NO DEFENCE: lawyers and miscarriages of justice

Edited by Jon Robins
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‘No defence: lawyers and miscarriages of justice’ will be available in hardcopy later in the year, and there will be a launch event.

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THE JUSTICE GAP

KNOW YOUR RIGHTS
This the sixth in the Justice Gap series published in conjunction with Wilmington and Solicitors Journal. We are grateful for their continued support.

The Justice Gap series is an ongoing series of publications and events. The ideas behind the series as set out in the first of the series Closing the Justice Gap are as follows:

- to make a positive and different contribution to the debate to improve ‘access to justice’ for ordinary people;
- to challenge received wisdoms;
- to be thought-provoking; and
- to raise the profile of the issues.

This collection (No defence: lawyers and miscarriages of justice) follows on from last year’s Wrongly Accused: who is responsible for investigating miscarriages of justice?.

The collection of essays could not have been timed more presciently arriving as the government begins to consider some 16,000 responses to its Transforming legal aid consultation.

We can’t take credit for the timing. We began commissioning in September last year when the Coalition government, led by the then justice secretary Ken Clarke, was busy dismantling the civil legal aid scheme. His successor Chris Grayling has now proposed a system of price competitive tendering (PCT) where the number of solicitors’ firms will be slashed from 1,600 to 400. Bids under the model of competitive tendering, which must be 17.5 per cent below existing rates, are expected to be made by the likes of Serco, G4S as well as Eddie Stobart.

The proposals, as they stand, would decimate a profession unfairly caricatured as ‘fat cats’. Committed firms who have spent decades representing the interests of their inner city communities, or acting on behalf of young or otherwise vulnerable people, as well as that tiny number of firms that specialise in miscarriage work are unlikely to survive the tendering process as envisaged.

And how would quality of legal advice be preserved under a regime which is seemingly designed with the principal aim of slashing the legal aid bill by £220 million?

On any reading of the consultation paper, it seems reasonable to note that the issue of quality is not to the fore in the government’s design specifications for this new system of criminal defence. At a meeting of defence lawyers last month, the former Court of Appeal judge, Sir Anthony Hooper quoted in full the impact assessment from the consultation (para 23) on quality assurance. (‘We will ensure that quality does not fall below acceptable levels by carefully monitoring quality and institute robust quality assurance processes to ensure it does not fall to an unacceptable level.’).

The former judge rightly dismissed it as ‘gobbledygook’. He referenced the now notorious comment by Chris Grayling that people who find themselves in our criminal justice system were not ‘great connoisseurs of legal skills’. (‘We know the people in our prisons
and who come into our courts often come from the most difficult and challenged backgrounds,’ Grayling told the Law Society’s Gazette.

‘Contrary to the views of the “secretary of state for injustice”, defendants are not “too thick to pick”,’ Sir Anthony said.

One of ‘the biggest impediments’ for the Birmingham Six was ‘not having the opportunity under the system to change their legal representatives’, Breeda Power told campaigners at a rally outside Parliament on the same day of the lawyers’ meeting. Her father, Billy Power spent over 16 years in prison for that most notorious of miscarriages of justice. His daughter described their lawyers as ‘two very young and inexperienced duty solicitors who did not realise they were unable to put their case before the court competently’. It was the first time she had spoken in public for 20 years.

‘It is a fundamental right to trial by jury and it is also a fundamental right to be represented by the legal representative of your own choice. The proposal to tender legal aid to the lowest bidder takes away that fundamental right. Justice will depend on market forces and a business decision.’ – Breeda Power

The Justice Gap is not a lawyer-led initiative. It is run by journalists and its subject is the law and justice and we are pleased to say it is well supported by lawyers. All contributors were directed towards an essay in the Wrongly Accused collection by Maslen Merchant, a legal executive who has specialises in miscarriage of justices. His article started thus:

‘As controversial and unexpected as it may be, in my experience a very high proportion of wrongful convictions are the fault of poor defence work by lawyers...’

The brief sent out to all contributors also quoted the veteran campaigning lawyer Gareth Peirce at the launch of Wrongly Accused at the College of Law in London in March last year. She said:

‘Lawyers are at the heart of many cases of the wrongly accused and wrongly convicted: wrong, shoddy, lazy representation. It is a recurrent theme. It should haunt us.’

Legal aid lawyers are ‘passionate about people and passionate about justice’, as one contributor puts it. They work in the most difficult of circumstances and often for little money. Whilst, this is the starting point for this collection of essays, we haven’t taken an overly prescriptive approach. Contributors have been encouraged to respond to the brief in the best way that they see fit.

Thank you

We’re grateful to all our contributors for their support. Thanks for your time, effort and patience. Thanks to Michael Mansfield QC for his continued support for the Justice Gap.

Also, I’d like to thank the Justice Gap team and, in particular, Mary-Rachel McCabe for her help.

Jon Robins

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June 2013
The need for constant vigilance

Michael Mansfield QC

Instead of closing the gap a huge chasm has just opened up right at the top of the system. It is a shocking and disgraceful manoeuvre by those who carry the core responsibility for maintaining and protecting the provision of justice. This value is central to any meaningful democracy, and is the attribute trumpeted across the world by our political leaders.

But, take note people of the Arab spring, people of Iraq, people of Afghanistan, people of Iran and Syria, that back home in the UK we have key figures colluding and conniving at destroying the fabric of fundamental rights to satisfy their perceptions of popularity and their grasp on power.

In the wake of electoral humiliation the Lord Chancellor/ Justice Secretary in tandem with the Home Secretary, both felt not for the first time, that they could use the opportunity to jettison the European bedrock of human rights in order to curry favour with the electorate. Such cheap posturing displays an irresponsible and totally unrealistic disregard for historically enshrined principles.

This series of admirable essays has sought to identify and suggest remedies for those most disadvantaged by our judicial system. Making any kind of progress at this level cannot be successfully accomplished unless there is a genuine and committed belief in due process, fairness and equality of arms and access from those who have the role of political supervision.

Whether they meant what they said or were merely huffing and puffing matters not, because in either event they cannot be entrusted with our future freedoms.

Chris Grayling wrote in the Sunday Telegraph (March 3 2012): “I cannot conceive a situation where we could put forward a serious reform without scrapping Labour’s Human Rights Act and starting again... we need a dramatically curtailed role for the European Court of Human Rights in the UK.”

He went on to tell the BBC that he was “absolutely certain” that the
Conservative Party would go into the next election with a plan that would change human rights law. When asked whether this meant a withdrawal from the European Convention he replied that he had “not ruled anything out”.

These propositions display a lamentable lack of understanding of the history of these rights, how they fit into an international network of other treaties and conventions which the UK has signed, their own party pledges, and most of all the evolution of common law rights in the UK long before the codification and incorporation of rights in the Human Rights Act which was intended to “bring rights home”.

The reason the UK took a lead role is because its common law had already developed norms that embraced basic rights - for example, concerning due process and fair trial. Reflecting on this position it is clear that if the UK withdraws from both the court and the convention the judiciary would revert to the same principles under common law, possibly with a more fiercely independent posture. It would not make the difference so fondly embraced by tabloid protagonists.

In any event the vast array of other treaties, conventions and protocols dealing with rights to which the UK is a party make this initiative quite unrealistic and unworkable. Besides, as the Attorney General has sensibly pointed out, it sets a bad example to the rest of the world and places us alongside pariah states. More importantly the message would be unambiguous that we have lost faith in the convention and to that extent in the rule of law. This gives licence and authority to those states who already ignore their obligations to continue to do so with impunity. All extraordinarily weird after expending so much time and effort promoting human rights adherence and making it a precondition for joining the European Union (e.g., Turkey). But then maybe that’s what it is really about. Ousting UKIP as the party that hates Europe the most and leaving the union.

This reprehensible game playing with rights has to be set alongside all the other equally detrimental positions adopted by the Coalition, the extension of secret civil court hearings, severe legal aid cuts resulting in diminishing services, restrictions on access to judicial review, attacks on the independence of the judiciary.

And then you add the continuing risks of miscarriage cases highlighted in these essays. These risks are exacerbated by a general approach to justice exemplified in the following themes explored in this collection.

This is a dismal picture and requires all those with passion and commitment to persevere with the struggle from top to bottom. Without this the forces of darkness will surely extinguish the flame of justice. Constant vigilance, remorseless exposure and solidarity of purpose are the eternal sentinels.
Contributors

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Eric Allison is the Guardian’s prison correspondent.

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Ros Burnett is a senior research associate at the Centre for Criminology, University of Oxford, where she has been based for over twenty years as a researcher and teacher of criminal justice. Her books include Joined-up Youth Justice (Russell House, 2003 co-author: Catherine Appleton) and Where Next for Criminal Justice? (The Policy Press, 2011, first author David Faulkner).

Ed Cape
Ed Cape is the author of a range of practitioner texts, including Defending Suspects at Police Stations, he contributes to Blackstone’s Criminal Practice, and writes case comments for Criminal Law Review. Ed has recently completed two research projects on access to effective criminal defence in Europe, and is now working on a third project in Latin America.

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Mark George QC
Mark George QC is a defence barrister at Garden Ct North Chambers in Manchester. He is a trustee of Amicus and a regular speaker at the Amicus training courses on the US death penalty. He regularly writes about aspects of the criminal justice system and is passionate about justice.

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Michael Mansfield QC
Michael Mansfield was called to the bar in 1967, established Tooks Court Chambers in 1984 and took silk in 1989. He has written extensively in all major broadsheets and law journals and has appeared in several documentaries. He is the president of Amicus, Halalodane Society of Socialist lawyers and National Civil Rights Movement.

Campbell Malone
Campbell Malone is a consultant to Stephensons’ Criminal Appeals team. He is chair of the Criminal Appeals Lawyers Association and one of the most experienced lawyers specializing in miscarriages of justice.

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Paul May has been involved in numerous campaigns on behalf of the victims of miscarriages from the Birmingham Six, Judith Ward, and the Bridgewater Four through to Sam Hallam, Eddie Gillfoyle and Colin Norris.
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Dr Daniel Newman is a research assistant at Cardiff Business School. He also teaches at Cardiff Law School. For his PhD at the University of Bristol, he investigated the state of access to justice by conducting the largest social research study into the lawyer-client relationship in England and Wales for some two decades.

Dr Angus Nurse
Dr Angus Nurse is Senior Lecturer in Criminology at the School of Law, Middlesex University. He was a lecturer in criminology at Birmingham City University from 2011 to 2013, and was a research fellow at the University of Lincoln’s Law School from 2008 to 2011, researching civil justice systems and criminal justice and teaching in constitutional law and human rights. Before this, he was an investigator for the Local Government Ombudsman.

Correna Platt
Correna Platt is a Partner in Stephensons’ criminal litigation department and specialises in miscarriages of justice and serious criminal cases at the Crown Court. Correna had the privilege of training under Campbell Malone and is committed to challenging miscarriages of justice.

Julie Price
Julie Price is the head of Pro Bono and the Law Clinic at Cardiff University. A qualified solicitor with a background in vocational law teaching, Julie recently won a Higher Education Academy National Teaching Fellowship Award for her commitment to enhancing the student experience.

Dr Hannah Quirk
Dr Hannah Quirk is a lecturer in criminal law and justice at the University of Manchester. She worked for four years as a case review manager at the Criminal Cases Review Commission.

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Jon Robins runs www.thejusticegap.com. He is a freelance journalist and director of the legal research company Jures. His work has appeared regularly in The Times, The Observer, The Guardian and the Financial Times. He has written several books including The Justice Gap: Whatever happened to Legal Aid and People Power: How to run a campaign and make a difference in your community. Jon is a visiting senior fellow in access to justice at the University of Lincoln and a patron of Hackney Community Law Centre.

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Adam Sampson is head of the Legal Ombudsman. Prior to leading the Legal Ombudsman he was Chief Executive of Shelter, the country’s leading housing and homelessness charity. He has been a member of various Government Task Forces, and is on the Board of a number of non-Governmental bodies, including the End Child Poverty Campaign and the UK Drugs Policy Commission.

Satish Sekar
Satish Sekar is a journalist who has specialised since the 1990s in investigating miscarriages of justice. He is the author of The Cardiff Five: Innocent beyond any doubt which is published by the Waterside Press (‘One of the most important books ever written about criminal justice,’ Michael Mansfield QC).

Tom Wainwright
Tom Wainwright has always been a devoted criminal defence barrister and is dedicated to upholding the rights of those against whom the State seek to bring criminal charges. Tom has a formidable reputation as a passionate defender and a strong advocate. He is regularly instructed in cases involving serious violence, sexual assaults, kidnapping, firearms, drug importation and armed robbery.
It was inevitable, and perfectly understandable, that the piece, ‘Poor Defence’ written by Maslen Merchant (for the previous collection of essays ‘Wrongly accused: who is responsible for investigating miscarriages of justice?’) should cause offence to defence lawyers. The uncomfortable point made by Maslen was that, despite an apparent reluctance by the Court of Appeal and the Criminal Cases Review Commission to acknowledge the fact, incompetent defence lawyers were a significant cause of miscarriages of justice and that the emerging structure of the profession was likely to make the situation worse.

Of course the majority of criminal lawyers working under the current legal aid provisions are committed, hard-working professionals of integrity working hard under considerable pressure doing a thankless but absolutely necessary job. All solicitors doing this work have surely experienced long nights in a police station facing not only hostility from sceptical police officers but occasionally abuse from the detainee they are trying to advise and...
Poor defence

assist only to get up in the morning and face an equally long day in court or in the office conducting or preparing cases (and frequently both). It takes a quiet heroism to continue to do that week in, week out, year after year in the face of tight fiscal constraint but it is undoubtedly true that it has become harder and harder for legal aid lawyers to deliver a proper level of professional service and at the same time make a reasonable living. Regrettably, however, failures by defence lawyers are not simply a product of government determination to control the legal aid budget and are certainly not a recent development.

If one considers the well-known and classic miscarriages of justice that have been exposed in the past and acknowledged by all, then it is apparent that there are common threads. They often involve particularly appalling crimes where there has been public outrage with resulting pressure on the police to achieve a positive result leading to a flawed investigation by them. An obvious example would be the Birmingham pub bombings which led to the conviction of the Birmingham Six or the horrific murder of little Lesley Molseed which led to the arrest and trial of Stefan Kiszko. In his case, arrest and prosecution followed a police investigation that could be best described as flawed and incompetent showing a typically blinkered attitude to the evidence which focused on what might be relevant against their suspect and ignored or even buried evidence which would exonerate him. For a flawed investigation and prosecution to succeed in those circumstances it can require the additional ingredient of a flawed defence and Kiszko was certainly an example of that, with the defence QC electing to run both defence of alibi, which was in accordance with the defence instructions, and diminished responsibility which most certainly was not. Fortunately in Stefan’s case we had in the failure to disclose key forensic material that exonerated him sufficiently strong grounds of appeal that enabled the court to avoid dealing with failures of the trial lawyers, an issue with which the court remains reluctant to confront.

“If one considers the well-known and classic miscarriaged of justice that have been exposed in the past... it is apparent that there are common threads”

On 4 July 2001 we arranged a conference at the Conway Hall in Holborn following a series of alarming decisions in the Court of Appeal. After the successful appeals of the Birmingham Six, Judith Ward, Kiszko etc in the early 1990s and the subsequent Royal commission and the setting up of the CCRC there was a brief period of optimism regarding criminal appeals and the commission enjoyed what can now be seen as a “honeymoon period” with a high level of success in cases they had referred. By 2000 however, the pendulum had swung again with the Court of Appeal rejecting strong appeals by such as Eddie Gilfoyle, Donald Pendleton and Sally Clark resulting in what we believed was a reluctance by the CCRC to refer cases. Campbell chaired the
meeting with speakers including Michael Mansfield QC and John Batt, one of Sally’s appeal team. In an open session at the end of the meeting a question was raised from the floor by leading criminal appeal specialist Jane Hickman regarding the quality of preparation in defence files she had taken over to review as a possible miscarriage of justice, a point which found considerable support in the meeting. After an informal discussion at the end of the meeting we arranged, with some difficulty, a follow up, managing to get in the same room at the same time a number of experienced solicitors such as Jim Nichol (the Bridgewater Three, Pendleton), Gareth Peirce (Birmingham Six, Judith Ward etc) and Jane Hickman. We all had shared similar experiences in dealing with defendants wrongly convicted where we had read through files and had been concerned to see failures both in preparation by solicitors and presentation by counsel which led to vital evidence being missed or arguments not made. We also realised that many practitioners struggled when it came to approaching an appeal and we resolved to try and address standards by sharing and pooling our own experience and so, together with like minded counsel, we set up the Criminal Appeal Lawyers Association in the hope that we could contribute to an improvement in standards within both sides of the profession.

“We set up the Criminal Lawyers Association in the hope that we could contribute to an improvement in standards within both sides of the profession”

trial, a defence solicitor gets a fee based on a formula that involves the gravity of the case, the number of pages of prosecution evidence and the number of days the trial lasted without any assessment of the actual work done. Correna Platt recently represented a client charged with murder who had a relative who was a co-accused, separately represented. In preparing his trial we instructed a number of experts, the client had weekly meetings and saw his QC on a number of occasions and Correna attended at the trial every day.

His co-accused on the other hand, had no experts instructed and no representative from the solicitors firm attended on any day – not even when the client was making a decision whether to give evidence. Fortunately our client was acquitted, however when one looks at the funding on this case our firm and that representing the co-accused received exactly the same fee. The reality is that when one compares the time spent by our firm preparing the case to that of his co-accused then it is clear that they would in fact have made a significantly greater profit. Unfortunately the profession is being given an incentive to cut corners and simply not do the necessary work. The above is one recent example we observed
directly but we hear many stories of counsel receiving a brief containing the prosecution papers in complex cases where clearly no attempt has been made to read them, prepare the case or even take a proof from the defendant.

The conflict between professionalism versus simple economics is now changing the way that cases are dealt with and will undoubtedly lead to more miscarriages of justice, just as Jane Hickman highlighted at the meeting in 2001.

It is evident in looking at files we have taken over to review as a potential appeal that in many the following concerns arise.

- Work is being undertaken by junior members of firms on complex cases.
- Clients are not being seen to take instructions.
- Committal papers are not being scrutinised.
- Witnesses are not seen.
- Crime scenes are not visited.
- Experts are not instructed.
- Counsel will only see the client on one occasion if at all before the hearing.

We are aware that many lawyers will be shocked and reluctant to accept that these failings occur but the evidence is clear that unfortunately it does. The stark truth is that the pressure all businesses face is that they do need to make a profit to stay in existence and that a scheme whereby they can receive the same fee whether work is done or not inevitably results in some firms doing as little as possible. Equally inevitably the consequence will be a growing number of wrongful convictions.

It is not all doom and gloom and there are still many firms who do act with professionalism and provide an excellent service but the difficulty that a client faces is finding the right firm in the first instance, as we all know that arguing the point later on appeal is extremely difficult.
Designing out defence lawyers

Ed Cape

Regulation of the police station stage of the criminal process by the Police and Criminal Evidence Act 1984 (PACE) and the PACE Codes of Practice is rightly regarded as a major achievement, admired around the world by those who value justice and fairness. Based on the recommendations of the Royal Commission on Criminal Procedure, and its organising principles of fairness, openness and workability, it sought to balance the investigative needs of the police with the rights of citizens who, of course, may or may not have committed a criminal offence. Under PACE, investigative powers were largely dependent on investigative need, and their use was often subject to authorisation by officers unconnected with the investigation and more senior to the officer dealing with the case. The custody record was established as a mechanism for making the use of such powers more transparent and, therefore, making the police more accountable. The inherent vulnerability and needs of the suspect detained in a police
station was recognised by the creation of an almost absolute right to consult a lawyer, in person at any time, supported by a non-means-tested right to legal aid.

While the basic structure of PACE has survived the intervening quarter of a century, when examined in detail it is evident that it is now a pale shadow of its former self. Police powers have increased, almost year-on-year, and successive governments have become increasingly unconcerned about suspects’ rights. Principles of fairness and justice have given way to managerialist imperatives of efficiency and economy, and effectiveness – not in securing just outcomes but in processing people in a way that, if possible, avoids the need to test evidence of guilt in a trial. In this context, the right of access to a defence lawyer has become less a mechanism for ensuring the integrity of the investigative process, and thereby ensuring fair trial, and more a way of transmitting system imperatives to the suspect and ensuring that they co-operate.

So in what ways have police investigative powers increased? The Royal Commission was of the view that given the obvious interference with liberty that arrest represents, those suspected of crime should be arrested and detained at a police station only when this was necessary for the purposes of the investigation or to protect the public. Where arrest was not necessary, prosecution could be by way of summons. As a result, when PACE was originally enacted powers of arrest were largely confined to more serious, ‘arrestable’, offences although it also enabled the police to arrest in respect of other offences where, for a variety of reasons, this was necessary. This was swept away in 2006 when the police were given powers to arrest for any offence, however minor. The officer carrying out the arrest must normally have reasonable grounds for suspecting the person of committing an offence, but the courts have repeatedly confirmed that the threshold of suspicion is low. Under the new powers, an arrest has to be ‘necessary’, but although a welcome clarification of the meaning of ‘necessary’ is introduced in amendments to Code G in November 2012, interpretation by the courts has largely rendered it meaningless.

“While the basic structure of PACE has survived... when examined in detail, it is evident that it is now a pale shadow of its former self”

Generally, following arrest a suspect must be taken to a police station as soon as practicable, but under powers introduced by the last government the arresting officer may alternatively release the suspect on conditional bail – which could include conditions to live in a particular place, or not to go to a particular part of town – without any statutory limit on the period for which they are bailed. Once at the police station, a decision to detain the suspect is more or less routine. The police are under no obligation to disclose to the suspect anything more than the reason for arrest and detention. Yet, if the suspect fails to tell the police, in interview, of facts which they later rely on in their defence (which is a more onerous
requirement than simply disclosing their defence) this can be used by the prosecution, in effect, as evidence of guilt. Powers to take fingerprints and non-intimate samples, which were previously confined to circumstances where they were needed for investigative purposes and which required authorisation from a senior officer, are now routinely available. Until the Protection of Freedoms Act 2012 comes into force, the prints and DNA profiles are kept indefinitely even if the person is not charged or, having been prosecuted, is acquitted.

When it comes to a charge decision, responsibility is split between the police and a Crown Prosecutor – broadly the custody officer takes the decision in cases that are likely to be dealt with in a magistrates’ court, and a prosecutor takes the decision in other cases. In either case, they have a large degree of discretion in determining whether there is sufficient evidence to charge. While normally they must be satisfied that there is sufficient evidence such that a court is likely to convict, if they believe that bail should not be granted they can decide to charge merely on the basis of reasonable suspicion coupled with a belief that more evidence is likely to be forthcoming. If they decide not to charge, they can bail the suspect subject to conditions, such as those mentioned above, and this can last for months if not years.

The aphorism that trial starts at the police station is now more true than ever. In addition to the fact that it is not only what the suspect does say, but also what they do not say, which can be used as evidence against them, the approach to sentence discount for a guilty plea that has developed over the past decade means that a failure to admit an offence at the police station can prevent a person who subsequently pleads guilty from receiving the full discount. Furthermore, the virtual court initiative means that the initial bail hearing can be conducted while the suspect is still at the police station, and the Stop Delaying Justice! Initiative means that the accused must normally be ready to indicate their plea at the first court appearance after leaving the police station, which may be within a matter of hours. Out-of-court disposals, such as cautions and penalty notices for disorder (don’t be misled by the title – they can be imposed for minor thefts and criminal damage) mean, in effect, that in many cases the trial takes place at the police station.

The use of such disposals, which although not formally convictions go on the person’s record, have increased by well over 100 per cent since 2003 and more than four out of ten people who are proceeded against are dealt with in this way.

Taken together, these developments mean that the right to consult a lawyer at the police station is now more important than ever, and the need for high quality legal assistance is now greater than ever. But as the police are given more power, and while the police station becomes the location of the trial, or the place where the outcome of the trial is largely determined, the position of the defence lawyer has been weakened. CDS Direct, which provides telephone-only legal
advise in minor cases, is a likely candidate for expansion as the Ministry of Justice seeks to make savings. Fixed fees for police station work reward lawyers who do the minimum for their clients rather than what is necessary to effectively defend them. The government’s war on ‘bureaucracy’ may well mean that it has another go at reducing the utility of the custody record.

Despite promises by the last government to enable defence lawyers to make representations to prosecutors regarding charge, in practice they almost always hide away behind the scenes. There is no provision for lawyers to make representations regarding police bail. And defence lawyers are literally being designed out as custody suites are increasingly being built or refurbished in a way that physically prevents them from speaking to the custody officer in person and from looking at the custody record.

Defence rights are being managed out of the investigative stage of the criminal process, and the danger is that miscarriages of justice are being managed back in.
More than a century ago, Sir Arthur Conan Doyle used the columns of the *Daily Telegraph* and other publications to campaign for the exoneration of George Edalji wrongly convicted on the bizarre charge of disembowelling a horse. Conan Doyle had earlier supported Adolph Beck an innocent Norwegian whose conviction for deception was vigorously challenged by the *Daily Mail* and other newspapers. Media interest in miscarriage of justice cases is, therefore, nothing new. There has been a decline in coverage of wrongful convictions since the 1980s/90s ‘golden age’ when major resources were devoted by media organisations to investigating and reporting alleged wrongful convictions. The slackening of interest has been caused by various factors including the establishment of the Criminal Cases Review Commission and the inexorable spread of celebrity culture. For its part, the commission professes to be entirely unmoved by publicity about individual cases. On the rare occasions the Court of Appeal deigns even to acknowledge the media’s existence, it usually expresses outright hostility to any intrusion into its affairs by journalists (or anyone else). Having chaired campaigns on behalf of some 20 innocent prisoners over the past 28 years, I would argue that the current media landscape is not entirely bleak for those seeking to overturn wrongful convictions. Committed journalism can still play a significant role in helping to correct miscarriages of justice. I recall, moreover, a few decidedly tarnished episodes during the supposed ‘golden age’ of media interest.

Media coverage of miscarriages of justice ranges widely from in-depth investigations such as those formerly conducted by Granada TV’s *World in Action* into the Birmingham Six case, the BBC’s *Rough Justice* and Channel 4’s *Trial and Error* through to brief reports on outlandish campaign stunts (I recollect with a deep blush our delivering a giant Valentine card in a February blizzard to Home Secretary Michael Howard urging referral of the Bridgewater four case while the Sam Hallam Campaign positioning a full...
media help?

chamber orchestra outside the Ministry of Justice in protest at CCRC budget cuts will doubtless remain the sole occasion anyone has attempted such an unlikely feat).

What does media coverage achieve? In the case of the abovementioned investigative documentaries, the answer is obvious. Fresh evidence unearthed by programme makers made a significant contribution to convictions being quashed. No less than 15 innocent individuals regained their freedom after Rough Justice investigations. Trial and Error boasted an equally impressive track record including the cases of Sheila Bowler and Mary Druhan. Even cursory media attention can have a positive impact. In several cases with which I’ve been involved, new witnesses came forward after seeing media reports. Publicity also reminds the wider public that miscarriages of justice still occur. Extensive reporting of Sam Hallam’s 2012 release (and the CCRC’s pivotal role in uncovering fresh evidence) provided a powerful argument against those who would cheerfully axe the commission and return us to the dark days of the Home Office’s C3 Division.

It is sometimes difficult to convince journalists that evidence about a wrongful conviction might be newsworthy or even sensational from a media perspective but would be worthless if presented before the courts. An example arose in the Birmingham Six case. In 1990, Granada TV decided to name five persons allegedly responsible for the 1974 pub bombings in a drama-documentary Who Bombed Birmingham? Most of the Six, their lawyers and supporters were strongly opposed. In heated discussions before transmission, the broadcasters expressed an unshakeable certainty that their decision would trigger the Six’s release. The day after broadcast, Margaret Thatcher declared in the Commons “we do not conduct trial by television”.

“In answer to Conservative MP Richard Alexander, Home Secretary David Waddington said “the programme did not put forward new evidence” and that was very much that. The ‘Granada Five’ received no mention in either the subsequent referral of the Six’s case nor when the Court of Appeal quashed the convictions. There was, however, a surreal postscript. A few weeks after broadcast, we received a letter at the Birmingham Six Campaign’s London office from an individual named in the film. He was an inmate at Portlaoise Prison in the Irish Republic and had seen an ITN interview in which I expressed the campaign’s objections. He vehemently denied any involvement in the pub bombings. Would the campaign, he asked, help to clear his name? It was not an invitation we felt we could accept.

Broadcasters often discouraged any other publicity about cases before transmission. While their reasons were understandable, this proved problematic for Danny McNamee (whose campaign I chaired). Channel 4 had commissioned a documentary about his case but broadcast was delayed for several years. We asked
an Irish newspaper to run an article about Danny’s case. Our campaign secretary (who had directed the film) received a letter from Channel 4 suggesting we were in breach of copyright in publicising details of the case. I sent an equally robust reply pointing out that the material in the film had been provided by Danny’s family, solicitor and supporters. If anyone owned copyright in his story, it was Danny McNamee himself. In the end, the film was only broadcast after the newly-established CCRC referred his case to the Court of Appeal (which rather missed the point of commissioning the documentary).

What of now? Following Sam Hallam’s release, an eminent commentator claimed Sam’s campaign was “unassisted by any mainstream press and television backing”. This was incorrect. During Sam’s seven-and-a-half years wrongful imprisonment, ITV1 broadcast in prime time a Tonight film about the case. The Independent ran several articles on one occasion devoting three whole pages of the paper to Sam. The Mail on Sunday published a lengthy sympathetic piece. Articles in Private Eye were instrumental in attracting support for the campaign (although the Eye would probably deny it has anything to do with the ‘mainstream press’). Some idea of changed media realities may be gathered from our discussions about the Tonight programme. ITV made clear that unless the actor Ray Winstone (whose nephew is a close friend of Sam) took part, it was unlikely the film would be made. In this celebrity-obsessed age, we were perhaps fortunate they didn’t also insist on Ant and Dec appearing as co-presenters. Although broadcast in the same time slot (and despite ITV’s press office working wonders to secure

“Following Sam Hallam’s release, an eminent commentator claimed Sam’s campaign was ‘unassisted by any mainstream press and television backing’”

pre-publicity in the tabloids), the Tonight film struggled to attract even one tenth of the audience regularly enjoyed by World in Action and other documentary strands in their heyday. The perception that Sam’s case received no coverage prior to his release probably says more about our changed relationship with television and the press than about the media per se. Put simply, the contemporary plethora of news outlets means we’re all less affected by (or can even remember) individual stories.

On a positive note, the popular press is nowadays much less hostile to wrongly convicted prisoners. Coverage of Sam Hallam’s release included an editorial in The Sun strongly condemning the miscarriage of justice under the headline ‘Sam Scandal’. This contrasted with the same newspaper’s ‘Loony MP Backs Bomb Gang’ headline when the Birmingham Six 1987 appeal was rejected and grudging speculation after the men’s 1991 release about the amount of compensation they might receive. I currently chair a support group for Eddie Gilfoyle whose wrongful murder conviction cries out to be overturned. Over several years, the Times investigations editor Dominic Kennedy
has uncovered significant fresh evidence pointing to Eddie’s innocence while editorials have called for his case to be resolved. I’m also closely involved with the case of former nurse Colin Norris dubbed the ‘Angel of Death’ after conviction for the purported murder and attempted murder of five elderly patients in two Leeds hospitals. A compelling film casting serious doubt on the evidence used to convict him made by former Rough Justice producer Louise Shorter was broadcast by BBC Scotland in 2011 (although inexplicably the documentary has yet to receive an airing in England and Wales).

Does media interest make any difference in light of the CCRC’s existence? The commission receives more than 1,000 applications annually from convicted persons claiming innocence. It would be unrealistic to expect every case could be investigated comprehensively with all potential avenues thoroughly explored. The commission admits it usually requires some substantial reason before it launches detailed investigations. In Sam Hallam’s case, statements from witnesses identified by ITV’s Tonight formed part of the initial submission which persuaded the CCRC to conduct a major investigation. Evidence gathered in making A Jury in the Dark features prominently in Colin Norris’s CCRC application which has led to the commission mounting a detailed inquiry. Coverage of individual cases also helps inspire public confidence in the continuing need for a body such as the CCRC. There are grounds to believe the Court of Appeal is more inclined to approach cases rationally when it feels the glare of publicity.

In the past, the solipsism of some journalists caused them to claim their endeavours alone led to the more notorious miscarriages of justice being overturned. In reality, these cases were resolved thanks to the combined efforts of dedicated lawyers, politicians, campaigners and the media not to mention the prisoners themselves and their families.

In the early 20th century, public concern about the Beck and Edalji cases was a major factor in the decision to establish a Court of Criminal Appeal (albeit populated by the same judges who had implacably opposed its creation). The cases of the Birmingham Six, Guildford four and others led to the CCRC’s foundation. Who knows? Renewed public awareness via media coverage might even convince the police, prosecutors and courts to do everything they can to avoid wrongful convictions happening in the first place.
Legal systems lie in the vulnerable position between the rock of justice and fairness and the hard place of workability and social control. Defence lawyers may be motivated by the former and thwarted by the latter. The great failing of the legal system as an institutional structure lies not in the vulnerability itself but in its denial of this vulnerability.

This denial involves the internalisation of a curious ‘doublethink’ which allows the belief and public persona of scrupulous fairness to live alongside a day-to-day compromise of negotiation and rationalisation. The investigation of crime is an uncertain process involving complex human interactions, the frailty of human memory and perception, and at times the failure of human integrity. Add to this the uncertainties and conflicting interpretation of medical, psychological and physical science and the murky world of informants, deals and plea bargaining. The interpretation of the different versions of the truth is then fought out in an adversarial tactical court room battle, where the jury hears not “the whole truth” but, usually two, carefully selected and choreographed accounts that may involve highly complex issues from science to human emotion.

These uncertainties are, in the main, probably inevitable and unavoidable and the adversarial system and certainly the jury system has much to commend it (although many variations and improvements to the jury system could be considered and a more ethical adversarialism might be desirable).

The real failing lies with the notion that the decision of the jury must be upheld regardless of whether it is right or wrong. Our appeal system tends to guard that principle at all costs, the implications of which many jurors may not realise at the time they make their decision.

The mythological basis of the Crown Court system is epitomised by the fact that a jury decision still cannot be reviewed, 20 years on from the Royal Commission on Criminal Justice 1993 which recommended that it should. It is patently absurd to think that 12 fallible human beings with no experience or evidence of aptitude could
unravel the often complex labyrinth of information presented at a major trial and inevitably come to the right decision. It may be the best system we have but that does not justify perpetuating the myth that it is an infallible one.

“As for the men in power, they are so anxious to establish the myth of infallibility that they do their utmost to ignore truth,” said Boris Pasternak.

The notion perpetuated by the Court of Appeal that to review a jury decision would undermine the jury as an institution has no more validity than to suggest that the employment of video technology in international cricket would undermine the role of the umpire. On the contrary, safeguards enhance the integrity of such institutions by recognising that they cannot always be right and by ensuring the primary aim of establishing the correct version of what actually happened.

So where does this leave the defence lawyer?
The ‘infallible jury’ myth is of course a failing of the appeal system, but as long as this situation persists the defence lawyer at trial faces an onerous responsibility. If he or she fails to “do justice” to the defendant’s case, there is unlikely to be any way back. Indeed, even if they do all that they reasonably can, truth and justice may still be lost forever.

Appeal lawyers, campaigners, journalists and Innocence Projects may engage in a post-trial struggle to achieve the justice lost at trial but they will face gargantuan hurdles in the form of the myth of jury infallibility. (We would have included the CCRC in this group were their endeavours not so hampered by the notion of jury infallibility inherent in their interpretation of their remit.)

The need for defence lawyers to interrogate the evidence, used and unused, with great diligence and to cover every base in preparing for trial (and whether they actually do this adequately) will have been discussed elsewhere in this collection. However there is another realm of uncertainty that defence lawyers routinely face as a consequence of the impact of workability and compromise within the trial process itself. It is this aspect of a defence lawyer’s work that this chapter considers.

Between us, we have encountered many cases where these dilemmas may have resulted in decisions or capitulations which throw doubt on the reality of the notion of a fair trial. Our argument is that if the concept of jury infallibility is to continue, and we strongly believe that it should not, the way that trials are set up and undertaken should be scrupulously fair.

We have direct experience that this is not always the case, and defence lawyers, albeit placed in an invidious position, may not, in some cases, have advised and supported their clients adequately.

The examples proffered here hail from our joint seven years running Cardiff Law
denial and fallibility

School Innocence Project and over 20 years of campaigning on high-profile miscarriage of justice cases.

Stopping a trial?
A decision to stop a trial is a massive and expensive one, which judges are naturally reluctant to take.

Case 1: One defendant described to us how his lawyer discussed the option of requesting a retrial with him after the discovery that a member of the jury was the cousin of the second in command of the police investigation. The barrister stressed it was the client’s decision and asked his client the direct question, “Do you want to request a new trial?” while gently shaking his head as he spoke. Once the issue is discussed with the client it becomes the client’s decision in the view of the appeal courts, despite the natural and eminently reasonable inclination to take the advice, subtle or overt, of the professional lawyer.

The Criminal Cases Review Commission’s (CCRC) response to this issue was to state (on the basis that the issue was discussed at the trial) that the jury member had had no contact with his cousin “over the case or indeed at all for some considerable time” and that in any event the second in command of the investigation did not play an active part in the investigation!

Ironically, if true, this latter assertion might explain a lot about the way the investigation was conducted and supervised. Given that the defendants in this case remain (wrongly in our view) in prison nearly 20 years later, perhaps the importance of this “infallible” jury being seen to undertake its secret deliberations without the risk of contamination should be re-considered. The defence lawyer’s failure to seek a new jury and the CCRC’s assessment of the importance of this should arguably be more open to question.

Defence lawyers: expectations of the CCRC and Court of Appeal
At this point it is relevant to reflect on the expectations that the CCRC/Court of Appeal have of defence lawyers.

Case 2: In a case recently rejected by the CCRC, Cardiff’s Innocence Project had provided a report by an eminently qualified police expert identifying major concerns and anomalies in the police investigation. In essence the CCRC response was that there was “no reasonable explanation for not adducing this evidence at trial”. If this conclusion is to be accepted, and to hold water, one has also to accept that defence lawyers are expected not only to have specialist knowledge of police investigations (which may not be an entirely unreasonable expectation) but also to know the subtle techniques and idiosyncrasies that might corrupt an investigation and which in reality would only be apparent to someone with direct experience of working on police investigations for many years.

Furthermore even in the unlikely event that the defence lawyer could detect such things by scrupulous examination and insightful interpretation of the investigation paperwork (if indeed this was fully disclosed, which is not always the case) then they would face the bizarre and very risky task of conducting a defence on the basis that the investigation on which the prosecution was founded
was corrupt. While it might be routine to question the actions and motives of individual police officers in cross-examination, defence lawyers cannot reasonably be expected to discover, interpret, expose and undermine the foundations of an investigation at the trial stage. Not only would such an approach be impractical, but it would probably be considered scurrilous by the court.

A brief account of other situations we have encountered may help to illustrate the obstacles and dilemmas faced by defence lawyers within compromised trial processes:

**Case 3:** Eighteen days into the trial of two defendants our client’s co-defendant changed his plea to guilty. A detailed prosecution case had been founded and presented based to a large degree on the incrimination of our client by his co-defendant. This was not a minor hint of prejudicial information but a wholly prejudiced prosecution case and would seem to be a clear case of the need for a re-trial.

What happened however was simply a debate about whether the first defendant should now be called to give evidence? No doubt largely in the dark about what he might now say, the defence initially opposed the prosecution’s wish to call this witness. The judge however allowed his evidence, but the prosecution then decided not to call him, presumably fearing his new position might not after all support their case.

The legal system however, with its mindful understanding of how human beings think, believes that such problems can be easily overcome by a warning to the jury not to be influenced by what they have heard. This situation in some ways mirrors the notorious case of Ray Gilbert and John Kamara where the former pleaded guilty during the trial. John Kamara was later cleared after serving nearly 20 years (*R v Kamara* (2000) EWCA Crim 37) while Ray Gilbert, who since the trial has maintained innocence, remains imprisoned after 32 years. Again the logic of sustaining a prosecution case against Mr Gilbert based at trial on two specific people acting together, when one has now been cleared, is a rationalising of principle that only legal doublethink can accommodate.

**Case 4:** The status of the key prosecution witness in this case changed from suspect to witness and back to suspect and then to defendant on a lesser charge. To be fair, the defence made creditable efforts to convince the court of various irrationalities in this person’s evidence and the fact that they were as likely a suspect as the other defendants. However the “bargain” had been struck before the trial and their efforts proved unsuccessful for our client.

There are some parallels here with another notorious miscarriage of justice case, that of the so-called Merthyr Three (*R v Clarke and Hewins* (1999) EWCA Crim 386), where a very young witness was re-designated from suspect to witness on the condition that she gave incriminating information, a move that enabled some convenient bypassing of the rules in place to protect suspects in police custody.

**Case 5:** In this case, as with the preceding case, the dye was cast before the trial began, leaving the defence powerless, it seems, to question the situation. The original
defendant once convicted of murder at his own trial soon after reversed his position of not guilty and admitted the killing. However, he claimed firstly that he had acted in self-defence and secondly that others, including our client, hired him to carry out the crime. According to our client the defence did not, or were not able to, thoroughly interrogate the process of case construction between the police, the convicted murderer-turned-chief prosecution witness, and his array of prison visitors-turned prosecution witnesses.

The problem of criminal witnesses invariably runs the risk of compromising justice but in this case a curious question arises: the judge explained to the jury that they must first decide whether the prosecution’s chief witness was telling the truth in saying that he acted in self-defence. The judge stated that if they decided he was being truthful about this the defendants could not have been guilty of conspiracy to involvement in the murder and the case would be dismissed. The jury did not believe him and the trial continued with consequent convictions.

However two questions arise here: firstly if the jury had believed that the killing had been in self-defence this would have been in direct contradiction to the original jury which convicted of murder in the face of a not guilty plea. In a sense this amounts to a re-trial within a trial with a new jury – would the convicted murderer have grounds for appeal in this situation given that the jury in another trial reached a different view to the jury in his own trial? Secondly it illustrates how defence lawyers and defendants are faced with a state of rationalisation where the jury is allowed to believe that the chief prosecution witness is lying on the most fundamental issue, yet truthful on all the other matters. Contrary to the notion that the cards are stacked in favour of the defendant, the opposite is true, and defence lawyers must struggle within these contradictions and confines.

**Case 6:** Sometimes, however, defence lawyers may agree to strategies that in retrospect fail to do justice for their clients. In case six instead of calling the medical experts for proper cross-examination on the most crucial issue in the case, the defence agreed with the prosecution that the experts should not be called and that an agreed joint statement should simply be presented to the jury.

The joint statement, however, stated what the experts agreed on and not what they disagreed on, when in fact their conclusions on the strength of the evidence were entirely different, with one expert seeing no real alternative to the prosecution scenario and the other seeing no convincing evidence.

The judge, at the end of the trial, confided in the absence of the jury that “perhaps it is regrettable that we did not hear from the medical experts….but now the jury have to do their best on the evidence they have got”. With the appeal system so stacked against the defendant, defence lawyers must be careful not to damage the chances for their client through such approaches that may be policed in such an arguably cavalier/pragmatic manner by judges.

**Case 7:** This case involved not only a principle witness with a serious criminal record but the granting of anonymity to
that witness. Again, the defence pleaded the case that their position was seriously compromised, but without success.

**Case 8:** This was a classic case of conviction by volume of accusations of historical abuse. The defence succeeded in showing most of the charges to be highly doubtful and our client was acquitted of most charges. However, this did not convince the jury that there was in fact no smoke without fire and serious convictions were obtained.

Further examples from our past cases could also be given, where defence lawyers struggle to convey to the courts the implications of certain practices:

**Case 9:** The supervised police station meeting between the original suspects that led to a body of evidence against the new suspects; and

**Case 10:** The meeting arranged by the police immediately prior to the trial between a co-defendant who had become the chief prosecution witness and a reluctant witness who needed persuading to give the “right” evidence.

In our experience, defence lawyers very rarely achieve protection for their clients in these “procedural” matters. Sometimes this seems to be through ill-judged “tactics” (judgement calls) or lack of resolution, but more often it is simply the determination of judges that the trial should proceed unhindered, motivated by financial and case management task masters.

**Good lawyer or bad lawyer?**
Many clients are deeply critical of their defence lawyers. While sometimes this is justified, our reviews also often reveal the thoroughness and professionalism that some take in examining the evidence.

When it comes to trial, however, they may be faced with dilemmas and rationalisations that undermine all the hard work that has gone before. Ultimately one wonders how often lawyers ask themselves the question: if I stand firm on this point of principle, will it help my clients or ultimately make things worse for them by enraging the judge? It is an unenviable dilemma but the damage for the lawyer is mitigated by their professional cloak. They are acting on their client’s instructions, whether or not the client fully understands the implications, and the appeal court will ultimately hold on to the, usually disingenuous, claim that it was the client’s decision.

“The human mind isn’t a terribly logical or consistent place. Most people, given the choice to face a hideous or terrifying truth or to conveniently avoid it, choose the convenience and peace of normality. That doesn’t make them strong or weak people, or good or bad people. It just makes them people.”

To err is human; to steadfastly decline to recognise and correct human error is inhumane.

The prospects for wrongly convicted people are fundamentally burdened by seemingly intractable hurdles. At the heart of this is the appeal system’s denial of the fallibility of human institutions, ironically a denial of the very reason for the appeal system’s existence.
The suspension of disbelief

Satish Sekar

There is no longer any credible doubt that the Cardiff five are innocent, but they always were. It should not have required the conviction of the real murderer of Lynette White to convince anyone. I say the Cardiff five, rather than Cardiff three as its often known, because John and Ronnie Actie are no less innocent than Yusef Abdullahi, Stephen Miller and Tony Paris.

Any objective review of the evidence should have led inexorably to that conclusion. As with other miscarriage of justice cases the evidence and common sense ought to have prevented not only wrongful convictions, but the wrongful arrests too.

The murder of Lynette White, a prostitute who was killed in Cardiff in 1998, is a tawdry tale. It was a vicious killing that involved excessive brutality – far beyond what was needed to kill – and the investigation and trials that followed of justice betrayed. It is now established as one of the most notorious and easily preventable miscarriages of justice in British history.

An extraordinary tale began in the early hours of Valentine’s Day 1988 with what
was then the most brutal murder of its type in Welsh history – over 50 stab wounds – with obvious sexual overtones to it. After ten months the original inquiry revealed a closed mind that focused on obviously innocent men.

Forensic science proved the police’s scenario that five men and at least two alleged eyewitnesses were in that room along with the victim was quite frankly ludicrous. This became an egregious miscarriage of justice, but it ought to have been impossible.

The quality of the evidence gathered against the five men who eventually stood trial was woeful to put it mildly. It was a case that required an extraordinary suspension of disbelief from several professionals, especially lawyers who should have known better, but there is nothing in that story that does not occur routinely in other cases. It is the combination of what has gone wrong that is incredible.

Equally unbelievable is the failure of the criminal justice system to halt a plainly inappropriate prosecution in its tracks and hold those who failed the public accountable.

It is well known that Stephen Miller was ‘bullied and hectored’ by police in interviews that breached his rights shamefully. Miller was shouted down until he accepted the police’s version of Lynette’s murder – a scientifically ludicrous scenario that produced an utterly false confession. Miller was an extremely vulnerable person. He was highly suggestible and of below average intelligence. He was very susceptible to bullying and held to an absurd standard by David Elfer QC – a standard that required accepting everything put to him to meet Elfer’s definition of suggestibility. Dr Gisli Gudjonsson, the acknowledged
leader in his field, understood the extent of Miller’s vulnerability to making a false confession. Sadly Elfer did not, and, even more worryingly, nor did Miller’s defence lawyers for his trial and retrial. Their failures contributed in no small measure to an awful miscarriage of justice.

Miller’s solicitor Graham Dobson used a local solicitor Geraint Richards to represent Miller in the interviews. His presence was a hindrance as legally Miller had been represented. Richards failed to intervene while Miller was interviewed in a manner that breached the protections of the Police and Criminal Evidence Act (PACE).

Miller was represented ably at the first trial by Anthony Evans QC, who presented the same arguments on oppression that Michael Mansfield QC argued successfully on appeal in December 1992. Evans found Mr Justice McNeill, who died before the first trial ended, in intransigent mood.

Had McNeill ruled as he should have done this case would have been thrown out in 1989. Instead it continued without criticism of McNeill being made by the appeal judges. Why? Judges must understand the law regarding oppression. McNeill’s decision on the admissibility of Miller’s confession was quite simply wrong.

The Court of Appeal, headed by then Lord Chief Justice Lord Taylor, was horrified by the same interviews that McNeill found admissible. He had heard the worst bullying and concluded that it was admissible. He was wrong and so was the Court of Appeal in failing to highlight his flawed judgement on that issue – one that contributed to making this miscarriage of justice all but inevitable.

Evans was unavailable for the second trial. That almost concluded Miller’s wretched luck. Roger Frisby QC failed to argue that Miller had been oppressed in a case that is now one of the standard texts on oppression in a police station. The ‘confession’ was in. The trial judge Sir John Leonard could have used his discretion under section 78 of PACE to exclude it, but the exercise of that discretion is rare and Leonard didn’t apply it. The jury heard the confession, but were deprived of the context and understanding of what could induce an innocent man to sign away his future for the shortest of gains and the most paltry reward – an end to the interviewing. His confession, which he retracted had the terrible consequence of convicting his co-defendants Abdullahi and Paris, despite compelling evidence of innocence.

But there was more. Miller’s lawyers missed the significance of evidence that all but proved Miller innocent and was available for his trial. Languishing in the unused material was statements by Debbie Actie and Robyn Reed. The young women had seen Miller playing pool shortly after the crown say Lynette was murdered. Those claims were never retracted. There were trainerprints, hairs, fingerprints, fibres and plenty of blood-staining – both that of the killer and of course Lynette’s. This meant that if Miller was guilty he would have had to remove all traces of the scientific evidence that tied him to the flat and victim without showing any attempt to interfere with it. He would then have had to clean himself and his clothes so thoroughly that not a speck of blood remained, but without interfering with the dirt on the white parts of his stone-washed jeans. He then had to go across the road to a nightclub and play pool
without a change in general demeanour. He had to achieve all this within 20 minutes of the murder and as his lawyers knew with the IQ of an eleven-year-old child. The prosecution case against Miller should have been laughed out of court – literally – but it was never contradicted as vigorously as it should have been. The poor performance of Miller’s solicitors and Roger Frisby QC have never been investigated, let alone censured.

Abdullahi had a strong alibi. It was treated not as a possible indicator of innocence, but as a guide to what the prosecution had to be undermine. It was in short seen as nothing more than an inconvenience. Disclosure obligations were even used to bluff the defence into not calling a witness the CPS and the crown must have known supported Abdullahi’s innocence.

And Paris too had an alibi that common sense verified and the sole corroboration against him was a prison informer whose story stretched credibility to absurd lengths. Ian Massey had been looking for a deal a month earlier. He didn’t care who would have to pay for his ticket to a reduced sentence. Massey was Massey, trying his luck. He tried claiming that he had information on a notorious double murder before Paris had even been arrested, but this information was kept from Paris’ lawyers. Dyfed Powys Police were not so easily impressed with Massey.

They rejected Massey’s overtures on that case – it was eventually solved with the jailing for life of John Cooper, who also committed another double murder in that jurisdiction four years later.

There never was credible evidence to justify the arrests of the Cardiff five and the more the police and crown tried to shore up the case the more leaks sprung. Rather than review the case they had as the CPS was bound to do, only evidence assisting the prosecution was processed.

Inconvenient evidence was marginalised at best. Instead of being thrown out as it should have been a palpably unreliable case resulted in convictions that disgrace every reasonable concept of justice, but it would be a mistake to blame just the police or defence lawyers for such an appalling prosecution.

There is plenty of blame to go round and shamefully only one institution has held its hand up and accepted responsibility for its role in this travesty of justice – South Wales Police.
It seems to be very difficult for the Court of Appeal and the CCRC to accept that some lawyers themselves who conduct trials are responsible for wrongful convictions; to put it simply they are not up to the job.

– Maslen Merchant: ‘Poor Defence’
Wrongly Accused: Justice Gap Series

It is true, to an extent, that the Court of Appeal is reluctant to accept that a convicted person’s legal representatives were inept. It has been said on many occasions that such assertions are to be approached with ‘healthy scepticism’. What is of more concern, what the court seem to have more difficulty accepting, is just how much of an effect poor representation has on the trial process.

Most of the time the Appeal Court will try to avoid dealing with the question of incompetence altogether. In Day [2003] EWCA Crim 1060 the court proclaimed that incompetent representation ‘cannot in
itself form a ground of appeal or a reason why a conviction should be found unsafe. Instead of examining the standard of preparation or advocacy in detail, the court will usually look at the evidence which was or was not put before the jury as a result.

For example, where the advocate did not object to prejudicial evidence being adduced by the prosecution, the court will focus on whether or not that evidence should have been introduced. If it shouldn’t have been, there has been an error in the trial process and it does not matter whether it was objected to at the time. It is not that ineptitude is difficult to accept in such cases. It is self-evident. Instead of dealing with it, it is treated as irrelevant and ignored.

Of course, the Court of Appeal then has to decide if the conviction is ‘safe’ despite the error - i.e. would the jury still have convicted? This is, and could only ever be, an imperfect review. No-one will ever know whether, if trial had proceeded as

“No all failings fit neatly into evidential boxes and it not corrent to say that incompetent representation cannot in itself form a ground of appeal”

it should have, an acquittal would have followed. The accused is left in the position of having the jury’s verdict second-guessed, having been deprived of the opportunity to marshal a full and fearless defence in front of a panel of his peers.

Where this arises as a result of neglect by those entrusted to look after his interests, the affront to justice is as great as those miscarriages caused by the prosecution’s failure to properly investigate, disclose and fairly present their case.
Not all failings fit neatly into evidential boxes and it is not correct to say that incompetent representation cannot in itself form a ground of appeal. The Privy Council in *Bethel v The State*, 10th December 1999, (Unreported) acknowledged that it “is conceivable that counsel’s misconduct may have become so extreme as to result in a denial of due process to his client. In such a case the question of the impact of counsel’s conduct is no longer of any relevance, for whenever a person is convicted without having enjoyed the benefit of due process, there is a miscarriage of justice regardless of his guilt or innocence.”

This often overlooked guidance would seem to provide some hope where the complaint is truly about the poor quality of representation, which cannot be directly linked to an evidential decision. It would appear to cover those lawyers who, as Maslen Merchant says, are ‘simply not up to the job’. It allows the Court of Appeal to examine those issues which are regularly raised by those seeking to appeal - lawyers failing to advise their clients properly, lawyers making half-hearted submissions or missing obvious points for cross-examination or closing speeches. Yet the cases where convictions have been quashed on this basis are few and far between.

In part, this may be because the Court of Appeal and the Bar Council’s guidance on advising on appeal in cases involving allegations of incompetence, could discourage some representatives from bringing such appeals. Those advising are told that such complaints must be viewed with that same ‘healthy scepticism’ and reminded that – as in all cases – grounds of appeal should not be submitted unless they have a ‘real prospect of success’. Yet the Court of Appeal has also stated that if ‘lawyers have failed in their duty to their client then other solicitors and members of the Bar must ruthlessly expose that failure and the courts must not hesitate to take the necessary action’. Similarly, the Bar Council guidance goes on to state that “[when] such allegations are properly made… counsel newly instructed must promote and protect fearlessly by all proper and lawful means his lay client’s best interests without regard to others, including fellow members of the legal profession.” Those advising on appeal should therefore be willing to examine allegations of incompetence and challenge it where it is established.

The real difficulty is in trying to objectively identify incompetence and determine the point at which it has resulted in a denial of due process.
tactics. Different audiences call for different persuasive techniques. There is rarely a right answer to problems raised in trials but rather a range of answers, within which an advocate has to make finely balanced judgments, often in the heat of the moment.

Some of the best results can come from counsel following their gut instincts and too prescriptive a test could result in risk-averse ‘defensive advocacy’.

The test for when incompetence has led to a denial of due process seems to be along the lines of ‘we know it when we see it’. Hypothetical examples were given in Bethel and included where the advocate’s judgment was ‘impaired by senility, drugs or mental disease or where no instructions have been taken.’

Further examples can be found in Boodram v The State [2002] 1 Cr App R 103 where the advocate somehow did not realise until the trial was nearly concluded that he was actually engaged in a retrial and in Bernard v The State [2007] UKPC 34 where an advocate who had only been practising for three months was appointed on the first day of a murder trial.

Although these examples show some willingness to examine the effect of poor advocacy on the trial process, they are unlikely to set the bar as high as most people would expect. Furthermore, they are all Privy Council cases.

The Court of Appeal, conversely, upheld convictions in R v Bolivar [2003] EWCA Crim 1167 where leading counsel was conducting two trials at the same time, while on bail for a serious offence and having just been adjudicated bankrupt. Due process is not mentioned in the judgment.

Unfortunately, it is likely that in the future the Court of Appeal will need to get over its reluctance to grapple with the question of ineptitude. When every Government action appears designed to undermine the need for proper investigation, preparation and presentation of Defendants’ cases, it is more important than ever that the Court of Appeal increase their scrutiny to guard against the risk of miscarriages of justice occurring.

In the meantime, the public should be aware of the importance of satisfying themselves of their lawyers’ ability before trial and not simply assuming that the Court of Appeal will save them if their representation is not up to scratch. Counsel should continue to fight to ensure that they have the time and facilities to properly prepare their cases and put forward the strongest defence possible.

Where failings have taken place, there is scope to challenge the safety of convictions, as set out here, and those advising on appeal must do so fearlessly.

Acknowledging that there are those who are not up to the task acknowledges just how important and essential it is that that task is carried out competently. Suggesting that inadequate representation makes no difference to the outcome undermines the system as a whole.
A tough court

Francis Fitzgibbon QC

The Court of Appeal (Criminal Division) is an exceptionally tough court for all would-be appellants. It’s difficult enough to get it to consider an appeal fully, and when it does so the judges test every argument to destruction – and sometimes beyond. And of all the types of appeal that come before it, the hardest are probably those in which the complaint is that the appellant’s trial lawyers have been so incompetent that the guilty verdict should not stand.

First, some background. There is no automatic right to an appeal hearing if you have been convicted by a jury in the Crown Court. The first thing that happens is that your representatives will advise you if they think you have arguable ‘grounds of appeal’ – reasons for holding that your conviction is not ‘safe’. We’ll come back to ‘safe’. If the advice is positive, they will complete the necessary paperwork and make written submissions supporting the ‘grounds of appeal’.
Typical grounds would include errors of law by the judge, such as wrongly deciding a legal issue at the trial, or giving the jury inaccurate or misleading directions in the summing up, or admitting evidence that should have been excluded and vice versa.

The papers go first to a single judge of the Court of Appeal, who will usually be a High Court Judge assigned to the court. He (most are men) will look at the arguments on paper, and will read transcripts of the parts of the trial that are questioned. The prosecution usually give a short commentary on the points raised. At this stage, the person bringing the appeal is known as the ‘applicant’, because he is applying for permission to appeal. The single judge acts as a filter and decides which cases are fit to be fully argued in court. Permission is granted if the single judge thinks that the written material shows there is an arguable case – meaning that the points raised may have merit. That decision converts the applicant into the ‘appellant’. If the judge decides otherwise, permission is refused. The judge gives a short statement of his reason. The applicant has one further opportunity to press his case: he may ‘renew’ his application to the full court, meaning that he can make oral submissions in court to a Lord Justice of Appeal flanked by two High Court Judges. The prosecution are almost never represented at this stage. If the full Court agrees that the case has no or not enough merit, the appeal is over.

If the single judge grants permission, or the full court do so on a renewal application, the case proceeds to a hearing with detailed submissions made by both sides and with the court giving much in depth consideration to their arguments.

‘Safe’: the Court of Appeal will quash a conviction only if they think that the jury’s verdict was not ‘safe’. This is the statutory test that for criminal appeals, but the word ‘safe’ is not defined. The court acts on the (reasonable) premise that if it should respect the jury’s verdict because they were the primary decision-maker and were best place to give judgment.

“Typical grounds would include errors of law by the judge, such as wrongly deciding a legal issue at the trial”

However, any practitioner will tell you that their famously pragmatic approach can mean that they stretch the concept of respect for the jury’s verdict to unrespectable limits.

Appeals based on complaints about legal representation show the Court of Appeal at its best and its worst. The Criminal Appeal Office (the Court’s admin section) say they do not keep statistics of appeal by type, but they get a great many of these, mainly by applicants in person rather than by lawyers.

The judges, according to Lord Steyn in the leading case of Boodram [2002] 1 Cr App R 12 [§38] have: “…two considerations firmly in mind. First, an appellate tribunal must approach complaints about counsel’s incompetence, and its effect, with a healthy scepticism. On the other hand, where it has been demonstrated that counsel’s failures were of a fundamental nature the court must proceed with great care before it concludes that, on the hypothesis that the failures
did not occur, the verdict of the jury would inevitably have been the same.”

In that case, a murder, defence counsel did not realise until near the end of the trial that he was in a retrial, and when he found out he failed to do anything about it. Hence Lord Steyn found there had been: “either gross incompetence or a cynical dereliction of the most elementary professional duties... The breaches are of such a fundamental nature that the conclusion must be that the defendant was deprived of due process.”

You would hope that an appellate court (in that case the Privy Council) would not hesitate to quash a conviction in what they called “the worst case of the failure of counsel to carry out his duties in a criminal case that their Lordships have come across”.

Those cases are not really the problem. Nor are those which anyone could see are try-ons by people rightly convicted, serving long sentences, and with time on their hands and blaming their troubles on their lawyers. It’s the ones in the middle that cause problems.

Here’s a real example: a case of historic sex abuse by stepfather (D) on child aged between four and about 13, shortly before D’s relationship with mother ended; no allegations made for over 15 years; allegations made at a time when D had just won a bitterly fought county court case over a debt owed by another family member. The now adult complainant gave her statement to a trained officer in a video interview (the ‘Achieving Best Evidence’ or ABE procedure standardly used in such cases).

It is then used as the witness’s evidence in chief in court, and the witness will be cross-examined about it. The prosecution served the transcript on the defence, with the rest of the case papers. The interview lasted over an hour and the transcript was 83 pages long. Almost every page had words or passages marked ‘inaudible’. The DVD itself was not served until the morning of the trial – far too late, and against the rules.

“Defence counsel did not realise until near the end of the trial that he was in a retrial, and when he found out he failed to do anything about it”

The barristers asked for 20 minutes to listen to it. They asked for no changes to be made to the transcript, which the jury would receive to assist while watching the DVD in court. Defence counsel cross-examined the complainant about a particular passage on the basis that it showed so great an inconsistency between her evidence and witness’s that it cast doubt on her credibility and the reliability of her whole account. The passage was one of those marked ‘inaudible’. Counsel commented on the point in the closing speech: it was the highpoint of the attack on the complainant as a malicious liar.

After the jury had begun deliberating they asked to view the DVD again. At this point one or other counsel noticed, for the first time, that the ‘inaudible’ passage was all too audible, and the words spoken showed there was no inconsistency at all. Other and perhaps better points had not been taken in cross-examination. A defence witness who could have rebutted at least part of the prosecution case was not called.
The single judge refused permission to appeal and the renewal to the full court fared no better. The failure to check the content of the transcript until much too late, and the error in the cross-examination, were described a ‘forensic accident’ which made no difference to the safety of the conviction.

The court declined to say what a ‘forensic accident’ is, but plainly regarded it as of no great consequence.

The decision not to call the potentially helpful witness was said to lie within counsel’s proper discretion, and caused no tremors to the safety of the conviction.

The refusal of the renewal application meant that the full court never heard the counsel being questioned about what had happened, which it would probably have if the case had gone to a full hearing.

You may or may not agree with the court’s decision. It is certainly right that an appellate court should be slow to second-guess a jury’s verdict, much less the rational and intelligible decisions by defence lawyers doing their best for their clients as they see it. And yet: rational, intelligent and skilful people can make serious mistakes, without realising it. It doesn’t make them bad people or bad lawyers. It’s if they keep making the same type of mistake that they become dangerous. In the criminal law, a single bad mistake may cost someone his freedom and his good name. None of us is above scrutiny.

Lord Steyn’s ‘healthy scepticism’ all too easily hardens into a refusal to countenance any criticism; or to say that if the decision was justifiable it doesn’t go to safety – even if it was wrong. If I thought a Lord Justice of Appeal would be on my case if I made a serious mistake, it would sharpen up my act more than somewhat.
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Blaming over-zealous police or irresponsible prosecutors for miscarriages of justice makes for a simple and straightforward narrative. As with most things, though, the reality is more complicated, and defence lawyers may also have a role to play. This being the case, the neat binary opposition we so rely on in criminal justice is somewhat obscured.

For those of a left-liberal bent keen to enforce due process values, we cannot simply take the side of the defence against the prosecution. We must detach the lawyer from their client and stand up for those suspected and accused of crimes by supporting their pursuit of justice from all practitioners. However, this separation is not a simple fissure to achieve because the defendant and their representation are intrinsically entangled together.

In the criminal justice system, defendants are largely rendered dependant upon lawyers – it is an inherently alienating institution. The criminal process presents a self-referential system, with an array of specific hearings, complex procedural rules and arcane language, quite detached from the real world. Defendants become dummy players in the course of doing criminal justice; discouraged from active participation, they are effectively silenced through their lack of understanding as to what is happening to them. In these circumstances, defendants are definitively established as clients – reliant upon lawyers. Access to justice, then, becomes access to lawyers, usually provided by legal aid – so, in essence, the production of justice can be reduced to the lawyer-client relationship. Clients, and society, must trust that these lawyers will show commitment to their clients, pursuing active defence to put their interests first.

**Less remuneration, less justice**

If lawyers are simply going through the motions, offering an altogether more passive defence, they act to deny rather than facilitate justice. Sadly, it is this negative view of lawyers that my recent empirical research highlighted. I conducted a yearlong ethnographic study to investigate the everyday reality of the lawyer-client relationship with three
more than money

criminal defence firms working in and around the magistrates’ court of a large English city. Though I attempted to select firms with a radical reputation for client-centeredness, they presented a practice that was anything but. I was subject to an unending barrage of critical comments about clients, poking fun at their supposed lack of intelligence, questioning the moral fortitude of their perceived class and routinely assuming factual guilt.

These bad attitudes transmitted into behaviour; lawyers devoted as little time as possible to their clients’ cases, talking over them and cutting short their stories, regularly pushing them toward early guilty pleas and sabotaging those that got through to trial by neglecting to properly prepare. At one time or another, every lawyer displayed such an approach. They showed me a fundamentally lawyer-centred practice.

According to the lawyers themselves, declining legal aid revenue was to blame. Contemporary Britain can be increasingly characterised by an ideology of consumerism – the market is all. This is reflected by governments of left and right pursuing neo-liberal policies, subjecting welfare to the vagaries of the profit motive. Under this commodification of state provision, public services are reduced to the status of products to be bought and sold.

This means that obligations of the state to care for the common good of its citizenry are challenged as they are exposed to the full force of capitalism and the drive to reduce prices by delivering standardised products that can be quickly, cheaply and routinely dispensed to a mass of consumers. The result has been a widespread restructuring of this branch of the profession and an orientation away from rather old-fashioned notions of service, firms that prioritise the client, toward a factory model, which passes clients along a mass-production assembly line.

“Under this commodification of state provision, public services are reduced to the status of products to be bought and sold”
The move to fixed fees, and the decline in real terms of the level of these fees (with loss of attendant extras, such as waiting at police stations) can be directly implicated in a process whereby lawyers coming to treat clients as sausage meat to be processed. Lawyers feel they need to act this way in order to survive. There is certainly some veracity in this line, as lawyers are placed into circumstances of moral ambiguity. Some options might serve the client but lose the lawyer money while others could claw the lawyer some money back but not be in the clients’ best interests, meaning lawyers are forced into making choices – whether or not they are fully conscious of such dilemmas.

As a result, when lawyers become disincentivised by reduced funding for their work, they are actively induced to provide a different, lesser product. On one level then, access to justice could be improved by improving remuneration, increasing the reward lawyers receive for their various inputs of time and effort, thus encouraging more. This is certainly the Law Society’s solution for overcoming the current malaise; they suggest that present contracts are not fit for purpose and should be reassessed by an independent pay review body.

A question of values
At the same time, singling out legal aid may provide too easy an answer. We are regularly reminded that these lawyers preside over the largest legal aid bill in history and, despite lagging behind their professional brethren in other areas of law, still earn more than the average wage many strive for.

Beyond this, more money cannot automatically be assumed to herald an upturn in standards in and of itself. While lesser remuneration might precipitate ever-greater declines in the service provided, it is possible that improving the situation will take more than financial reward.

As professionals engaged by the state to protect the rights of its citizens, criminal legal aid lawyers lay claim to a moralistic notion of public service.

This involves a principled commitment to serve society, accepting a responsibility that extends beyond their immediate clients.

The professional is supposed to pertain to Pythagorean standards, eschewing any connection between work and wealth, occupying a privileged position above the pettiness of the class systems and the division of labour that taints the masses. By this line, these lawyers are disinterred servants of the community.

While fully realising that ideal is, of course, unrealistic in the face of cold, hard reality, it is still within such grand values that those of us arguing for justice try to frame the debate. More so, it is the imagery that such lawyers often appeal to in attempting to justify themselves.

To whatever degree is realistic then, these lawyers should not allow financial matters to push them to mistreat and neglect their clients; their role is to resist such pressures as much as possible in the name of justice.
However, I have seen with my own eyes that they do not always do this – in fact, it was a miniscule exception to the norm if it did occur at all. When the profit motive is induced, they lose their moral compass and values shift away from those we expect and should demand.

Has reduced remuneration cause this moral decline? Has it actually just exacerbated an underlying trend? Or, has it merely acted as a justification for something knowingly unacceptable?

I would suggest that there is most likely a circular relationship between diminished funding and sullied morals. Regardless of which came first, my suggestion for improving the situation would be the same: increase and enhance ethical training for such lawyers.

Those lawyers who would be funded by the state to uphold the most fundamental principles of justice must spend more time reflecting on the meaning of their practice, exploring its social significance.

This may involve rewriting an organisational culture that has come to legitimise the sustaining of unpleasant attitudes and behaviour in the name of necessity – a means to an end in ensuring that the profession can still do some good despite structural opposition.

The vague pleasantries found in professional remits including items such as public service commitment, integrity and fairness currently act but to retain the privileged position of these lawyers and exempt them from responsibility. Values are detached from what they should represent, empty in practical terms; relegated to a theoretical argument by which to preserve the status quo.

Any discussion of realigning the values of practitioner, then, must move beyond the syllabuses of law schools or the strictures of professional bodies. There is a need to overcome a narrow and positivistic legal education that develops a managerialist outlook, under which it is natural to elevate the tangible facts of profits above the fleeting experiences of clients.

In these circumstances, ethics become functional rather than moralistic; a tick-box activity which simply equates them to compliance with professional codes.

Law schools might better integrate themselves in the local community, fostering face-to-face relationships with those they would serve.

Talk of an annual legal MOT for those in practice need to be made to include an element of client relations – forcing lawyers to engage with feedback from some of those they have represented. Legal ethics must be made into a living, breathing concern and, in so doing, the essentially aspirational quality of their content can be drawn out.

To these ends, research such as my own should function as reflexive learning, holding up a mirror to the profession.

On seeing the disgraceful way that clients can be treated, lawyers must question their own practice. If they genuinely do not see themselves in such a portrayal, the onus falls on them to support their colleagues because those that do recognise their practice require ethical renewal.

The profession is supposed to be a vocation, not just a job. As a calling, such lawyers should spend less time passing the buck and more taking responsibility for their own actions.
A few months back there was some discussion around the level of service that legally aided clients could expect in the era of permanent cuts in the legal aid budget. Whilst the future may look bleak as further cuts are contemplated there is no doubt in my mind that there are still many dedicated solicitors and barristers who work extremely hard to provide their clients with a service every bit as good as they would if they were paid privately.

No one embarking on a career in legal aid work does it to get rich. Until recently you could at least make a reasonable living at it but if you wanted flash cars and big houses legal work was not where you wanted to be. Those who do legal aid work are generally determined to do their very best to protect the rights of their clients.

Whether it’s in the police station helping a vulnerable person deal with hostile
questions from a detective or a barrister working late into the night before trial because she has found a legal argument that might win the case, the motivation is not just our professionalism but also a desire to ensure that our clients get their constitutional right to a fair trial.

The same applies to those in all other areas of legal aid work from housing to immigration and asylum.

Legal aid lawyers are passionate about people and passionate about justice. We do the job because we want to protect our clients’ interest and do our best to get them the right outcome. We do it because we know that legal aid lawyers can make a difference to our client’s lives.

Saving an innocent person from wrongful conviction is a wonderful feeling. The same applies if we can prevent a tenant being wrongly evicted or a desperate asylum seeker from being deported. And even if we may not always win, we will make damn sure our clients get as fair a trial as we can manage to achieve.

That has never been easy and in many ways in has got harder to achieve. In my own field of criminal law where I have been in practice now for over 35 years I am
acutely aware that almost the only changes made in the law during my career have been designed to increase the rate of conviction regardless of whether than puts more people in peril of being wrongfully convicted.

**Moving in the wrong direction**

Back in 1984 the Police & Criminal Evidence Act was passed. When it came into effect a year or two later it revolutionised practice, particularly in police stations. Almost at a stroke it ended the practice known as ‘verballing’ whereby police officers invented alleged ‘confessions’ on the part of suspects. Once interviews had to be taped and suspects given access to solicitors the opportunities for the police to fabricate confessions virtually disappeared. It was a major step forward in ensuring that suspects get due process of law, a fair trial.

But since then I can barely think of a single provision in any Act of Parliament that has been designed to strengthen the rights of suspects. Rather the moves have all been in the opposite direction. From removal of the right to jury trial, to removal of the right to challenge the composition of the jury, through abolition of the right to silence, the requirement to tell the prosecution in advance what the defence will be, the introduction of bad character evidence and changes to the hearsay rules and the endless possibilities for a jury to be invited to draw an adverse inference against an accused, the only purpose any of this could possibly have had has been to try to increase the rate of convictions. And if your try to increase the rate of convictions it is as inevitable as night following day that you increase the risk of some of those convictions being wrongful.

I can’t even blame one party more than the other for these measures. In fact Labour has been every bit as guilty of ignoring the rights of the accused as the Conservatives. It was Gordon Brown who first seriously contemplated the idea of locking people up for up to three months without charge and Labour who first thought about the idea of governments having total access to everyone’s personal communications, which makes it hard for them then to oppose what the present government have in mind.

“There is no doubt that the last Labour government had seriously lost its bearings when it came to the rule of law, that vital bulwark against governments that want to accrue more power to themselves than is appropriate in a democracy.

But like many of my colleagues I do fear for the future of legal aid. The relentless cuts are already having an effect. The number of solicitors doing legal aid work has fallen and many barristers also appear to have switched to better paid work or otherwise given up.

Student lawyers will shortly be clocking up debts of £90,000 by the time they qualify. It is asking a lot of such people to accept a training contract with a high street legal aid firm at £14,000 a year or a pupillage with a
grant as low as £12,000 when, if they have the talent, they can get £40,000 or more from a magic circle law firm or commercial set of chambers.

I regularly meet many students who are clearly still motivated to go into legal aid work but I wonder how long it will be before this enthusiasm becomes a victim of the reality of a life of grinding debt. The number of pupillages is falling and already it is very hard in many chambers for a newly qualified barrister to make a living doing criminal work.

**Market forces**

In time this is bound to have an effect on the quality of the service that lay clients can expect. The government seem very keen for lawyers to accept that the rules of the market must apply to our trade as much as anywhere else. In which case why does the government not seem prepared to admit that paying Lidl prices is not going to get you Waitrose quality? People who shop at Lidl know what they are getting is of a lower standard but if price is the priority they are prepared to put up with that.

Why does anyone think the same won’t happen in legal services?

If you want to see what happens to the standard of legal services when rates of pay are cut you only have to look to the United States. In that country the most serious criminal cases, those involving capital murder are the worst paid.

Whilst there have been some recent improvements there are many on death row today whose lawyers at trial were alcoholics, drug addicts, had previously been disbarred for misconduct, lacked experience of criminal cases and some who were so egregious they couldn’t even stay awake during their client’s capital trial!

Shocking as this may sound, the reason is simple. The fees on offer have been so low that the only lawyers prepared to do the cases are those who can’t get other work.

The legal aid system is regarded by many as an essential aspect of the welfare system of which we are rightly proud.

Attacks on this aspect of the welfare state are every bit as dangerous as attacks on welfare benefits and the health system and we should all be very concerned about what is happening to our right to proper representation before the courts.
Many notorious miscarriages of justice, such as the Guildford Four and Birmingham Six, occurred when suspects were denied access to solicitors and were coerced into making false confessions. Injustices can also happen when a legal adviser is present, however. Academic research, together with cases such as the Cardiff three, raised concerns about the performance of unqualified, incompetent or insufficiently adversarial advisers.

More recently, anxieties have been expressed about the effects of cuts to legal aid affecting the performance of solicitors. One area that has been overlooked thus far is the effects of changes in evidential rules that have made it harder for defence lawyers to act in their clients’ best interests: the moves to encourage ‘speedier justice’, the requirement that defendants disclose their case before trial and, most significantly, the restrictions on the right of silence.

The right to legal advice has been described by the Court of Appeal as an essential feature of a fair trial, protected by article 6(c) of the European Convention on Human Rights. The Police and Criminal Evidence Act 1984 (PACE) gave suspects the right to free, independent legal advice at the police station, as well as a range of other protections to counterbalance the increase in police powers. Although fewer than half of suspects seek legal representation, PACE was caricatured by some as a gift to professional criminals and terrorists. The police and some senior judges were quick to suggest that the right of silence should be curtailed in exchange for legal advice.

This exchange was based on the logically flawed premise that, if legal advisers were enforcing their clients’ rights, then suspects should lose one of their most historically significant protections.
Following his notorious 27-point crackdown on crime speech at the Conservative Party Conference, then Home Secretary, Michael Howard introduced the legislation curtailing the right of silence that became the Criminal Justice and Public Order Act 1994 (CJPOA). Section 34 CJPOA provides that, when a defendant relies at trial upon any fact not mentioned during questioning or charge that could reasonably have been mentioned at that stage, the prosecution and judge are allowed to comment on this. The jury or magistrates may then draw ‘such inferences as appear proper’ from this omission. Sections 36 and 37 allow inferences to be drawn when suspects fail to account for the presence of any substance, object or mark about their person, or their presence at a particular place.

The legislation was supposed to prevent ‘ambush defences’, even though there was little evidence that these were causing difficulties for the prosecution. It also ignored the principle that in an adversarial system, the defence should not have to disclose its case in advance of trial (exceptions were already made requiring alibi notices).

The silence provisions faced intense opposition from the Bar Council, Law Society and academics, and public protests were held against the bill. Much of the opposition focused on the risk of miscarriages of justice being caused by suspects having to answer police questions. Whilst it seems that there are fewer ‘no comment’ interviews since the Act, there has been no evidence of a rise in convictions, or examples of injustices occurring as a direct result of it. Although there has been much legal analysis of judgments relating to the CJPOA, one area that has not been explored sufficiently is the effects it has had on the ability of legal representatives to do their job.

“Although fewer than half of suspects seek legal representation, PACE was caricatured by some as a gift to professional criminals and terrorists”

The Court of Appeal has failed to recognise the practical difficulties that its decisions have caused for legal representatives in the police station. The PACE Codes of Practice declare that “The solicitor’s only role in the police station is to protect and advance the legal rights of their client… [the solicitor may]…advise their client not to reply to particular questions”. Yet the court has insisted that solicitors must now have objective reasons for advising silence that are sufficient to outweigh the public interest in the suspect answering police questions. It has not explained how solicitors should resolve these conflicting demands. Legal representatives have little formal authority to control how the police exercise their broad discretionary powers.

A no comment interview was one of the few options they had if they thought the police were on a ‘fishing expedition’, were refusing to disclose their case, or were exceeding their powers. The court refused from the outset to exclude no
comment interviews where the legal advice was ‘tactically based’, for example if the complainant had not made a written statement or it was thought that the allegations would be withdrawn. This has made it riskier to test the prosecution’s case.

Legal advisers now have to assess, not only the current strength of the case – even if the police will not reveal it – but also predict its credibility should the case go to trial. If the case is too weak to result in a charge, answering questions may provide enough evidence for the case to go forward. If the case is just strong enough to be prosecuted, the inferences drawn from a refusal to answer questions may be enough to secure a conviction. Poor legal advice is not considered a ground of appeal in itself, unless a specific error can be shown that rendered the conviction unsafe.

The court’s expectation that suspects should answer questions makes it unlikely that poor advice to answer questions could be a successful ground of appeal.

In Condron, the first case it considered on the subject, the court dismissed the suggestion that defendants should be protected from adverse inferences if they remained silent on legal advice. The court held that this ‘would render section 34 wholly nugatory’ as any competent solicitor would then be bound to advise a no comment interview (a view that ignored the low rates of both legal advice and no comment interviews). It held that jurors should be told that what matters is what the defendant rather than the solicitor thought.

Aside from the impossibility of jurors establishing the defendant’s thought processes, such a view assumes that the lay client is in a position to evaluate the expert advice they are given and to decide whether or not to follow it. Such a view fails to consider the high levels of academic failure, the mental health problems and drug and alcohol abuse amongst those in custody, many of whom do not have English as a first language.

“The court’s expectation that suspects should answer questions makes it unlikely that poor advice to answer questions could be a successful ground of appeal”

It is now much harder for solicitors to protect vulnerable clients by advising ‘no comment’ interviews. The court has allowed inferences to be drawn from silence when the solicitor thought that heroin withdrawal made the accused unfit to be interviewed (Condron) and when the solicitor thought that the suspect did not have sufficiently good English to understand the relevant legal concepts or to give her instructions (Roble).

Communications between lawyers and their clients were previously considered absolutely confidential (‘a fundamental condition on which the administration of justice as a whole rests’ as the House of Lords declared). Yet the Court of Appeal has interpreted the CJPOA in such a way that defendants are now faced what is essentially Hobson’s Choice. A simple statement that they were silent following legal advice is
unlikely to protect them from inferences, but if the legal representative is called to give evidence about the advice that was given, the defendant is considered to have ‘waived privilege’ – that is details of the legal consultation are no longer confidential and the prosecution can then ask questions about the advice given.

This introduces a tension into the lawyer-client relationship as legal representatives are conscious of having to protect their position should they have to give evidence and many ask their clients to sign disclaimers about the advice they have received.

As around 75 per cent of defendants are recidivists, if they have experienced their adviser having to give evidence about their legal consultation, they may be more guarded in future meetings.

Many of the recent evidential changes have been based on a more inquisitorial approach in which evidence is disclosed by both sides before trial. Nevertheless, the system is still an adversarial one and it is unfair that legal representatives are restricted in testing the prosecution’s case.

The right of silence was regarded as a fundamental right of suspects – and still is in most Anglo-American judicial systems. Not only was this right removed in the absence of supporting evidence for such a decision but the way in which the Court of Appeal has interpreted the CJPOA has undermined legal professional privilege and made it harder for legal representatives to test the police case and to protect their clients’ interests. A ‘triple-whammy’ that was not anticipated at the time and is unfair both to suspects and to their representatives.
Writing this, it is difficult to know what identity I should use. Half a lifetime ago, I used to be a probation officer in Tottenham in the aftermath of the Broadwater Farm riots. Given that I had two of the Tottenham Three – Winston Silcott and Engin Raghip – on my books at one point, I could talk about the difficulty in supporting efforts to get any attention paid to the possibility of miscarriages of justice. In my personal life, I am married to a criminal defence barrister. I could therefore talk about the pressures I see on such lawyers at a time of decreasing incomes and increasing competition for work, pressures including those from intolerant and unsympathetic husbands.

But I suspect that is not why I have been asked to contribute to this volume; there are many better placed that I am to write on these areas. No – it is in my current capacity, as Chief Legal Ombudsman, that I am making this contribution. And if that means that I am not going to express any views on the shape of legal aid cuts or the way that the legal services market is being reshaped, you will have to forgive me. As an Ombudsman, my role is not to act as a commentator on government policy but to describe what it is I see in the cases with which we deal.

And there are a lot of them. Last year we investigated nearly 7,500 complaints of which over 900 were about criminal law. And there are signs that number is set to build as the word about our existence spreads around prison landings. For prisoners who have tried and failed to interest the Court of Appeal in their cases or who have given up on the Criminal Cases Review Commission, our arrival gives fresh hope. After all, if a statutory body such as the Legal Ombudsman might be persuaded to opine that the defence they received was inadequate, that surely will be a step on the road to release.

And they have a point. As a body set up to deal with complaints about the adequacy
of service provided by lawyers, we are there as much for criminal defendants as for those who instructed lawyers to do their conveyancing or obtain a divorce. And we find that the service given to someone whose liberty was at stake was inadequate, it is our duty to seek to do something about it.

That said, such cases cause real challenges for us. Despite the fact that the Legal Ombudsman was established by piece of legislation sponsored by the very government department which oversees the system of justice and sponsors the Criminal Cases Review Commission, we have little formal relationship with the criminal justice system.

Our remit is limited to the individual lawyers who provided the service; even where we find that the defence was inadequate and that this may have contributed to the conviction, we have no formal powers in relation to the court system (and nor would it be usual for an Ombudsman to have such powers). We can order the lawyer to make whatever redress lies within their power but our writ extends no further.

Moreover, the twin hurdles of determining that the defence provided was inadequate and that these inadequacies raised serious questions about the conviction are, in practice, high for us to surmount. We are a lay organisation, required to provide a speedy and efficient complaints resolution service. We are neither set up nor resourced to undertake detailed analysis of the intricacies of criminal defence strategies. In most cases, the complaints received revolve around unhappiness with the

“We are there as much for criminal defendants as for those who instructed lawyers to do their conveyancing or obtain a divorce”
tactics adopted: why was a particular witness not called? Why was a particular line of questioning not adopted? These are questions of legal judgement which it is difficult for anyone, particularly a lay organisation, to establish definitively were unreasonable. And just because a line of argument was rejected by the judge or the jury was unconvinced by the way the evidence was presented does not mean that the lawyer’s judgement was flawed or that the service was inadequate. Were this to be the case, in every contested case one side could always be held to have good cause to complain.

There is also an inequity of evidence in many of these cases. Complainants who argue that they were bullied into pleading guilty are often faced with their signature on the brief or a contemporaneous attendance note; rarely do they have their own notes to counteract these.

And lawyers can argue, reasonably enough, that many of the decisions they make are necessarily subjective – whether a witness would be credible or a question would alienate the jury – which no-one subsequently is in a position to retake.

These are not merely issues for the Legal Ombudsman; I have heard judges voice the same concerns in relation to the assessments of advocates’ quality that they will have to make under the QASAR scheme.

Even where we can find evidence to substantiate that the service was poor, that does not automatically mean that the conviction is necessarily unsafe.

Many of the issues raised with us – delay, rudeness, communication failures, cost – can almost never be linked with the outcome of the case.

Others, such as the late change of a barrister, can easily enough be shown to have had an emotional impact but unless the judge has, for example, commented on the lack of preparedness of the defence counsel, it is difficult to find a direct link between that and a case being lost.

As a result, many of our complainants are able successfully to establish that the service they had was poor but leave disappointed with the outcome of our process. It is no coincidence that the levels of satisfaction with our service on the part of prisoners are lower than we would like.

Which is not to say that we can never be an effective route to challenging a conviction. While most complainants are destined to leave disappointed, some do achieve a successful outcome. One of our early cases was from an individual who claimed that his defence team failed to argue for an adjournment to enable his defence to be investigated.

On looking into the matter, it rapidly became clear that he had indeed been let down by his legal team and when they, to their credit, agreed that they should have done more to trace and interview his witnesses, we were able to broker an agreement that they would do some pro bono work on preparing an appeal; we also liaised with the Criminal Cases Review Commission to ensure that they were in a position to approach the matter sympathetically.

But such cases are relatively rare. And for all that we will continue to look seriously at claims that the defence lawyers have failed to provide a reasonable service, there is reason to feel some discomfort about our positioning. There is an argument to say...
“Even where we can find evidence to substantiate that the service was poor, that does not automatically mean that the conviction is necessarily unsafe”

that our arrival into the current system of providing a service to people who claim to have been wrongfully convicted has not been helpful, that we have merely added a further level of complexity and raise hopes which in the main will not be fulfilled. When I write articles for prisoner magazines, I spend more time trying to damp down their expectations about what we can achieve than I do drumming up business. I do not want to be the cause of greater alienation and frustration to a population which is already prone to both feelings.

Nor has our arrival been seen as great news by some lawyers. On the positive side, part of our role is to defend them against unfounded allegations and provide somewhere for them to refer clients who they simply cannot satisfy. By policing the behaviour of the worst of the profession, we also aim to support the work of the best. However, I am deeply conscious that many criminal defence lawyers, particularly legal aid lawyers, are struggling with a faltering economic model and a rapidly transforming market. Given that the burden of regulation, according to a recent Law Society survey, is currently the single most profound challenge to solicitors, I do not want to add unnecessarily to it.

And in seeking to help the fight for justice by some defendants, we do risk being part of an injustice for some lawyers.

For lawyers, dealing with my office is not cost-free: along with the potential for being ordered to make redress and pay a case fee of £400, there is the time cost of answering our questions and providing the evidence we need. This is increasingly known to some complainants.

Already I am aware of some former criminal clients writing to lawyers threatening to report them to the Legal Ombudsman if they do not pay a small amount of compensation, and some lawyers paying up on a naked cost-benefit basis.

Given that the total earnings from a criminal case may be as low as £200, hard-pressed legal aid lawyers may be increasingly reluctant to take on cases involving clients they consider difficult if they know that they risk losing double that amount by a complaint being made to the Ombudsman.

But it is these very economic pressures which makes it so important to have an outlet for complaints about poor legal service. As the legal aid cuts bite and the competition from new legal models intensifies, there is a risk that some lawyers may be tempted to shave the quality of their service in an attempt to continue to survive. If that happens, the impact on those facing criminal charges could potentially be profound.

For all our limitations, it is the Legal Ombudsman’s job not just to seek to right the wrongs which may have resulted but also to feed back to lawyers, clients and government what we are seeing.

And that is what we will do.
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awyers are at the heart of many cases of the wrongly accused and wrongly convicted: wrong, shoddy, lazy representation. It is a recurrent theme. It should haunt us,” said Gareth Peirce, speaking at the launch of the Justice Gap’s Wrongly Accused on 29 March 2012.

Andrew Pountley was convicted of the abduction, rape and murder of Rosie, a four-year-old girl, just after midnight on a January night in 1996. Key evidence against him was that of a child witness who lived across the road from where the girl was taken. He said he saw Pountley carry Rosie down a side passage, across a garden, and along a track behind the garden. Pountley maintained his innocence, and the television programme Rough Justice investigated the case. With their researcher, I visited the scene. It was immediately obvious to us that the witness could not have seen what he claimed to have seen. Behind the row of houses which included the house from which Rosie was taken, the ground fell away steeply, so that the gardens behind them and the track were completely obscured by them.
and invisible from the witness’s viewpoint. Surely, I thought, someone from Pountley’s defence team must have visited this site, one-and-a-half miles from the solicitors’ office, and established that the witness’s evidence was untrue? But I already knew that I should make no assumption that defence lawyers investigate even the most obvious aspects of key prosecution evidence. In 1996 I published an article on this subject in the newspaper for prisoners, *Inside Time*, ‘Lawyers who let you down.’ I received nearly 200 unsolicited letters, containing such comments as “You have hit on a taboo subject, a practice that has been going on for years and to my knowledge you are the first person to bring it to light,” and “at last someone has spoken out about what really does take place in court cases ... Once you are in the legal system you are systematically fitted up by people you put your trust in,” and “When I first read your article... I thought ‘How has this man written about my case without knowing me!’” For over 20 years I have listened, in the meetings of INNOCENT and its sister organisations, to the accounts of the friends and families of those who believe that someone they love has been wrongly convicted, and virtually all of them believe that their loved one would not have been convicted had their lawyers been more diligent. Their impressions dovetailed with the findings of the large scale and detailed academic research by Professor Mike McConville and his associates in the early 1990s, which showed that defence lawyers usually believed in ‘the trustworthiness of the prosecution case’ and that their clients were guilty.

But should we believe these stories? Are they simply the product of those who feel themselves to be the victims of injustice blaming an easy target? Or are they made

> “It was immediately obvious to use that the witness could not have seen what he claimed to have seen”
up by those who are actually guilty, hoping to escape justice on legal technicalities? Laurie Elks, a former commissioner at the CCRC, tells us that in applications to the commission, “assertions of legal incompetence loom very large indeed”, but that “a majority of such claims are plainly incredible or defamatory”. Closer inspection of claims I have heard does not permit them to be easily dismissed as “plainly incredible”, however. Complaints that important evidence was not put to juries are common: “the evidence against me was flimsy to say the least, yet my defending counsel Mr *** QC took it upon himself to discharge all my defence witnesses without giving valuable evidence to the jury, one of them being a paediatrician who could have proven the allegations to be untrue. How can any accused person have a fair trial without any defence witnesses?” wrote a prisoner serving 12 years for rape.

Jordan Cunliffe was convicted of the murder of Garry Newlove in 2007. There was no evidence that he had physically attacked Mr Newlove, but he was in the company of two others who knocked Mr Newlove to the ground and kicked him in the neck, thus causing his death. Cunliffe was convicted because he was believed to have encouraged the other two, through use of the legal doctrine of joint enterprise. His defence was that he suffers from visual impairment so disabling that he did not know that Mr Newlove was being attacked, and could not have anticipated the assault or tried to prevent it.

During his trial, prosecution counsel told defence counsel that he would not contest a report by an expert on Cunliffe’s eyesight, on condition that the expert himself was not called to testify in court. Cunliffe’s counsel agreed. In his summing up, judge Andrew Smith said: “He’s partially sighted suffering from keratoconus and you heard from the report of Mr. Parkin, a consultant Ophthalmic Surgeon that he’s severely physically handicapped and would qualify for blind registration. As a result for example he couldn’t distinguish the men from the ladies in the jury box.”

Mr Parkin’s report was however highly technical, and he was expecting to be able to explain to the jury that Cunliffe’s vision was extremely blurred, and that he saw multiple images which were particularly hard to interpret in the night time conditions when the assault took place. Street lighting and car headlamps appeared to him as multiple flashing lights. He could not see what was happening around him. But this information was not given to the jury who convicted him, because of the lawyers’ time saving deal.

In any case, anyone hoping the Court of Appeal criminal Division [CACD] might overturn a conviction simply because of negligent or incompetent courtroom advocacy is likely to be wasting her or his time. Elks writes that “it has become clear that the [CCRC] is likely to be distrusted or even resented by the Court of Appeal when it has the temerity to suggest that learned counsel has slipped up on the job”.

Even in the case of Adams, referred by the commission, when the CACD quashed Adams’s conviction after hearing evidence not used at his trial because of multiple failings in the work of his solicitors, the appeal judges administered only a faint trace of a rebuke to counsel who ‘did their best’ but ‘underestimated the time needed to complete the work.’
Where counsel for Adams had failed was in requiring their instructing solicitor to read material already disclosed to them by the prosecution. It seems the CACD is prepared to admit a few criticisms of solicitors. To those of us trying to help a few of those people in prison who claim to be innocent, the failings of solicitors appear to be routine.

In case of Susan May, the prosecution relied effectively on one item of evidence. May’s elderly aunt was beaten and smothered between 9.00 one evening and the small hours of the following morning. She was found by May, her carer, in the morning. Forensic experts discovered marks on the wall near the bed where the victim was found. They included a palm print and fingerprints identified as those May’s, and on this evidence she was convicted of murder. “There would need to have been quite a lot of blood on the hand to produce the mark,” the judge told the jury. May could think of only two possible explanations. Either she had touched the body when she found the victim in the morning, but had forgotten she had done so because she was extremely distressed, or, more probably, the marks predated the murder. But if there was a lot of blood, clearly visible, how could such marks be old?

Twenty years later, her solicitor, the second to have taken on the case since the trial, gave the full case file to May, who still maintains her innocence. In the file, she found documents never previously disclosed to her. They included a series of photographs of the marks on the wall, taken when they were first noticed, and at various stages of chemical treatment intended to enhance the fingerprints so that they could be identified, as well as presumptive test for blood. The first of the series showed faint, almost undetectable smudges. Fingerprints could only be detected after chemicals had been sprayed on to them. These were clearly old marks, made long before the date of the murder, and this evidence which demonstrated the claims of the prosecution to be wrong must have been available since before the original trial.

How can such failures in the preparation of defences by solicitors be explained? The explanations put forward include: the inexperience of those who have never represented defendants in trials of complex cases involving serious charges; the cutting of corners to save time and money (failing to read material not used by the prosecution, as in Adams, or not carrying out basic research, as in Pountley); failures to take instructions from clients or failures to act on instructions; and failures to make adequate defence statements and requests for disclosure of evidence by the prosecution (in one case file I found a series of letters from the CPS begging the defence to supply a defence statement, the last of these written on the first day of the trial!).

Defence lawyers do not originate miscarriages of justice, but they make many of them impossible to remedy. The Criminal Appeal Act 1995 (section 4) allows the CACD to admit fresh evidence in appeals “having regard to... whether there is a reasonable explanation for the failure
to adduce the evidence at the trial”, but in practice the CACD presumes that all lawyers are competent and committed to their work, and so any failures to use apparently relevant evidence in trials must be due to ‘tactical decisions’.

My acquaintance with the detail of many cases and research on the practices of defence lawyers leads me to endorse everything that Maslen Merchant wrote in his article for the Justice Gap in 2012. But I note too the comments, in particular that of Andrew Keogh. He asserts that “the number of miscarriage cases is negligible” and that Merchant’s “statement that ‘Conscientious, ethical, altruistic lawyers are now few and far between...’ is the type of poorly evidenced rhetoric that one might expect to find in a tabloid newspaper and I would hope that the author of this article either puts up the statistics to support it or withdraws it.” But what statistical evidence supports the claim that “the number of miscarriage cases is negligible”? and how might we compile statistics showing how many good lawyers there might be? What evidence there is supports Merchant’s claims, and there are good reasons for believing them to be true.

Luke Dougherty and Laszlo Virag were both convicted in 1972 of separate robberies on eyewitness identification evidence and both subsequently exonerated. These cases led to the Devlin Commission on eyewitness identification and in turn to the judgement in Turnbull which provided the term of the standard warning given by judges in eyewitness identification cases. But really the problem faced by both men was the failures by their own lawyers to call their alibi witnesses. Dougherty was on a coach with 20 to 30 people who knew him at the time the robbery took place. Adequate preparation of his defence would have prevented the case from even going to trial.

While some attempt has been made to reduce the contribution of misidentification to the conviction of innocent people, has nothing been done to reduce the failures of lawyers to prevent miscarriages of justice? I was reminded of Dougherty and Virag recently when I listened to the friend of someone convicted of the robbery of a corner shop. He said that witnesses had identified his friend despite the fact that he was much taller than either of the two men actually seen running from the shop:

“He said that witnesses had identified his friend despite the fact that he was much taller than either of the two men actually seen running from the shop”

The allegations against defence lawyers have been much the same for decades, and now it is alleged that their failings are exacerbated by cuts in legal aid funding.
No doubt that is so, but the problem is as much structural as immediately financial. As Merchant says, solicitors’ practices are businesses. They seek to maximise profits by minimising costs and generating greater volumes of work. That means not just reducing the time spent on case preparation, but also adopting practices that border on the unethical. Conflicts of interest appear to be ignored, such as a murder case in which the same firm of solicitors represented both a defendant and the person named by the defence in court as the perpetrator; and a riot case in which two separate groups of people blamed the others for the whole of the riot, and in which one firm of solicitors had clients from both groups.

In practice finding evidence to support defence cases is often not technically difficult. The evidence which led to the quashing of the convictions of Sally Clarke for the murder of two of her children was discovered by Clarke’s husband, whose persistence in searching for medical records resulted in the disclosure of evidence that the children had died from natural causes. Almost any evidence can be rooted out by diligent lawyers: a senior detective once remarked to me that he relied on defence lawyers not preparing cases thoroughly.

The problem of poor defence work which leads to injustice is not so much due to the negligence or incompetence of individual lawyers, but of the situation in which these individuals find themselves, a situation created not just by current financial pressure, but by economic structure and an occupational context in which relationships with other lawyers and even police officers are closer than those with clients, where clients are routinely disbelieved and assumed to be guilty (justifying inadequate case preparation).

Research conducted over the last 40 years has revealed the institutional divide between criminal justice insiders and their clients from outside the system, frequently regarded as dependents, outsiders, others, and alien (see also the excellent work by Daniel Newman recently published by the Justice Gap). ‘Starburger’, in a comment on Merchant’s article, assures us of lawyers’ ‘firm intention to act in the best interests of their clients’; the latter see promises frequently made but rarely kept.

What possible reasons could there be for this situation to change? The very few ‘conscientious, ethical, altruistic lawyers’ will continue to have their work cut out for many years to come as they attempt to clear up the messes left by the others, and while some lawyers may imagine that miscarriages of justice amount to only a minor problem, organisations like INNOCENT have a strong impression that their frequency is increasing alarmingly.
Show me a miscarriage of justice and, nine times out of ten, I will show you the blueprint that caused it. There is a pattern, a template, in virtually all of these cases, made up of the following strands.

First; you have a defendant who has little or no knowledge of the criminal justice system (and, in many cases, a touching belief in the integrity of that system).

Two; investigating police officers who act as judge and jury, making up their minds they have the right person and going to great lengths to hamper the defence. Non-disclosure of evidence being the main obstacle they place in the path of truth.

Three; prejudicial pre-trial reports by the media. Jurors are told to ignore this, but I suggest this is asking too much of them, especially in high profile cases.

Four; poor legal representation. In every case I have studied, I have found glaring errors on the part of the defence lawyers. These include, failure to call witnesses, failure to seek full disclosure of evidence and a general lack of endeavour on the part of those chosen to lead defendants through
the minefield of criminal trials. And, with cutbacks in legal aid biting deeper, this situation can only get worse.

Last, but not least, those wrongly convicted face a hostile, intractable, appeal system, with an appeal court seemingly concerned only with maintaining the status quo, that being, the validity of the original conviction. Their Lordships never being more unyielding than when confronted with the assertion that an appellants trial lawyers let him or her down. The wigged ones all feed from the same trough and few will question the abilities of another of their ilk.

“In every case I have studied, I have found glaring errors on the part of the defence lawyers”

Other factors go towards the likelihood of more and more innocent people being convicted. The introduction of majority verdicts, in 1967, was a dangerous step. Given it is for the prosecution to prove guilt; I would have thought two people, out of 12, not being satisfied with the crown’s case, constituted reasonable doubt?

Not so and many high profile alleged miscarriages were the subject of majority verdicts-notably Jeremy Bamber, found guilty on a ten to two basis.

And in 2003, the law changed to allow into evidence of a defendant’s convictions for previous offences.

Prior to then, unless a defendant attacked the character of a prosecution witness, juries were kept in the dark about previous convictions the people in the dock had to their name. Easier for the prosecution to prove it’s case. But is it fair? “Give a dog a bad name…”

On paper, the Criminal Cases Review Commission (CCRC) provides a safety net for those floundering in the mire of a wrongful conviction. But the CCRC have disappointed those who hoped the establishment of such a body would deal swiftly and surely with miscarriages of justice.

In practice, the CCRC are under-resourced and seemingly unable to carry out the in depth investigations required to uncover the truth when the justice system has got it wrong. Critics see them as gatekeepers to the court of appeal, trying to second guess how that tribunal will view the cases they refer, rather than the independent, fact finding, body hoped for.

I mention Jeremy Bamber: of all the alleged miscarriages of justice I have researched, his case, and that of Susan May, stand out, for two reasons. One, I have absolutely no doubt about their innocence and two, they tick every box of the blueprint of how the system fails. Both were people of hitherto good character, with no experience of the criminal justice system. If either had had one tenth of the knowledge of the law-and trial procedure-they have now, both would have walked free; of that I am certain. (Despite both falling victim to prejudicial pre-trial reporting and biased police investigations.) Both have had their cases rejected by the court of appeal twice. And both have had their submissions rejected by the CCRC(though Susan’s case is now being reviewed again by that body.

I am convinced there are more miscarriages of justice now than at any time.
since I have been a student of the system—a study going back over half a century. I am personally aware of well over a hundred, serious, cases that scream out to be looked at again. And I repeat, I believe the situation is set to worsen a) because of cut backs in legal aid and b) the massive increase in convictions for historical sexual offences. The latter area concerns me greatly; in the current, post-Savile, climate, I expect the conviction rates for these offences to take a surge. And yet this is one area where greater care than ever ought to be taken in deciding guilt, or innocence. Almost uniquely, as far as criminal trials are concerned, a defendant can be convicted on the uncorroborated word of the accuser. There are usually no witnesses to such crimes and, because of the passage of time, no forensic or medical evidence to support the allegations. It is one person's word against another.

I have researched several convictions for historical sexual offences and in some cases, my findings are deeply troubling. It is a murky world to peer into and any concern for the safety of such a conviction can be taken as having some sympathy for people deemed beyond the pale, in the court of public opinion. Questioning some of those convictions is to risk being accused of having no understanding of the awful trauma endured by victims of sexual abuse. But two wrongs never made a right and some things need to be said.

Consider this: Albany prison, on the Isle of Wight holds some 560 prisoners. Virtually all sex-offenders, many convicted of historical offences. Around half of the population of Albany is in denial. This means they are not addressing their offending behaviour and not participating in treatment programmes. Because of their plea of innocence, they will never become eligible for parole (and many are serving extremely long sentences, so they count the difference in years—and some will die in prison); they will not have their security classification downgraded, a move which invariably means better prison conditions, and, on their eventual release, will find their place on the sex offenders register coming under intense scrutiny. Without doubt, some of these men will be in denial because they cannot come to terms with the offences they have committed. But over 250 of them, in one jail? Something is wrong.

Like many, I hoped, with the freeing of the Birmingham Six, Guildford Four et al and the setting up of the CCRC, we had seen the back of wholesale wrongful convictions. The ever burgeoning case file of alleged miscarriages of justice tells me the hope was in vain. We are back to where we were before we thought “this cannot happen again.”
Failings in the criminal justice system: why we are all to blame

Mark Newby

It would be easy to blame the current state of the criminal justice system on one simple cause and LASPO as the final icing on the cake of a series of cut backs and restrictions on representation would be an easy target.

However the more unpalatable answer to the issue of how anyone can get a fair trial in our current system is that the malaise lies at the door of virtually every participant in the criminal justice system all of whom must ask searching questions of themselves. It starts at the door of the accused and finishes at the steps of the Court of Appeal Criminal Division.

The charge of failure is often squarely leveled at the door of the hard pressed defence practitioner and there can be no getting away from the fact that solicitors and trial Counsel have contributed towards some fairly horrendous miscarriage of justice cases along the way. But that should be counter-balanced with the often exceptional service offered in a very difficult atmosphere.

But if representation can lead to miscarriage, how bad can it get?

In *R v Lawless* [2009] the appellant had been represented in a murder trial he had the services of two counsel and a solicitor, however that did not save him from being consigned to eight-and-a-half-years’ imprisonment due to his legal teams failings.

Lawless had falsely confessed to various prosecution witnesses that he had acted as lookout whilst the victims flat was set on fire, the victim sadly passed away. Lawless was well known in the area as an alcoholic and fantasist such that the prosecution witnesses said so in their witness statements. Yet this strong signal that something was not right led to nothing more that the junior barrister in the case calling the prison so see if he had seen a psychiatrist.

As both the Court of Appeal and recently the Divisional Court considering a claim for his compensation noted this was a case where psychological evidence was important. Little wonder when it was finally
obtained some eight years after conviction that the result was that the confessions were deemed to be wholly unreliable and as there was no other evidence against Ian Lawless the conviction was quashed.

An outside observer might conclude it was inexcusable for the original defence team to fail to obtain the expert evidence.

But it is not simply an issue of failing to obtain a specific expert where defence teams can be found lacking but by their whole failure to apply themselves to investigate a case at all. Proper defence requires a full and careful investigation of all facts upon which a case is grounded and this is something, which some defence teams fail to grasp at any level.

The case of Anver Daud Sheikh [2004] is a particularly shocking example of the issue. When Mr Sheikh was convicted in 2002 during the last frenzy over historical sexual abuse in care homes he was alleged to have committed acts of sexual abuse against two individuals. One individual alleged he was sexually abused between 1979 and 1983 whilst Mr. Sheikh was a teacher at the school.

Mr Sheikh was saddled with the worst possible advice but advice which almost seemed to be common place in the field of historical sexual allegations namely “all you can do is say you didn’t do it”.

He was naturally convicted of the offences. The problem was that had the defence team looked further than the end of their noses they would have uncovered evidence that he wasn’t actually employed for much of the period between 1979 to 1983 and even worse the complainant wasn’t even at the school during a large part of that period.

The appeal team conducted a forensic analysis of all the facts and actually left their office and searched out the evidence to prove the points. This might be regarded as a lesson for the Criminal Cases Review Commission as convictions are invariably never quashed by simple desktop reviews.

As a result the evidence ultimately heard by the court over two appeals ended up with a situation in which the only opportunity to have committed the offences was narrowed down to one weekend in August 1980. Mr Sheikh’s convictions were quashed accordingly but not before he had endured a significant period of time in custody.

The problem does not simply rest with defence solicitors however. In R v F [2009] the appellant had been accused of sexual offences against one complainant. He had a genital deformity, which was completely unmissable yet the complainant remained silent over it in his account.

Defence counsel had been alerted to this issue and had even asked some preliminary ground work questions but then wholly failed to ask about the genital deformity. The Court of Appeal in a strong judgment considered the approach of counsel to be wholly lacking and the conviction was quashed.

In another historical allegation case of R v B [2010] an appellant was faced with the
usual advice that all he could do was say he didn’t do it. He chose to take a different course of action however and presented a series of facts and suggested enquiries the defence team should undertake which might assist his defence. The defence solicitors sent the enquiries to Counsel who never addressed the issues and the appellant was afforded one conference with counsel almost immediately before his trial.

He was convicted and the reader might anticipate what comes next. He found new appeal lawyers who investigated the facts, which raised overwhelming evidence that the appellants conviction was as a result unsafe.

If there is a pattern of failure is there any indication to explain why this may be occurring. Well it is certainly the case that the effect of legal aid cuts has been significant and it has had a detrimental effect upon the way in which for example Crown Court Cases are conducted.

Non-solicitors run many Crown Court departments on a daily basis and for a solicitor to actually be with counsel in the Crown Court is very much the exception to the rule due to the graduated fixed fee which is counter productive to good preparation and defence.

The effect of cuts is to place extreme pressure on solicitors to maximize fees, which means they are over stretched and under resourced.

That of course should never be an excuse to ensure good defence for those who are represented but it does rely on the willingness of defence teams to go the extra mile often at a cost to the firm.

This occurs in a context of already cut fees for magistrates’ court work, police station representation and a Ministry of Justice Agency, as the Legal Services Commission is now becoming who are slaves to the National Audit Office and seek to recover every penny they possibly can from already hard pressed defence lawyers.

As a result good defence work should not only be the aspiration of all those who practice but an essential requirement but it is being asked for in an ever reducing cost base with an ever increasing set of demands.

If some defence teams may be letting down their clients as they enter the court process what about the police who are charged with conducting a fair and independent investigation in the first place. They too have faced similar cuts and interference with the way in which they operate. Recent cases such as Christopher Halliwell have demonstrated the willingness of the Police to bend the rules at all possible costs to secure a conviction and this is not something new. The Hillsborough Cases are also demonstrative of the general willingness of the police to cover up and hide from the public gaze questionable conduct.

We have seen such police conduct in historical cases as well and so for example in the case of Sheikh there was evidence between the first conviction being quashed and the re-trial that the complainant had been told exactly what was wrong with his evidence. They had also been quite prepared to run a case in which they should have recognised the evidence in their possession undermined the allegations made.

In another case of Joynson [2008] allegations were brought which could not possibly be true but there was no perspective from the police to assess that material in the
we are all to blame

way in which it should have been.

The difficulty with the police is that there remain an inadequate level of safeguards and practices to ensure that investigating officers do not lose perspective and become so tied to an investigation that they are prepared to believe the allegations made at all costs.

In some cases it seems like the police are prepared to do almost anything to achieve a conviction and this sort of behaviour can do only damage to a criminal justice system already in free fall.

It is the case therefore that the evidence of past historic sexual abuse enquiries is not supportive of the recent position taken by the Director of Public Prosecutions Keir Starmer that more needs to be done as the pendulum has swung too far in favour of the accused. In reality nothing could be farther from the truth.

The problems do not improve once a decision is made to prosecute and we are regularly confronted with the tales of a Crown Prosecution Service, which is underfunded and often found lacking.

Cases invariably are long delayed, inadequately prepared or come to an end when the investigations that should have been undertaken have been simply missed.

Money seems to have been a determinative factor so far as the Crown Prosecution Service is concerned and HCA Advocates seem to have been deployed on a cost basis rather than properly training and utilising them as a way to enhance the prosecution of cases. The recent controversy over the leaked memorandum of the approach to keeping cases in house gives little assurance of a professional prosecution service for the future.

“The problems do not improve once a decision is made to prosecute”

One might have thought that was the end of the problem but the final part of the jigsaw is the Court system itself and the approach of the Judiciary.

To a large extent the judiciary has lost ground completely to government and the statisticians such that the mark of a good judge is now all about his or her statistics and that of the court centre at which they sit rather than delivering fair and proper justice to all involved.

As a result defendants find themselves given small windows of time to prepare themselves for a fight for their liberty, with directions strongly skewed against them and a trial process which is inherently manipulated to make it exceptionally difficult to achieve a not guilty verdict right down to limiting the time their barristers can ask a witness questions.

Of course there were some bad excesses of practice in the past and any modernisation of a court system brings with it benefits and consequences. However searching questions now need to be asked about whether the system has gone too far.

And when all goes wrong the appellant finds himself in an appellate system, which is simply not working. The Court of Appeal is regarded as ever more restrictive and hostile to those who seek to appeal their conviction and their representatives. Is this born out by the statistics?

The 2011 statistics revealed yet a further
we are all to blame

reduction in appeals granted. 196 Conviction appeals allowed which included 52 re-trials. Applications to the single judge in 2011 for conviction appeals were 1,535 of which 221 were given permission to appeal.

The figures certainly do not make happy reading for an appellant with broadly 1 in 7 getting permission to appeal.

No separate statistics are available by offence type for example for sexual offences where the Court seems particularly less willing than in the past to interfere in convictions. The CCRC as the last hope has completed reviews into 14,470 cases as of 31st December 2012 and has referred back to the Court of Appeal only 466 of which 328 were quashed. This is a referral rate of only just over 3 per cent, which on any view is a rate, which is simply far too low and gives appellants little hope of success through the commission.

The appellate system is simply failing the participants of the process. The court should remember its role is twofold. Primarily of course it is there to maintain the rule of law and integrity of a criminal justice system. But it is also there to do justice and if the court allows itself to slip below an acceptable level of restoration of inequity then it will be regarded as a body in which the public will have little faith.

No wonder many commentators are suggesting we are heading to the sort of atmosphere that was prevalent before the Birmingham 6 Cases.

Over the last few years we have seen a lot of modernisation of various state institutions and searching questions asked of them. It may be time for similar questions to be asked of our system of putting right wrongful convictions.

Equally it is long overdue that our politicians stop using the justice system as a political football for when the ballot box is long forgotten people affected by the consequences of politically motivated change will still be living with the consequences.

We need a modern system that does justice to any victim but also offers balance to those accused and ensures that when all goes wrong there is a much more open and fairer path for those wrongfully convicted.

**And as for now?**

It can be seen that any future defendant about to enter the criminal justice system can look forward to a process, which by incompetence, under funding and systematic failings is destined to ensure that they are convicted.

If the police investigation isn’t skewed against them then they will probably be caught be a badly prepared defence or one which isn’t given enough time to be prepared. They will be met with an ill prepared crown prosecution service which will inevitably lead to late service of evidence and applications.

The judge supervising it will probably, unless they are lucky, have little regard for the safety of the process and the risk of a wrongful conviction.

When they get to the Court of Appeal they will probably never get off the ground and the CCRC will hang on to it for a while and then deliver a refusal reacting to their appeal points rather than investigating the case as a whole.

One thing is for sure at least the statistics will be good.
Perhaps it isn’t surprising that many criminal defence lawyers are wary of journalists. Most reporting of trials covers only the prosecution opening, followed by the verdict and sentence at the end, so that any weaknesses or irregularities in the case for the crown will usually emerge without being noted by the media.

The more heinous features of an alleged crime will tend to be highlighted, together with comments by the judge on a defendant’s bad character. It is therefore not surprising that if defendants or their family members ask for advice as to whether they should talk to reporters, they will generally be told to stay well away.

Understandable as such attitudes are, they are not always well-founded, even at the pre-trial and trial stages: there can be circumstances when a sympathetic journalist can be quite helpful to the defence. I covered the aftermath of the 1985 riot at Broadwater...
Farm, and observed at close quarters the oppressive and primitive tactics being used by the Metropolitan Police to try to find the killers of PC Keith Blakelock, who was murdered during the disturbance. Almost 400 people were arrested, many of them juveniles or otherwise psychologically vulnerable, and held incommunicado unlawfully for days on end, without access to solicitors or their parents.

By the time the murder trial began in January 1987, and it became clear that the crown was relying almost entirely on confessions, I had spent a lot of time on Broadwater Farm, and was convinced that a miscarriage of justice was unfolding in front of me. My coverage of the case for The Guardian reflected that view.

On the day after the Tottenham Three were wrongly convicted of the killing, the paper published an editorial taking sharp issue with the way the investigation and trial had been conducted, noting with prescient accuracy: “We have not heard the last of these convictions” – which were, of course, quashed at a second appeal after a reference from the Home Secretary almost five years later. In the intervening period, I published many articles which continued to draw attention to the deficiencies of the case.

But if such circumstances before a trial are relatively rare, now, in an era when defence lawyers are being systematically starved of funds, maintaining distance from the media post-conviction will often represent

“Almost 400 people were arrested, many of them juveniles or otherwise psychologically vulnerable, and held incommunicado unlawfully for days on end”
a significant missed opportunity, which may be seriously counterproductive to the defendant’s interests.

I have been writing and broadcasting periodically about wrongful convictions and miscarriages of justice throughout a 32-year career, with spells at The Guardian, The Observer, BBC, The Mail on Sunday and Vanity Fair. I am also the author of two relevant investigative books: A Climate of Fear (1992), about the Tottenham Three, and Violation (2007), an inquiry into the Columbus ‘stocking stranglings,’ a serial murder case in the American Deep South, in which an African-American, Carlton Gary, was found by a jury in 1986 to have raped and murdered seven elderly white women. (Despite two DNA tests exonerating him, he currently remains on death row.)

I seek no credit for the fact that some of the convictions which I have examined have been referred back to the Court of Appeal by the CCRC and its Home Office C3 predecessor, and that several of their verdicts have been subsequently quashed. Ultimately, the heavy lifting was done by lawyers. But I am also convinced that the relationships of trust which I developed with defendants’ lawyers have sometimes been quite valuable.

Unfortunately, I have also had experience of dealing with lawyers who do not see the potential in such a relationship with a reporter. The vital thing to note here is that this is likely to make any meaningful journalistic investigation into a wrongful conviction all but impossible. A reporter who hopes to expose a conviction’s flaws is going to need access to all or most of the documents, suggestions from the lawyers as to what may be fruitful sources of fresh, exculpatory evidence, and, if applicable, frank disclosure of the defence case’s problematic areas.

I regret to say that over the years, there have been occasions where I felt, on a preliminary examination of a case, that I might well have been able to make progress. But in the end, I was forced to give up - because of the disinclination by defence solicitors and barristers to co-operate.

Some lawyers, struggling to make a living from criminal defence legal aid, may simply be too stretched, or even, rarely I hope, have ceased to care. Others evidently do care, but still seem to find it difficult to bestow the trust a truly cooperative relationship requires. Others again have long ago realised that collaboration with the media can bring huge benefits, and possibly make all the difference to their client’s prospects, and I count one or two of these individuals as among my close friends.

So what might these benefits be? On occasion, like other journalists working in this somewhat uncrowded field, I have been able to unearth important pieces of fresh evidence. In Carlton Gary’s case, where back in 2000 I was formally designated the defence paralegal investigator, it is no exaggeration to say that this has prolonged his life, and may still ultimately save it. As an outsider, and a Brit to boot, I was able to penetrate the tightly-knit white community of Columbus, Georgia and speak to certain key witnesses who had earlier made it plain they wanted nothing to do with his lawyers.

One of them led me to a high-quality dental cast made from the killer’s bite wound on the body of one of the victims, which had been hidden from the trial jury. Experts testified that the wound could not have been
created by Gary’s teeth. The federal court which heard his habeas corpus appeal did not reverse his conviction because of this, but the years it took for this issue to work its way through the labyrinthine US system, with a series of hearings and further appeals, delayed his execution long enough for semen swabs taken from the victims to come to light. These too had been concealed from the jury, and now form the basis of the DNA exclusions.

Having had some access to the CCRC, I don’t imagine an English case’s media profile is ever going to make a lot of difference to a decision by the Commission whether or not to refer it for appeal. But there are, I think, occasions where media coverage has helped a case’s chances earlier on, at the ‘triage’ stage, when the CCRC decides on a case’s priority, and the level of investigative resources it needs to allocate. Recently I wrote two long articles about the young London man Sam Hallam, who was freed after serving seven years of a life sentence for a murder he palpably did not commit – the first article a year or so before his appeal, the second after his release.

One of the first things the CCRC’s Case Review Manager (CRM) did when assigned the case was watch an ITV documentary about it featuring one of Sam’s family’s friends, the actor Ray Winstone. The CRM went on to do a brilliant job, spotting several critical lines of potential fresh evidence before the Commission used its powers under section 19 of the Criminal Appeals Act 1995 to order a new police investigation, carried out by officers from Thames Valley. But the film also played its part.

In general, assistance from an investigative journalist may give solicitors the opportunity to present the strongest possible dossier to the CCRC – a far from unimportant issue given its caseload of more than 1,000 applications a year, only a proportion of which the commission has the resources fully to investigate.

I do not pretend that relationships between lawyers and journalists will always be unproblematic. But they are worthy of serious consideration, and at their best, can produce a synergy which can only be to defendants’ advantage. They have a venerable history, with distinguished past exemplars such as the journalist Paul Foot, whose son, Matt, now carries on the family tradition on the legal side through his work at Birnberg Pierce & Partners. It is hoped that through The Justice Gap, which plans to organise a seminar later this year, the dialogue between journalists and lawyers can be further deepened and explored.
The client comes first: effective representation and investigation to prevent miscarriages of justice

Dr Angus Nurse

The criminal defence lawyer is both an essential part of preventing miscarriages of justice and, regrettably, a significant cause of many miscarriages of justice. Poor representation of clients and a failure to properly scrutinise the investigative process that has led to a presumption of their client’s guilt are significant factors in allowing errors by the state to result in flawed convictions.

In his article *A Poor Defence*, Masleen Merchant argues that “today’s criminal lawyer is a businessman first and foremost” and that many lawyers fail their clients by prioritising business over proper representation. Merchant identifies a range of factors that impact on the ability of criminal lawyers to defend their clients effectively. Some are internal others are external yet the effect of flaws in either the prosecution’s or defence’s investigation of the evidence is often the same; the state gains a conviction even where evidence may exist to prove the defendant’s innocence.

The United Nation’s Havana Declaration, which relates to the role of lawyers, identifies that all defendants ‘are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.’

Article 6 of the European Convention on Human Rights broadly replicates this provision while the case law of the European Court of Human Rights and domestic law such as PACE also reinforce the right to a
lawyer to defend and uphold a suspect’s rights. The European Court has also held that the right to be effectively defended by a lawyer arises at the investigative stage. Thus, from a very early stage in proceedings the ability of the defence lawyer to effectively investigate the case against her client and to challenge flaws in the state’s reasoning through effective representation are vital to uncovering miscarriages of justice.

Wrongly Accused, an earlier volume in the Justice Gap series, raised the question of who is responsible for investigating miscarriages of justice. The UN Declaration, Article 6 and the realities of how miscarriages occur mean that this duty is firmly placed on the criminal lawyer from the point at which their client is charged and throughout the investigative and prosecution process.

Identifying a miscarriage is not solely an issue for the lawyer to pursue by way of appeal or referral to the Criminal Cases Review Commission (CCRC) after conviction but is an active issue to be considered during a defence.

However as Merchant and other commentators have identified, many lawyers fail in this task: some by virtue of poor
work on behalf of their client, others as a result of the confines of the legal aid system and business practices that are focused too heavily on providing an expedient defence rather than the best defence required for the case.

The best way to deal with a miscarriage of justice is to prevent it from happening in the first place. In Goddi v Italy [1984] the European Court said the courts must ensure that defendants have an opportunity for a fair trial which includes an adequate defence [my emphasis].

Defining what constitutes an adequate defence in the context of each case may be difficult to determine yet as a minimum, it should include effective scrutiny of the crown’s case and the evidence against the lawyer’s client. Should this extend to a full examination of all the evidence including any unused material?

Merchant argues that it should, identifying that arguments which can be used to derail the prosecution case are often found in the unused material.

At a more fundamental level it is the prosecution’s role to present its case against the accused and the defence’s role to examine the merits and validity of that case and identify where it is lacking. Doing so may require the use of a range of expertise including dedicated investigators able to identify prosecutorial errors and to sift through the unused material to identify holes or alternate lines of enquiry not pursued. Yet as Merchant identifies; the extent to which extensive defence scrutiny of the case takes place is variable.

Investigating a miscarriage of justice should begin at an early stage and certainly before conviction has occurred. However the Criminal Procedure Rules, cuts in Legal Aid and a range of other factors have substantially impacted on the role of the defence lawyer, to the extent that lawyers may be unable to effectively fund the full range of investigative inquiries required to identify a potential miscarriage of justice during the process of a case.

The decision on whether to commission expert reports, for example psychiatric reports or forensic experts, will obviously need to be taken on a case by case basis. However a review of unused material may be a necessary step in cases where a miscarriage is suspected.

The House of Lords in R v H and C [2004] 2 AC 134 stated at 47:

Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence.

Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.

Yet the evidence from recent cases shows that the disclosure rules are not fully working and thus the onus rests on defence lawyers to conduct effective scrutiny and enforce disclosure where required.

One of the central causes of miscarriages of justice is tunnel vision on the part of investigators. Convinced that they have the right person, investigators and prosecutors will naturally put forward a narrative that supports this view sometimes omitting facts and evidence that undermine it. This is not to suggest that material has been
deliberately withheld by the prosecution; evidence which could support a defendant’s case at trial might not be disclosed by the prosecution but might equally be missed by the defence team.

Kim Evans has noted that unused material can run to thousands of pages and can be the perfect place to hide evidence which can undermine the prosecution case. But says ‘unless you are a lawyer with a deep sense of justice, there is little motivation to plough through this material for no financial reward, and with many solicitors’ firms laying off staff, there are fewer and fewer people available to do the work.’

Potentially this is the crux of the problem. In the US where the nature of the legal system and the free market economy that surrounds it are such that criminal defence can be a lucrative profession, defence investigators are an integral part of the system.

Defending a client requires not only assessing the legal arguments and preparing a legal defence, it requires going beyond key prosecution documents, getting to grips with how the police investigation was conducted, how the evidence was obtained and where there are not only flaws in the basic case against a client but also flaws in the investigative process which have led to a flawed or mistaken conclusion on a client’s guilt.

In essence the current system asks criminal defence lawyers to do this but in the case of legal aid cases does not pay them adequately for doing so.

This not only creates a disincentive to carry out a thorough investigative review and provide an effective defence based on detailed understanding of the investigative process, but also creates reliance on use of the (readily) available documents and materials supplied by the prosecution to construct a defence in the name of managerial efficiency.

Lawyers are not necessarily to blame for this state of affairs. They will inevitably work within the rules of the system in which they operate and it is perhaps unreasonable to expect them to undertake work that may not be adequately claimed for.

The reality is that many miscarriages of justice only receive the full investigative scrutiny that they deserve after the event and when a miscarriage has already taken place.

While investigative journalists, pressure groups, friends of the accused, academics or the CCRC may conduct forensic scrutiny of an investigation after a conviction has occurred, the system regularly fails to do this either before the event or while the miscarriage is taking place.

Effective defence representation is the key to dealing with miscarriages and defence lawyers with intimate familiarity with their client’s case are the key to effective investigation and scrutiny of the prosecution case. Our system of justice needs to allow them to carry out this vital work.

“Evidence from recent cases shows that the disclosure rules are not fully working and thus the onus rests on defence lawyers to conduct effective scrutiny”
Consider these two distinct wrongs, with largely different sets of victims – but which share some common ground. One is: being sexually or violently assaulted, especially by someone more powerful than you. The other is: being wrongly accused and judged as someone who has done such a terrible deed. Each of these experiences is likely to be seriously traumatic and have possibly lifelong damaging effects.

The common ground is the heinous deed in question. Of course the exact nature and level is subject to considerable variation, with corresponding differences in consequences. At the mildest end (for example: a. being inappropriately touched; b. being falsely called a paedophile when no-one believes it) it is possible to over-react and overstate the wrong that has been done.

Step up the seriousness a little bit, and we begin to get troubling outcomes; and
the most extreme levels (for example: a) forcing a child or adult to engage in sexual acts; b) imprisoning an innocent person found guilty of those crimes) are among the worst experiences that can be inflicted on human beings.

While both forms of victimisation are supported by distinct professional groups and organisations, being falsely accused and being abused are two sides of the same coin. Both types of victim need to have their experiences taken seriously and believed.

And that is feasible, until we start talking about the same incident – in which case it becomes a zero-sum game. Both claims can’t be true. Hence supporters of each are likely to be oppositional. Because this type of alleged incident would not typically be witnessed nor leave behind a crime scene or objective evidence, and what people say happened or didn’t happen becomes all-important, mistakes of judgement are likely to be made.

Campaigners for innocence groups may be unintentionally supporting some who are not innocent. Campaigners for victims of child abuse and rape may be unintentionally supporting some who have erroneously or vengefully made a false (untrue) accusation.

There are two types of errors here, which are analogous to types of errors anticipated in experimental science and statistical probability models. Research begins with a hypothesis; likewise, when someone is

“Being falsely accused and being abused are two sides of the same coin. Both types of victim need to have their experiences taken seriously and believed”
arrested the police hypothesise that the individual may have committed a crime.

The null hypothesis in experimental science is that the theoretical hypothesis does not apply. In the justice process the null hypothesis is the presumption of innocence.

In the absence of absolute proof, statistical probability tests are used in science to reject the null hypothesis; and in judicial systems it has to be rejected beyond a ‘reasonable doubt’.

Errors can occur in both cases if some crucial evidence is missing or when a misjudgement is made in evaluating the existing evidence. Therefore the initial hypothesis may be accepted as significant when it is not; and, in the case of a trial, the null hypothesis of innocence may be rejected for the same reasons and an innocent person found guilty. In the language of statistics, this is a ‘false positive’ or a type I error.

Similarly, missing evidence or mistakes of judgement can result in errors in the other direction with a guilty person being acquitted; or with the hypothesis in a scientific experiment being abandoned even though the study was onto something. This second type of error is known as a ‘false negative’ or type II error.

Understandably, campaigners for each of these causes will not want doubts to risk adulterating their cause. Single cases of mistakes can be highly publicised and public opinion seems prone to over-generalisation.

The temptation is to ignore false positives and false negatives so as not to throw doubt on those genuine cases. So errors can be made on either side. I say ‘sides’ but these are like neighbouring communities who mostly close their eyes against each other, but when crossing paths have confrontations to challenge each other’s truth. Ironically, this absolutism rather than strengthening each case surely weakens it – because such black and white thinking is an enemy to truth and rationality.

When there is no forensic proof, no proof that a crime has even occurred, as in so-called historical cases, sometimes we simply cannot ever categorically establish that we are right. That doesn’t mean we should relinquish the effort to investigate each case impartially and fully.

We are at a moment in time though when child protection and supporters of rape victims may not see the need for or value of such moderation. From the moral high-ground of outrage against abuse of women and children, any questioning of assumptions can be taken as an affront. These are shocking times.

Child abuse and rape and sexual harassment are endemic, and we’ve only recently woken up to that or been able to acknowledge its prevalence. The care homes scandal in the 1990s followed closely by revelations of extensive child abuse by priests, the Soham murders by a school employee, abuse of vulnerable people in nursing homes and hospitals, and the Savile scandal and numerous other claims of historical child abuse.

No wonder there is now a sense of collective guilt, an urge to make recompense by never again disbelieving people who claim abuse and a determination not to allow the same mistakes to occur again.

That means no more cover-ups, no more denials, no more suggestion that anyone could be lying or wrong. In consequence, any doubts about the veracity of abuse claims now seem wrong.
In that case, what hope for the falsely accused? If the default belief is that anyone claiming to be a victim of abuse is indeed a victim, the denial by the accused is not only a lie, it is tantamount to a further offence adding to the suffering of the accuser. Indeed, to consider the plight of the wrongly accused or to be seen as concerned about such an outcome may seem inappropriate – that’s if it is even allowed that someone accused of rape or historical child abuse could be innocent.

More than a willingness to err on the side of type I errors in bringing a guilty verdict, there is increasingly an unwillingness to recognise that such errors can be made. The accuser is unquestionably a victim of abuse. The mistake in the past has been one of incredulity. Abused children were told no-one would believe them and that things would only be worse for them if they spoke up.

Women who were raped were not believed when they complained, and the tendency to blame them or deny that rape had occurred and call them liars added to their suffering. Now we all know better, and in place of the denial is a corrective to have learned the lessons from the past, never to make it again, which means not questioning the accuracy of claims.

As well as correcting the past by a default belief that allegations of abuse are true, we are now convinced of the commonness of such kinds of abuse, that it is endemic in some professions, and that there is indeed a paedophile on every corner that would act on those impulses if left alone with a child.

No-one would question the need to make every effort to prevent child abuse from occurring as far as is humanly possible. If there had to be a trade off between different categories of possible victims, it seems right to prioritise children.

Our compassion and sense of moral outrage can’t be reserved only for children though. Some plights for adults are every bit as intolerable: for example, lengthy imprisonment of people who haven’t committed any crime.

For anyone who might think that is a price worth paying to redress the evil of child abuse, then consider this.

The children of people who are falsely accused of child abuse and sexual crimes do themselves become victims of a form of child abuse – not by their innocent parents, but by others who condemn and hate their presumed guilty parent.

The revulsion and hostility against sexual crimes and child abuse is visited upon their families. Their children are forced to imagine their parent committing those deeds, to bear the insults of their school friends, and the loss of their normal relationship with that parent now imprisoned, perhaps to choose between loyalty to that parent and the company of their peers.

When a father or mother is imprisoned as a ‘nonce’, guilty or innocent, no child is likely to recover from that.