Do we need barristers?

Professor Leslie Thomas KC

Difference between solicitors and barristers

- Solicitors traditionally had a monopoly on the “conduct of litigation”
- Barristers traditionally not allowed to conduct litigation or handle client funds
- Barristers traditionally had a monopoly on rights of audience in the higher courts
- Clients traditionally could not instruct barristers directly, only through a solicitor
- Changes in recent decades e.g. some barristers can accept Public Access instructions, and some solicitors have higher rights of audience
- Traditionally barristers could not be sued for negligence and could not sue for their fees, but this has now changed

The history of the split profession

- At one time there were five legal professions: attorneys, solicitors, barristers, advocates and proctors!
- Barristers originated from the “pleaders” who argued cases in court – originally divided into “serjeants” and “apprentices at law”, and were members of the Inns of Court
- Attorneys acted as agents for their client in the conduct of litigation in the common law courts (such as the Courts of King’s Bench and Common Pleas)
- Solicitors did similar work to attorneys, but in the Court of Chancery
- Advocates and proctors practised in the ecclesiastical and admiralty courts, which administered civil (Roman) law rather than common law; their professional society was Doctors’ Commons

Consolidation in the 19th century

- In 1857 Parliament created the Court of Probate and Court for Divorce and Matrimonial Causes, in which barristers could practise
- The Judicature Act 1873 merged the superior courts of common law and equity into a single High Court, and merged the attorneys and solicitors into one profession, to be known as solicitors

The history of barristers

- Originally the leaders of the profession were the serjeants (servientes regis ad legem) who had their own inn, Serjeant's Inn; no more serjeants were appointed after 1873
- The Attorney-General and Solicitor-General developed as the King's representatives in the courts; these offices traditionally held by barristers, not solicitors
- King's/Queen's Counsel originally retained to advise the King, but over time became a title of honour for influential barristers; appointed by Lord Chancellor until an independent panel was introduced in 2005

The training of barristers

- Inns of Court were responsible for training of barristers
- Until the 18th century Oxford and Cambridge only taught civil (Roman) law, not English common law
- Barristers trained at the Inns through moots, readings and lectures
- But by the 17th century the system had decayed, and all students had to do was eat the required number of dinners at their Inn
- A bar examination was introduced in 1872, and law degrees at universities were established in the late 19th century
- Pupillage became compulsory in 1959, and pupils were prohibited from taking cases in their first six months of pupillage from 1965
- Inns of Court School of Law established in 1967; Bar Finals replaced with Bar Vocational Course in 1989
- Universities able to deliver Bar Vocational Course (now Bar Professional Training Course) from 1997

Barristers and solicitors: the class divide

- Barristers were generally drawn from wealthy families, while attorneys/solicitors were of lower social status
- In 1614 the Benchers of the Inns of Court described attorneys and solicitors as *"ministerial persons of an inferior nature"*
- In debate on the County Courts Act 1846 the Attorney-General said *"…the business of the advocate in all our courts, superior or inferior, should be conducted by men of trained education as advocates, of established position as gentlemen, as men of honour. He did not believe that any one was visionary enough to imagine that it would be an advantage to dispense with the advocacy of a class of men who had enjoyed the highest education, and who were known to be influenced by the highest feelings …. if any monopoly at all were allowed to exist, it would surely be better to place it in the hands of a highly-educated class of men, rather than in those of an inferior class."*
- Even in modern times the Bar has often been inaccessible to people from poor backgrounds
- Senior judges are still normally drawn from the Bar, not solicitors


The Royal Courts of Justice

Advantages of split profession?

- Barristers are professional advocates and develop specialist skills in advocacy
- Barrister may be more detached from a case and able to offer a more objective view
- Barrister may have expertise that a solicitor lacks in a particular case

Disadvantages of split profession?

- Most barristers are self-employed, which can mean financial hardship for junior barristers, fee inequality, and no right to holiday pay, sick pay, pensions or paid parental leave
- Administering a barristers' chambers presents unique challenges
- Arbitrary distinctions between solicitors' and barristers' work often creates practical problems for barristers, especially with Public Access work
- Arbitrary bright line rule on solicitors' right of audience – why can they do advocacy in lower courts and tribunals but not higher courts?

Conclusion

- No sensible reason for a split profession – the split exists mainly for historical reasons
- But would be difficult and disruptive to fuse the legal professions overnight
- Key context is the systematic underfunding of legal aid in recent decades – much more funding of legal aid is needed, whether we have a split profession or a fused one