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### **Empathy in the legal profession and its role in shaping my career**

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The incorporation of empathy skills in a legal setting has gained a considerable amount of traction in recent years and is deemed to be a core legal competency required as part of legal training.<sup>2</sup>

This reflection aims to critique the use of empathy in a legal context and reflect on how my experience of working in the Student Law Office (SLO) has helped to deepen my understanding of both the role of empathy and requirement of using empathy as a tool to use in legal practice.

#### **What is empathy in a legal setting?**

The traditional standpoint was that emotions and the affective domain should be denied a place in the practice of law owing to the notion that legal practitioners should maintain an objective and impartial standpoint when dealing with clients.<sup>3</sup> Some commentators have even gone so far as to liken emotion to a bodily function and therefore are considered unpredictable and often illogical in nature,<sup>4</sup> thereby inappropriate in a legal setting.

Empathy, as discussed by Westaby and Jones, is a notoriously tricky concept to define. Not only is it a relatively new term in the English language, dating back only a century, during

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<sup>2</sup> Legal Education and Training Review independent research team, 'The Future of Legal Services Education and Training Services in England and Wales', [2013], table 4.3.

<sup>3</sup> Binder, D.A. Bergman, P., Price, S.C. & Tremblay, P.R, *Lawyers as Counsellors. A Client-centred Approach*, (3<sup>rd</sup> ed. St. Paul, Thomas/West 2012).

<sup>4</sup> Grossi, R, Understanding law and emotion [2015] *Emotion Review*, 7(1), pp. 55-60.

which time there has been no stable definition<sup>5</sup>, but empathy is not in itself an emotion but involves an emotional reaction.<sup>6</sup>

One of the most frequently cited definitions of empathy in a legal setting is that of legal academic Lynne Henderson. In the article *Legality and Empathy*, Ms Henderson describes empathy as falling into three separate categories:

1. Feeling the emotion of another;
2. Understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself in the position of the other; and
3. Action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion).<sup>7</sup>

I believe that empathy in the legal setting is as Henderson describes in her second category, effectively placing yourself in the shoes of the client.<sup>8</sup> In my opinion, it is no longer tenable to exclude emotion in the legal profession, and in order to provide clients with a humanistic consumer experience, a degree of empathy is required. Furthermore, there is an increasing weight of scientific evidence and philosophical argument demonstrating that emotion and cognition are intertwined, and to separate the two would result in impaired reasoning and decision making.<sup>9</sup>

### **Critique of general academic consensus**

The public perception of lawyers is that they fall into one of two camps, they are either cold and calculating or justice warriors with a burning desire to right worldly wrongs.<sup>10</sup> In 1983,

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<sup>5</sup> Merriam Webster Dictionary, <<https://www.merriam-webster.com/dictionary/empathy> accessed 10<sup>th</sup> May.

<sup>6</sup> Westaby C and Jones E, 'Empathy: An essential element of legal practice or 'never the twain shall meet?' [2017] *International Journal of the Legal Profession*, p 108.

<sup>7</sup> Henderson L, 'Legality and Empathy' [1987] *Michigan Law Review* p.1579.

<sup>8</sup> Henderson L, 'Legality and Empathy' [1987] *Michigan Law Review* p.1579.

<sup>9</sup> Nussbaum M., *Upheavals of Thought: The Intelligence of Emotions* (1<sup>ST</sup> ed. Cambridge, Cambridge University Press 2001).

<sup>10</sup> Edwards H.T, 'A Lawyer's Duty to Serve the Public Good' [1990] 65<sup>TH</sup> *New York University Law Review*, p.1148.

Barkai and Fine stated that ‘most people are probably less eager to see a lawyer than to see a doctor’.<sup>11</sup> There is a plethora of academic material describing the honing of empathy as an essential skill for the legal professional; the emphasis is continuously placed on mechanising empathy for professional gain,<sup>12</sup> utilising empathy as a communication strategy as opposed to establishing an enhanced rapport.<sup>13</sup> There is however an ever increasing enclave of academics who believe that feeling a genuine sense of empathy can lead to the building of a genuine and authentic relationship with the client and the enabling of the legal professional to better understand and meet client needs.<sup>14</sup>

From a personal standpoint, the gravitas awarded to ‘mastering the skill’ of empathy<sup>15</sup> does not sit comfortably with me. The strategising of emotion strikes me as a calculating and somewhat manipulative method of behaviour and only reaffirms the public perception of the untrustworthy lawyer so often perpetuated in popular culture. For example, a recent Princeton University study found that a surveyed public felt lawyers to be equally as trustworthy as prostitutes.<sup>16</sup>

Despite my opinion, ultimately, the goal of the lawyer is to achieve the best possible outcome for their client. If the method by which they achieve this goal is disingenuous, does it matter? By no means would Atticus Finch condone such behaviour, but ultimately there is one overriding objective in these corporate times, lawyers have to have one eye on the accounting ledger as well as their copy of *To Kill a Mockingbird*. What I am attempting to say is that if one process works for one lawyer, and the client is happy, is there an issue? By no means am I

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<sup>11</sup> Barkai J.L & Fine V.O, ‘Empathy Training for lawyers and law students [1983] *Southwestern University Law Review*, 13(3) p.510.

<sup>12</sup> Margulies P, ‘Reframing empathy in clinical legal education’ [1999] *Clinical Law Review*, 5 (2), pp. 605-637.

<sup>13</sup> Gerarda Brown J, ‘New directions in negotiation and ADR: deeply contacting the inner world of another: practicing empathy in value-based negotiation role plays’ [2012] *Washington University of Law and Policy*, 39, pp.189-230.

<sup>14</sup> Rosenberg, J.D, ‘Teaching empathy in law school’ [2002] *University of San Francisco Law Review*, 36, pp. 621-657.

<sup>15</sup> Genty, P.M., ‘Clients do not take sabbaticals: the indispensable in-house clinic and the teaching of empathy’ [2000] *Clinical Law Review*, 7(1), pp. 273-286.

<sup>16</sup> Fiske S.T. & Dupree C, ‘Gaining trust as well as respect in communicating to motivated audiences about science topics’ [2014] *Proceedings of the National Academy of Sciences of the United States of America*, September 16, 2014 111 (Supplement 4).

propagating a Machiavellian, 'the ends justify the means' approach, but if one lawyer feigns empathy in order to make their client more comfortable in order to provide them with the best possible service, then I struggle to see the problem.

### **Empathy as a tool**

Initially, I thought that regarding empathy as a tool was a mechanistic approach, a "pretend empathy"<sup>17</sup> was not a school of thought to which I wished to adhere. By way of experience, I realised that it is essential for a legal practitioner to have a level of impartiality in the work they do and as a result, it might prove quite difficult to invest emotionally in every client. Sometimes in the SLO, and no doubt in practice too, a considerable amount of time can be spent preparing information to advise a client who then does not attend. This can leave students feeling angry at the lack of empathy reciprocated towards themselves and to some extent, this could compromise our professionalism, so it is crucial to maintain a professional distance at all times.

Every individual operates uniquely; some will naturally have a more developed sense of empathy and self-awareness through their life experiences. Over time people will develop their own style of working, and for some, it may be completely devoid of all empathy, and of course, such things are situation dependent. Gregory Forman, a family law attorney, discussed how he took being accused of "anti-empathy" as an "unintended compliment".<sup>18</sup> For Mr Forman, empathy was not something that assisted in achieving the best results for his clients but instead acted as a hindrance.

From personal experience, when interviewing a client, I found that my intention to demonstrate empathy, through verbal acknowledgement and body language resulted in me losing track of the purpose behind the interview. It would appear that there is a skill that I

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<sup>17</sup> Morton A, 'Empathy for the Devil' [2001] in: A. Coplan & P Goldie (Eds) *Empathy. Philosophical and Psychological Perspectives* (Oxford, Oxford University Press) pp. 318 – 330.

<sup>18</sup> Gregory Forman, 'Is empathy really useful for a family attorney?' (5<sup>th</sup> January 2017) <<https://www.gregoryforman.com/blog/2017/01/is-empathy-really-useful-for-a-family-law-attorney/>> accessed 10<sup>th</sup> May 2019.

need to hone and that the ability to ensure that I can perform the basics of interviewing seamlessly in order to display empathy. Therein lies the difference, while many people may feel empathy by placing themselves in the shoes of another, maybe not everyone can display their understanding of another's situation.

A few weeks later, I conducted a second interview in which I made the conscious decision to focus on the main objective, which was to extract information. My previous experience of trying to run before I could walk was pushed to the back of my mind, and just through focusing on gathering information, I was able to perform the interview to the best of my current ability. It is not to say that in the future, when more experienced, I would not revert to attempting to convey my empathy but only if the main objectives are taken care of. I should add that I did not sit in the interview like a robot while asking probing questions relating to an extremely sensitive situation, human nature kicked in, and sensitivity was exhibited.

### **My encounters with empathy during my time in the SLO**

Whilst working in the SLO, my time has been divided between a call for a public inquiry and small claims cases. One case gave me cause to examine a private contractual dispute whilst the other had me assisting a firm of lawyers looking at the physical and sexual abuse of almost 1800 young men in a Youth Detention Centre. There was a clear difference in the emotions experienced when reading through the two different cases and from a personal perspective, I found the motivation to work on the detention centre case significantly easier to find than on the contractual case, important as it was to the person involved. I made sure that I conducted both cases to the best of my ability but these experiences did cause me to reflect on where my career aspirations might lead me.

Entering into my final year in the SLO, I started with the opinion that I did not want to work in a field that requires a significant emotional investment without a reciprocal salary. Working on the Detention Centre case forced me to change my opinion. What I initially thought of as an unwillingness to work within areas of law that I would most likely find uncomfortable was instead a lack of understanding of how I would respond to the emotions that would result

from interacting with such instances. I feared that the emotions I experienced could affect my mental wellbeing. If I was unable to manage my emotions when dealing with one case, would I be able to sustain a career of such emotions? Ultimately, when I was confronted with the facts of the case, rather than shy away from the uncomfortable truth, I took in the situation and used it to motivate me to produce work to the best of my ability.

The reason I found it easier to motivate myself was due to the natural empathy that I felt for the victims in the Detention Centre case. The sincerity of empathy allowed me to find an extra gear in order to help the clients and to make a difference in their lives. When looking at the contractual case, I found it difficult to envision my future sitting at a desk dealing with, what I consider to be, straightforward legal issues. The experience taught me that in order to embark on a legal career, I would need to pursue work which offers me fulfilment.

All this being said, I am not sure if I would be able to invest the level of emotion brought about by cases involving human rights abuse continuously. It was a unique scenario where so much time was dedicated to one case, and with each interaction, the onion shed another layer allowing for a deeper connection with the survivors. It took over my life, and I am not sure that I would be able to sustain such investment in the future. I realise that I sound like Goldilocks wanting just the right amount of interest to tantalise me to work to the best of my ability. What I am driving towards is my desire for is the requisite balance of work, work that is both engaging due to its fulfilling nature yet not so overwhelming that I cannot exercise sufficient restraint in order to remain logical and focused. I must not be alone in this sentiment based on the positive response to the incorporation of Corporate Social Responsibility.<sup>19</sup>

### **Conclusion**

My initial approach to the role of empathy in a legal setting was that it is an essential skill and requisite in becoming a good quality legal practitioner. What I did not initially subscribe to,

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<sup>19</sup> American Bar Association, 'Report on the future of legal services in the United States' [2016].

was the opinion held by many commentators that it was a skill that should be honed, an automatic tool utilised to coax information from unwilling clients.

My viewpoint has changed through personal experience. What many commentators were discussing was the ability to convey to the client a sense of compassion through empathy, an ability to demonstrate that you had placed yourselves in the shoes of the individual and experienced the same emotions as them, in a removed sense. There is a fundamental difference between experiencing empathy and demonstrating empathy. It would be almost inconceivable that, per Henderson's definition of empathy,<sup>20</sup> a lawyer would not place themselves to some degree in the shoes of a client. Empathy is a fundamental skill of comprehension; in some respects, a normal human behaviour.

The skill that I feel can be improved, is conveying to the client that you can understand their situation. Every individual possesses emotional intelligence, which changes through life experiences and is perhaps not something that can be worked on.<sup>21</sup> The ability to exhibit your understanding of another person in a professional setting is a skill that can be worked on. It is not the calculating tool I initially feared it to be, but instead, it is a skill that can and should be worked on, much in the same way that interviewing a client is.

In conclusion, my time in the SLO has enabled me to explore my understanding of empathy and how it plays an essential role in a legal context and will also help to shape my legal career.

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<sup>20</sup> Henderson L, 'Legality and Empathy' [1987] Michigan Law Review p.1579.

<sup>21</sup> Rosenberg, J.D., 'Teaching empathy in law school' [2002] University of San Francisco Law Review, 36, pp. 621-657.

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