account and disseminated to everybody working in the environment.

Another area of assessment is the requirement to meet the quality assurance demands of our respective institutions – be that a university teaching or planning committee, a faculty board or the eagle eye of a sceptical dean. For example the

decisions we make on the assessment of students on credited modules will be subject to this institutional scrutiny.

The student perspective is, of course, vital too and this may be garnered through exit questionnaires, other forms of module or programme feedback and, in the UK context, the National Student Survey. Whilst many may doubt the true value of the latter²⁷, our institutions take the results seriously indeed, especially as it leads to the ubiquitous league tables, by university and subject area, and therefore a ranking through which public perception is influenced.²⁸

Whatever one's views on the content, the principle of on-going evaluation from a range of stakeholder perspectives is important if the intention is to oversee and, as necessary, fine-tune provision to extract the maximum learning potential. For us this requires a process of near continuous assessment and reflection of what we are doing in clinic and what we hope to achieve.

CONCLUSIONS

²⁷ Might, for example the student take on the quality of teaching provision be used at some point to inform pay awards and/or promotion?

²⁸ For those especially interested the findings of the NSS can be seen at: www.hefce.ac.uk (accessed 2 November 2015)

There is an old saying: 'pigs don't get fat by being weighed'²⁹ As true as this adage might be pigs may stand a better chance of weight enhancement (if that is a good thing!) if we know what pigs weigh now as we can then decide what steps to take to provide any desired addition.

We have suggested in this paper that assessment is a key component to aiding learning, in part as a measuring point in the educational continuum and partly to provide feedback on how improvement can be made. Whilst many of the points we make are equally relevant to all forms of educational delivery, in the context of experiential learning certain forms of assessment lend themselves to the educational process. We have explored the creation of a package of assessment types to best serve the interests and requirements of 'us', 'them' and the 'others'. We do not consider this to be a definitive or perfect package, but we suggest that it goes some way to address some of the complications that are inherent in the assessment of learning in general and experiential learning in particular.

Some of us may wish that we could break away from the minutiae of summative assessment. Is a script really worth 54 or 57%? More significantly, at least in a UK context, is it 69 or 70%? Would a move towards a pass/fail system better facilitate learning so that less emphasis is placed on marks and grades and more on what is learnt and improving performance and understanding? In our obviously

²⁹ For an interesting discussion and slightly contrary view see: www.societyforqualityeducation.org/index.php/blog/weighing-a-pig-does-fatten-it (accessed 1 November 2015)

competitive world should the differentiation between the students who excel and those who do not do so convincingly, be done by personal references or other form of commendation instead?

We leave the discussion by re-stating the questions we set out at the start:

- Having set clear learning outcomes, do the means used for assessing whether they have been achieved relate specifically to each of the relevant outcomes?
- Are the outcomes and is the assessment regime fitting in terms of the level of the student's study, the juncture at which the outcome is expected to be achieved and when the assessment is to be carried out?
- Are the outcomes and means of assessment likely to be perceived by the tutor and student as applicable to the relevant study?
- Can the outcomes and assessment be logistically fitted into the period of study and any assessment slot that may follow it?
- Does the whole have credibility for tutor and learner? In other words is there 'buy-in' or ownership by all concerned?

We have suggested some answers to these questions for further consideration, and in the hope that less attention may eventually be spent on taking assessments and more on learning from them.

'Pigs are not fattened by being weighed' – so why assess clinic- and can we defend our methods?

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For those clinics that assess their students, there can be a panoply of issues to consider. The nature of clinic means that the experience of students is non-standardised, not least in terms of workload. Is it appropriate to assess such an experience? How can clinical teachers be sure that their assessment methods are valid and reliable?

WHY ASSESS IN CLINIC?

Perhaps because teaching and participating in a clinical experience can take such a wide variety of forms, the approaches to assessment have been similarly diverse. Many law schools have students involved in a range of pro bono activities, the majority of which will not be assessed. According to the LawWorks Law School Pro Bono and Clinic Report 2014,² of those law schools that responded to the survey, 96% do pro bono work. This report suggests that (in the UK at least) clinics are increasingly becoming assessed as a credit bearing part of the curriculum and whereas previously only 10% of law schools in 2010 assessed student performance,

¹ Carol Boothby is Director of the Student Law Office at Northumbria University

² Carney, F. Dignan, R. Grimes, G. Kelly, G and R. Parker, "The LawWorks Law School Pro Bono and Clinic Report 2014", LexisNexis.

today this total is around 25% - relatively low, but apparently increasing, perhaps as clinics move from extra to intra curricular.³

Views diverge on the value of assessing clinic, as well as how to do so. In terms of the views of students, recent work by Combe indicates a minority (40%) responded negatively to the question “would you feel comfortable being assessed on law clinic work?”, suggesting that the majority were ‘either perfectly happy or indifferent to the prospect of assessment’.⁴ Brustin and Chavkin also found that the “overwhelming majority of the students believed that clinical courses should be available on a graded basis”, one student commenting that ‘grading permits rewarding those who make greater effort and excel...’.⁵ Other writers do not challenge assessment per se, but challenge the idea of grading. Rice argues that;

‘Grading undermines the collaborative role of the clinical teacher. This is not a journey where we arm students with a map and compass drop them in the wilderness, and give a prize to the first one home. This is a journey we travel with them, clearing the path ahead, holding back to

3 See D. Nicolson, “Legal Education or Community Service? The Extra-Curricular Student Law Clinic” [2006] 3 *Web Journal of Current Legal Issues* at <http://www.bailii.org/uk/other/journals/WebJCLI/2006/issue3/nicolson3.html> and subsequent exploration of the challenge of bringing clinic within the curriculum; D. Nicolson, “Calling, Character and Clinical Legal Education: Inculcating a Love for Justice from Cradle to Grave” (2013) 16(1) *Legal Ethics* 36. Also M. M. Combe (2014) “Selling intra-curricular clinical legal education” , *The Law Teacher*, 48:3, 281-295.

4 Combe, *supra* n. 2, at p. 292

5 Stacy L. Brustin and David F. Chavkin, “Testing the Grades: Evaluating Grading Models in Clinical Legal Education” (1997) 3 *Clinical Law Review* 299, p. 316.

let them go ahead, offering them a steady hand, coaxing them on narrow bridges over deep ravines, exhorting them to climb steep hillsides... grading distracts us from our teaching'.⁶

Hyams disagrees, seeing the reluctance to grade as 'an evasion of our duty to our students'⁷and Levine sees pass /fail as not providing enough feedback to enable improvement.⁸

Nelson and Murray, reviewing the move to the use of grade descriptors at the clinic here at Northumbria Student Law Office , also challenge the case for pass/fail in clinic, arguing that grading recognises the efforts displayed by students and it motivates them to achieve. ⁹

Perhaps the idea that grading distracts from teaching is more likely where the assessment is summative in nature. Where supervisors are providing ongoing formative feedback, and where the method of assessment is fully aligned with the clinical work, assessment can drive learning. From the clinical supervisor's point of view, one reason for assessing and grading could be that it isn't enough to simply get students to a 'pass ' level - we are wanting to help students to move along a continuum towards being ' practice ready '- and perhaps for them also to have some awareness of how near or far they are from that. Stuckey's definitive work, *The Best*

⁶ S. Rice, "Assessing - but not grading - clinical legal education", Macquarie Law Working Paper No. 2007 – 16 available to download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1061622 (last accessed 29 October 2015)

⁷ R. Hyams, " Assessing Insight: Grading Reflective Journals in Clinical Legal Education" (2010) 17 *James Cook U. L. Rev.* 25 p. 34.

⁸ M. Levine, "Toward Descriptive Grading" (1970-71) 44 *California Law Review* 696.

⁹ V. Murray and T. Nelson, "Assessment – Are Grade Descriptors the Way Forward? " (2009) 14 *International Journal of Clinical Legal Education* 48, p. 57.

Practices Report, suggests that assessment methods may have more influence on how and what students learn than any other factor.¹⁰ The benefit of assessment in providing information to students is touched on by Foxhoven;

*'Assessment is a powerful tool because law students uniformly desire to be prepared to become competent lawyers, but, being novices in the legal profession, they are unable to identify core competencies themselves.'*¹¹

Like a runner who checks their times and receives advice from their coach in order to improve their performance, students in clinic can (depending on the nature of the clinical experience) use formative assessment feedback to improve their performance. As Brown and Knight argue, 'far from it being the case that you'll not fatten a pig by weighing it... the science of weighing is necessary for the art of development'.¹²

Assessment provides information about student learning – but a stronger claim (according to Brown and Knight) is that assessment shapes the curriculum; 'Assessment defines what students regard as important'.¹³

Coffield et al, in a comprehensive and critical examination of learning styles, refer to the work of Desmedt in finding that, 'because of the curriculum, students are not

¹⁰ R. Stuckey et al. , *"Best Practices for Legal Education: A Vision and a Roadmap "* (USA, Clinical Legal Education Association, 2007) p.266.

¹¹ J. R. Foxhoven, " Beyond Grading: Assessing Student Readiness to Practice Law" (2009) 16 *Clinical Law Review* 335, p. 344

¹² S. Brown and P. Knight, *" Assessing Learners in Higher Education"* (London, Kogan Page, 1994) p. 46

¹³ *Ibid.*, at p. 12.

interested in learning, but in assessment.’¹⁴ This may seem a depressing indictment of students, but surely it is not specific to students, but simply of human nature; if the way in which a race is run is judged on time, then no matter how much we may exhort a particular running style, unless this actually contributes to the goal of ‘best time’, it is likely to be discarded or ignored. For many clinicians in law clinics, particularly those driven by a social justice motive, (as Rice is) there is a risk that, unless the assessment and any grading leads to and measures progress in social justice terms, these aspects are merely a distraction.

SO WHAT IS ‘GOOD’ ASSESSMENT?

Arguably, a crucial factor underpinning all the support for assessing is how useful the assessment actually is *in driving learning*. What do we mean by ‘useful’? Taking forward the point about concerns over validity of assessment, this can be a perplexing area. One field that legal clinicians can (and have) drawn from is the medical profession. The use of problem based learning in the teaching of law has been derived in this way, as was the use of standardised clients and the training used in medicine continues to provide a rich seam of expertise.

Those assessing medical students have puzzled over many of the same issues as legal clinicians. In particular, the work of Van der Vleuten, an academic in the field

¹⁴ F. Coffield et al. “Learning styles and pedagogy in post 16 learning: a systematic and critical review”. The Learning and Skills Research Centre, 2004. <http://hdl.handle.net/1/273> (accessed 29th October 2015)

not of medicine, but of education, led to him becoming the “accidental hero”¹⁵ of medical education, who wanted to discover “promising ways to advance and to prevent repetition of the mistakes of the past in the future”,¹⁶ moving away from high stakes assessment.

In summary, Van der Vleuten uses a conceptual model for confirming the ‘utility’¹⁷ - simply put, the ‘usefulness’ - of an assessment method by using a mathematical model incorporating key aspects such as validity, educational impact, and acceptability. This model can help us to examine what good assessment in clinic might look like, and this is a process which has been started at Northumbria University’s in- house law clinic, the Student Law Office.

ASSESSMENT AT NORTHUMBRIA STUDENT LAW OFFICE

Can the reflective and experiential elements of CLE be codified into assessment rubrics that provide guidance to students (and staff) without reducing their depth and complexity? At Northumbria, the law clinic moved in 2007-8 from criterion-referenced, outcome- focussed assessment to the use of 10 grade descriptors, including a range of skills and attributes from oral communication, written communication, to key skills such as a student’s ability to demonstrate autonomous

¹⁵ L. Pritchard “Cees van der Vleuten - Accidental hero” (2005) *Medical Education* Vol.39, Issue 8 p. 761.

¹⁶ L. W.T Schuwirth and C. van der Vleuten, “Changing education, changing assessment, changing research?” (2004) *Medical Education* Vol 38: p. 805.

¹⁷ C. P M Van der Vleuten and L W T Schuwirth, “Assessing professional competence: from methods to programmes” (2004) *Medical Education* Vol.39, Issue 3, p.309

learning.¹⁸ There is no explicit 'justice' agenda within the clinic curriculum, although it is implicit in many of the activities and experiences. So how is the clinical training and assessment of students linked to the wider discourse of what a lawyer is, and can be? Through the development of reflection and reflective / reflexive practices, students have the opportunity to consider their own development, (see appendix A for assessment matrix). In addition to carrying out casework under supervision, and being assessed on these through the grade descriptors, students are currently required to produce two reflective pieces, 2000 words each, one on the development of their skills, and a second drawn from a list of topics such as 'Law in Action', 'Clinic and my Career', 'Justice and Ethics' and 'Clinic and Legal Education'. These reflections are submitted with the portfolio evidencing their casework, at the end of the module.

If challenged, how could we defend our use of our current form of assessment? Attacks can come from either end of the spectrum- those who see the social justice mission as too important for things like assessment¹⁹ and grading²⁰ to get in the way, and others who worry that the experience of clinic is too non-standard and that this variety of experience needs to be narrowed into a check list of activities. The writer experienced such a challenge from an external examiner, who questioned the variability of the clinic experience, and the lack of control staff or students have over

¹⁸ Murray, *supra* n.7, pp. 48-60.

¹⁹ Nicolson, *supra* n.2.

²⁰ Rice, *supra*, n.5.

this, which provided much food for thought, reflection, and a useful opportunity to critique and justify our existing methods. It brought a realisation that it may not be enough to rely on the mantra of clinic being so good that challenging assessment validity is a heresy. On the other hand, it cannot be that simply because clinic is a non-standard experience, (arguably one of the reasons students engage with it) and because this makes assessment difficult, that we give up either on clinic within the curriculum or assessment of it. Being able to deconstruct and critique clinical methods, including assessment tools, should help to understand our clinical teaching more deeply- and perhaps also to see it from the students' point of view, in terms of alignment and authenticity.

So if non standardisation is one purported challenge to the validity of assessment in clinic, what are the other potential components of validity?

Van der Vleuten's work based on the 'utility model' gives a framework within which to carry out a methodical examination of our use of assessment.

THE UTILITY MODEL

Van der Vleuten uses the idea of 'utility' as a conceptual model, whereby criteria are multiplied together to produce a utility index. Those criteria can include;

1. Validity (does an assessment instrument measure what it purports to?)
2. Reliability (can scores for an assessment be reproduced)
3. Educational impact – the impact of assessment on learning
4. Acceptability to stakeholders/Cost – in terms of resources

He makes 2 further points; that

- Selecting assessment methods involves context-dependent compromises
- Assessment is not a measurement problem but an integrated design problem²¹, made up of educational, implementation and resource aspects.

What was already known was that the usefulness of assessment depends on compromise between various quality parameters, but what Van der Vleuten highlights in his later work is that ;

1. ANY method of assessment may have 'utility', depending on use
2. We need more methods using qualitative information relying on professional judgement, the latter being highly valuable.
3. Assessment is an 'educational design problem'²² that needs a holistic approach.

In terms of reliability, here lies the importance of sampling, by which Van der Vleuten appears to mean that because competence is highly dependent on context or content, we need to use a large sample across the content of the subject to be tested, particularly if there are other potential effects on reliability, such as, in the case of clinic, clients, and single supervisor. This has relevance for assessment at Northumbria SLO, where it could be argued that, through the use of a wide range of grade descriptors, and ongoing assessment, we compensate to some extent for the 'single supervisor' aspect- but is that enough? The Northumbria SLO clinic assessment includes a thorough moderation process, where a sample of each supervisor's marking is examined by a different supervisor. But we do not directly

²¹ Van der Vleuten, *supra* n.17, p.310.

²² Van der Vleuten, *supra* n.18, at p.314.

involve more than one supervisor in the clinic assessment. Further, there is no real link between the practical work, the grade descriptors and the 2 reflective pieces, save that these pieces purport to be a reflection on the clinical experience. In reality, students treat these as an end point assessment, and for many it seems to take until the end of the clinic module for them to grasp what is required. Therefore the use of reflections as part of the clinical assessment is currently being re-examined, and Van der Vleuten's framework has provided a useful structure.

ASSESSING REFLECTIVE PRACTICE

There is widespread use of reflections as a key part of clinic assessment; some clinics incorporate a presentation as well as written work, but no assessment of casework carried out by students.²³ Others are all written but include formative pieces such as a 'critical incident' report.²⁴ All appear to embrace the concept of reflection with gusto, although there have been critiques of the use of reflections.²⁵ In looking to apply Van der Vleuten's work on assessing competence, the area of student reflection is one which has been of concern to clinic staff. In 2013, the writer introduced the reflections matrix (Appendix B) to Northumbria SLO assessment,

²³ J. McNamara, "Validity, Reliability and Educational Impact of Reflective Assessment in Clinical Legal Education", presented at ALT seminar, 4 June 2015, <https://www.northumbria.ac.uk/about-us/academic-departments/northumbria-law-school/law-research/legal-education-and-professional-skills/problematising-assessment-in-clinical-legal-education/> (last accessed 29th October 2015)

²⁴ R. Spencer, "Holding Up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education" (2012) *International Journal of Clinical Legal Education*, No. 18, pp. 181-216, available at SSRN: <http://ssrn.com/abstract=2482873> (last accessed 29th October 2015)

²⁵ J. Tummons, "'It sort of feels uncomfortable': problematising the assessment of reflective practice", (2011) 36:4 *Studies in Higher Education*, pp. 471-483.

providing rubrics to help clinic supervisors in assessing, and feedback from these assessors was generally positive, but other aspects of the way in which reflection was assessed remain the subject of concern, for example, the structure of the reflections as being essay-style pieces, submitted at the end of the module.

Testing our assessment in clinic against the utility model using grid structured questions provides a structure for discussion. As an overview, the grid below can help to summarise Van der Vleuten's approach, and enable a critique of current or proposed assessment practice.

Utility model applied to SLO practical work using grade descriptors			
Element of trustworthiness	Criteria	To what extent is this achieved through current assessment strategy in the Northumbria clinic?	
		<i>high</i>	<i>low</i>
Credibility (internal validity)	Aligned with stage of competency (Miller's triangle)	<i>Complex tasks/requiring mastery of skills, similar to legal practice</i>	
	Authentic integration of competencies at each stage	<i>Good integration of legal skills</i>	<i>Lack of real integration of reflective practice</i>
	Structural coherence within the programme	<i>Grade descriptors align to the skills required for clinical casework</i>	<i>Some coherence and alignment of reflective work, but could be improved</i>
	Prolonged engagement, triangulation and member checking	<i>Good training of assessors (clinic supervisors)</i>	<i>Limited involvement of more than one supervisor(only at moderation)</i>
Transferability (generalizability)	Time sampling	<i>Judgement based on broad sample of data points , repetition of tasks</i>	
	Thick description	<i>Assessors justify decisions in detail</i>	

Dependability (reliability)	Domain or content specificity	<i>Test across content and contexts, over time</i>	
	Awareness of complicating conditions	<i>Awareness of Impact of different clients/case complexity</i>	<i>Actual Impact of different clients/case complexity</i>
	Stepwise replication through sampling	<i>Uses assessors who have credibility</i>	<i>Only one assessor used per students</i>
Confirmability (objectivity)	Review and audit	<i>Detailed moderation process, with marks being sampled – peer review</i>	<i>No real possibility for students to appeal or challenge the assessment decision</i>

For supervisors less familiar with the terminology used by Van der Vleuten, a more user friendly approach asks the question; *‘What would failure to meet/ meeting/ exemplary practice in relation to this criterion look like?’*.

A pilot group using this table plus a brief explanation of Van der Vleuten’s work were able to engage with a valuable critique of our current assessment of reflections. Points raised in relation to the current clinic assessment at the Student Law Office were:

Competency- we would expect students to be able to reflect at a reasonably sophisticated level – but have we provided sufficient previous experience and support to raise their reflective skills to the level of study they were at, which is Masters level (level 7)?

Integration of competencies - the use of end-point essay-style pieces for assessment of reflection separates reflective practice from the ongoing development and mastery of complex legal skills, so that learning and development of competency in reflection

is not perceived by students in the same way as their development of those legal skills. This is reinforced by the contrast between the high level of formative feedback provided for practical casework, and the limited opportunities built in to the assessment for the purposes of reflection.

Structural coherence within the programme- The reflections matrix sets out the way in which the written piece will be marked, but this does not link to or facilitate an ongoing reflective process- and perhaps fails to assess authentic growth in reflective skills. At a programme level, it could be argued that there is little prior preparation for the development of reflective skills.

Prolonged engagement, triangulation and member checking – the current perception of the reflective pieces as ‘end point’ led them to be summative in nature. In reality, students can prepare them during the year, but the only point at which they have the opportunity to gain supervisor feedback is at the mid year appraisal, when students submit a one-page draft. There is little triangulation, in the sense that the reflections are freestanding pieces of writing. The use of a different format such as presentations might provide an opportunity to engage with students directly and assess the level of true understanding and genuine reflection.

CONCLUSIONS

The good news for clinicians is that, as Van der Vleuten says, there is ‘no need to banish from our toolbox assessment instruments that are rather more subjective and not perfectly standardised, on condition that we use them sensibly and expertly. We

can move assessment back to the real world of the workplace as a result of the development of the less standardised but nevertheless reliable methods of practice based assessment'.²⁶

Authenticity is valued, as is the role of professional judgment by those assessing. Tasks should be treated in a holistic rather than reductionist way. We need to 'construct an overall judgment by triangulating information across these sources'²⁷—perhaps something analogous to the way in which judicial judgements are reached. A thoughtful and informed approach to assessment in authentic learning environments such as law clinics should enable this assessment process to be both informative in terms of student development and reliable as a measure of achievement.

²⁶ Van der Vleuten, *supra* n. 18, p. 312.

²⁷ Van der Vleuten, *supra* n. 18, p.313.

Appendix A: Grade descriptor for Student Law Office (The assessment criteria are equally weighted.)

Assessment Criteria	Grade descriptor				
	F(below 50)	2:2 (50-59)	2:1(60-69)	1 st (70-79)	+1 st (80+)
Autonomy and efficiency	Poor initiative shown; routinely relies on supervisor / routinely requires instruction / routinely requires prompting / requires significant correction of work	Fair/reasonable initiative shown, and often relies on supervisor / often requires instruction / often requires prompting / often needs significant correction of work	Good initiative shown but there is some evidence of the following; reliance on supervisor / requirement for instruction / prompting / significant correction of work	Very good initiative shown and there is little evidence of the following; reliance on supervisor / requirement for instruction / prompting / significant correction of work	Excellent/outstanding initiative shown, and the following are extremely rare; reliance on supervisor / requirement for instruction / prompting / significant correction of work; <i>a very high level of trust and responsibility can be given</i>
Knowledge and understanding of the law / legal practice	Poor knowledge and understanding of law / legal practice issues; rarely draws on appropriate prior knowledge or legal principles	Fair/reasonable knowledge and understanding of law / legal practice issues but little thinking across subject disciplines; sometimes draws on appropriate prior knowledge or legal principles	Good knowledge and understanding of law / legal practice issues including thinking across subject disciplines; regularly draws on appropriate prior knowledge or legal principles	Very good knowledge and understanding of law / legal practice issues including thinking across subject disciplines; routinely draws on appropriate prior knowledge or legal principles	Excellent/outstanding knowledge and understanding of law / legal practice issues including thinking across subject disciplines; almost always draws on appropriate prior knowledge or legal principles; <i>stretches supervisor's own understanding</i>
Strength of oral communication skills	Poor oral communication skills indicating enduring difficulties in articulating legal and factual material; regularly fails to plan, listen or adapt to the needs of the audience	Fair/reasonable oral communication skills; sometimes shows strong ability to articulate legal and factual material, plans, listens and adapts to the needs of the audience	Good oral communication skills; regularly shows strong ability to articulate legal and factual material, plans, listens and adapts to the needs of the audience	Very good oral communication skills; routinely shows strong ability to articulate legal and factual material, plans, listens and adapts to the needs of the audience	Excellent/outstanding oral communication skills; almost always shows strong ability to articulate legal and factual material, plans, listens and adapts to the needs of the audience; <i>instils confidence in clients</i>

<p>Strength of written communication skills</p>	<p>Poor written communication skills; rarely shows clarity, precision and accessibility; drafts routinely require significant amendment</p>	<p>Fair/reasonable written communication skills; sometimes shows clarity, precision and accessibility; drafts often require significant amendment</p>	<p>Good written communication skills; regularly shows clarity, precision and accessibility; drafts sometimes require significant amendment</p>	<p>Very good written communication skills; routinely shows clarity, precision and accessibility; drafts rarely require significant amendment</p>	<p>Excellent/outstanding written communication skills; almost always shows clarity, precision and accessibility; drafts very rarely require significant amendment; <i>excellent sentence and paragraph structure displays eloquence</i></p>
<p>Strength of research skills</p>	<p>Poor research skills; rarely shows appropriate depth, detail and comprehensiveness; reports rarely display effective practical awareness and application</p>	<p>Fair/reasonable research skills; sometimes shows appropriate depth, detail and comprehensiveness; report sometimes display effective practical awareness and application</p>	<p>Good research skills; regularly shows appropriate depth, detail and comprehensiveness; reports regularly display effective practical awareness and application</p>	<p>Very good research skills; routinely shows appropriate depth, detail and comprehensiveness; reports routinely display effective practical awareness and application</p>	<p>Excellent/outstanding research skills; routinely shows appropriate depth, detail and comprehensiveness; reports almost always display effective practical awareness and application; <i>research addresses problems holistically</i></p>
<p>Commitment to clients and the Student Law Office</p>	<p>Demonstrates little commitment or enthusiasm for achieving the best solution for clients; rarely puts more than the minimum required to perform tasks; completes insufficient work</p>	<p>Demonstrates some commitment or enthusiasm for achieving the best solution for clients; performs tasks with fair/reasonable diligence; completes sufficient work</p>	<p>Demonstrates a good level of commitment or enthusiasm for achieving the best solution for clients; performs tasks with a high degree of diligence and shows pride in the work; completes sufficient work and shows willingness to help further</p>	<p>Demonstrates a very good level of commitment or enthusiasm for achieving the best solution for clients; performs tasks with a very high degree of diligence and shows pride and zeal for the work; completes sufficient work and actively seeks to help further</p>	<p>Demonstrates an excellent/outstanding level of commitment or enthusiasm for achieving the best solution for clients; performs tasks with an excellent degree of diligence and shows pride and zeal for the work; completes sufficient work and goes the extra mile for clients and the Student Law Office; <i>Supervisor has to work hard to keep up</i></p>

<p>Case management and strategizing</p>	<p>Cases are progressed poorly; very few ideas about cases are offered or are poorly formed and not thought through; there is little or no evidence of proactivity or thinking about the overall strategic direction of clients' cases</p>	<p>Cases are progressed reasonably; some ideas about cases are offered – these are sometimes poorly formed or not thought through; there is some evidence of proactivity or thinking about the overall strategic direction of clients' cases but this tends to be limited and lacking imagination / insight</p>	<p>Cases are progressed effectively; quite a few ideas about cases are offered – these are often well formed and thought through but with inconsistency; there is good evidence of proactivity or thinking about the overall strategic direction of clients' cases with some imagination / insight</p>	<p>Cases are progressed highly effectively; lots of ideas about cases are offered – these are regularly well formed and thought through; there is very good evidence of proactivity and clear thinking about the overall strategic direction of clients' cases with imagination / insight</p>	<p>Cases are progressed excellently; lots of ideas about cases are offered – these are routinely well formed and thought through; there is excellent/outstanding evidence of proactivity or thinking about the overall strategic direction of clients' cases with imagination / insight; <i>routinely thinks "outside the box" which generates creative potential solutions to problems</i></p>
<p>Organisation: time and file management</p>	<p>Displays poor organisational skills; makes little effective attempt to manage time; regularly fails to anticipate how long tasks will take or to plan use of time effectively; late on more than three occasions; files are often disorganised and not up to date; copes poorly under pressure and fails to achieve results when time is of the essence</p>	<p>Displays fair/reasonable organisational skills; makes a real attempt to manage time; sometimes fails to anticipate how long tasks will take or to plan use of time effectively; late up to three occasions; files are reasonably well organised but inconsistent and are sometimes not up to date; struggles under pressure but manages this</p>	<p>Displays good organisational skills; makes a good attempt to manage time; generally anticipates how long tasks will take and plans use of time effectively but with some defects; late up to two occasions; files are well organised and up to date with few significant defects; copes well under pressure</p>	<p>Displays very good organisational skills; makes a very good and sustained attempt to manage time; routinely anticipates how long tasks will take and plans use of time effectively with few defects; late up to one occasion; files are very well organised and up to date with very few significant defects; copes very well under pressure</p>	<p>Displays excellent/outstanding organisational skills; almost always displays excellent time management; almost always anticipates how long tasks will take and plans use of time effectively with no significant defects; never late; files are excellently organised and up to date with no significant defects; <i>organisational skills reveal a calm, unhurried attitude that can easily cope with significant pressure</i></p>

<p>Teamwork skills and contribution to firm meetings</p>	<p>Poor working relationship with Supervisor / partner / peers; ineffective or negligible or disruptive contribution to firm meetings; may sometimes fail to attend firm or other meetings; relies heavily on other people to achieve client goals</p>	<p>Fair/reasonable working relationship with Supervisor / partner / peers; some effort to contribute to firm meetings but mainly reactive / focused on own cases; contributes to achievement of client goals but provides limited support to others and little leadership</p>	<p>Good working relationship with Supervisor / partner / peers; good effort to contribute to firm meetings including discussions of other people's cases and general discussions; contributes to achievement of client goals; provides ideas and support to others and some leadership</p>	<p>Very good working relationship with Supervisor / partner / peers; very good, creative contribution to firm meetings including discussions of other people's cases and general discussions; contributes fully to achievement of client goals; provides ideas and support to others and effective leadership but does not dominate others</p>	<p>Excellent/outstanding working relationship with Supervisor / partner / peers; excellent, creative contribution to firm meetings including discussions of other people's cases and general discussions; contributes fully to achievement of client goals; provides ideas and support to others and strong leadership but does not dominate others; <i>embraces the notion of mutual assistance in clients' best interests</i></p>
<p>Understanding of client care and professional conduct</p>	<p>Displays a poor understanding of professional obligations; fails to take client care procedures seriously or fails to ascertain the appropriate office procedure; commits a significant breach of the Code of Conduct or error of professional judgment</p>	<p>Displays a fair/reasonable understanding of professional obligations; tries to comply with client care procedures but requires significant guidance; follows basic office procedure but is not always fully aware of the significance of this; struggles to articulate the rationale for ethical rules; treats clients well</p>	<p>Displays a good understanding of professional obligations; complies with client care procedures with limited guidance; follows office procedure and is aware of the significance of this; is capable of articulating the rationale for ethical rules; treats clients with care and respect</p>	<p>Displays a very good understanding of professional obligations; complies precisely with client care procedures with very little guidance; follows office procedure and is fully aware of the significance of this; clearly articulates the rationale for ethical rules and appreciates the context of SLO service; treats clients with a high degree of care and respect</p>	<p>Displays an excellent/outstanding understanding of professional obligations; complies precisely with client care procedures with no significant guidance; follows office procedure and is fully aware of the significance of this; clearly articulates the rationale for ethical rules and appreciates the context of SLO service; treats clients with a high degree of care and respect; <i>makes clients feel the utmost confidence that their best interests are being served</i></p>

Appendix B Reflections matrix Student Law Office

	Third/fail (below 50)	Lower Second (50-59)	Upper Second(60-69)	First/strong first (70+)
Reflective Analysis	No significant analysis or reflection on the topic	Fair analysis and reflection on the topic. Using some detailed examples but primarily descriptive with a lack of development or analysis.	Good analysis and reflection on the topic. Specific and personal, using some detailed examples, showing good ability to synthesise and evaluate information and ideas	Excellent relevant in depth analysis and reflection on the topic. Specific and (where appropriate) personal, using detailed examples showing excellent ability to synthesise and evaluate information and ideas
(Self) Awareness and insight (where appropriate, dependent on the topic) *	Exhibits little or no self-awareness, generalises experiences, fails to take into account other perspectives or examine potential value	Exhibits fair/reasonable levels of self-awareness, but some generalisation of experiences, sometimes takes into account other perspectives and examines potential value	Exhibits good levels of self-awareness, avoids generalisation of experiences, often takes into account other perspectives and examines potential value	Exhibits high /very high levels of self-awareness, avoids generalisation of experiences, always takes into account other perspectives and examines potential value. Evidence of development/learning and future development/learning needs
Context (Knowledge of relevant material and sources)	No evidence of relevant knowledge or independent reading.	Little evidence of relevant knowledge. Relies solely on personal anecdote.	Some evidence of independent reading such as books or journal articles.	Good/ Excellent evidence of independent reading such as books or recent journal articles which supports the reflection and or provides context
Clarity of expression	Not always clear what was intended. Very poor style. Extensive grammar or vocabulary errors	Some points may not be expressed clearly. Poor style. A number of grammar or vocabulary errors.	Most points expressed clearly and succinctly. Mainly engaging and comprehensible style. Mainly correct grammar and vocabulary	All points expressed clearly and succinctly. Engaging and comprehensible style. Correct grammar and vocabulary
Organisation	Little or no organisation of the material	Clear organisation of material but at times the transitions are unclear.	Very clear organisation of material.	Excellent organisation of the material, forming a coherent whole.

*this may be slightly less relevant in some of the optional titles, such as Clinic and Legal Education

Assessment in the legal and medical domain: two sides of a coin

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INTRODUCTION

It has been such an honour to read the assessment papers in legal education that were written with an earlier paper of mine (C. P. Van der Vleuten & Schuwirth, 2005) as a frame of reference. The papers provide an excellent insight in a number of assessment practices in different law schools. Very striking were the similarities of the issues that are discussed from the legal domain to my own domain, the field of medicine. The papers are addressing notions of reflections, reflective practice, the importance of learning (and assessing) in context (either simulated or real) developing professional competences, definitions of professional competence, the relevance of general skills (professionalism, ethics, values, altruism, empathy, client-centeredness, managing themselves and others in work), and new approaches to assessment (journals, portfolios, extracted examples of work, observation, think-aloud in practice and holistic approaches to assessment). All these notions completely resonate with developments in the medical domain. For this contribution I thought of summarizing some recent developments in the medical domain having

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relevance to all these topics: competency frameworks, assessment of performance in context, reflection, and programmatic assessment. This is meant merely as an informative mirror on what happens in this other domain.

COMPETENCY FRAMEWORKS

The issue of competency and competency definitions has been articulated strongly in the medical domain in recent years. A whole number of countries around the world has engaged in consensus procedures leading to a set of competency frameworks that are nationally agreed upon. Among the most prominent ones are the ones from the US, Canada and the UK such as described in table 1 below.

United states (ACGME) ²	Canada (Canmeds) ³	United Kingdom (Good medical practice) ⁴
<ul style="list-style-type: none"> • Medical knowledge • Patient care • Practice-based learning & improvement • Interpersonal and communication skills • Professionalism • Systems-based practice 	<ul style="list-style-type: none"> • Medical expert • Communicator • Collaborator • Manager • Health advocate • Scholar • Professional 	<ul style="list-style-type: none"> • Good clinical care • Relationships with patients and families • Working with colleagues • Managing the workplace • Social responsibility and accountability • Professionalism

Many other countries have similar agreed competency frameworks and they vary to some degree. Each of these competencies within the framework is further defined

² Accreditation Council of Graduate Medical Education (2009). Common Program Requirements: General Competencies. From

<http://www.acgme.org/outcome/comp/GeneralCompetenciesStandards21307.pdf>

³ Frank, J. R., & Danoff, D. (2007). The CanMEDS initiative: implementing an outcomes-based framework of physician competencies. *Medical teacher*, 29(7), 642-647. See also:

<http://www.royalcollege.ca/portal/page/portal/rc/canmeds/canmeds2015>

⁴ General Medical Council (2013). Good medical practice: working with doctors for patients. From: http://www.gmc-uk.org/guidance/good_medical_practice.asp

into behaviours. The frameworks have been developed in extensive consensus procedures with abundant stakeholder input. What is really interesting is that most competencies emphasize skills outside the “knowledge domain”. They also bear similarity to the skills summarized above that were found in the legal papers. These skills are apparently less bound to the domain in which they were developed. The descriptions of the competencies show remarkable similarity across frameworks. So apparently when different organizations consult stakeholder groups for reaching consensus on what professionals should be able to do, they reach rather similar outcomes.

The frameworks have had and still have vast consequences in medical education. They have become the standard by which medical training programs are increasingly being structured both at the undergraduate level as well as at the postgraduate level. To give you an example, The Netherlands has adopted the Canmeds system and has given it legal status. Training programs have to be built around the competency framework, assessment strategies have to be developed to assess these competencies and accreditation procedures inspect the attainment of the competencies. What typically happens is that longitudinal curricular lines are created in which teaching, learning and assessment activities take place in a more coordinated fashion. This is not easy to achieve change, because most training programs are very modularly structured with little transfer of information from one module to the other. Good implementation of competency-based education is therefore challenging and requires good governance on the curriculum as a whole. Many universities and their

programs are not used to such kind of governance. Nevertheless, the rising importance of the competency frameworks requires universities and postgraduate training institutions to change.

An interesting more recent development has been an alternative way of defining what is competence. It is very difficult for clinical teachers to understand exactly what collaboration means or professionalism or communication and how to define if you master enough of it. When a critical professional activity is taken, say handling a normal delivery of a child, it is clear for any clinician with whom to collaborate, how to act professionally and with whom to communicate. Subsequently a decision can be taken on the level of entrustment of the learner in relation to performing the critical professional activity independently. Often this is done on an entrustment scale with varying degrees of supervision: observing the activity, acting with direct supervision present, acting unsupervised, providing supervision to juniors. Standards are now defined language that clinicians understand feel acquainted with it. They continuously make judgments about patient safety and that is what this entrustment related to (Kogan, Conforti, Iobst, & Holmboe, 2014). The critical professional activities have been termed Entrusted Professional Activities (EPAs) (ten Cate, 2013). EPAs are currently conquering the medical education world and various disciplines have identified their EPAs. By mapping these EPAs on competencies and by formulating at which level of education “milestones” of competencies in the form of rubrics need to be achieved a comprehensive framework can be developed. EPAs have helped shaping what we wish to train and assess in the

words of the professionals in the domain thereby creating a natural buy-in and a formal language on what to train and assess.⁵

ASSESSMENT OF PERFORMANCE IN CONTEXT

Many competencies in table 1 are behavioural in nature. Experiential learning is imperative for learning these skills either in the form of simulation or in a real world work setting. Behavioural skills can only be assessed by direct observation. Therefore many observation instruments have been developed and validated in medical education. For simulated performance simulated performance testing are widely used. They are called Objective Structured Clinical Examinations and virtually every medical school in the world uses it (Harden, Lilley, & Patricio, 2015). However, since a number of years assessment methods are developed that used in the unstandardized real clinical environment (Norcini & Burch, 2007).

One very popular method is called the Mini-Clinical Evaluation Exercise (Mini-CEX). An assessor directly observes a learner while doing a clinical activity, fills in an assessment form (usually structured according to the Canmeds competencies), and then gives feedback often in the form reflective questioning. Finally some actions are formulated. Rubrics are often used to describe the performance quality. Narrative written feedback is strongly encouraged. The Mini-CEX is repeated a number of times while the learner is in a same clinical setting.

⁵ An illustration of such a mapping exercise can be found here:
<https://www.acgme.org/acgmeweb/Portals/0/PDFs/Milestones/PediatricsMilestones.pdf>

Another popular instrument is the multi-source feedback (MSF). A questionnaire is (electronically) sent to a range of assessors who are relevant to the learner (clinical supervisors, peers, nurses, patients, secretary at the desk, etcetera). The learner also has to complete one as a self-assessment exercise. The questionnaire is also structured according to a competency framework. Each assessor completes the questionnaire (mostly anonymously) and data are aggregated across assessors. A feedback report is generated, for example in a spider chart format showing the self-assessment score, the average assessor score and the cohort score. Narrative information is also here very much encouraged and is part of a feedback report. Often the feedback is moderated in a discussion between supervisor (or mentor) with the learner after the MSF has been completed. MSF procedures are becoming also increasingly popular to assess clinicians in their daily working role as part of their continuous professional development (Overeem et al., 2010).

Finally portfolios have become very popular. In a portfolio the evidence burden is reversed. Not the teacher but learner has to prove competence. Therefore the portfolio contains evidence and reflections from the learner. Portfolios have been well researched in medical education (E. Driessen, Van Tartwijk, Van Der Vleuten, & Wass, 2007), (Buckley et al., 2009). Many portfolios now are online and provide all kinds of assessment services (e.g. conducting an MSF assessment) and aggregation tools.

There are many more instrument to assess the performance of learners in a clinical context. The more enriching the feedback is, the more serious assessor and learner

take these assessments, the more engaging these assessments can be. As is often mentioned in the legal papers on assessment, time is a concern and finding ways to embed these assessment activities in the routine of daily practice is a challenge.

REFLECTION AND MENTORING

Experiential learning and reflection are closely related. A number of the legal papers discussed the use of reflections for example in the use of diaries. Reflective learning is emphasized in educational theories such the well known model from Schön (Schön, 1983) and Korthagen (Korthagen, Kessels, Koster, Lagerwerf, & Wubbels, 2001). Reflection is the link between the feedback and the performance improvement (Sargeant, Mann, van der Vleuten, & Metsemakers, 2009). Most of the feedback is ignored by learners (Kluger & DeNisi, 1996) and making learners reflect may facilitate the use of feedback. Just like in legal education reflection is not always considered to be enjoyable by learners. Reflection should have a clear education value or otherwise learners disengage with it. In medical education this is often done through mentoring either in peer groups or with faculty coaches or both. Mentoring has been broadly studied and has shown considerable effectiveness on increased use of feedback, improved professional development, career preparation and success and prevention of production loss such as for example through burnout (E. W. Driessen & Overeem, 2013). It has also been a key issue to the success of the use of portfolios and self directed learning (E. Driessen et al., 2007). Reflection has therefore had considerable attention in medical education in recent years and is part of many

modern assessment approaches where learners are connected to mentors or coaches and their longitudinal performance on competency development is being monitored and discussed. Learning complex skills, experiential learning, assessment providing feedback, longitudinal monitoring and coaching are all important ingredients that mutually influence each other in a positive way. The ingredients provide the bricks of a highly powerful learning environment.

PROGRAMMATIC ASSESSMENT

In recent years a more synthetic approach to assessment has been proposed that integrates many of the insights discussed above and is called programmatic assessment (C. P. Van der Vleuten et al., 2012). In this approach a whole assessment program is purposefully designed very similar to a full curriculum design. Methods are carefully chosen for their educational function in that moment in time and in relation to other methods being used in the program. Methods purposefully require a variation in activities: verbalizing, writing, arguing, defending, synthesizing, all following the educational purpose of the learning program. Each moment of assessment is considered to be one data point. Decision-making on pass/failing is disconnected from individual data points. Individual data points only provide feedback to the learner. Decisions are based on many data points by aggregating the information across data points being gathered. The higher the stake of the decision the more data points are needed. Learners are coached in using the assessment information for planning their learning or for remediation. An overarching structure

such as a competency framework is used to aggregate the assessment information (and other learning information such as learning or work products) in a meaningful way. Independent committees take progression decisions based on all the information.

Currently a number of education practices are using programmatic assessment in their curriculum (Dannefer & Henson, 2007), (Bok et al., 2013), (Heeneman, Oudkerk Pool, Schuwirth, Vleuten, & Driessen, 2015), (Chan & Sherbino, 2015) and many more are working towards it. Although educationally appealing, changing towards programmatic assessment presents a great challenge requiring substantial staff buy-in, good leadership and strong central governance over the curriculum. Many universities lack such organizational virtues. Nevertheless, parts of programmatic assessment, i.e. the feedback orientation or the mentoring, are very valuable approaches to modernize our assessment more evolutionary. Often one hears that assessment drives learning. In programmatic assessment learning drives assessment. Perhaps many more ways of assessment are viable in our educational practices inspired on this mantra.

CONCLUSION

Medical education has embraced the move towards competency-based education in which consensus is sought on what to train. Assessment methodology is following this movement resulting in considerable more performance assessment in the reality of the professional context. This move has been strongly promoted to the problems in

health care and patient safety (Frenk et al., 2010). Without responding to the needs of society education will fail on its mission to prepare our learners for the labour market. It is difficult to compare the needs in legal and medical education, but from the papers it is clear that many parallels do seem to exist.

As has been mentioned a number of times in assessment papers in legal education, cost is an issue. All the assessment approaches above are not cheap. In reality staff-student ratios are probably worse in legal education as compared to medical education. Despite of the cost and the realization that we will not get more funding, we need to think of ways how to implement some of these ideas. We will not be able to resolve this resource constraint without more fundamental scrutiny of our funding allocation in education. In my view we spend too much resources on information transmission to learners (C. Van der Vleuten & Driessen, 2014). Learning is about information processing and not about information consumption. In my view it is a waste of resources that the same but different professor gives the same lecture across rather similarly across the world. Expensive teacher time should not be wasted to information delivery but to the scaffolding of the information processing of learners, preferably in small face-to-face settings. Meaningful assessment information providing the necessary feedback to the learning is part of this scaffold. Two of the most powerful effects on learning are then united: the teacher and feedback. What more could you wish for?

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