



Original communication

Forensic physicians and written evidence: Witness statements v. expert reports



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ABSTRACT

When assisting the courts in criminal proceedings, the work of forensic physicians are leaning more towards the preparation of written evidence rather than the giving of oral evidence in person. For this, they may be asked to serve either as professional witnesses or expert witnesses. These 2 roles have nevertheless been a constant source of confusion among forensic physicians. In view of this, the article aims to highlight the similarities and differences between these 2 roles particularly in relation to the preparation of written evidence. It will take a close look at the forms of written evidence which forensic physicians are expected to produce in those distinct capacities and the attending duties, evidentiary rules and legal liabilities. Through this, the work aspires to assist forensic physicians undertake those responsibilities on a more informed footing.

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1. Introduction

As medical practitioners working in the area of clinical forensic medicine, the forensic physicians' primary role is to provide medical care for persons detained in custody as well as for complainants of crime.¹ In addition, they also serve three crucial functions. The first is to assess fitness for investigative interview.² The principal aim of this is to identify those individuals who are at risk of making a false confession. The second is to collect "forensic evidence" which is a broad term encompassing the taking of samples³ as well as recording assessments and noting the presence or absence of injuries in cases of assault.⁴ The third is to present evidence to the criminal courts. This latter aspect of their work has, as a result of the UK government's cost-saving and efficiency agenda, been leaning more and more towards the preparation of written evidence rather than the giving of oral evidence in court. For this, they may be asked to serve either as professional witnesses or expert witnesses.⁵ These two roles have been a source of constant confusion among forensic physicians. This is particularly so over issues like the nature

and remit of the written evidence expected of them when acting in those distinct capacities, and the respective duties and liabilities attending those tasks. In response to this concern, this article aims to highlight the similarities and differences between those two roles, principally in relation to the preparation of written evidence. Through this, it aspires to assist forensic physicians undertake those responsibilities on a more informed footing.

The discussion will proceed as follows. Section 2 focuses on forensic physicians' role as professional witnesses and outlines the form of written evidence they are required to produce in this capacity. It will then identify the scope of the attending duties, evidentiary rules and liabilities. Section 3 will look at these sets of issues from the perspective of their role as expert witnesses. It will highlight the parallels and disparities between these and those applicable in the case of forensic physicians acting as professional witnesses. In Section 4, we will make recommendations on how forensic physicians can safeguard their position in relation to these roles, while at the same time ensuring that the public is sufficiently protected.

2. Forensic physicians as professional witnesses

Forensic physicians may be requested to serve as professional witnesses when they possess knowledge gained directly from their

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examination of detainees or alleged victims of crime.⁶ As witnesses in possession of important information, they can be summoned or formally directed to serve in this capacity.⁷ Failure to comply would constitute contempt of court.

2.1. Witness statements

When serving in this capacity, they are regularly required to prepare witness statements which provide professional evidence of, and reasons for, their clinical findings, observations and actions in the case.⁸ These are based on details documented in the contemporaneous clinical records they made following their medical examination.⁹ Writing as mere witnesses of facts, these statements do not contain any interpretation of the clinical findings. They merely recount what they saw, heard and did when examining the patients.¹⁰ If interpretations of the medical evidence are needed, assistance will be sought from “expert witnesses”.¹⁰

Although as witnesses forensic physicians should generally give their evidence orally in court not least so that their evidence can be challenged under cross-examination by the party against whom they are called,¹¹ an exception has been recognised for this general rule. Since 1967, the government in an effort to save costs and improve efficiency, has allowed for written statements to be admitted as evidence to the like extent as oral evidence made by the maker of those statements. This exception, which was specified in section 9 of the Criminal Justice Act 1967 (CJA 1967), avoids the need for forensic physicians to appear in person to give evidence orally. The section also stipulates 4 conditions.¹² First, that the statement must contain the name and signature of the person who made it. Second, that it contains a declaration to the effect that the statement is true to the best of his knowledge and belief, and that he understands that if it is tendered in evidence, it would be an offence if anything that is stated therein is known to be false or that he did not believe to be true. Third, that before the hearing, a copy of the statement must be served on the court officer and each of the other parties to the proceedings. Fourth, that none of the other parties or their solicitors, within 7 days from when a copy of the statement was served, serves a notice objecting to it being tendered under this section. This last condition indicates that a section 9 statement is admissible only if all the parties involved agree, which is likely to be the case where the evidence is not controversial.¹³ Further, even where the statement is admissible, the court may, of its motion or on the application of any of the parties to the proceedings require that its maker attends court to give oral evidence.¹⁴

2.2. Rules of evidence

When a section 9 statement is admitted in evidence, it is ordinarily read out aloud in court.¹⁵ Its contents must therefore comply with the rules of evidence in criminal proceedings. The most important for forensic physicians acting as professional witnesses are the rule against hearsay and the rule against evidence of opinion.

Hearsay refers to an out-of-court statement which is being adduced in court as evidence of a matter stated in the statement.¹⁶ Following this definition, witness statements are therefore hearsay evidence. According to section 114(1) of the Criminal Justice Act 2003, hearsay evidence is generally inadmissible. This rule against hearsay consists of four elements being that a written statement from a witness is not acceptable as a substitute for his live evidence delivered orally in court; that a disputed fact may not be proved by producing a written record; that the evidence of a witness who gives oral evidence may not be supplanted or supported by reference to what he said on an earlier occasion (i.e. the rule against

narrative or previous consistent statement); and that a witness giving oral evidence is not allowed to tell the court about a fact of which he or she heard from someone else.¹⁷ But section 9 of the CJA 1967, by allowing the admission of a written statement in court if all parties to the proceedings agree to it being so submitted, provides a statutory basis for the first and second elements to be overridden. As regards the third element, if forensic physicians are called to court to give evidence, the rule against narrative is also waived by section 120 of the CJA 2003 where a judge would allow them to access the previously written statement or their contemporaneous medical records for the purpose of refreshing their memory.¹⁸

In relation to the fourth element, it is necessary to point out that in its simplest form, the medical consultation itself is composed of an account given by the patient, a physical examination resulting in findings, the provision of medical care where necessary, the making of tests that support or refute a working diagnosis and the formulation of a diagnosis.¹⁹ Consequently when writing their witness statements, forensic physicians may state what they were told by the patients in order to explain the grounds on which they reached their conclusion in relation to those patients' condition.²⁰ They cannot, however, state that these are factually correct²¹ as that would transgress the rule against hearsay. These may, for example, be presented as follows: “On the 28th February 2013, I was called to see Mrs Mary Smith. Mrs Mary Smith *told me*²² that she was in the bedroom of her home when an incident developed during which she was struck on the left arm by a baseball bat”. Further, unlike expert witnesses whose position will be looked at below, this is the limit of any information received from third parties which they are able to communicate in their statements.

Also, as professional witnesses, forensic physicians would need to adhere to the common law rule which prohibits witnesses from conveying their opinions about what may have happened.²³ They are to only give evidence of facts which they have personal knowledge of. Hence although their professional statements may include a limited opinion on the significance of the examination findings (e.g. causation of a bruise),²⁴ this is allowed only because it is not reasonably practicable to expect them to separate observed facts from the inferences to be drawn from those facts.²⁵ However, it is important that they do not go beyond this and give their opinion on matters which call for the special skill or knowledge of an expert.²⁵

Thus in the preparation of their witness statements, some exceptions are recognised for forensic physicians in relation to the rule against hearsay, but like other witnesses of fact, they would have to abide by the rule against evidence of opinion. As will be seen later,²⁶ wider latitude is granted in relation to the written evidence produced by forensic physicians who serve as expert witnesses.

2.3. Legal liability

The system introduced by section 9, which allows witness statements to be admitted in court without the need for their makers to appear in person, seems to have generally worked rather well. However, if these statements contain any information which their authors knew to be false or do not believe to be true, then they can be prosecuted under section 89 of the CJA 1967. Anyone found guilty may be imprisoned for a period of up to 2 years and/or be issued with a fine. According to the Ministry of Justice, the statistics for cases which were prosecuted in the Magistrates Court under section 89 are as follows²⁷:

2008–2009	2009–2010	2010–2011	2011–2012
9	14	13	18

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