

Accountability Is Key To Preventing Miscarriages Of Justice

By **Thomas Walford and Gerald Frost** (September 27, 2023, 3:20 PM EDT)

No legal system is perfect. Despite the best efforts of those involved, England and Wales have a long history of high-profile criminal cases where the convictions of innocent individuals were later recognized as miscarriages of justice.

The most recent addition to the list is the case of Andrew Malkinson, who was wrongfully convicted of rape in 2004 and served 17 years in prison. His case was referred by the Criminal Cases Review Commission, or CCRC, in January this year, and on July 26, the Court of Appeal of England and Wales quashed the conviction. The judgment was later handed down by the court in *Malkinson v. The King* on Aug. 7.[1]

The case follows others, including that of jailed British subpostmasters wrongly accused of theft and fraud, as well as that of 24 Libor traders charged in the U.K. with conspiracy to commit fraud, with major implications for companies that assist in the prosecution of employees, or long-term subcontractors alleged to have broken the law.

So, what does the Malkinson case and other recent miscarriages tell us about mistakes occurring in the justice system, and what can be done to minimize the chances of them being repeated in the future?

Malkinson's conviction, made much worse by subsequent errors and misjudgments, illustrates multiple systemic deficiencies.

No forensic evidence linked him to the crime, and key aspects of his appearance did not match the victim's description of her attacker. It took fresh forensic evidence linking another individual to the crime and detailed investigative reporting before his appeal eventually succeeded.

Having initially appealed his conviction in 2006, Malkinson applied to the CCRC for review in 2009. Both attempts failed. Post-conviction, Greater Manchester Police, or GMP, took steps to dismiss his appeals, even though retesting of cold case samples in 2007 revealed that another man's DNA was present in a sample taken from the victim.



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Case files released to Malkinson and reported by the Guardian on Aug. 15 show that the Greater Manchester Police and the Crown Prosecution Service knew that forensic testing in 2007 had found a male DNA profile on the victim's clothing that did not match Malkinson.[2]

According to documents reported on by the BBC on Aug. 16, the CPS was aware of this by December 2009, but refused to reexamine the DNA evidence unless there was an appeal. Accordingly, even though there was potentially exonerating evidence, the CPS advised against further examination.[3]

Malkinson sought to secure a CCRC referral of his conviction on three separate occasions: 2009, 2018 and 2021. Even though there was exculpatory DNA evidence, the first two applications were rejected.

On Aug. 7, the CCRC published an explanatory statement that the "CCRC referred Mr Malkinson's case in January 2023. He had applied to the CCRC twice previously, but the first application was made at a time before current DNA techniques were available and the second concentrated on issues concerning the identification procedure." [4]

The statement included a comment from CCRC Chair Helen Pitcher: "In each review, we focused on the submissions made to us. But knowing what we know now we would have sought the undisclosed police evidence to refer this case."

Seeking to deflect blame, the CCRC directly pointed the finger at the GMP's undisclosed evidence in their earlier decisions not to refer the case.

The Post Office Horizon Scandal

In another prominent miscarriage of justice, the scandal involving the Post Office and its Horizon accounting system, dating back to the late 1990s, saw more than 700 subpostmasters being convicted of theft, false accounting or fraud — mostly through private prosecutions by the Post Office. Despite multiple reports that the software was causing errors, the subpostmasters got blamed.

In March 2019, the High Court of Justice of England and Wales found in *Bates v. Post Office Ltd. (No. 3)*, [5] a group litigation, that the Post Office owed a duty of good faith to its subpostmasters — namely, they "must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people."

This was followed by a High Court decision in December 2019 in *Bates v. the Post Office Ltd (No. 6)*, which found that extensive bugs were in the Horizon software. [6] Justice Peter Fraser stated that the "Post Office has gone to great lengths over the years, and spent a great deal of time and a huge amount of public money, in defending the performance of Horizon." [7]

The CCRC only began referring Horizon-related convictions to the Court of Appeal in March 2020.

Progress remains slow, however, with the CCRC having called for additional government funding to facilitate its efforts. Many subpostmasters spent years in prison and were made bankrupt through the Post Office's asset recovery efforts,

while their personal tragedies include at least one suicide.

Libor

Another example of miscarriage of justice is the case of Tom Hayes, a former currency derivatives trader. Sentenced to 14 years in prison in 2015 — reduced to 11 on appeal — for manipulating the Libor interest rate benchmark, Hayes' conviction was **referred by the CCRC** in July 2023.

Having had a previous CCRC application rejected, the CCRC changed its position following a U.S. judgment relating to Deutsche Bank traders, Matthew Connolly and Gavin Black. In January 2022, in *USA v. Connolly*, the U.S. Court of Appeals for the Second Circuit found a lack of evidence that Connolly and Black had caused Deutsche Bank to make false Libor submissions and **overturned** their convictions. [8]

Following the 2008 global financial crisis, seven traders who faced similar charges to Hayes were convicted by English courts. But no senior bank executives faced criminal proceedings; the banks simply paid fines. At the time, public sentiment against the banking sector was very strong. Among others, this was reflected by Mark Carney, who was governor of the Bank of England from 2013 to 2020 and who called for tougher sentences against rogue traders.

Although Hayes' appeal has yet to be heard, the CCRC has said there is a "real possibility" that the Court of Appeal could overturn his conviction. Pitcher said the CCRC's decision to refer Hayes' case followed a "lengthy and complex investigation" and that the Court of Appeal should clarify whether the "right legal approach" was taken.[9]

It is now known that the main boards of the banks were aware of the pressure on rate-setting executives from the government and the Bank of England to post Libor rates that did not reflect market reality. But this was withheld from the trials of the traders, many of whom were jailed as a result.[10]

Lessons to Learn

These cases highlight how miscarriages of justice can occur: In Malkinson's case, there was a persistent refusal to admit potentially exculpatory evidence, and in Horizon, a private company sought to protect its reputation by throwing its employees under the bus.

An independent public statutory inquiry, Post Office Horizon IT, was established in September 2020 "to gather a clear account of the implementation and failings of the Horizon IT system at the Post Office over its lifetime." [11] The inquiry's findings and recommendations are not expected until next year.

Meanwhile, an independent inquiry into Malkinson's wrongful conviction will investigate the role of the GMP, the CPS and the CCRC to determine who knew what and when, and where the ultimate blame lies. But in examining the circumstances and handling of the Malkinson case, it is not yet a statutory inquiry, meaning that witnesses will not be compelled to give evidence nor will there be any legal obligation to disclose documents.

As was the case with Post Office Horizon, the Malkinson inquiry should also be

elevated to become statutory — i.e., a full public inquiry held under the Inquiries Act 2005.

Both inquiries should ideally provide comprehensive answers in relation to the conduct of public bodies and prosecuting authorities. Only then can lessons be learned by the police and the CPS, although it is already self-evident that inconvenient facts should not be ignored nor evidence withheld.

It is also vital that criminal investigations do not fixate on one hypothesis to the exclusion of others, and that securing a conviction is not viewed as a "win." The inquiries' findings will perhaps restate the importance of applying these basic principles at all times and recommend how this might best be achieved.

In terms of the CRCC, which was established in the wake of high-profile cases where the convictions were later recognized as miscarriages of justice, including the Guildford Four and the Birmingham Six, it is worth revisiting precisely why and how those cases and others like them occurred.

Among their common features were false confessions, police misconduct, nondisclosure and issues about the reliability of expert forensic testimony. The pressure to obtain convictions and restore public confidence were also contributory factors.

Public Confidence

Public confidence in the police and prosecuting authorities remains a widespread concern: full answers and total accountability are therefore paramount. As Emily Bolton, the founder of Appeal and Malkinson's solicitor, said in a statement: "The police, prosecution, courts and CCRC all failed disastrously in this case. Their actions must be scrutinised in the same way investigators interrogate black box data after a plane crash." [12]

To avoid future miscarriages of justice, or remedy them expeditiously once they are discovered, there needs to be a fundamental reevaluation of how investigators, prosecutors and the CCRC operate. Manifestly, an increase in funding for every part of the criminal justice system must also be prioritized to ensure that standards are maintained at every level and the potential for future miscarriages is minimized.

Looking ahead, among other potential inquiry recommendations, prosecutors and investigators could and should face stronger penalties for disclosure failings in criminal proceedings.

The police have been extensively criticized for their disclosure failures in numerous cases with many trials collapsing, often resulting in huge financial cost to taxpayers and enormous personal cost to defendants.

Equally, companies must admit wrongdoing under their watch, avoid taking on the ill-suited role of prosecutor and fulfill their duty of care to employees, instead of seeking to pay a fine and remaining silent.

As we have seen, this latter approach is very likely to result in major reputational damage to the companies involved as well as egregious miscarriages of justice that shame those who could have prevented them.

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[1] *Malkinson, R. v* [2023] EWCA Crim 954.

[2] <https://www.theguardian.com/uk-news/2023/aug/15/police-and-cps-had-key-dna-evidence-16-years-before-andrew-malkinson-cleared-of-rape>.


[3] <https://www.bbc.co.uk/news/uk-66513959>.

[4] <https://ccrc.gov.uk/news/ccrc-response-to-coa-judgment>.

[5] *Bates & Ors v Post Office Ltd*  ((No.3) "Common Issues") [2019] EWHC 606.

[6] *Bates & Ors v the Post Office Ltd* (No 6: Horizon Issues) (Rev 1) [2019] EWHC 3408.

[7] *Ibid*, para. 960.

[8] *USA v. Connolly* , case number 19-3806, in the U.S. Court of Appeals for the Second Circuit.

[9] <https://ccrc.gov.uk/news/tom-hayes-libor-referred/>.

[10] *Rigged: The Incredible True Story of the Whistleblowers Jailed after Exposing the Rotten Heart of the Financial System*, Andy Verity, Flint, 2023.

[11] <https://www.postofficehorizoninquiry.org.uk>.

[12] <https://www.lawgazette.co.uk/news/chalk-announces-independent-inquiry-into-malkinson-miscarriage/5117043.article>.