

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

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Expert evidence of fact ('professional witness evidence') versus expert opinion evidence

Forensic clinicians are regularly asked to provide professional statements following the examination of a detainee or complainant. These statements will detail the clinical findings (as recorded in the contemporaneous clinical records) using language that can be understood by lay people. They may also include a limited opinion with respect to the significance of the examination findings e.g. causation of a bruise. Although it is expected that all forensic clinicians should have had training in how to produce a factual statement, and have ongoing support with writing statements from an experienced forensic physician, the author of a professional statement is a witness of fact and may not have the knowledge or experience with regard to the interpretation of the clinical findings. However, the courts will often need expert opinion as to the interpretation of the factual medical evidence.¹

In *Expert Evidence: Law & Practice* Hodgkinson and James 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. Category iii is sometimes referred to as professional evidence with the implication that it is not expert evidence and this can give rise to some confusion. However, the terms 'professional witness' and 'professional evidence' do not exist in the law of evidence.

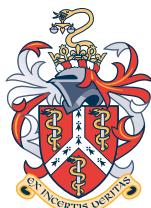
In England and Wales the Criminal Procedure Rules refer to an expert as 'a person who is required to give or prepare expert evidence for the purpose of criminal proceedings' (r.19.1(2)) and this includes 'expert opinion evidence' (r.19.1(1)). In order to do so, the person must have 'the necessary knowledge and experience' (*Kennedy v Cordia (Services) LLP* [2016] UKSC 6) to give an opinion on a particular issue or issues to a court.

The BMA has produced detailed expert witness guidance² and this should be read in conjunction with the *FFLM Code of Practice on Expert Evidence* (FFLM, 2018).

The expert witness who provides 'expert evidence of opinion' may, or may not, have examined the patient. However, in contrast to the professional witness (who provides only expert evidence of fact), the expert opinion witness will be entitled to consider all of the available evidence in advance of forming an opinion.

Before agreeing to provide expert opinion evidence, the forensic clinician should consider if s/he is properly qualified and experienced to do so. The FFLM believes that expert evidence of opinion should only be sought from forensic clinicians who have a post-graduate qualification in clinical forensic medicine.

All medical witnesses must be familiar with and act in accordance with the General Medical Council's *Acting as a witness in legal proceedings*.³ Similarly, forensic nurses and paramedics should be familiar with and act in accordance with any guidance from the Nursing and Midwifery Council (NMC) or the Healthcare Professions Council (HCPC).



Clarification of status

To avoid later confusion the FFLM recommends that all forensic clinicians annotate their professional statements with 'This is a professional witness statement of fact. I am able/unable to provide expert opinion evidence in relation to this matter/and would be happy to do so on supply of all relevant documentation'.

If asked to consider other papers in a case prior to a trial the forensic clinician should advise the police/CPS that this goes beyond providing factual evidence and is the field of an expert who can provide expert evidence of opinion. The forensic clinician should then advise if s/he believes that s/he has the necessary qualifications and experience to provide expert opinion in the case and, if s/he does whether s/he is prepared to accept the instruction. The forensic clinician should then ask to see the defence statements/reports in ample time to provide an opinion before attending court.

If a professional witness is asked to consider an expert opinion at the trial s/he should decline to do so reminding the court that s/he is appearing as a professional witness as to facts and either is not suitably experienced or qualified to offer expert opinion in the case or that s/he will not have the opportunity to properly consider the opinion in the context of the available literature.

References

1. Hodgkinson, T. and James, M.
Expert Evidence: Law & Practice (4th edition)
Sweet & Maxwell, p.10; 2015
2. British Medical Association
Expert Witness Guidance
British Medical Association; October 2007
3. General Medical Council
Acting as a witness in legal proceedings
GMC; 2013