

CHAPTER 3

Prepared for practice? Assessment for the Bar, 1975–2015¹

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Introduction

This chapter draws a contrast between two teaching and assessment regimes for qualification for the Bar in England and Wales. The two regimes chosen are separated by 40 years of change in the nature of practice at the Bar, in our understanding of learning and in the approach of regulators. The earlier date is chosen as the time when the recommendations of the Ormrod Report² had largely been implemented. The chapter presents the assessment regime for the Bar Finals Part II in Trinity Term, 1975, and contrasts it with that for the Bar Professional Training Course (BPTC) in 2015. It then explains how students were prepared for the 1975 Bar Finals and contrasts this with the approach adopted at one law school³ in 2015. This involves a critical analysis with two main points of focal concern: the extent of constructive alignment⁴ between student learning and their assessment; and the tension between preparing students for

1 I would like to express my thanks to a number of friends and colleagues who have shared their experience of the Bar Finals Part II as students, tutors and assessors, in particular David Emmet, Lawrence Pickett, Tony Spinak and Allison Wolfgarten. Responsibility for errors and misunderstandings remains, of course, mine.

2 Lord Chancellor's Department, *Report of the Committee on Legal Education*, Cmnd No. 4595 (HMSO 1971).

3 City Law School, part of City University London, and the current incarnation of the original Inns of Court School of Law.

4 See John Biggs, *Teaching for Quality Learning at University* (SRHE 2003).

their assessments and preparing them for the demands of pupillage and practice. Thus it demonstrates the extent to which design-led assessment has been introduced by teachers with an interest in developing student learning and regulators with a responsibility to ensure fitness for practice. This suggests that the application of learning theory to the design of the program and its assessments has gone a long way towards meeting the needs of the regulator and achieving high standards of student learning. Finally, it looks briefly to the future, considering some of the issues that are currently concerning providers of the BPTC, their students and the professional regulator.

The Bar Finals, 1975

In 1975, qualification for the Bar was open to those who had graduated in law (or passed the Bar Finals Part I) and also the Finals Part II. Such individuals could be Called to the Bar by one of the four Inns of Court: Gray's Inn, Inner Temple, Lincoln's Inn or Middle Temple. Call allowed them to describe themselves as barristers but they were not entitled to practise until they had satisfied the requirements of pupillage. During the first six months of pupillage they worked under a 'pupil master', perhaps undertaking specific tasks such as writing a draft pleading or advice, but undertaking no work on their own account. In their second six months they were able to take on their own cases subject to supervision. They only acquired a full practising certificate after satisfactorily completing their pupillage.

Students who had satisfactorily completed a qualifying law degree were exempt from the Bar Finals Part I examinations.⁵ Students who had taken a non-law degree could undertake a one-year conversion course (the predecessor of the Post Graduate Diploma (PGDip) course).⁶ All aspirant barristers, however, had to take the Part II examination and it is this, and the course that led to it, that is the concern of this section.

5 I do not have figures for 1975, but in 1976 Goff J (as he then was) indicated that 85 per cent of those entering the Bar were graduates and 65 per cent were law graduates. The Common Professional Entrance examination was not introduced until 1977: Justice Goff, 'The Law as Taught and the Law as Practised' (1977) 11(2) *Law Teacher* 75–88 at 76.

6 It covered the then six required subjects: criminal law, tort, contract, land law, equity and trusts, and constitutional and administrative law.

At this time the Bar Finals course was a monopoly of the Inns of Court School of Law (ICSL), a school subject to the control of the Council of Legal Education (CLE). This body had been responsible for Bar training since 1852, when it was established by the four Inns of Court. In 1967 it became a division of the Senate of the Inns of Court and the Bar after which time it was composed of representatives of the Inns and the General Council of the Bar.⁷ It taught its students in buildings situated in Gray's Inn.

Bar Part II examinations, 1975

The examinations in 1975 all took the form of what would now be perceived as traditional closed-book exams. There were three compulsory papers and students also had to choose three from a selection of option subjects. General Papers I and II were concerned with substantive law and addressed subjects that students had already studied in their LLB or Final Part I papers. General Paper I included two sections: Tort and Criminal Law. General Paper II covered Equity and Trusts, and a special topic (Remedies for Breach of Contract in that year). The third paper addressed adjectival law and covered Civil and Criminal Procedure and Evidence.⁸ They were sat over three consecutive days (Tuesday 13 – Thursday 15 May in 1975).

The General Papers did not simply replicate the approach found in most LLB degrees, which typically required students to write essays on topics set, or provide advice on the basis of short problems. Instead, they required students to undertake the sort of tasks that practising barristers regularly undertook. For example, students might be presented with a fact pattern and asked to write an Opinion and to draft a Particulars of Claim or a Defence. Thus there was a serious attempt to bridge the gap between academic study and preparation for practice. In one three-hour examination students were required to undertake two such tasks, one from each of the two substantive areas. Each section had two questions from which to select one. This meant that students had to choose which questions to attempt, then come to grips with two different factual situations, each of which raised different legal issues, and then write four pieces of work (two Opinions and two Drafts) all within three hours.

7 Council of Legal Education, *Calendar 1967–68* (Council of Legal Education 1967) 5.

8 Council of Legal Education, *Calendar 1975–76* (Council of Legal Education 1975).

See below for a view from an examiner of the day as to the quality of the answers presented, especially given the precision required for a real draft Particulars of Claim.

Here is an example of one such problem set in the Trinity Paper of 1975. Whichever questions students selected they would have been required to prepare both a written Advice and a draft. In the Criminal Law section of General Paper I, this was likely to be a task like the drafting of an indictment or grounds of appeal.

Re SHAUN O'ROURKE (DECEASED)

Instructing Solicitors act for Miles O'Gorman, the Executor of Shaun O'Rourke, a widower who died on 1st November 1974 leaving two sons, Brendan and Kevin. By his Will, dated 1st April 1974 the Testator, after appointing Miles O'Gorman to be Executor and Trustee thereof, and after making various bequests, including one of '£8,000 to the Society for the Relief of Poverty among Ulster Freedom Lovers', left the residue of his estate 'Upon Trust, first, to apply half the income therefrom to such of the adult residents of Greater London as my Trustee in his absolute discretion shall think fit having regard *inter alia* to the need to combat the stress, squalor and expense of residing in Greater London and, second, to apply the other half of the income in educating the children of employees or ex-employees of London Transport, provided that my Trustee shall have power to add to the first Trust as further possible beneficiaries residents of any other city in the United Kingdom where the stress, squalor and expense are in my Trustee's absolute discretion comparable to that of Greater London, provided always that no one who is a confirmed member of the Church of England is ever to qualify for assistance under either of the aforesaid trusts and provided further that one day before the expiration of the period of eighty years from my death (which period I hereby specify as the Perpetuity Period applicable hereto) the aforesaid trusts shall determine and the capital shall be distributed equally *per stirpes* amongst those who shall then be my statutory next of kin.'

Miles O'Gorman obtained Probate of the Will on 1st December 1974 and then discovered that on 1st July 1974 the Society for the Relief of Poverty amongst Ulster Freedom Lovers (a registered charity) had ceased to exist as such owing to an amalgamation with the Society for the Relief of Poverty amongst Catholics in Northern Ireland (a registered charity). As it happens, Miles O'Gorman has recently left the Catholic faith for the Anglican faith. The residue is worth about £100,000.

Counsel is asked:

- a. To advise the Executor as to the validity of the above dispositions of the Testator.
- b. To draft any application to the Court necessary to determine any questions which arise. (Do not draft Affidavits).

The third compulsory paper, Civil and Criminal Procedure and Evidence, contained nine questions of which the candidate had to choose five, at least one, but no more than two, from each of the three sections. Each question tended to have sub-questions, often setting different types of task. Drafting questions were never set in this examination. Here is an example of a single Civil Procedure question.

- a. You are instructed on behalf of the plaintiff in an action on a cheque which has been regularly drawn and presented. Your instructing solicitors have issued a summons under Order 14. You are asked to advise as to the circumstances, if any, in which the Master will not give judgment for your client.
- b. You are instructed in a building contract case on behalf of the defendant employer. The contract provides for the issue of interim certificates certifying the work done to date and requiring payment within seven days. The plaintiff contractor is suing your client for the amount of an interim certificate issued by your client's architect. The plaintiff is proceeding by way of Order 14. Your client wishes to raise a *bona fide* set-off and counterclaim for unliquidated damages for breach of contract for defective work and delay.
- c. What order is the Master likely to make in the Order 14 proceedings?
- d. In what circumstances, if any, can Order 14 be used in a running-down action?

In addition to the three compulsory papers, students had to choose three options from a choice including Revenue Law, Local Government and Planning, Conflict of Laws, Law of International Trade, Public International Law, Roman-Dutch Law, Conflict of Laws and European Community Law, Labour Law and Social Security Law, Family Law, Landlord and Tenant, Sale of Goods and Hire Purchase, and Practical Conveyancing. These exams were sat in the week following the compulsory

papers. For those who were planning to practise at the Bar, Revenue Law was compulsory. This examination required students to answer five from a choice of 10 questions. Here are two contrasting questions from the 1975 Revenue Law paper.

1. On 6th April 1974 Plutos executed a Deed whereby he covenanted to pay to the Blandings Educational Charity for 7 years 'such a sum each year as will after deduction of income tax at the basic rate for the time being in force leave £670'. Plutos' income in 1974–75 was such that he was liable to income tax at the higher rates but not the investment income surcharge. All the parties are resident in the United Kingdom.

Advise Plutos and the Charity on the tax treatment of these payments in 1974–75.

How would your advice differ if the covenantee had been Plutos' ex-wife Xanthippe, instead of the Charity?

8. Explain the rules governing the Income Tax treatment of income held on a discretionary trust where the trustees, the trust property and the individual beneficiaries are all in the United Kingdom.

Some of the option papers include drafting questions, but there were none in the Revenue Law paper.

These examinations are evidence of a significant step towards preparing recent graduates for practice, compared with the predecessor, the Bar Examinations, which themselves had evolved over the years. In the 1890s Gandhi's experience was: 'Everyone knew that the examinations had practically no value. In my time there were two, one in Roman Law and one in Common Law. There were regular text-books ... but scarcely anyone read them. ... Question papers were easy and the examiners were generous.'⁹ Although there had been a compulsory drafting task in certain of the papers, most of the questions had been essay-type.¹⁰ The new course had introduced more problem rather than essay questions and required the student to recognise a client, rather than an academic, perspective. It is noticeable, however, that they only addressed certain aspects of practice. They were written purely under time constraint (although many

9 M Gandhi *An Autobiography: The Story of my Experiments with Truth* (Penguin Modern Classics 1927, 2001) pt 1, 25, 88.

10 Council of Legal Education (n 7).

barristers will tell you that this is entirely realistic of their working lives). The problems were pre-digested, containing no conflicts in evidence or different witness perspectives on what was alleged to be the situation. They were entirely in writing, with no assessment of interactive skills such as advocacy, negotiation or conference skills.

In conversation with those who had been assessors at the time, I was told:

Inevitably in the marking process a great deal of weight would be given to whether the law, which could not be properly and professionally researched by the candidates was correctly stated. Presentational and practical aspects of the opinions were very secondary. In the drafting part of the papers (dealt with usually last by candidates, when the pressure of time was showing) markers had to have realistically low expectations of what most candidates could achieve, so that the quality and precision that candidates were working for paled in comparison with the BVC [Bar Vocational Course] and was limited preparation for practice.¹¹

The examiners were not as generous as those in Gandhi's day. No one was awarded a First for the Trinity 1975 exams; 25 students achieved an Upper Second, this from a cohort of over 1,000.¹² I was told: 'in those days the vast majority (about two-thirds) of candidates got a third. A 2:2 was easily a "very competent"¹³ in today's terminology. 2:1s were reserved for only a handful of candidates, and firsts were real rarities: in some years there were none.'¹⁴

Consistency of assessment was also uncertain. All students who chose a particular question were assessed by one examiner, those who chose the other being assessed by another. There was no moderation of assessment and inconsistencies were noted, although they were not then acted upon.¹⁵

11 Record of conversation on file with author.

12 Council of Legal Education (n 8) 101.

13 This is the grade on the 2015 BPTC given for performances achieving between 70 per cent and 85 per cent.

14 Record of conversation on file with author.

15 It was the recognition of this problem which led to the introduction of detailed moderation systems into the new Bar Vocational Course in 1989. This is now a Bar Standards Board (BSB) requirement for the Bar Professional Training Course (BPTC) at 65, 85: Bar Standards Board, *Bar Professional Training Course: Course Specification Requirements and Guidance* (2013) <www.barstandardsboard.org.uk/media/1542061/bptc_handbook_2013-14.pdf> accessed 20 January 2017.

The 1975 teaching program

There was a team of eight permanent lecturers at the ICSL, with a wide group of experienced practitioners, judges and academics, often of very high status, providing lectures.¹⁶ In addition, tutorial classes provided for small groups of students to meet with a tutor to discuss the law and to work out legal problems.¹⁷ Also, students who intended to practise at the Bar of England and Wales were required to enrol for a course of Practical Exercises. This was a significant departure from the preceding course and involved three activities:

Forensic exercises in advocacy

These involved demonstrations with judge and counsel, followed, on occasion, by opportunities for the students to practise under the supervision of a practising barrister.¹⁸ They were undertaken by practitioners in early evening sessions.

Chambers exercises

These involved the drafting of a variety of pleadings under the supervision of a practising barrister in Chambers or the Royal Courts of Justice. They took place on Monday evenings.

Court attendance

Six full days' attendance at a variety of courts, arrangements being made for the students to be able to discuss the work of the court with court officials or judges.

16 The eminence of the lecturers did not guarantee the quality of their lectures. William Rose wrote: 'He read his notes in a voice ponderous and gravelly. He spoke of "striking out your opponent's pleadings", and used words like "contumacious". He dealt both "*in extensor*" and "*ad nauseam*" with something called a "setoff", which apparently was connected with a counterclaim, although I never did discover how. I had no idea what he was talking about': W Rose *Pleadings without Tears* (4th edn, Blackstone Press 1997) 1–2.

17 For more detail of how these classes worked in practice, see the 'Constructive Alignment' section below.

18 A student from that time told me that in an entire year of Advocacy exercises he was only once asked to stand and practise advocacy himself.

In addition, extra Drafting classes were offered on Saturdays. None of these activities were assessed as such, although the Chambers exercises would have been a valuable element in preparation for the examinations.

Radical revision of Bar training

During the 1980s growing dissatisfaction with the extent to which the Bar Finals prepared barristers for practice led to the ICSL commissioning research by Valerie Johnston and Joanna Shapland.¹⁹ One of their respondents said: ‘The CLE is a necessary evil. Like a driving test it proves that you are not completely dangerous, but has little relevance to life at the Bar.’²⁰ Their findings showed only a quarter of junior barristers and only 17 per cent of pupils believed their course had prepared them for life at the Bar.²¹ Their report proposed a course that sought to reflect the realities of practice by focusing on the skills that barristers were required to exercise and to excel in. These were identified as Advocacy (submissions to the judge, examination-in-chief and cross-examination), Opinion Writing, Drafting, Conference Skills, Negotiation, Fact Management and Legal Research. The plan was to spend about 60 per cent of the course on these skills, taught through practical exercises involving role-play and writing of Opinions and Drafts. The remaining 40 per cent of the course would be spent on adjectival law: civil and criminal litigation and evidence. Those areas of substantive law covered in the LLB degree would not be addressed as such, although they would constitute the core knowledge students would be assumed to bring to their work. This was the Bar Vocational Course (BVC), introduced by ICSL in 1989. Further research was commissioned over the first two years of the new course in order to evaluate whether it had achieved its goals.²² This found only 21 per cent of those on the first year of the new course saying that they did not feel more confident in their ability to practise as a barrister, a figure that dropped to 19 per cent for those on the second year.²³ One respondent said: ‘From a purely personal point of view, however, I thoroughly enjoyed

19 V Johnston and J Shapland, *Developing Vocational Legal Training for the Bar* (Institute for the Study of the Legal Profession 1990).

20 *ibid* 49.

21 *ibid* 49–50.

22 J Shapland, V Johnston and R Wild, *Studying for the Bar* (Institute for the Study of the Legal Profession 1993).

23 *ibid* 32.

the course. It was challenging, stimulating and different. I feel I have benefited enormously in terms of confidence, discipline, control of nerves and skill. I feel trained.²⁴

A revised version of the BVC was introduced in 2010 by the regulator, the Bar Standards Board (BSB).²⁵ This, the Bar Professional Training Course (BPTC), largely reflected the content and approach of the BVC, although Negotiation was replaced by Resolution of Disputes out of Court or Alternative Dispute Resolution (ADR) and a discrete Professional Ethics assessment was introduced. This forms the basis of the 2015 course, which will be described in the following section.²⁶

Bar Professional Training Course, 2015

The first obvious distinction between the assessment regimes in 1975 and 2015 is the diversity of types of assessment now used. A major distinction is made between the 'knowledge subjects' assessed in closed-book examinations, and the others.

Closed book assessments

These are used for the 'knowledge subjects':

1. Civil Litigation, Civil Evidence and Remedies
2. Criminal Litigation, Criminal Evidence and Sentencing
3. Professional Ethics
4. Alternative Dispute Resolution.

They are characterised by the use of multiple-choice and short-answer questions. In each case the assessment is divided into two parts, each of which must be passed independently at 60 per cent. Civil and Criminal Litigation and Evidence are three-hour examinations where the first section comprises of 40 multiple-choice questions (MCQs) and the second

24 *ibid.*

25 The review that led to this development is at: <www.barstandardsboard.org.uk/media/1353435/bvc_report_final_with_annexes_as_on_website.pdf> accessed 20 January 2017.

26 The 2015 specification may be seen at: BSB (n 15).

section comprises of five short answer questions (SAQs). Professional Ethics and ADR are two-hour examinations comprising of two sections: 20 MCQs and three SAQs.²⁷

A typical MCQ consists of a paragraph or two setting out a scenario, followed by a sentence posing a question. Candidates must then choose one of four answers. Here is an example of an MCQ, taken from the mock examination prepared by the BSB for the 2014–15 civil test.²⁸

Three weeks ago, Laura served a claim form with particulars of claim attached on Neil. The only remedy sought is specific performance of a written contract. Neil has not done anything in response to the claim. You are acting for Laura.

Which ONE of the following statements is CORRECT?

- a. Judgment in default cannot be entered until a further week has elapsed, because Neil has a total of 28 days in which to respond after service.
- b. Judgment in default can be entered at this stage, because more than 14 days have elapsed since service, but an application must be made because the claim is for equitable relief.
- c. Judgment in default can be entered at this stage, because more than 14 days have elapsed since service, and there is no need to seek permission.
- d. Judgment in default is not available in this case, because Laura's claim is for equitable relief, which falls outside the rules on entering default judgments.

A typical SAQ will set out a case study. There are then two to five questions based on the case study. There are 10 marks available in total for the sub-questions. Here is an example of a SAQ prepared by the BSB for the 2014–15 mock Professional Ethics test.

27 Criticisms of the centrally set assessments have resulted in the introduction of changes. As from the academic year 2016–17 the Civil and Criminal Litigation papers are no longer split into questions of two types. Instead, there are a number of 'single best answer questions', like MCQs in form but designed to demonstrate greater analytical and critical ability: <www.barstandardsboard.org.uk/media/1713290/centralised_assessments_review_-_for_publication.pdf>. The Professional Ethics assessment is composed purely of SAQs: <www.barstandardsboard.org.uk/media-centre/press-releases-and-news/bar-regulator-announces-changes-to-the-professional-ethics-exam-in-the-bptc-from-2017/> both accessed 20 January 2017. Whether these changes will prove to address the criticisms effectively will be a matter for continuing review.

28 The mock examination is not made freely available but is released through the providers of the BPTC. For details see Section B4 at <www.barstandardsboard.org.uk/media/1983663/bqm_part_2b_-_b4_centralised_assessments.pdf> accessed 18 July 2019.

QUESTION 1

A claim has been started, concerning the ownership of shares in a business. The Claimants are brother and sister, Mr Leo Gardiner and Miss Teresa Gardiner. The Defendants are other family members. You represent the Claimants at an interim directions hearing. Just before the hearing, the Defendants make an offer of settlement which is much lower than the sum that you advise the Claimants they are likely to obtain at trial. The Claimants tell you that they will not accept the offer. However, during the interim hearing, the Judge directs that all parties should disclose their personal financial affairs over the previous three years to help the Court to decide the ownership of the business.

After the hearing, you tell the Claimants that they should expect their personal financial affairs to be disclosed in open Court and advise them that disclosure is necessary in order to succeed in their claim. Miss Gardiner immediately says that she has changed her mind and she would like to accept the offer which was made before the hearing, explaining 'I don't want my private affairs dragged through the Court'. Mr Gardiner says that she is being ridiculous, that this is a direction that they all have to comply with and he is not prepared to accept the offer.

Please answer the following questions, giving full reasons for your answer in each case.

- a. Can you continue to act for both clients in these circumstances and what are the ethical issues that arise in coming to a decision on this point?
(3 marks)
- b. In what circumstances could you agree to a settlement this morning?
(1 mark)

Half an hour later, Defence Counsel, Mr Forthright, asks to speak to you privately. You agree. He advises you to persuade the Claimants to accept the Defendants' offer or, he says, 'Things could get pretty unpleasant' for the Claimants. You tell him that you need more time to take instructions. He then accuses you of 'deliberately prolonging the litigation in order to increase your brief fee.'

- c. Is Mr Forthright in breach of the Code of Conduct or any other guidance provided by the Bar Standards Board and, if so, describe how?
(1 mark)

- d. What action could you take in response to his recommendation and how should you behave in this situation? Consider any practical solutions to Mr Forthright's behaviour.

(2 marks)

- e. How, if at all, would your answers to (c) and (d) above be different if Mr Forthright had spoken to you in a raised voice in the Court lobby in front of members of the public who were likely to have heard him?

(3 marks)

(10 marks total)

Resolution of Disputes out of Court differs from the other three closed-book assessments in that it is set individually by BPTC providers rather than centrally by the BSB.

Open-book timed assessments

These are used to assess Drafting and Opinion Writing, the written skills that are taught on the BPTC. Each requires students to attend an examination centre having been informed some two weeks earlier what areas of substantive law will be addressed by the case papers. Students are permitted to bring practitioner texts such as the *White Book*²⁹ or *Blackstone's Criminal Practice*,³⁰ materials that the course provider has made available to them, such as the *City Law School Bar Manuals*,³¹ all of which may be annotated, plus notes they have prepared and materials they have photocopied in preparation for the assessment.

The examination is invigilated and students receive a realistic set of papers, comprising instructions from solicitor plus documents that may include witness statements, reports, correspondence, etc. Space precludes presenting one here, but, as an example, the Drafting resit paper in 2015 comprised 11 sides of A4 and required students to draft Particulars of Claim in a contract dispute. The Opinion Writing assessment had eight pages plus extracts from the Judicial College

29 Sir Rupert Jackson (ed), *Civil Procedure (the White Book)* (Sweet & Maxwell 2015).

30 David Ormerod (ed), *Blackstone's Criminal Practice* (25th edn, OUP 2014).

31 A series of books written by CLS academic staff, practitioners and judges, covering the main areas of the BPTC and published by Oxford University Press (see the OUP website).

Guidelines³² and several quantum case digests³³ in order for students to advise on liability and remedies in a personal injury case. The examination lasts for three-and-a-half hours.

Simulated assessments

This approach is used for the interpersonal skills taught on the BPTC: Advocacy and Conference Skills. There are three Advocacy assessments: Civil Submissions, Examination in Chief and Cross-Examination.

For Civil Submissions, students receive their papers several weeks ahead of the assessment. They must prepare in advance a skeleton argument, which is submitted to the assessor who will role-play the judge in their assessment. They must then appear before that judge and seek to persuade her or him to take a particular action in their client's interests. This performance is digitally recorded and lasts for 12 minutes. Both skeleton argument and performance are assessed, with the performance being weighted more heavily.

For the two witness-handling assessments the papers are, again, received in advance and students conduct a 12-minute recorded examination with an actor playing the role of the witness.

The Conference Skills assessment lasts for 20 minutes, but is otherwise similar in that students receive their papers in advance, their performance uses an actor as their client and is recorded.

For these three assessments students are asked to hand in their written plans, but unlike the skeleton arguments prepared for Civil Submissions, these are not marked as such. Instead they are used to help the assessor to resolve doubts arising from the performance they are assessing.

32 Judicial College, *Guidelines for the Assessment of Damages in Personal Injuries* (13th edn, OUP 2015).

33 These are extracts from precedents that are used to argue for particular levels of compensation to be awarded for specific injuries, depending on the victim's circumstances. The most commonly used are in Kemp and Kemp, online and in loose-leaf hard copy as *Kemp and Kemp: Quantum of Damages* (Sweet & Maxwell looseleaf) and Lawtel.

Assessment of taught options

BPTC students must, in addition, study two options from a choice, at City Law School (CLS), of 11. The taught options at CLS are Advanced Criminal Litigation, Commercial Law, Company Law, Employment Law, Family Law, Fraud and Economic Crime, Law of Landlord and Tenant and Professional Negligence Litigation. These involve a written assessment that is more realistic than those described above in that the student receives the papers two weeks before it is necessary to submit the answers. The papers will typically be of a similar page length to those described above in relation to the Opinion Writing and Drafting assessments. These involve the writing of an Opinion and may also require the preparation of an associated Draft.

Assessment of Clinical Options

At CLS students may apply to take one of our three clinical options. These are organised in conjunction with two well-established organisations that provide support and representation to clients who cannot afford to instruct lawyers. Two options are offered with the Free Representation Unit (FRU). The FRU (Employment) Option is assessed by students representing a real client in a case that has a hearing date set down at the employment tribunal. Assessment is of an analytical report of the case and their work on it supported by evidence in the form of the case papers, attendance notes, and their own plans for and reports of client conferences and interactions with the respondent and the tribunal. This is supported by a reflective report on the students' own learning from their work on the option. The FRU (Social Security) Option is similar except that students' work encompasses two cases, given the more limited scale of a typical social security case. The Domestic Violence Option works with the National Centre for Domestic Violence in a similar way, although students work as McKenzie Friends to support victims of domestic violence in preparing for court appearances normally aimed at an order designed to ensure their safety. Students advise and help victims to prepare witness statements and draft documents required for application to the court. Assessment, again, is on an analytical report of the cases on which they have worked.

Assessment overview

A comparison between the assessment regimes of 1975 and 2015 immediately shows two things: a considerable increase in assessment activity (from six examinations to 12 discrete assessments) and much greater diversity in assessment.

I will now turn to compare the two regimes in terms of the extent to which they achieved constructive alignment with the learning process that students experienced and how effectively they demonstrate preparedness for practice.

Constructive alignment

This concept was developed by John Biggs³⁴ with a goal of maximising the quality of student learning. It is an inherently student-centred approach to learning and involves the alignment of three aspects of a student's experience: the presage, the process and the product. The presage is the experience the individual student brings to their study and the fundamental design of the course they are undertaking.³⁵ The process is the variety of learning activities that the student undertakes on the course, and the product is the outcome of that process: the assessment.³⁶ In the following sections I address the presage briefly, given the limited control course providers have over it, and focus on the process and the product. The way in which assessment may impact on student learning was explored by Chris Rust in an article that brought together the existing literature and proposed methods of designing courses to encourage deep learning through constructive alignment.³⁷

Biggs is concerned to develop learning activities that achieve deep learning that transforms the learner, rather than shallow learning of knowledge. It is important that a course designed to transform a new graduate from a student to a professional achieves this deep learning. I would argue that the design of the BPTC, informed as it is by these theoretical insights, achieves this more effectively than the Bar Finals course of 1975.

34 Biggs (n 4).

35 *ibid* 18.

36 *ibid* 19.

37 Chris Rust, 'The Impact of Assessment on Student Learning: How Can the Research Literature Practically Help to Inform the Development of Departmental Assessment Strategies and Learner-Centred Assessment Practices?' (2002) 3, 2 *Active Learning in Higher Education* 145–158.

Bar Finals Course, 1975

Students were expected to attend regular lectures and tutorials addressing each of the examinations they would have to sit. Lectures were largely didactic and, while most lecturers permitted questions, some tacitly discouraged them while only a few actively encouraged them. Tutorials involved 12 students meeting a tutor in her or his room to discuss lists of questions that had been distributed in advance or bringing along pre-prepared answers to former exam questions. Tutors would attempt to involve all students by using individually directed questions.

Thus there was a serious attempt at alignment between the taught course and the assessments students subsequently sat. However, it is doubtful if this alignment can properly be described as constructive as understood by John Biggs. Knowing that they were preparing for three-hour assessments in each of which they had to write several different answers is conducive to shallow learning rather than the deep learning sought by Biggs. The complexity of the problems and the requirement in many to adopt a client focus will have contributed to some reflection and depth of learning, and was a significant step forward from the previous Bar Examination, but it continued to be dominated by rote learning.

The Practical Exercises, compulsory for those intending to practise in England and Wales and undertaken with practitioners, will have added an extra dimension to students' learning and will have contextualised what was learnt in class. They are considered in the 'Preparation for Practice' section below.

Bar Professional Training Course, 2015

In designing the CLS BPTC we were informed by constructivist design principles. Philips³⁸ identifies three constructivist approaches: the active learner, the social learner and the creative learner. The first recognises that knowledge and understanding are best actively acquired; the second that they are best socially constructed; the third that they are created or recreated by the learner.³⁹ We adopted the first two perspectives more than the third, embedding social interaction into our classes and learning method in order to promote active learning.

38 DC Philips, 'The Good, the Bad and the Ugly: The Many Faces of Constructivism' (1995) 24(7) *Educational Researcher* 5–12.

39 David Perkins, 'The Many Faces of Constructivism' (1999) 57(3) *Educational Leadership* 7.

The CLS BPTC is highly integrated. Students have three or four Large Group Sessions weekly, but the core of their learning is through six streams of Small Group Sessions (SGS). Three of these address the skills and knowledge required for criminal practice; three address those required for civil practice. Each group of 12 students sees the same tutor regularly for each stream, but classes in that stream may differ significantly from each other. I will focus on the civil streams as it is these with which I am most familiar.

Civil Stream 3 focuses on the knowledge subjects that will be assessed by MCQs and SAQs. In Civil Streams 1 and 2 students learn the skills of legal research, analysis, drafting, opinion writing and advocacy, and to apply the procedural rules, rules of evidence and professional ethics in practical activities. This aims to achieve coherence in the learning of the requisite knowledge alongside its application in the written and interpersonal skills that students also develop, thus achieving a high degree of integration of knowledge and skill development.

Most work in Streams 1 and 2 is done through realistic sets of case papers. These are in contrast to the relatively predigested fact patterns used on most LLB problems and on the former Bar Finals course and have been a characteristic of the BVC and BPTC since 1989. The Johnston and Shapland report⁴⁰ had shown that the previous training for the Bar had not adequately prepared students for pupillage and practice. One element of that problem was the failure to ensure a conceptual shift from 'law student' to 'legal professional'. Undergraduate law studies focus on developing a critical understanding of the law itself. However, the reality of practice is that facts are slippery, partly because they are likely to be contested and partly because of the unreliability of those reporting them. Our concern was to develop students' understanding of that truth experientially through an integrated spiral curriculum.⁴¹

This was done by designing sets of papers that require students to undertake solicitors' instructions in advising clients orally and in writing, drafting documents, seeking to settle disputes through negotiation or mediation and, preeminently, in undertaking advocacy. One set of papers

40 Johnston and Shapland (n 19).

41 Jerome Bruner, *The Process of Education* (2nd edn, Harvard University Press 1976) 13, 52–54.

may be used in several stages,⁴² enabling program designers to encourage students in early stages to identify gaps in the evidence they need and request that evidence in their first written Opinion. At later stages they are provided with more information that forces them to review their advice while recognising that their client's and opponents' statements may not be reliable. This shift to understanding, through experience, the importance of evidence is a significant element of their professional development. A particular case may go through mediation and, should that fail, different stages of advocacy. We will require students to represent different sides in the dispute at different stages, thus assisting them to develop objectivity and also to reflect on their emotional responses to their clients' circumstances.

Interpersonal skills

The clearest example of how skills and understanding are developed through a spiral curriculum⁴³ can be seen in the advocacy classes where students work in groups of six. Altogether there are 24 advocacy classes that engage students in a reflective learning spiral⁴⁴ where performance, peer review and tutor feedback are recorded. Students have opportunities to record repeat performances in which they address difficulties identified. At each of the 'civil submissions' classes, students must come to the class with a skeleton argument and use it and a copy of the *White Book*⁴⁵ to persuade the tutor, role-playing a judge, to grant an order (or otherwise if representing the opponent). In witness-handling classes, the tutor also plays the judge, but other students role-play witnesses. A fundamentally similar approach is adopted in the Conference Skills course, with students role-playing clients. This achieves a high degree of constructive alignment as the assessment takes a similar form, albeit using actors as witnesses and clients.

42 A fuller explanation of how a particular case can be used to achieve our learning goals may be seen in Nigel Duncan, 'Representation: Objectivity and Artistry for Trainee Lawyers' in N Courtney, C Poulsen and C Stylios (eds), *Case Based Teaching and Learning for the 21st Century* (Libri Publishing 2015) 171–197, <<http://casemaker.libripublishing.co.uk/>> accessed 20 January 2017.

43 A model for and analysis of a spiral curriculum in law may be seen in Paul Maharg, *Curriculum Models for the Diploma in Legal Practice* (Law Society of Scotland 2003) 16–18.

44 Developing on Kolb's Learning Cycle: David Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice Hall 1984).

45 Sir Rupert Jackson (n 29).

Written skills

The same level of alignment is not achieved in respect of the written skills. This is largely the consequence of the nature of the assessments required by the BSB. Although a degree of alignment is achieved by the requirement in Drafting and Opinion Writing classes for students to bring drafts to class that are then projected and subjected to peer and tutor review, the fact that the assessment is an unseen paper that requires the work to be done in three-and-a-half hours creates a different and less realistic experience.

Knowledge subjects

Teaching in Civil Stream 3 concentrates on enabling students to succeed on the MCQ and SAQ assessments. Classes may be preceded by podcasts and prior reading and may include sections where students practise MCQs or SAQs. This achieves a high degree of alignment, but a lesser degree of constructivist characteristics. This, again, is largely a function of the nature of the assessment itself. However, a more constructive approach is achieved by the fact that students apply many of the rules they are learning in the integrated skills streams that run alongside. This is designed both to contextualise the rules that must be mastered and to deepen the learning of them. This integration of the learning is important, as without it the learning is likely to be shallow.⁴⁶

Clinical options

Constructive alignment probably exists to the fullest degree in the live clinical options.⁴⁷ This has been explored by Anita Walsh, who has applied John Biggs's theories to work-based learning.⁴⁸ One of her concerns is the problem of students' impotence when they see the need for change in a workplace where they are on placement. This problem is largely avoided in these options, where students learn, not through simulating the work of barristers, but by taking on lawyers' work in reality. Thus they are directly

46 F Marton and R Saljo, 'On Qualitative Differences in Learning – 1: Outcomes and Process', and '2: Outcomes as a Function of the Learner's Conception of the Task' (1976) 46(1) *British Journal of Educational Psychology* 4, 115; D Boud, 'Assessment and the Promotion of Academic Values' (1990) 15(1) *Studies in Higher Education* 101, in particular his references to professional work at 105–107.

47 For an explanation of the progenitor of these options, see Nigel Duncan, 'On Your Feet in the Industrial Tribunal' (1997) 14 *Journal of Professional Legal Education* 169.

48 Anita Walsh, 'An Exploration of Biggs' Constructive Alignment in the Context of Work-Based Learning' (2007) 32(1) *Assessment & Evaluation in Higher Education* 79–87.

engaging in the change process for the clients they represent. In the two FRU Options, this involves analysis of a file supplied by a referral agency such as a Citizens' Advice Bureau; meeting the client in conference to find out what further is needed, to advise and to take instructions; interacting with the opponent and the tribunal so as to explore the possibilities of settlement and to ensure compliance with tribunal directions; and finally either settling the matter so that a hearing is unnecessary or representing the client at tribunal. In the FRU (Employment) Option this usually requires examination in chief and cross-examination of witnesses, as well as submissions to the tribunal. In the Domestic Violence Option, students interview their clients and assist them with the procedures necessary for achieving a court order that will protect them (and often their children) from their abuser. Key to this is assistance with preparing a witness statement that will communicate accurately and effectively what the court will need as evidence before it. In some circumstances, students may also accompany a client to the court hearing where they are entitled to advise on questions to be put and submissions to be made. It is not uncommon for the judge to permit them to act as a representative where it is clearly likely to be helpful.⁴⁹ Students' assessment is through their analytical and reflective reports on their activities, thus ensuring that process and product are fully aligned.

Preparation for practice

Bar Finals Course, 1975

The assessed course in 1975 made a reasonable attempt to prepare students for the written activities they may find themselves engaged in as practitioners. However, there was no attempt to develop the interpersonal skills of client interviewing (conference skills), negotiation or advocacy. The Practical Exercises in advocacy went some way towards this, but I am told that the normal practice was for students to observe submissions or witness-handling, rather than to practise and receive feedback on their

49 Veronica Lachkovic, 'McKenzie Friends for Victims of Domestic Violence: Training Law Students to Assist the Court and the Victim' (paper delivered at 8th Worldwide GAJE Conference, Eskisehir, Turkey, July 2015).

own work. It is not surprising that when research was done in the 1980s into the effectiveness of the Bar Finals in preparing barristers for practice, a very low level of satisfaction was found.⁵⁰

Bar Professional Training Course, 2015

BSB monitoring 'indicates that BVC and more recently BPTC graduates who secure pupillage are better prepared than in the more distant past'.⁵¹ Recent focus group research conducted by the BSB produces a number of interesting conclusions about the BPTC:

the current training programme meets at least some of the regulatory requirements, in that those who complete it are equipped with the knowledge and skills needed to fulfil their duties in the public interest.⁵²

However, a number of concerns were expressed. Those that relate to preparation for practice are:

e) both knowledge and skills are essential for practice. The breadth of the BPTC knowledge requirement combined with the nature of assessment (especially multiple-choice questions) leaves limited scope for developing skills. There was widespread concern, including among many experienced practitioners and tutors, that this focus has a negative impact on the development of skills learning and is not fostering the ability to assimilate new knowledge and apply it to solve problems in professional day-to-day practice;

f) There should be increased focus on the 'real world' of practice in the prescribed content of the BPTC. Specifically, a practical focus is very important for skills training, particularly advocacy;⁵³

The concerns expressed here about the knowledge assessments are mirrored in the responses of students undertaking the live clinical options. One student from 2015 wrote:

50 Johnstone and Shapland (n 19).

51 BSB, 'Future Bar Training' para 20 (2015) <www.barstandardsboard.org.uk/media/1676754/fbt_triple_consultation_9_july_2015.pdf> accessed 20 January 2017.

52 *ibid* para 400.

53 *ibid* para 401.

To some extent, I expected to gain insight into the skills/abilities mentioned in Question 5 of this survey. My actual experience surpassed this expectation. FRU has been invaluable, and a breath of fresh air compared to the centralised BSB assessments, which feel very far removed from the practical world of law.⁵⁴

This suggests that further change in the BPTC is desirable for it to prepare its graduates as fully as possible for practice. The next section will consider the current consultation being undertaken by the regulator.

Developments in regulators' requirements

At the time of writing (January 2017),⁵⁵ the BSB is undertaking consultation on the future for training for the Bar. The context is the implementation of the Legal Services Act 2007 and the decision by the Legal Services Board to require the professional regulators to carry out a review of legal education and training.⁵⁶ This led to the Legal Education and Training Review (LETR), a program of research and analysis that reported in 2013.⁵⁷ This has prompted a review by all of the professional regulators into their requirements for education and training. The LETR report made few direct proposals in respect of the BPTC, although some of its general recommendations are relevant to it. One of these that is of particular concern to the Bar is the desire to encourage wider participation.

54 Response to end-of-module survey by FRU (Employment) student, May 2015, responding to the question: 'What were your expectations before the option and to what extent have they been met?' on file with author. The skills/abilities referred to as 'in question 5' were: 'To understand how litigation works in practice; To identify key facts; To research and understand the law; To communicate with my client; To negotiate with my opponent; To advocate for my client before a tribunal; To appreciate the impact of litigation on the lay client; To recognise ethical dilemmas; To learn about my own values'.

55 Final editing gives me the opportunity to confirm that the BSB did in fact choose Option B and that providers are currently preparing their bids for approval.

56 David Edmonds, 'Training the Lawyers of the Future – A Regulator's View (The Lord Upjohn Lecture 2010)' (2011) 45(1) *The Law Teacher* 4–17.

57 J Webb and others, 'Setting Standards. The Future of Legal Services Education and Training Regulation in England and Wales' (SRA, BSB, IPS 2013) <<http://letr.org.uk/the-report/index.html>> accessed 20 January 2017.

The current consultation is in its second stage,⁵⁸ which will close on 31 January 2017.⁵⁹ The first stage had provided the BSB with a variety of responses leading it to propose three options while clearly expressing a preference for Option B.

The three proposed options are:

Option A: ‘Evolutionary’ approach⁶⁰

This, in effect, is the status quo, maintaining the existing sequence of degree (or PGDip), BPTC and pupillage, while strengthening assessments and allowing course providers greater flexibility.

Option B: ‘Managed Pathways’ approach⁶¹

The regulator would consider approval of a number of different pathways through the process of education and training to become a barrister. The consultation document presented four examples while leaving open the possibility of others. One of these was similar to Option A. The second integrated the academic and vocational stages (modelled on the existing integrated program taught at Northumbria University).⁶² Another proposed integration of the vocational and work experience stages. A fourth indicated a modular approach, possibly attractive to the employed Bar.

Option C: ‘Bar Specialist’ approach⁶³

This would make no requirements in respect of what is currently the academic stage and would require students to sit a centrally set examination of the knowledge currently gained in a qualifying law degree and in the current centrally set assessments on the BPTC. Only after passing this

58 Bar Standards Board, *Future Bar Training: Consultation on the Future of Training for the Bar: Future Routes to Authorisation* (2016) <www.barstandardsboard.org.uk/media/1794621/future_bar_training_routes_consultation_final.pdf> accessed 18 July 2019.

59 This chapter was initially written in 2015 during the first stage of consultation. Revision since receiving referees’ comments is being undertaken shortly before the second stage of consultation concludes. I should declare that between those two dates I have been appointed to the Education and Training Committee of the BSB. The views expressed here are those of the author and do not necessarily represent those of the BSB.

60 BSB (n 57) 24–30.

61 *ibid* 30–38.

62 <www.northumbria.ac.uk/study-at-northumbria/courses/m-law-exempting-ft-uufmay1/> accessed 20 January 2017.

63 BSB (n 57) 38–45.

assessment would a student be permitted to undertake a skills course covering the oral and written skills currently taught on the BPTC. This option aligns closely to the SRA's proposals for training to be a solicitor, subject to consultation at the same time.

After the publication of this consultation document in October 2016 the Council of the Inns of Court (COIC) and the Bar Council requested that a further proposal be included in the consultation. As a result, an Addendum⁶⁴ was published. This proposal shares some of the characteristics of Option C in that it requires success at a qualifying examination before entry to skills training, but would operate on the assumption that all students had already done a qualifying law degree (or PGDip).

The BSB focus group research, as well as raising the points identified above, expressed real concern about the cost of the BPTC,⁶⁵ and the fact that there was a 3:1 ratio between those commencing the BPTC and those entering the profession after undertaking pupillage. Option C and the Bar Council/COIC proposal are both intended to address these concerns. If the subjects currently centrally assessed,⁶⁶ plus, possibly, ADR, were to be assessed by centrally set assessments with no prescribed course, candidates would be free to undertake home study, distance-learning programs or follow a taught program if they preferred. Only if a candidate passed these assessments would they be permitted to enrol for a shorter skills-based course. This may well enable a reduction in overall cost to be achieved, and be, in effect, a functional filtering system, so that those with little chance of passing these knowledge subjects do not incur the expense of the skills course. It would, however, entail a loss of one of the educationally valuable elements of the current BPTC described above. Learning the knowledge subjects in parallel with applying them in the skills classes mitigates what would otherwise be a very shallow learning

64 <www.barstandardsboard.org.uk/media/1798993/bptc_coic_bar_council_proposal_final_dec_2016.pdf> accessed 20 January 2017.

65 In 1975 the cost of the Bar Finals Part II course was £389 plus £30 for sitting the examinations. In 2015, the cost of the BPTC varied between £12,000 and £18,000, with the London providers clustered close to the upper figure. The Retail Price Index in 1975 was 37.0; in 2014 it was 257.5. This represents a considerable increase in cost in real terms, although the course is now taught much more intensively.

66 Civil Litigation, Evidence and Remedies; Criminal Litigation, Evidence and Sentencing; Professional Ethics.

process.⁶⁷ There is a risk that choosing this option will result in learning without understanding, with two damaging consequences. One is that those who pass will, by the time they come to apply that knowledge, have forgotten most of it. The other is that some who might well have acquired the knowledge necessary to pass if they had undertaken experiential work that helped them to understand its application will fail and not be permitted to attempt the skills course. This would be a retrograde step, ignoring the educationally sound developments of the past 40 years.

Option B also has its problems. The regulator might rely on outcomes only – assessments of the various required skills. However, any assessment can be coached for, and it may well be that ‘cheap and dirty’ courses could be developed to prepare individuals for assessments without developing their skills in a more thorough way. This would not be in the interests of the consumers of legal services, the group the regulator has ultimate responsibility for. If, as described above, students undertake an integrated spiral curriculum with many iterations of practice, reflection and development, we can have much greater confidence in their ability to represent their clients effectively. The BSB appears to recognise this, suggesting in their first consultation paper requirements they might maintain over course providers.⁶⁸

At the time of writing, the outcome of the consultation cannot be predicted, although the stated preference for Option B suggests that this may well be what the BSB ultimately chooses, unless it is presented with sufficiently cogent alternative arguments. However the process is concluded, it is clear that change will be a continuous feature of education and assessment for the Bar. There have been major upheavals in 1970 (introduction of the Bar Finals Part II), 1989 (introduction of the BVC) and 2010 (introduction of the BPTC). However, development and improvement have been a constant feature with committed educators and regulators taking their responsibilities seriously. It is important that the progress identified to date continues. In my view, that progress must be informed by recognition of the impact that the form of assessment has on the approach students adopt to learning. With that in mind, the role

67 K Scouler, ‘The Influence of Assessment Method on Students’ Learning Approaches: Multiple Choice Question Examination versus Assignment Essay’ (1998) 35 *Higher Education* 453–472, and see the discussion of constructive alignment above.

68 BSB, ‘Future Bar Training: Consultation on the Future of Training for the Bar: Academic, Vocational and Professional Stages of Training’ (2015) para 179–182 <www.barstandardsboard.org.uk/media/1676754/ftb_triple_consultation_9_july_2015.pdf> accessed 20 January 2017.

of 'single best answer' and 'short answer' assessments should be examined carefully. They have their value, but risk damaging the effectiveness with which programs encourage deep learning and sound preparation for practice. Maintaining an effective degree of integration of the learning of knowledge and the development of skills will go a long way to minimising that risk.

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