

# Witness for the prosecution – the problem of expert witnesses in criminal trials

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Many will be aware of Agatha Christie's popular and much-adapted tale involving a witness for the prosecution whose evidence is undermined. But, in the real world, last month we saw the latest discrediting of an expert witness who had been used by the prosecution in a number of fraud trials.

The prosecution offered no evidence against eight defendants accused of running a £7 million carbon-emission credits scam after the defence were able to identify a number of fundamental problems with prosecution's expert witness, Andrew Ager. Mr. Ager was relied on by the prosecution to show that the defendants must have known they were asking investors to buy a product that was essentially worthless. Suspicions arose in relation to Mr Ager after he contacted the defence expert witness and apparently attempted to dissuade him from giving evidence. The defence sought to cross-examine Mr Ager in a *voir dire* before he gave evidence to the jury. Some of the things that emerged from the cross-examination were:

- He had no relevant academic qualifications. He did not hold a degree and could not remember if he had passed his A-levels.
- He had not read any books on carbon credits, although he had once watched a documentary on the topic.
- Ager had cut and pasted the same evidence for several different cases.
- He had made no notes of his workings and he had kept sensitive material provided by the police in a cupboard under the stairs, which had been damaged by a "leak".
- He did not consider it his duty to bring facts to the court's attention which might assist the defence.
- In closing the case, the judge said: "*Andrew Ager is not an expert of suitable calibre. He had little or no understanding of the duties of an expert. He had received no training and attended no courses. He has no academic qualifications. His work has never been peer-reviewed.*"

Mr. Ager had already appeared as an expert witness for the prosecution in at least 20 other cases.

The CPS has said it is reviewing past cases to identify those Mr. Ager appeared in as an expert witness and it will consider any action once those cases have been fully reviewed. Mr. Ager has been removed from the National Crime Agency's list of approved experts, but the impact of the findings in this case and the judge's comments is likely to be costly and time-consuming. And for those who were convicted as a result of a trial involving Mr. Ager and who undoubtedly suffered as a consequence, there is likely to be a lengthy wait while the review takes place.

This is just the latest example of UK prosecutors encountering problems related to expert witnesses.

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In March 2018, the Court of Appeal found that a banking expert who testified in the Serious Fraud Office's ("SFO") Libor-rigging prosecutions had made a series of serious mistakes.

Saul Haydon Rowe had been called as an expert witness for the SFO in three Libor-rigging trials. In ruling on whether one of the defendants in those trials, Alex Pabon, should have his conviction overturned due to the inadequacies of Rowe as an expert witness, the SFO's decision to use him came in for stinging criticism. His conduct was held to fall far below the standards expected of an expert witness in many ways, and fresh material which had come to light about Rowe's expertise would have '*permitted devastating cross-examination*'.

The Court of Appeal found Rowe failed to understand and comply with his basic duties as an expert. He strayed into areas beyond his knowledge and failed to inform the prosecution of the limits of his expertise. He had also texted friends for advice while giving evidence. Whilst the Court of Appeal ultimately concluded that Pabon's conviction was safe, partly because Rowe's evidence did not have a sufficient impact on the key issue in the trial, the Court of Appeal did comment that the instruction of Rowe turned into an "*embarrassing debacle*" for the SFO.

The Court received a letter from the SFO's General Counsel which stated that there had not been an internal report dealing with lessons learnt but there had been extensive internal discussions. The court observed that "*there is no room for complacency and [the] case stands as a stark reminder of the need for those instructing expert witnesses to satisfy themselves as to the witness' expertise and to engage (difficult though it sometimes may be) an expert of a suitable calibre*".

Of course, the failure to use an expert witness causes problems of its own. In November 2018, the high-profile accounting fraud case brought by the SFO against two former executives at Tesco PLC collapsed after the judge concluded that there was no case to answer at the conclusion of the prosecution case. This decision was affirmed by the Court of Appeal in December, with its judgment revealing that one factor contributing to the downfall of the case was the prosecution's failure to call an independent accounting expert who could differentiate between legal and illegal accounting practices. In January 2019, the SFO offered no evidence in the prosecution of a third former Tesco executive who was accused in relation to the same alleged wrongdoing.

The latest debacle surrounding the use of Mr Ager shows that the problem with expert witnesses has not gone away. Of most concern is that Mr Ager (in the carbon credits trials) and Mr Rowe (in the Libor trials) had both been relied upon by the prosecution in several criminal proceedings before questions about their suitability to be expert witnesses arose. Although the CPS is said to be reviewing previous cases involving Mr Ager and his conduct has been referred to the National Crime Agency, one still has to ask – how big is the problem? How many other so-called expert witnesses relied on by the prosecution have gone unchallenged and managed to interfere with the fair administration of justice? And why is it that relevant background material appears not to be disclosed by prosecutors, and instead such failures are discovered via fortuitous findings of information and the diligence of defence teams?

In 2011, the Law Commission published a report entitled "*Expert Evidence in Criminal Proceedings in England and Wales*", in which it argued for a statutory admissibility test for expert opinion evidence which would require the expertise of any purported expert witness to be proved on the balance of probabilities, and would thus "*put the parties and the expert communities on notice that any individual claiming the status of an expert witness will not be able to provide expert evidence in criminal proceedings unless and until it is established that he or she is in fact an expert.*"<sup>1</sup> Perhaps it is time to reconsider the Law Commission's Report and its broader recommendations. In the meantime, however, prosecutors must ensure that they subject potential expert witnesses to a thorough and considered selection process. This will be of particular importance in new areas for the prosecution, where it does not have or does not know of experts. However, appropriate scrutiny of the selected expert witness (or witnesses) by experienced counsel for the defence is also crucial. After all, if the defence team had not acted on its concerns regarding Mr. Ager, the outcome for the defendants may have been very different.

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<sup>1</sup> Available at <https://www.lawcom.gov.uk/project/expert-evidence-in-criminal-proceedings/>

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