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Duty Bound? Court Possession Schemes and Clinical Education

Carol Boothby¹

*'At the heart of clinical legal education is a real client. It is the presence of a real client that distinguishes (it) both from traditional legal education ..and from practical legal skills training..'*²

'My times at the rent court have been the most satisfying of the course. It has made me feel that I am really on my way to becoming a barrister and has given me much greater confidence in my advocacy skills'

Northumbria Bar student, July 2004

Introduction

The opportunity to take part in the local County Court hearings of repossession cases arose around 3 years ago, the same time as I joined the University of Northumbria as a solicitor/ tutor working in the Student Law Office. I wanted to keep up my own hands-on skills as a solicitor, and so grasped this opportunity with enthusiasm. It has been an invaluable teaching tool as part of student's experiences within the student law office, but only recently have I stopped to take stock of the nature and value of this experience, and to consider more carefully the aims and objectives, from the Student Law Office point of view, in taking part in this.

This paper looks at experiences with students at court repossession days, and the messages we are giving students when we expose them to this type of work – are we moving closer towards clinical legal education with a social justice agenda? And what do we get out of these court days as a student learning experience.

Clinical legal education with a reformist or social purpose?

Clinical legal education in both Australia and the United States has always been imbued with the concept of the lawyer as having a public service role.³ In the United States, as early as 1968, when the Ford Foundation set up CLEPR (the Council on Legal Education for Professional

1 Carol Boothby is a Senior Lecturer and solicitor/ tutor in the Student Law Office at Northumbria University.

2 Watterson, Cavanagh and Boersig "Law School Based Public Interest Advocacy: An Australian Story"

(2002) 2 International Journal of Clinical Legal Education 7.

3 Judith Dickson – "CLE in the 21st Century: Still Educating for Service?" (2000) 1 International Journal of Clinical Legal Education 36.

Responsibility), and provided funding to the value of \$6 million dollars, this was focussed on introducing clinical legal education in law schools in a way that involved students in providing services to the poor. In Australia, the growth of free services through community legal centres and clinics in the 1970's offered an opportunity for clinical legal education programs to then integrate with them, and this model is characteristic of Australian clinical programmes. The Faculty of Law at Monash University in Australia for example are well known for their clinical work and have extensive experience both in conjunction with generalist clinics and more recently, specialist clinics such FLAP (the Family Law Assistance program.)

However, in the UK there has not been an overt commitment to issues such as social reform, or pro bono activities. In the past there has been no requirement, or even specific encouragement from the professional bodies to promote student participation for the wider benefit of the community. This may be changing – sceptics may say as a result of the restrictions on the legal aid budget. With the onerous administration requirements, low levels of remuneration and demanding quality standards involved in gaining a franchise, many solicitors firms have felt unable to justify a continuing commitment to areas such as welfare benefits and housing. As a result, there have been warnings from solicitors that this has created ‘advice deserts’ where no specialist advice is available, leading many to challenge the reality of ‘Access to Justice’. In 2003, of the 421 bid zones used for Community Legal Service contracting, 45% had no specialist Housing Law provider.⁴

But there are perhaps the winds of change blowing – the pro bono movement in the UK seems to be gathering momentum and, perhaps seeing the potential benefits offered by law clinics where there is input from academic establishments in terms of both staffing and funding.

There is no over riding social lawyering agenda permeating the provision of clinical legal education in the UK, but rather a symbiotic one where diverse groups are coming together where there is mutual gain. Taking the duty possession scheme as an example, the focus for us is still very much on the intellectual skills, and the student learning to be gained, with any spin off in terms of benefiting the needy being seen as incidental.

Duty possession schemes

These are court-based free housing advice and representation schemes that aim to provide last minute help to homeowners and tenants who are facing repossession of their homes. They exist in around one-third of county courts. The growth of these schemes has been rapid, but ad hoc. They are normally staffed by local advice agencies and/or local solicitors, on a voluntary basis. There is no other provision because, even if the client qualifies for public funding (under the limited Legal Help scheme) this may not cover representation at court and they will not obtain a full legal aid certificate covering them for representation unless there is an arguable defence. In the majority of cases, arrears are owed, and there is no complete defence – it is usually more of a mitigating role, seeking to argue reasonableness, i.e. that it would be reasonable for the court to make a suspended possession order, on specific terms of rent plus a sum towards arrears, rather than an absolute possession order whereby the tenant has to leave their home, normally within 28 days.

4 [2003] *Legal Action* January, 9.

How the scheme arose in Newcastle

In 2000/2001 the local Community Legal Service sought bids for a court-based representation scheme. However, local housing advice groups and the few solicitors with housing franchises were concerned that the contract would have onerous requirements, in terms of attendance at court and administration, for potentially very small financial return. Instead of this formalised scheme, local housing groups came together to provide their own rota of cover for the court dates, which are around once a fortnight. There was no direct funding for this – and the only financial incentive was the possibility of picking up clients who might then be eligible for limited funding under the Legal Help scheme. The scheme has run successfully since then, and a rota is circulated by e-mail well in advance of the court hearing dates, requesting volunteers. These volunteers are a mix of local law centres, citizens' advice bureaux, and solicitors. Interestingly the local branch of Shelter, a national housing charity, declined to take part.

At the Newcastle upon Tyne County Court scheme, two rooms are normally set aside for interviewing, as normally two advisers attend and the court clerk asks every defendant whether they need free legal advice, in which case they are pointed in the direction of the advisers. In each list, which is a morning session running from 10 a.m. to 1 p.m., there will be between 60 and 90 cases listed, out of which only around a quarter are likely to attend, the rest being dealt with by the court on the papers alone. Advisors normally deal with around 8 cases each, interviewing and then representing the client before the court.

How the Student Law Office is involved

The Student Law Office has a Community Legal Service Specialist Quality Mark in Housing Law. This recognises that a high standard of advice is available, as well as allowing the Student Law Office to offer Legal Help funding to those who qualify financially.⁵

There are in excess of 120 students working within the Law Office. The students are grouped into "firms" of about six students, with each "firm" supervised by a practitioner member of staff. The Law Office takes on a huge range of different kinds of work, but two of the firms specialise in Housing Law. The students in these firms may or may not have covered Housing Law as an academic topic prior to starting in the Law Office, but the firms are supervised by staff with experience in housing law. These staff take part in the court duty representation scheme rota and during the academic year, are accompanied by small groups of these students.

Student involvement

Initially, the students attend essentially as observers. Normally, only one or two student will attend with their supervisor. The court will normally allow students to sit in the public area if there are no objections from the parties. However, over the two years since this began, student involvement has increased to a level where this year, students carried out interviewing and advocacy for the first time, under close supervision.

5 *In theory it also means that the Law Office can get paid for some of the work it does on these cases. In practice the number of claims for payment are small, and are outweighed by the sheer cost of administering*

the scheme. However the fact of having the Quality Marks is an indication that the Law Office can offer a high quality legal service – which is, for us, an important message to the public.

Lawyering in a microcosm

Attending possession hearings as part of the duty advisers scheme enables students to see many aspects of lawyering in a microcosm; it is a fast learning curve – clients are introduced to the adviser, and they are interviewed. This can be demanding, as clients often have little perception of the relevant parts of their case. The interview has to be closely controlled to focus in on the relevant and not to waste time on the irrelevant – as there is no time. The court will rarely allow additional time for instructions once the case has been called. Any paperwork the client has managed to bring has to be scanned, digested and a decision made with the client about what realistic outcome there may be. Brief representations are put together, to argue either for an adjournment, a suspended possession order, or for the case to be dismissed depending on the circumstances. Sometimes it may be a case where we are suggesting that there is a defence (these are usually where there have been allegations of anti social behaviour breaching the tenancy) in which case directions need to be considered.

The court setting is a formal courtroom, not the small informal chambers. If it is the local council as landlord, there is no opportunity to discuss or agree anything about the cases at the court door, as the council's representative will remain in the court throughout. If it is a mixed list including housing associations, then there may be some opportunity for negotiation at the court door. After the hearing, the client is advised of the outcome, and a letter confirming this is sent out to them. We will also refer clients on to obtain debt or benefits advice where appropriate.

Skills developed?

The intellectual skills developed in this environment are manifold – the ability to distinguish the relevant from the irrelevant, to identify issues through appropriate questioning, the ability to construct and present an appropriate argument. However, the wider learning these hearings encompass cannot be undervalued. 'An understanding of the law is worth very little unless that understanding can be used respond to people's needs'⁶ Students come into contact with people from very different backgrounds, often struggling with multiple social problems relating to unemployment, illness, and frequently the frustration of an unresponsive benefits system. They soon realise that their learning to date has been only the first step towards becoming an effective lawyer. They begin to appreciate the complexity of their role – as suggested by Professor Hugh Brayne, 'good judges and good lawyers use a combination of legal knowledge, analytical powers, insights experience and understanding of human nature to make difficult decisions in a practical and wise way.'⁷

Selecting cases – sink or swim?

The prospect of someone being ordered to leave his or her home within 28 days is daunting. Normally supervisors will represent those clients at high risk of being repossessed before the court, as this is placing considerable responsibility on the shoulders of students in this situation. This will however depend on the individual student and the amount of time we have had to

6 "CLE: Bridging the Gap between study and legal practice" Jessica Kaczmarek and Jacquie Mangan – (2002) 2 *International Journal of Clinical Legal Education* 86.

7 Hugh Brayne, 'A Case for getting Law Students Engaged in the Real Thing – the Challenge to the Sabre Tooth Curriculum' (2000) 34 *The Law Teacher* 17.

prepare. In other cases, if the level of arrears is low and there are good prospects of an adjournment on terms of rent plus a sum towards arrears, or a suspended order, the supervisor will assess the ability of the individual student, and decide if they should represent, discussing it with the student. I will normally sit beside the student in court to enable me to assist them if required. There is little time for discussion immediately after the hearing, but once the list is finished, we will discuss the cases we have dealt with. I will also ask the students to reflect on the experience at the next meeting with their firm.

In some cases, clients will contact us before the hearing date, and in this situation, students have more time to prepare, and to get to grips with the issues. They often have to act quickly to gather information from the clients, try to negotiate with the landlord and chase up outstanding housing benefit to reduce outstanding arrears.

A case study – success stories

Mrs S had lived in her council owned home for nearly 30 years. Her adult son who had been living with her intermittently was convicted of a burglary offence and a minor drugs offence in the local area, and received a short jail sentence. The council, treating this as a breach of her tenancy, sought to evict Mrs S, who was in poor health, and who was adamant that her son no longer lived with or even visited her. The council offered to agree a consent order based on a lifelong exclusion of the son from visiting the property. This was clearly unreasonable, and the SLO student eventually negotiated an 11th hour consent order, based on a short period of exclusion of the son. The client represented in court by an SLO student also argued successfully and vigorously against a costs order of over £1000 sought by the council, reducing this to the court issue fee of £130 only.

In this case, the student met the client well before the hearing, took detailed instructions, carried out detailed research, negotiated with the very difficult opponent, redrafted the proposed consent order, attended the possession day hearing and explained the amendments before the court and argued against costs – therefore applying all five DRAIN skills (drafting, research, advocacy, interviewing and negotiation) on which much emphasis has been placed as a cornerstone of the Legal Practice Course. This student also experienced all the difficulties of assessing clients for legal aid and applying for a representation order from the Community Legal Services – an eye-opener to someone unused to the vagaries of public funding.

Typical cases where students have assisted on the day have included refugees from the Ivory Coast who have been granted asylum but struggled to deal with the benefits system; tenants with learning difficulties who have been unable to interpret the correspondence warning them of the arrears problem; as well as those tenants who simply struggle to make ends meet and fail to prioritise their debts. A common pattern is that, as tenants move in and out of employment, the benefits system does not keep step, leading to a build up of arrears.

Students' perspective

All students, but perhaps particularly Bar students, have grasped this opportunity enthusiastically. The Law Office is compulsory for Bar and solicitor students on our four year Exempting Law degree, and this year for the first time we have allowed the LPC and freestanding Bar students to join the SLO.⁸

'It was a really good experience especially for us on the BVC course. It gave me a taste of what working life/pupillage would be...it can be quite stressful trying to retrieve all the relevant information so quickly. All in all, it was a fantastic experience.'

'I found the experience really exhilarating all three times. It is a very challenging forum to work in ...the difficulties are made up for by the thrill of representing real people in a real court ...fortunately I have never had a case where no absolute possession order was made, as I think I would have found this quite difficult to handle.'

'One thing which I did learn very quickly was to avoid confrontation with the Judge as much as possible. One judge in particular was extremely combative at times and it was very difficult to resist getting into an argument with him. I had to learn some fast lessons in diplomacy and how to take hearings in my stride and not to take them personally. If I had a bad hearing early in the day, I could not let that interfere with the conduct of the rest of the hearings I was involved in that day.'

What is it about the court duty possession days that make this a special experience?

Repetition:

There are a number of cases in short succession – so students can see the supervisor deal with one case, then if the supervisor feels it appropriate, the student can deal with the next client under the watchful eye of the supervisor, and hopefully build some confidence in their ability to deal with the court situation.

A mentoring and collaborative relationship – not hierarchical:

It is stressful – one cannot predict what might happen once in the courtroom – but I feel this changes the normal teaching dynamics where students are looking to please their teacher so that they get a high mark – here one huge step made by students is the realisation that this is not all about them – this is about what the skills they have learnt can do to help solve someone's problem. They will then work with their supervisor who acts in a mentoring role rather than in a hierarchical 'teacher is all knowing' role. This transition for the student, in stepping from a self-centred role to an enabling, advising role is almost palpable to the supervisor, and it is very noticeable when with some students, the transition never seems to happen – so that they stay in that hinterland where the acquisition of knowledge seems enough, and they never seem to take responsibility for the

8 The exempting law degree is so-called because, although an undergraduate law degree, it incorporates the requirements of the one year vocational-stage graduate programmes – and so exempts the students from further post-graduate study, enabling them to enter straight into the work-based training stages. The University also provides the free-standing vocational

courses, the Legal Practice Course (LPC) and Bar Vocational Course (BVC): these are primarily taken by students who have taken an undergraduate law degree elsewhere and so are not exempted, or who have taken the law conversion course (CPE) having originally taken a degree in a non-Law subject.

case. However, the demands of the possession day are such that it can make it happen for many of the students – they can achieve that synthesis and analysis required to ‘take responsibility for the resolution of a potentially dynamic problem’.⁹

Disadvantages?

Limited availability:

The numbers of students able to participate is small – I took around 18 students over around 10 hearing dates – one Bar student enjoyed it so much he filled in for anyone at short notice and as a result attended on three court dates, representing around 8 clients in total.

Staff resourcing:

The work is intensive on staff time – the morning lasts around three hours, (but has on occasions lasted longer) of non-stop interviewing and advocacy, when only three students at most can accompany a supervisor. It is therefore very staff intensive.

Can all students cope?

It is important that a judgement is made by the supervisor. If there is doubt that the student will be able to deal effectively with the situation before the court, the client must come first – we can’t allow clients to be sacrificed on the altar of student learning! Usually, this is discussed with the student, and the supervisor will then represent. Whilst the hearings don’t always run according to plan, it is very rare to have a situation where a client has been worse off as a result of being represented by a student, and in many cases, we have helped them to avoid a suspended order or worse.

The Future

Feedback from students helps to inform and improve the experience for future students. Work to build up a picture of the benefits perceived by students has begun – the data collected at present through questionnaires is too small to provide a statistical data at present but the idea is to look at student experiences, and also to seek the views and feedback of the District Judges before whom the supervisors and the students appear. In addition, feedback from clients would provide an insight into their experience of the service offered, and a suitable questionnaire is being prepared.

The teacher hat or the solicitor hat?

I am motivated by a combination of my own wish to provide a really worthwhile service to a sector of the population who otherwise would be left to fend for themselves in an intimidating court environment, and my belief that there are fantastic learning opportunities for students, who have to be able to synthesise the academic intellectual skills they have learnt with the practical requirements of the often stressful situation. It is hard to place a value on the insights they gain into another world – one of poverty, social deprivation and powerlessness.

⁹ A. Boon, “Making Good Lawyers – Challenges to Vocational Legal Education”, Opening address,

UKCLE Vocational Teachers Forum, 26 September 2001 at <http://www.ukcle.ac.uk/resources/utf/boon.html>.

Students have expressed amazement at the human tragedy which unfolds in the telling of how the client, perhaps suffering an injury or loss of an elderly parent slips into a depression, loses their job and falls into the benefit system, where it is only too easy to fail to fill the necessary forms in, leading to arrears and inevitably the threat of eviction. As part of their assessment, students prepare a portfolio reflecting on the various aspects of their Student Law Office work, and their comments and observations on their experiences in the possession courts are enlightening. In addition, students prepare an essay of 3500 words and a number have tackled topics related to and inspired by these experiences – one student (the one who dealt with the court case referred to earlier where a draconian order excluding the tenant’s son was sought) explored the topic of the role of alternative dispute resolution in housing and in particular in repossession cases.

There are underlying concerns, and frustration, at the failure to properly fund legal services to provide advice and representation to those who need it. I am saddened by the falling away of the provisions of legal aid in many areas. Expecting clients to represent themselves in a formal courtroom environment where their home is at stake can seem barbaric, particularly those who suffer mental illness, or where English is their second language. I do worry that there is an increasing reliance on pro bono work as a replacement for a properly funded system. The question has been posed by the Monash clinicians, Susan Campbell and Alan Ray¹⁰: Should we be filling the gap in public legal aid and letting the government off the hook? However, the possession days offer the combination of the opportunity to do good – to do some really worthwhile pro bono work, at the same time as offering students a unique opportunity for learning essential practical skills, and for many students, it may instil a sense of responsibility to assist not just the privileged and wealthy, but the less advantaged.

However, in the final analysis, our current focus at Northumbria is on the learning opportunities – the chance to consider the law in context, what Richard Grimes has described as a holistic approach. Without doubt, there is the opportunity to move towards a deeper learning approach, based on the understanding and not just the acquisition of knowledge. To see students take these steps towards deeper learning before your very eyes is something I see as a privilege.

¹⁰ Susan Campbell and Alan Ray, “Specialist Clinical Legal Education: An Australian Model” (2003) 3 *International Journal of Clinical Legal Education* 67.