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Using a diagram as a teaching and learning tool for assessing the law of servitudes

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1. Introduction

The first few years of my academic career have largely coincided with the Council on Higher Education's ("CHE") national review of the Bachelor of Laws ("LLB") degree.¹ The purpose of this review was to determine whether the LLB programmes offered by the seventeen universities in South Africa satisfy the CHE's programme accreditation criteria, its LLB qualification standard ("LLB standard") and if these programmes could be re-accredited. Upon completion of this review process only three law faculties – from Nelson Mandela University, the University of KwaZulu-Natal and the University of Pretoria – initially had their accreditation confirmed.² The accreditation of the LLB programme at the University of Pretoria was confirmed subject to meeting two short-term conditions: Improving the diversity of its academic staff members, and addressing the apparent misalignment between the teaching and learning practices observed and assessment methods employed in the faculty.³ It is within this context that I want to reflect on my own teaching and learning practice with the aim of evaluating whether the assessment practices in the undergraduate property law module at the University of Pretoria, of which I am the coordinator, has the potential to equip students with the expected graduate attributes set by the CHE.

As a young scholar, I have been encouraged to dedicate the first few years of my academic career to formulating a sound teaching and learning philosophy and developing an outstanding teaching and learning practice. Such a philosophy and practice are standard requirements of a teaching portfolio that ought to be submitted in fulfilment of a probationary contract and application for promotion. However, the rationale for this professional development is more utilitarian than securing permanent employment or promotion. The formulation of a flawed philosophy and the arduous task of unlearning bad practices could not only mean a precarious and strained

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sojourn in the academy but may also result in an early and dishonourable exit from it altogether.

Since an evaluation of all the assessment practices of the undergraduate property law module is beyond the scope of this article, I set out to evaluate an experiential assessment method in the area of the law of servitudes – in particular, the institution of action proceedings to claim a permanent way of necessity and the relocation of a defined right of way in the event of changed circumstances or conditions. In both these actions, the use of a diagram plays an integral part in the articulation of the plaintiff's cause of action and the presentation of a suggested remedy for judicial approval. This evaluation is pertinent in addressing the Review Panel's suggestion that more experiential learning opportunities must be explored within the LLB programme following the observation that insufficient time is dedicated to the development of applied competencies and higher-order cognitive abilities.

My hypothesis is that the use of a diagram as a teaching and learning tool for the assessment of the law of servitudes – specifically the permanent way of necessity and the relocation of a defined right of way – can change a student's approach from surface learning⁴ where shallow, rote learning of concepts and principles are adopted as a coping strategy without any evidence of understanding, to deep learning⁵ where deep, thoughtful learning of concepts and principles transforms the way in which the student thinks about the subject, its context and its application. I set out to do this by providing a brief introduction to the requirements for the establishment of a permanent way of necessity and for the relocation of a defined right of way in parts 2 and 3 respectively. I proceed to test my hypothesis in the second sub-section of the respective parts by adopting an apprenticeship teaching perspective⁶ through which I answer the problem posed to the students. I then evaluate the answer in the third sub-section of the respective parts against the standards of Bloom's taxonomy⁷ and the LLB standard.

2. Establishing a way of necessity

2.1 Introduction

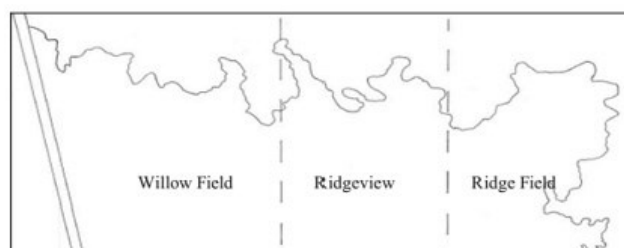
A way of necessity (*via ex necessitate*) is a specific kind of non-consensual praedial servitude⁸ that can be imposed on an owner in terms of a court order. The way of necessity is usually claimed by the owner of a piece of land

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that is landlocked by the land of other owners⁹ or natural phenomena (like a river, deep crevice or a mountain) surrounding it to the extent that the former owner does not have "direct or reasonably sufficient access"¹⁰ to a public road.¹¹ Traditionally a distinction is made between a periodic or temporary way of necessity (*ius viae precario*) for which no compensation is due; and a permanent way of necessity (*ius viae plenum*) for which compensation must be paid.¹² In the problem below and for the remainder of this article I will focus on the latter way of necessity.

Referring to Diagram A, the area between the highway in the west and the mountain in the east was a large farm – known as Willow Field – before it was sold in July 2017. The new owner applied for a subdivision of the original farm into three smaller farms and sold Ridgeview and Ridge Field to two different owners. The owner of Ridgeview intends using her farm for industrial agrarian purposes while the owner of Ridge Field wants to create a small game reserve for endangered white rhinos and antelope. The latter farms are, but for wind pumps and small concrete dams, essentially vacant land with minimal undulations. There is an existing road measuring 4,8 metres in width from the highway that leads directly to the compound on Willow Field. This compound is nestled against the steep slopes of the surrounding mountain. The owners of Ridgeview and Ridge Field would like to obtain access to the highway. An authorised valuer¹³ has determined that each kilometre of land in this area that is used to establish a single width road would be valued at R5 000. The scale of the diagram is 1 centimetre: 1 kilometre.

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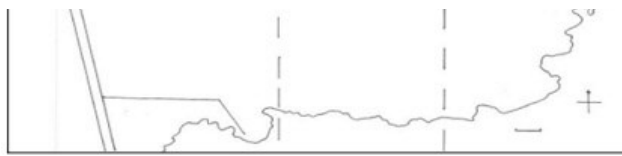


Diagram A

In *Van Rensburg v Coetzee* ("*Van Rensburg*")¹⁴ the former Appellate Division of the High Court (currently the Supreme Court of Appeal) laid down the following guidelines for the institution of action proceedings in terms of which a permanent way of necessity will be claimed as a right against another owner:

- (a) the particulars of claim must allege the particular necessity, as well as the reason why the way of necessity must traverse the defendant's land;
- (b) the width of the road claimed must be stated and the grounds upon which that claim is founded;
- (c) a particular route should be indicated for the court's consideration as being suitable; and
- (d) a particular amount as compensation should be offered for the court's consideration as an amount that is just and equitable.¹⁵

I now turn to the application of these requirements to the facts of the problem.

2.2 Application

2.2.1 Application of requirement I

According to *Van Rensburg*, the applicant must allege the particular necessity, as well as the reason why the way of necessity must traverse the defendant's land in her particulars of claim.¹⁶ A particular necessity will not only exist in those circumstances where a piece of land is geographically

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enclosed but also where available alternative ways do not satisfy the economic needs of the enclosed property.¹⁷ In the problem statement, Ridgeview is landlocked by a mountain range to the north and south and by Ridge Field to the east and Willow Field to the west. Ridge Field is similarly landlocked by the mountain range to the north, east and south and by Ridgeview and Willow Field to the west.¹⁸ The first part of this requirement has therefore been satisfied because it is possible to articulate the particular necessity.¹⁹ An interpretation of the diagram makes it clear that no other observable entry to and egress from Ridgeview and Ridge Field is possible to a public road other than in a western direction over Willow Field. This fact makes Ridgeview and Ridge Field inaccessible for all practical purposes and would significantly limit the ability of Ridgeview and Ridge Field's owners to use and enjoy (*ius utendi*), draw fruits from (*ius fruendi*), and alienate or encumber (*ius abutendi*) their farms. But for the creation of a permanent way of necessity in favour of Ridge Field over Ridgeview and Willow Field, and in favour of Ridgeview over Willow Field these properties would have limited economic value. I specifically limited this case study to a scenario where the properties are landlocked and no other ways for entry to and egress from those properties are observable. However, if the interpretation of another diagram does reveal other ways for entry to and egress from the landlocked properties, it should first be determined whether and to what extent those other ways can satisfy the economic needs of the landlocked properties.²⁰

In the agricultural context it will be possible for these alternative ways to serve the economic needs of the enclosed properties if the farmer is able "to carry on his farming operations"²¹ to the extent that these alternative ways allow for the in- and egress of farming implements and machines, trucks and normal motor vehicles.²²

2.2.2 Application of requirement II

According to *Van Rensburg* the applicant must state the width of the road that she claims and the grounds upon which that claim is founded.²³ This appears to be an anodyne requirement in South African law because the permanent way of necessity is usually claimed over an existing route the width of which has been determined by frequent use. In principle, the width of the

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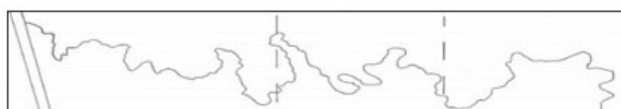
road depends on the needs of the landlocked property.²⁴ A plain reading of the diagram shows an existing road measuring 4,8 metres in width that provides entry to and egress from Willow Field to the highway. The common-law rules regarding the width of the route will apply²⁵ in the event that the applicant and the respondent fail to reach agreement on the width of the route and no evidence is provided about the prospective needs of the enclosed property.²⁶ In this problem the owners of Willow Field and Ridgeview agree on a width of 4,8 metres for the permanent way of necessity, but the owners of Ridgeview and Ridge Field cannot reach agreement on the width of the route. It appears clear from the facts that the owner of Ridge Field intends on creating a small game reserve on the property for endangered white rhinos and various antelope. In these circumstances it is reasonable to assume that the owner of Ridge Field would need to transport the rhinos and antelope from where they are currently held to Ridge Field using appropriate trucks and/or trailers that are designed to transport large or small game. It is similarly reasonable to assume that a wildlife veterinarian will be consulted periodically to check on the health of the animals or to assist in moving these animals to other farms in the face of poaching threats. Taken together these reasonable assumptions about the prospective needs of the enclosed property and the possible simultaneous use of the route by the owner of Ridgeview for the continuance of her farming operations seem to suggest that two-way traffic is a reasonable prospect and that double the minimum width allowed at common law should be awarded.

2.2.3 Application of requirement III

The next requirement is that the applicant should indicate a particular route – without claiming this route as a right²⁷ – for the court's consideration as being suitable. The guiding principle of *ter naaster lage en minster schaden* (the nearest route with the least damage) is generally used to determine the way of necessity across the land that lies between the plaintiff's land and the nearest public road.²⁸ I suggest breaking this guiding principle into its two constitutive parts by first determining the shortest route between the plaintiff's land and the public road and then determining whether there is a need to deviate from this route to reduce the disadvantage that the respondent will suffer. For the moment I take my cue from metric geometry and assume that the shortest distance between two points is a straight line. It appears that there are a number of straight lines that can be drawn between the public road in the west and the respective boundary lines of Ridgeview and Ridge Field

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in the east on the extreme ends of the continuum spanning north to south between the mountain ranges. Since the highway runs in diagonal direction from north-northwest to south-southeast on the diagram it appears clear that a straight line between the public road in the west and the respective boundary lines of Ridgeview and Ridge Field in the east towards the northern end of the continuum will be longer than a straight line between these points on the southern end of the continuum. Since there is already an existing route that runs to the compound on Willow Field, my recommendation would be to simply extend that route from the point where it bends (and runs in a south-south-easterly direction) to the boundary line of and over the full width of Ridgeview and up to the boundary line of Ridge Field.



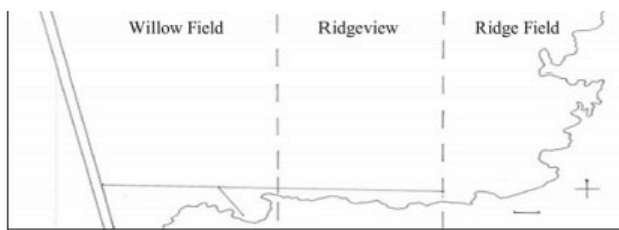


Diagram B

However, the *ter naaster lage en minster schaden* principle does not create a rigid rule and may be deviated from³⁹ if the terrain is so rugged that it does not constitute a practical alternative.³⁰ It appears clear from the facts of the scenario and a plain interpretation of the diagram that the proposed route for the permanent way of necessity that I identified will not run over a terrain that is so rugged that it will not constitute a practical alternative. It is also possible to deviate from the guiding principle if the route will cause undue prejudice to the owner of the servient land.³¹ A cursory interpretation of the diagram might mislead an inattentive mind to thinking that the proposed route for the permanent way of necessity is too close to the compound on Willow Field and that the route would be a nuisance that causes annoyance or discomfort³² to the owner of Willow Field. However, upon careful interpretation, it is clear that the compound is approximately 2 kilometres away from the proposed route for the permanent way of necessity despite appearing in close proximity to it on the diagram. As a result, it appears unlikely that the proposed route

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for the permanent way of necessity would constitute a nuisance that causes annoyance or discomfort to the owner of Willow Field or interferes with her farming operations around the compound in any material way. It then appears that there is no reason to deviate from the *ter naaster lage en minster schaden* principle as it manifests in the proposed route for the permanent way of necessity by extending the existing route with a straight line to the boundary line of and over the full width of Ridgeview and up to the boundary line of Ridge Field as indicated on Diagram B.

2.2.4 Application of requirement IV

The final requirement according to *Van Rensburg* is that the applicant must offer a reasonable amount (or *iustum pretium*) as compensation for the court's consideration. Apparently, the compensation will be a reasonable amount if it provides compensation "in proportion to the advantage gained by the plaintiff and the disadvantage suffered by the defendant".³³ Jansen AR erroneously equates the creation of a permanent way of necessity with a *sui generis* kind of expropriation that demands compensation.³⁴ The creation of a permanent right of way of necessity by operation of law cannot be expropriatory in nature because there is no common-law authority for expropriation in South African law.³⁵ Van der Walt suggests that a better explanation for the duty to compensate could be that the compensation is "intended to alleviate the burden that is imposed unilaterally on the servient owner by operation of law" and as such saves the *ex lege* creation of the servitude from being an arbitrary deprivation for purposes of section 25(1) of the Constitution of the Republic of South Africa, 1996.³⁶

According to my measurements, the length of the permanent way of necessity is 8,5 centimetres on the diagram. Applying the scale of the diagram, the length of the permanent way of necessity, in reality, would be 8,5 kilometres. I then used the amount determined by a professional land valuer of R5 000 per kilometre for the permanent way of necessity at a width of 2,4 metres to calculate the total amount of compensation that must be paid as R85 000. However, the full R85 000 should not be paid to the owner of Willow Field since the owners of Ridgeview and Ridge Field will actually only be adding a relatively short section (3 centimetres on the diagram or 3 kilometres in reality) for the permanent way of necessity on the existing route. I, therefore, calculated that a total of R30 000 compensation should be paid to the owner of Willow Field by the owners of the other two farms. Since there is no other reasonably practicable way of determining how the owners of the other two

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farms will share the use of the permanent way of necessity on Willow Field,³⁷ I propose that they resolve to contribute in equal proportion to the use of the permanent way of necessity. Put differently, the owners of the other two farms should each pay the owner of Willow Field R15 000. In addition to this amount the owners of the other two farms should also compensate the owner of Willow Field for the costs that will be incurred to register the servitude and for the increased maintenance costs of the existing route that will result from the creation of the permanent way of necessity.

The owner of Ridgeview will suffer the most disadvantage from the creation of the permanent way of necessity with the addition of a route (5,5 centimetres on the diagram or 5,5 kilometres in reality) that will run the full width of her farm from west to east. I, therefore, calculated that a total of R55 000 compensation should be paid to the owner of Ridgeview by the owner of Ridge Field. In addition to this amount the owner of Ridge Field should also compensate the owner of Ridgeview for the costs that will be incurred to register the servitude and for the maintenance costs that will result from the creation of the permanent way of necessity.

It is important to now evaluate this model answer that I have prepared using the apprenticeship approach to teaching against the range of learning objectives that have been identified in the cognitive domain of Bloom's taxonomy and the graduate attributes that the CHE articulated in its Qualification Standard for the Bachelor of Laws ("Qualification Standard").

2 3 Evaluation

The purpose of evaluating the model answer that I have prepared against Bloom's taxonomy is to estimate the kind of learning outcomes that can be achieved with this assessment and to then appraise whether this is appropriate for an undergraduate module at the third year level of a professional degree.

An analysis of the answer flowing from the first requirement shows that the student should not only be able to state the requirement accurately and in full, but also be able to describe when the necessity will be present and why there will be a need to traverse the defendant's property. The student should further be able to determine whether other ways for entry to and egress from the landlocked properties are available and to what extent these alternative ways can satisfy the economic needs of the landlocked properties. The interpretation of the diagram is indispensable for purposes of this requirement because it appears to be impossible to illustrate an understanding of how the requirement and principles would apply without a sound understanding of the cardinal directions (north, south, west and east) that mark the points of a

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compass, wind directions, and spatial orientation. For purposes of the second requirement the student should not only be able to state the requirement accurately and in full, but also be able to recognise that there is a practice of using existing roads for the creation of permanent ways of necessity. The student should further be able to explain the instances under which the common-law rules regarding the width of the route will apply. The third requirement again demands that the student should not only be able to state the requirement accurately and in full, but also be able to state the exceptions that exist to the guiding principle of using the shortest route with the least damage to establish the permanent way of necessity. This requires that the students should be able to appraise whether the terrain would be too rugged to traverse and whether the defendant would suffer undue prejudice from the proposed route for the permanent way of necessity. Again the interpretation of the diagram appears to be indispensable for purposes of this requirement because it appears to be impossible to illustrate an understanding of how the requirement and principles would apply without a sound understanding of geometry, distance, numeracy and topography. The student should be able to state the last requirement accurately and in full too. Crucially, a student should be able to describe the purpose of the compensation, explain why the creation of a permanent way of necessity is not an expropriation and then discuss why there remains a need to

pay compensation. Here too the interpretation of the diagram appears to be indispensable for purposes of this requirement because the student can only calculate the amount of compensation that is due after she measured the distance of the way of necessity, converted that measurement using the scale of the diagram, multiplied that distance with the value that a professional land valuer has determined for the establishment of a permanent way of necessity, and then apportioned the total amount of compensation to the owners of Willow Field and Ridgeview according to the disadvantage that they will suffer as a result of this court-ordered imposition on their property rights. This evaluation reveals that the use of a diagram as a teaching and learning tool enables the achievement of not only different types of learning outcomes (referring to the verbs used to describe the learning outcomes), but also learning outcomes on more cognitive levels (knowledge, comprehension, application, and analysis) in Bloom's taxonomy.

To determine how many of the graduate attributes are implicated in this assessment, it is necessary to evaluate the model answer that I have prepared against the CHE's Qualification Standard.

To answer this question a student should have a sound knowledge of the requirements, principles and exceptions for the creation of a permanent way of necessity by way of court order and how this legal figure fits into the law of servitudes, property law, and private law. ³⁸ Interpreting the diagram will assess the student's critical thinking skills ³⁹ in that she will have to orientate herself to the spatial dynamics, use the cardinal directions, measure distance, and convert those measurements according to the scale of the diagram. She

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will furthermore have to display a familiarity with the discourse of the discipline, specifically the determination of when a property is landlocked, what the minimum width is for a way of necessity in terms of the common law, and how the *ter naaster lage en minster schaden* principle is used to identify the route for the permanent way of necessity. Using the diagram as an information source will assess the student's research skills ⁴⁰ in that she will need to organise, analyse, synthesise and evaluate the information with the aim of applying the requirement, principles and exceptions to the facts of the problem. The assessment is designed to simulate the bringing of an action proceeding in court. This experiential learning context simulates the environment within which the student's professional communication and literacy skills ⁴¹ can be assessed in that she will be required to formulate a persuasive argument to satisfy the appropriate burden of proof in such proceedings. The problem furthermore assesses the student's basic numeracy skills ⁴² through the use of imperial units of measurement, the conversion of these units of measurement to metric units of measurement, the use of a ruler to measure the shortest distance between two points, and the calculation of the amount of compensation that is due for the creation of the permanent way of necessity through basic arithmetic. In bringing these action proceedings the student will have to obtain the title deeds of the relevant properties and any diagrams that may be attached to it by using software to conduct a deed search. While the problem has its limits in assessing the competency with which the student can use information technology ⁴³ for this purpose, the assessment creates a clear link to the resources that the student would need to use in practice. If the problem is given as group work it could be possible for one or two students to work on the first requirement in so far as this would notionally form part of the first *stadia* of the action proceedings (*de servitute constituenda*) and for three to six students to work on the second to fourth requirements in so far as this would notionally form part of the second *stadia* of the action proceedings (*de servitute constituta*). As such the assessment can assess the self-management of individual members of the team in executing their responsibilities independently and without supervision or guidance and to what extent individual members can then make meaningful contributions to the formulation of a coherent and persuasive argument of the team. ⁴⁴ The hypothetical example enables the student to transfer the knowledge that she has acquired from reading the textbook and case law that have been prescribed in the module to new, unfamiliar and variable contexts that will arise in practice during a career of continuous professional development. ⁴⁵ Finally, with the application of acquired knowledge to new, unfamiliar and variable contexts as part of a problem-solving exercise, ⁴⁶ comes reward for assisting the owner

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of a landlocked property to obtain access to a public road ⁴⁷ and satisfaction of having done so according to the highest ethical and professional standards and legal practice. ⁴⁸

3. Relocating a way of necessity

3.1 Introduction

Following the reasoning in *Van Rensburg* it remains uncertain whether it is strictly necessary to register a permanent way of necessity after a court order granted it to the plaintiff to ensure that it takes full real effect. ⁴⁹ However, the plaintiff who claimed the permanent way of necessity will likely insist on the right being registered ⁵⁰ against the title deed of the defendant's property. ⁵¹ Usually the route of the permanent way of necessity will be indicated on a diagram which will render it susceptible to registration. ⁵² The process of determining the route that is *ter naaster lage en minster schaden* and the subsequent judicial acceptance of this determination transforms the route into one that may not be deviated from with ease. This makes a permanent way of necessity divisible, unlike other praedial servitudes, in that it only exists over that part of the servient tenement that has been determined to be *ter naaster lage en minster schaden*. The result is that the route along which a permanent way of necessity operates will be a defined servitude. ⁵³

A praedial servitude, like a permanent way of necessity, in principle places a perpetual burden on the land and is therefore said to "run with the land". However, praedial servitudes are usually created – by agreement, court order, or statute – with only the particular current circumstances and conditions in mind (which misleads many people into thinking that these servitudes

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are static) and seldom consider the possibility that these circumstances or conditions could change in the future. ⁵⁴

Van der Merwe suggests that it should in principle be possible to amend the width and route of an existing defined right of way ⁵⁵ as a result of changed circumstances ⁵⁶ or conditions. ⁵⁷ In the problem that I provided to students this change in circumstances manifested with the desire of Ridgeview's owner to exploit her farm using a new agrarian technology that increases the size, mass and quality of the produce. However, the implementation of this technology requires a relocation of the crops in order to utilise the unique conditions that are present in the microclimate within a two-kilometre band from the foot of the mountains in the north and the south on her farm. The defined right of way is located roughly in the middle of the microclimate to the south and would need to be relocated in order to facilitate the planting of the crops.

Van der Merwe's suggestion was confirmed nineteen years later in *Linvestment CC v Hammersley* ("*Linvestment*"). ⁵⁸ Van der Walt states that the court made a rather dramatic change to the common law, ⁵⁹ albeit under the influence of comparative law ⁶⁰ and policy considerations ⁶¹ rather than constitutional principles or values. ⁶² The crisp issue that fell to be decided by the court was whether a defined and registered servitude of right of way could be relocated upon the insistence of the owner of the servient tenement, even against the wishes or objections of the owner of the dominant tenement. The court held that if the owner of a servient tenement of right of way offered a relocation of an existing defined right of way, the dominant owner is obliged to accept the relocation, provided that:

- (a) the servient owner is or will be materially inconvenienced in the use of his property by maintaining the *status quo*;
- (b) the relocation occurs on the servient tenement;
- (c) the relocation does not prejudice the dominant owner; ⁶³ and
- (d) the servient owner pays all the attendant costs.

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In the next section, I apply these requirements to the facts in the problem.

3.2. Application of the *Linvestment* requirements

According to *Linvestment* the plaintiff would have to allege that she is or will be materially inconvenienced in the use of her property if the *status quo* is maintained. If the route of the defined right of way is maintained the plaintiff will be unable to take full advantage of the unique conditions that are present in the microclimate and will be unable to harvest technologically enhanced produce. Put differently, she will be precluded from using an area of her land that is at least 5,5 kilometres long and 4,8 metres wide. In addition, any scales of efficiency that she would be able to foster would be limited with the defined right of way running through the crops. This state of affairs would significantly impact on her ability to exploit the part of her land over which the defined right of way runs and would, therefore, satisfy the first requirement formulated by the court. The second requirement states that the relocation of the defined right of way would have to occur on the servient tenement. In this context Ridge Field is the dominant tenement because it obtains access to the public road in the west through entry to and egress over both Ridgeview and Willow Field. The latter two tenements are both servient tenements to Ridge Field. However, since it is only the owner of Ridgeview that seeks to exploit her farm in a different way as a result of changed circumstance, the relocation should only happen on this tenement leaving the route of the existing permanent way of necessity unchanged.

According to *Linvestment* the relocation of the defined right of way should not prejudice the dominant owner. Since we are essentially dealing with the relocation of a permanent way of necessity the guiding principle of *ter naaster lage en minster schaden* would again be applicable. In following the same methodology as above, I would recommend that the route of the defined right of way be relocated as a start by simply moving the current route (as it runs over Ridgeview to the boundary lines of Willow Field in the west and Ridge Field in the east) north by 2 centimetres on the diagram or 2 kilometres in reality. The point where the route of the existing permanent way of necessity meets the boundary line between Willow Field and Ridgeview will then be connected with the point where the route of the relocated defined right of way meets the boundary line between Willow Field and Ridgeview using a straight line that follows that boundary line.⁶⁴ We know that it is possible to deviate from the route that has been identified for this relocated defined right of way in terms of the *ter naaster lage en minster schaden* principle if the terrain is so rugged that it does not constitute a practical alternative. It appears clear from the facts of the scenario and a plain interpretation of the diagram that the proposed route that I identified will not run over a terrain that is so rugged that it will not constitute a practical alternative. Further, a cursory interpretation of the diagram might again mislead an inattentive mind into thinking that the

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proposed route is too close to the crops and that the route would be a nuisance that causes annoyance or discomfort to the owner of Willow Field. However, upon careful interpretation it is clear that the crops are approximately one kilometre away from the proposed route despite appearing in close proximity to it on the diagram. As a result it appears unlikely that the proposed route for the relocated defined right of way would constitute a nuisance that causes annoyance or discomfort to the owner of Willow Field or interferes with her farming operations in any material way. It then appears that there is no reason to deviate from the *ter naaster lage en minster schaden* principle as it manifests in the proposed route for the relocated defined right of way.

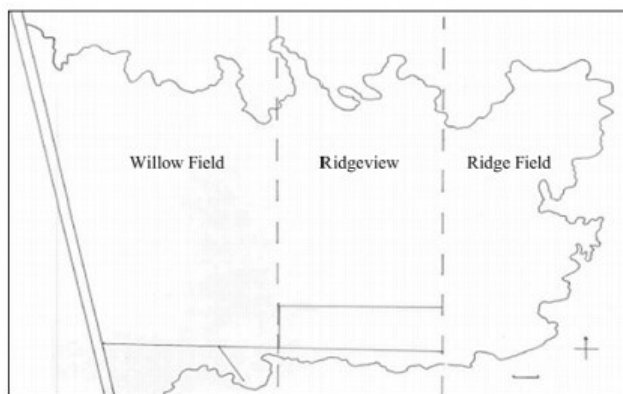


Diagram C

The last requirement is that the servient owner must pay all the attendant costs for the relocation of the defined right of way. I would advise the owner of Ridgeview to tender, as the plaintiff in *Linvestment* did,⁶⁵ paying for all the costs of amending the defined right of way which include the costs of surveying of the land; obtaining all the relevant permissions that would allow the relocation; registering the amendment of the servitude; and the construction of the new road for the right of way.

3.3 Evaluation

This part of the article evaluates the model answer that I have prepared against Bloom's taxonomy to gauge the learning outcomes that can be achieved with this assessment and to then appraise whether this is appropriate for an undergraduate module at the third year level of a professional degree.

An analysis of the answer flowing from the first requirement shows that the student should not only be able to state the requirement accurately and in full,

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but also be able to analyse whether a material inconvenience will arise from maintaining the *status quo* in the particular circumstances. The latter will flow from an appraisal of whether the servient owner's entitlement to use and enjoy (*ius utendi*) and draw fruits from (*ius fruendi*) her farm will be limited. For purposes of the second requirement, a student should be able to recall the defining characteristics of a servient and dominant tenement respectively and must then demonstrate her understanding by differentiating between Willow Field, Ridgeview and Ridge Field's nature in relation to one another according to these characteristics. The third requirement again demands that the student should not only be able to state the requirement accurately and in full, but also be able to state the exceptions that exist to the guiding principle of using the shortest route with the least damage to establish the permanent way of necessity. This requires that the student should be able to appraise whether the terrain would be too rugged to traverse and whether the defendant would suffer undue prejudice from the proposed route for the relocation of a defined right of way. Again the interpretation of the diagram appears to be indispensable for purposes of this requirement because it appears to be impossible to illustrate an understanding of how the requirement and principles would apply without a sound understanding of geometry, distance, numeracy and topography. For purposes of the final requirement the student should recall the details of the tender that was made in *Linvestment* and then apply those details to the problem by calculating the total costs that the servient owner would have to pay for the relocation of the defined right of way. In practice this will require obtaining the services (and paying the professional fees) of a registered land surveyor, a conveyancer, a notary and a general contractor. This evaluation reveals that the use of a diagram as a teaching and learning tool enables the achievement of not only different kinds of learning outcomes (referring to the verbs used to describe the learning outcomes), but also learning outcomes on a more cognitive level (knowledge, comprehension, application and analysis) in Bloom's taxonomy.

In order to determine how many of the graduate attributes are implicated in this assessment, the model answer that I have prepared will, again, be evaluated against the CHE's Qualification Standard.

To answer this question a student should have a sound knowledge of the requirements, principles and exceptions for the relocation of a defined right of way and how this legal figure fits into the law of servitudes, property law and private law.⁶⁶ Interpreting the diagram will assess the student's critical thinking skills⁶⁷ in that she will have to evaluate the merits of the changed circumstances and what impact this will

have on the route of the existing permanent way of necessity. The student will also have to orientate herself to the spatial dynamics of the problem, use the cardinal directions, measure distance, and convert those measurements according to the scale of the diagram. She will furthermore have to display a familiarity with the discourse of the discipline: specifically when a changed circumstance or condition will

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arise, whether there will be a limitation of the servient owner's *ius utendi* and *ius fruendi*, what the distinguishing characteristics are of servient and dominant tenements respectively, how the *ter naaster lage en minster schaden* principle is used to determine the route for the relocation of the defined right of way, and what costs should be included for purposes of calculating all the attendant costs that the owner of the servient tenement should offer to pay for the relocation of the defined right of way. Using the diagram as an information source will assess the student's research skills⁶⁸ in that she will need to organise, analyse, synthesise and evaluate the information with the aim of applying the requirement, principles and exceptions to the facts of the problem. The assessment is again designed to simulate the bringing of an action proceeding in court. This experiential learning context simulates an environment within which the student's professional communication and literacy skills⁶⁹ can be assessed in that she will be required to formulate a persuasive argument to satisfy the appropriate burden of proof in such proceedings. The problem furthermore assesses the student's basic numeracy skills⁷⁰ through the use of metric units of measurement, the use of a ruler to measure the distance that the route of the existing defined right of way should move so that it is relocated outside the area that comprises the microclimate at the foot of the mountain, and the calculation through basic arithmetic of all the attendant costs that the servient owner should offer to pay for the relocation. While the problem has its limits in assessing the competency with which the student can use information technology⁷¹ for this purpose, the assessment creates a clear link to the resources that the student would need to use in practice. If the problem is given as group work it could be possible for one or two students to work on the first requirement for a detailed analysis of the changed circumstance or condition, for two to four students to work on the second and third requirements of identifying the best route for the relocation of the existing defined right of way so that it does not prejudice the dominant tenement, and for one or two students to work on the final requirement of calculating the total of the attendant costs that the servient owner should offer to pay for the relocation of the existing defined right of way. As such, self-management of individual members of the team in executing their responsibilities independently and without supervision or guidance can be assessed as well as to what extent individual members can then make meaningful contributions to the formulation of a coherent and persuasive argument by the team.⁷² The hypothetical example enables the student to transfer the knowledge that they have acquired from reading the textbook and case law that have been prescribed in the module to new, unfamiliar and variable contexts that will arise in practice during a career of continuous professional development.⁷³ Finally, with the application of

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acquired knowledge to new, unfamiliar and variable contexts as part of a problem-solving exercise,⁷⁴ comes reward for assisting an owner who wishes to exploit her land in a different way as a result of changed circumstances or conditions⁷⁵ and satisfaction of having done so according to the highest ethical and professional standards of legal practice.⁷⁶

4. Conclusion

In this article, I set out to illustrate that it is possible to achieve a deep learning approach amongst students where deep, thoughtful learning of concepts and principles transforms the way in which a student thinks about the subject, its context and its application through the use of a diagram. I sought to make the modest claim that the use of a diagram creates a unique, stimulating teaching and learning environment where assessment promotes both lower and higher-order thinking skills. The lower-order thinking skills manifest in articulating the requirements, principles and exceptions for the creation of a permanent way of necessity by way of court order and the relocation of a defined right of way; displaying a familiarity with the discourse of the discipline – specifically the determination of when a property is landlocked, what the minimum width is for a way of necessity in terms of the common law, the rationale for paying compensation, how to apply the *ter naaster lage en minster schaden* principle as used to identify the route for the permanent way of necessity and the relocation of a defined right of way, when a changed circumstance or condition will arise, whether there will be a limitation of the servient owner's *ius utendi* and *ius fruendi*, what the distinguishing characteristics are of a servient and dominant tenements respectively, and calculating the attendant costs for relocating a defined right of way. The higher-order thinking skills manifest in: developing critical thinking skills through the interpretation of the diagram (spatial orientation, cardinal directions that mark the points of a compass, use of the wind directions, measuring distance, conversion of those measurements according to the scale of the diagram) and evaluating the merits of the changed circumstances and its impact on the route of the existing permanent way of necessity; and simulating the bringing of action proceedings in an experiential learning context – specifically, the honing of a student's professional communication and literary skills in formulating persuasive arguments to satisfy the burden of proof, developing numeracy skills (measurement, conversion of units, and calculation of compensation and costs); the use of professional information technology databases and other resources; the fostering of self-management and collaboration by dividing responsibility either according to the different *stadia* (*de servitute constituenda* or *de servitute constituta*) or logical phases (establishing changed circumstances or conditions, determining the route for relocation, and calculating attendant costs) of action proceedings.

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I have taught an undergraduate property law module at third-year level at two South African universities. At third-year level there is a pronounced focus on problem solving through the application of concepts and principles in "new, unfamiliar and variable contexts".⁷⁷ In my experience students find this applied competence to be exceptionally challenging because it demands more than lower-order thinking skills that are typically associated with rote learning of requirements, principles and exceptions. Put differently, assessment at this level requires more than mechanical or habitual repetition of theoretical requirements, principles and exceptions. When assessments are situated in new, unfamiliar and variable contexts to those which students are accustomed (from textbooks, case law, tutorials, class discussion and past test or exam papers) it requires that students must apply the requirements, principles and exceptions in a thoughtful manner, in that they should pay close attention to the details of that particular problem; display careful consideration to the rights and needs of the affected people; and mediate the exigencies of the parties through the principles of effective use⁷⁸ and *civilliter modo* exercise of a servitude.⁷⁹

Summary

In this article I investigate whether the use of a diagram as a teaching and learning tool for the assessment of the law of servitudes can change a student's approach from mainly surface learning to deep learning. I set out to do this by providing a brief introduction to the requirements for the establishment of a permanent way of necessity (Van Rensburg v Coetzee) and for the relocation of a defined right of way (Linvestment CC v Hammersley). I adopt the apprenticeship teaching perspective to answer a hypothetical problem posed to students. I then evaluate the answer against the standards of Bloom's taxonomy and the Council on Higher Education's LLB qualification standard. This article is a response to the finding by the council's review panel that there is a misalignment between the teaching and learning practices observed and assessment methods employed in the Faculty of Law at the University of Pretoria. In this article I show that the use of a diagram creates a unique, stimulating teaching and learning environment where assessment promotes both lower and higher-order thinking skills in an experiential learning environment.

1 Council on Higher Education "National Review System" (undated) CHE <http://www.che.ac.za/che_online_accreditation_system/national_reviews_system> (accessed 07-09-2017).

2 Council on Higher Education *Outcomes of the National Review of the Bachelor of Laws (LLB) Programme* (2017). See further B Macupe "Eight universities get full LLB accreditation; five more in the balance" (22-06-2018) *Mail & Guardian* <<https://mg.co.za/article/2018-06-22-00-eight-universities-get-full-llb-accreditation-five-more-in-the-balance>> (accessed 21-10-2019).

3 Council on Higher Education *Final HEQC Report of the University of Pretoria* (2017) 24.

4 J Biggs & C Tang *Teaching for Quality Learning at University* 3 ed (2007) 22-24.

5 24-25.

6 DD Pratt "Good teaching: One size fits all?" (2002) 93 *New Directions for Adult and Continuing Education* 5–15 9–11.

7 BS Bloom, MD Engelhart, EJ Furst, WH Hill & DR Krathwohl *Taxonomy of Educational Objectives: The Classification of Educational Goals, Handbook 1: Cognitive Domain* (1956).

8 See AJ van der Walt *The Law of Servitudes* (2016) 340 and CG van der Merwe *Sakereg* 2 ed (1989) 485–486 and for the main differences between a right of way of necessity and other praedial servitudes.

9 Van der Walt *The Law of Servitudes* 338 and Van der Merwe *Sakereg* 484 note that the a way of necessity has been extended to effective industrial use of land (*Saner v The Local Road Board for the Inanda Division* (1892) 13 NLR 225) and could in principle also be available for any other reasonable necessity regardless of whether the land is used for agricultural purposes or if there is an identifiable dominant tenement.

10 G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The Law of Property* 6 ed (2019) 390.

11 Van der Walt *The Law of Servitudes* 337 and 347 and Van der Merwe *Sakereg* 486 note that the notion of a "public road" is interpreted to include public water ways and railways (*Nielson v Mahoud* 1925 EDL 26).

12 Van der Walt *The Law of Servitudes* 338–339 and Van der Merwe *Sakereg* 484–485.

13 As defined in s 1 of the Property Valuation Act 17 of 2014.

14 1979 (4) SA 655 (A).

15 678A–C.

16 See 677C–D and Van der Merwe *Sakereg* 490 where it is observed that this forms the first *stadia* (known as the action *de servitute constituenda*) in the action proceedings to claim a permanent way of necessity.

17 See Van der Walt *The Law of Servitudes* 349–350, specifically the sources cited in footnotes 281 and 282.

18 In *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 675B–D the court, in accepting the practical implication articulated in *Matthews v Road Board for the District of Richmond* 1967 (3) SA 244 (N) at 247F–H, concludes that Van Leeuwen *Rooms-Hollands Regt* 2.21.12 should be interpreted to mean that where a permanent way of necessity must be created following a subdivision of agricultural land that such creation will arise from tacit agreement.

19 Jansen JA uses the same technique to articulate the particular necessity in *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 667G–668E.

20 Jansen AR did this in *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 678F.

21 *Lentz v Mullin* 1921 EDC 268 270.

22 *Van Rensburg* at 671E–F.

23 See *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 677C–D and Van der Merwe *Sakereg* 490 where it is observed that the second to fourth requirements form the second *stadia* (known as the action *de servitute constituta*) in the action proceedings to claim a permanent way of necessity.

24 *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 675G.

25 According to Voet *Ad Pandectas* 8.3.3 the minimum width is approximately 8ft or 2.4m.

26 *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 675H.

27 669C–D. Compare *Mazista Slate Quarries Ltd v Oosthuizen* 1943 TPD 28 31; *Botha v Maree* 1964 (1) SA 168 (O) 171A–E; *Berg v Gossyn (1)* 1965 (3) SA 702 (O) 703H and *Berg v Gossyn (2)* 1965 (3) SA 707 (O) 708E–H and *Maree v Raad van Kuratore vir Nasionale Parke* 1964 (3) SA 727 (O) 731G. Muller et al *Silberberg and Schoeman's The Law of Property* 391.

28 See Van der Walt *The Law of Servitudes* 357–358 and *Van Rensburg* 672F–G where Jansen AR cited the following *dictum* from *Wilhelm v Norton* 1935 EDL 143 at 168–169 with approval: "the natural outlet is to the nearest public road, [...] the [c]ourt should be guided by the rule that the choice should fall on the route which gives the plaintiff access to the nearest public road."

29 *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 672H.

30 672H.

31 673A.

32 See Van der Walt *The Law of Neighbours* 262–291.

33 *Wilhelm v Norton* 1935 EDL 143 at 176.

34 *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 676C–D.

35 Van der Walt *The Law of Servitudes* 360.

36 360 and 364–370. See also AJ van der Walt & TN Raphulu "The right of way of necessity: A constitutional analysis" (2014) 77 *THRHR* 468–484 and TN Raphulu *The right of way of necessity: A constitutional analysis* LLM thesis, Stellenbosch University (2013).

37 In the context of free co-ownership, the undivided co-ownership share reflects each co-owner's interest in the co-owned property. The undivided co-ownership share entitles a co-owner to reasonable use of the co-owned property in proportion to his/her co-ownership share. However, this does not mean that the property itself is divided into proportionate shares and that each co-owner is restricted to the use of his/her divided part of the property. However, in practical terms, an undivided co-ownership share that is split amongst three free co-owners according to their interest that they hold in the co-owned property (eg 50%, 30% and 20%) will result in the first co-owner being entitled to the use of a small beach house during 50% (or 26 weeks) of the year. See Van der Merwe *Sakereg* 385.

38 LLB Qualification Standard 8.

39 9.

40 9.

41 10.

42 10.

43 10.

44 11.

45 11.

46 11.

47 11.

48 10.

49 *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 676D.

50 Section 76 of the Deeds Registries Act 47 of 1937. Regulation 73(2) issued in terms of section 10 of the Deeds Registries Act 47 of 1937 states: "A diagram shall be annexed to ... deeds creating or defining servitudes and real rights whether created or defined by the parties thereto or by order of the Court or a Water Court: Provided that a servitude feature of uniform width, or a servitude feature at a specified distance from and parallel to a surveyed line shown on a registered diagram, in either instance extending along the entire length of such surveyed line other than a servitude for road widening purposes, may be registered by description without a supporting diagram"

51 *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 676E.

52 Van der Merwe *Sakereg* 491.

53 491 implies that a permanent way of necessity is created *simpliciter* (in general terms) and cites *Wynne v Pope* 1960 (3) SA 37 (C) 39G as authority for this conclusion. However, this characterisation of a permanent way of necessity appears to be at odds with the meaning that is ascribed to servitudes that are created *simpliciter* in *De Villiers v Barnard* 1958 (3) SA 167 (A) 226G ("The grant is *simpliciter* because the dominant owners are permitted to construct their aqueduct from any point on the Salt River to any point on their properties") and *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A) 217D ("This applies to a servitude created *simpliciter*, without the route being specified."). See further *Hollmann v Estate Latre* 1970 (3) SA 638 (A) 645 and *Nach Investments (Pty) Ltd v Yaldai Investments (Pty)* 1987 (2) SA 820 (A) 831C–E. The guiding principle that a way of necessity must be *ter naaster lage en minster schaden* precludes a way of necessity from being created from any point along the public road to any point on the boundary of the dominant tenement. As such, a route that is "*ter naaster lage en minster schaden*" will be specified.

54 H Mostert & A Pope A (eds) *The Principles of The Law of Property in South Africa* (2010) 244.

55 Van der Merwe *Sakereg* 491. Compare Van der Walt *The Law of Servitudes* 420–421 for the general principle on the relocation of rights of way.

56 S van Staden *Ancillary rights in servitude law* LLD dissertation, Stellenbosch University (2015) 17 described "changed circumstances" as the subjective need of either the servient or dominant tenement owners to develop or exploit her land in a different way.

57 16 defines "changed conditions" as those instances where the "physical features of the land or the elements relevant to the servitude change so that the functionality of the servitude is affected." She refers the following examples of changed conditions: erosion of the land subject to the servitude as a result of floods or heavy rains; where the servient or dominant tenements are changed to a different state than when the servitude was created as a result of droughts or other changes that occur slowly and incrementally over time; where the effective use of the servitude is affected by changes in the society, the economy, technology or the political sphere. All these conditions can arguably be ascertained objectively.

58 2008 (3) SA 283 (SCA).

59 *Investment CC v Hammersley* 2008 (3) SA 283 (SCA) paras 11–14 and 17–19.

60 Paras 23–29. For a more extensive comparative analysis of Dutch, German, American, Scots, and English law see L Kiewitz *Relocation of a specified servitude of right of way* LLM thesis, Stellenbosch University (2010) 37–72.

61 *Investment CC v Hammersley* 2008 (3) SA 283 (SCA) paras 31–32. For a more extensive policy analysis see Kiewitz *Relocation of a specified servitude of right of way* 109–150.

62 AJ van der Walt "Property Law" (2008) 1 *Juta's Quarterly Review*.

63 See *JJPC Brand Administrators v Lombard* [2019] ZASCA 55 (1 April 2019).
64 *Van Rensburg* at 675E citing *Van Leeuwen Rooms-Hollands Regt* 2.21.6 where he articulates the rule as follows: "aan d'een of d'ander kant van land heen"
("on the one or the other side of the land").
65 *Linvestment CC v Hammersley* 2008 (3) SA 283 (SCA) para 5.
66 LLB Qualification Standard 8.
67 9.
68 9.
69 10.
70 10.
71 10.
72 11.
73 11.
74 11.
75 11.
76 10.
77 The South African Qualifications Authority *Level descriptors for the South African Qualifications Framework* (2012) 10.
78 Van der Walt *The Law of Servitudes* 224–240.
79 247–259.
