



Forensic clinicians (physicians, nurses and paramedics) as witnesses in criminal proceedings

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Forensic clinicians are frequently asked to provide witness statements following the assessment of a detainee or a complainant. These statements will detail the clinical findings, as recorded in the contemporaneous clinical records, and use language that can be understood by lay people. The latter may require the explanation of forensic procedures or the meaning of medical terms.

The statement may be limited to factual findings. It may include a limited opinion with respect to the interpretation of the examination findings, e.g. the causation of a bruise. But there must be accurate documentation of the type of injuries found. It may include opinion evidence, for example, that a detainee is fit to be detained and fit to be interviewed, or that a complainant needs a specific treatment.

It is a common misunderstanding that statements setting out only findings of fact do not constitute expert evidence. In *Expert Evidence: Law & Practice* Hodgkinson and James¹ distinguish five categories of evidence that may be given by experts:

- i. expert evidence of opinion, on facts adduced before the court;
- ii. expert evidence to explain technical subjects or the meaning of technical words;
- iii. evidence of fact, given by an expert, the observation, comprehension and description of which require expertise;
- iv. evidence of fact, given by an expert, which does not require expertise for its observation, comprehension and description, but which is a necessary preliminary to the giving of evidence in the other four categories; and
- v. admissible hearsay of a specialist nature.

Category iv is not expert evidence as such but is included because 'it often forms an inseparable part of the evidence given by an expert and is often included within the loose definition of "expert evidence" implied by the ordinary usage of the expression'.

Category iii is sometimes referred to as professional evidence with the implication that it is not expert evidence and this is what has given rise to confusion as to the status of factual evidence of a specialised nature given by professionals. However, the terms 'professional witness' and 'professional evidence' do not exist in the law of evidence.

If the professional's expertise is required for the observation, comprehension and description of the factual evidence, this is evidence of fact, given by an expert, and it is therefore a form of expert evidence.

The distinction, however, is enshrined in the language of Her Majesty's Courts and Tribunals Service because 'The allowances awarded by the courts observe a distinction between "expert" and "professional" witnesses, the latter being professionals called to give factual evidence, although the observation of fact may require expertise'.² The term 'professional witness' is also used by the General Medical Council (GMC) and the Academy of Medical Royal Colleges.

It follows from this that forensic clinicians who provide witness evidence in criminal proceedings in England and Wales must comply with the Criminal Procedure Rules that apply to experts as set out in Part 19³ and its accompanying Practice Direction V Evidence 19A: Expert Evidence.⁴ Forensic clinicians should also adhere to the FFLM's *The Code of Practice on Expert Evidence* and the GMC's *Good Medical Practice*⁵ and *Acting as a witness in legal proceedings*⁶ and they should also follow the guidance of the Academy of Medical Royal Colleges⁷. Similarly, forensic nurses and paramedics should be familiar, and act in accordance, with any guidance of the Nursing and Midwifery Council or the Healthcare Professions Council.

A forensic clinician who provides 'expert evidence of opinion' may, or may not, have examined the detainee or complainant. However, in contrast to the witness who provides only expert evidence of fact, they will be entitled to consider all of the available evidence in forming an opinion.

Before agreeing to provide expert evidence, the forensic clinician should consider if he/she has the necessary skill acquired through training, practice and experience having regard to the facts in issue in the case. He/she should then further consider if he/she has the necessary skill not only to provide expert evidence of fact but also expert evidence of opinion. It is the position of the FFLM that expert evidence of opinion should only be given by forensic clinicians who have a postgraduate qualification in clinical forensic medicine.

It is expected that all forensic clinicians should have had training in how to produce a witness statement setting out factual evidence and have ongoing support with writing statements from an experienced forensic clinician. Furthermore, to avoid later confusion, the FFLM recommends that all forensic clinicians should include in their witness statements one of the following two declarations:

'This is a witness statement as to fact. I am unable to provide opinion evidence in relation to this matter but may be able to recommend an appropriate expert to do so.'

'This is a witness statement as to fact. I have also provided opinion evidence in relation to this matter/ I am willing to provide opinion evidence upon receipt of the relevant witness statements, etc., and any other expert reports.'



If asked to consider other evidence in a case prior to trial, or if approached as an independent expert in an ongoing case, and asked to provide an opinion on a matter or matters in issue, the forensic clinician should ask him/herself if he/she has the necessary skill to provide the opinion requested. If in doubt or if they do not, he/she should advise the police/Crown Prosecution Service that it is outside their expertise to do so and seek to assist by identifying a suitably qualified or experienced expert. If he/she considers that he/she has the necessary skill and is prepared to accept instructions to provide opinion evidence, he/she should make it clear what further evidence they may need to see and ensure that arrangements are in hand either to hear relevant evidence before giving their own evidence or be provided with transcripts of such evidence.

If a forensic clinician is asked at the trial to consider and comment upon expert opinion evidence, he/she should either decline to do so, reminding the lawyer or the court that he/she is providing only evidence of fact and that providing opinion evidence is outside their expertise, or, if he/she is confident that he/she has sufficient skill, agree so to assist subject to the court adjourning for sufficient time explaining that this is because the preparation of the opinion evidence may require considerable time and study.

Further Reading

Faculty of Forensic & Legal Medicine (2018) *The Code of Practice on Expert Evidence*.

Rix, K. (2020) 'The expert medical witness', in Rix, K., Mynors-Wallis, L. & Craven, C. (eds) *Rix's Expert Psychiatric Evidence*, 2nd ed. Cambridge University Press.

Rix, K. (2020) 'Courts, laws and procedures' in Rix, K., Mynors-Wallis, L. & Craven, C. (eds) *Rix's Expert Psychiatric Evidence*, 2nd ed. Cambridge University Press.

Rix, K. (2020) 'The report, amendments, answers to questions, experts' meetings and conferences' in Rix, K., Mynors-Wallis, L. & Craven, C. (eds) *Rix's Expert Psychiatric Evidence*, 2nd ed. Cambridge University Press.

Rix, K. (2020) 'Going to court' in Rix, K., Mynors-Wallis, L. & Craven, C. (eds) *Rix's Expert Psychiatric Evidence*, 2nd ed. Cambridge University Press.

Rix, K.J.B. (in press) Expert evidence. Frequently asked questions. *Journal of Forensic and Legal Medicine*.

Stark, M.M. & Nittis, M. (2020) 'Fundamental principles' in Stark, M.M. (ed) *Clinical Forensic Medicine. A Physician's Guide*, 4th ed. Springer Nature.

References

1. Hodgkinson, T. and James, M.
Expert Evidence: Law and Practice (4th edition)
Sweet & Maxwell; p.10; 2015
2. Hodgkinson, T. and James, M.
Expert Evidence: Law and Practice (4th edition)
Sweet & Maxwell; p. 391; 2015
3. <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-19.pdf>
4. <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-practice-directions-V-evidence-2015.pdf>
5. General Medical Council
Good Medical Practice
GMC; 2013
6. General Medical Council
Acting as a Witness in Legal Proceedings
GMC; 2013
7. Academy of Medical Royal Colleges
Acting as an expert or professional witness. Guidance for healthcare professionals
AoMRC; 2019