THE CASE METHOD OF TEACHING LAW

R O McGechan[*]

It is not my purpose to trace in this article the evolution of Case Method teaching in US law schools. It is a method which has accumulated to itself a sizeable literature and a grand mana, richly deserved. Yet I am sure that it had quite practical origins and that much of the theory to justify it was sheer invention. For myself I am satisfied that it is the most effective method of training lawyers and that is its justification.

What is immediately necessary is to let law students at Victoria University College know something about this method we are in process of developing here.

First of all let us be quite clear about one thing, that Case Method is a generic term covering a wide variety of methods. Students familiar with the lecture method know that lecturing techniques vary enormously from teacher to teacher and subject to subject. So it is with Case Method, which, in USA has developed a flexibility owing little, directly at least, to theory, and much to the practical requirements of sound teaching. You may expect different techniques from each of the law teachers at VUC, even though we claim to be employing this method of teaching.

Some short statements of the functions of a law school may well be in order. I had to clarify my own thoughts on these some short time ago and perhaps I may be excused for repeating what I said. The functions are:

1 To teach and train lawyers;

2 To develop legal knowledge by research and publication;

3 To cooperate with other social sciences for the better understanding of the law and the betterment of applied social science.

---

* Professor and Dean of Law, Victoria University College. The paper was first published at (1953) 1 VUCLR.

Though we hope that shortly you may be given some opportunity at the LLM level to take part in the second of these functions, and our work in the third may inform our teaching, you will be interested in the main in the first, the teaching and training of lawyers.

Notice that the purpose is not to teach law, but to teach and train lawyers. The training is an integral part of one process. Training, and learning law, go hand in hand. Don't imagine that this is what inevitably happens at any and every law school at the hands of any and every teacher.

In fact neither the ordinary student text book, nor the usual lecture, are sound instruments for the training of lawyers. The reason for this is clear. The student text book is an arrangement of dogmatic statements that the law is so and so, followed by illustrations from cases asserted to be authority for the dogmatic statement, and a series of footnotes, partly referring to literature the student knows he need not read, and references to other cases, called authorities, in which the law round and about the matter was discussed or at least mentioned, but which of course again the student will not read. Nowadays student text books with their varied types and aids to easy memorising are little more than cram books where the candidate can learn to pass that memory test miscalled a law examination paper. The lecture, qua lecture, can do little more than the text book. We have veered away from these things at VUC, but they are what we reacted to.

Whatever the evolution of Case Method in USA, the evolution of it at VUC, begins with the advent of professors who came to teaching from practice, without any theoretical training in teaching methods, and, be it admitted, without the conviction that the methods by which they had been taught at law school were adequate.

The basic must-nots for you in practice are citation of elementary student text books and the opinions of your teachers. The basic must is citation of authority which really is authority for the proposition of law you want the court to accept, backed up by adequate and appropriate argument to convince the court; and sound law teaching is necessarily concerned with this must. It cannot be enough to learn, uncritically, a number of legal rules divorced from the uses to which they can be put. Trite perhaps, but basic, and, in most places, ignored.

It was during the period beginning a few years before the War and ending a few years after the War that we changed our methods at VUC. While continuing to lecture we set about demonstrating to the student in class just how the rule stated was derived from the cases. We did this after the pattern of argument to support the proposition of law in court. We developed in this way a new lecturing technique. This in turn led us to further exploration of methods. One of the most interesting experiments I remember carrying out during the War was one in a Contract class, in which war-time numbers were few. For each class hour students were required to read one of the cases cited by Anson. During class we

discussed whether that case established the proposition of law for which it was cited. More often than not, at least alone and unaided, it did not establish it. We had no casebook, but we were using Case Method. That class has never forgotten the work we did; they revert to it often when we meet.

What I would like students today to realise is that though we are avowedly borrowing freely from America's eighty odd years' experience in Case Method, the growth of the method at VUC is a healthy indigenous development. We acknowledge our great indebtedness to US teachers. All four of our fulltime teachers have been to US. We have at present in Professor Dunham one of their best teachers with us, so that we may learn from his handling of New Zealand students. But, basically, the growth is indigenous.

The essential difference between the old method and the new lies in the attitude to law the student is asked to adopt. Learning in Case Method is for the student a positive, active process of working, searching and thinking under guidance from his teachers, of finding the law for himself from the sources. By contrast the lecture method views the student as receptive, with the negative function of understanding what he is given on the authority of his teacher (or text book).

Because it means that the student discovers the law for himself, Case Method has advantages both in the training of lawyers and as a form of university education.

The advantages of Case Method as a way of training young lawyers once the core of the method is appreciated seem to me to be clear. The student learns by doing; and by doing in the way all lawyers do their work, in the way he himself will work throughout his professional life. He learns techniques as well as law. He has constantly before him the crucial questions, What would a court regard that case as deciding? How could I use that case to establish this proposition? How do I draft a document to protect my client from the effect of that case? He learns that law not only is but is becoming, and is made. And, as will appear later, he learns to give voice to his ideas, an asset of great value to all lawyers.

What he acquires in techniques is surely clear gain. But, perhaps, being critical, you object that he will not know much law when he finishes his course. On the contrary I am sure, for I have had unmistakable evidence from quarters which must know, that our students learn more law in the same time than others do by the lecture system. The process of learning more in less time is only just beginning with us and may go a long way further yet. The truth is that every case, once you divorce it from the proposition in a text book it is used to illustrate, contains in itself a wealth of law, and the cumulative effect of the critical examination of cases is much more wide-ranging than text book and lecture can every be. And the law acquired by search for it yourself sticks - for years. It is not forgotten when the examination is over. For years I have been aghast at the amount of text book law the student learns and forgets. In fact all practitioners know, as I have often heard them say, that they

have passed examinations without really learning very much. At VUC we are just not prepared to let that situation go on.

I believe there is very great value in Case Method because it proceeds by way of concrete instances seen in the light of the legal ideas which underlie them. This is and has been through the ages the way of the law. Too great abstraction robs a student of substantial contact with his subject. If he can see and think the abstract in its concrete manifestations he can come to grips with it for it meets his experience and so enables him to learn.

We turned to Case Method, then, because we wanted the student to learn actively by doing, not passively by repeating; because we wanted him to learn the techniques, the way of the law and not so many legal rules; because we wanted him to learn for keeps, not to pass examinations. There are other weighty reasons for the change, reasons which put Case Method in a wider university setting.

A law school, after all, is part, maybe we are even justified in thinking it a vital part, of a university. And a university is an institution where the student is taught to develop his intellectual powers. It is not an institution where you acquire so many items or yards of information - in terms of law, so many rules of law, or, as I have put it elsewhere, a yard and a half of law. Primarily it is a place where you develop your capacity to think.

Law is quite good material for university purposes, provided it is used to encourage the development of lively intellect. And Case Method is the best of methods for encouraging that development. It is interesting for a teacher to watch a student develop over a year or two as he is first made to, then learns to, and ultimately enjoys, thinking in class and aloud. I take it every lawyer would agree that a critical and lively mind is invaluable in practice. Our difficulty has been to get the practitioner to be critical about the legal education he was subjected to, to be critical about it above all in a practical way. He will cling to the quaint notion that if you chop off a unit here and there the student will get through more quickly: the truth is that mature, trained and developed intellects learn more quickly, and if attention were given to training, instead of to the number of units, students could take the present course, learning more from it too, in less time. I believe that at VUC we are gradually making advance along this line.

One constantly hears of the need for individual tuition at university level if the university is to fulfil its true function. Case Method carries individual tuition as far as it can be taken in class. In discussion a teacher soon gets to know his students as individuals, addresses questions, each appropriately graded in difficulty and varied in interest, to the individual student as to someone he knows. In fact not only does the teacher get to know his class, but the class get to know each other very well, very quickly, and educate each other. This is just as it should be.

Case Method classes have that other indispensable element of all good teaching, they are enjoyable for all parties concerned. I have not yet taken a class without one or two students resenting (for an hour or two) having to think when called on, or to think at all, and there are always one or two students who yawn (actually or metaphorically) - a carry-over from times past. I do not of course ever let these things go by. But I have watched with some amusement the resentment disappear and the "please do not disturb" languor give way to interest and keenness. A Case Method class is a live one - and you can't really learn while you are bored.

But you may be more curious about the "how" of Case Method, than you are about my views of the "why" of it and the value of it.

Our methods as I said will differ, but some general description of what we will do, and what we will expect students to do, can be given and is important.

First of all we must as teachers either have case books, or prepare case materials. In International Law and in Conflict of Laws we have case books to hand. Professor Campbell is using a case book in Trusts. I have nearly completed a set of materials in Administrative Law. Professor Dunham prepared a set of materials on Landlord and Tenant for his own use in our classes. Professor Campbell is using a few stencilled cases in Property, and will be preparing further materials in Property, Trusts and Criminal Law. We are in a transitional phase and it will take some time, for our other work has to go on as usual. In fact increased numbers have made other work more exacting.

The sets of materials prepared for class may contain a variety of things. In Administrative Law where social, economic and political background necessarily obtrudes in many places, there will be cases, statutes, rules, and paragraphs of comment from a variety of sources, local and foreign, ancient and modern, there will be some glimpses even at foreign law where comparison may throw light on our own system, by showing a contrast, or suggesting a line of development.

Given the set of materials the teacher indicates at the end of one class hour what part of the materials he intends to use during the next class hour. The method cannot work unless students read carefully and critically the materials they are asked to read. Students at VUC in Law must give up once and for all the notion, if they ever entertained it, that Legal Education consists of getting marked present, scribbling down what the teacher says, and doing no more about it till the month before the examination. That will spell failure in the examination for a variety of reasons two of which I should instance. First, what I say, even if taken down accurately, learnt accurately, and reproduced in the examination accurately, will not be enough to get any student through. Secondly, it will not be humanly possible to read the materials in the month before the examination; they will be too bulky for that: and mere reading will not be enough anyway. No, from now on you must work consistently

through the year, for you must do the work required for every class hour as it comes. There will be no other way. So we will assume that the cases to be discussed have been read and some thinking done about them before you come to class. Please do not plead that you are a poor part time student and have only time to come to class and read the text book. We have taken the fact that you are a part time student into account and assessed the amount to be done accordingly. Our aim is to get you to use the time you have to your own greater advantage. The plea is really mere self pity - better admit this, get over it, and get on with the job.

Many Case Method teachers begin by asking one student to give the facts and the decision in the case. I will do this at the beginning of the course, till I think the class has grasped the importance of attention to the facts. The opening question will thereafter more often be a more direct one, what was decided in the case. From here at least two lines of inquiry proceed by question of teacher and answer of student. A testing of the accuracy of the student's version of what was really decided; and a series of problems which involve capacity to use the decision in other sets of facts - what the Americans call hypotheticals. Sometimes it will be useful - often so in Administrative Law - to explore the background, political, economic and social, of the decision and to ask ourselves whether it is a good and sound decision not only for its logic in law but in its justice and in its practical bearing on the lives of twentieth century New Zealanders. At other times the historical development of the law will be worth attention.

Sometimes there will be conflicting decisions to reconcile. There will be problems of precedent and of statutory construction to consider. We can turn now and then to a drafting problem arising out of the cases. We can concern ourselves with what advice given a litigant might have avoided the mess he has got into. We can think in terms of arguments a litigant could or should have used.

These are all lines I have found fruitful. I have not, and indeed cannot, state the possibilities exhaustively. Every set of materials carries within it its own potentiality for treatment in class. And of course we - I hope - continue to develop as teachers. I want, above all, to avoid too stereotyped an approach; it could, I have no doubt, become tedious. I hope I have said enough to indicate the rich field Case Method mines in.

My aim will be to make sure all students participate. Better to say something without being called upon, for you may then choose your own field. You will be called on, more often by design than by accident, though perhaps not when you yourself would have chosen. With me, failure to prepare will not let any student out. It will merely lead to a more prolonged cross-examination under, for the student, more difficult conditions. The student who first told me he had not read the case spent, there and then, the next three-quarters of an hour on it. (We are still good friends.) But please don't waste your own time and the time of

the class by not preparing your work. A teacher needs, and is really entitled to, the cooperation of a class.

What of text books? The compendious practitioners' book, covering the subject, is not, except for a purpose I shall explain later, for the student - it is not a book from which he can learn to take his first steps. The short cram book is the student's poison; better eschew it. There are very few good student text books, books which set the subject out in such a way that you can master it by mastering that book that year, and can then build upon the book ever afterwards. But we won't need this, the only text book of any value, during the learning years. Case Method, I think, could benefit by introductory text books which open up the subject and the nature of its problems - books to be read before the course in the subject begins, and then discarded. I have it in mind to produce such a book by way of experiment. For the rest, in New Zealand, whatever may be the position in the US, our students must be taught to go to the larger text books as a first step in solving legal problems. This is our legal method, and it must be taught. The text book, the one which is the well established standby, has its place in Case Method. Sometimes I shall ask students which text book they would consult when I enunciate a problem for consideration. This device is particularly useful when students can have the next day to test the value of their suggestion, before being asked the same question again.

One development, which I am nibbling at and will no doubt slowly develop, is what I shall call the problem method - though that term is used to cover a variety of things. The method proceeds rather by accumulating several cases on each of a number of difficult and yet unsettled points, than by using single cases in a series more fully covering the whole subject. You will find this done in some parts of Administrative Law and approached in some other parts. For the present, however, I am content to walk before I run, and for the most part to cover the subject more adequately.

Might I add two further comments related to Case Method, the one elementary perhaps but of practical importance, the other of great practical moment but impinging on high politics.

The first concerns note taking. If I were a student taking, say, Administrative Law, I would make a summary, about half a page, of the facts and decision in any case dealt with, and I would make it when I prepared the case for class. I would supplement this by short notes of points emerging (from student as well as teacher) in class discussion, notes phrased to enable me to recall the point again whenever I read them. I would supplement this with notes from further reading both of text books, articles or other cases. You must learn to take a good note; it is a valuable professional skill. This procedure will make revision possible and profitable.

The second concerns examining. We will have to find examining methods to suit Case Method, ways of testing ability to use material, for this is what we would teach you to acquire. Memory tests are obviously irrelevant. A suitable examining technique will probably involve allowing the candidate to have his case book and his own notes with him in the examination room. But in any case the usual style law examination paper, with its thinly disguised memory test, ie problems the answers to which anyone who remembers a certain illustration from a set text book cannot miss, is no better - in fact it is only a memory test, though examiners who employ the method bluff themselves that it is not. If you are to test whether students are able to use materials, the materials must be more complex than the Simple Simon stimulus-response reaction which goes by the name of problem in law examination papers, and if you are to test with more complex materials, to make the test fair, the teacher must prepare the examination paper; and as he alone can assess the individual student's capacity in relation to the materials, the teacher must be the determining factor not only in setting the paper but in marking the scripts, for no one else can know what the student has really contributed. It is not that our students will have trouble with examinations set and marked by practitioners; it is that such papers cannot adequately test our students and the study of law at VUC is hampered by examiners who for this reason and in this way are out of sympathy with our teaching methods. These are our difficulties and we must do our best to overcome them.

What we are confident of is that the teaching methods we are evolving will give you a sound University training and a sound professional training. We would ask you to help us through the difficulties of the next few transitional years.