



Legal Advice in the Covid-19 Lockdown: Making Do or Brave New World?

Donald Nicolson, Director of the Essex Law Clinic and Professor and Elizabeth Fisher-Frank, Essex Law Clinic Supervisor and Lecturer, School of Law and Human Rights Centre [DOI: 10.5526/xgeg-xs42_029]

I. Introduction

For some time now, university law clinics have played an important role in filling the gap between those who qualify for legal aid and those who can afford to pay for legal services. This is a need which continues to grow as legal aid is inexorably cut back in terms of both those who qualify and those issues it covers.¹ More recently there have been calls for lawyers and more latterly law clinics and other not for profit organisations to use the rapidly evolving capacity of the internet and digital computing facilities to expand the ability of service providers to both assist their clients and to develop ways, through technology, to help clients help themselves.

Indeed, more than thirty years² ago Richard Susskind³ began to argue that the digital revolution, which was only beginning to show itself, would and should also lead to a revolution in legal services, and suggested that such development could even mean, the end of the profession as we know it. While he has had to adjust his prediction about the timescale in which this revolution would take place, there are now visible signs of the legal profession embracing a wide range of digital means to deliver legal services, ranging from the very mundane such as computerised case management systems, digital document storage and search tools to online platforms allowing clients to create their own legal contracts. Equally, courts have also begun to get in on the act, for instance by enabling court documents to be filed online and encouraging online dispute resolution.⁴ Moreover, as the papers in this publication show, the Covid-19 crisis, has caused those responsible for delivering legal and courts services to turn to the internet and digital computing to try as far as possible to maintain “business as usual”.

A similar trajectory describes the role of digital services in the law clinic sphere. Thus, as we show in this paper, law clinics which had slowly begun to embrace new digital technologies, have been forced by Covid-19 to bring this means of delivering services to the fore. However, it is important to examine whether such forms of services are merely a necessary response to the Covid-19 crisis or whether they herald a “brave new world” for law clinics. Do digital services enhance or detract from the values of law clinics in helping to fill the access to justice gap? Before turning to this question, however, it is useful to have an idea of the clinical landscape prior to the Covid-19 crisis (the Pre-Covid or PC world!).

¹ See Paul McKeown and Elaine Hall, ‘If We Could instil Social Justice Values Through Clinical Legal Education, Should We?’, (2018) 5(1) J Intl & Comp L 143, 147.

² Richard Susskind, *Expert Systems in Law - A Jurisprudential Inquiry* (Oxford University Press, 1987).

³ Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Oxford University Press, 1996); *The End of Lawyers?: Rethinking the Nature of Legal Services* (Oxford University Press, 2010); *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013). See also, Daniel Susskind and Richard Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2015).

⁴ See, Emma Jones, Francine Ryan and Hugh Mcfaul, ‘Connectivity, Confidentiality and Confidence: Key Issues in the Provision of Online Pro Bono Activities’ (2018) 25 Intl J Clinical L Ed 48, 54-57.

II. Digital Legal Services in the PC World

There has been considerable interest throughout the world in the potential of the internet and digital computing to enhance access to justice. Thus both worldwide⁵ and in the UK,⁶ conferences and “hackathons” have brought together those in the tech world with those at the access to justice coalface. But, anecdotally it seems that there has been far more interest from the former than the latter, and that many ingenious apps have been imagined but very few if any developed.⁷ This has also been the pattern in the UK law clinic world. Indeed at a recent conference on the use of lawtech in law clinics, the advice of one of the lawtech pioneers was to stop trying to invent the perfect app and instead translate what is currently done in “real time” into simple digital format.⁸

In fact some law clinics have been doing this for some time. Thus, six years ago the University of Strathclyde⁹ used email advice to develop a useful triage system which allowed it to concentrate its energies on the more complex live-client cases. Thus, having the benefit of the services of some very tech-savvy students who first developed a relatively sophisticated website and then an even more sophisticated case management system, Strathclyde developed a system whereby clients who access the website are first directed to a series of questions and answers on their problem. If the Q and A's do not solve their problems, which is likely to be the case, they are invited to send an email explaining their problem. If it is felt that their query can be dealt with by email because it is of general nature not requiring detailed facts or complex law (such as how can I challenge a parking “fine” imposed by a supermarket?), a student produces advice via email within five days which is checked by a supervisor, with the option retained of escalating the case to full representation if felt necessary.

Somewhat differently, Essex Law Clinic (henceforth ELC) has begun work to develop an app to allow the public in England and Wales to create their own will. More relevantly, as far as the Covid-19 situation is concerned, ELC began in January 2020 to offer face to face interviews with clients via Zoom. Admittedly, this was not done with a pandemic in mind but to respond to a serious geographical problem. Like some clinics in the UK, ELC is not situated conveniently for clients. Essex does not have a city and its university is situated a long-ish bus ride from the nearest large town. Consequently, for the last three years ELC has developed outreach clinics in the community so that clients who are unable to travel to campus, whether due to poor or expensive public transport or because campus is seen as an ‘alien world’, can also access advice. However, as some journeys remain too far and too expensive whether for the clients or students or both, the ELC has turned to Skype. This augmentation of services stemmed from an exciting new initiative involving the creation of a “holistic” law clinic involving clients being interviewed on Skype by law students whilst supported by social work students. Given the demographic of likely clients,

⁵ Hague Institute for Innovation of Law (HIIL), ‘Innovating Justice Forum 2019 - From Justice Innovation to Scale’, 10 February 2019, <https://www.impactcity.nl/innovating-justice-forum-2019-from-justice-innovation-to-scale/>.

⁶ See, e.g., <https://www.legalhackathon.london/>.

⁷ Exceptions include an app developed by Compassion in Dying to help people to write their own power of attorney/living will. See, <https://compassionindying.org.uk/services/>.

⁸ Alex Hamilton from Radiant Law, speaking at Legal Tech and Clinics, University of Manchester, 10 January 2019.

⁹ <https://www.lawclinic.org.uk/annual-report-2014-2015>.

who might not have access to computers or the experience of using video conferencing, and the fact that the social work students already have a placement in the Southend community, this meant that law students from the Colchester campus could advise clients, who are supported generally and in relation to tech by social work students, in Southend. This process was piloted with cases in both family and housing law with positive feedback from clients. For example, a family law client at the end of the interview reflected that she had been far less daunted by the interview as she was not sitting across a desk facing an adviser. Unknown to us at the time, this highly successful experiment provided the prototype for our response to the Covid lockdown.

For other university law clinics, geography has played a somewhat different role in motivating the establishment of what many call “virtual law clinics” (VLCs). Thus without an actual campus, the Open University has always operated online,¹⁰ whereas the fact that BPP is spread over various campuses meant that the provision of online services was useful.¹¹ However, for other universities, there have been more direct reasons for establishing a VLC. Thus, the University of Cumbria’s VLC seems to have been motivated by a desire to introduce students to the way that law is likely to be increasingly practised in the future, in this way enhancing their tech skills and employability.¹²

III. The Digital Response to the Covid Crisis

However, in the current situation, using the internet to advise and perhaps also represent clients seems to be, not just a way of enhancing access to justice, but a necessity. Consequently many law clinics have or are planning to set up VLCs.¹³

As is usual with law clinics, different institutions adopt different models, while the competitive nature of the IT market means that there are various platforms to choose from for the “virtual law clinic ” (VLC). Choices about platforms are often determined by the licence held by the university. Thus the ELC uses Zoom, whereas others have responded to concerns about zoom bombing (which should be easily avoided by the use of codes and waiting rooms) or instead have chosen Adobe Connect Microsoft Teams.¹⁴ There are also differences in VLC models as to whether supervisors are present throughout the video interview (VI), come in at the end or only speak to the students afterwards. In addition, some clinics provide advice on the spot – at least as in the case of the ELC by the supervisor but possibly, in appropriate circumstances, also by students in the presence of a supervisor who can make real-time corrections. Where supervisors are not available, some clinics have chosen to record interviews,¹⁵ but this raises data protection issues regarding where and how long recordings are stored and for this and other reasons (such as detracting from students learning the important skill of simultaneous note taking), most clinics do not record interviews. A final important difference relates to the extent of the service offered to the clients – advice only or some form of subsequent assistance – but

¹⁰ See generally, <http://law-school.open.ac.uk/open-justice>.

¹¹ See, <https://probono.bppuniversity.ac.uk/>.

¹² See, Ann Thanaraj and Michael Sales, ‘Lawyering In A Digital Age: A Practice Report Introducing The Virtual Law Clinic At Cumbria’ (2015) 22(3) Intl J Clinical Legal Ed 334.

¹³ All but two of 23 respondents to a question at a recent CLEO workshop (<https://www.cleo-uk.org/>); and one was not sure.

¹⁴ BPP began with Skype but given that clients must have an account or be prepared to set one up, they are now also moving to Microsoft. In any event Skype for Business is being ‘retired’ online in July 2021 and all new customers from September 2019 are automatically set up with Teams.

¹⁵ Swansea.

here, as with many of the above differences, much depends on the particular model used by the clinic generally rather than just in their VLC.

IV. VLCs in the Future

While the implementations of VLCs has not necessarily been smooth and many staff and even students, not to mention clients, have had to negotiate a steep learning curve, the “lawtech turn” in the clinical world appears to have been a success. This leads to the inevitable question of whether this suggests that clinics should retain their VLCs or return to the face to face delivery of legal services which dominated the PC world, and in turn to a discussion of the benefits and drawbacks of VLCs.

Video interviewing (VI) allows students (and staff) to see clients and to respond to what they can see of their facial and body language. While not quite as effective as face to face contact, this goes a long way to establish the emotional connection which is so important for a good working relationship, trust and hence fuller disclosure of facts and client concerns.¹⁶ Certainly, it is better in this regard than contact by phone and much better than email. Also as with a phone, VI allows for immediate response in terms of advice. As such, there are obvious advantages for clients after lockdown – those with mobility issues and other disabilities,¹⁷ those who are put off by hassle, expense and anxiety from travelling especially onto campuses which, as already noted, can be seen as an alien and intimidating domain populated by the social elite. Moving from the “demand” to the “supply-side” of clinic services, there are also huge advantages both for the students involved and for the overall effectiveness of clinic services. If lockdown or social distancing continues into future academic years, students can continue to be involved even if they are not on campus and law clinics can remain open (as some already do) out of term and particularly over the summer. Where law clinics require real-time supervision of interviews, supervisors and students need not be in the same locality and clinics can thus make better use of pro bono lawyers who often struggle to get to campus during office hours or even early evening because of traffic, late meetings, etc. It may even help if those students who suddenly have to cancel have a colleague on hand to take over at short notice.

Thinking more widely, the ability of clinics to extend their services beyond their geographical environs to anyone in or outside the country (or at least jurisdiction) means that clinics as a whole or those within particular regions could begin to specialise in one or two areas, while referring all other cases to their partners. However, while this may work well for clients and clinics in allowing the latter to play to their strengths and for the even greater development of special expertise, it may be less attractive to students who, anecdotally, seem to want to gain a wide range of skills and knowledge and “try out” different areas of law before making a career choice.

One advantage for student learning and indirectly for clinics is that virtual interviews may (with client permission) allow for more students to learn and gain experience through shadowing rather than conducting interviews. Surprisingly, while it is early days, students at ELC reported preferring video interviewing to campus interviews, citing feeling more confident by being in the comfort of their own home with a lesser degree of tension than being in the same room as a client. Likewise clients, as mentioned in our early findings,

¹⁶ Cf Jones, et al (n. 4).

¹⁷ Open University clients report that VI may ensure that “you see the person first not the disability” : Francis Ryan, personal communication (1 June 2020).

have reported that not being in the same physical room as an adviser meant they felt far less anxious about talking about their legal issues.

A final advantage is also more beneficial to clients and clinics as an institution rather than just for students. As the University of Strathclyde has shown, being able to answer more simple queries via email prevents time being wasted setting up and conducting interviews when there is no need to interview (and by extension even more so in case of clients who are served by looking at FAQs) - though there is always the danger that information or nuances are not conveyed by email. Also, of course, students may lose out from their valuable educational experience of practising their interviewing skills. Furthermore, an email service does depend on a client being able to sufficiently articulate their issue as, so often in client interviews, it becomes apparent that what clients think their legal issue is, is in reality very different.

Nevertheless, VLCs clearly offer opportunities for directly enhancing access to justice. At the same time, it cannot be denied that there are downsides to VLCs. Some are minor and relatively easy to overcome. For instance, they pose risks for the leak of confidential information via insecure emails and to a much greater extent via VIs in that conversations might be overheard at the locality of the client, student and/or supervisor. But the sort of advice that can be given by email is far less likely to involve confidential information and if it does then the level of details suggest that clinics should in any event consider using face to face or interviews or video conferencing). As regards the latter, while there will always be risks clinics can take steps to minimise risks of confidential conversations being overheard such as students and advisers using headphones and prohibiting using client's names during the call and indeed the discontinuation of any VI once it is thought that confidentiality might be compromised.

Other problems also have partial solutions at least. Thus, notwithstanding the number of people who do have access to the internet and computing facilities for email and video conferencing there is inevitably a substantial group who do not¹⁸ and there will be a large overlap with this groups and the socio-economic group which clinics serve (or in our view should serve).¹⁹ Less extreme than this problem of "internet poverty" is that of "computer illiteracy"²⁰ whereby those who do have access to the internet and computers do not have the skills to utilise what might seem daunting video-conferencing platforms. Here, one solution for both problems is for clinics to collaborate with community groups or other service providers (as in the case of the ELC's holistic clinic) who can provide clients with access to and help with setting up interviews and dealing with problems if they arise. Computer illiteracy can be also overcome by taking clients through the necessary steps to get connected via phone either just before the interview or some time before hand. Of course there is likely to still a small group of people who cannot access these "workarounds" or who are daunted by anything other than face to face interviews,²¹

¹⁸ 7% of the UK population do not have access to the internet. See, <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics>.

¹⁹ For example, 64% of disabled people have access to a tablet/PC/laptop compared with 85% of non-disabled people. See, https://www.ofcom.org.uk/__data/assets/pdf_file/0018/132912/Access-and-Inclusion-report-2018.pdf.

²⁰ This could be due to age. For example, 100% of 16-24 year olds use the internet daily whereas 55% of over 65 year olds do. Also people with low income are less likely to have used the internet in the last 3 months than those with greater income. See, <https://www.ons.gov.uk> 2018.

²¹ ELC clients reported that they felt anxious about how to connect to Zoom notwithstanding that full information is provided before each interview.

suggesting that whatever the benefits of VLCs for expanding access to justice, clinics need to retain old school forms of service delivery.

Indeed, it is arguable that while VLS may enhance the quantity of clients served, they may also reduce its quality. Arguably, better rapport and hence fact-finding can be achieved in an actual room where subtle changes in atmosphere can be detected²² and demeanour detection is not limited to the face and upper body but extends more widely.²³ Unwarranted interruptions, poor internet connection, technical issues and silences while these problems are sorted may also detract from the atmosphere and unnerve clients.²⁴ It is also far better to show empathy towards angry or upset clients, for instance by handing over a glass of water, offering tea and coffee at the beginning of the interview which may help settle and show care towards clients. Being in different localities, where this occurs, may also detract from the subtle signals and possibly also the passing of written notes between students interviewers, and between them and supervisors if they are present, which may be useful in alerting students to problems, such as unwanted questions, or prompting lines of questions which might otherwise be overlooked.²⁵ For this reason and also to reduce problems of confidentiality leaks, having two way video-conferencing where possible is better than multiple localities. On the other hand, whether follow up work is likely to be affected by virtual contact between students and them and staff is a moot point.

Also moot is whether VLC will have a negative impact on the indirect role clinics may play in enhancing access to justice. Thus, by contrast to the direct enhancement of access to justice through providing the public with legal services, law clinics can indirectly enhance access to justice by inspiring law students to go on to play some role in redressing social injustice after they graduate. Thus a study by the Open University, revealed that students at their virtual clinic 'developed new perspectives on access to justice and the value of pro-bono work'²⁶ This could be via career choice, engaging in pro bono work, making donations, providing training or other forms of assistance to organisations which promote access to justice or social justice more widely.²⁷ If so, given that this may translate into years of pro bono or financial assistance or even a career devoted to helping those most in need, the indirect role of law clinics in promoting social justice may in the long run be even more important than their direct role.²⁸ Thus, drawing on educational theory, many clinicians claim that student exposure to clients may cause 'disorienting moments'²⁹ whereby their pre-existing assumptions about the world clash with their observation of social deprivation, unequal access to justice and substantive legal injustice, especially

²² Cf the comment of one ELC supervisor that it "is obviously not possible to capture all the nuances of behaviour/reactions etc. by video but it is a pretty good approximation."

²³ On the other hand, research does not suggest that even trained interviewers are likely to be good at at least determining lies from demeanour. See, Donald Nicolson, *Evidence and Proof in Scotland: Critique and Context* (Edinburgh University Press, 2019), 282-6.

²⁴ Our thanks to Francine Ryan (personal communication, 1 June 2020) for this insight.

²⁵ Again a factor raised by one ELC supervisor: "The interview was less formal and I slightly felt that the students took it less seriously. There was some insensitivity from one of the students and I found it more difficult to raise this than I would have in a face to face interview."

²⁶ Francine Ryan 'A Virtual Law Clinic: A Realist Evaluation of What Works for Whom, Why, How and in what Circumstances?' (2019) *The Law Teacher* (early access).

²⁷ See Donald Nicolson, 'Our Roots Began in (South) Africa': Modelling Law Clinics To Maximise Social Justice Ends' (2016) 23 *Intl J Clinical Leg Ed* 87.

²⁸ Steven Wizner and Jane Aiken, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice', (2004) 73 *Fordham L Rev* 997, 1005.

²⁹ Fran Quigley, 'Seizing the Disorientating Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics', (1995) 2 *Clinical L Rev* 37.

when repeated exposure reveals that these problems are endemic rather than exceptional.³⁰ According to adult learning theory,³¹ learning from experience rather than abstract teaching is likely to make these lessons particularly profound. And, when the experience is that of someone in dire need and it is realised that they may have no other source of assistance, knowledge may be transformed into empathetic care. Furthermore, Aristotelian theories of moral development³² teach that satisfaction at helping others (or regret at not being able to do so), particularly if accompanied by guided reflection on experience and the example of positive role models, may convert knowledge about social injustice and empathetic concern for its victims into an ongoing commitment to contribute to social justice.

In this regard, all forms of digital justice, except for VI are far less likely than direct contact with the client to play this indirect role. Thus, if email advice is confined, as it should be, to requests for general information, there is far less likely to be a “disorienting moment” and no learning from experience. As regards students who develop apps and other internet sources as forms of public legal education and capacity building to support other providers or help members of the public to help themselves, any learning about disadvantage and injustice is not likely to be more vivid and impactful than that gained from more traditional forms of education. This suggests that law clinics who want to have a long term impact on access to justice via their graduates should ensure a “blended learning” approach whereby students gain both direct experience of the lives of actual clients at what can be called a “retail level” as well as involvement in “wholesale” methods designed to expand the number of people served but without personal contact³³ - with perhaps the former coming before the latter in terms of the student’s chronological experience. This though might clash with other needs such as to get those with tech skills working on digital wholesale work as soon as possible and the benefits of testing students on and training them while engaged in non-client facing work before letting them loose on members of the public.

By contrast, to the extent that clinics only provide advice to clients, the amount of learning about the client’s lived experience of hardship and injustice is likely to be less than if students try to resolve their problems, whereas there obviously can be no learning from success or failure. At the same time, however, such learning of justice is not likely to be much less in VLCs than advice giving after face to face interviews. So here any marginal loss of an indirect impact of clinic work is more than outweighed by the possible gains in direct enhancement.

³⁰ See, e.g., Jane Harris Aiken, ‘Striving To Teach “Justice, Fairness, And Morality”,’ (1997) 4 Clinical L Rev 1; Stephen Wizner, ‘Beyond Skills Training’, (2000-1) 7 Clinical L Rev 327, 327-8; Donald Nicolson, ‘Education, Education, Education: Legal, Moral and Clinical’, (2008) 42 Law Teacher 145; Juliet M. Brodie, ‘Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics’, (2008-9) 15 Clinical L Rev 333, 379-83.

³¹ Quigley (n 29); Frank Bloch, ‘The Andragogical Basis of Clinical Legal Education’, (1982) 35 Vanderbilt L Rev 321.

³² See e.g., Richard Stanley Peters, *Moral Development and Moral Education* (London: George Allen & Unwin 1981), ch. 2; Joel Kupperman, *Character* (Oxford Univ Press, 1991); Hubert L. Dreyfus and Stuart E. Dreyfus, ‘What is Morality? A Phenomenological Account of the Development of Ethical Expertise’ in David. Rasmussen (ed), *Universalism Versus Communitarianism: Contemporary Debates in Ethics* (Cambridge, Mass.: MIT Press 1990).

³³ See Nicolson, (n. 27), section 3.2.6.

V. Conclusion

Indeed it is arguable that the biggest question which clinics should face is not whether legal advice should be delivered face to face but how to take the next step to provide clients with the representation they need to put their advice into effect. Using the internet to provide advice via video-conferencing and/or email has as many – and in some cases such as with clinics suffering a geographical deficit more – advantages as disadvantages. Where however what many law clinics – including our own – should be urged to consider is how they develop both digital and non-digital means of enabling clients to put advice into effect. This is not to question the need for such advice, not least as it may help clients realise that they do not have any legal rights or remedies. However, where they do, but are left without the ability to vindicate these right and remedies, clients may in fact feel worse off. In addition, the ongoing engagement with clients through representation and the intimate contact with the workings of the (in)justice system does far more to motivate students to become “justice warriors”³⁴ than the brief encounters in interviews even if face to face rather than video conferencing. Nevertheless the brave new digital world may offer a way to have one’s cake and eat it too. Where it is possible to deliver advice via email or VI, this may speed up the time taken to inform clients of their rights and remedies and this in turn can free up time for clinics to devote to representation or at least capacity building so that clients can be helped to help themselves. In this way, it can be argued that VLCs are on balance far more of a permanent opportunity than a temporary necessity in the Post Covid world of law clinics.

³⁴ Donald Nicolson, ‘Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-Liberal World’ (2015) 22 Intl J Leg Profession 1.