Experts and pretenders: Examining possible responses to misconduct by experts in criminal trials in England and Wales

Elaine Freer
Robinson College, University of Cambridge, Cambridge, and 5 Paper Buildings, London, UK

Abstract
Much academic literature explores the reliability of expert evidence in criminal proceedings in England and Wales. However, almost no attention has been paid to misconduct by experts giving evidence in criminal cases. Whilst rare, its serious impact on the administration of justice and public trust in it means that this area requires analysis. This article explores possible responses to expert witness misconduct occurring in the context of criminal proceedings in England and Wales, noting particularly the differences in responses available, depending firstly upon whether the expert is a registered professional, and secondly whether the expert has stepped outside of their expertise; did not have relevant expertise at all, or was dishonest. Professional disciplinary procedures focus on ‘fitness to practise’, and it is argued that this is sufficient where a registered professional has overstepped their expertise, but has not displayed mala fides. On the contrary, where someone gives evidence purporting to have expertise that they do not, or lies about their conduct as an expert in the case, criminal sanctions are available, appropriate, and should be used. These include contempt of court; perverting the course of justice; fraud by false representation, and perjury.

Keywords
contempt of court, criminal evidence, criminal procedure, exclusion of evidence, expert evidence, fraud, perjury, perverting the course of justice

Expert evidence has long enjoyed special status in the English criminal justice system. Unlike witnesses of fact, who can only report on what they directly saw, heard or experienced, expert witnesses are permitted to give opinion evidence on matters within their professional purview.¹ The relationship

¹. Turner (1975) QB 834, applying the exception in Folkes v Chadd (1782) 3 Dougli. 153.
between the English courts and expert evidence has not been straightforward, however. The English system has resisted requiring formal qualifications; anybody could therefore potentially be an expert witness. Identifying those who are ‘expert enough’ when there is no formal threshold poses some difficulties. With no reliable way for the parties to check the expertise of a witness who is not from a professional group requiring registration (such as medical doctors), someone purporting to be an expert when they are not is difficult to combat. This article discusses how such behaviour could be sanctioned, and analyses whether those sanctions are appropriate and sufficient to protect the integrity of the criminal justice process. For these purposes, the ‘integrity of the criminal justice process’ is taken to mean conviction of the guilty, acquittal of the innocent and maintaining public confidence. I would argue that the development of a peer-review college would be desirable, to allow assessment of expertise prior to the expert’s instruction. Currently sanctions operate after the event, and their deterrent effect can be questioned in light of recent cases.

Introduction

This article examines two types of expert misconduct. Firstly, it considers two recent fraud cases (Sulley & Ors and Pabon) where the prosecuting authority had called people purporting to be financial experts. In Sulley, it later transpired that the expert in fact had no qualifications at all. This having been discovered during the trial, the judge was forced to discharge the jury and the prosecution had to offer no evidence, leading to ‘not guilty’ verdicts being entered by the judge. In Pabon, the expert did not have the particular knowledge that he claimed to have, and was later discovered to have been seeking assistance via text message from people with genuine expertise in the area during overnight adjournments in the trial.

Secondly, it looks at two older cases concerning medical experts who were subject to professional disciplinary proceedings as a result of their evidence in criminal trials concerning the deaths of young children allegedly caused by their parents or carers. In those cases both experts were genuine experts in their fields, but did not deploy their expertise appropriately, or strayed outside of their specific area of expertise. In one case, this likely contributed to the wrongful conviction of a mother for killing her infant sons, though her appeal was allowed on unrelated grounds.

Having analysed these two types of conduct, which I argue are fundamentally distinct, the article examines responses to expert misconduct. This analysis includes criminal and civil law responses to such misconduct, as well as disciplinary proceedings by professional regulatory bodies. I analyse the sufficiency of those responses in differing circumstances, but argue that they all share an inadequacy of being available only ex post facto. This usually means that an accused person has been subjected to a criminal trial (sometimes more than once) where, without that expert’s misconduct, they may not have been tried at all, or might not have been tried multiple times. I conclude that current regulatory/professional disciplinary responses are largely adequate for regulating the expert, but are unlikely to provide any sufficient recourse for accused people convicted in trials where such evidence was utilised. Regulatory and disciplinary responses are also not intended to punish the expert. Criminal sanctions would punish an errant expert, and, as explored below, are applicable to all, not just those belonging to registered professions. However, the relevant offences are serious offences against the administration of justice, usually punished by imprisonment, to reflect high levels of culpability.

It is suggested that to avoid the waste of the significant cost of trials being stopped due to expert misconduct, or appeals where the trials conclude with convictions, a peer review college should be set up. This would allow review of the expertise of any expert not from a registered profession prior to their

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2. As per the overriding objective in the Criminal Procedure Rules.
3. First instance, Southwark Crown Court, His Honour Judge Nicholas Loraine-Smith, 2019.
4. [2018] EWCA Crim 420.
appearance in court. It shares the spirit of Law Commission recommendations, combined with the ‘multi-agency panel’ advocated by Stockdale and Jackson (2016).

**When to call an expert?**

Although many cases requiring experts involve medical or scientific issues, expert evidence can be called on a wide array of topics. Indeed, the only general requirement is that the expert’s evidence is on matters likely outside of jurors’ knowledge. The finer technical points of many things, from banking to parachuting (BBC News, 2018), are outside of most ordinary people’s knowledge. Therefore, the use of experts is far from unusual, and that is why it is important to have a coherent and appropriately strong response to expert misconduct. Before considering some examples of expert misconduct, it is helpful to briefly consider who the English criminal courts consider capable of being an expert.

**Who is an expert witness?**

The criteria for when it will be appropriate to call an expert witness was set out by the Court of Appeal in *Luttrell*, citing the Australian case of *Bonython*:

1. that study or experience will give a witness’s opinion an authority which the opinion of one not so qualified will lack. Elucidated in *Bonython* (1984) 38 SASR 45, as:
   
   (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and
   
   (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.

2. The witness must be so qualified to express the opinion.

Whilst those requirements might seem straightforward and easy to identify, case law suggests otherwise.

In *Silverlock*, the court was clear that where the prosecution solicitor had since 1884, quite apart from his professional work, given considerable study and attention to handwriting, and especially to old parish registers and wills, and had on several occasions professionally compared evidence in handwriting (though had never given evidence on the subject), he could still be regarded as an expert.

Lord Russell of Killowen CJ, giving the leading judgement, stated:

We now come to the second objection, as to the proof of the handwriting, which affords a good illustration of that class of evidence called evidence of opinion. It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so; but we cannot say that he must have become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge? Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence.

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5. Criminal Practice Direction V Evidence 19A Expert Evidence: 19A.1(ii)—‘it is needed to provide the court with information likely to be outside the court’s own knowledge and experience’.
6. [2004] EWCA Crim 1344.
7. *Luttrell*, above n. 5 at [32].
8. [1894] 2 QB 766.
9. The word ‘peritus’ is Latin for ‘expert’.
This outcome might seem somewhat shocking to a practitioner in the 21st century; as much due to the egregious conflict of interest in using the prosecution solicitor as an expert as that the expert had gained his knowledge through informal means.

Nonetheless there was, and remains, no requirement for any formal qualifications or membership of a professional association before a person is permitted to give evidence in a criminal court as an expert witness. This gives perhaps the first glimpse at how the issues in the fraud cases discussed later in this article arose. There was no requirement for the prosecuting authority to seek proof of educational, academic, professional or vocational qualifications from those whom they proposed to call as expert witnesses. This contributed to them only being exposed during or after trials, by which time significant time, money and defendant distress had been wasted.

In late 2019, the Inns of Court College of Advocacy, a component of the Council of the Inns of Court, published a guidance document for advocates regarding expert evidence. It made it very clear that a significant responsibility for the appropriateness of an expert being called, and that expert not straying outside their expertise, lay with the advocate themselves (2019: 12). It regrettably overlooks the role that prosecuting agencies and instructing solicitors should also play in this process.

**Criminal Procedure Rules on expert witnesses**

In light of this absence of formal requirements, it is helpful to examine what guidance exists for experts in criminal cases. There are no statutory provisions—the Criminal Procedure Rules are the full extent of guidance provided outside of the case law on the role and responsibilities of any expert witness.

Substantial amendments were made to the Criminal Procedure Rules, and a Practice Direction inserted, on the recommendation of the Law Commission in its 2011 Report into expert witnesses (see below). The recommendations were intended to promote best practice amongst experts, including recognising the limits of one’s own knowledge; crucial where no formal qualifications are required.

Matters relevant to expert evidence are encompassed within Rule 19.2 of the Criminal Procedure Rules. That Rule states that:

1. An expert must help the court to achieve the overriding objective—
   (a) by giving opinion which is—
      (i) objective and unbiased, and
      (ii) within the expert’s area or areas of expertise . . .

2. This duty includes obligations—
   (a) to define the expert’s area or areas of expertise—
      (i) in the expert’s report, and
      (ii) when giving evidence in person
   (b) when giving evidence in person, to draw the court’s attention to any question to which the answer would be outside the expert’s area or areas of expertise . . .

This makes it very clear that experts are relied upon to be scrupulously honest and fair in their assessment of their own ability and levels of knowledge. Such can often be the problem—how are tribunals to know whether someone is being honest about these aspects? Having no requirement for professional qualifications could be said to favour those whose confidence outweighs their competence. Furthermore, the more obscure the body of knowledge needed, the more likely that someone acting outside their knowledge will be able to go undetected for want of other expert witnesses to challenge their evidence.

In March 2019, Parts 19A.7, 8 and 9 were added to the Criminal Procedure Rules; ‘The inclusion of the three additional sections will assist the court and clarify to experts what they are obliged to disclose
to the party instructing them about themselves, or any corporation or body with which the expert works as an employee or in any other capacity. The section goes on to offer guidance to the courts and the experts as to what may happen as a result of any disclosures that are forthcoming’ (Courts and Tribunals Judiciary, 2019). This was a decisive move, displaying an expectation that parties would be more open about their experts’ qualifications and circumstances. 19A.7 gives 15 circumstances or events that an expert must declare, including adverse judicial comment, a history of lax or inadequate scientific methods, and any case in which an appeal has been allowed by reason of a deficiency in the expert’s evidence.

19A.9 effectively introduces a ‘due diligence’ aspect: ‘The rules do not require persistent or disproportionate enquiry, and courts will recognise that there may be occasions on which neither the expert nor the party has been made aware of criticism.’

**Law Commission recommendations**

In 2011, the Law Commission published a report on expert evidence in criminal proceedings (Law Commission, 2011). The central tenet of its 22 recommendations was that there should be a reliability-based admissibility test for expert evidence (Law Commission, 2011: [1.32], [3.36]–[3.37]), which would only be applied if there were concerns about the reliability of the evidence it was proposed to admit (Law Commission, 2011: [1.39], [3.38]). If there were such concerns, then the party who sought to adduce the evidence would bear the burden of proving that it was sufficiently reliable (Law Commission, 2011: [3.87]–[3.124]). Consultees supported this test being statutory (Law Commission, 2011: [1.36], [3.65]–[3.78]), and the Law Commission adopted this as their recommendation (Law Commission, 2011: [3.125]–[3.136] and Part IV). As this article is examining misconduct as opposed to reliability, the recommendations relevant to preventing or punishing misconduct are focused upon.

The Law Commission was satisfied that the ‘relevant expertise’ limb of the common law admissibility test for expert evidence was appropriate, and whilst it recommended codification, believed that no change to the test was required (Law Commission, 2011: [3.126] and [4.6]).

It is clear that the Law Commission regarded expertise as a crucial bedrock from which reliability could be assessed. This was demonstrated by the test’s bipartite nature: the qualification (expertise) requirement (Law Commission, 2011: [4.15]–[4.24]) and the impartiality requirement (Law Commission, 2011: [4.25]–[4.36]). The CrimPR were altered to require greater transparency by experts regarding their qualifications. CrimPR 19.4 was an amendment made by the CrimPR Committee at the request of the Government in its response to the Law Commission (Criminal Procedure Rule Committee Secretariat, 2014: 4). It requires that an expert’s report must ‘include such information as the court may need to decide whether the expert’s opinion is sufficiently reliable to be admissible as evidence’.10 In furtherance of such matters, the Crown Prosecution Service Guidance on Expert Evidence suggests that when an expert is considering what to include in a report in order to comply with this new requirement, the expert should have regard to the Practice Direction (CPS, 2019a).11 However, Stockdale and Jackson (2016: 362) suggest that even CrimPR 19 could usefully have been made more specific by the new credibility provision being amended so as to provide parties with examples of the types of matter that they are required to disclose. Such requirements, however, still rely on the expert being honest about their qualifications, and on the party putting that expert forward having verified their claimed credentials.

10. CrimPD 19.4(h).
11. Further guidance for experts appearing as prosecution witnesses, also with extensive reference to the CrimPR and PD are available in CPS (2019b).
There is increasing guidance publicly available for experts, which emphasises the importance of setting out qualifications clearly and honestly. For example, the Forensic Science Regulator in its 2019 document ‘Legal Obligations’ contains a section on Statement of Qualifications and Experience (2019: 111–113). It notes that: ‘The requirement relates to the accreditation of the expert as opposed to the organisation for which he works for. In this jurisdiction it is not normal for experts to have accreditation so this provision is not normally relevant.’ (2019: 113). This article does not expressly address the position of forensic scientists, as their position has already been explored, for example by Edmond and Roberts (2011).

Similarly, in May 2019, the Academy of Royal Medical Colleges issued a guidance document which notes (2019: 12); ‘Healthcare professionals acting as expert witnesses should make a self-declaration as to their scope of practice, professional development, training, special interests, areas of expertise both in general and in relation to the specific case and any conflicts of interest that could impact on their evidence. They should appreciate that if they are found to have provided misleading information after such a declaration, they could be liable to professional misconduct proceedings in addition to the possibility of any criminal sanction.’

The recency of these two documents suggests that the responsibilities of expert witnesses are becoming more prominent in the minds of professional bodies involved in areas where expert evidence is most likely to be sought.

As Ward notes (2015: 239), the sanction for non-compliance could be exclusion of the expert’s evidence as a whole, or on specific points. In some cases, this could lead to the collapse of the case, though often another expert can be found if the issue is identified early enough.

Whilst the Law Commission accepted that there would rarely be a need, they nonetheless were minded to recommend the inclusion of a power for trial judges to appoint an expert on behalf of the court (Law Commission, 2011: paras 6.1–6.5). Whilst alive to risks of lengthening and increasing the cost of trials (Law Commission, 2011: para 6.2), the Law Commission felt that the recommendation would nonetheless be of sufficient use to warrant its inclusion. It was thought that often the main role of a court-appointed expert would be at a pre-trial hearing where the judge was determining the admissibility of a prosecution or defence-instructed expert’s evidence (Law Commission, 2011: paras 6.15–6.24). Arguably, this process might have the effect of discouraging all but the most confident improperly or unqualified individuals in and of itself, though its expected ‘rare use’ might lessen any deterrent effect.

However, the eventual recommendation was rather different—a panel of legal practitioners be appointed to select a shortlist of expert witnesses (Law Commission, 2011: paras 6.41–6.68). The Law Commission suggested that the need would so rarely arise for the panel to be used that there need not be concerns about delay, if that were to be an issue in any event (Law Commission, 2011: paras 6.69–6.73). Again, I would suggest that this would potentially have the same effect of dissuading all but the most confident non-experts from seeking to hold themselves out as sufficiently knowledgeable, and it is regrettable that neither of these mechanisms was introduced.

The sanction for non-compliance proposed by the Law Commission would be the inadmissibility of the non-complying party’s expert evidence (Law Commission, 2011: para 7.38). This would, I argue, be a proportionate response to the problem—it would not prevent the case from continuing if the party had other reliable evidence upon which they could bring the case, but it would prevent the continuation of cases centring around the expert’s explanation of practices or phenomena unless an appropriately qualified expert could be found.

Recent rogue experts—financial expertise

Since the middle of 2018 the role of the expert has been cast into the limelight, particularly their use in fraud cases to assist juries with complex financial transactions and tax matters. Two cases have done this with particular newsworthiness.
Saul Hayden Rowe—LIBOR trials

Although much expert evidence is medical or scientific, a recent key case, *Pabon*, featured Saul Hayden Rowe, a purported expert on the operation of a complex economic matter—the London Inter-Bank Offer Rate (‘LIBOR’). This case illustrated that although the subject matter in medicine or science might be more contentious, and open to different interpretations, the quality and integrity of any expert evidence is crucial.

Put shortly, LIBOR is the rate at which banks lend to and borrow from one another. Its rate and fluctuations are therefore significant to bankers responsible for commercial transactions between banks. A series of cases alleging improper manipulation of the LIBOR by traders has generated a rich seam of appellate law.

It was not until the appeal of *Pabon*, however, that the role of expert evidence took centre stage. Throughout the LIBOR trials, expert evidence had been given by a former banker called Saul Hayden Rowe.

The first trial involving former Barclays’ bankers (employees of other banks had been in previous trials) involved five defendants—R, C, Merchant, Mathew and Pabon. Whilst Merchant, Mathew and Pabon were convicted, the jury were hung on R and C at the first trial. They were re-tried some time later. In that intervening period, suspicions had been raised, and further investigations undertaken, regarding Rowe. This meant that, at the re-trial, defence counsel had significant material with which they could cross-examine Rowe. The nature of that material was such that his credibility as an expert and as a witness of truth in any sense were fatally undermined. R and C were both acquitted very quickly at the re-trial (Johnston, 2017).

Through the re-trial and the Court of Appeal hearing, the true extent of Mr Rowe’s discreditable conduct came to light—all the more striking when he had given expert evidence in two previous LIBOR trials and the Serious Fraud Office (‘SFO’) had (overall) paid him over £400,000. He had provided statements to the SFO on the basis that he was instructed as an expert to provide a report:

explaining the workings of an investment bank, inter-dealing brokerage and related financial instruments and trading terms used by individuals within these institutions’. […] Included amongst the areas Rowe was instructed to cover were an overview of the trading floor and an explanation of the different types of traders within an investment bank and their functions. The letter of instructions drew specific attention to the duty of an expert ‘to give objective unbiased opinion on matters within their expertise’, together with the relevant provisions of the Crim PR.

His report ran to 121 pages. Prior to the first trial, perhaps presciently, the defence applied to exclude his evidence for want of expertise in the specific areas of banking with which the trial was concerned. In resisting this application, the SFO drew attention to the fact that Rowe had signed his report including a declaration that he understood his duty to restrict himself to those areas within his

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12. See n. 2 above.
13. *Merchant & Mathew* [2017] EWCA Crim 60.
14. *Hayes* [2015] EWCA Crim 444.
15. *Hayes* [2018] EWCA Crim 682.
16. *Hayes* (unreported) 14th March 2016, 2016 WL 01085958.
17. *Hayes v Financial Conduct Authority* [2017] UKUT 423 (TCC).
18. *Pabon*, above n. 3 at [6].
19. *Pabon*, above n. 3 at [7].
20. *Pabon*, above n. 3 at [29].
21. *Pabon*, above n. 3 at [32].
22. *Pabon*, above n. 3 at [33].
23. *Pabon*, above n. 3 at [34].
The judge ruled that his evidence was admissible, and on the evidence before him at the time, the Court of Appeal could not fault that ruling. At the end of the first day of his evidence, he was given the usual warning by the judge to any witness whose evidence is interrupted by any adjournment—that they must not speak to anyone about the case or their evidence. Rowe’s evidence featured only briefly in the summing up. Three of the defendants were convicted.

By the time of R and C’s re-trial disclosure was provided to the defence: email correspondence which Rowe provided ‘revealing that Mr Dominic O’Kane, a partner at Rowe’s firm and a part-time Professor of Pricing and Risk Financial Derivatives, had been responsible for drafting sections of Rowe’s report. This was not previously known.’

The full extent of what had not previously been known was even wider, however, as set out in a witness statement given by the solicitor for R:

5. . . . that prior to April 2016 Mr Rowe had sent excerpts of the case papers to Ms Signe Biddle an interest rate derivatives trader and financial consultant at RBS and Mr Michael Zapties, Head of Rates Trading at HSBC and sought their assistance.

6. On Friday 10 March 2017 I contacted both Ms Biddle and Mr Zapties. I spoke with each by phone on 15 March 2017. They both said that they had been contacted by Mr Rowe and that in the course of their respective conversations he had neither told them that he was acting as an expert witness in a criminal trial, nor had he explained to them the caution which they should exercise in expressing an opinion.

7. On the weekend of the 11 March 2017 Mr Rowe provided further material to the SFO, in the form of text messages between Mr Rowe, Ms Biddle and Mr Zapties . . .

8. From the additional disclosure it appeared that in the month prior to his giving evidence in the 2016 trial, Mr Rowe exchanged around 60 text messages with Ms Biddle and 27 text messages with Mr Zapties, as well as numerous emails with both them and Mr Nick Van Overstraeten, a third expert.

The Court of Appeal did little to hide their surprise at the events of the re-trial as they granted leave to appeal, noting ‘the startling manner in which the concerns as to Rowe came starkly to the forefront of the retrial’. Their Lordships did not, however, go so far as to allow the appeal, despite the situation arising from the behaviour of Mr Rowe being characterised in submissions by counsel on behalf of the appellant thus:

. . . he had signed documents stating that he had complied with his duties when he knew he hadn’t; he had failed to report with any detail or accuracy as to how he reached his opinions; he secretly consulted with a number of undisclosed advisors; he blatantly disregarded the directions of a trial judge during the course of a criminal trial; and he knowingly gave evidence about matters outside his area of competence. These are deeply troubling failings that bring the system of justice into disrepute . . .

I would argue that it is shocking that where an expert has behaved in this way, and that despite the fact that once his behaviour was exposed, cross-examination at the re-trial was able to take a different direction, after which two defendants were acquitted, there is no quashing of the convictions of those who did not have such ammunition for cross-examination. Whilst the court was keen to characterise the

24. Pabon, above n. 3 at [35].
25. Pabon, above n. 3 at [36].
26. Pabon, above n. 3 at [40].
27. Pabon, above n. 3 at [44].
28. Pabon, above n. 3 at [45].
29. Pabon, above n. 3 at [28].
30. Pabon, above n. 3 at [29].
evidence as going to a peripheral issue, and that jurors not being permitted to give reasons meant that it could never be known definitively whether the much more robust cross-examination contributed to the second jury’s decision to acquit. I would argue that the public’s faith in justice is likely to be severely damaged by a conviction being upheld in these circumstances. Furthermore, it provides no deterrent to parties not to call ‘experts’ about whom they may have doubts, and no encouragement to perform thorough ‘due diligence’ checks into any expert whom they intend to instruct.

**Andrew Ager—carbon credit trials**

More recently, in May 2019, a further lengthy fraud trial (*Sulley & Ors*[^31]) at Southwark Crown Court had to be stopped, and not guilty verdicts entered against all defendants, when it transpired that the prosecution’s expert witness was not, in fact, an expert at all. This prosecution had been brought by the Crown Prosecution Service (‘CPS’) as opposed to the SFO. After being made aware that the ‘expert’ had no qualifications at all—in fact, could not even remember whether he had passed any A levels, the judge discharged the jury, saying (Coleman, 2019):

> 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 also made a telephone call to the expert the defence intended to call, seeking to persuade that expert not to give evidence. Perhaps the most concerning aspect was the revelation that Andrew Ager had given evidence for the prosecution in more than 20 other fraud cases concerning abuse of the carbon credit system. Yet his true lack of expertise had not been discovered, illustrating how reliant the system is on the honesty and integrity of the individuals who are being put forward as experts in criminal trials.

**Well-known cases—medical experts and minority opinions**

Yet problems with expert evidence are not restricted to situations where someone claims to be an expert when they are not. Two very experienced medical experts were famously subject to disciplinary action by the General Medical Council (‘GMC’) as a result of their evidence in criminal trials. The two experts are Dr Waney Squier, and Professor Sir Roy Meadow.

**Dr Waney Squier**

In 2010 the GMC received a complaint about Dr Squier from the National Policing Improvement Agency.[^32] This complaint related to six cases in which she had given evidence. All of the cases involved alleged non-accidental head injuries (‘NAHI’) to young children, following which their parents or carers were prosecuted for causing death or serious injury, or there were proceedings in the Family Court over the care of the child’s siblings.[^33]

By way of summary, Dr Squier had originally subscribed to the majority medical theory regarding the ‘triad’ in NAHI cases in babies.[^34] The ‘triad’ was shorthand for three medical findings which it was believed, when found together in the same child, denoted that they had been shaken forcefully, or had suffered a serious impact, and became known as ‘shaken baby syndrome’ (‘SBS’). These were

[^31]: First instance, Southwark Crown Court, His Honour Judge Nicholas Loraine-Smith.
[^32]: *Squier v GMC* [2016] EWHC 2739 (Admin) at [3]. https://www.judiciary.uk/wp-content/uploads/2016/11/squier-v-gmc-protected-approved-judgment-20160311-2.pdf.
[^33]: *Squier*, above n. 31 at [18], [64], [75], [83], [105] and [125].
[^34]: *Squier*, above n. 31 at [2].
encephalitis (brain swelling), retinal haemorrhaging (breaking of blood vessels in the eye) and a subdural haematoma (bleeding in the brain) (Elinder et al, 2018). However, around 2002 she had departed from that view, and moved instead towards the minority view that there was no such thing as SBS.

The charges against Dr Squier related to six babies about whom she had given expert evidence. The allegations were that:35

i) Dr Squier had expressed an opinion in a field outwith her expertise.

ii) She made assertions in support of that opinion which were insufficiently founded on the evidence available to her.

iii) She purported to rely on research papers which did not support her opinion in the way she suggested.

Furthermore, that she had failed to discharge her duties as an expert, and that her acts and omissions in doing so were misleading, irresponsible, deliberately misleading, dishonest and likely to bring the medical profession into disrepute.

The matter proceeded to a full fitness to practice hearing in front of a Fitness to Practice Panel (FTPP) of the GMC in 2016, at which the FTPP found the charges proven: Dr Squier’s fitness to practice impaired, and consequently ordered her erasure from the medical register.36 On appeal to the High Court, Mitting J considered the factual findings of the FTPP37 to conclude whether or not they were wrong or unjust due to a serious procedural irregularity.38 His Lordship concluded that many aspects of the FTPP’s determination were flawed, particularly their conclusion that Dr Squier had been dishonest, and deliberately misled courts to which she had given evidence. For example, he found that in a number of instances where the Panel had found that Dr Squier had expressed opinions outwith her expertise, she had said that other instructed experts who were specialists in that area would be the people to ask. Thus, she had only expressed opinions outside her expertise to expressly disclaim her ability to give that answer better than other experts.39

The flaws were so great that the FTPP’s decision on whether she was impaired in her ability to practice, and the appropriate sanction, could not be maintained.40 Mitting J’s decision on sanction was not to order her erasure from the medical register, as the FTPP had done. He permitted her to continue in practice as normal, but imposed a condition of practice that she did not give evidence in any legal proceedings for three years (Press Association, 2016).

**Professor Sir Roy Meadow**

Professor Sir Roy Meadow also had a professional medical interest in sudden deaths of children. He gave evidence in a number of such cases,41 the best known being Sally Clark. Sally Clark was convicted in 1999 of murdering her two infant sons. An appeal in 2000 was unsuccessful,42 but a second appeal on a referral by the Criminal Cases Review Commission in 2003 succeeded.43

At Mrs Clark’s trial in the Crown Court, Prof Meadow had given evidence concerning the statistical likelihood of two siblings both dying suddenly of natural causes,44 graphically describing it in terms of

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35. *Squier*, above n. 31 at [6].
36. *Squier*, above n. 31.
37. *Squier*, above n. 31 at [4].
38. *Squier*, above n. 31 at [5].
39. E.g. *Squier*, above n. 31 at [115].
40. *Squier*, above n. 31 at [137].
41. E.g. *Cannings* [2004] EWCA Crim 1; *Anthony* [2005] EWCA Crim 952.
42. *Clark* [2000] EWCA Crim 54.
43. *Clark* [2003] EWCA Crim 1020.
44. *Clark*, n. 41 above at [94]–[110].
backing winners of consecutive Grand Nationals. The Court of Appeal allowed the appeal on the basis of a failure by a prosecution pathologist to disclose a crucial microbiology report to the defence which undermined the Crown’s case.\textsuperscript{45} That was not linked to Prof Meadow’s evidence. However, in its judgement the court stated that it was likely that Prof Meadow’s evidence on the statistical likelihood of two cot deaths in the same family would, in and of itself, have afforded a successful ground of appeal.\textsuperscript{46}

As a consequence of this judgement, Sally Clark’s father made a complaint to the GMC about Prof Meadow, expressing an opinion that he had committed serious professional misconduct and seeking that he be prevented from giving evidence as an expert witness.\textsuperscript{47}

The FTPP found the allegation proved, and ordered Prof Meadow’s erasure from the medical register.\textsuperscript{48} He appealed to the High Court, where the finding was quashed. Controversially, Collins J went much further, holding that expert witnesses were immune from disciplinary proceedings based solely on their reports to or evidence before a court.\textsuperscript{49} The qualification was that the immunity was not absolute. It applied where the complaint came from an aggrieved party (for example, Mrs Clark’s father), but would not apply if the judge before whom the evidence was given thought that it demanded disciplinary action.\textsuperscript{50} As Collins J acknowledged, this was a significant extension of immunity, which had previously only extended to protect the witness from civil or criminal charges (except perjury or perverting the course of justice).\textsuperscript{51} For this reason the finding of the FTPP was quashed, on the basis that the GMC should have declined to pursue the complaint because it was made by an aggrieved party.\textsuperscript{52}

Should that aspect not be upheld on appeal, however, Collins J also considered the position had the FTPP been right to consider the complaint.\textsuperscript{53} Collins J concluded that the complaint was about the misuse of statistics, in good faith, based on a misunderstanding of a research paper to which Prof Meadow had written a preface.\textsuperscript{54} Therefore, there was no serious professional misconduct.

The GMC appealed Collins J’s decision to the Court of Appeal.\textsuperscript{55} Each judge gave their own judgement, each divided into two parts: whether there was immunity, and whether there had been serious professional misconduct. Giving the leading judgement, Sir Anthony Clarke, MR, observed,\textsuperscript{56} ‘It is I think inconceivable that the draftsman of any of these provisions could have thought that a person against whom there was a case to answer that he was guilty of serious professional misconduct or, now, that his fitness to practise was impaired, would or might be entitled to an immunity of the kind suggested here. Such immunity would, to my mind, be inconsistent or potentially inconsistent with the principle that only those who are fit to practise should be permitted to do so.’

All three judges agreed that there was no immunity from professional disciplinary action arising from evidence given in legal proceedings.\textsuperscript{57}

By a majority of 2 to 1, the Court of Appeal held that there had not been serious professional misconduct. Sir Anthony Clarke, dissenting on this point only, noted that although it would be rare to have serious professional misconduct without bad faith, this was such a case due to the seriousness of the

\textsuperscript{45} Clark, n. 41 above at [171].
\textsuperscript{46} Clark, n. 41 above at [172]–[180].
\textsuperscript{47} Meadow v GMC [2006] EWHC 146 (Admin), at [5].
\textsuperscript{48} Meadow, above n. 46 at [5].
\textsuperscript{49} Meadow, above n. 46 at [21], [22] and [25].
\textsuperscript{50} Meadow, above n. 46 at [22], [24].
\textsuperscript{51} Meadow, above n. 46 at [9], [10], [13], [16].
\textsuperscript{52} Meadow, above n. 46 at [26].
\textsuperscript{53} Meadow, above n. 46 at [28].
\textsuperscript{54} Meadow, above n. 46 at [47]–[51].
\textsuperscript{55} GMC v Meadow (HM’s Attorney-General intervening) [2006] EWCA Civ 1390.
\textsuperscript{56} GMC v Meadow, above n. 54 at [41].
\textsuperscript{57} GMC v Meadow, above n. 54 at [63], [106] and [249].
charge and the consequent likely effect of expert evidence on the jury.\textsuperscript{58} His Lordship did not think that the conduct warranted erasure, however. Thorpe and Auld LJJ did not agree, both concluding that there was no serious professional misconduct, and upholding Collins J’s quashing of the FTPP’s finding that there was. This was focused on the fact that Meadow’s use of the statistics had been in good faith, albeit that as he was not a statistician he should not have sought to use them, or illustrate them in the way he did by reference to the odds of backing the winners of consecutive Grand Nationals.

**Responses to expert misconduct**

The reason for constructing this article around two sets of two experts is to illustrate different responses to possible misconduct depending on the expert’s status. Ager and Rowe were not within registered professions with a regulatory body overseeing their activities. This significantly restricts the options available for punishing their conduct, as explored below. The possibilities are piecemeal and, I suggest, insufficient to properly reflect the seriousness of the effects of their conduct. Meanwhile, Meadow and Squier were both registered medical practitioners. This meant that the consequence of their conduct was to find themselves before the Fitness to Practice Panel of the GMC.

However, I would argue that whilst their membership of a professional body meant that Meadow and Squier could be subject to disciplinary proceedings, the focus of those proceedings was not their wrongdoing, or its effect on the defendants in those trials in which they gave evidence. The principal purpose of Fitness to Practice hearings is to establish whether the respondent doctor’s ability to practise at the time of the hearing is impaired (General Medical Council, 2004: 1), and thus the preservation and maintenance of public confidence in the profession rather than retributive justice.\textsuperscript{59} Its purpose is not punishing the doctor for their misconduct. I argue that, for that reason, professional disciplinary proceedings do not necessarily offer a sufficient response to expert misconduct in criminal trials. As set out below, however, such behaviour would not fulfil the requirements for criminal sanction either.

**Responses to misconduct—medical experts**

This section focuses on the response to expert misconduct by the expert’s professional regulatory body. For the purpose of this article I have taken the example of medical practitioners registered with the GMC.

Part V of the Medical Act 1983 (‘the 1983 Act’) gives responsibility to the GMC for taking action where concerns are raised about the abilities of doctors. Where the GMC receives a complaint about a doctor, the Investigation Committee will investigate. If necessary it can refer to the Medical Practitioners Tribunal Service (‘MPTS’), as established in s. 1(3)(g) of the 1983 Act. The MPTS carries out an independent hearing of the matter, with the GMC as prosecuting body, and the respondent represented if they so wish.

Section 35C(2) of the 1983 Act sets out the exhaustive list of circumstances under which a doctor’s fitness to practise may be impaired for the purposes of the Act:

(a) misconduct;
(b) deficient professional performance;
(c) a conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence;
(d) adverse physical or mental health;

\textsuperscript{58} GMC v Meadow, above n. 54 at [95].

\textsuperscript{59} Rashchid v General Medical Council, Fatmami v General Medical Council [2007] EWCA Civ 46.
(da) not having the necessary knowledge of English (but see section 2(4));
(e) a determination by a body in the United Kingdom responsible under any enactment for the
regulation of a health or social care profession to the effect that his fitness to practise as a
member of that profession is impaired, or a determination by a regulatory body elsewhere to the
same effect.

For the following reasons, however, I would suggest that where someone has been tried and possibly
convicted as a result of the medic’s improper evidence, the FTPP process does not offer sufficient
reflection of the gravity of the effect that their misconduct has had on the defendant. Primarily, this
is because the FTPP’s purpose is not to mete out retributive justice. Furthermore, the interests of a
defendant convicted on the basis of medical evidence that was given out of a fixedness of view
(such as that of Dr Squier), or a misinterpretation of data that occurred in good faith (as by Sir Roy
Meadow), are not likely to align with the interests of the public who might be treated by that
person in the future in their medical practice. It is highly likely to be in the public interest,
especially in an under-staffed National Health Service, to allow that person to continue to treat
patients as a medical practitioner.

Indeed, as was observed by Mitting J, there had been no complaints that the court was aware of
concerning Dr Squier’s routine medical practice. The Court of Appeal described Sir Roy Meadow as
someone who ‘maintained a general paediatric practice and, as the many testimonials which were
provided to the GMC and to this court show, he was regarded as a superb practitioner and teacher.
Many families have cause to be grateful to him for what he did for their children.’

Thus there is a disconnect between the person’s abilities as a doctor, and their judgment on matters
when giving evidence in court cases. There is therefore a tension inherent—should the public be
deprived of a good practitioner because in court they acted in good faith, but without desirable precision?
In the case of Dr Waney Squier, it is suggested that the eventual conclusion, of a prohibition on her
providing medico-legal reports for three years, carefully trod the line of preventing her from compro-
mising criminal trials, whilst nonetheless permitting the public to continue to benefit from her significant
medical knowledge as a practitioner. In this way, although retributive justice is not achieved, there can
be assurances that the instance will not repeat.

Offering a different perspective, albeit in the context of disciplinary proceedings against lawyers, Sir
Thomas Bingham MR (as he then was), observed in Bolton v Law Society,

Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would
ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the
ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the
Tribunal can aducce a wealth of glowing tributes from his professional brethren. He can often show that for
him and his family the consequences of striking off or suspension would be little short of tragic. Often he will
say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after
striking off, all these points may be made, and the former solicitor may also be able to point to real efforts
made to re-establish himself and redeem his reputation. All these matters are relevant and should be con-
sidered. But none of them touches the essential issue, which is the need to maintain among members of the
public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable
integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an
appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is
past. If that proves, or appears likely to be, so the consequence for the individual and his family may be deeply
unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The

60. Rashchid v GMC; Fatmami v GMC, above n. 58 at [16] and [19].
61. Squier, above n. 31 at [1].
62. Meadow, above n. 46 at [2].
63. [1993] EWCA Civ 32 at [16].
reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

This keenly illustrates the difference between a criminal sanction and a disciplinary one. Although a disciplinary sanction is not meant to be punitive, it often will indirectly have consequences regarded by the person upon whom it is imposed as highly punitive—the loss of their career, in some cases. But this misfortune for one individual is justified in the name of upholding the standards of the profession, and the reputation of that profession. It is a collective need. This is very different to proceedings for contempt of court or perverting the course of justice (see below) where the focus is entirely on that single individual alleged to have committed the crime, and their specific conduct. Those proceedings do not focus on a collective need for good practice and faith in the profession, arguably due to the far more egregious nature of the behaviour, and its criminality.

Therefore, the importance of past events for a FTPP is what that tells them about the future conduct of the doctor, as opposed to what harmful effect that past behaviour has had in and of itself. A wrongful conviction on a doctor’s evidence given in good faith two years ago may be seen to have little effect on their ability to conduct medical practice now.

Silber J in Cohen v General Medical Council[^64] stated that the FTPP should take into account the need to protect the individual patient and the collective need to maintain confidence in the profession as well as declaring and upholding standards of conduct and behaviour. In R (Harry) v GMC[^65], Goldring J was also clear that the public interest is relevant to the consideration of impairment of fitness to practise. Both of these excerpts demonstrate that the clear focus is on looking forwards as to whether the public can have confidence in this person’s ability to practise as a doctor, and that the question of public interest fixes on that aspect.

Indeed in Cohen, Zygmunt v General Medical Council[^66] and Azzam v General Medical Council[^67], the High Court confirmed that in deciding whether there is impairment, FTPPs must take account of the misconduct of the practitioner and then consider it within the context of all the other relevant factors put before them. Only after that global consideration will the FTPP be able to answer whether the doctor’s misconduct means that their fitness to practise is impaired.

Even a medical professional who made an error amounting to serious professional misconduct in January may have addressed the issues that caused that error, and be under no impairment, come October. Where a doctor is found to be impaired as a result of the FTPP arising from their conduct as an expert in a court case, and sanctions imposed as a result, the doctor may feel that they have been punished as a direct result of their behaviour in the case. However, the sanction is not a direct response to their past conduct in the case; it is a response to the finding of the FTPP that their fitness to practise is currently impaired. The misconduct will be relevant, and may be an historic manifestation of an ongoing impairment in fitness. However, the link between the expert evidence and the sanction is the current impairment. Without current impairment, the FTPP cannot sanction a medical expert for their conduct in a court case.[^68]

For this reason, I argue that disciplinary proceedings, whilst necessary and appropriate in cases of registered expert witness misconduct, do not in and of themselves address the situation of the defendant whose case was affected. Dr Squier, for example, was prevented by the FTPP from giving evidence for three years. As Prof Meadow had retired from medical practice by the time of the final appeal in the disciplinary proceedings, the court felt that even had there been serious professional misconduct, no

[^64]: [2008] EWHC 581.
[^65]: [2006] EWHC 3050 at [30].
[^66]: [2008] EWHC 2643 (Mitting J).
[^67]: [2008] EWHC 2711 (McCombe J).
[^68]: Though separate criminal charges can be brought by the Crown if there is sufficient evidence for a realistic prospect of conviction and it is in the public interest to prosecute—the Full Code Test for Crown Prosecutors.
suspension would have been necessary, as there was no need to protect the public from someone who was not practising. Whilst protecting against a recurrence, it offers no recompense of any kind to those against whom the evidence was used. Adopting the argument of Sir Thomas Bingham, this is also a collective imperative—it is more important that society can benefit from the doctor’s practical expertise than that a small number of defendants receive specific recourse against the doctor by their striking off as a result of their evidence in a court case.

Responses to misconduct—any person acting as an expert

As noted at the beginning of this article, one of the problems in dealing with expert misconduct is that not all who hold themselves out to be experts are genuine experts, or governed by professional associations. Ager and Rowe had no overarching professional regulatory body to whom they could be reported, and no disciplinary body that could impose sanctions upon them.

Neither were they using registered titles when they are not entitled to, which can itself be a criminal offence. For example, under s. 20(1) of the Architects Act 1997 (‘the 1997 Act’), no-one may use the word ‘architect’ about themselves unless they are registered with the Architects’ Registration Board having undergone appropriate training and accreditation. Section 21 of the 1997 Act makes it an offence to use the title of ‘architect’ unless registered: a summary-only offence punishable by a fine of up to £2500.

Therefore they could not be susceptible to disciplinary proceedings, or a prosecution by a professional body, despite their reports and sworn evidence being provided under a declaration of truth and under oath. This does not mean, however, that there is no route through which they can be held to account for their conduct. This next section considers four possible criminal offences with which those who have given expert evidence outwith their expertise could be charged, and also the possibility of the court making a Wasted Costs Order against such a person. It should be noted that these offences are equally applicable to those who are members of registered professions, and there would be nothing to prevent criminal proceedings being brought, if the behaviour of the registered professional warranted it, followed by a disciplinary hearing and sanction on conclusion of the criminal proceedings.

Contempt of court

Contempt of court was described by the Law Commission in their 1979 Report into Offences Relating to Interference with the Course of Justice as (Law Commission, 1979: 46):

... generally, conduct which is likely to interfere with, or bring into disrepute, the administration of justice by the courts (either in pending proceedings or, in cases of victimising of witnesses, or of vilification of a judge, after the completion of proceedings) if there is a real risk that the administration of justice will be prejudiced thereby.

As Lawton LJ observed in Balogh v St Albans Crown Court:70

In my judgment this summary and draconian jurisdiction should only be used for the purposes of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment.

In other words, judges are not to hold individuals in contempt lightly, and where they do so, are to put them on notice of that fact, and allow submissions as to both the contempt itself, and the appropriate sentence.71

69. GMC, above n. 54 at [222].
70. [1975] QB 73 at 93.
71. Khan [2018] EWCA Crim 2641 at [10].
When considering the role that contempt of court might play in addressing expert witness misconduct, this article benefits from a very recent judgement of the Civil Division of the Court of Appeal. Guidance was provided where an expert witness (a medical doctor) was dishonest, causing an application for them to be held in contempt of court; *Liverpool Victoria Insurance Company v Dr Asef Zafar*.72

The judgment of the Court of Appeal concerned an appeal by Liverpool Victoria against the decision of Garnham J to commit the respondent, Dr Zafar, to prison for a period of six months suspended for two years,73 as a result of 10 findings of contempt of court against him.74 The Appellants argued that the sentence was wrong in principle and so lenient as to be unreasonable.75 Whilst the Court of Appeal upheld the appeal on the period of committal being unduly lenient, they did not increase the period, on the basis that they had been able to provide guidance for future cases.76

Dr Zafar was a medical doctor who had provided a written report for a claimant, whom he had examined, who had been involved in a low-level personal injury case resulting from a road traffic collision. He wrote a report saying that the claimant had fully recovered,77 with the usual declaration and statement of truth stating that he had prepared the report from his own examination, using independent judgment, and that the contents of the report were true to the best of his knowledge and belief.78

On seeing the report, the claimant contacted his solicitor to complain that the report was not accurate, as he had ongoing symptoms.79 The solicitor representing the claimant consequently emailed the doctor, asking him to review his notes from the examination and requesting that he amend his report.80 This amendment was done without any further examination, and without any reference in the revised report to there ever having been an earlier report.81 When this was discovered, an agent from Liverpool Victoria visited Dr Zafar, who made a witness statement stating that the original report was accurate, and that the amended one had been produced without his knowledge, which was untrue.82

The original contempt proceedings pleaded 16 grounds of contempt against Dr Zafar as respondent. Each alleged interference with the administration of justice through making, or causing to be made, a false statement in a document verified by a statement of truth. Ten of those grounds were found proved.83

The Appellant argued that by virtue of the special position of an expert witness, meaning that the court and parties relied upon them, experts who abused their position by lying should expect to be treated more severely than a civilian who lies in court.84 The court took the view that it mattered little whether there was dishonesty or recklessness—both were very serious due to their effect on the administration of justice.85 It noted:86

> Without seeking to lay down an inflexible rule, we take the view that an expert witness who recklessly makes a false statement in a report or witness statement verified by a statement of truth will usually be almost as culpable as an expert witness who does so intentionally. This is so, because the expert witness knows that the court and the parties are dependent on his or her being truthful, and has made a declaration which asserts that

72. [2019] EWCA Civ 392.
73. Within the permissible range in s. 14 Contempt of Court Act 1981, which provides for a maximum period in custody of two years from a superior court, or no more than one month’s custody and/or a fine of £2,500 from an inferior court.
74. [2018] EWHC 2581 (QBD).
75. [2019] EWCA Civ 392 at [2].
76. Zafar, above n. 71 at [75].
77. Zafar, above n. 71 at [6].
78. Zafar, above n. 71 at [7].
79. Zafar, above n. 71 at [8].
80. Zafar, above n. 71 at [10].
81. Zafar, above n. 71 at [11].
82. Zafar, above n. 71 at [14].
83. See full judgment at [2018] EWHC 2581.
84. [2019] EWCA Civ 392 at [27].
85. Zafar, above n. 71 at [58].
86. Zafar, above n. 71 at [61].
he or she is aware of his or her duties to the court and has complied with them (see [33] above). To abuse the trust placed in an expert witness by putting forward a statement which is in fact false, not caring whether it be true or not, is usually almost as serious a contempt of court as telling a deliberate lie.

The court also turned its attention to the interplay between contempt of court proceedings and consequential losses to an expert in those circumstances. These included matters such as loss of reputation. However, the court was clear that these things did not mean that the punishment for the contempt should be reduced.87

Previous positive good character, an unblemished professional record and the fact that an expert witness has brought professional and financial ruin upon himself or herself are also matters which can be taken into account in the contemnor’s favour. However, in deciding what weight can be given to those matters, it must be remembered that it is the professional standing and good character of the expert witness which enables him or her to act as an expert witness, and thus to be in a position to make false statements of this kind. Breach of the trust placed in an expert witness by the court must be expected to result in a severe sanction being imposed by the court in addition to any other adverse consequences. The fact that an expert witness has brought ruin upon himself or herself, and/or the fact that he or she faces proceedings by a professional disciplinary body, will therefore not in themselves be a reason not to impose a significant term of committal.

**Perverting the course of justice**

Perverting the course of justice is a common law offence,88 triable only on indictment, and punishable by up to life imprisonment and/or an unlimited fine. The offence is committed when the defendant (‘D’) does an act or series of acts which has or have a tendency to pervert, and which is or are intended to pervert, the course of justice.

It is therefore of crucial importance that the course of justice is in existence at the time of the act(s). The course of justice starts when an event has occurred from which it can reasonably be expected that an investigation will follow;89 investigations which could lead to proceedings have commenced; or proceedings have started or are about to start. The investigation of an offence, and later the trial process, are self-evidently part of the course of justice.

The extent of the act need not be great, and nor must it be guaranteed to have the effect of perverting the course of justice. As per Lord Lane LCJ in Murray:90

There must be evidence that the man has done enough for there to be a risk, without further action by him, that injustice will result. In other words, there must be a possibility that what he has done without more might lead to injustice [...] To establish a tendency or a possibility, you do not have to prove that the tendency or possibility in fact materialised. If it did, and if there is evidence of that, then of course that is powerful argument to show that there was a tendency; but it is not necessary.

In Murray, the appellant had, as is usual practice, been provided by the police with half of the blood specimen, taken on suspicion of drink driving. He had then tampered with his half of the sample and sent it off for analysis. It returned a low blood-alcohol reading as a result of the tampering. He did not seek to use the sample, or that lower reading, as evidence in his case. Nonetheless, the court held, this was sufficient for a charge of perverting the course of justice.91 This construction was cited with approval by

87. Zafar, above n. 71 at [65].  
88. Even if it is an attempt that is not successful—Williamson (1991) 92 Cr App R 158 (CA).  
89. Rafique [1993] QB 843.  
90. Murray (1982) 75 Cr App R 58 at 62.  
91. Murray, above n. 89 at 63.
the court in *Archer*.92 Case law emphasises that a charge of perverting is not concerned with the final outcome—whether the course of justice was in fact perverted is irrelevant to the charge (*Rex v Tibbits*).93

**Perjury**

By s. 1(1) of the Perjury Act 1911, perjury is committed when a lawfully sworn witness in judicial proceedings wilfully makes a false statement which s/he knows to be false or does not believe to be true, and which is material in the proceedings. The offence is triable only on indictment and carries a maximum penalty of seven years’ imprisonment and/or a fine.

There must be more than one witness, or other evidence corroborating a single witness, as to the falsity of the statement underlying the perjury charge.94 Bringing a charge for perverting the course of justice cannot be used to circumvent this requirement.95 There would therefore need to be evidence that the expertise claimed by D was false, which could come from other experts’ assessments of D (peer-review).

In *R (Purvis) v DPP*,96 the claimant sought judicial review of the CPS’s decision not to prosecute a police officer for perverting the course of justice, misconduct in public office and perjury. The officer had taken a statement from J, an adult to whom a child complainant had made sexual allegations against Purvis. J had given a statement about events which she said had happened on 2–3 June. She then realised the events had happened on 4–5 July. The officer therefore amended the statement to read 2–3 July. He then later further amended it to read 4–5 July. He committed perjury by denying in the witness box that there had ever been a version of the statement that read 2–3 July. That made both counsel, who had seen that statement, witnesses of fact, and the trial stopped. At a re-trial Purvis was convicted.

The essential elements of perjury were not discussed, but observations on the public interest test are relevant when considering how well-suited this offence would be to addressing expert witness misconduct, assuming the evidential threshold had been passed.

The court noted that the Full Code Test for Crown Prosecutors contained the following considerations of ‘public interest when considering whether to prosecute’.97

Paragraph 4.12 sets out, at (a)–(g), a non-exhaustive list of questions to be considered by the prosecutor in making the public interest decision. The questions include the following:

(a) How serious is the offence committed? The Code indicates that, the more serious the offence, the more likely it is that a prosecution is required.
(b) What is the level of culpability of the suspect? The code indicates that, the greater the suspect’s level of culpability, the more likely it is that a prosecution is required.
(c) What are the circumstances of and the harm caused to the victim? The Code indicates that the circumstances of the victim are highly relevant and that, the greater the vulnerability of the victim, the more likely it is that a prosecution is required.
(f) Is prosecution a proportionate response? The Code indicates that prosecutors should consider whether prosecution is proportionate to the likely outcome.

Having identified that the officer had lied on oath three times regarding the statement alterations, the court directed that the decision not to prosecute had been seriously flawed, and directed it be re-taken by a different CPS unit.98

92. [2002] EWCA Crim 1996 at [42]–[44].
93. [1902] 1 KB 77.
94. Section 13 Perjury Act 1991.
95. *Tsang Ping Nam v R* 74 Cr App R 139 (PC).
96. [2018] EWHC 1844 (Admin).
97. *R (Purvis) v DPP*, above n. 96 at [23].
98. *R (Purvis) v DPP*, above n. 96 at [88].
**Fraud Act offences**

Section 2 of the Fraud Act 2006 (‘the 2006 Act’) makes it an offence to dishonestly make a false representation,\(^99\) knowing it to be, or believing that it might be, false,\(^100\) with the intention of making a gain for yourself or causing a loss to another.\(^101\) The representation can be as to fact or law, including a representation as to the state of mind of the maker of the representation or another.\(^102\) A representation can be express or implied.\(^103\)

The requirement for dishonesty is fairly easily fulfilled here, especially since the ruling in *Ivey v Genting Casinos Ltd*.\(^104\) Therefore, the only factor for the jury to consider is whether, on the basis of the facts as the defendant knew or believed them to be, the jury think the defendant’s conduct was dishonest. There is now no second, entirely subjective, limb as there was when the second limb of Ghosh applied.\(^105\) Although that removal of the second limb was obiter in the Supreme Court, Leveson LJ (PQBD) in *DPP v Patterson*\(^106\) noted that,\(^107\) ‘Given the terms of the unanimous observations of the Supreme Court expressed by Lord Hughes, who does not shy from asserting that Ghosh does not correctly represent the law, it is difficult to imagine the Court of Appeal preferring Ghosh to Ivey in the future.’

**Costs orders**

The three possible costs orders applicable to bogus experts are set out succinctly by Hughes LJ (VP) in *P*.\(^108\)

1. Under section 19A of the Prosecution of Offences Act 1985 an order may be made against a legal representative that he pay ‘wasted costs’. Wasted costs are costs incurred as a result of improper, unreasonable or negligent act or omission on the part of any representative or the employee of any representative. […]

   A legal representative is however fully defined in the section. It means ‘a person exercising a right of audience or a right to conduct litigation on behalf of a party’. In the context of a criminal case, the parties are the Crown on one side and the defendant on the other. The legal representative is the advocate or litigator appearing or acting for one or other of those parties. In other words, in very simple terms this power to make wasted costs is a power exercisable against a lawyer personally.

2. Under section 19 of the same Act and Regulation 3 of the Costs in Criminal Cases (General) Regulations 1986, 1986/1335 made under that section, an order may be made that one party pay the costs of the other party to criminal proceedings. Such an order may be made when the judge is satisfied that the costs in question have been incurred by party A as a result of ‘an unnecessary or improper act or omission by or on behalf of’ party B.

3. Under section 19B of the 1985 Act, an order may be made against a ‘third party’ that he pay the costs incurred by any other party to the proceedings. This order can be made only when the third party has been guilty of ‘serious misconduct’.

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99. Section 2(1)(a).
100. Section 2(2)(b).
101. Section 2(1)(b)(i) and (ii).
102. Section 2(3)(a) and (b).
103. Section 2(4).
104. [2017] UKSC 67.
105. [1982] EWCA Crim 2.
106. [2017] EWHC 2820 (Admin).
107. *DPP v Patterson* at [16].
108. [2011] EWCA Crim 1130 at [6].
Section 19A, in conjunction with Reg 3F (as amended) of the Costs in Criminal Cases (General) Regulations 1986 (made under the power in s. 19) empowers a court to order a party to pay another party’s costs due to the improper act of a legal or other representative (often known as a ‘wasted costs order’). This power therefore only applies as against a representative of the prosecuting authority, and therefore not the individual expert. The threshold is high: see s. 19A3; ‘as a result of any improper, unreasonable or negligent act or omission on the part of any representative or his employee, or which, in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay’.

Section 19 could require the prosecuting authority to cover costs incurred by the defence in responding to a case founded on a bogus expert, as instructing an unqualified expert would be an improper act, and the failure to thoroughly research that expert would be an improper omission.

Section 19B of the same Act empowers regulations to be made allowing orders to be made against third parties. This is brought into force by regulations 3E to 3I of the General Regulations. CrimPR 45.10 sets out the procedure, supplemented by Criminal Practice Direction 45. For such an order to be made there must have been serious misconduct (whether or not constituting a contempt of court) by a third party and the court considers it appropriate, having regard to that misconduct, to make a third-party costs order (‘TPCO’) against them. A TPCO is an order for the payment of costs incurred by a party to criminal proceedings by a person who is not a party to those proceedings. This would cover an expert, and would be most applicable where there has been a trial abandoned, meaning the costs are fairly straightforward to calculate. A TPCO may be made on the application of any party, or on the court’s own initiative.

Exclusion of evidence

Whilst not often used as a sanction per se, the exclusion of expert evidence where the expertise of the person giving the evidence is shown to be seriously in question could mean that a party seeking to rely on the evidence as part of their case would not be permitted to do so.

Focusing on criminal proceedings, as the main thrust of this article, Part 19A.9 of the Criminal Practice Direction notes that: ‘Nevertheless, where matters ostensibly within the scope of the disclosure obligations come to the attention of the court without their disclosure by the party who introduces the evidence then that party, and the expert, should expect a searching examination of the circumstances by the court; and, subject to what emerges, the court may exercise its power under s. 81 of the Police and Criminal Evidence Act 1984 or s. 20 of the Criminal Procedure and Investigations Act 1996 to exclude the expert evidence.’

It must be remembered that judges also have a power under the Criminal Procedure Rules to exclude evidence any party is seeking to call where it has been adduced without proper procedural steps being taken, or in circumstances that do not further the overriding objective of timely convictions of the guilty and acquittals of the innocent. Where the prosecution wishes to call the expert evidence at issue, the judge also has the possibility of excluding it pursuant to an application under s. 78 of the Police and Criminal Evidence Act 1984. That permits prosecution evidence to be excluded ‘if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.’

In a civil context exclusion could occur using the extremely wide power of the court to control evidence under CPR Part 32.1, which states that the court may give directions as to: (a) the issues on

109. An example of this power being used in the criminal context to exclude evidence to maintain fairness can be seen in Musone [2007] EWCA Crim 1237. D’s counsel applied to adduce co-defendant’s bad character as an ‘ambush’, and the judge’s decision to exclude it for breach of CrimPR was upheld.
which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is to be placed before the court. Furthermore, 32.1(2) states that the court may use its power under this rule to exclude evidence that would otherwise be admissible. This could clearly include expert evidence where the qualifications of the expert are in doubt.

How effective would these responses be against expert misconduct in criminal proceedings?

This article has considered a variety of possible responses to experts who have put evidence before criminal courts that is outside of their expertise. The available responses vary in two material respects: firstly, is the expert in question a member of a professional body? If so, then it is likely that their professional regulatory body will take the lead in investigating the matter and bringing the expert before a professional disciplinary panel. If the person is not a member of a professional body, then there are unlikely to be any automatic proceedings flowing from their conduct in court, and the focus is more likely to be on whether they did know, or should have known, that the evidence they were giving was not within their own expertise as objectively understood.

Contempt of court

The applicability of contempt proceedings to situations such as Rowe and Ager is arguably straightforward. Both had made declarations in documents bearing statements of truth about their expertise that transpired to be false. As Sulley was halted by the first instance trial judge, less is known about the facts of Ager’s claims to being qualified to act as an expert. However, the extent of Rowe’s misleading claims is rather clearer. In light of the robust judgement in Liverpool Victoria Insurance Company, arguably there need be far less concern with whether his misleading of the SFO and court by giving evidence under declarations and statements of truth was deliberate or reckless—the final position remained that he did not have the level of relevant knowledge that he had claimed.

Consider the observation in Liverpool Victoria Insurance Company:110

Because this form of contempt of court undermines the administration of justice, it is always serious, even if the falsity of the relevant statement is identified at an early stage and does not in the end affect the outcome of the litigation. The fact that only a comparatively modest sum is claimed in the proceedings in which the false statement is made does not remove the seriousness of the contempt. The sum in issue in the proceedings is however relevant, because contempt of court by an expert witness will be even more serious if the relevant false statement supports a claim for a large sum, or a sum which is grossly exaggerated above the true value of any legitimate claim.

This raises an important question about the seriousness, in terms of culpability and harm, of writing a report under a declaration and statement of truth, and then further giving live evidence, where the matter is criminal proceedings.

How can the relative ‘value’ of proceedings in criminal courts be calculated? In a fraud case, there will be a sum alleged as the value of the fraud. That will not be so in cases where there has been a death or serious injury. All offences have a maximum sentence, and different levels of seriousness within one offence will carry different sentencing levels in the Sentencing Guidelines.111 Long fraud trials are financially costly for the state, and emotionally costly for defendants.

Although in Zafar there was no oral evidence given to be considered as part of the proceedings, I would suggest that giving evidence in court is analogous to the conduct of Dr Zafar in maintaining his untrue account of events when questioned by an agent of the insurance company, and making a witness

110. L V Ins Co v Zafar at [60].
111. Which judges must follow unless it is in the interests of justice to depart from them—s. 125 Coroners and Justice Act 2009.
statement. Between making a statement and giving evidence in a criminal trial there is often a significant hiatus, in which the ‘expert’ could reflect on their conduct and realise that it is improper. Instead, they proceeded to give oral evidence under oath.

**Perverting the course of justice**

Following *Murray*, the focus is on the acts done, and not their effect. Indeed in *Murray*, there was no effect on the eventual course of justice. Considering the crucial elements of this offence, and the dicta of Lord Lane in *Murray*, it would be necessary that the giving of the statement or evidence could, in itself, lead to injustice. In most cases involving an expert witness, there is likely to be other evidence supporting the Crown’s allegation against the defendant. Furthermore, as juries do not give reasons, it cannot be known whether, without the expert’s evidence, there would still have been a conviction.

Applying the ratio in *Machin*, that ‘[...] the jury should not be directed to assess the accused’s conduct in terms of proximity to an ultimate offence but should be left to consider its tendency and the intention of the accused [...]’ further supports a contention that this offence could properly be charged where a bogus expert is concerned. When a bogus expert gives a witness statement, they are not necessarily proximate to an ultimate offence. However, applying *Murray* and *Machin*, that would be sufficient, as their witness statement’s existence could pass the ‘without more might cause an injustice’ test.

Considering the starting point that the expert’s evidence must be necessary in order to be admissible, one perspective on this issue would be to say that without the evidence of the expert the case might not have been brought at all, on the basis that the jury would not be able to understand the evidence. This is not a complete answer as often there would be other experts who could have fulfilled the role. Nonetheless, where the threshold is as low as ‘might lead to injustice’, it is arguable that a perverting charge could properly be laid against the ‘expert’ witness. Matters of fact and degree would then be for a trial jury to decide. A notable irony would be that, to understand whether the now-defendant’s evidence led to a risk of injustice, the jury would likely need the assistance of a further expert in the same field to assess the quality and accuracy of the now-defendant witness’s evidence.

The outstanding question, therefore, would be whether a bogus expert ‘intended’ to pervert the course of justice. I would argue that regarding a bogus expert this aspect is the hardest to identify. One could argue that this intention could be shown by their willingness to give evidence on aspects that they know they are not qualified to do so for payment, not complying with the declaration of truth and oath, coupled with an awareness that their evidence as a witness would be used by the jury in deciding guilt of the accused. The jury are likely to presume that anyone called by the prosecution is giving evidence supporting D’s guilt (and vice versa if called by the defence), and are likely to set greater store by the evidence of someone presented as an expert than a layperson. Therefore, an expert, or someone purporting to be an expert, could in theory be prosecuted for giving evidence that they knew was outside of their expertise, if they intended that evidence to pervert the course of justice.

Sentencing would pose a further difficult exercise. Even if by their verdict the jury had accepted that the evidence given by the rogue expert had passed the ‘might cause injustice’ threshold, there are no reported cases where a charge of this nature has been brought against an expert witness. Many of the decided cases concern false allegations made to the police of offences committed, such as the notorious case of *Beale*, in which a young woman made multiple allegations of rape over a number of years, including one that led to the trial and imprisonment of an innocent man.

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112. (1980) 71 Cr App R 166 at 170.
113. [2019] EWCA Crim 665.
Giving evidence whilst posing as an expert instinctively feels a long way away from falsifying rape allegations. However, when the underlying legal issues are considered, I would argue that the differences are not so marked. In *Beale*, and other similar cases such as *Vine*, where the allegations led to arrests but not charges, the mischief was that a lie had led to the criminal justice process being visited on those who had not deserved it, as the allegations were untrue, and the complainant knew them to be so.

In cases as complex as *Pabon* and *Sulley* it is not uncommon for prosecuting bodies to gather expert evidence on practices that they are investigating before making any arrests or charging decisions. Where the decision to charge is based in part on the evidence of the discredited expert I would argue that the ‘might cause injustice’ threshold has clearly been passed. The discredited expert would have known the reason for their evidence being sought as they would be provided with a letter of instruction. The ramifications of being asked to give evidence are clear—that if there is a conviction your evidence will have played a part in that, though the extent of that part can never be known whilst juries do not give reasons.

**Perjury**

As noted above, *R (Purvis) v DPP* is of some assistance when considering the role of a bogus expert witness. In *Purvis*, it was acknowledged that the officer’s intentions were laudable—to avoid the inconsistency only being revealed whilst the witness was giving evidence, when she had told him earlier. The problems arose as he had not followed the correct procedures where a witness wishes to amend their statement, and then sought to cover that error. Consequently a trial was abandoned and D re-tried.

Comparing this to a bogus expert witness, some similarities can be seen. In both cases, it is arguable that the perjuring witness is not seeking wrongful convictions. I would argue that the public interest aspect of the Full Code test, as set out above, would be fulfilled, particularly in cases where the ‘expert’ participated in a trial that led to convictions, as Rowe did. This is illustrated more sharply where a retrial, the same in all other material respects, led to acquittals. The culpability of such an ‘expert’ is clearly high—as they were well aware of what they were doing and that their knowledge fell short of that required. As the exact effect of their evidence cannot be known, it is not possible to quantify accurately the effect on the ‘victim’ (the defendants). However, public confidence is likely to be severely affected by such cases. Where both a statement with a declaration of truth, and evidence on oath at various trials has been given, I would argue that prosecution is a proportionate response. The more times a statement and live evidence are given, the less it can be said that the expert genuinely believes themselves to be sufficiently qualified and only realised once they were giving evidence that they were out of their depth. Similarly, a witness who is seeking assistance from others for the content of their evidence must be aware that they are lacking the expertise needed.

**Fraud Act offences**

The writing of a witness statement, and the giving of evidence in court, are both clearly ‘representations’ (of competence as an expert) under the Act.

A person’s expertise is entirely within their own knowledge, so it would not be difficult to satisfy a jury that the person purporting to be an expert knew that they did not have the expertise that was required of them. Letters of instruction from the prosecuting authority seeking an expert report could be adduced, along with evidence of the (lack of) expertise through qualifications, roles and responsibilities. Evidence could be called from those who had worked with D regarding their role and any training that they had

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114. [2011] EWCA Crim 1860.
115. Though of course it must be noted that the jury had been hung on those two defendants at the first trial, suggesting that the evidence against them was not as strong as against those who were convicted in any event. Therefore, it cannot be known that the acquittals at the retrial were solely attributable to the expert witness issue.
done. Where there was an allegation, as in Pabon, that the ‘expert’ had sought information from others, those others would need to be called as witnesses. In turn, the defence could adduce evidence of length and content of experience, and evidence from others who knew the ‘expert’ professionally to speak as to their competence.

The letter of instruction would likely also reveal what sum was being paid to the expert for their participation in the case, allowing proof of gain to the expert, and loss to the prosecuting authority.

In light of the evidence before the Court of Appeal that Rowe had received payments totalling over £400,000 for his evidence in the LIBOR trials, this is an offence worth considering. In that case, the representation would be his representation (written and spoken) to the SFO that he had the expertise to give evidence on the matter on which they sought expert evidence. This was supported by his signing the declaration of truth on his witness statement that the matters contained within it were within his knowledge, and that he understood that his duty was to the court.

For the purposes of the 2006 Act, it would not matter whether Rowe thought that he was being dishonest. It would be sufficient for an ordinary person to think that his conduct was dishonest. I would suggest that, on the basis of the facts as revealed in the Court of Appeal’s judgement in Pabon, there would be little difficulty in a jury reaching such a conclusion.

Costs orders

When considering costs orders founded on misconduct or improper or acts or omissions, the court will be alive to the balancing needed between the D’s loss and the effect on the prosecuting authority required to pay. A wasted costs order under s. 19A requires identifiable misconduct, but it need not be egregious. In Ahmati, the court noted that: ‘misconduct in this context would include deliberate or negligent failure to attend to one’s duties or falling below a proper standard in that regard.’

In that case, a Government department had failed to follow-up paperwork in a timely fashion, leading to the Court of Appeal being unable to establish D’s nationality and immigration status. Thus his appeal against a deportation order made on his conviction in the Crown Court was uncertain. The costs of the appeal for both parties totalled around £1,500. The court ordered that the Home Office pay £500 to the relevant CPS department, and £250 to the solicitors for D. I would argue that the instruction of someone such as Rowe would fall within this definition.

Such matters will be a question of fact and degree, and judges would be careful before making such a finding, especially as the consequences would be visited on the prosecuting agency for the decision to instruct that ‘expert’, and would probably not order payment of the full amount in a case such as Sulley, where the costs thrown away would be likely to be in the hundreds of thousands of pounds. Even an order for a sum far below the full amount wasted would demonstrate that the court took misconduct by experts very seriously. The high threshold for such an order would, I suggest, mitigate any chilling effect on the willingness of experts to give evidence. Nonetheless, where it transpires that an ‘expert’ is as lacking as Rowe or Ager, that threshold test could theoretically be satisfied, I would argue, in relation to the reviewing lawyer at the prosecuting authority who took the decision to instruct that ‘expert’.

The possibility of a wasted costs order would communicate very clearly to parties that it was their responsibility to ensure that they had thoroughly researched the person whom they intended to call. The threat of a financial sanction to support that responsibility could gradually lead to a position where parties were carrying out such thorough checks on potential experts that rogue experts were exposed as such and no longer instructed.

116. In general, courts take a restrictive approach to awarding costs against prosecuting bodies; Luton Borough Council v Zeb [2014] EWHC 732 (Admin).
117. [2006] EWCA Crim 1826 at [10].
118. Ahmati at [14] and [17].
119. As noted by Thorpe LJ particularly pertaining to family proceedings in GMC v Meadow at [226]–[228].
Exclusion of evidence

Similarly to a wasted costs order against one of the parties, exclusion of the ‘expert’ witness’s evidence would create an incentive to instructing parties to perform due diligence thoroughly. The knowledge that if they instruct a questionable expert, then however favourable that expert’s evidence is, it will not avail them as it will be prevented from being put before the tribunal of fact, could be a powerful tool in starving rogue experts of instructions. That could then lead to a reduction in the number of such purported experts. Prosecuting authorities would also be conscious that exclusion could damage the interests of complainants as a conviction based partly upon incompetent evidence may be overturned on appeal, leading to more delay and uncertainty, and potentially a retrial.

Conclusion

It cannot be ignored that many trials, not only in the criminal courts, rely on the willingness of genuine experts to act as witnesses. In his judgment in *GMC v Meadow*, Thorpe LJ paid significant attention to concerns that, especially in the Family Division, there was already a notable reluctance of expert witnesses to appear in cases. This was especially marked where the case concerned decisions on the wellbeing of a child as a result of alleged abuse to that child or a sibling.120 Both other members of the court acknowledged this concern and emphasised that nothing in the judgement was intended to belittle it.121

I would argue that a greater willingness to use the criminal law responses outlined above against bogus experts, or those who are genuine experts but whose behaviour falls so far below what can be properly expected of an expert (as in *Liverpool Victoria*), would not have the chilling effect feared by Thorpe LJ. As demonstrated by the cases of Dr Squier and Prof Meadow, those whose expertise is genuine and who give evidence in good faith would not fall within the auspices of the criminal law responses. A crucial step in discouraging rogue experts will be to ensure that they are exposed as such, and that parties are consequently unwilling to instruct them in the knowledge that if they do so the instructing party will experience sanctions. I would argue that this would lead to instructing parties carrying out far more thorough ‘due diligence’ on their experts.

Therefore, there is a need, I suggest, to deploy these responses against experts who do not have any genuine expertise (such as Ager) or those who grossly overstate their expertise in the specific area about which they are being asked to give evidence (such as Rowe). The failure to take any action against behaviour of this sort risks bringing the criminal justice system into disrepute. Public confidence would be severely affected if it was known that people could masquerade as experts, earn significant sums of money from doing so, and then when their untruthfulness was uncovered, not be subjected to any kind of sanction for their wrongdoing.

Further, there is the lack of parity between the treatment of Dr Zafar, whose conduct was clearly unacceptable, and that of Rowe and Ager. It is difficult to say that Zafar’s conduct had a greater effect on the administration of justice than Rowe’s or Ager’s. Indeed, the judgement suggests that his wrongdoing did not, in fact, impact on the outcome of the personal injury claim filed by the person whom he examined. On the contrary, Rowe’s and Ager’s misconduct was not discovered until much later in the process. Consequently there are a number of men who have been convicted of conspiracy to defraud in cases that included Rowe’s evidence. Hundreds of thousands of pounds will have been wasted on investigating and preparing the case and running the trial that had to be abandoned as a result of Ager’s behaviour.

120. *The General Medical Council v Professor Sir Roy Meadow v Her Majesty’s Attorney General* [2006] EWCA Civ 1390 at [225]–[249].
121. *GMC v Meadow* at [62].
Therefore a more desirable solution would be to uncover rogue experts before they get as far as giving
evidence. To achieve this I would suggest a peer-review college, where acknowledged academic and
practitioner experts in the relevant area were used to peer-review the work of the expert whom a party
hoped to instruct. Once that individual had been peer-reviewed that process would not need to be carried
out again unless the expert asked for it, on the basis that they had assimilated further or different
knowledge since their previous assessment. Any assessment could set out the topics on which an expert
would be suitably experienced and knowledgeable about to give advice and/or evidence, on the basis of
peer review of their published work and practical experience.

Edmond and Roberts proposed a method for establishing the validity of techniques (2011: 846):
‘[...] multi-disciplinary scientific advisory panel to advise on what is empirically known about tech-
niques and methods used in the forensic sciences and, where appropriate, to indicate what studies or
measures are required to address deficiencies.’ My proposal goes further than this, as the cases explored
in this article have demonstrated that it is not only scientific evidence that may not be coming from a
sufficiently reputable corpus of expertise, and so a peer review college should extend further than simply
scientific or forensic evidence. I would argue that this is less costly than the Law Commission’s
proposals on the basis that there would only need to be one review of each expert—similarly, delay
would be reduced, as there would no need for every expert to be assessed for every case. Furthermore,
experts could submit themselves to the process voluntarily at a time of their choosing, meaning that they
would then already be ‘approved’ should a party wish to instruct them.

In conclusion, I would suggest that there are appropriate tools already available to deal with expert
misconduct, but that, particularly in the case of bogus experts, these tools are simply not being used.
Despite reports being made to the Metropolitan Police by Tom Hayes, convicted in a trial in which Rowe’s
evidence was used, and R, one of the men acquitted at the retrial in 2018 (Ridley, 2017), there have been no
further reports that any action is to be taken. This is despite the announcement by the former head of the
SFO Sir David Green that acknowledged that their practices for instructing expert witnesses had had to
change in light of Rowe’s conduct.122 Recently the SFO announced that they are no longer pursuing
enquiries into manipulation of the LIBOR after seven years of investigations (Financial Times, 2019).

There is, however, no clear answer to the question of how to respond to behaviour by genuine medical
experts that falls below that which could properly be expected. The earlier part of this article set out the
disciplinary and regulatory responses available in those circumstances. Whilst those responses can
reassure the public that the behaviour of the medical expert has been examined to ascertain whether
it impacts on their ability to treat patients now, it does not, and is not designed to, offer any directly
punitive or compensatory outcome. Although this might seem unattractive at first blush, I would argue
that the ongoing ability of a doctor to practise is of greater public interest than inflicting punishment in
cases such as those of Squier and Meadow. Where the behaviour has been so appalling as it was in
Liverpool Victoria, the criminal sanctions then become appropriate, regardless of the fact that the
individual is a registered professional.

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122. https://compliancex.com/sfo-writes-justice-committee-changes-instructing-witnesses-following-embarrassing-debacle-libor-trials/ (accessed 12 November 2019).
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ORCID iD

Elaine Freer https://orcid.org/0000-0003-4482-9921

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