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Access to justice outside the conventional mould: creating a model for alternative clinical legal training.*

Summary

The Constitution guarantees access to legal representation in criminal cases, but not for civil matters. The challenge for university law clinics is, therefore, to find alternative ways of assisting law clinic clients in respect of civil matters. Because the delivery of legal services to law clinic clients form part of an academic curriculum, such services have to conform to the demands and standards of teaching final year LLB students at the university. The alternative to the traditional way of litigation via the Magistrates' Court is found in the Consumer Affairs Court. The operation of a specialist consumer unit, as a litigation entity and as an academic teaching unit is discussed. The functions of such a unit, measured against the goals set for law clinics, can be applied successfully in providing access to justice for civil litigants, whilst providing multiple academic teaching, research and career opportunities.

Opsomming

Toegang tot die reg buite die konvensionele drukgang: die daarstelling van 'n model vir alternatiewe kliniese regsopleiding

Aangesien die Grondwet regsverteenvoording in strafsake waarborg, maar sodanige toegang beperk is vir siviele litigante, is regsklinieke by universiteite genoop om alternatiewe maniere te vind om regsdienste aan regs kliënte te lewer. Die lewering van regsdienste aan regs kliënte vorm deel van 'n akademiese leerplan en moet derhalwe voldoen aan die vereistes en standaarde van lesings wat aan finale jaar LLB studente aangebied word. Die alternatief vir tradisionele litigasie (in die Landdroshof) is gevind in litigasie in die Verbruikershof. Die manier waarop 'n spesialis verbruikerseenheid as beide 'n litigasie- en 'n akademiese eenheid funksioneer, word bespreek. Die funksies van hierdie eenheid, gemeet aan die doelstellings van regs klinieke, kan suksesvol aangewend word in die voorsiening van toegang tot die reg vir siviele litigante, terwyl dit voorsiening maak vir 'n verskeidenheid van akademiese-, navorsing- en loopbaan geleenthede.

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1. Introduction

Herbert Spencer, a 19th-century disciple of Charles Darwin, coined the expression “survival of the fittest.” He originally applied it to the winnowing of firms in the harsh winds of high-Victorian capitalism, but when Darwin’s masterwork, *On the Origin of Species* was published, he equated it with natural selection and transferred it to the process of evolution. Spencer, as social Darwinist, applied Darwin’s theories to human society, concluding that the criterion of desert was genetic, rather than moral. The fittest not only survived, but prospered. Measures to help the poor were therefore wasted, as such people were obviously unfit and doomed *ab initio*. Modern Darwinism does not rely on Spencer’s idea of individual competition, but on social interaction. It identifies the central role of trust in human evolution. Relatives collaborate on the basis of nepotism. The unrelated collaborate on a basis of trust, by keeping score of who does what, when and by punishing cheats.¹ A client attending a law clinic is dependent on the relationship of trust established between him/her and the student counsellor.² Clinical teaching to ensure optimum access to justice to a typical client of a law clinic is therefore key. The clinical teaching is measured against set goals for clinical legal education, which include the development of an appropriate curriculum.

During the course of their academic careers, students study a variety of subjects and invariably compartmentalised subjects as well as different spheres or fields of law and traditions in which law is practised. This approach is often carried over into practice and may hamper innovative thinking and proper utilisation of newly established systems or specialist courts by practitioners. This may be remedied, or at least an alternative way of approach may be stimulated, at entry level, by clinical legal training, at university law clinics. The ideal is for the supervisor, who is the tutor in the clinic, to allow students to think freely and allow for the disintegration of such compartments; in short, setting free the lawyer who is struggling to get out of the law student.

The specialist consumer unit of the law clinic of the University of the Witwatersrand, Johannesburg, will be used by way of example to illustrate how to achieve these outcomes. Whilst the poor have certain legal rights, they remain isolated in many ways. To overcome shortcomings that exist in traditional legal aid in civil litigation matters, an alternative solution in a clinical environment is explored.

2. Goals of law clinics

When law clinics were first established,³ the main objective was to render free legal services to the indigent and, in the process, afford law students practical

1 *The Economist* 2005(12):11.

2 See paragraph 5.

3 Steenhuisen 2004:2. The University of Cape Town and the University of the Witwatersrand had law clinics established by 1973. Several other University law clinics were established by the later 1970s and early 1980s.

training.⁴ Clinical legal education in South Africa follows the approach of the socially conscious perspective which has, as its central motivation, the objective of client representation by the law student.⁵ This methodology is a distinguishing feature of clinical legal education. Although an acceptable single definition of clinical legal education cannot be formulated, seven goals have been identified, namely: professional responsibility; judgment and analytical abilities; substantive law; applied practice skills; legal services to the community; learning and working in groups; and an integration of all or some of these goals.⁶

The American Bar Association and the Law Society of England and Wales have indicated that all lawyers should understand litigation and alternative dispute resolution.⁷ This is held to be “fundamental lawyering skills essential for competent representation,” before beginning practice. In the United States of America, the MacCrate Report, stated as a requirement, that all lawyers graduating from law school, regardless of what practice settings they are entering, should understand the potential functions and consequences of litigation and alternative dispute resolution processes and should have a working knowledge of the fundamentals of litigation at the trial-court level.⁸ These are common objectives of clinical courses.

South African universities state their objectives as threefold,⁹ namely teaching, community service and academic research. Law clinics comply with the first two objectives,¹⁰ and academic research, resulting in accredited publication output, already is an essential output of some law clinics.¹¹ Although South African universities have law clinics at their schools of law, clinical legal education forms part of the academic curriculum of the LLB degree in only some of these universities.¹² Where clinical legal education is compulsory, the role of law clinics in the academic environment becomes more pronounced and a stronger emphasis is placed on the academic training of students in the clinical environment. Access to justice for the indigent is no longer the main or only focus of the law clinic, but will remain a strong component, as client service is inseparable from the clinical methodology. The supervisor¹³ bears the responsibility to strike a

4 The functions of law clinics since expanded, see page 4.

5 Steenhuisen 2004:2. The alternative perspective, not generally used by South African law clinics, would be the pragmatic-professional approach, where simulation is used as a learning opportunity.

6 Steenhuisen 2004:2.

7 Stuckey 2006:9. American Bar Association, Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development — An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) (referred to as “the MacCrate Report”).

8 Stuckey 2006:9-10.

9 Wimpey and Mahomed 2006:17.

10 Wimpey and Mahomed 2006: 7.

11 At the University of the Witwatersrand, Johannesburg, the supervisors at the law clinic are required to publish a specified amount of academic research annually.

12 De Klerk 2006b:246.

13 The attorneys, who are employed by universities (in some, as for instance the University of the Witwatersrand, Johannesburg, as academic staff), serve as supervisors in the clinic. These supervisors are known as clinicians. For purposes of this paper, they will be referred to as supervisors.

balance between training and teaching of the students and service to the community.¹⁴

3. Curriculum

Clinics have to devise a curriculum that aims at both academic excellence and quality access to justice. The curriculum should afford the students the opportunity to experience the (substantive) law in context, striking a balance between academic theory and applied theory.¹⁵ Justice O'Regan has stated that the primary responsibility of law schools is to provide competent legal education to students, pointing out that skills, not content, forms the bedrock of a competent lawyer.¹⁶ Law schools should, therefore, not allow skills training to be a by-product of legal education, but a core component.¹⁷ Skills training, in a clinical context, should therefore aim to embrace as many of the litigation methods as possible. This can be attained by expanding the fields of specialisation in the clinic and by using alternative methods of litigation.

When developing a curriculum for a law clinic, the competing needs of the clients, students and profession must be reconciled. Fox is of the opinion that law schools exist "to produce and deliver legal education in order to satisfy societal needs and demands for legal services."¹⁸ Clinical law should produce lawyers who can represent people effectively; the profession seeks law graduates trained to do just that.¹⁹

The curriculum must address concerns emanating from the nature and variety of the client society attending the clinic. The law clinic of The College of Shari'ah and Law of the United Arab Emirates University at Al-Ain in Abu Dhabi Emirate listed among these concerns those of students' sensitivity to national clients, their attitude towards foreign clients, the sensitivity to legal consultations involving Islamic Law and the resulting assessment of these consultations.²⁰ Such concerns have to be addressed by the South African law clinics, where clients include foreign nationals,²¹ as well as addressing tension created through the indigenous customs in society, which may be in conflict with existing law.

Teaching methodology in law clinics should focus on skills teaching, enabling students,²² not the supervisor, to seek solutions and use different methods of problem solving, including the use of alternative methods, as will be indicated

14 Steenhuisen 2004:12.

15 Steenhuisen 2004:8.

16 O'Regan 2002:248 as quoted by De Klerk 2006a:937.

17 O'Regan 2002:248 as quoted by De Klerk 2006a:937.

18 As quoted by Osman 2006:268-269.

19 Osman 2006:277.

20 Shawky 2006:1-8.

21 These are pronounced in the refugee unit, operating as a specialist unit at the Wits Law Clinic.

22 Vawda 2003:4. This methodology employs certain key features: experiential learning, problem solving approach, partnerships in learning, close supervision of students and evaluation and feedback. As indicated in Osman 2006:259.

later herein, to attain acceptable results. The practice at the Legal Advice Centre of The College of Law, London, is to allow students to work without any participation by the supervisors.²³ Supervisors use file reviews in guiding the students in their casework and file management.²⁴ At the clinic of the University of South Carolina School of Law, USA,²⁵ students who represent clients are allowed to work autonomously, which is seen as the key feature of “graduateness,” distinguishing the final year student from the first year student.²⁶ In the South African clinical environment students, although consulting autonomously, work with a supervisor present in the clinic,²⁷ to provide for a low risk environment for mistakes, especially during the consultation and decision-making processes. These circumstances are conducive to the creation of new methods, strategies and theories, when faced with unfamiliar problem situations.²⁸

De Klerk is of the opinion that clinical courses have become stale and are “trapped in a certain mould,²⁹ with very little growth or innovation being apparent over the past number of years.” Research conducted at the Howard College Campus on past students’ evaluations on the clinical law curriculum posed, *inter alia*, the following challenges to the clinic: clinicians’ lacking skills in *developing* (emphasis added) curricula; seminars allocated to clinical law not sufficient to cover all the topics; difficulty in meeting the needs of society students and the profession; the repeating of traditional topics and methods; and the need to include skills topics in other modules.³⁰ These challenges will be addressed in this paper. A strong and workable curriculum should also dispel negative perceptions held by many academics regarding the educational value of clinics.³¹ University law clinics are academic institutions teaching skills in conjunction with “higher-order cognitive functions which gives the use of those skills meaning.”³²

The challenge for a clinic, within the framework of the identified goals, lies in the extension of its boundaries, by finding and implementing alternative cost effective means to render legal services to the indigent in its community and simultaneously aiming to strengthen and/or expand the existing academic input to students. A successful outcome of the challenge will enhance the existing curriculum.

In preparation for their consultations with and assistance to their clients, students need to have an understanding of the general circumstances of their clients, what rights are afforded to them, why a shortage in funding necessitates the search for alternative forms of litigation and how their clients may be empowered in the process.

23 Chandler and Robotham 2006:5-10.

24 Chandler and Robotham 2006:5-10.

25 Stuckey 2006:12.

26 Stuckey 2006:12-14.

27 Steenhuisen 2004:6-7.

28 Steenhuisen 2004:6-7.

29 De Klerk 2006b:245-246.

30 Osman 2006:276.

31 Woolman 1997:53-54, as quoted by De Klerk 2006a:942. Clinics were branded as “ersatz legal-aid clinics” doing little reflective teaching.

32 De Klerk 2006a:948.

4. Access to justice: the rights of clients and legal aid

4.1 The rights of clients

In the preamble to the South African Constitution “a society based on democratic values, social justice and fundamental human rights” in which “every citizen is equally protected by law,” and commits to “improve the quality of life of all citizens” is envisioned.³³ The founding values include “human dignity, the achievement of equality and the advancement of human rights and freedoms.”³⁴ The Constitution also imposes a duty on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights.”³⁵ The equality provision states, as to the individual’s relationship to the law, that “everyone is equal before the law and has the right to equal protection and benefit of the law” and that “equality includes the full and equal enjoyment of all rights and freedoms,”³⁶ and that “everyone has inherent dignity and the right to have their dignity respected and protected.”³⁷ Unlike in criminal matters, the Constitution does not expressly provide for a right to legal representation in civil matters. The rights of civil litigants are limited to minimum standards of procedural fairness in terms of section 34.³⁸ Bodenstein³⁹ argues that the constitutional guarantee of equality in judicial proceedings (section 9(1)), is meaningless if indigent persons are to be denied the right to legal representation in civil matters, especially in view of the great divide between the economic classes and the incommensurable position between a poor and illiterate litigant,⁴⁰ on the one hand, and a corporate opponent, on the other.⁴¹ A consciousness is ingrained into the students that, ultimately, the clients who approach the clinic are seeking access to justice, which has been described as “the most basic requirement — the most basic ‘human right’ — of a modern egalitarian legal system which purports to guarantee and not merely proclaim the legal rights of all.”⁴²

4.2 Profile of clinic clients

The profile of typical clinic clients, who generally reflect the indigent and unemployed in society, is explained to the students. According to September 2005 figures issued by Statistics SA, unemployment was estimated at 26,7

33 *The Constitution of the Republic of South Africa* 108/1996.

34 *The Constitution of the Republic of South Africa*:sec 1(a).

35 *The Constitution of the Republic of South Africa*:sec 7(2).

36 *The Constitution of the Republic of South Africa*:sec 9(1) and 9(2).

37 *The Constitution of the Republic of South Africa*:sec 10.

38 *The Constitution of the Republic of South Africa*:sec 34: “everyone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

39 Bodenstein 2005:314.

40 Bodenstein 2005:314.

41 The process of litigating in the Consumer Affairs Court will be discussed later herein. The nature of consumer litigation typically places the clinic clients against corporate opponents.

42 Vawda 2005:239.

percent.⁴³ Poverty is endemic in South Africa. Almost half of South Africans (48,5 percent) are considered to subsist below the national poverty line.⁴⁴ South Africa is also one of the most unequal societies with a highly skewed income distribution. The Gini co-efficient, which is a measure of economic inequality, rose from 0,596 in 1995, to 0,635 in 2001.⁴⁵

Typical clinic clients are all dependent on legal aid assistance, which in the traditional way, is failing. In 1982 already Judge Bhagwati, in his (unpublished) address to the International Bar Association in New Delhi, said that: [Traditional legal aid]

suffers from the vice of passive acceptance of the fact of poverty and looks upon the poor as simply traditional clients without money, regards law as a given dictum which the lawyer has to accept and work upon, treats the poor as beneficiaries ... rather than participants ... and is confined in its operation to problems of corrective justice and is blind to problems of distributive justice.⁴⁶

4.3 Legal aid and other funding

Whereas the services rendered by the principal supplier(s) of legal aid in South Africa, the Legal Aid Board (LAB),⁴⁷ is supply driven (assistance in criminal matters),⁴⁸ the burden of providing assistance in civil cases, increasingly falls on non-governmental organisations and law clinics to represent clients who lack the skills, comprehensive knowledge and litigation techniques required to represent themselves.⁴⁹ Some law clinics have co-operation agreements with the LAB, whereby funding is granted, but these instances are on the decrease, as the LAB start to incorporate existing projects within its system.⁵⁰ Law clinics have to look towards other sources of funding. AULAI allocates donor funds that it manages⁵¹ to some clinics on specific conditions. Clinics also receive institutional support from the legal profession through a Fidelity Fund grant,

43 <http://www.statssa.gov.za/PublicationsHTML/P0210September2005/html/P0210September2005.html> (accessed on 18 June 2006).

44 Vawda 2005:238. This measure is based on the UN poverty line of R354 per month per adult.

45 Vawda 2005:239.

46 As quoted by Bodenstein 2005:308.

47 McQuoid-Mason 2005b:215. The South African Legal Aid Board was established in 1971 "to render or make available legal aid to indigent persons" (*Legal Aid Act 22/1969* sec 3). The Legal Aid Board established a set of rules incorporated in a Legal Aid Guide. The Guide contains, *inter alia*, the sets of tariffs of fees for practitioners and the "means tests" which allows legal aid for individual clients. The Board has salaried in-house lawyers, is based in Johannesburg and has currently 58 justice centres (spread over South Africa) that also service 27 satellite offices and 13 high court units.

48 Mainly due to the Constitutional guarantees (*The Constitution of the Republic of South Africa*:sec 35(2)(c) and 35 (3)(g)) for legal representation in criminal matters.

49 Bodenstein 2005:308.

50 De Klerk 2006a:947.

51 De Klerk 2006a:931.

which is based solely on the importance of clinical legal education to the law degree.⁵² Law clinics continue to seek sources to fund their projects,⁵³ as most, if not all, do not rely on their university for all the funding.⁵⁴

5. Student profile and motivation

In the process of teaching students in a clinical environment, motivation is required, in addition to just meeting academic requirements, so as to inculcate the passion to assist the poor and unemployed who will be their clients. Stuckey argues that students who never considered what “justice” is and how injustices can destroy people and societies,⁵⁵ or why it is important for lawyers to have a commitment to justice, are less likely to have or develop a commitment to justice, than students who have this understanding. The supervisor can facilitate an understanding of the power that students will exercise as lawyers. Students, when questioning whether their actions can develop not only their own consciousness⁵⁶ but also that of their clients, should recognise that the casework they do with clients has the power to transform not only reality for their client, but sometimes for others as well. This is in line with Freire’s philosophy when he states:

Whereas banking education anesthetizes and inhibits creative power, problem-posing education involves a constant unveiling of reality. The former attempts to maintain the submersion of consciousness; the latter strives for the emergence of consciousness and critical intervention in reality.⁵⁷

The answer to most students’ natural compassion and motivation to assist clients, may be found in the results of studies done (through playing of games with formal rules) at the Universities of California at Santa Barbara and Michigan, USA, on that part of evolutionary psychology devoted to uniquely human behaviour.⁵⁸ It was found that not all games are about competition. Many require trust, a sense of justice and sometimes self-denial. The studies further found that,

trust, and the detection and punishment of injustice, lie at the heart of human society. They are so important that people will actually harm their own short-term interest to punish those they regard as behaving unfairly.⁵⁹

52 De Klerk 2006a:931.

53 Wimpey and Mahomed 2006:9. For example: the University of Johannesburg Law Clinic developed and runs a successful paralegal diploma and the Rhodes University Law Clinic developed outreach programmes in partnership with public interest funders whose focus is primarily access to justice.

54 Wimpey and Mahomed 2006:9-18.

55 Stuckey 2006:23.

56 Chandler and Robotham 2006:8-9.

57 Paolo Freire: *Pedagogy of the Oppressed*: 1970, English Translation: 1996, as quoted by Chandler and Robotham 2006:6.

58 Carr 2005:10-11.

59 Carr 2005:10-11.

Although there is a natural compassion for the poor with most of the students serving as legal counsellors at the law clinic, their "fighting spirit" seems to diminish with time when years of theoretical studies collide with the reality of the tediousness of procedure and practice, which is hampered further by the lack of funding for the cases they are dealing with. Students are discouraged, perhaps more on a psychological or emotional level as clinical workers, when alternatives available to expedite a matter or assist their clients more efficiently are taught but may not be made available due to lack of funding.⁶⁰ Application for assistance to a funder may be denied, or clients may be told to pay for such assistance themselves. The challenge facing the supervisor, other than the constant motivation of the students, lies in finding and teaching alternative skills which assist in overcoming a vast number of these problems.

6. Alternative solution

By focusing on a specialised court and its methodology, students are trained "to transform the analytical aspects of lawyers' work into predictive decision-making capabilities for counselling clients and resolving clients' problems in a manner that is consistent with the relationship, role and responsibility of the lawyer to society, clients and the legal process,"⁶¹ whilst the cost of the accompanying legal aid is minimized and students and clients are empowered by the results attained.

When the University of the Witwatersrand Johannesburg Law Clinic (Wits Law Clinic), implemented specialised units in 1999, a general civil litigation unit was established.⁶² During 2004, further specialisation occurred within this unit, through the establishment of a consumer unit, after statistical data revealed that clients presented with problems suitable for hearing in the Consumer Affairs Court.⁶³ A specific benefit for the clinic, students and the clients, by litigation through this unit, is that the cases brought before the Consumer Affairs Court by the clinic's candidate attorney,⁶⁴ acting as a Consumer Protector, are procedurally correct, heard expeditiously, with no direct costs to either the clinic or the client.⁶⁵

60 For example, for the briefing of counsel, expert witnesses (such as medical examiners, handwriting experts, engineers, tracing agents or private investigators).

61 Roger Cramton, as quoted by De Klerk 2006a:938.

62 Du Plessis 2006:284.

63 Statistical data indicated that between 60 percent to 65 percent of clients attending the civil litigation unit, presented with typical problems that include those with service delivery, incomplete building renovations, unlawful repossessions of vehicles, cancellation of contracts, poor workmanship, the sale of defective or inferior products, agreements with minors, debt collecting agencies, burial societies and a vast number that will merely be classified as breach of contract.

64 Du Plessis 2006:288-289. This allows for interaction between the students and the candidate attorney, as consultations are done at the clinic and files opened by the students. This is also in accordance with the identified support law teachers require, described as: "support from candidate attorneys is needed to implement group work during teaching" in Osman 2006:281.

65 See discussion of this process on pages 14-16.

6.1 Comparison of benefits and shortcomings between the traditional system (Magistrate's Court) and the alternative system (Consumer Affairs Court)

The students in the general civil litigation unit are trained to litigate in the Magistrate's court. In the specialised consumer unit,⁶⁶ operating within the general civil litigation unit, the focus is specifically on the litigation skills applied in the Consumer Affairs Court.⁶⁷ Once the client's legal problem is identified during consultation, the students will evaluate the procedures of the different court systems, as well as factors such as expected time frames to complete the case and costs relating thereto,⁶⁸ where after the appropriate forum from which to litigate will be selected. Students are encouraged to involve their clients during this process, creating an educational forum for the clients and affording them the opportunity of taking such knowledge to their own environments to empower others.

6.2 Implementation of skills acquired

To illustrate how litigation through this alternative method affords clients the opportunity to take control of their destinies, and at the same time, allow students to critically analyze and apply skills acquired, a simple example is used, based on the following facts:

The client purchased goods from ABC Stores for an amount of R 7 500,00. Upon taking delivery of the goods, it transpired that the goods were defective. ABC Stores refused to make good on the warranty when approached by the client.

Normally the following may happen. Due to the overload of cases carried by clinics in general,⁶⁹ clients may be asked to abandon the amount of R500,00 and are referred to the Small Claims Court to claim the amount of R7 000,00 themselves.⁷⁰ Realities for clinics necessitating such referrals are often budgetary constraints.⁷¹

Should the matter however be proceeded with at the clinic in the traditional way, it will involve the sending of a letter of demand, failing response, the issuing

66 This method rectifies a constraint identified as "large classes make it difficult to use some methods," as well as the student feedback query of "the seminars allocated to clinical law are not sufficient to cover all the topics." Osman 2006:276-278.

67 A prescribed form of summons is used when litigating in the Consumer Affairs Court and the Act also provides for additional processes. See pages 14-16.

68 See note 72 for time frames and costs.

69 De Klerk and Mahomed 2006:308-309. Supervisors, who are responsible for the weekly intake of suitable matters, enjoy the discretion as to the number of matters taken on. Such matters should be appropriate for student training.

70 *Small Claims Court Act* 61/1984.

71 Although clients process their cases through the Small Claims court themselves, thereby not paying for legal representation, they are still required to pay the Sheriff for service of the summons issued by the court, which places even this process outside the financial reach of some clients.

of a summons through the Magistrate's Court, which will be served by the Sheriff, the traditional pleadings will follow, leading to the eventual trial. All this will take time and involve costs.⁷² To alleviate the burden on the indigent, and also in the process develop students' litigation skills in a teaching environment, a solution was found in using an alternative litigation method on the same factual scenarios, despite the option of the client to make use of either the traditional or the alternative route.

Using the same scenario as set out here above, assisting the client through the alternative method will entail applying the provisions of the *Consumer Affairs (Unfair Business Practices) Act* ("the Act").⁷³ A letter of demand will be sent to ABC Stores, the difference being that, added to the normal content of the letter of demand, will be an allegation that it had committed an unfair business practice in terms of the Act and that proceedings will be instituted in the Consumer Affairs Court.⁷⁴ The penalties the court may impose in terms of section 24 are in most cases also stipulated in the letter of demand.⁷⁵

Experience has indicated that established commercial enterprises tend to enter into settlement negotiations after receiving such letters of demand.⁷⁶ In the event of no reaction to the letter of demand, the role of the clinic's candidate attorney, placed at the office of the Consumer Protector, becomes pivotal. In terms of section 8 of the Act, the candidate attorney, in his/her capacity

72 Direct costs for the clinic will be the revenue stamp on the summons and payment of the Sheriff for the service of the summons. Other potential costs will be to the Sheriff for the serving of further pleadings. In the Johannesburg Magistrate's court, the general waiting period for a trial date is 3 months. (Information confirmed with the Clerk of the court on 9 November 2006).

73 *Consumer Affairs (Unfair Business Practices) Act* 7/1996.

74 "Unfair business practice" means any business practice which, directly or indirectly, has or is likely to have the effect of unfairly affecting any consumer.

75 Section 24: "Declaration of certain business practices to be unlawful
24. (1) If the court, pursuant to proceedings instituted in the court in terms of section 12(1), is satisfied that it is in the public interest that any particular business practice or type of business practice which was the subject of the proceedings in question should be declared to be unlawful, it may –

(a) declare to be unlawful the business practice or type of business practice or type of business practice concerned, either generally or in respect of a particular area, or depending upon whether the investigation was of a general nature or was undertaken in relation to a particular area;

(b) declare any agreement, accord or undertaking, or term thereof to be void;

(c) prohibit any person from entering into or being continuing to be a party to an agreement, arrangement or understanding, or from using advertising, or from applying a scheme, practice or method of trading, or from committing an act or from bringing about a situation which was the subject of the proceedings, whether wholly or to the extent specified by the court, or subject to a condition or exemption so specified or to an exemption contemplated in subsection (3);

(d) regulate any business practice or type of business practice which was the subject of the proceedings, by determining conditions or requirements which must be complied with in respect thereof.

.....

76 Statistical data indicate that approximately 74 percent of matters are settled. Of these settlements, 98 percent of the defendants are commercial enterprises.

as an acting Consumer Protector, will institute an investigation and issue summons.⁷⁷ All costs pertaining to the summons and service are borne by the office of the Consumer Protector. A further benefit for consumers using this process lies in the collection of evidence. In terms of section 9, the Consumer Protector may appoint investigating officers, who, in terms of section 10, may search and seize any information required by the office of the Consumer Protector relating to an investigation,⁷⁸ after a warrant is obtained.⁷⁹

Through the Magistrate's court process, information only becomes available upon discovery or after the issuing of *subpoenas*, without the guarantee that the information required will be made available. The "search and seizure" procedure in the Consumer Affairs Court ensures that information that may be pivotal to the consumer's complaint can be obtained prior to the trial.⁸⁰ This in turn may increase the probability of settlement of the case. Students have the opportunity to exercise their mediating skills through the application of section 11, which provides for the negotiation of arrangements (settlements) to discontinue unfair business practices.⁸¹ Students will draft the arrangement,⁸² thereafter it will be confirmed by the court in accordance with section 21. If a settlement cannot be reached, the matter proceeds to trial, normally within weeks,⁸³ as opposed to the longer waiting period in the Magistrates' Courts.⁸⁴ An additional advantage of such a prompt trial, for consumer clients and for the benefit of student training, is that the same candidate attorney, who initiated the case, will in most of the cases, proceed with and finalise the trial, as opposed to those of the Magistrates' courts, where the trials are attended to by attorneys or candidate attorneys who did not attend to the cases from initiation thereof and who take over cases, after their rotations to those clinic units, as a result of lapse of time.⁸⁵ All court orders, whether confirmation of arrangements in terms of section 21 or those prohibiting an unfair business practice in terms of section 22 must be published in the *Provincial Gazette*.⁸⁶ Students and consumer clients are empowered thereby, as transcripts of hearings and arrangements are published in their entirety, serving as a record of the cases and to be used for future reference. The Consumer Affairs Court can be used for a variety of

77 Summons must be in the prescribed format and be served in the prescribed manner — *Consumer Affairs (Unfair Business Practices) Act*:sec 8(2).

78 Du Plessis 2006:289-290.

79 A warrant will not be issued without showing good cause and it will be issued for a limited period, which assures the prompt proceeding of the investigation of cases.

80 Steenhuisen 2004:11 (satisfying a sub-goal of clinical legal education: "fact investigation").

81 Du Plessis 2006:290-291.

82 The Act uses the term "arrangement" to indicate a settlement between parties.

83 Trial dates are allocated for between ten days and three weeks. (Information confirmed with the Clerk of the Consumer Affairs Court on 9 November 2006).

84 See note 72.

85 Du Plessis 2006:291-292. See De Klerk and Mahomed 2006:309. Candidate attorneys at the Wits Law Clinic rotate between the various units of the clinic every six months.

86 Du Plessis 2006:290-292.

consumer issues, when the definitions of “business” and “business practice” are considered.⁸⁷

7. Assessing the impact of the implementation of the alternative method

The success of introducing these alternative methods needs to be assessed against the goals of both the university and the law clinic.⁸⁸

7.1 Access to justice for the poor and their ability to take control

Van Bueren suggests that human rights litigation has a potential role in poverty eradication, but that new litigating tools should be developed that are more appropriate for litigating economic and social rights.⁸⁹ She appeals for a judiciary with vision and a profession with compassion and proposes these changes to be through Constitutional litigation.⁹⁰ Despite the many advantages, one has to agree with the following practical disadvantages highlighted by Vawda in the form of the time, costs and the complexity of bringing a case before the Constitutional Court:

the fact that litigation invariably takes away the initiative and decision-making out of the hands of the broader community and locates it in the hands of a few brilliant lawyers; and that it can only be effective as a complementary strategy, combined with both popular action in advocating, implementing and monitoring the reform measures, and policy shifts by government with regard to resource allocation, in particular.⁹¹

The system developed by the Wits Law Clinic in its consumer unit already afford relief to the indigent, as clients are the beneficiaries of the accelerated processing of cases through the Consumer Affairs Court. There are many slightly

87 “Business” means –

- (a) offering, supplying or making available any commodity; or
- (b) soliciting or receiving any investment;

“business practice” includes –

- (a) any agreement, accord or undertaking in connection with business, whether legally enforceable or not, between two or more persons;
- (b) any scheme, practice or method of trading in connection with business, including any method of marketing or distribution;
- (c) any advertising, type of advertising or any other manner of soliciting business;
- (d) any act or omission in connection with business on the part of any person, whether acting independently or in concert with any other person; and
- (e) any situation in connection with the business activities of any person or group of persons, but does not include a restrictive practice, acquisition or monopoly situation as defined in section 1 of the *Maintenance and Promotion of Competition Act*, 1979 (Act No. 96 of 1979).

88 As indicated in paragraph 2.

89 As quoted by Vawda 2005:242.

90 As quoted by Vawda 2005:242.

91 Vawda 2005:242.

less poor people who do not qualify for legal aid, but who can also use the Consumer Affairs Court system, and who can, and will, benefit once the benefits of this Court are widely known. This sub-section of society will benefit indirectly, as the clinic clients will refer them directly to the office of the Consumer Protector, where they will be assisted free of charge by the State in terms of the legislation.⁹²

7.2 Implementation of student training in a clinical environment

Van As is of the opinion that the role that legal technicians can play in the provision of legal services should be considered seriously.⁹³ He describes legal technicians as persons who possess the necessary training and skills to handle specified legal matters up to a certain level and that a technician “must not only know certain things, but must be able to apply them as well.” He is of the opinion that the latter aspect is one that is often neglected by universities.⁹⁴ Students, as legal technicians in the consumer unit, apply the specialised skills they develop by litigating in the Consumer Affairs Court.

Eric Fromm posed the question:

Why should society feel responsible only for the education of children,
and not for the education of all adults of every age?⁹⁵

Reflecting on our profession, lawyers tend to consult with clients and solve their immediate problems. This may reinforce the client's position of powerlessness and dependence.⁹⁶ With the focus now specifically on the indigent, this situation needs to be addressed at a grassroots level. Budlender contends that this tendency is ingrained in the whole ethic of professional legal training and that a greater effort should be made to empower the “poor and powerless to act cohesively and effectively on their own behalf.”⁹⁷ The challenge for the supervisor and the students of changing the way in which they interact with clients, to be less controlling and more inclusive in legal decision-making,⁹⁸ whilst ensuring that clients have a greater understanding of processes and rules, are achieved through the alternative method used in the consumer unit. As students are encouraged to involve their clients during the process of litigation in the Consumer Affairs Court,⁹⁹ the clients are not merely assisted, but also educated and empowered to later on, act cohesively and effectively on their own behalf, and share the knowledge within their communities.¹⁰⁰ This method provides for a

92 The *Consumer Affairs (Unfair Business Practices) Act*:sec 8.

93 Van As 2005:206.

94 Van As 2005:206.

95 Peter 1977:161.

96 Bodenstern 2005:309.

97 As quoted by Bodenstern 2005:309.

98 Bodenstern 2005:309.

99 See paragraph 6.1.

100 Steenhuisen 2004:11 (satisfying the goal of 'legal services to the community; empowerment').

unique community development opportunity, as the public is educated, through the students, about their rights as consumers in terms of current and pending legislation and the approachability of the office of the Consumer Protector.¹⁰¹ This method of clinical legal education enforces professional commitment to the ethics and values of service to the public.¹⁰²

7.3 Applied practical skills

Applied practical skills are described as generic and long term and encompass consultation skills, legal advice to client/client counselling, negotiation, litigation techniques, appellate advocacy, the drafting of legal documents, legal research, fact investigation and office management.¹⁰³ These are met through training in the consumer unit, in that students, who normally work in pairs,¹⁰⁴ consult with their clients and will, either in the clinic, or during a weekly tutorial,¹⁰⁵ on each client's case file,¹⁰⁶ be assisted by the supervisor in assessing the problem of the client and decide on a specific route of mediation/litigation. Students have the unique opportunity in the specialised unit,¹⁰⁷ of being trained the practical and drafting skills in both the Magistrate's Court and Consumer Affairs Court litigation processes,¹⁰⁸ including skills in drafting settlement agreements due to the higher incidence of settlements in Consumer Affairs Court matters.¹⁰⁹ Additional teaching is afforded through the input by the candidate attorney allocated to the unit.¹¹⁰

101 Students are lectured on the applicable legislation during the unit based lectures and tutorials. This includes The Consumer Protection Bill 2007.

102 McQuoid-Mason 2005a:1.

103 Steenhuisen 2004:8-11.

104 De Klerk and Mahomed 2006:308. "Students are paired with a partner with whom they work together as a team for the duration of the course. Students pairs are then allocated to one of seven supervising attorneys (between 14 to 20 pairs per supervisor, depending on student numbers) and closely work with that supervisor for the duration of the course." Steenhuisen 2004:14 (satisfying the goal of "learning and working in groups").

105 De Klerk and Mahomed 2006:308. Individual supervisors are responsible for managing weekly clinic intake sessions, screening of members of public for suitable cases, allocation of cases to students and monitoring of professional activities on files during weekly tutorial sessions.

106 De Klerk and Mahomed 2006:308.

107 Osman 2006:278. This is in accordance with the suggestion for addressing a challenge, described as: "when classes are too big, they can be broken into smaller classes to ensure interactive teaching methods."

108 Steenhuisen 2004:10 (satisfying the sub-goal of "drafting of legal documents").

109 De Klerk and Mahomed 2006:309. The teaching of drafting skills includes the drafting of accompanying legal correspondence.

110 Osman 2006:281. This is also in accordance with the identified support law teachers require, described as: "support from candidate attorneys is needed to implement group work during teaching."

7.4 Substantive law

Knowledge of substantive law is reinforced by clinical education. The consumer unit affords students focused training in consumer law, its principles and application. This training often amounts to the acquiring of new knowledge,¹¹¹ as consumer law often does not form part of a standard academic curriculum. Students have the opportunity to gain the knowledge of practice in accordance with typical legal and social problems experienced by the community in which the law clinic operates.¹¹²

During the students' clinical experience, de-compartmentalisation starts to occur. The methodology of using actual experiences of the legal process as the educational core challenges students to consider clients' legal problems that are "neither neatly packaged nor have a single solution."¹¹³ This increases their awareness to develop skills and strategies,¹¹⁴ as is done in the consumer unit, for addressing clients' problems. Students may, for example, be challenged to, depending on the facts, consider whether a claim is as a result of breach of contract, or rather based in delict.¹¹⁵ After such evaluation, the client's problem finds a theoretical home in law, i.e. breach of contract. Students are referred back to their textbooks on law of contract and the applicable legislation and are required to do additional research where their knowledge is inadequate.¹¹⁶ The appropriate court from which to litigate is researched and selected.¹¹⁷ Alternatives and their implications are pointed out to and discussed with the clients.¹¹⁸ Thus the route whereby relief for the client will be sought has been selected. Students are encouraged to "de-compartmentalise" the substantive law studied over the past years and apply it to the case on hand. They are referred to the law on civil procedure for court procedure. As an integral part of litigation in the Consumer Affairs Court, entails mediation and the negotiation of arrangements (settlements),¹¹⁹ students need to refer to the theoretical skills and knowledge obtained during their studies of the academic course in alternative dispute resolution. The drafting of the settlement agreement will refer students to the law of contract. Students will refer to their academic course

111 Steenhuisen 2004:8.

112 Steenhuisen 2004:8 (satisfying the sub-goal of "study of specific law areas").

113 De Klerk 2006a:937.

114 Osman 2006:277.

115 Although the Consumer Affairs Court may come to a ruling that an unfair business practice has been committed in terms of the Act, a legal cause will be proved for such an unfair business practice.

116 Steenhuisen 2004:11 (satisfying the sub-goal of "legal research"). This research component will increase upon the enactment of The Consumer Protection Bill 2007.

117 See pages 14-16.

118 Steenhuisen 2004:9 (satisfying the sub-goal of "legal advice to client/client counseling"). This reflects on an advantage of the consumer unit, as a specific case may be heard in either the Consumer Affairs Court or the Magistrate's court. Students and clients are afforded the opportunity to select the court from which they wish to proceed. (See pages 14-16).

119 Steenhuisen 2004:9 (satisfying the sub-goal of "negotiation").

in the law of criminal procedure for the investigation and search and seizure procedures used in the Consumer Affairs Court. Therefore, by continuously drawing students' attention to the fact that they are applying knowledge obtained from a multiplicity of legal subjects in litigating a case,¹²⁰ the supervisor is breaking down the subconscious segmentation that may exist in students' minds.

7.5 Professional responsibility

Batt is of the opinion that for too long legal educators have assumed that students will "*sua sponte* develop a nuanced understanding of the values and standards of work that is consistent with excellence and duty."¹²¹ She suggests that professionalism should be affirmatively incorporated within clinical pedagogy.¹²² In agreement with Batt and because of the direct consequences for both client and student, various writers regard the law clinic as the best learning opportunity for teaching professional responsibility.¹²³ The goal regarding professional responsibility is achieved through lectures,¹²⁴ including specific lectures on legal ethics and file maintenance and by focusing on those aspects during student tutorials. Professional responsibility is taught on a continuous basis through clinical legal education in the consumer unit, where students develop a social perspective and insight, experiencing the study of law in context.¹²⁵ Students take responsibility in guiding clients in their choice of litigation forum which in turn may lead to community education. Professional responsibility is accentuated in its practical application in the consumer unit, through the close relationship and consistent feedback from the office of the Consumer Protector.¹²⁶

8. Conclusion

A challenge for law clinics to achieve their goals and to ensure optimum academic standards, whilst affording quality access to justice, is constantly making use of opportunities for innovation, the search for alternative methods of practice and the need for specialisation within the clinics, all of which should form part of the curriculum. These challenges are met through the introduction of the consumer law unit that afford the students the opportunity to experience the (substantive) law in context, striking a balance between scientific theory and applied theory.¹²⁷

120 Steenhuisen 2004:4-7 (the above process satisfies the goal regarding "judgment and analytical abilities").

121 Batt 2006:1.

122 Batt 2006:1.

123 Steenhuisen 2004:3.

124 De Klerk and Mahomed 2006:309.

125 Steenhuisen 2004:4.

126 The candidate attorney placed at the office of the Consumer Protector, attends a weekly tutorial with the supervisor, where cases referred by the students, are assessed. These assessments form the basis for critical analysis by the students.

127 Steenhuisen 2004:8.

Students' learning is enhanced by rising to the challenge of problem solving for real clients, even more so when alternative processes are introduced that accelerate the required results. Social issues such as poverty, potential loss of possessions, discrimination, harassment and failure of the justice system all create the environment in which students become strongly motivated to assist their clients and resolve their problems.¹²⁸ Stuckey holds that "[I]n a world populated by ultra-rational men, Law must find its strength in Justice, not Legality."¹²⁹ Justice is achieved by affording both students and clients the opportunity to be introduced to the consumer unit. The advantages of this unit include the opportunity for students to apply knowledge obtained from a multiplicity of legal subjects, thereby demystifying the law. The process used in the unit ensures the bridging of the divide between litigation and alternative dispute resolution. Should litigation be proceeded with, justice becomes pronounced by the shorter turnaround time for proceedings and the cost-effectiveness for both the clinic and the clients. These experiences are transferred back, by the clients, to their communities. This process is in accordance with Woodward's call on law schools "to train students to regard themselves as agents of justice as well as officers of the court."¹³⁰ This integration of skills and knowledge should assist students, as future practitioners in achieving the good of legal professions; achieving justice, which according to Stuckey is a professional responsibility upon which rests the reliability and integrity of the entire legal system.¹³¹

Whilst the clinical experience may not result in most of the students entering the field of public interest work, their "perspectives on their future roles as private legal professionals" can be affected, which will improve the legal profession.¹³² Osman, through her research, indicated that "students typically experience a change of heart after having done clinical law."¹³³ She holds that "clinical law has managed to inspire several law graduates to become human rights activists working to realise rights for the people of South Africa."¹³⁴ Candidate attorneys, appearing as acting Consumer Protectors, are exposed to a field of law and gain the practical experience of appearing in a specialist court they may not otherwise be exposed to. For them, new opportunities of practice are created once they are qualified.¹³⁵

The introduction to this paper referred to Herbert Spencer, a 19th-century disciple of Charles Darwin, who invented the "poisoned" phrase, "survival of the fittest." In conclusion, the following remark by David McQuoid-Mason seems apt:

128 Chandler and Robotham 2006:15.

129 Stuckey 2006:21.

130 As quoted by Stuckey 2006:22.

131 Stuckey 2006:21.

132 De Klerk 2006a:944.

133 Osman 2006:277.

134 Osman 2006:277.

135 The first candidate attorney placed, by the Wits Law Clinic (in 2004), at the office of the Consumer Protector, was employed by such office once she qualified as an attorney.

The South African experience is that law schools in developing countries can make a significant contribution to access to justice in both repressive and democratic political environments. They can make a similar contribution by educating ordinary citizens about their legal rights. What sets developing countries apart from developed countries is that law schools in the former have a special duty to serve their communities. This is because they often operate as a privileged island of resources in a sea of scarcity, particularly when it comes to providing access to justice for the poor.¹³⁶

136 McQuoid-Mason 2005a:14.

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