

TEACHING EVIDENCE LAW WITHIN THE FRAMEWORK OF A TRIAL: RELATING THEORY TO PRACTICE AS STUDENTS TAKE TO THEIR FEET AND TAKE RESPONSIBILITY FOR THE TRIAL NARRATIVE

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I. INTRODUCTION

I remember clearly the words of one of my mentors and colleagues at the bar table, when he said: ‘It was not till I had to get to my feet that I understood the real importance of evidence law.’ I adopted this refrain as something of a mantra in my design and teaching of evidence law at the University of Canberra in 2008. Students were required to take to their feet and take responsibility for questioning witnesses and arguing evidential points of law in a semester-long mock trial in the Faculty of Law moot court. My purpose was not to teach a skills-based course unit within the Bachelor of Laws degree. Rather, my purpose was to create an authentic learning environment and engage all students — whether they harboured an ambition to practise as advocates or not — as rational, ethical actors, aware of the importance of their own decisions to an emerging trial narrative. The premise for the unit was not simply that evidence law is best understood in a practical context,¹ but that ‘in role’ student engagement fosters a capacity for critique and challenge, as the complexities and shortcomings of the trial process are directly revealed.²

Often the practical and moral importance of university learning is only realised when that learning is ‘put in action.’³ And often this does not occur until the newly graduated are faced with the responsibility of making decisions that affect the lives of their clients, other participants in the legal process, and the wider community. With a rapidly expanding case load, it can be too late by then to learn the lessons missed. This creates an imperative: to take students, so far as possible, to the ‘coalface’ of practice, in order to inspire in them a sense of ‘[r]eal purpose and relevance’⁴ so they don’t miss the opportunity that university learning offers. Court observations and reports are one way to take students to the ‘coalface’, audio-visual media another⁵, but neither of these approaches places the student in an active position as a player in the drama and excitement of trial evidence law.⁶ Participating as defence and prosecution lawyers, and as

1 See Andrew Ligertwood, ‘Teaching Evidence Scholarship: Evidence and the Practical Process of Proof’ in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 239; Andrew Palmer, ‘A Proof-oriented Model of Evidence Teaching’ (2002) 13(2) *Legal Education Review* 109. Both authors adopt a similar focus on the practical process of proof in their teaching and this paper draws upon their experience.

2 Ligertwood, above n 1, requires students to participate in a mock trial.

3 See generally, Patricia Easteal, ‘Teaching about the Nexus between Law and Society: From Pedagogy to Andragogy’ (2008) 18(1&2) *Legal Education Review* 163,163-6, for a useful discussion of the importance of ‘action-learning’.

4 Sally Kift, ‘Lawyering Skills: Finding their Place in Legal Education’ (1997) 8 *Legal Education Review* 43, 57, provides an excellent discussion of the importance of making explicit to students the purpose and relevance of learning.

5 See, eg, Jacqueline Horan and Michelle Taylor-Sands, ‘Bringing the Court and Mediation Room into the Classroom’ (2008) 18(1&2) *Legal Education Review* 197, for a discussion of methods used in a civil litigation unit.

6 Internship and voluntary work placements where students are given active responsibility are, in the author’s experience, invaluable locations of ‘action-learning’, yet even here, students are not in position to take carriage of witness examination and advancing a case in court, as this requires their formal admission to practice.

witnesses, in a fictional trial, provides a controlled approximation of evidence law in action. The excitement and apprehension of appearing, questioning and arguing a case is very real, though, thankfully, the almost inevitable mistakes are not attended by 'real' consequences — other than in the mark-book — but offer important opportunities for learning.

It is asking a lot of students — even of those in the last year or years of their degree⁷ — to require them to perform in a court before their peers, taking on the unfamiliar tasks of witness examination and engaging in complex evidential analysis and argument. Indeed, it is asking a lot of junior practitioners, conducting their first summary trial. But, like junior practitioners, students demonstrate a capacity to rise to the challenge that demands respect. And, like practitioners, students must take to their feet as prepared as they can be: understanding their role and objectives; understanding the process of adducing evidence and the principles of admissibility; and having determined their theory of the case and identified the factual propositions upon which that winning theory is based.⁸

To enable this preparation, lectures in evidence law at the University of Canberra in 2008 were designed to elucidate the critical processes and principles of evidence law, providing the theory which, each week, students put into practice in the fictional trial. Lectures became opportunities to stimulate critical thinking to enable students to independently analyse the progressing case as participants in its emerging narrative. Tutorials became witness examinations and opportunities for students, in role as defence and prosecution lawyers, to make submissions about what witnesses could and could not say in court. Students were required to make strategic decisions founded on their evolving understanding of the trial, trial process and principles of evidence. The intent was to explicitly and continually relate theory to practice to enable experiential learning. This was done through the adoption of a 'proof-oriented model of evidence teaching' where 'the emphasis is on teaching students how to go about proving the facts in issue in litigation'.⁹

Students can certainly acquire discipline and unit-specific 'learning by doing'¹⁰ within role as a defence or prosecution lawyer, fostering and developing communication skills, information literacy, problem solving and professional ethics along the way. However, university education demands more than this. Graduates must be capable of critical thought and reflection, able to understand their social responsibilities and have the capacity to challenge existing social orders and institutions.¹¹ Once the trial had run its course, students were asked to reflect upon whether trial processes and outcomes are 'just'. Students were asked to consider the voices of those that remain unheard, whether as a result of their position in society or the process itself. After being questioned as witnesses and conducting witness examinations themselves, students were well placed to engage in such critique.

The purpose of this article is to record, relate and reflect on the experience and outcomes of adopting a 'proof-oriented model of evidence teaching'¹² at the University of Canberra. What follows is a discussion of the rationale for taking the approach, a description of the unit design and assessment, followed by reflection. Finally, the article will consider and locate the approach

7 Evidence Law at the University of Canberra is generally taught as a final or later year subject, with a suggested progression from Criminal Law and Procedure. However, I did have one first-year student who took the unit and did remarkably well given the stage she was at in her degree.

8 Palmer, above n 1, 116.

9 Ibid 111.

10 Graham Gibbs, *Learning by Doing* (1988), cited in Kift, above n 4, 61.

11 See generally, Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian University Teaching Committee (AUTC)* (2003) 152, citing the work of Sharon Christensen and Sally Kift, 'Graduate Attributes and Legal Skills: Integration or Disintegration' (2000) 11 *Legal Education Review* 207, 214-29.

12 Palmer, above n 1, 111.

adopted by reference to contemporary efforts in Australian law schools to teach evidential rules and principles ‘in the context of the practical legal process within which they arise’.¹³

II. RATIONALE FOR THE COURSE

I came to the teaching of evidence law as I came to the bar table, willing, but inevitably, to some extent, unprepared. To be frank, I did not have an established pedagogical position when I commenced teaching in 2008. Nor did I have an appreciation of the teaching approaches and ‘new evidence scholarship’ of those who have adopted a focus on the ‘process of proof’ rather than simply the ‘articulation of rules of evidence’.¹⁴ I am indebted to Andrew Palmer at the University of Melbourne and Andrew Ligertwood at the University of Adelaide for the work they have done in this regard which enables me to contextualise my own approach.¹⁵ However, at the time that I developed the evidence law unit at the University of Canberra, I was unaware of the methods and approaches of my interstate colleagues. My motivation came from my own convictions and experience, and an opportunity presenting itself in the shape of an operational courtroom at the University of Canberra equal or superior to many of those in which I had appeared in the Northern Territory.

Evidence law courses are traditionally taught in a standard lecture and tutorial format: a format in which, week by week, the principles of evidence law receive systematic exposition in lectures and are then discussed and analysed in problem and essay type questions in tutorials. This was my experience as an undergraduate, and I struggled to uncover a framework upon which to pin the apparently disparate, dry and complex principles. It became clear to me in practice that the ‘trial’ itself is the framework — the lens through which the holistic nature of evidence law can be understood. And whilst the trial stage of legal dispute resolution may be reached in only a small proportion of cases, an awareness of what may happen at trial informs all aspects of legal practice, from initial instruction-taking onwards.¹⁶ This understanding translated into a desire to give the trial a central role in my teaching. All that was lacking was a story to be told or, more properly, competing stories to be adduced and argued over.

A story, pregnant with the potential for justice or injustice, came in the initial form of a relatively simple mock-trial brief prepared by the office of the ACT Director of Public Prosecutions.¹⁷ With significant alterations, and a great deal of creative licence, a suitable mock-trial brief in support of an indictment for armed robbery took shape, complete with nine prosecution witnesses to subject to examination over the course of the semester. But this alone does not fully answer the question of why I chose to focus on storytelling, in the form of witness examination. Nor does it make clear my motive to require students to take to their feet as questioners, taking responsibility for the trial narrative.

The rules of evidence, with all their complexities, facilitate and constrain the storytelling process in court, providing for the ultimate resolution of legal disputes. According to Evatt J, ‘they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth.’¹⁸ Whether these rules operate effectively or ineffectively to meet this end is subject to ongoing and focused debate. What is not in debate is that the rules operate in a dynamic human environment, where narratives emerge, evolve

13 Ligertwood, above n 1, 239.

14 Richard Lempert, ‘The New Evidence Scholarship: Analyzing the Process of Proof’ (1986) 66 *Boston University Law Review* 439, cited in Palmer, above n 1, 109.

15 Palmer, above n 1; Ligertwood, above n 1.

16 Ligertwood, above n 1, 244.

17 The ACT Director of Public Prosecutions runs an annual mock trial competition between the University of Canberra and the Australian National University with an emphasis on advocacy and persuasion as opposed to evidence law. In relation to the provision of materials to enhance authenticity, I am particularly grateful for the assistance of Shane Drumgold, senior prosecutor with the office of the Director of Public Prosecutions.

18 *R v War Pensions Entitlement Appeal Tribunal; Ex Parte Bott* (1933) 50 CLR 228, 256.

and alter as storytellers take the stand; an environment in which ‘facts are the main point of controversy between the parties’.¹⁹ Through questioning, objection and argument, lawyers bear responsibility for the stories that are told, enabling or silencing narrative threads within the constraints of the process.

It is certainly possible to read, listen to or observe these narratives and study the operation of the laws of evidence upon them, thereby developing an understanding of the legal principles involved. Yet, as observed by Andrew Palmer, ‘it can be difficult for students to understand the purpose and operation of the rules of evidence when they are divorced from the process of proof.’²⁰ It is, according to Palmer, effectively like teaching someone to drive without having them get behind the wheel.²¹ Taking the wheel in terms of the operation of the laws of evidence arguably requires having students take to their feet as actors in a fictional trial. In so doing, they assume responsibility, practically and morally, for the evidence that emerges. To advance their case, they must necessarily develop a comprehensive understanding of trial process, practice and the applicable principles of evidence. Objections as to the admissibility of evidence, the form of questions put to witnesses and the content of answers must be taken and answered, and in those moments the trial and the interests of justice — albeit fictional — may hang in the balance. This weight of responsibility is a driver of learning. Indeed, it is not difficult for students to imagine the consequences of ineptitude in a real trial setting: cases lost, victims disbelieved, innocent defendants imprisoned. And then, ultimately, from a more critical perspective, students come to understand that these same consequences can be attendant despite diligent application to the task as a consequence of the complexities and shortcomings of the process itself.

As should be clear, the model I adopted for teaching evidence law, and am now advocating, is an experiential one — an approach of wider application with strong pedagogical roots.²² Experiential learning requires learners to engage with theory and practice in an integrated learning cycle.²³ In an experiential learning model, it is not enough to simply study theory, nor is it enough to simply engage in practice. The relationship between the two must be explicitly fostered and maintained:

It is not enough just to do, and neither is it enough just to think. Nor is it enough simply to do and think. Learning from experience must involve links between the doing and the thinking.²⁴

An experiential learning model for evidence law requires a focus on both the articulation of the rules of evidence *and* on the process of proof. It requires a learning model that makes explicit the links between the two — a learning model where students engage directly and actively with the process of proof, applying the rules of evidence in the setting from which they arise.²⁵ According to Kift, experiential learning involves taking the learner through a four stage cycle of principle formation, planning, doing and reflecting.²⁶ ‘The cycle may be entered by the learner at any stage, but the process must be followed sequentially.’²⁷ As it applies to the model I have adopted — using the trial as the centrepiece — it requires cyclically enabling and facilitating students to:

1. *think* about the process of adducing evidence in the trial and the principles of admissibility and exclusion that may apply to that evidence;

¹⁹ Palmer, above n 1, 117.

²⁰ Ibid 131.

²¹ Ibid.

²² See generally, Kift, above n 4, 61, for a discussion of experiential learning theory.

²³ David Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (1984) in Kift, above n 4, 61.

²⁴ Gibbs, above n 10, 9.

²⁵ Ligertwood, above n 1, 239.

²⁶ Kift, above n 4, 62-3, by reference to Kolb, above n 23.

²⁷ Ibid 63.

2. *plan* and prepare to engage in the process of adducing that evidence, guided by these principles;
3. *actively engage* in the process of adducing evidence through witness examination and argument for or against the admissibility of aspects of their evidence; and
4. *reflect* upon that engagement to develop new understandings, returning the student to step one.

The added attraction to, and justification for, this model in relation to evidence law is that it closely approximates the experience of a trial lawyer, enabling transferability of skills from the ‘classroom’ to the ‘world of work’.²⁸ According to Palmer, the ‘evidential tasks of a lawyer’ may be categorised as follows:²⁹

- fact investigation and the gathering of evidence;
- organisation and analysis of the evidence in preparation for trial;
- making arguments about the admissibility of evidence; and
- the adducing of evidence at trial itself.

By reference to the learning cycle undertaken in evidence law at the University of Canberra, fact investigation together with organisation and analysis of evidence are aspects of the *planning* stage of trial, whilst making arguments about admissibility and adducing evidence are aspects of the *active engagement* stage of trial. Necessarily, both are informed by the *thinking* stage, and, to effect learning, both are followed by *reflection*.

Requiring students to take to their feet in a fictional trial therefore presents as an appropriate experiential learning model for evidence law, whilst at the same time confronting ‘students with situations and problems which resemble those they will eventually have to tackle’³⁰ should they choose to become trial lawyers. That this is so is hardly surprising. Experiential learning is taking place all the time at the ‘coalface’ of trial practice, as the advocate cycles through the thinking, planning, actively engaging and reflecting stages with each new brief. The structure may not be explicit, the time for lengthy reflection may not be there and, to a greater or lesser extent, the advocate may be assisted by mentors or colleagues, but with varying degrees of efficacy, the cycle continues.

With appropriately adapted learning materials and assessments, bringing the trial to the classroom enables explicit and ongoing links between theory and practice. And, further, it provides the critical potential — not always available to the practitioner — for students to step beyond their roles in the trial to consider the injustices inherent in the adversarial system of evidence law. In the following section, I provide a description of the teaching activity and assessment tasks undertaken by students of evidence law at the University of Canberra in 2008.

III. DESIGNING THE COURSE – THE TRIAL OF JAMES SWIFTY

In 2007, delivery of the evidence law unit at the University of Canberra was by way of four contact hours: a two-hour lecture, a one-hour lecture and a one-hour tutorial each week. On taking responsibility for the unit in 2008, I did not alter these time allocations. I moved the tutorials to the moot court, capping student numbers at 18 to enable each student to appear in the trial.³¹ I then set about organising and developing material for delivery in lectures in answer to the question: what do you need to know to take to your feet in a trial? Notably, the *Uniform Evidence Acts*³² and many evidence law texts³³ are largely organised in answer to this question,

28 Gibbs, above n 10, 4.

29 Palmer, above n 1, 122.

30 Gibbs, above n 10, 4.

31 Initially there were about 80 students enrolled, requiring five tutorials.

32 See, eg, *Evidence Act 1995* (Cth).

33 See, eg, Miiko Kumar, Stephen Odgers and Elisabeth Peden, *Companion to Uniform Evidence Law* (2nd ed, 2007); Kenneth Arenson and Mirko Bagaric, *Rules of Evidence in Australia* (2nd ed, 2007).

and lend themselves to this teaching approach. I selected a text,³⁴ complete with case extracts to enable students to grapple with and apply judicial decisions and reasoning to the issues presenting in the trial before them. And, by and large, I maintained the commitment that if material could not be made relevant to the trial, or at least intelligible by reference to the trial, then it would not be taught.³⁵ I produced the following resources:

A. The Brief

I created a fictional trial brief in the case of James Swifty, in which it was alleged that he had robbed an elderly woman inside a bank after she had made a withdrawal. It was a trial in which the ultimate issue was the identity of the robber. The brief contained an indictment, a case statement, client instructions and a criminal record, together with nine witness statements, one for each week that the trial ran in tutorials. Inadmissible material, or arguably inadmissible material, was embedded in each witness statement, such that as the weeks progressed, so did the arguments of students at the bar table in relation to principles of evidence. Largely following the scheme of the *Uniform Evidence Acts*,³⁶ the issues progressively embedded were relevance, hearsay, admissions, opinion, tendency and coincidence, credibility, character, identification and discretions. Students were permitted to make limited arguments about the exercise of a discretion from an early stage. Further, their knowledge was expected to be cumulative, in the sense that by the time final witnesses took the stand, objections could be taken and argued over in relation to all preceding principles, though the focus remained on the specified weekly content.

The progressively developing brief, with its nine witnesses, was central to the teaching model adopted. It was the brief that enabled lectures to keep pace with the trial, maintaining the link between theory and practice. And it was this strategy of a developing brief, above all others, that made the unit distinctive.³⁷

Authenticity was provided thanks to the provision by the ACT Director of Public Prosecutions of appropriate templates for court documents and witness statements, and the provision, by the Australian Federal Police, of a fictional criminal record for our defendant. However, authenticity was to some extent compromised by the need to comprehensively address the many principles that determine evidential admissibility in trial proceedings. Time limitations and the fact that students were playing the roles of witnesses further dictated the content of the evidence sought to be adduced. For example, in relation to opinion evidence, the witness was somewhat of a 'straw expert': a student doing their best to justify an opinion as to the identity of the robber based upon tenuously supported face and body mapping techniques, applied to poor quality closed circuit television footage.³⁸ All student witnesses were provided with limited written and verbal instruction — occasionally in secret to procure hostility or oral evidence that was inconsistent with their written statement. And, generally, they performed well, demonstrating creativity where it was required as well as providing, for their questioners, a level of uncertainty in relation to their responses. Finally, in order not to overwhelm students with material for analysis, witness statements in the brief were released progressively, contrary to fundamental principles of advocacy that require an advocate to master an entire brief before taking to their feet

34 Kumar, Odgers and Peden, above n 33.

35 Despite teaching a criminal trial, it was, in general, not difficult to explain the variations applicable to the civil jurisdiction.

36 See, eg, *Evidence Act 1995* (Cth) ch 3, flow chart at beginning of chapter 3.

37 I would like to say that this approach is unique, given that I have not been able to identify a like model. However, my research has not been sufficiently comprehensive to make this claim.

38 In relation to this witness, students for the prosecution and defence had to examine an expert and argue for and against the admissibility of the expert's evidence in the trial, having regard to the *Evidence Act 1995* (Cth) s 79 — which sets out an exception to the opinion rule based on specialised knowledge — and the case of *R v Hien Puoc Tang* (2006) 65 NSWLR 681.

at trial.³⁹ However, given that the competing prosecution and defence theories of the case were developed in conjunction with the students and designed to accord with all witness statements to be released, this did not present a problem. Indeed, it fostered a sense of anticipation as students waited for each new statement to be released to determine whether the prosecution would get nearer their goal.⁴⁰

B. Lectures

In order to prepare students to take to their feet in week three of semester, lectures commenced with a focus on trial process and procedure, roles of prosecution and defence, burden and standard of proof, and the first principle of admissibility, relevance. Preparing a case theory, and analysing evidence to be adduced, necessarily requires an understanding of the facts at issue in the trial, and the potential for evidence to ‘rationally affect (directly or indirectly) the assessment of the existence of the facts in issue in the’⁴¹ trial. This required close attention being paid to the elements of the offence with which James Swifty was charged.⁴² Accordingly, relevance was the focus from the outset, in conjunction with consideration of testimonial and other forms of evidence, and the process of witness examination. Students were encouraged to consider the practices of effective trial advocacy⁴³ as inextricably tied to the principle of relevance and case theory.

Prior to the commencement of witness examination in tutorials, the last lecturing hour of each week was refocused to explicitly address the witness statement for the following week’s tutorial. This was designed to assist students to analyse the evidence to be adduced, and consider their tactical approach, in the context of what they had learned so far in the unit. This lecturing division then continued throughout the semester until the trial was concluded.

Once the trial had concluded, lectures took a more critical focus as I sought to highlight the shortcomings of the trial process, and reform efforts, by requiring students to consider experiences of many Indigenous Australians and child victims of sexual assault. These two specific groups were chosen because of their particular, and well documented,⁴⁴ vulnerabilities as witnesses: whether these result from historical, cultural and linguistic factors in the case of Indigenous Australians, or developmental and situational factors in the case of child victims

39 The unit was not designed to usurp the need to offer a specialist advocacy elective for those interested in pursuing a career as an advocate. Indeed, it is worth noting that students were not required to prepare an opening or closing address. Despite this, the skills taught to enable the trial would complement additional training in the field of advocacy.

40 At the conclusion of the evidence for the prosecution, students remained in a state of uncertainty about whether or not James Swifty was guilty, an uncertainty warranting acquittal. This was frustrating for some, and prompted certain students to ask for James Swifty himself to be called, in the expectation that he would either vindicate himself or demonstrate his guilt. I am still considering the dramatic merits of this suggestion, though I regard the ultimate factual uncertainty as central to the premise of the unit, and capable of providing students with a valuable lesson.

41 *Evidence Act 1995* (Cth) s 55.

42 *Smith v The Queen* (2001) 206 CLR 650, 654 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

43 Students were introduced to Irving Younger’s Ten Commandments of Cross-examination, *The Art of Cross-Examination*, ABA Monograph Series No. 1 (ABA Section on Litigation 1976). Younger’s Ten Commandments are: (1) be brief; (2) use plain words; (3) use only leading questions; (4) be prepared; (5) listen; (6) do not quarrel; (7) avoid repetition; (8) disallow witness explanation; (9) limit questioning; and (10) save the ultimate point for summation. See also Peter Berman QC, *The Ten Commandments of Evidence in Chief* (2002) Public Defenders Office NSW <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_tencommandments> at 26 September 2009.

44 See, eg, Diana Eades, ‘Telling and Retelling Your Story in Court: Questions, Assumptions, and Intercultural Implications’ (2008) 20(2) *Current Issues in Criminal Justice* 209-30; Christine Eastwood and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (2002) Criminology Research Council <<http://www.criminologyresearchcouncil.gov.au/reports/eastwood.html>> at 26 September 2009.

of sexual assault. By this stage of the program of study, all students had taken on the role of questioner, and many had been in the position of a witness. All were therefore in a position to understand courtroom and trial dynamics, and — with the assistance of additional readings — to appreciate the potential for alienation, trauma and injustice. Ultimately, students were asked to come to terms with the relationships of power that exist within the trial process.

C. Assessment

I adopted an ‘authentic assessment’⁴⁵ approach to enhance learning outcomes, approximate reality, and foster the critical link between theory and practice. This required the integration of assessment with activities undertaken by students throughout the semester, to stimulate a ‘wide range of active responses’ and necessitate critical decision making.⁴⁶ These active responses and critical decisions were designed to mimic those required of a practising trial lawyer. Each student was required to appear as counsel for the defence or prosecution and was marked on their preparation and presentation, the effectiveness and fluency of their witness examination, their responsiveness to objections and queries from the bench, and the strength and content of their submissions in relation to the evidential principles of admissibility. At the time of their appearance, students were required to submit a short, written ‘outline of argument’ in an approved format, relating to the particular evidential issue or issues that arose in the week that they were required to appear. The purpose of this assessment was to focus their thinking, facilitate their oral argument, and give them the experience of preparing a document of appropriate quality for court submission.⁴⁷

Students received immediate oral feedback on their performance, questioning approach and, in particular, on their handling of the evidential issues that arose. This feedback was given by myself, both ‘in role’ as the judge in the trial making rulings, and as a tutor at the conclusion of the trial exercise each week. Oral feedback allowed all within the tutorial group who had observed the efforts of their peers to benefit from an immediate critique, and indeed provide their own, to enable reflection and crystallisation of principles and processes.

Students were further required to maintain and submit a ‘trial chart’⁴⁸ for assessment which demonstrated their analysis of the witness statements of seven of the nine witnesses that were called to give evidence in the trial, complete with reasoned objections or responses to potential objections, and commentary of use for preparing witness examinations. In the chart, students were required to summarise the witness’s evidence in one column and record against it, and in a second column, the relevance, practical importance and evidential issues arising from that evidence.⁴⁹ This approach proved useful to ensure students maintained engagement with the trial, even when they were not appearing as counsel. Unfortunately, in 2009, whilst the ‘trial

45 See generally, Jan Herrington and Anthony Herrington, ‘Authentic Conditions for Authentic Assessment: Aligning Task and Assessment’ in Alison Bunker and Iris Vardi (eds) *Critical Visions : Thinking, Learning and Researching in Higher Education: Proceedings of the 2006 Annual International Conference of the Higher Education Research and Development Society of Australasia Inc* (2006) 146-51.

46 Ibid 147, for a more complete set of descriptors for authentic assessment.

47 In this case, I adopted a format deemed acceptable by the Supreme Court of the Northern Territory for an outline of argument on appeal. It is perhaps less likely for such a document to be submitted in support of *voir dire* submissions at the point of trial, yet the requirement served its intended purpose.

48 Whilst I was introduced to the idea of a trial chart as an undergraduate in an advocacy course and used the idea during my time as advocate, I was unable to locate an appropriate template in the advocacy texts I canvassed prior to teaching the course. This was perhaps because what I wished students to develop could more properly be likened to a ‘witness chart’.

49 As a practitioner I added a third column, with points for cross-examination, to enable the ordering and focusing of questions in a manner not governed by the original narrative order of the statement.

chart' method will be maintained, it will no longer be assessable, as the trial brief remains largely the same and assessment would therefore be compromised.

At the conclusion of the unit, students were required to sit a two-and-a-half-hour exam comprising two tasks:

1. The rapid analysis of a fresh brief of evidence in a new trial in order to demonstrate their grasp of the practical and theoretical aspects of the law of evidence. The approach to be adopted accorded with that taken in weekly witness statement analysis lectures throughout the semester and was the subject of a favourable independent review.⁵⁰
2. The critical discussion of the experience of a vulnerable witness group by reference to assigned readings and the student's own experience in the trial, and the evaluation of law reform approaches to enabling all voices to be heard.

D. Experiential Learning through Delivery and Assessment

Through the combination of delivery methods and assessments, students were arguably required to enter and progress through the experiential learning cycle⁵¹ on 10 occasions throughout the course, once for each witness and then finally in the exam. For each witness, students were required to *think* about the process of adducing evidence and the principles of admissibility. Students were required to *plan* to engage in the process, either directly or as assessed through the trial chart. They were required to *actively engage* through appearance, observation of their peers, and in the exam. And, finally, students were required to *reflect* following their appearance, during tutorials and in preparation for the exam.

IV. STUDENT RESPONSES AND REFLECTION

In an anonymous student feedback survey, completed towards the end of the semester, students were asked to specifically comment on the focus of the unit on witness examination and witness statements. In particular, they were asked whether, in their view, it assisted them to understand the principles of evidence law. As largely final-year students, familiar with other methods of instruction, they were in a position to provide a sound indication of the success or otherwise of the approach. Of the 59 respondents to the survey, 56 indicated that the approach and focus of the course had assisted them to understand the principles of evidence law. Three respondents did not specifically answer the question but were positive about the course in response to other questions. In particular, students commented that:

The semester-long mock trial was an excellent way to achieve and maintain student involvement at the highest level.⁵²

It really enabled me to focus on the relevant issue being taught as covered that week. Without this exercise, I believe that I would have missed a vital part of making the connection between theory and practice.⁵³

50 An independent examination review conducted by Professor Neil Andrews of Victoria University in relation to a similar 'brief of evidence' exam sat by students in the parallel Juris Doctor unit taught by me concluded that:

The examination question is a very good and fair assessment of evidence law which covers issues which graduates are likely to encounter in early stages of practice and it is appropriately layered with issues which enable better students to demonstrate their deeper understanding of the law and its application.

51 Kift, above n 4, 62-3.

52 Internal 2008 On-line Unit Satisfaction Survey, open text comments.

53 Internal 2008 Feedback on Teaching student survey response.

Stepping through statements is a practical way of understanding the content. Building upon each theory weekly was awesome.⁵⁴

Taking responsibility for the oral examination of a witness and arguing objections caused significant apprehension, but, in my estimation, resulted in a generally high standard of presentation and engagement with the subject matter of the unit. Student responses were again supportive of this contention:

Although this seemed extremely daunting, it was great in enabling a greater level of understanding. It showed how the theory directly related to the practical.⁵⁵

Witness statements and examinations were a great way to bring a practical element to the course and to help understand where evidence law is most relevant ... Having students explain concepts and set them out before a court also worked really well in demonstrating principles and how they are used every day in courtrooms.⁵⁶

In consideration of student feedback and my own reflection in the lead-up to running the course again in 2009, I have made a number of alterations designed both to foster desirable graduate attributes or 'transferable skills'⁵⁷ and further the process of experiential learning. In particular, students will be offered the opportunity to participate in pairs, fostering their capacity for teamwork. Each member of the pairing will be required to assume primary responsibility for questioning and oral argument on one occasion. This means that, as a pair, they will be *actively engaging* in the trial, as participants, on two occasions rather than one. Further, strict time limits will be applied to oral argument in support or response to objections to ensure there is sufficient time for oral feedback to be provided by the judge in the tutorial for the benefit of all students, to promote the *reflection* stage of the experiential learning cycle. Ultimately, when appropriate recording facilities are available in the moot court, as they should be by 2010, the opportunity will present to have students consider and critique their own performance and handling of evidential issues, with all the lessons that type of reflection can provide.

IV. COMPARISONS WITH OTHER 'IN PRACTICE' EVIDENCE COURSES

In order to contextualise and differentiate the approach taken at the University of Canberra, I will briefly consider the evidence law subjects taught by Andrew Palmer from the University of Melbourne and Andrew Ligertwood from the University of Adelaide. Palmer, taking a 'new evidence scholarship' approach,⁵⁸ teaches evidence law with a focus on the process of proof and factual analysis. In particular, the University of Melbourne course focuses on the 'organisation and analysis of the evidence in preparation for trial.'⁵⁹ The course does not, however, require students to take to their feet in a simulated trial. Arguably, therefore, whilst students have grasped the wheel and started the engine, they have not yet put the car in motion. According to Palmer:

... the highly performative nature of the ... task ... – the mechanics of actually adducing evidence – makes it difficult to teach and assess in a mass-enrolment subject (so therefore unsuitable for transfer to the LLB), and arguably means that it is better left for specialist advocacy courses.⁶⁰

I acknowledge that the 'quality of a student's trial presentation can only be as good as the quality of their pre-trial preparation'⁶¹. However, the excitement, apprehension and responsibility entailed in conducting witness examination and evidential argument is a critical motivator of

54 Ibid.

55 Ibid.

56 Ibid.

57 See, eg, Kift, above n 4, 50-6, for discussion of transferable skills.

58 Palmer, above n1, 109.

59 Ibid 122, 123.

60 Ibid 123.

61 Ibid.

pre-trial preparation, and productive of an holistic understanding of the law of evidence. The untamed complexity and humanity of the trial process is apparent with the witness in the stand, along with the strengths and flaws in a student's pre-trial preparation – taking to your feet can be both terrifying and transformative.

Andrew Ligertwood takes a more performative approach to teaching evidence law at the University of Adelaide. Perhaps in acknowledgment of concerns raised by Palmer, Ligertwood teaches the law of evidence in combination with a compulsory advocacy unit.⁶² Students must take each subject at the same time, and evidence lectures and seminars run parallel to mock-trial exercises in the advocacy unit.⁶³ According to Ligertwood:

Four years of teaching these combined courses have convinced me that student participation in evidence marshalling exercises and mock trials has not just resulted in a much greater appreciation by students of the evidential rules, but has also given them a greater appreciation of the complexity of the process.⁶⁴

Whilst Ligertwood's approach and experience is confirming, the question arises: am I asking too much of students in the limited time available? Particularly as the combined course run at the University of Adelaide has almost twice the number of face-to-face teaching hours as evidence law at the University of Canberra. There is no easy answer to this question. Whilst the doctrinal content of the unit has been reorganised and tailored since 2007, it has not been significantly reduced. Thus, students in the 2008 unit were being asked to rapidly master practice and process at the same time as principle. In my view, results, experience and reflection demonstrate that students have this capacity. Given responsibility as lawyers in a fictional trial, students rose to the challenge, enhancing their educational outcomes.

VI. CONCLUDING THOUGHTS

For evidence law teachers who may be interested in adopting an approach that requires students to take to their feet in a mock trial, two further questions may immediately present themselves: Does teaching of evidence law in this way require a courtroom? And does the lecturer need to have practised trial evidence law? The answer to each of these questions must surely be that it helps. Whether it is essential is another matter. On many occasions throughout the semester when the moot-court was unavailable, the trial continued in a standard classroom. Tables and chairs were moved to recreate, as closely as possible, the courtroom set-up and students had little difficulty performing the tasks assigned of them despite the less formal setting. Indeed, such conditions *are* authentic, in so far as they are standard on bush-court circuits throughout Australia. In relation to the second question, my answer is more guarded. As lecturers teaching principles and processes 'calculated to prevent error and elicit truth'⁶⁵ in the courtroom, we must to some extent engage with the practice from which the principles and processes arise. One possibility for the non-practitioner is to engage practitioners to run tutorials, and perhaps deliver guest lectures in relation to the practice of advocacy and methods of adducing evidence.⁶⁶ Ideally, a text could be provided containing a suitably authentic, yet creative, mock-trial brief, prepared by experts.⁶⁷ In the event that such resources are not available, and even where they are, the non-practitioner or even the junior practitioner — as I am — must be prepared to appear

⁶² Ligertwood, above n 1, 252.

⁶³ Ibid 253.

⁶⁴ Ibid 254.

⁶⁵ *R v War Pensions Entitlement Appeal Tribunal; Ex Parte Bott* (1933) 50 CLR 228, 256 (Evatt J).

⁶⁶ In 2009 at the University of Canberra, it is intended that a number of the tutorials will be run by a senior prosecutor from the DPP.

⁶⁷ Kumar et al, above n 33, provide a case file complete with witness statements in their text which is referred to throughout, providing practical application of principles discussed. However, this case file does not contain sufficient witness statements for use within the program of teaching as described in this article, nor are admissibility issues progressively embedded to enable a semester long trial.

‘naive or uninformed’;⁶⁸ prepared to make mistakes. After all, the courtroom is a dynamic environment in which errors are made, efforts to elicit truth fail, and the complexities of the process and principles can obscure the humanity of what is ultimately a process of resolving factual disputes. Why not expose students, first hand, to these complexities and allow them to grapple with evidence law, the purpose and relevance of which will be immediately apparent to them as they take to their feet?

⁶⁸ Ligertwood, above n 1, 239.