A Proof-oriented Model of Evidence Teaching

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The "new evidence scholarship", which has revitalised evidence research and teaching in North America in the last thirty years, still seems to have had very little impact in Australia.[1] The key feature of this new scholarship is a transformation of evidence "from a field concerned with the articulation of rules to a field concerned with the process of proof",[2] "a shift away from the rules of evidence towards the process of proof and the way inferences should be drawn from a mass of evidence".[3] In Australia one can point to scholars[4] such as Richard Eggleston,[5] David Hodgson,[6] David Hamer,[7] and Andrew Ligertwood,[8] as having published work which falls somewhere on a spectrum that ranges from actively engaging with the new evidence scholarship, to applying its insights, to sharing its concerns. For most published Australian evidence scholarship, however, Lempert's description of evidence as a "field concerned with the articulation [and critique] of rules" remains apt.[9] Given the minimal impact of the new evidence scholarship on evidence research in Australia, it would be surprising if the new evidence scholarship had had a significant impact on the teaching of Evidence in Australian law schools, and a cursory examination of a range of Australian evidence teaching texts confirms an almost exclusive focus on the rules of evidence, and a corresponding neglect of the processes of proof.[10]

Undeterred by my own lack of published "new evidence" work, however, I have recently been involved with others in a redesign of the evidence courses at the University of Melbourne in a manner which entailed a shift in focus away from the rules of evidence, and towards the process of proof.[11] The particular orientation which the redesign described in this article took was to attempt to develop

students' skills in factual analysis; the aim, then, was to adopt an approach first championed by Wigmore in the *Science of Judicial Proof*,[12] and subsequently expounded by Anderson and Twining in their *Analysis of Evidence*.[13] This is a proof-oriented model of evidence teaching, in the sense that the emphasis is on teaching students how to go about proving the facts in issue in litigation. The "new evidence scholarship" is a broad church,[14] however, and there are any number of ways in which an Evidence course could be redesigned along "new evidence" lines.[15] The particular redesign discussed in this article is not, therefore, being put forward as the last word in Evidence courses (it is not even the last word in Evidence courses at the University of Melbourne, which have continued to evolve since the completion of this article), but it is hoped that it might stimulate some thought about the ways in which we teach Evidence in Australian law schools. The article falls into two main parts: the first describes the redesign in some detail; the second deals with some of the objections which might be made to it.

STEPS TOWARDS A PROOF-ORIENTED MODEL OF EVIDENCE TEACHING

Evidence in the LLB at the University of Melbourne is generally taken as a final year subject, taught over one semester in two or three streams. Prior to its redesign, it might more accurately have been called "The Law of Evidence" than "Evidence", because its focus was almost exclusively on the *rules* of evidence. That said, the course was not entirely traditional in its approach. In particular, it used a problem- based methodology, rather than focussing on the reading and analysis of appellate judgments,[16] but its focus was nevertheless almost entirely on the exclusionary rules. The high enrolment and low staff/student ratios in the LLB course did not make it an ideal environment for experimentation, however.

A better environment for experimentation with the introduction of a proof-oriented teaching model was provided by a new law program, the Juris Doctor, or JD. This is a fee-paying graduate law degree where the intake is limited to 24 students. The introduction of the JD at the University of Melbourne was used as an opportunity to trial the proof-oriented model of teaching evidence, before introducing it into the LLB. At the time of writing, the new

Evidence course has been taught four times on the JD, and twice on the LLB. What follows, then, is a description of the JD Evidence course, followed by a discussion of the differences in approach required when the proof model was introduced into the mass-enrolment LLB Evidence course.[17]

The JD Evidence Course

The JD is taught over two years, in six trimesters, in each of which the students are required to take four subjects. Evidence is taught in the first trimester, along with Legal Research and Method, Criminal Law, and Procedure. This placement is in direct contrast with the majority of LLB courses, where Evidence (or Litigation) is typically taken in the final or penultimate year. An obvious consequence of its placement in the JD is that students do not bring much experience or knowledge of the law, or bodies of legal rules, to Evidence. A less obvious consequence, is that students take to later subjects the awareness of, and sensitivity to, factual issues, that they develop in Evidence: "how would I prove that" has apparently become a question students learn to ask of the elements of the causes of action they encounter in later year subjects.[18] The discussion of the Evidence course falls into three parts, dealing respectively with teaching methods, course content, and assessment.

Teaching Methods

There are twelve classes in the course, each of three hours duration; typically these take place once a week. The course is divided into 12 units, corresponding to these classes. Students are provided with course materials, which together with the text *Principles of Evidence*,[19] constitute the primary teaching resources for the subject. The materials for each unit fall into two distinct parts:

- The Information section details the objectives and reading for the unit. All the essential reading is marked with an asterisk. Almost all of the essential reading is provided in Principles of Evidence or the subject materials.
- The *Materials* section of each unit contains an outline of the points that will be considered in seminars through mini-lectures and class discussion. The Materials section

commences with an Introduction, including instructions about what students should read and prepare before class. The Materials section also includes a series of problems and questions for each week of the subject, some of which will be dealt with in class, others of which are there to provide students with the opportunity for further exercise and reflection. In some units, the Materials section also includes selected legislative provisions, case extracts and articles. These are the minimum required reading for each unit. One of the units, which covers criminal investigation and procedure, has an extra section headed Lecture Notes, which provides a basic outline of the law relating to the topics dealt with in that unit, which are not covered in Principles of Evidence.

The materials are also made available via the Evidence Subject Homepage which includes downloadable versions of all these subject materials (excluding some article and case extracts), and online links to some of the listed reading.

There is, however, no attempt to systematically cover the material contained in each unit through lectures. Rather, "mini-lectures" on selected topics within the unit are interspersed with the discussion of problems designed to highlight some aspect of the material under discussion, or to provide an opportunity to apply a rule which has just been expounded. The problems are typically taken from reported cases, often from the leading cases in the area, with students not being told how the court decided the case until after they have completed their own analysis (the aim in approaching a case in this way is to provide the students with the basis for a critique of the court's decision because they form their own views about how the case should have been decided before being exposed to the court's actual decision).

The usual method of dealing with problems is to require students to discuss the problem with their immediate neighbours first (ie student-selected small group discussion), before the problem is discussed by the group as a whole, led by the teacher. The reason for the initial small group discussion is to ensure that each student has the opportunity to actively engage with the problem through debate and dialogue with a peer. This may then provide them with the confidence to contribute to the discussion of the problem by the group as a whole, but even if it does not, it ensures that all students have the opportunity to discuss the

problem, and that no student is able to sit back and passively rely on the contributions of others.

Most of the problems are sufficiently short that they can be done in class whether or not students have prepared them prior to coming to class, but where the problem is particularly lengthy, preparation will be required. Sometimes, for example, in order to expose students to the primary materials out of which evidential arguments must be constructed, a problem will be based on lengthy extracts from records of interview, depositions, or the examination and cross-examination of witnesses on a voir dire. Such problems have to be prepared in advance. Given the non-systematic nature of the coverage of material in class, however, an onus is also placed on the students to complete the readings set out in the materials, and to raise any points of obscurity or interest in class.

Course Content

As noted above, the course is divided into 12 units. The final week is a revision unit and covers no new material. The law of evidence is covered in eight weeks, in units 4 to 11.[20] Obviously covering the law of evidence in only eight weeks requires a certain amount of squeezing; I will discuss the justifications for, and acceptability of, doing this in the second part of the article. It is, however, the first three units which are the crucial ones for present purposes. These first three weeks of the course are basically a "law-free zone", focusing only on the skills of factual analysis, with evidence being analysed without any regard to its admissibility. Before describing the course content further, it may be useful to define precisely what it is that is meant by "factual analysis".

Anderson and Twining offer a useful definition, turning on the distinction between "legal" and "factual" analysis:

> Legal analysis ordinarily requires analysis of the facts, but customarily this analysis is limited to selection and variation and to identification of facts needed and lines of investigation to be pursued. Which of the given facts are likely to be (or should be) perceived as important by the court? How can the facts be structured to make it clear that the case at hand falls clearly within the rule for which the student or practitioner contends? What additional facts are necessary to determine the principles to be applied? Although facts are crucial in law analysis, the facts are ordinarily treated as given and are used to manipulate and test the scope and applicability of legal rules.
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> Factual analysis is different. It is more familiar to practitioners

> than to students. The skills necessary are those required to organize and analyze a mass of raw data – the evidence actually or potentially available – and to determine the inferences that can properly be drawn from that data in relation to the ultimate facts in issue in a case. To illustrate the distinction, factual analysis ordinarily assumes that the applicable legal principles are given. Agreed jury instructions for a trial, an indictment, or the settled pleadings would be examples. From these the lawyer can determine the ultimate factual propositions that must be proved if the plaintiff or prosecutor is to win. The analytic and reasoning task for the lawyer then becomes determining whether the factual data available as evidence support inferences that can be ordered to frame a compelling argument that the elements of the ultimate propositions have or have not been proven according to the applicable standard of proof. Although the principles of logic are involved in both legal analysis and factual analysis, the application of these principles in factual analysis differs from their application in legal analysis.[21]

It is, then, the skills of factual analysis which the first three units of the course aim to teach students. The reason for introducing factual analysis *before* admissibility is to prevent the exclusionary rules dominating student thinking. In this author's experience, if the exclusionary rules are introduced first, students can tend to be blinkered by the question of admissibility in a way which prevents them from both thinking creatively about the ways in which they might attempt to use a particular item of evidence, and thinking critically about whether the rules help or hinder the trial process. Indeed, once students know the exclusionary rules, they can too quickly rule evidence out of their consideration by assuming that it will be inadmissible. The rules of evidence are deferred, then, until after the students been exposed to the principles of proof, and when they are introduced they are represented as being of secondary importance to the "main process": that of using evidence as part of the process of attempting to prove or disprove a case. Indeed, the first assessment task (currently worth 25% of the marks for the course) requires the students to analyse a brief of evidence without any consideration of admissibility issues at all.

Even in the admissibility units, the focus on proof is maintained, with the problems consistently requiring students to both construct case theories and to see items of evidence in the context of an overall case. The reading of appellate decisions is

generally avoided because in such cases the "facts" have already been "found"; approaching cases on the basis that the "facts" themselves are not neutral, and are actually the main point of controversy between the parties, sometimes appears to be a startling concept for students who take Evidence near the end of their degree, as the LLB students do. For the JD students, having this awareness from the start will hopefully inoculate them against the fallacy that "the facts" are indeed "facts".

Teaching for the three proof units of the course currently revolves around a progressive analysis of a hypothetical homicide brief, *R v Smith*, which is loosely based on the facts in *Wilson v R* (1970) 44 ALJR 221. Homicide was chosen because of its inherent fascination, and because it allowed for the presentation of a complex body of information, including a variety of different kinds of witnesses, a variety of different kinds of evidence (including things like hearsay and propensity evidence), and a variety of possible outcomes. The reading materials for these units are drawn from a variety of sources of varying degrees of difficulty.[22]

The first of the three proof units is called "Introduction to the Analysis of Evidence", and the objectives for the unit are that students completing it should:

- understand the role played by evidence in litigation;
- be able to identify the facts in issue in a case;
- be able to prepare a chronology;
- be able to identify matters requiring further investigation;
- be able to develop a theory of the case;
- be able to state that theory in the form of a narrative;
- be able to anticipate an opponent's theory of the case; and
- be able to identify the issues which are likely to the subject of genuine dispute in a case.

The students' analysis of the *Smith* brief begins with the preparation of a chronology. The ability to organise a mass of information according to time of occurrence is an obvious and basic pre-requisite to the development of both investigative strategies and a theory of the case, which is essentially an extended factual allegation which satisfies the proof requirements of the cause of action or criminal offence in question, or which rebuts the same.[23] On the investigative side, the chronology reveals gaps in the information currently available to the student, which suggests areas requiring investigation. On the case theory side, the

chronology provides the materials out of which a "story", or case theory, can be constructed. The mere sequence of events is likely to suggest relationships between facts which might not otherwise be apparent. The students "homework" is to return the following week with a narrative of what happened, and the reasons for believing that that is what happened, in the form of the kind of address they would like, as prosecutors, to be able to deliver to a jury at the close of the trial.

The second week – "Analysing Individual Items of Evidence" – is, as its name suggests, concerned with the microscopic analysis of the individual items of evidence contained in the brief. Its objectives are that students completing it should:

- be familiar with the main classes of evidence, according to both the source of the evidence and the relationship it bears to the facts in issue; and
- have developed the ability to analyse individual items of evidence and to identify issues of fact, including the ability to:
  - identify information and inferences which could be used to prove or disprove the facts in issue in a case;
  - describe the specific use or uses for which information is or might be relevant; and
  - articulate, and represent, any chain of reasoning which shows information to be relevant (or not).[24]

The first of these objectives involves familiarising the students with the main classes of evidence, according to both the source of the evidence and the relationship it bears to the facts in issue.[25] The second is concerned with developing students' abilities to construct arguments about evidence. The aim of teaching students to be able to "represent" chains of reasoning is a pre-cursor to the evidential charts dealt with in the third week of the course. An important component of this unit is an emphasis on the role of generalisations in inductive reasoning.[26] The underlying premises of this unit are that fully articulating the reasoning which makes evidence relevant also exposes the weak links in a chain of reasoning,[27] and that being able to do this is useful in relation to the evidence being adduced both by oneself and by one's opponent.

If the second unit was about pulling the brief to pieces, then the third unit, "Organising Complex Masses of Evidence", is about putting it back together again. Its primary objective is that students should:

- have developed the ability to analyse complex masses of evidence, including the ability to:
  - draft a narrative statement of a theory of the case and of the evidence and inferences which could be used to support that theory;
  - use the outline method to organise the evidence in a case;
  - use the chart method to organise the evidence in a case; and
  - evaluate the strengths and weaknesses of opposing cases.

The fundamental objective, then, is to help students to develop the ability to organise the complex masses of mixed evidence which are typical of litigation. Three main methods are offered: the narrative method, the outline method and the chart method. The key point that each of the methods has in common, is that students are required to identify what it is that they will have to prove in order to succeed in the litigation (ie the facts in issue, and the subset of that, the facts genuinely in dispute), and to explain how they will go about proving it.

The narrative method,[28] which is the one which comes most easily to students, really just requires them to explain in prose what they have to prove, and how they will prove it. The outline method is a more rigorous version of the kinds of outlines sometimes used by lawyers.[29] The outlines students are required to develop are essentially a nested series of factual propositions descending from the facts in issue to the actual sources of evidence, setting out all intermediate inferences and necessary generalisations. The chart method taught in the course is a modified version of that described by Anderson and Twining in *Analysis of Evidence*, which is itself based on the method expounded by Wigmore in *The Science*.[30] The major drawback to Wigmorean charts – as anyone who has ever seen one will know – is that they are forbidding to look at, and all but impossible to decipher. This obviously limits their usefulness. The charts which students are taught to prepare in the course instead rely on modern flow charting or argument mapping software which permit students to include text in the chart.[31] This means that a chart can include all of the information contained in an outline which – at least for those with a preference for information to be presented in a more visual form – can be an aid to the comprehension of the case.

All of the methods serve the same fundamental purposes. In particular, they enable the student to identify all of the elements of

the charge and any defences; the evidence available to prove each such element; any gaps in the evidence; as well as the areas which are not in dispute, and those where there is a conflict of evidence. By doing this, students will be able to identify the evidence they need to adduce from their own witnesses, and should be able to identify appropriate aims for the cross-examination of their opponent's witnesses.

The Assessment

As Ramsden has pointed out, from "our students' point of view, assessment always defines the actual curriculum".[32] It was essential therefore that the new assessment actually set out to assess whether students had acquired the skills in factual analysis specified in the objectives. It also seemed a good idea to try to move towards a form of assessment more closely modelled on the kind of task lawyers have to perform in practice. As Gibbs has argued in relation to the transferability of skills:

> It is necessary to bring elements of the world of work into the classroom, to confront students with situations and problems which resemble those they will eventually have to tackle, and to allow them to learn the necessary skills in work-like contexts, tackling the problems in the way they will eventually have to tackle them outside academia.[33]

In the legal context, this is often referred to as a "clinical" approach to legal education.[34] According to Amsterdam, such an approach includes the following characteristics:

1. Students were confronted with problem situations of the sort that lawyers encounter in practice. The situations might be simulated … or they might be real …

2. The problem situations were: (a) concrete, that is, textured by specific factual detail; (b) complex, that is, they required the consideration of interacting factors in a number of dimensions – legal, practical, institutional, personal and (c) unrefined, that is, they were not predigested for the student through the medium of appellate opinions or coursebooks, but were unstructured, requiring the student to identify "the problem[s]" or "the issues[s]".

3. The students dealt with the problem *in role*. They bore the responsibility for decision and action to solve the problem. They had to (a) identify the problem; (b) analyze it; (c) consider, formulate and evaluate possible responses to it; (d) plan a course of action; and (e) execute that course of action.[35]

It was fairly clear that the traditional law school final

examination did not have any of these characteristics, not least because of the time limitations inherent in the format, which make it almost impossible to present problem situations which are "concrete", "complex" and "unrefined". Even just in terms of admissibility, "spotting issues" in such an examination, while no doubt a difficult task, is very different from the task demanded of practising lawyers. Where a single examination problem might be crammed with an enormous number of issues – and the students will know from experience that this is going to be the case – in a legal file the admissibility issues are likely to be spread over numerous, often lengthy, witness statements or other documentary material, and the lawyer will have no idea in advance of how numerous or complex the issues are likely to be. For the appellate lawyer, the task of finding an issue on which to base an appeal may be even more challenging, requiring the close scrutiny of an enormous number of pages of transcript.

So what kind of realistic task might the students be set? It is suggested that the main evidential tasks required of a lawyer fall into the following categories:

- 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 the trial itself.

The first of these seemed too removed from the trial and the issues of admissibility to provide an appropriate assessment task; this left a choice between the other three tasks. Romero has suggested that it is the third and fourth tasks which should be assessed in an Evidence course which uses a clinical method:

> Instead of asking a student what [evidentiary] objection might be made, the clinical method requires the student to make the objection. Instead of asking what foundation is required to admit an item of evidence, the clinical method requires the student to lay the foundation by calling the necessary witness … and then asking the necessary questions.[36]

Romero's description of what can actually be tested using this clinical approach, however, suggests a course still dominated by the law of evidence (what objections, what foundations for admission etc). Moreover, the highly performative nature of the fourth task in particular – 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. In any case, the quality of a student's trial presentation can only be as good as the quality of their pre-trial preparation: technical proficiency in the examination of witnesses, for example, is fairly empty if the student has not first identified, through detailed analysis of the case, the points that they need to make through their own witnesses and in the cross- examination of their opponent's.

This left the second task: analysing the evidence in preparation for trial. To assess this, students are provided with a brief of evidence as a take-home examination. The brief is based on a real brief (with any identifying details changed), and students are assigned a particular standpoint such as counsel for the prosecution or counsel for the defence. The proceedings are criminal for two reasons; first, because a brief in a civil proceeding would not test the students' ability to apply a number of important rules of evidence; and secondly, because the criminal law is in any case the only body of law which JD students have all been taught. As with most real life briefs, the brief provided to the students both contains a mass of irrelevant material, and fails to cover every point of significance.

Students are required to write an Advice on Evidence, which is essentially a counsel's analysis of the evidence in a case, and therefore a realistic task of the kind with which lawyers will be confronted in practice.[37] The instructions given to students are, however, fairly specific. In particular, students will be instructed to perform a combination of the following tasks (the precise combination will depend, inter alia, on the role assigned to students):

- Draft a statement (in narrative form, akin to an opening or closing address) of the case theory or theories likely to be relied on by either or both of the prosecution and defence; this statement should also include (where appropriate) the student's reasons for preferring one theory of the case over another. In doing this, students should also identify the real issues in the case.[38]
- Identify the evidence to be relied on, and articulate or represent the reasoning to be used, in attempting to persuade the court to accept the student's theory of the case.
- Analyse the strengths and weaknesses of the opposing cases.

- Indicate how the student intends to run the trial in order to advance his or her theory of the case; in doing this students would be expected to indicate how they would deal with any evidence which was inconsistent with their case, as well as to address issues such as their aims in the cross-examination of their opponent's witnesses, and whether they would be likely to call the accused to testify in his or her defence.
- Discuss the admissibility of any potentially inadmissible items of evidence likely to be relied on by either the prosecution or defence. It is here that the students' knowledge of, and ability to apply, the law of evidence is assessed; depending on the problem, between 40-60% of the marks for the examination might be allocated to this component.
- Indicate, in light of the above, the likelihood of conviction.
- Append a chronology of events.
- Append either a chart or an outline of either or both of the prosecution and defence cases.

Such a form of assessment obviously places a premium on factual analysis. The fact that the brief, like any brief, is unlikely to cover every possible issue of relevance also means that students are required to think creatively about what kind of evidence they might need to adduce in addition to that contained in the brief. In relation to admissibility, this form of assessment also provides, in many ways, a more challenging and realistic task than a traditional examination. Because students are provided with a large body of material, admissibility issues are simply not flagged in the way that they almost inevitably are in a three hour examination. Instead they really have to be spotted, and can easily be missed.

As already noted, as well as the final assessment described above, students are also required to complete an earlier piece of assessment (worth 25% of the marks for the subject). The main differences between the final assessment and the first assessment task are that the earlier assessment task does not require students to consider the admissibility of any of the evidence analysed; and that the earlier assessment task is usually done in "syndicates" of four, whereas the final assessment is done by students on their own.

Students taking this form of assessment have exhibited a high degree of sensitivity to factual issues, as well as a degree of savviness and sophistication. For example, asking the students to consider whether they would be likely to call the accused to testify

requires them to take into account matters such as the extent of inconsistency between any prior statements made by the accused, the degree to which the conduct of the defence is likely to expose the accused to prejudicial cross-examination about prior criminality, and whether the defence is one which relies on facts about which only the accused could give evidence. The fact that such a question looks forward to the trial seems to lead students to a better understanding of the issues surrounding testimony from the accused than does a backward-looking question about whether the asking of particular questions or the giving of particular evidence had resulted in the "shield" being lost.

The LLB Evidence Course

Transferring the proof model to the mass-enrolment environment of the LLB proved far less difficult than had been anticipated. The course content described above was, with some simplification and reduction of reading material, replicated in the LLB. The same general teaching approach was also taken so that the classes comprised a similar mixture of mini-lectures and problems. The problems were also approached in the same way as on the JD; that is, the problem would first be expounded to students, who would then be given the opportunity to discuss it with whomsoever they happened to be sitting near, before being invited to contribute to the public discussion of the problem by the class as a whole. *Smith* was retained as the vehicle for teaching the same three units on proof that had been taught in the JD. A slightly simpler methodology for analysing the brief was, however, developed. This involved the following main steps:

- Reading the brief.
- Preparing a chronology.
- Drafting a narrative statement of the prosecution theory of the case, in the form of a closing address.
- Identifying all the facts in issue which needed to be proved.
- Broadly identifying the evidence which would be used to prove each of these facts in issue.
- Analysing as much of this evidence as class time allowed in greater detail, including identifying all necessary generalisations and inferences from the evidence to the facts in issue.

In effect, this involved teaching the second and third units in a slightly different order, although the end "product" was essentially the same. The assessment used in the JD was also transferred, with some significant modifications to the LLB. The new assessment, developed by my co-teacher, Dr Andrew Kenyon, involves the online presentation of a brief in a criminal proceeding, under the name "Evidence Briefcase". The material includes statements from potential witnesses, transcripts of police interviews, photographs of an alleged crime scene, and audio and video files, such as a videotape of a police interview with the accused person. The web-based format aims to create a learning environment which simulates legal practice. Students are able to make and store their own notes about the potential evidence, and to communicate with each other and with the teachers through an online forum (which has been used extensively). Students are given a set period (for example, a week) to complete an Advice on Evidence of the kind described above in relation to the JD assessment. During this period, the Briefcase software also captures a certain amount of data in relation to each student's use of and interaction with the brief, which provides some measure of protection against cheating.

There was an extensive evaluation program of the introduction of the project. The evaluation included an online survey of students, which achieved an 80% response rate and provided detailed quantitative and qualitative data. This evaluation will be developed by Andrew Kenyon into an academic article, but it is notable that 89% of students replied "yes" or "to some extent" to the question: "Evidence Briefcase better assessed my learning to date in this subject than a problem or essay-style question in a traditional law exam". Only 11% replied "no" to this question. The overall response was consistent with the views of the examiners that the analysis of a brief of evidence and the requirement to complete an advice on evidence were a better method of assessing Evidence than a traditional three hour examination.

While Briefcase was being trialled, however, and then awaiting approval as the sole assessment for students in Evidence, students were also required to complete a final examination. The examination took the format of what might be called a "mini-brief", or perhaps more accurately, a summary of a brief. As with the other forms of assessment, a substantial proportion of the marks for the examination were allocated to factual analysis. Nevertheless, none

of the evidence teachers involved regarded this as the ideal form of assessment for the subject, given the difficulty of digesting, and then analysing, such a large amount of information in so short a space of time. Although, the answers produced were generally of a good standard given the difficulty of the task – so that the marks awarded suffered no drop in comparison to previous years – there was a degree of student dissatisfaction with the form of assessment. Indeed, the corollary of the results of the Briefcase evaluation reported above, are that an examination in this form would not have been regarded by students as an equally satisfactory form of assessment to the kind of assessment represented by the Briefcase project.

TWO OBJECTIONS TO A PROOF-ORIENTED MODEL OF TEACHING EVIDENCE

While numerous objections could no doubt be made to the teaching model described above, I intend to deal with just two of them: that there is no room in an Evidence course for factual analysis, and that the development of skills in factual analysis is appropriately left to specialist courses.

There is No Room for Factual Analysis

Like most other subjects, Evidence often feels overcrowded: too many topics, not enough time. This is particularly true when Evidence is taught over one semester – as it is at Melbourne – or is incorporated into a larger subject such as Litigation. With so many topics already crammed in, and so many important ones possibly already left out, how can room be made for additional material? The answer to this objection – if there is one – is perhaps that it is never possible to teach students *all* of the rules of evidence anyway, and that the drawing of any line between the essential and the inessential is a fairly arbitrary process, determined as much by the number of teaching weeks available as anything else.[39] Although the Council of Legal Education's list of the topics which have to be taught in a university Evidence course in order for it to be recognised for the purposes of professional admission[40] might appear to impose breadth of coverage requirements on a course, it is perhaps worth pointing out that this list says nothing about the amount of class time which has to be devoted to each topic.

Teachers are, in any case, given the option of abandoning the list and teaching "topics of substantial equivalence in breadth and depth";[41] this flexible alternative requirement clearly leaves a great deal of discretion in the hands of individual teachers.

With these thoughts in mind, Evidence teachers might feel sufficiently emboldened "to slaughter the dragon 'coverage'",[42] and to so reduce the depth and/or breadth of their coverage of currently taught topics in order to make room for material on factual analysis.[43] But the fact that coverage *can* be reduced is not in itself sufficient reason to do so: the case for the inclusion of material on factual analysis within an Evidence course must still be made.

Factual Analysis belongs in Specialist Courses

A second objection to a proof-oriented model of teaching evidence is that factual analysis is already, and adequately, and indeed appropriately, dealt with in specialist subjects such as advocacy, trial practice, or other clinical courses: that being so, there is no need to include factual analysis in Evidence. What follows are some reasons for believing that factual analysis might well be sufficiently important to warrant a place in the compulsory and quasi-compulsory core of subjects which all students are required to complete,[44] and for believing that the appropriate place for it in that core is in an Evidence course.

First, any list of the skills required of lawyers is bound to include skills in factual analysis.[45] These skills are generally rated by the legal profession as very important to the practice of law.[46] Given that Evidence is a subject required for admission to practice (but not, generally, for the award of a law degree), it does not seem unreasonable that an Evidence course might make some attempt to provide students with the skills they will need in practice. Furthermore, whereas the *law* of evidence has a limited sphere of operation – applying only in courts, and in practice, not even in all of them – the skills of factual analysis are equally applicable in jurisdictions where the rules of evidence do not apply at all (such as administrative tribunals), or are rarely, or only partially, applied in practice (such as most civil proceedings or the Magistrates' Court). Restricting the contents of "Evidence" to the law of evidence does nothing to prepare students for practice in jurisdictions such as these.

Factual analysis is not only central to litigation, however; it is also an important component of any career which requires the marshalling and evaluation of the evidence and arguments for competing claims. Factual analysis thus fits the definition of a "transferable skill", of relevance in a wide variety of employment situations. The checklist of transferable skills compiled by Gibbs et al, for example, includes "information gathering", which consists of skills such as "locating information sources, evaluating sources and data, extracting relevant information, interpretation of data, presentation of data";[47] in short, factual analysis. That factual analysis is a transferable skill is significant, given the high proportion of law graduates who will ultimately pursue a career outside the legal profession.

A second reason for including factual analysis in Evidence is that if a course in "Evidence" is to live up to its label, then it should include a consideration of evidence as evidence, and not just an analysis of that evidence from the point of view of admissibility.[48] This is because the question of admissibility is only one aspect of the evidential analysis required as part of trial preparation, and it is most certainly *not* the most important aspect. Before the question of admissibility even arises, a lawyer must carry out a number of tasks which require some analysis of the evidence currently available to him or her. In the early stages of litigation, a lawyer may be required to develop investigative strategies based on the information presented to him or her by a client.[49] At subsequent stages the lawyer might be required to draft pleadings or other documents containing factual allegations.[50] Closer to, and during a trial, the lawyer will have to prepare opening and closing addresses and plan the examination and cross-examination of witnesses.

All of these tasks require the development of a theory of the case, and they require a detailed analysis of all of the evidence available, or potentially available, to the lawyer. Part of that process of preparing for trial – but most decidedly only *part* of the process – is a consideration of the admissibility of the items of evidence which the lawyer or his or her opponent is likely to attempt to lead. But a lawyer can only carry out this analysis if he or she has first identified this evidence, and this evidence can only be identified when the lawyer's case theory has been developed, and the likely case theory of the opponent considered.[51]

A third reason for including factual analysis in an Evidence

course is that, in this author's experience at least, 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. Indeed, teaching admissibility without teaching proof can arguably be likened to teaching someone the road rules without also teaching them how to drive. Like the road rules, the question of admissibility only has meaning when one bears in mind the underlying objective: that one is attempting to get from point A to point B. In the case of evidence, the journey from A to B is obviously the aim of proving one's case by means of evidence; like driving, this too is subject to certain restrictions and obstacles, and like driving those restrictions and obstacles only have meaning as a component of a larger process with its own objectives.

Moreover, there are a number of exclusionary rules whose scope and operation depend on the purpose for or manner in which the evidence is being used. These rules do not prohibit categories of information, but specific uses of information.[52] This is most obviously true of the hearsay and tendency and coincidence rules, but it is also true of the rules regulating the use of opinion and credibility evidence. Unless students are able to analyse the way in which these kinds of evidence are being used – which depends on their skills in factual analysis – they will be unable to determine whether or not the evidence is admissible. In other words, a greater emphasis on factual analysis will develop an improved capacity to deal with questions of admissibility.

A fourth reason for including factual analysis in an evidence course, is that just as an emphasis on factual analysis can enhance students' ability to apply the rules of evidence, so can it open the door to the introduction of critical insights. Kathy Mack has, for example, recently described an Evidence course in which a focus on the "fundamental evidentiary questions of relevance and the logic of proof" is used as a vehicle to explore issues of diversity and "to investigate how we think and why we think a certain way, and to expose unacknowledged assumptions, beliefs and idea".[53] Close attention to the way in which we reason about, and from, evidence is thus a powerful tool for exposing prejudices, biases and assumptions embedded in the way we think; to take a simple and obvious example, a defence of the relevance of sexual history evidence is likely to founder when the generalisations upon which the relevance of such evidence depend are exposed to view.

CONCLUSION

The shift towards a more proof-oriented model of teaching Evidence is now well entrenched. Its fundamental aim has been to increase students' skills in factual analysis, such skills being important to the practice of law, transferable, and essential to a proper application of many of the exclusionary rules of evidence. The change in approach has gone hand in hand with a change to the assessment, so that students are now presented with a task much more akin to that which they are likely to encounter in practice, namely the analysis of a brief of evidence in a criminal proceeding and the completion of an advice on evidence based on that analysis. Anecdotally, students have reported that the focus on factual analysis has improved their general thinking and arguing skills; more formal evaluation has confirmed that students are satisfied that the new assessment provides a better measure of their abilities than the assessment it replaced.

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1 For a general overview of the "new evidence scholarship" see J Jackson, Analysing the New Evidence Scholarship: Towards a New Conception of the Law of Evidence (1996) 16 *Oxford Journal of Legal Studies* 309; as Jackson notes, the phrase "new evidence scholarship" derives from R Lempert, The New Evidence Scholarship: Analyzing the Process of Proof (1986) 66 *Boston University Law Review* 439.

2 Lempert, *supra* note 1.

3 Jackson, *supra* note 1.

4 The names which follow are not intended to be exhaustive!

5 See R Eggleston, *Evidence, Proof and Probability* 1 ed (London: Weidenfeld and Nicolson, 1978); R Eggleston, The Probability Debate [1980] *Criminal Law Review* 678; R Eggleston, *Evidence, Proof and Probability* 2 ed (London: Weidenfeld and Nicolson, 1983); R Eggleston, Focusing on the Defendant (1987) 61 *Australian Law Journal* 58; R Eggleston, Wigmore, Fact-finding and Probability (1989) 15 *Monash University Law Review* 370; and R Eggleston, The Philosophy of Proof (1991) 65 *Australian Law Journal* 130.

6 See D Hodgson, Probability: The Logic of the Law—A Response (1995) 15 *Oxford Journal of Legal Studies* 51; D Hodgson, The Scales of Probability: Probability and Proof in Legal Fact-finding (1995) 69 *Australian Law Journal* 731; and D Hodgson, *The Mind Matters: Consciousness and Choice in a Quantum World* (Oxford: Clarendon Press, 1991).

7 See D Hamer, The Civil Standard of Proof Uncertainty: Probability, Belief and Justice, (1994) 16 *Sydney Law Journal* 506; D Hamer, The Continuing Saga of the Chamberlain Direction: Untangling the Cables and Chains of Criminal Proof (1997) 23 *Monash University Law Review* 43; D Hamer, "Chance would be a

fine thing": Proof of causation and quantum in an unpredictable world (1999) 23 *Melbourne University Law Review* 557; and D Hamer, "Hoist with his own petard"? Guilty Lies and Ironic Inferences in Criminal Proof (2001) 54 *Current Legal Problems* 377.

[8] See A Ligertwood, *Australian Evidence* 3 ed (Sydney: Butterworths, 1998) ch 1 and *Australian Evidence: Cases and Materials* (Sydney: Butterworths, 1995) ch 2.

[9] *Supra* note 1.

[10] See, for example, PK Waight & CR Williams, *Evidence: Commentary and Materials* 5 ed (North Ryde, NSW: LBC Information Services, 1998); M Aronson & J Hunter, *Litigation: Evidence and Procedure* 6 ed (Sydney: Butterworths, 1998); S McNicol & D Mortimer, *Evidence* 2 ed (Butterworths Tutorial Series, Sydney: Butterworths, 2001); and my own *Principles of Evidence* (Sydney: Cavendish Publishing Australia, 1998). This is not intended to suggest that these texts or the courses which rely on them are narrowly "black letter"; it is not necessary to focus on the processes of proof to be innovative or exciting: see, for example, J Hunter & K Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (Sydney: Butterworths, 1995), and J Hunter, Teaching Plumbing with Periclean Ideals: Should it be done? Can it be done? Advocacy and Courtroom Scholarship (1996) 30 *Law Teacher* 330. Ligertwood's texts, *supra* note 8, clearly do pay some attention to the processes of proof; and see also K Mack, Teaching Evidence: Inference, Proof and Diversity (2000) 11 *Legal Education Review* 57, discussed in more detail *infra*, text accompanying note 53.

[11] This ongoing process of redesign has been a collaboration with my teaching colleagues, Dr Andrew Kenyon & Dr Jeremy Gans.

[12] JH Wigmore, *The Science of Judicial Proof: As Given in Logic, Psychology and General Experience, and Illustrated in Judicial Trials* 3 ed (Boston: Little, Brown and Company, 1937); see also Wigmore, *The Principles of Judicial Proof: As Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials* (Boston: Little, Brown and Company, 1913).

[13] T Anderson & W Twining, *Analysis of Evidence: How to do Things with Facts* (London: Weidenfeld and Nicholson, 1991).

[14] See Jackson, *supra* note 1.

[15] See, for example, Mack, *supra* note 9.

[16] The reasons for this can be briefly set out. First, our aim in the course was to provide students with a good grasp of basic principle, rather than the ability to construct the kind of argument about the scope or operation of an exclusionary rule that might be made on an appeal in the High Court. Secondly, being a later year subject, we felt entitled to assume that the skills to be gained from reading, analysing and synthesising case law – important as they are – are skills which students should already have learnt in earlier subjects, and which they should not need to be taught again in Evidence; cf AG Amsterdam, Clinical Legal Education – A 21 Century Perspective (1984) 34 *Journal of Legal Education* 612, 618: "… *why* do we need to teach case reading and doctrinal analysis to the same students twenty-nine times *sub nom*. torts, contracts, criminal law, admiralty, antitrust, civil rights, corporations, commercial law, conflict of laws, trusts, securities regulations and so forth?"

[17] During the same period a new specialist LLM subject, Proof in Litigation, which is concerned solely with the process of proof, has also been developed; this subject is not, however, discussed in this article.

[18] According to the teachers of some of the later subjects.

[19] Palmer, *supra* note 9.

[20] Those weeks are currently – the process is ongoing and likely to remain so for some time – divided as follows: 1. Introduction to the law of evidence. This is an "omnibus" unit, which introduces students to the main sources, principles, techniques, terminology and concepts of the law of evidence in Australia; and

outlines the main methods for adducing evidence, including the limitations on the availability of evidence imposed by the law of privilege and immunity. 2. Criminal investigation: the gathering of evidence. This deals with investigative powers, suspect's rights, including the right to silence (and silence at trial), and the public policy discretion. 3. Criminal investigation: interrogation and confession. This deals with the admissibility of admissions and confessions in criminal proceedings. 4. Hearsay: the exclusionary rule. 5. Hearsay: exceptions to the rule. Previous attempts to teach both aspects of the hearsay rule in one week have proved consistently unsuccessful, with students requiring more time to assimilate the rule. 6. Opinion evidence. 7. Tendency and coincidence evidence. 8. Credibility evidence.

[21] Anderson & Twining, *supra* note 12, at xx.

[22] Including Wigmore (1937), *supra* note 11; Anderson & Twining, *supra* note 12; D Schum, *Evidential Foundations of Probabilistic Reasoning* (New York: John Wiley & Sons, 1994); D Schum, *Evidence and Inference for the Intelligence Analyst* (2 volumes, Lanham: University Press of America, 1987); and D Binder & P Bergman, *Fact Investigation: From Hypothesis to Proof* (St Paul: West Publishing, 1984). These will soon be replaced by a new text by the author: *Proof and the Preparation of Trials: How to do things with evidence* (Sydney: LBC, 2003).

[23] See, inter alia, S Lubet *Modern Trial Advocacy: Analysis and Practice* (Notre Dame: National Institute for Trial Advocacy, 1993), Chapter 1; E Imwinkelried, The Development of Professional Judgment in Law School Litigation Courses; The Concepts of Trial Theory and Theme (1986) 39 *Vanderbilt Law Review* 59; and E Ohlbaum, 'Basic Instinct: Case Theory and Courtroom Performance' (1993) 66 *Temple Law Review* 1.

[24] With acknowledgement to Kathy Mack of Flinders University, whose objectives were partly used as the basis for these: see Mack, *supra* note 9, at 58.

[25] Based on the taxonomy of evidence in Schum (1994), *supra* note 21, at 115, where evidence is classified according to two dimensions: first, its source, real or testimonial; and secondly, its relationship to the facts in issue, direct, circumstantial or ancillary (which includes, for example, evidence relating to the credibility of a witness or authenticity of an item of real evidence).

[26] See, for example, Schum (1994), *supra* note 21, at 86-92.

[27] As well as those links which depend on biased or unfounded generalisations, assumptions or beliefs: cf Mack, *supra* note 9.

[28] So called, because it is very loosely based on Wigmore's "narrative method": see Wigmore (1937), *supra* note 11.

[29] See, for example, Binder and Bergman, *supra* note 21.

[30] See Anderson and Twining, *supra* note 12, at 108-155.

[31] A number of products have been tried by students including Microsoft Visio, MindManager (available from http://team-link.org) and Reason!Able (available from http://www.goreason.com). The latter has proved the most popular, in part because it is available free of charge to University of Melbourne students.

[32] P Ramsden, *Learning to Teach in Higher Education* (London: Routledge, 1992) 187. See also, D Rowntree, *Assessing Students: How shall we know them?* Rev ed (London: Kogan Page, 1987) 1; and M Le Brun & R Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (Sydney: Law Book Company, 1994) 178-183.

[33] Gibbs, *supra* note 46, at 4; quoted in S Kift, Lawyering Skills: Finding their Place in Legal Education (1997) 8 *Legal Education Review* 43, at 54.

[34] See, generally, K Mack, Bringing Clinical Learning into a Conventional Classroom (1993) 4 *Legal Education Review* 89.

[35] Amsterdam, *supra* note 15, at 616-617 (emphasis in original).

[36] L Romero, Integration of Clinical Methods into an Evidence Course, distributed at Association of American Law Schools Annual Meeting January 1989; quoted

in Mack, *supra* note 34, at 91.

[37] For a description of what an Advice on Evidence should do, see J Glissan & S Tilmouth, *Advocacy in Practice* (Sydney: Butterworths, 1998) 11.

[38] This first task obviously requires students to apply the narrative method.

[39] In the BCL in Oxford, for example, the eight topics in Evidence correspond to the eight teaching weeks; at the University of Melbourne there are twelve topics for twelve weeks; where Evidence is taught over a full year, there will no doubt turn out to be even more topics which need to be covered.

[40] Namely, "1. Introduction. 2. Competence and compellability. 3. Privilege. 4. The examination of witnesses. 5. Disposition and character. 6. Similar fact evidence. 7. The accused as a witness. 8. Burden and standard of proof. 9. Documentary evidence. 10. Opinion evidence and prior determination. 11. Hearsay: -the exclusionary rule; - the common law and statutory exceptions. 12. Admissions and confessions in criminal cases. 13. Illegally obtained evidence and confirmation by subsequent fact. 14. Res gestae. 15. Corroboration."

[41] Although the topics must also satisfy the following guideline: "The topics should include examination of both the sources and acceptability of evidence, including rules concerning the burden and standard of proof and technical rules concerning such matters as hearsay, admissions and confessions, illegally obtained evidence and res gestae."

[42] Cf W Twining, Legal Skills and Legal Education (1988) 22 *Law Teacher* 4, at 12.

[43] See *supra* note 19, for a list of the topics currently taught at Melbourne.

[44] By "quasi-compulsory" I mean those subjects which, while not compulsory for award of a law degree, must be completed if a student is to be admitted to practice.

[45] See, for example, N Gold, Are Skills Really Frills? (1993) 11 *Journal of Professional Legal Education* 1, at 6 which describes ten necessary lawyering skills, including both "fact analysis" and "fact management". See also N Duncan, Why Legal Skills – Whither Legal Education? (1991) 25 *Law Teacher* 142, at 144, which refers to "casework skills".

[46] See, for example, J de Groot, Acquiring Basic Legal Skills and Knowledge: What and Where? (1994) 12 *Journal of Professional Legal Education* 1, which compares the results of a survey of senior members of the solicitors branch of the Queensland profession, with surveys conducted in Chicago and Montana. See also T Anderson & W Twining, Analysis of Evidence, in N Gold, K Mackie & William Twining eds, *Learning Lawyers' Skills* (London: Butterworths, 1989) 216.

[47] G Gibbs et al, *Developing Students' Transferable Skills* (Oxford: Oxford Centre for Staff Development, 1994) 9.

[48] But see F Martin, The Integration of Legal Skills into the Curriculum of the Undergraduate Law Degree: The Queenland University of Technology Perspective (1995) 13 *Journal of Professional Legal Education* 45, at 54-55, where factual analysis is treated as an element of several other skills such as mooting, ADR, communication and fact gathering, all of which are taught progressively through the degree.

[49] See, inter alia, Binder and Bergman, *supra* note 21; F Vincent, 'Preparation of a Criminal Trial' in G Eames ed, *Criminal Law Advocacy* (Adelaide: Legal Services Commission of South Australia, 1984); and P Tillers & D Schum, 'A Theory of Preliminary Fact Investigation' (1991) 24 *University of California, Davis Law Review* 931.

[50] Such as, for example, the summary of prosecution opening and defence response required by the *Crimes (Criminal Trials) Act* 1999 (Vic), or Crown Case Statement, required by the practice directions for Supreme Court Criminal Trials in New South Wales: see Hunter & Cronin, *supra* note 9, 418-9.

[51] The argument that admissibility is only one component of evidential analysis

was persuasively put by Wigmore in the opening paragraphs of *The Science of Judicial Proof*, *supra* note 11; these words were first published in Wigmore, The Problem of Proof (1913) 8 *Illinois Law Review* 77

[52] See P McNamara, 'The Canons of Evidence - Rules of Exclusion or Rules of Use?' (1986) 10 *Adelaide Law Review* 341.

[53] Mack, *supra* note 9, at 57-58.