The Learning Curve in the Professions

by

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A 'learning curve' is a graph showing progress in learning. A 'profession' is a vocation or a calling which requires advanced knowledge or skill. Many definitions of 'profession' refer disjunctively to the acquirement of knowledge or skill. The professions with which I am concerned this evening require both. They are law and medicine.

Such qualifications as I have to speak about my topic are limited to two aspects of the practice of law: advocacy and judging. I must, however, confess to a lifelong interest and involvement in adult education especially in teaching of skills. My medical colleagues tell me that the professional education issues and problems which lawyers face are similar in medicine although my impression is that the medical learning curve shows better progress at the post-graduate specialist qualification level.

Allow me to explain the beginning of my interest in professional legal education and then to introduce my thesis by reference to a little history and a few general observations.

From the very beginning at law school I wanted to be an advocate. But nothing happened throughout the next four years to give me even the slightest glimmer of understanding of what being an advocate involved. One moot without any instructions or debriefing was inadequate. I was, however, fortunate to be around when Ray Dunn brought some reality into the law school in his criminal procedure lectures and to be accepted as a volunteer for his mock courts which were conducted for justices of the peace.

When it came to doing articles I consulted David Derham who knew of my interest in being a barrister. He rang Ray Dunn who must have thought 'better the devil I know' and he took me on.

Again I was fortunate. Not only was Ray one of the best advocates and tacticians of the day but I was also able to instruct and watch such greats as Jack Cullity, Lazarus, Rapke, Starke, Oliver Gillard and others. Then, at the mature age of twenty four, immediately after the admission ceremony I started reading at the bar. That was, I think appropriately because of the way I felt, April Fool's day 1958. Those who were kind enough to brief me were even more foolish as they placed their clients' cases in my unlearned hands. Ray Dunn was smarter. He wished me well at the bar and added that he would not have me learn at his clients' expense but would brief me if and when it became apparent that I had some idea of what I was doing. He kept his word and after

giving me a simple good will brief on my first day in an application which was hard to lose, he waited for quite some time.

In considering the learning curve in my profession two questions should be asked. Where was I and others like me on that curve and where should we have been? The answer to the first question is easy; at the very bottom. Some general knowledge of what an advocate should do was far from enough. I certainly did not know, even at the most basic level, how to examine and cross-examine witnesses or how to prepare and present a case. What I had seen in others did not seem readily to translate to anything I could do. Yet to the world at large I was a barrister, that is someone held out by my profession as a specialist advocate. I said earlier that the medical equivalent, the young specialist, was further along the learning curve because such a person had by then three years of learning in a hospital as part of the undergraduate degree. More importantly he or she would also have had two or three years of specialist training followed by rigorous examinations in both theory and practice. Nothing like that was required of or available to a barrister.

The answer to the second question now seems obvious. I should have been at the point on the learning curve equivalent to that of my medical colleague. That is a point at which it would have been possible to describe me as a professional, albeit an inexperienced specialist, possessing the required basic knowledge and skills. The answer is only now obvious because it is relatively recently that the myth that advocacy cannot be taught has been exploded.

'Don't worry, you will learn by experience' said my elders and I followed their advice and blundered along. Those were the good old days and anyone who could stand up in court and speak had more work than they could cope with. My time with Ray Dunn, the reading period with Harold Ogden, a few lucky results for Frank Galbally's clients and my clerk, Kevin Foley's, belief that anyone who was really interested in advocacy should be doing crime all combined to ensure that I did just that. There were lots of briefs in the Magistrates' courts and before long I found myself talking to judges and juries.

As I floundered around trying to pick up as much as I could and making error after error along the way I began to realise two things. First was that there were many experienced and successful barristers who were poor advocates. They had obviously not

learned from their experience. Secondly, I had nothing by which I could measure my progress, if any, along the learning curve. Few solicitors, except perhaps those who acted as advocates, seemed to be interested in or able to brief on the basis of the barrister's quality as an advocate. So neither market forces nor a busy practice were necessarily indicia of professional excellence.

Should professional development be left to the individual practitioner from the very start or was there another way? What about the solicitor who could not discriminate and that solicitor's poor client? I think that it was because of those concerns that other questions came to mind. What is good advocacy? What common features do good advocates have? Can any and which of those features be taught or developed and if so, how and by whom? Can and should the profession do anything about minimum standards? Was the open door policy adopted by the bar having a detrimental effect on the bar's standing as a body of expert professional advocates?

In the 1960s and 70s such thoughts were considered to be heresy particularly by the senior members of the bar many of whom were misled by their success into believing that they were good advocates and that the future generations need do no more than to follow that path.

Fortunately there was, by 1979, a sufficient number of others who saw the difficulties which faced the increasing number of people coming to the bar and so the readers' course was established. The reading period was increased from six to nine months. The first three months were to be devoted to a full time compulsory course conducted by the bar. This course has continued to develop and is now the most extensive and sophisticated one of its kind in the English speaking world.

At the beginning advocacy was taught by lectures and mock courts. Many of the lecturers referred to the well known dos and don'ts and told anecdotes and stories of their own forensic experiences, usually triumphs. As judges at mock courts they played a role which combined the worst characteristics of all judges they had ever seen in an attempt to destroy any confidence which the pupil may have had. This was the 'sink or swim' method of instruction consistent with their own past experiences.

The breakthrough came in the early 1980s with the realisation that good advocacy consisted mainly of a number of highly

developed skills practised with such natural ability as the individual possessed. Those skills could be identified and taught as the natural ability developed. Felicity Hampel, who is a barrister and now a very experienced advocacy teacher, and I worked with the American National Institute for Trial Advocacy on four occasions at its basic, advanced and teacher training workshops. It was while teaching in the United States in what they call the 'learning by doing' method that I began to appreciate fully that which now seems so obvious, that teaching of skills is quite different from imparting knowledge. Take the simple sporting analogy of the beginner learning to play tennis. Fundamental to good tennis are the correct movement and stroke. No amount of reading, watching or even playing can replace continuous coaching and practice under instruction. A good coach will be able to analyse the pupil's performance at that pupil's level and identify weaknesses as well as strengths. He or she will be able to demonstrate the correct stroke and, most importantly, prescribe a way of correcting what the pupil did so that it can be improved.

Advocacy as a performance skill is best taught in a similar way. The advocacy teacher must therefore be a competent advocate at the level at which he or she is teaching and must be a competent trained teacher. One of the common problems with learning the professions is that most of the teaching is done by people who are professionals and know their skills but they are not teachers. Knowledge or the ability to perform skilfully do not necessarily equate with knowledge and ability to teach others.

Once the initial learning is done and a specialist qualification obtained by a doctor or the readers' course completed by the barrister the problem of continuing education remains. It is left to the individual and the plotting of the individual's progress on the learning curve becomes impossible.

Much has happened in the world of advocacy teaching during the last few years. The Victorian bar's readers' course led to the introduction of a similar but shorter one in NSW. The Law Council of Australia helped to set up the Australian Advocacy Institute which conducts workshops all over Australia and overseas both at basic and advanced levels. Recently we conducted workshops and teacher training sessions for the English and Scottish bars. Soon we are off to establish advocacy training in Singapore and Kuala Lumpur. The Institute's work is not limited to the specialist bars.

Many of our clients are solicitors who practise as advocates and wish to improve their skills. Our involvement is sought not because we are better advocates but because we are able to demonstrate that advocacy can be taught and teach the method by which that can be done.

Modern advocacy teaching is based on the concept that in an adversarial trial system advocacy is the art of persuasion. Considerable emphasis is therefore placed on communication skills. I am not convinced, after 11 yeas on the bench as a consumer of advocacy, that often the difference between an ordinary and a good or even excellent advocate lies in the ability to communicate. Methods of case analysis and performance preparation are taught in action not in theory. Skills and disciplines which help in opening addresses, examination and cross-examination of witnesses, final addresses and legal argument are developed and performed under instruction. Performances are videoed and reviewed by teachers who assist the pupils to develop their individual styles and to gain confidence. At the more advanced level we teach examination and cross-examination of expert witnesses, appellate advocacy and a range of sophisticated advocacy techniques.

Senior practitioners and judges are required to undergo teacher training workshops before they are invited to teach with the Institute. Only those with teaching ability and commitment are invited. The teaching methods employed both in teaching advocacy and in teaching the teachers are based on the combined knowledge, research and experience of those who have now been involved in this pursuit for up to 20 years in Canada, the United States and Australia.

There is now a signficant change in culture in the legal profession in Australia. The proposition that advocacy skills can and should be taught is widely accepted particularly amongst the young members of the profession. More senior practitioners are beginning to accept that the learning and further development of advocacy skills is an on-going process and continuing education is useful. The sporting analogy is again helpful. After all even the top players, and other performers continue to be coached because they may need objective assessment and assistance in order to improve. Consequently over 20 Queens Counsel and many experienced advocates have recently attended appellate and other specialist advocacy workshops. If this trend continues it will be possible

to measure progress on the learning curve which will reflect development beyond the basic qualification stages.

I spoke earlier of the acceptance by the profession of the fact that advocacy can be taught. I now contend that it can and should be assessed, at least at the basic level. The argument used against this contention is that advocacy is an art and its assessment would be too subjective to be fair and valid. Another argument is that any legal practitioner should be entitled to practise as an advocate and if he is incompetent the market forces will operate to protect the public and the courts from him.

The first thing to be said is that subjective assessment is present whenever a performance skill is assessed. This skill can not be measured by fixed criteria such as a time or distance. Secondly, it is interesting how close the most subjective assessments tend to be to each other, once identifiable criteria are established. I have, over the past 10 years, sat on many mooting competitions within and between the universities. The three judges are instructed to allot points for various aspects of the performances and to announce the winning team and the best mooter. Almost invariably we agreed on both and, even more remarkably, the points out of 100, independently allocated by each judge, were very close.

Once clear criteria and objectives are formulated there should be no difficulty in assessing basic skills in order to determine if a person, whether as a barrister or solicitor, should be entitled to undertake the specialist role of an advocate. The problem is not in the method of assessment but in the acceptance by the profession of the proposition that it is not good enough to learn fundamentals at the expense of the client.

The profession of judging also involves a combination of knowledge and skills. The skills required of a judge are not taught or assessed. The skills acquired during their professional life by those who are appointed to the bench are not necessarily relevant to what they are required to do as judges and, in any event, nothing is done to assess whether a person has the relevant skills, or to help with the acquisition of them.

I see no reason why a skills course conducted by experienced judges should not be undertaken on appointment. This could include — general conduct of trials, particularly jury trials, making of rulings and judgment writing! I also see no reason

why new judges should not have to sit with experienced judges especially in unfamiliar jurisdictions.

At the present time, when so much is being discussed about the professions and especially the legal profession, it is time to look at that learning curve in order to ensure that there is progess in the development of knowledge and skills towards professional excellence.

George Hampel