

Do Lawyers Do Any Good

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Introduction

This paper represents some very early fruits of current research. This is research which until now was simply not possible to carry out in any jurisdiction - anywhere in the world. It is therefore quite exciting to consider what it might be telling us. You will probably be surprised that the questions that are being asked have not been asked or rather answered before. Answers, such as they are, which are proposed in this paper are proposed as a set of conjectures based on this newly appearing data.

So, what I have to say will be both earth shatteringly new and completely unimportant all at the same time. Earth shatteringly new because it has not been done before and completely unimportant because until it has been done again and properly reflected upon, it would not be right to draw any lasting conclusions from what I say.

What Do People Really Think of Lawyers?

Last year a MORI survey showed, surprisingly perhaps, that most people actually have a positive view of lawyers, especially the better informed and those who use their services.

But How Do They Compare to Others?

But, although people's attitudes towards lawyers are positive when they are looked at in isolation, in comparison with other professions, lawyers are not looked upon favourably. This same survey asked respondents how satisfied or dissatisfied they were with the way certain types of people do their jobs. Nurses topped the list, with net approval of 94%. Lawyers meanwhile came third from the bottom, with a net approval of 38%. The only professionals people were less happy with were politicians.

This Research

The possibility for carrying out this research comes about because of:

- A statutory instrument passed to enable researchers to look at lawyers' files which are otherwise confidential and covered by "privilege" from disclosure.
- The new system for organising publicly funded legal aid work called "franchising" or "contracting".
- The undermining of professional confidentiality and privilege by the Legal Services Commission within that system.
- The "breaking of the backs" of the lawyers.
- The new system of peer review as a part of the methodology for assuring quality within contracting.
- Benchmarking within peer review itself.
- The Public Defender Scotland Office and the Public Defender offices in England and Wales plus the statutory/Parliamentary promises to research the pilot schemes.
- The development of a new methodology for consideration of competence of legal professionals, and
- The bringing together of a specialist research team of Professor Lee Bridges, University of Warwick, Professor Ed Cape, University of the West of England, Professor Alan Paterson, University of Strathclyde, Professor Richard Moorhead, Cardiff Law School and myself to be involved in this project.

Public Defenders and Private Practice Criminal Defenders

In the data which I intend to report and consider in this paper you will see a comparison being made by the peer reviewers of the work of Public Defender lawyers and lawyers in private practice. The

purpose of the research undertaken has been to compare a new possible system for the provision of criminal defence services in England and Wales. It involves a pilot in some six regional offices for staff salaried services known as “Public Defenders” in some other countries including the United States.

In the research, the research team have compared the work of Public Defenders with the work of private practice criminal defence lawyers in each of the same towns and regional areas in which the public defenders practice. This is organised in order to be sure that no regional differences would affect the comparison as particular courts or particular approaches to criminal justice do vary throughout the country. The peer reviewers would not necessarily know of the differences in each area, since they are likely to come from different areas from those they review. However, the area/situational or regional effect would be true for both the Public Defender Office and for the private practice criminal lawyers in each area.

For all purposes in terms of my major argument today I have lumped together both forms of practice and funding. I am looking at lawyers here and not at different types of lawyers or different types of funding for lawyers. It is therefore appropriate to place these different data sets together. Additionally, we have found in interrogating the data that the differences between different regions and between different firms and offices are greater than the differences between our two forms of legal service delivery. Therefore, statistically also there is no problem in putting them together.

In beginning to answer the question posed “Do Lawyers do any Good?” I am here only looking at criminal defence lawyers. I say “only” because there are of course also criminal prosecution lawyers, there are also lawyers who work in civil cases of litigation against and for landlords on behalf of employers and on behalf of employees, on behalf of companies, buying and selling land, advising companies etc. However, I would say that in the mind of the public the business of the criminal defence lawyer is the archetype of legal work. Criminal defence lawyers stand in between the power of the State and the individual. The stakes are high. Clients can go to prison or walk free. Rapists, child molesters and murderers might be punished or not. Individual people such as you or me could find themselves mistakenly at the mercy of an unforgiving accusation and circumstances can produce severe miscarriages of justice either way. So the business of the criminal lawyer is, and is seen to be, of the utmost importance socially, politically and philosophically.

Images of the lawyer in the public imagination, in books, the media and films tends to over emphasise criminal defence lawyering (in the rather inelegant American term) as classic lawyering. most of the lawyers that the public can call to mind are fictional, like Atticus Finch in *To Kill a Mockingbird*, Kavanagh QC or Ally McBeal.

In an earlier paper published in 1995 in *Current Legal Problems* entitled “Of Superheroes and Slaves: Images and Work of the Legal Professional” I noted four prior images in the literature of lawyers: the high priest or priestess delivering law ex cathedra from on top of a pedestal, the hired gun who came into town, sorted out the problems and fought for the right, the family GP who looked after the interests and woes of a nuclear family throughout its life and the lawyer as business person. Viewed through the lens of the sociologists of law and rather “simply put, Weberian theorists who operate closure, controlling the market and the supply of new lawyers, conform through the adapted models which Larson and Abel give to them to the ‘business person’ with a touch of ‘high priest’ overtones.” On the other side of the battle in the sociological literature, “Durkheimian theorists come closer to a general practice doctor through their structural functionalist approach with some hired gun overtones”. I noted before launching into my new images of superhero and slave (which are just to tease you and not for today) that “analogising inference of an image provides some intellectual satisfaction, often some amusement and has a descriptive force which is not context bound in the same way as the subject is.” I will not return to the images today although some of them are quite useful in considering the information I will produce. But those images serve as a brief introduction to the literature. I would like to quote further Rick Abel in his book on American lawyers “Historical and sociological primary and secondary sources offer rich accounts of who lawyers are, how they are trained and certified, the structures within which they practice and the rules that govern them, how much they earn, how they organise themselves into professional associations, and what those associations do. With some notable exceptions, however, most observers tell us little more about what lawyers do and how they allocate their time among different subject matters”. We will know a little bit more about what Abel asks for by the end of this session.

Some words on the concept of what a good lawyer might do occur in a 1996 article, “Why are there so few Black Lawyers?” by David Wilkins from Harvard and Gulati: “In order to render sound advice to clients or make persuasive arguments in court, a lawyer must have a firm command of the relevant substantive and procedural doctrines. But an effective lawyer must also be a good judge of character, a quick and accurate calculator of costs and benefits, an empathetic listener and a

thorough, balanced, and calm deliberator, who nevertheless does not lose sight of the important role that passion plays in human affairs... she must also be a team player, a salesperson, and a manager of complex personalities, events and institutions.”

There is also some literature on criminal defence including a classic “The Practice of Law as a Confidence Game by Blumberg and in this country “Standing Accused” by McConville, Hodgson, Bridges and Pavlovic. To an extent they note many of the issues I will address today.

This paper

My intentions in this paper are:

- To demonstrate to this audience some of my areas of research work.
- To expose some very early and tentative findings in the form of conjecture.
- To discuss issues to do with professional competence and meaning of competence.
- To discuss issues related to the nature of lawyers, the law and lawyering.

So that takes us back to our title. “Do Lawyers do any Good”? Tony Bell’s immediate response, perhaps similar to your own, was “Some do rather well”. Of course, the ones we are looking at are not likely to be the ones who do “rather well”. In fact legal aid lawyers earn a great deal less than their commercial lawyer counterparts and part of their great annoyance is the small amount that legal aid pays them for such responsible work.

For the purpose of answering the question I am going to draw on a number of tables out of our, as yet, draft unpublished research from one chapter dealing with the peer review of the competence of the legal work seen.

Peer Review

This peer review was carried out under a methodology developed at the Institute of Advanced Legal Studies aiming to consider the quality of legal work. It is important to notice that it is a file based review. In other words it is the work of the lawyer as evidenced in the files in terms of inputs,

structure, process and outcomes. But it does not look at the way the lawyers behave during the few moments that they are in front of a court. It is not because we do not believe that it would be possible to assess lawyers on that basis – we do believe that that is an important element also of their work. However, it turns out to be practically impossible to carry out such an assessment because the events of advocacy are extremely short and the actual dates and times of appointments and involvement of lawyers concerned are completely unpredictable. However, what they do and the outcome of what they do has to be evident on file and therefore a review of the files by their peers should provide an adequate set of data for measuring competence.

Table 23: How effective was the work done in achieving the client's (reasonable) objectives?

		Excellent	Competence Plus	Threshold Competent	Not Competent	Very Poor	N/A	Insufficient Information	Total N	Mann Whitney
Birmingham	PDSO	0	62.0	32.0	4.0	0	0	2.0	50	0.448
	PP	8.2	57.1	26.5	6.1	0	0	2.0	49	
Cheltenham	PDSO	2.0	53.1	40.7	2.0	0	0	2.0	49	0.079
	PP	2.1	33.3	62.5	0	0	0	2.1	48	
Liverpool	PDSO	2.3	48.8	41.9	7.0	0	0	0	43	0.946
	PP	4.1	36.7	44.9	2.0	0	0	12.2	49	
Middlesbrough**	PDSO	20.4	46.9	26.5	0	4.1	0	2.0	49	0.001
	PP	0	38.0	44.0	12.0	0	0	6.0	50	
Pontypridd**	PDSO	4.3	60.9	32.6	0	0	0	2.2	46	0.0001
	PP	4.2	14.6	56.3	14.6	0	0	10.4	48	
Swansea**	PDSO	2.0	16.0	62.0	16.0	4.0	0	0	50	0.0001
	PP	8.2	40.8	44.9	6.1	0	0	0	49	
All*	PDSO	5.2	47.7	39.4	4.9	1.4	0	1.4	287	0.033
	PP	4.4	36.9	46.4	6.8	0	0	5.5	293	

Table 23 of our chapter asks how effective was the work done in achieving the clients' reasonable objectives. You will see here that 80% of the work is either at the level of competence or competence plus. A word about the gradings or levels. The highest level is excellence. The midpoint or passing level is a 3 known as "threshold competence". Failing levels are at 4 and 5 and in between excellence and threshold competence is "Competence Plus".

Therefore any gradings at 3, 1 or 2 are "passing" but a grading at "3" is at a minimum level of acceptable competence.

Table 23 therefore confirms that in terms of effectiveness of the work done approximately 83% is above the passing level.

Different Stages in Criminal Defence Work

It was convenient to examine the performance of defence lawyers at different stages in the process of criminal.

Police station work can begin before a suspect has even been charged with an offence. Key issues at this stage might include:

- Obtaining information and instructions from a suspect
- Giving advice
- Attending police interviews
- Gathering information from police and, possibly, prosecutors; and
- Representations as to charge and bail.

The magistrates' courts are a key part of the criminal justice system – virtually all criminal cases start in a magistrates' court and over 95% of cases are also completed here. In addition, magistrates' courts deal with many civil cases, mostly family matters plus liquor licensing and betting and gaming work. Cases in the magistrates' courts are usually heard by panels of three lay magistrates (Justices of the Peace), of which there are around 30,000 in England and Wales.

The Crown Court sits in 78 locations in England and Wales and deals with more serious criminal cases transferred from the magistrates' court such as:

- Murder
- Rape
- Robbery

It also hears appeals against decisions made in the magistrates' courts and deals with cases sent from magistrates' courts for sentence.

Process

Table 23 looked at effectiveness of the work done in achieving the clients' "reasonable" objectives. In Tables 2-4 the peer reviewers summarised their view of the investigation stage of criminal work

in Table 2 – that is at the police station, at the magistrate’s court stage in Table 3 and at the Crown Court stage in Table 4.

I am concentrating for the moment on these overall marks but it should be noted that these are not simply “gestalt” assessments – they are based on a set of objective criteria which the peer reviewers go through and on which I am not reporting here. These include sections looking at the information on the files reviewed, the communication of the lawyer with the client and other parties in the process, the lawyers’ ability to gather information and necessary facts from different parties, the quality of the advice given and the quality of the work carried out on behalf of the client defendant.

Table 2: Overall mark – at Investigation Stage (%)

		Excellent	Competent Plus	Threshold Competent	Not Competent	Very Poor	N/A	Insufficient Information	Total N	Mann Whitney
Birmingham	PDSO	0	25.5	14.9	0	2.1	55.3	2.1	47	0.564
	PP	2.1	20.8	18.8	0	2.1	43.8	12.5	48	
Cheltenham	PDSO	0	43.8	10.4	0	0	43.8	2.1	48	0.131
	PP	2.0	10.2	32.7	0	6.1	42.9	6.1	49	
Liverpool	PDSO	4.0	24.0	14.0	4.0	0	54.0	0	50	0.432
	PP	0	20.4	10.2	2.0	0	57.1	0	49	
Middlesbrough	PDSO	0	34.0	10.6	2.1	2.1	51.1	0	47	0.575
	PP	2.0	16.0	18.0	10.0	0	48.0	6.0	50	
Pontypridd	PDSO	8.3	27.1	14.6	0	0	45.8	4.2	48	0.451
	PP	0	20.8	25.0	8.3	0	43.8	2.1	48	
Swansea**	PDSO	0	4.1	36.7	4.1	0	40.8	14.3	49	0.005
	PP	6.1	28.6	26.5	6.1	0	28.6	4.1	49	
All	PDSO	2.1	26.3	17.0	1.7	0.7	47.0	3.7	289	0.085
	PP	2.0	19.5	21.9	5.5	0.3	43.1	6.7	293	

Table 3: Overall Mark – At Magistrates Courts Stage

		Excellent	Competent Plus	Threshold Competent	Not Competent	Very Poor	N/A	Insufficient Information	Total N	Mann Whitney
Birmingham	PDSO	0	42.6	40.4	6.4	0	8.5	10.2	47	0.783
	PP	2.0	46.9	28.6	6.1	2.0	2.1	4.1	49	
Cheltenham	PDSO	0	41.7	29.1	6.3	0	10.4	12.5	48	0.966
	PP	2.0	24.5	59.2	8.2	0	2.0	4.1	49	
Liverpool	PDSO	0	24.0	58.0	12.0	2.0	4.0	0	50	0.940
	PP	2.0	30.6	40.8	8.2	0	14.3	4.1	49	
Middlesbrough**	PDSO	10.6	42.6	27.7	10.6	4.3	4.3	0	47	0.027
	PP	0	26.0	54.0	14.0	0	0	6.0	50	
Pontypridd**	PDSO	0	47.9	41.7	8.3	0	0	2.1	48	0.010
	PP	0	20.8	62.5	12.5	0	2.1	2.1	48	
Swansea**	PDSO	2.0	8.2	73.5	6.1	0	10.2	0	49	0.015
	PP	6.1	32.7	44.9	12.2	0	0	2	49	
All	PDSO	2.1	34.3	45.4	8.3	1.0	6.2	2.8	289	0.424
	PP	2.0	30.3	48.3	10.2	0.3	4.8	4.1	294	

Table 4: Overall Mark: At Crown Court Stage

		Excellent	Competence Plus	Threshold Competent	Not Competent	Very Poor	N/A	Insufficient Information	Total N	Mann Whitney
Birmingham	PDSO	0	6.4	34.0	8.5	2.1	48.9	0	47	0.134
	PP	4.9	29.3	9.8	12.2	0	41.5	2.4	41	
Cheltenham	PDSO	2.2	23.9	19.6	2.2	0	50.0	2.2	46	0.367
	PP	0	16.1	41.9	16.1	0	25.8	0	31	
Liverpool	PDSO	2.7	40.5	21.6	0	0	35.1	0	37	0.054
	PP	2.3	18.2	13.6	20.5	0	43.2	2.3	44	
Middlesbrough	PDSO	11.6	23.3	14.0	4.7	4.7	41.9	0	43	0.135
	PP	0	20.5	11.4	11.4	2.3	50.0	4.5	44	
Pontypridd	PDSO	0	10.4	29.2	4.2	0	52.1	4.2	48	0.895
	PP	0	8.5	23.4	17.0	4.3	44.7	2.1	47	
Swansea	PDSO	2.1	10.6	23.4	14.9	4.3	44.7	0	47	0.504
	PP	4.5	22.7	15.9	9.1	0	45.5	2.3	44	
All	PDSO	3.0	18.3	23.9	6.0	1.8	45.9	1.1	268	0.971
	PP	2.0	19.1	18.4	16.4	0.8	42.6	2.4	251	

It can be noted that in respect of the investigation stage – Table 2 some 80% of the legal work done was considered to be over the passing level, as far as the Magistrate’s Court stage is concerned the amount is similar and a similar proportion of passing results appear at the Crown Court stage in Table 4. However, it should be noted that there is a clear division between work at the threshold competent level (approximately 40%) and work at competence plus or excellent level which is also approximately 40% of the results shown.

This then is the position in relation to the assessment of the way in which the work was carried out.

Outcomes

But we also asked the peer reviewers to consider the outcomes of the work carried out by the lawyers. This was divided into a number of types of outcome. The peer reviewers considered how well the lawyers did in relation to bail decisions made by the Court, mode or venue of trial, the process undertaken, the conviction of the defendant and the sentence awarded by the Court.

Table 24: What was the impact of the lawyer on bail?

		Better than Expected	As Expected	Worse than expected	N/A	Insufficient Information	N	Mann Whitney
Birmingham	PDSO	0	66.0	0	34.0	0	50	0.101
	PP	6.1	71.4	0	18.4	4.1	49	
Cheltenham	PDSO	0	81.6	0	18.4	0	49	0.295
	PP	6.1	69.4	2.0	20.4	2.0	49	
Liverpool	PDSO	12.0	68.0	0	20.0	0	50	0.942
	PP	10.0	54.0	0	26.0	10.0	50	
Middlesbrough	PDSO	12.2	59.2	0	28.6	0	49	1.000
	PP	14.0	56.0	2.0	22.0	6.0	50	
Pontypridd	PDSO	6.5	60.9	0	32.6	0	46	0.416
	PP	14.6	75.0	0	10.4	0	48	
Swansea	PDSO	4.0	62.0	2.0	26.0	6.0	50	0.360
	PP	8.2	79.6	0	10.2	2.0	49	
All	PDSO	5.8	66.3	0.3	26.5	18.0	294	0.156
	PP	9.8	67.5	0.7	1.0	4.1	295	

Table 25: What was the impact of the lawyer on mode/venue

		Better than expected	As Expected	Worse than expected	N/A	Insufficient Information	N	Mann Whitney
Birmingham	PDSO	0	94.0	2.0	4.0	0	50	0.862
	PP	2.0	65.3	4.1	20.4	8.2	49	
Cheltenham	PDSO	0	69.4	0	30.6	0	49	1.000
	PP	0	67.3	0	32.7	0	49	
Liverpool*	PDSO	0	52.0	6.0	40.0	2.0	50	0.030
	PP	2.0	76.0	0	18.0	4.0	50	
Middlesbrough	PDSO	4.1	71.4	2.0	20.4	2.0	49	0.630
	PP	2.0	84.0	2.0	10.0	2.0	50	
Pontypridd	PDSO	0	95.7	4.3	0	0	46	0.426
	PP	2.1	58.3	2.1	37.5	0	48	
Swansea	PDSO	2.0	48.0	2.0	44.0	4.0	50	0.421
	PP	4.1	75.5	0	18.4	2.0	49	
All	PDSO	1.0	71.4	2.7	23.5	1.4	294	0.127
	PP	2.0	71.2	1.4	22.7	2.7	295	

Table 26: What was the impact of the lawyer on the process?

		Better than expected	As Expected	Worse than expected	N/A	Insufficient Information	N	Mann Whitney
Birmingham	PDSO	0	94.0	2.0	4.0	0	50	0.088
	PP	14.3	75.5	0	6.1	4.1	49	
Cheltenham	PDSO	2.0	95.5	0	2.0	0	49	0.702
	PP	10/2	85.7	0	2.0	2.0	49	
Liverpool	PDSO	6.0	88.0	4.0	0	2.0	50	0.055
	PP	4.0	90.0	0	2.0	4.0	50	
Middlesbrough	PDSO	12.2	83.7	2.0	0	2.0	49	1.000
	PP	2.0	90.0	4.0	0	4.0	50	
Pontypridd	PDSO	4.3	93.5	2.2	0	0	46	0.317
	PP	6.3	87.5	4.2	2.1	0	48	
Swansea	PDSO	4.0	92.0	2.0	2.0	0	50	0.317
	PP	4.1	87.8	8.2	0	0	49	
All	PDSO	4.8	91.2	2.0	1.4	0.7	294	0.529
	PP	6.8	86.1	4.0	2.0	2.4	295	

Table 27: What was the impact of the lawyer on what convicted of/or not

		Better than expected	As Expected	Worse than expected	N/A	Insufficient Information	N	Mann Whitney
Birmingham	PDSO	8.0	72.0	2.0	16.0	2.0	50	0.155
	PP	19.1	63.8	2.1	4.3	10.6	47	
Cheltenham	PDSO	8.3	77.1	2.1	2.1	10.4	48	0.168
	PP	18.4	65.3	2.0	4.1	10.2	49	
Liverpool	PDSO	20.8	64.6	0	12.5	2.1	48	0.951
	PP	18.4	55.1	0	12.2	14.3	49	
Middlesbrough	PDSO	22.9	47.9	4.2	22.9	2.1	48	0.169
	PP	10.0	68.0	0	14.0	8.0	50	
Pontypridd	PDSO	10.9	82.6	0	4.3	2.2	46	0.373
	PP	6.5	76.1	2.2	6.5	8.7	46	
Swansea	PDSO	14.3	75.5	4.1	6.1	0	49	0.662
	PP	16.3	77.6	4.1	4.1	0	49	
All	PDSO	14.2	69.9	2.1	10.7	3.1	289	0.605
	PP	14.8	67.6	1.4	7.6	8.6	290	

Table 28: What was the impact of the lawyer on sentence?

		Better than expected	As Expected	Worse than expected	N/A	Insufficient Information	N	Mann Whitney
Birmingham**	PDSO	8.0	70.0	4.0	18.0	0	50	0.004
	PP	28.6	20.4	6.1	36.7	8.2	49	
Cheltenham**	PDSO	12.2	59.2	0	24.5	4.1	49	0.002
	PP	40.8	36.7	0	18.4	4.1	49	
Liverpool	PDSO	30.0	36.0	2.0	30.0	2.0	50	0.270
	PP	20.4	44.0	2.0	18.4	14.3	49	
Middlesbrough	PDSO	32.7	36.7	2.0	28.6	0	49	0.246
	PP	22.0	46.0	2.0	24.0	6.0	50	
Pontypridd*	PDSO	26.1	43.5	2.2	28.3	0	46	0.017
	PP	8.5	62.5	4.2	19.1	4.3	47	
Swansea	PDSO	30.6	44.0	2.0	22.4	0	49	0.887
	PP	28.6	44.9	2.0	20.4	4.1	49	
All	PDSO	23.2	48.5	2.0	25.3	1.0	293	0.515
	PP	24.9	42.7	2.7	22.9	6.8	293	

In relation to each of these a different form of question was asked of the peer reviewers. Was the outcome “better than expected”, “as expected” or “worse than expected”? The figures are interesting. Approximately 67% of bail outcomes were “as expected”. Approximately 72% of mode/venue outcomes were “as expected”. Approximately 88% of process outcomes were “as expected”. Conviction and sentence are a little different. 69% of conviction outcomes were “as expected” but 14% were better than expected. Considerable conformity is shown between the Public Defender Office and private practice. As far as sentence is concerned 46% were as expected but 24% were better than expected. Once again there are surprisingly similar results for both Public Defenders and private practice.

Another question was asked slightly differently which will also help us answer the title of this seminar. The peer reviewers were asked if there was any actual prejudice to a client in the work done on behalf of them.

Table 29: Was the client prejudiced in any way by the work done or not done?

		Yes	No	N	Chi Square
Birmingham	PDSO	2.0	98.0	49	0.297
	PP	6.1	93.8	49	
Cheltenham	PDSO	0	100	49	N/A
	PP	0	100	47	
Liverpool	PDSO	4.1	95.9	49	0.297
	PP	9.5	90.5	42	
Middlesbrough	PDSO	14.6	85.4	48	0.513
	PP	10.2	89.8	49	
Pontypridd	PDSO	2.2	97.8	45	0.544
	PP	0	95.5	45	
Swansea**	PDSO	25.0	75.0	48	0.001
	PP	2.0	98.0	49	
All	PDSO	8.0	92.0	288	0.214
	PP	5.3	94.7	281	

As one would hope in 93% of the cases the answer was “no” but in 7% of the cases the answer was that there had been actual prejudice. Sometimes the lawyers do some “bad”.

So, do lawyers do any good? Are they worth the enormous cost of the criminal legal aid payments which per annum last year cost the taxpayer £1,179,000,000?

It is not just the efficiency of lawyers which must be considered when questioning the legitimacy of criminal legal aid. Sometimes the legal aid system brings itself into question. £40,000-a-week Bolton Wanderers striker, El-Hadji Diouf from Senegal, was accused of spitting at a Middlesbrough fan. He successfully claimed legal aid to defend the charge.

The decision has sparked fury amongst MPs of all parties, who said it was an abuse of the legal aid system. **[CLICK]**

Bob Russell, MP for Colchester and the Liberal Democrat spokesman on sport, said:

"I am appalled and equally appalled at the arrogance of the man to have the gall to ask for legal aid. We all know the law is an ass but we did not expect it to be as bad as this. It beggars belief that he had the nerve to ask for it. Clearly he is a man with no pride."

He added it demonstrated the system was in need of an overhaul. **[CLICK]**

Former sports minister Kate Hoey said:

"This seems to me not to be what legal aid was set up to do. There are many poor people in my constituency who have been refused legal aid. If someone on £40,000 a week can get legal aid there is something wrong with the system." **[CLICK]**

Geoffrey Clifton-Brown, Conservative MP for the Cotswolds, said:

"This is a disgrace and an abuse of the system."

But was it an abuse of the system? **[CLICK]**

The Legal Services Commission says that individual courts make decisions to grant legal aid "in the interests of justice".

A Teesside Magistrates Court spokeswoman confirmed the footballer had been given legal aid, which is now known as a representation order, and will mean his legal costs are paid for by the state. The spokeswoman said Diouf had been granted legal aid because he was a French-speaker and so could not defend himself and, if he is convicted, magistrates would have to consider making a football banning order which could put him out of work. Legal aid is not means tested in Magistrate's Courts.

Some prolegomena

1. In beginning to answer this question we have to remember that the assessments that are our data for consideration here have been measured by lawyers. Therefore it is an internal, self-reflective lawyer's standpoint that we are considering. This is an important standpoint in terms of assessing the quality of the lawyers from the point of view of the lawyers being assessed. But if we are asking more general questions – "Do lawyers do any good?" – then other standpoints might also be important. The lawyer peer reviewers were not asked, or trained to consider a social standpoint, a political standpoint, a philosophical standpoint, a Treasury standpoint, a taxpayer standpoint or others which might produce a different result.
2. Even if we were to come out with a view that the lawyers were not doing any "good" according to our understanding of the judgements of the lawyers, there are other ways in which the lawyers involved could have been useful. So, for example, much of the literature refers to the use of lawyers being helpful to clients in explaining to them what was happening in a rather confusing and difficult system at a very difficult time. This would obviously be most important for first time defendants within the criminal justice system.

In our research we can actually say a little about what clients have felt because we sent out client questionnaires – but I do not intend to report in the time available at this seminar on that particular issue.

3. The lawyers could also be assisting with the smooth running of the processes of the criminal justice system. This is in fact what Blumberg seems to be saying in the monumental book

“The Practice of Law as a Confidence Game”. The job of lawyers he suggests is that they assist defendants through the process by advising them to plead guilty or to put their case in ways that are more acceptable to the criminal justice system, but may not always actually assist the final outcome in relation to the individual defendants.

Blumberg asserts that “all law practice involves a manipulation of the client and a stage management of the lawyer-client relationship so that at least an appearance of help and service will be forthcoming. This is accomplished in a variety of ways, often exercised in combination with each other. At the outset, the lawyer-professional employs with suitable variation a measure of sales-puff which may range from an air of unbound[ed] self-confidence, adequacy, and dominion over events, to that of complete arrogance.”

It is unclear whether Blumberg’s view is lent support or undermined by some of the findings of McConville and others, in their book *Standing Accused*. In a chapter on *The Culture of Criminal Defence* they quote a solicitor saying:

“Criminal Clients were always very pleased whether or not the solicitor in question had done much, or could have done more. The client really doesn’t know about that, and all the ones I came across were really pleased they had somebody there that they could rely on. Or thought they could rely on.”

This quote suggest no active deception on the part of lawyers, merely lies of omission. This may reflect cultural differences between the US, where Blumberg was writing, and the UK, where McConville’s research took place. Also it suggests that the role of lawyer as a guide or support is one that is valued by the clients.

4. Another, and perhaps even more important, way in which the work of the lawyers might be doing some good is that they are providing legitimacy to the entire process. The criminal justice system is a painful process with the need for the appearance of fairness. Society needs to execute its pound of flesh from social miscreants according to law and propriety. It does not necessarily matter about truth, fairness, morality or what we might refer to as real justice. The system in fact takes over and the need for the appearance of fairness is more important than actual fairness. Justice must be seen to be done as well as being done. Some of the research suggests that even people who know they are not being treated properly have a

tendency to say “It is a fair cop, mate” because the system leads even them to believe that this is so.

If any of these ideas are correct, then the cases that make it to court might not provide the best examples of lawyering: In 2001 I was involved with the evaluation of the Public Defence Solicitors’ Office in Edinburgh. One of our findings in that study was that the Public Defence Solicitors were more likely than those in private practice to resolve cases early, without a trial. This was good on several grounds. Public Defence cases took fewer resources in terms of court and prosecution time. We found that Public Defenders’ cases were 11% cheaper on average than cases handled by private practice solicitors. The public defenders’ tendency to resolve cases before trial also meant less disruption for witnesses in unnecessary attendance at court, and may have saved them distress in more emotional cases. However, in approximately 12% of cases the Prosecution gave up on the day of trial. Was an early guilty plea, therefore a big mistake for these defendants?

5. Another important preliminary question on the data is what does “as expected” mean. In this cameo picture these words become extremely important. If we say that Peer Review lawyers expect a high level of performance and outcome then if their expectations are met perhaps the subject lawyers who are performing “as expected” are in fact doing rather well, because the expectations of the peer review lawyers are high.

But if they do not have such high expectations, then the opposite would be true, and “as expected” would be OK but mediocre.

6. So, what do we know about the character of the peer reviewers themselves? Well, we know quite a little bit about them because in the methodology we have been using I have actually personally selected them, trained them and monitored their work all the way through. In summary, I can say that we have not tried to select the highest level of specialist, but “peers” who are operating at the same level as other existing criminal defence practitioners.

As a result:

- They know the political landscape of legal aid
- They are aware of the public funding issues that are currently present

- They will want to show their colleagues as doing well
 - They will want to be able to make a complaint about the lack of funding, the pressure in legal aid work, but that their colleagues are still doing a good job despite all.
7. Do we know that they can differentiate between good and better? Answer: we do know this because in Tables 2-4 and Table 23 we can see that they divide their assessments quite well between 40% as operating at minimal competence, which might be expected at least of lawyers, and 40% operating at competence plus or excellence. So they can differentiate. They do think that the lawyers perform well approximately 40% of the time.
 8. It would be useful to know what YOU - this audience - thinks should be the level of performance of professionals. What do you think a professional should perform at? 100%? 80%? 40%? Do you think they are just the same as everybody else and therefore that we should see a “normal distribution” in their performance levels?
 9. Now lets move from performance of the work to “outcome”. Here, we saw a very different picture. They might perform well, at least at 40% of the time and OK at another 40% of the time but in terms of outcome they seem in general to be gaining outcomes only “as expected” in approximately 80% of the time in relation to a number of the issues measured. “As expected” probably means they do not do any “bad” but it does not mean that they are doing a lot of good.
 10. We should note a major exception to this 70% picture in relation to both conviction and sentence. We could certainly say that these are the only really important outcomes to be considered. It is noticeable that even here we are not getting a massive set of figures that are favourable but they certainly are “better than expected” on more occasions.
 11. Well, if the lawyers reviewed were not really doing very much good, there could be two possible types of reason for this. (And I am not actually saying that they were not doing any good – I am just arguing for the moment if they were not doing any good why that might be). One type of reason is that it could be possible that very little difference can be made in outcomes in criminal defence trials.

12. Another possible reason is that a difference could be made, but the lawyers who were reviewed were not in fact able to make any difference. In both cases we could say then that lawyers do not do much good. If it is for the second reason it is their fault. If it is for the first reason then it is not their fault. But we could query in both cases whether it is worth spending so much public money on criminal defence which is not as effective as might be expected – compared with spending money on education, heart disease, cancer treatment and prevention etc. Unless, of course, other things are happening which are “good” in some sense as already mentioned.

13. My view – this is not as “good” as one might hope. But what are we comparing with? If these criminal defendants did not have lawyers what would the outcome have been? Would they have been better off with the magistrates or judges “looking after” them? Even under an inquisitorial process the defendants have their lawyers.