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## More Than the Rules: Using Pleading Drafting to Develop Lawyering and Transferable Skills

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# MORE THAN THE RULES: USING PLEADING DRAFTING TO DEVELOP LAWYERING AND TRANSFERABLE SKILLS

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KATHERINE CURNOW\*

## I INTRODUCTION

This article seeks to contribute to the ongoing debate in Australia about what should be taught at law school<sup>1</sup> and assist legal academics in the design and implementation of learning and teaching activities for pleading drafting. Prior research has sought to identify the lawyering and transferable skills law students will ultimately require for practice, should they ever practise law, and for careers that will most likely traverse a number of disciplines.<sup>2</sup> While the skills development potential of some law student activities (such as mooting)<sup>3</sup> has been considered in the literature, pleading drafting has not been analysed in a similar manner. This article examines why pleading drafting exercises are an appropriate forum for students to develop a level of proficiency in aspects of several lawyering and transferable skills different to those attained through other university activities. An example of pleading drafting activities at a law school level is then explored, namely, the simulated experience pleading drafting exercises in the *Civil Procedure* course<sup>4</sup> at the University of

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<sup>1</sup> This includes that generated by the Legal Admissions Consultative Committee's (LACC) ongoing review of the Academic Requirements for Admission: <<http://www1.lawcouncil.asn.au/LACC/index.php/review-of-academic-requirements>>.

<sup>2</sup> See, for example, Dennis C Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (AGPS, 1987); Australian Law Reform Commission (ALRC), *Managing Justice: A Review of the Federal Civil Justice System* (ALRC Report No 89, 2000) [3.23]; Richard Johnstone, 'Whole-of Curriculum Design in Law' in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis, 2011) 8; Sally Kift, Rachael Field and Ian Wells, 'Promoting Sustainable Professional Futures for Law Graduates through Curriculum Renewal in Legal Education: A Final Year Experience (FYE2)' (2008) 15(2) *Murdoch University Electronic Journal of Law* 145.

<sup>3</sup> See, for example, Alisdair A Gillespie, 'Mooting for Learning' (2007) 5(1) *Journal of Commonwealth Law and Legal Education* 19; Andrew Lynch, 'Why Do We Moot? Exploring the Role of Mooting in Legal Education' (1996) 7 *Legal Education Review* 67.

<sup>4</sup> The term 'Civil Procedure' is used in this article to describe the undergraduate course in which students study the procedural law applicable to civil litigation.

Queensland (UQ). The theoretical basis for the design of those exercises and data about student perceptions of them is discussed.

To begin, this article analyses the nature of pleading drafting, what differentiates it from other legal writing genres, and the lawyering and transferable skills it requires. The article then examines why experiential learning is effective for pleading drafting, as it promotes a deep approach to learning and, in turn, promotes lifelong learning. The *Civil Procedure* tutorial program at UQ is used to explore how lawyering and transferable skills training can be integrated into pleading drafting exercises in a *Civil Procedure* course at a law school level in a manner designed to foster experiential learning. The results of a survey of student perceptions of the pleading drafting learning and teaching activities in the UQ *Civil Procedure* course are then utilised to discuss the potential effectiveness of the activities in cognitively and/or affectively motivating students. Finally, it is argued that the different aspects of lawyering and transferable skills required for pleading drafting and the need to give students progressively more complex activities to master them warrant the inclusion of pleading drafting at a law school level.

## II PLEADING DRAFTING AND SKILLS

There is widespread recognition of the need to introduce more lawyering skills into legal education,<sup>5</sup> including legal research skills, problem solving skills, dispute resolution skills, negotiation, the ability to recognise and resolve legal ethical dilemmas, and counselling skills.<sup>6</sup> In addition, compelling arguments have been made for law students to develop more generic or transferable skills as part of their legal education.<sup>7</sup> Transferable skills include communication skills, information gathering skills (locating and evaluating relevant information sources and then extracting relevant information from them), problem solving skills (including creative problem solving and decision-making) and teamwork skills.<sup>8</sup> Development of high-level transferable skills can assist students to adapt and change in a competitive and evolving legal profession.<sup>9</sup> Further,

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<sup>5</sup> Gillespie, above n 3; Lynch, above n 3.

<sup>6</sup> The Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers: Preparation for the Profession of Law* (2007) (Carnegie Report) 12-24, 27-29, 147, 191-197 as cited in Charity Scott, 'Teaching Health Law: How Well Do We Engage Our Students?' (2007) 35(4) *The Journal of Law, Medicine & Ethics: A Journal of the American Society of Law, Medicine & Ethics* 739, 739; Michael Robertson, 'Embedding 'Ethics' in Law Degrees' in Kift, above n 2, 110-112.

<sup>7</sup> Kift, Field and Wells, above n 2; Johnstone, above n 2, 8-9; Carnegie Report as cited in Scott, above n 6. See also the 26 factors by which to measure lawyer effectiveness identified in Marjorie M Shultz and Sheldon Zedeck, *Identification, Development, and Validation of Predictors for Successful Lawyering: Final Report* (2008) 26-27 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1442118](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442118)>.

<sup>8</sup> Sally Kift, 'Lawyering Skills: Finding their Place in Legal Education' (1997) 8 *Legal Education Review* 43 at 50-56; Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537, 541.

<sup>9</sup> ALRC, above n 2 [2.89]; Kift, Field and Wells, above n 2, 150.

they are relevant to careers outside practice, such as government, business and the not-for-profit sector.<sup>10</sup> This is significant as many law graduates will never practise law or complete professional legal training (PLT). Many others who do enter the law immediately after graduating will later transition into other careers.<sup>11</sup> Thus, law school must lay the foundations not only for graduates to enter a legal profession in considerable flux, but for other career paths as well.<sup>12</sup>

The standards agreed by the Council of Australian Law Deans (CALD) as the self-regulatory framework for Australian law schools (Standards) require that law students develop both lawyering and transferable skills during their law degrees. The Standards incorporate the Threshold Learning Outcomes for the Bachelor of Laws (TLOs)<sup>13</sup> as well as requiring that a university legal education curriculum develop skills of research, analysis, reasoning, problem-solving and oral and written communication.<sup>14</sup> The TLOs include thinking, research and ethical, communication and collaboration as well as self-management skills.<sup>15</sup> Significantly, the communication skills students develop at law school should include an appreciation of the different forms of legal writing and the ability to use appropriate communication for different contexts.<sup>16</sup>

Pleading drafting is a form of legal drafting.<sup>17</sup> As discussed above, legal drafting skills are identified as a 'lawyering skill' law students should develop at law school. Unlike many other forms of legal writing, pleading drafting is strictly governed by the relevant court rules. What must, may or may not be included in a pleading is dictated by the rules in the relevant court.<sup>18</sup> It has been suggested that pleading rules form a code

<sup>10</sup> Kift, Field and Wells, above n 2; Johnstone, above n 2, 8-9.

<sup>11</sup> Keyes and Johnstone, above n 8, 557.

<sup>12</sup> See generally Gillespie, above n 3, 23.

<sup>13</sup> The TLOs were developed as part of the Learning and Teaching Academic Project managed by the Australian Learning and Teaching Council: Australian Learning and Teachings Council (ALTC), *Learning and Teaching Academic Standards Project - Bachelor of Laws – Learning and Teaching Academic Standards Statement* (December 2010)

<<http://www.cald.asn.au/assets/lists/ALSSC%20Resources/KiftetalLTASStandardsStatement2010.pdf>>. They have been endorsed CALD: Council of Australian Law Deans (CALD), *Introduction and Context to the CALD Standards for Australian Law Schools* (March 2014)

<<http://www.cald.asn.au/assets/lists/ALSSC%20Resources/CALD%20Standards%20Introductory%20Context%20Statement%20March%202014.pdf>>.

<sup>14</sup> CALD, *CALD Standards for Australian Law Schools* (2009 as amended in March 2013) <<http://www.cald.asn.au/assets/lists/ALSSC%20Resources/CALD%20Standards%20As%20adopted%2017%20November%202009%20and%20Amended%20to%20March%202013.pdf>>.

<sup>15</sup> ALTC, above n 13.

<sup>16</sup> Ibid 21.

<sup>17</sup> Kift, above n 8, 55.

<sup>18</sup> See, for example, *The Uniform Civil Procedure Rules 1999* (Qld) Ch 6. See also Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters, 10<sup>th</sup> ed, 2014) Ch 6; Stephen Colbran et al, *Civil Procedure Commentary and Materials* (LexisNexis, 5<sup>th</sup> ed, 2012) Ch 11.

for pleading.<sup>19</sup> The communication style in pleading is concise (in many jurisdictions the rules require it be as brief as the case permits)<sup>20</sup> and factual rather than argumentative because pleadings set out material facts and not evidence or legal argument, unless specifically required by the rules.<sup>21</sup> But pleading can also be strategic. A party's pleadings are critical to the presentation of their case to other parties and any adjudicator.<sup>22</sup> They must clearly and persuasively detail or respond to all the material facts necessary to establish a cause of action while complying with the relevant rules.<sup>23</sup> As some of the first documents that adjudicators and other parties review, pleadings may influence the perceptions of other parties and any adjudicator about the strength of a particular party's case. Further, pleadings can be used to draw out information and admissions from other parties in order to obtain a more comprehensive picture of their case.<sup>24</sup> Finally, the pleadings in a case may influence party decisions about preferred dispute resolution processes and strategy in those processes.<sup>25</sup>

As evident from the discussion above, pleading drafting requires written communication skills. The style of writing is succinct, factual, rule driven and forensic and therefore unlike other written communication activities used in law and non-law university subjects such as essay writing. The notes on the TLOs refer to effective communication skills requiring an appreciation of the appropriate communication style and format for different contexts.<sup>26</sup> Pleading drafting provides an opportunity for students to engage with a style of writing different to that which they encounter in most other university courses. Pleading drafting activities are therefore an important opportunity for students to further develop their written communication skills and, through discussion of the objectives of a pleading, appreciate the need for different forms of communication in different contexts.

In addition to written communication skills, effective pleading drafting requires the exercise of other lawyering and transferable skills. Before setting out the material facts in a pleading, the drafter must locate

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<sup>19</sup> Cairns, *ibid*, 217.

<sup>20</sup> Cairns, *ibid*, 217; Colbran, *above n* 18, 494.

<sup>21</sup> David Bamford and Mark Rankin, *Principles of Civil Litigation* (Thomson Reuters, 2<sup>nd</sup> ed, 2014) 102; Cairns, *above n* 18, 217-230; Colbran, *above n* 18, 494-502.

<sup>22</sup> *Downer Connect Pty Ltd v McConnell Dowell Constructions (Aust) Pty Ltd* [2008] VSC 77 at [2]-[4]; Richard Douglas SC, 'Effective Pleading – Avoid the Pig' on *Hearsay Issue* 61 (April 2013) <[http://www.hearsay.org.au/index.php?option=com\\_content&task=view&id=1595&Itemid=35](http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1595&Itemid=35)>.

<sup>23</sup> Cairns, *above n* 18, 219-220.

<sup>24</sup> Anthony Morrison QC, 'The Seven Deadly Sins of Pleading' on *Hearsay Issue* 32 (December 2008) <[http://www.hearsay.org.au/index.php?option=com\\_content&task=view&id=427&Itemid=4](http://www.hearsay.org.au/index.php?option=com_content&task=view&id=427&Itemid=4)>.

<sup>25</sup> For example, see *Clarke (as trustee of the Clarke Family Trust) & Ors v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) & Ors* [2014] VSC 516.

<sup>26</sup> ALTC, *above n* 13, 21.

and evaluate relevant oral and written information sources and then extract pertinent information from them.<sup>27</sup> Legal research skills are also needed to identify relevant substantive and adjectival law. The drafter must then utilise their knowledge of substantive and procedural law to analyse the particular case scenario to determine what is required to establish a cause of action and what must, may or may not be pleaded.<sup>28</sup> This analysis will, in most Australian jurisdictions, require differentiation between evidence, fact and legal argument.<sup>29</sup> For the reasons set out above, a pleading is also an exercise in advocacy and the influencing of other parties as well as any adjudicator. In this sense, pleading drafting is a legal research, problem solving and advocacy related exercise. While other law related learning and teaching activities (for example, mooting) may require students to exercise similar skills, pleading drafting is an excellent base for further developing those skills, including different aspects of those skills and in a different context. A pleading drafting exercise at law school can therefore provide an opportunity for students to develop analytical and communication skills and challenge them to demonstrate a succinct, factual style of writing. These types of skills are necessary for legal practice, as well as careers in government, business or the non-profit sector where they are required for preparing, for example, reports, executive summaries and submissions to parliament or government inquiries.

Beyond an exploration of the pertinent procedural rules and development of the skills necessary for drafting pleadings, a pleading drafting exercise can, in the author's experience, also provide a basis for discussing broader issues about the civil justice system and practice. Pleadings perform the role of defining the issues in the dispute between the parties and thereby shaping subsequent steps in the proceedings (such as disclosure/discovery and the evidence to be adduced at trial).<sup>30</sup> As such, pleading drafting activities provide a context for discussing issues associated with the cost and efficiency of the justice system<sup>31</sup> as well as the overall objectives of the system, including ensuring fairness and justice.<sup>32</sup> Whether or not students ultimately enter practice, appropriately designed pleading drafting activities allow students to develop a greater understanding of critical considerations for the modern civil justice system, and thereby develop a greater appreciation of the system and how it operates. Further, pleading drafting activities provide a platform through which to discuss ethical and client care<sup>33</sup> issues with students. For example, when considering what should be included in a pleading, the

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<sup>27</sup> Douglas, above n 22.

<sup>28</sup> Ibid.

<sup>29</sup> Morrison, above n 24.

<sup>30</sup> Cairns, above n 18, 207-208; Andrew Hemming and Tania Penovic, *Civil Procedure in Australia* (LexisNexis, 2015) 289.

<sup>31</sup> Bamford and Rankin, above n 21, 7-9, 74-75; Hemming and Penovic, above n 30, 21-28.

<sup>32</sup> Hemming and Penovic, above n 30, 15-16.

<sup>33</sup> Required by TLO 2: ALTC, above n 13, 14-16.

duties of a lawyer to their client as well as to the court naturally arise. The further issue of what happens if those duties conflict can then be explored.

### III EFFECTIVE PLEADING DRAFTING LEARNING

As established above, pleading drafting requires communication, research, analytical, problem solving and advocacy skills. Any learning and teaching activities associated with pleading drafting should therefore seek to develop the skills required to successfully draft a pleading and not simply focus on the procedural rules that govern pleading.

#### *A What Promotes Effective Learning of Skills?*

A deep learning approach where students are actively engaged and motivated to learn by interest in the subject matter is required for high quality and effective learning.<sup>34</sup> This necessitates a student-centred learning environment.<sup>35</sup> A key factor for effective skills learning is motivation. Learners who are cognitively and/or affectively motivated to undertake an activity and achieve a particular outcome are more likely to achieve good learning outcomes because they will approach the activities in a manner that facilitates obtaining those outcomes.<sup>36</sup> As Ambrose et al explain, 'motivation influences the direction, intensity, persistence and quality of the learning behaviours in which students engage.'<sup>37</sup> Student motivation is enhanced by their perception that the learning and teaching activities have value, positive expectations about their likelihood of success and a supportive environment.<sup>38</sup> An early sense of achievement is a key factor for a student's expectations and thus for their motivation and engagement.<sup>39</sup>

Few learners will master a skill on their first attempt. Learners should be given opportunities to learn and develop basic skills through initial activities in which they can gain a sense of achievement.<sup>40</sup> Subsequent activities involving more challenging tasks can then be utilised to further develop the learner's proficiency in the skill. The linkage between particular skills and future professional careers will also almost certainly act as a strong motivator for many students because they will see the activity as having value for their future careers.<sup>41</sup> Consequently, student perceptions of the value of, their ability to succeed in, and the

<sup>34</sup> JB Biggs, 'Teaching for Better Learning' (1990-1991) 2 *Legal Education Review* 133, 140-141.

<sup>35</sup> Paul Ramsden, *Learning to Teach in Higher Education* (RoutledgeFalmer, 2<sup>nd</sup> edition, 2003) 143.

<sup>36</sup> Paula Baron, 'Deep and Surface Learning: Can Teachers Really Control Student Approaches to Learning in Law?' (2002) 36(2) *The Law Teacher* 123, 124.

<sup>37</sup> Susan A Ambrose et al, *How Research Works: 7 Research-Based Principles for Smart Teaching* (Jossey Bass, 2010) 68-69.

<sup>38</sup> Ambrose, *ibid*, Ch 3; Biggs, above n 34, 140. See also Baron, above n 36.

<sup>39</sup> Kift, above n 8, 57-58; Biggs, above n 34, 140.

<sup>40</sup> ALTC, above n 13, 9.

<sup>41</sup> Ambrose, above n 37, 84.

supportiveness of the environment in which they undertake an activity will be key factors in their approach to learning.

An additional consideration for the design of learning and teaching activities for skills is that effective learning and teaching strategies must seek to accommodate different learners with different learning styles. However, they should also seek to assist students to develop the ability to use different learning styles in order to increase their learning potential.<sup>42</sup> Consequently, learning activities for the development of skills in law schools must use methods suited to skills learning, accommodate different learning styles, and develop the ability of students to use a range of learning styles.

### B *The Experiential Learning Model*

Experiential learning theory insists that experience is central to the learning process. Kolb defines experiential learning as ‘the process whereby knowledge is created through the transformation of experience. Knowledge results from the combination of grasping and transforming experience’.<sup>43</sup> Experiential learning encourages students to build their own understanding of abstract concepts and skills through personal experience of the application of those concepts and skills. It engages students in both cognitive and affective approaches to learning, that is, strategies for learning, motivations and affective responses.<sup>44</sup>

Experiential learning theory has its origins in philosophical pragmatism, social psychology and cognitive-developmental genetic epistemology.<sup>45</sup> It differs to cognitive learning theories in that it focuses on affect rather than simply cognition. It is also different to behavioural learning theories ‘which deny any role for subjective experience in the learning process’.<sup>46</sup> Kolb asserts that experiential learning theory provides ‘a holistic integrative perspective on learning that combines experience, perception, cognition, and behaviour’.<sup>47</sup>

Kolb’s experiential learning model (see figure 1) involves 4 stages. Concrete experience (‘do’) leads to reflective observation (‘reflect’), which forms the basis for the development and refinement of abstract concepts and skills (‘form principles’) that can then be tested in new

<sup>42</sup> M Le Brun M and R Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (Law Book Company, 1994) 82.

<sup>43</sup> David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice Hall, 1984) 36-38.

<sup>44</sup> Lynch, above n 3, 74-75, 79.

<sup>45</sup> David A Kolb, Richard E Boyatzis and Charalampos Mainemelis, ‘Experiential Learning Theory: Previous Research and New Directions’ in Robert J Sternberg and Li-Fang Zhang (eds), *Perspectives on Thinking, Learning and Cognitive Styles* (Lawrence Erlbaum Associates, 2000) 227.

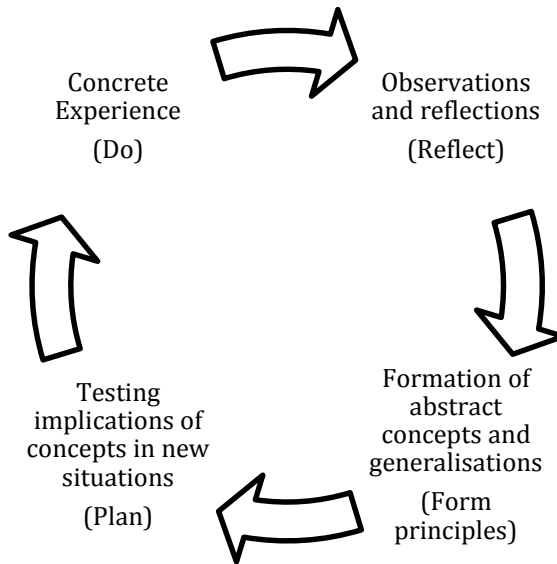
<sup>46</sup> Ibid.

<sup>47</sup> Kolb, above n 43, 21.



situations ('plan').<sup>48</sup> Concrete experience in this context includes a simulated experience.<sup>49</sup> The cycle may be entered at any of the learning activities as long as each stage in the cycle then follows sequentially from the point of entry. It is the sequencing of the activities that promotes the personalisation of knowledge. This occurs in two ways. Firstly, reflection by the learner about their own 'real' experience enables them to translate 'abstract concepts' into reality. Secondly, putting abstract concepts into action can arm the learner with the skills and motivation to use them.<sup>50</sup>

Figure 1  
Kolb's Experiential Learning Model as modified by Kift<sup>51</sup>



A further strength of experiential learning is its suitability for learners with different learning styles. Each stage of the model involves abilities associated with a different learning style. The ability to enter the cycle at any point means those with different learning preferences may be engaged in an activity at different points in the cycle, and with appropriate motivation, may be encouraged to engage in subsequent steps

<sup>48</sup> David A Kolb and Linda H Lewis, 'Facilitating Experiential Learning: Observations and Reflections' in Linda H Lewis (ed), *Experiential and Simulation Techniques for Teaching Adults* (Jossey-Bass, 1986) 99-107.

<sup>49</sup> Kolb, Boyatzis and Mainemelis, above n 45, Ch. 9.

<sup>50</sup> Kolb and Lewis, above n 48, 100.

<sup>51</sup> Kift, above n 8, 62. It is beyond the scope of this article to explore how experiential learning should be modelled, however, it is noted that Kolb's experiential learning cycle has recently been reconceptualised as a twin-cycle experiential learning model to address criticisms relating to the conceptualisation and categorisation of concepts such as learning modes and stages: Harald Bergsteiner and Gayle C Avery, 'The Twin-cycle Experiential Learning Model: Re-conceptualising Kolb's Theory' (2014) 36(3) *Studies in Continuing Education* 257. The stages and sequencing of the Kolb cycle referred to in this article remain unchanged in that reconceptualization.

in the cycle. Moreover, encouraging learners to engage with all the stages of the cycle can assist them to develop the ability to undertake tasks at all stages of the experiential learning cycle, including those associated with other learning styles. Doing so will equip them to be more effective learners<sup>52</sup> and promote their capacity to engage in lifelong learning.<sup>53</sup>

A discussion of how learning and teaching exercises in the UQ tutorial program were designed to create an experiential learning cycle is set out below.

### *C Experiential Learning and Pleading Drafting*

Purely verbal and written explanations of the theory underpinning a skill will not facilitate effective learning of that skill. Traditional methods of teaching law, including a didactic approach focusing on the conveyance of legal rules and principles to students, are therefore ill suited to skills learning.<sup>54</sup> Effective skills learning will also not occur if students are left to master the skill by practising without supervision and feedback. There is a risk in those circumstances that learners will reinforce bad habits. Students must instead be given the opportunity to practise the skill in a reflective and supervised manner.<sup>55</sup> Gibbs argues '[i]t is not enough just to do, and neither is it enough just to think. Nor is it enough simply to do and think. Learning from experience must involve links between doing and thinking.'<sup>56</sup> Experiential learning is accepted as an effective model for skills learning.<sup>57</sup> Further, an experiential learning model is an appropriate pedagogical approach for legal skills training.<sup>58</sup>

As noted above, student perception of the value of learning and teaching activities is an important factor for their motivation. In the case of lawyering skills, the linkage between particular skills and practice will act as a strong motivator for many students.<sup>59</sup> Hewitt contends that

[e]ngaging students in activities which simulate the practice of law is likely to inspire their interest, enhance their perceptions of the relevance of the subject-matter, deepen their understanding of the principles learnt, and lead to greater retention of that knowledge.<sup>60</sup>

<sup>52</sup> Kolb and Lewis, above 48, 100.

<sup>53</sup> Kift, above n 8, 64.

<sup>54</sup> Kift, above n 8. See also Keyes and Johnstone, above n 8, 545-547.

<sup>55</sup> Kift, above n 8, 60-61.

<sup>56</sup> Graham Gibbs, *Learning by Doing* (Oxford Brookes University, Online Edition, 2013) 28-29.

<sup>57</sup> Kift, above n 8, 56-64.

<sup>58</sup> Kift, above n 8, 56-67; Kift, Field and Wells, above n 2, 153; Allan Chay and Frances Gibson, 'Clinical Legal Education and Practical Legal Training' in Kift et al, above n 2, 501-506; Lynch, above n 3.

<sup>59</sup> Kift, above n 8, 58; David Bamford et al, 'Learning the "How" of the Law: Teaching Procedure and Legal Education' (2013) 51 *Osgoode Hall Law Journal* 45, 59-60. See also, Ambrose, above n 37, 84.

<sup>60</sup> Anne Hewitt, 'Producing Skilled Legal Graduates: Avoiding the Madness in a Situational Learning Methodology' (2008) 17(1) *Griffith Law Review* 87, 89.

A further significant consideration for a challenging task like pleading drafting is ensuring learning and teaching activities are carefully designed to ensure student motivation is not diminished. The initial exercises given to learners should be within their capabilities so that they can build confidence for the reasons detailed above.

#### IV A SIMULATED EXPERIENTIAL LEARNING EXPERIENCE: PLEADING DRAFTING ACTIVITIES AT UQ

##### *A Civil Procedure at UQ*

Most Australian law students study civil procedure during their law degrees. *Civil Procedure* is an elective subject at UQ. However, almost all law students take the *Civil Procedure* subject as it is a pre-requisite for admission as a legal practitioner.<sup>61</sup> Most UQ law students take *Civil Procedure* in their final or penultimate year of law school. It is a large course with an enrolment of 250 students in 2012 and 360 students in 2013.

*Civil Procedure* necessarily involves a focus on the legal rules and procedures governing the adjudication of civil disputes. However, at UQ, it also presents a key opportunity for students to understand how civil law is (or, in many cases, is not) enforced and to experience the civil legal system in action. It is also a fitting forum for lawyering and transferable skills learning through simulated activities.<sup>62</sup> A project lead by the author developed a simulated case scenario with a series of activities relating to common steps in a civil legal proceeding for implementation in the UQ *Civil Procedure* subject in a manner aimed at fostering experiential learning. Students were then surveyed about their perceptions of those activities.

##### *B The Project*

The overarching goal of the project was to explore the effect on student learning experience of implementing into the UQ *Civil Procedure* subject a related series of learning activities designed to facilitate experiential learning. Due to the large number of students taking the subject, the concrete experience utilised was a simulated experience. A case scenario and a series of tutorial activities in relation to it were developed in conjunction with barrister Jennifer Sheean. The 'simulated experience' tutorial program was developed and implemented in 2012,

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<sup>61</sup> LACC, *Uniform Admission Rules 2014: Schedule 1 Prescribed Areas of Knowledge*.

<sup>62</sup> Jacqueline Horan and Michelle Taylor-Sands, 'Bringing the Court and Mediation Room into the Classroom' (2008) 18 (1 & 2) *Legal Education Review* 197; Kathy Mack et al, 'Developing Student Self-reflection Skills through Interviewing and Negotiation Exercises in Legal Education' (2002) 13 *Legal Education Review* 221; Hewitt, above n 60.

2013 and 2014, with modifications for the 2013 and 2014 offerings.<sup>63</sup> The case scenario was principally presented to students in the form of letters, memoranda and emails. It comprised a relatively straightforward commercial transaction leading to contract and negligence claims. This simple scenario formed the platform for exploring the rules of civil procedure and skills training. Documents were gradually released to students at different points during the semester. In essence, the students were given the simulated experience of following a single case through the key steps in a civil proceeding with developments in the facts and legal argument as the case proceeded. This article will focus on the pleading drafting exercises.

### *C The Simulated Experience Pleading Drafting Activities*

Students in the UQ *Civil Procedure* subject were asked to engage in a number of activities intended to promote an experiential learning cycle in relation to the skills associated with pleading drafting. The activities were as follows (with the stage in the experiential learning cycle in brackets):

- Hearing a contextual explanation of the rules of pleading in a lecture in which pleading drafting was explained by John McKenna QC using example pleadings to illustrate the relevant principles. The lecture included tips about strategies for approaching pleading drafting. (Form)
- Undertaking prescribed readings and reviewing example Statements of Claim. (Form)
- Planning and drafting a Statement of Claim in preparation for the tutorial. The Statement of Claim related to the tutorial case followed through the entire tutorial program and was intended to give the students an early sense of achievement. (Plan and Do)
- Attending a tutorial (the Pleading Tutorial) and discussing their draft Statement of Claim with other students in a small group, and then in a discussion lead by a tutor with the entire tutorial group. Again, tips about strategies for approaching pleading drafting were given during tutorials. (Reflect)
- Reviewing an example Statement of Claim for the tutorial case. Students could also seek further feedback from teaching staff through online or traditional consultations. (Form)
- Planning and drafting a Statement of Claim as part of an assignment. (Plan and Do)

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<sup>63</sup> The principle modification was the introduction of 5 additional tutorial exercises for 2013 and 2014. In 2012, the Civil Procedure tutorial program was 5 tutorials so 5 activities were developed. In 2013 and 2014, the Civil Procedure tutorial program was extended to 10 tutorials and so further exercises were added. Other minor modifications were made to the activities to improve clarity and reflect alterations in the law.

- Receiving written and oral feedback about their Statement of Claim assessment. (Reflect)

An aspect of the pleading drafting exercise for the tutorial was that students were asked to consider how they would respond to a request from a client to plead a cause of action with no prospects of success. The strategies that could be employed should such a context arise were canvassed in tutorials. This aspect provided students with an opportunity to practise recognising and resolving ethical dilemmas. The importance of law students developing these skills is recognised in TLO 2,<sup>64</sup> and has been emphasised by Australian<sup>65</sup> and United States academia.<sup>66</sup>

### D *The Surveys*

All students enrolled in the 2012 and 2013 *Civil Procedure* subject at UQ were invited to complete a survey. Invitations were sent to the 2012 and then 2013 student cohorts by email towards the end of the relevant semester. The surveys included questions covering a range of issues relating to the UQ *Civil Procedure* tutorial program. The findings reported in this article are only the statistically significant results relevant to the discussion of pleading drafting. Thirty-two students completed the 2012 survey and 43 students completed the 2013 survey. As a result of the relatively low response rate, it is possible that those who responded do not constitute a representative sample of the entire *Civil Procedure* student cohort in 2012 and 2013. The analysis of the data collected through the survey was conducted with this in mind.

### 1 *The Respondents*

Most respondents (91.4%) were aged 18-25 years. Slightly more females than males responded to the survey with 59% of respondents being female. Over 96% of the respondents were fulltime students. Almost three quarters were enrolled in a dual program, and about 22% were Bachelor of Law (Graduate Entry) students. Approximately one third of the respondents were already working in practice. Consistent with the course plan for law students at UQ, the respondents were principally later year law students.

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<sup>64</sup> ALTC, above n 13, 14-16.

<sup>65</sup> For example, Michael Robertson, 'Embedding 'Ethics' in Law Degrees' in Kift et al, above n 3, 110-112.

<sup>66</sup> For example, Carnegie Report as cited in Scott, above n 6. Johnstone argues the Carnegie Report is largely applicable to Australia: Johnstone, above n 2, 8.

## *2 Student Perceptions of the Pleading Drafting Learning*

### *Activities*

A number of the questions in the surveys were designed to elicit information about student perceptions of the particular learning and teaching activities. Information about student perceptions was sought because of its importance to student motivation and, consequently, student approaches to learning. The questions included indicating on a Likert scale whether they strongly agree, agree, disagree or strongly disagree with, or are neutral about, the following statements:

- ‘I used the knowledge I developed in the activities associated with the Pleading Tutorial<sup>67</sup> in the Drafting Claim and Statement of Claim assignment.’ [Question 7(e)].
- ‘I felt better able to complete the Drafting Claim and Statement of Claim assignment as a result of the Statement of Claim preparation and tutorial exercises associated with the Pleading Tutorial.’ [Question 7(f)]

Students were also asked to rate the helpfulness in developing their pleading drafting skills of several activities in the Pleading Tutorial (i.e. very helpful, helpful, neutral, not very helpful and not at all helpful). These activities were as follows:

- ‘Specific feedback from my group member/s about the Statement of Claim that I drafted in preparation for the tutorial.’ [Question 8(a)]
- ‘Discussion of the Statement of Claim lead by my tutor.’ [Question 8(b)]

Further, students were asked to rate their level of confidence in their pleading drafting skills before the preparation and tutorial exercise in the Pleading Tutorial and then after the tutorial [Question 11]. They were asked to rate their skills before and after the tutorial as excellent, good, satisfactory, poor or very poor. The data that follows is aggregated data from the 2012 and 2013 surveys.

Most of the students who completed the survey perceived the tutorial related activities as helpful in preparing for assignment and agreed that their pleading drafting skills improved through them. A majority of students (86%) agreed that they used knowledge they developed in the activities associated with the Pleading Tutorial in the undertaking the

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<sup>67</sup> The survey question in 2012 referred to Tutorial 2 instead of ‘the Pleading Tutorial’ and the survey question in 2013 referred to Tutorial 4 instead of ‘the Pleading Tutorial’. In each year the wording reflected the tutorial number of the tutorial in which pleading activities were undertaken. The tutorial number changed because the number of tutorials in the UQ Civil Procedure subject was increased, as noted above, from 5 to 10 in 2013. The term ‘the Pleading Tutorial’ is used in this article instead of ‘Tutorial 2 or Tutorial 4’ for brevity and clarity.

assignment [Question 7(e)]. Univariate analysis of student responses to Question 11 revealed four out of five students (80%) agreed that their pleading drafting skills had improved after preparing a pleading for the pleading tutorial and attending the tutorial. There was also a statistically significant relationship (see Table 1) between a student feeling more confident in their pleading drafting skills after the pleading drafting tutorial exercises and students agreeing that:

- the knowledge they gained from the Pleading Tutorial was useful for their Drafting Claim and Statement of Claim assignment [Question 7(e)];
- the Pleading Tutorial made them feel better able to complete the Drafting Claim and Statement of Claim assignment [Question 7(f)]; or
- the Statement of Claim discussion lead by their tutor was helpful [Question 8(b)].

*Table 1: Bivariate analysis of whether students felt more confident about their pleading drafting skills after the tutorial program and their responses to questions 7(e), 7(f) and 8(b)*

Student's confidence improved for pleading drafting skills after the tutorial program					
	Neutral / Disagree	:	Agree	p	n
7(e) I used the knowledge I developed in the activities associated with the Pleading Tutorial in the Drafting Claim and Statement of Claim assignment.	1	:	1.67	*	73
7(f) I felt better able to complete the Drafting Claim and Statement of Claim assignment as a result of the Statement of Claim preparation and tutorial exercises associated with the Pleading Tutorial.	1	:	1.83	**	73
	Neutral/ Unhelpful		Helpful	p	
8(b) Discussion of the Statement of Claim lead by my tutor.	1	:	1.75	**	73
Statistical Significance: * = 95%; ** = 99%; & *** = 99.9%					

In open-ended feedback at the end of the survey, one student stated about the overall tutorial program that they:

... appreciated having the tutorial exercises as a way to test my skills.

Another student stated that it would be:

... great...to give students the opportunity to develop complex skills (eg, pleading, negotiation) over several weeks.<sup>68</sup>

<sup>68</sup> This student completed the course in 2012 when there were five tutorials. This comment was made as part of an argument as to why there should be more tutorials in the course. It is included here because of the point being made that pleading drafting skills would be better developed over more than one tutorial.

The majority of students (73%) felt that discussion lead by the tutor of the statement of claim in the Pleading Tutorial was helpful or very helpful [Question 8(b)]. However, only just over one quarter (26%) viewed the feedback from other students in small group exercises in the Pleading Tutorial as helpful or very helpful [Question 8(a)]. In open-ended feedback, a number of students commented on the small group discussions with other students in tutorials generally. While the comments relate to the small group discussions in tutorials throughout the semester rather than in the Pleading Tutorial specifically, they arguably reveal some helpful insights into what influenced the perspectives of students about the feedback they received from other students. A number of students said they felt other students were not sufficiently knowledgeable or prepared to give adequate feedback. One felt that the small group work was 'the blind leading the blind'. A number of further comments were made about how particular tutors managed tutorials and implemented the activities. For example, one student said:

For my tutorial there was too much emphasis on the discussion part of the tutorial. Sure have a quick 5-10 [minute] discussion with peers at the start is helpful to get some extra [information], but in my tutorial it was always rushed at the end because we ended up having 40 [minutes] discussion and a quick 10 [minute] glance of answers.

Another student said:

I also don't think the tutor was connected to the course material enough (as compared with practice) and did not give us any further information or guidance from the lectures.

Yet another student said:

I think that the practical nature of the tutorial tasks was great and I learnt a lot in preparing for the [tutorials] but not much in the [tutorials] themselves.

Finally, some students felt the way feedback was given by their peers detracted from the effectiveness of the small group activities. For example, one student said:

.... many law students [are] very judgmental [about] the views of others making some people feel reluctant to contribute.

### *E Analysis*

The data set out above suggests simulated experience pleading drafting activities can provide students with a sense of achievement in the development of skills necessary to undertake a pleading. A high proportion of the students who responded to the surveys agreed that the tutorial related activities were useful and that they developed their pleading drafting capability in a manner that would assist them with the subsequent assignment. A sense of achievement derived from the perceived improvement in their skills through the tutorial pleading learning activities could act as a motivator for students to engage with



further experiential learning activities, including those associated with completing the assessment pleading task and subsequent pleading drafting in LPT and early practice. As set out above, motivation is a key factor for achieving good learning outcomes.

Further, analysis of the data collected in the surveys indicates that the quality of the feedback a student receives is significant for the student's perception of the utility of the learning and teaching activities. Where students perceived that the tutorial related activities were useful, in particular that the discussion lead by the tutor in the tutorial was helpful, they were highly likely (99%) to also perceive that their pleading drafting skills improved through the activities associated with the pleading tutorial. This suggests that where students receive feedback they perceive to be useful, they are more likely to feel a sense of achievement. Notably, many students did not perceive the feedback they received from other students in the UQ tutorial activities to be helpful. The open-ended question comments cited above suggest the design and implementation of student feedback activities may be a key factor in how students perceive the value of those activities. In combination, these findings suggest learning and teaching activities must be carefully structured and implemented to incorporate feedback students feel is helpful.

Finally, analysis of the survey data suggests simulated experience pleading drafting activities can be perceived as valuable by students. As evidenced by the comment from the student above about the practical nature of the tutorial activities generally, this may be because of a perception the activities will be of use for their future careers. However, a number of students made general comments (see above, for example) indicating they were not motivated by association with practice but by success in forthcoming assessment instead.

## V SHOULD WE ENGAGE STUDENTS IN PLEADING DRAFTING AT LAW SCHOOL?

A key argument for law students learning and developing lawyering and transferable skills by the completion of law school is that those skills can facilitate the learning transition from tertiary education to PLT and practice, or into other careers.<sup>69</sup> This transition is comparable to that from high school to university.<sup>70</sup> Further, a graduated learning process involving law school and continuing through PLT and practice, or in careers in other fields, may enhance the learning of skills.<sup>71</sup> In the case of some transferable skills, this learning process will have commenced before university.<sup>72</sup> Possessing solid transferable and lawyering skills by

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<sup>69</sup> Kift, Field and Wells, above n 2, 150.

<sup>70</sup> Ibid, 146, 153.

<sup>71</sup> ALTC, above n 13, 9.

<sup>72</sup> For example, as in the United Kingdom, many Australian law students will be proficient in oral and written communication skills before they commence at law school: ALTC, above n 13, 21.

the end of university may therefore assist students to develop even higher level transferable and lawyering skills through PLT, practice or other relevant careers.

The discussion of the nature of the lawyering and transferable skills involved in pleading drafting above establishes that pleading drafting engages unique aspects of legal drafting, communication, research, analysis, problem solving and advocacy skills. It can further provide an opportunity for exercises and assessment that explore, in context, legal ethical dilemmas. Over 80% of the students who responded to the surveys agreed the discussions of ethical dilemmas in tutorials prompted them to consider how they would deal with such issues in practice. As such, pleading drafting is an activity that could be used at law school to develop lawyering and transferable skills in a similar way to mooting, albeit with an emphasis upon different aspects of those skills.

Drafting a pleading is, however, a task many experienced lawyers find challenging.<sup>73</sup> This is not, in and of itself, sufficient reason not to introduce it at a law school level. In fact, the challenging nature of the task arguably gives greater impetus to introducing students to it through appropriate activities at law school so that students will have basic skills that can be further developed in PLT and in early practice. As noted above, few learners will master a skill on their first attempt. The staged development of the skills necessary to effectively undertake pleading drafting activities through a series of progressively more complex tasks at law school, in PLT and practice may assist students to develop the relevant skills to a high level. The survey results reported in this article suggest that law students can develop a sense of achievement through appropriately designed pleading drafting activities. Those entering practice or PLT will be able to further develop their pleading drafting skills in those environments with a level of confidence and understanding of the tasks they are asked to undertake. Those students who do not enter practice will have been engaged in tasks designed to develop different aspects of certain transferable skills that can be useful to them in the transition to the workforce and throughout their careers.

The difficulty of pleading drafting does, however, warrant careful design of the learning and teaching activities associated with it. An experiential learning model is an appropriate theoretical basis for planning learning and teaching of pleading drafting, for the reasons set out above. Significantly, any pleading tasks must be at a suitable level for law students in order that they develop a sense of achievement, as explained above. Finally, any assessment criteria must also focus on the level of skills it is reasonable to expect of law school students and ensure requisite levels of skill are appropriate.

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<sup>73</sup> See, for example, *Mio Art Pty Ltd v Macequest Pty Ltd & Ors* (2013) 95 ACSR 583; [2013] QSC 211, particularly [58] - [72]. See also the discussion of particulars versus material facts in Bamford and Rankin, above n 21, 100.

## VI CONCLUSION

Students can be assisted in the transition from university to PLT, practice or the wider workforce by obtaining lawyering and transferable skills that equip them to undertake tasks in those contexts. This article has argued that pleading drafting is an activity that requires different aspects of lawyering and transferable skills to those of other legal and non-legal activities at university. As such, it can provide a platform for students to enhance their lawyering and transferable skills. This article has further established that experiential learning is an appropriate and effective mechanism for learning pleading drafting at law school, including by reporting on the results of surveys of students about their perceptions of the utility of simulated experience pleading drafting activities in the UQ *Civil Procedure* subject. The majority of the students who responded to the surveys perceived the learning and teaching activities in that subject to be beneficial in learning pleading drafting skills. Student perception of the value of an activity is critical to their motivation to undertake that activity which in turn influences their approach to learning and the learning outcomes they achieve.

The survey results, however, further suggest that feedback mechanisms, particularly those involving peers, need to be carefully designed and implemented to ensure students perceive the feedback they receive about their performance of a skill as helpful. If so, they are better equipped to identify an improvement in their skills, which may in turn positively motivate them. These results should be of assistance to teachers designing learning and teaching activities for skills, including pleading drafting activities.

Finally, this article has demonstrated that the quintessentially legal task of drafting pleadings can be a platform for learning and teaching about broader issues relevant to the civil justice system and practice. Pleading drafting can be a forum through which to explore ethical and client care issues as well as key issues in relation to the civil justice system. An understanding of these issues will give students a holistic understanding of the law and the civil legal system.