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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 samples[3] 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 correct[21] 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 follows[27]:

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

The figures do not specify how many or indeed if any of the offenders were forensic physicians. They do show, however, that in general there were very few prosecutions under this provision. One reason for this very low number despite the extensive use of section 9 statements is that the writer of a section 9 statement will be called to court to give oral evidence if the statement requires clarification. Acceptance of section 9 statements by the courts might thereby be used as a quality indicator for forensic physicians. Anyone who is repeatedly called to court to clarify a statement may therefore need to improve the quality of the statements they submit.[28]

3. Forensic physicians as expert witnesses

The discussion above shows that forensic physicians are called to serve as professional witnesses in cases which they are directly involved in. They are thereby able and expected to provide clinical evidence of the injuries received by the patients they examined and/or specific aspects of the medical care extended.[29] Given that they are witnesses of fact, they can be summoned to attend court[30] and as such cannot decline when approached to serve in that capacity. By contrast, when forensic physicians are approached to serve as expert witnesses, they may choose whether to undertake the task.[31] Should they accept the responsibility, they are required to give expert evidence and opinion on matters within their specialised knowledge in cases where they have not been involved in giving medical care to the patient or been a witness to any occurrences in connection to the case.[32] Such evidence may be sought, for instance, on the causes or consequences of the incidents presented in any particular case.[33] Unlike professional witnesses who need to make statements, as expert witnesses they are requested to write reports which set out the facts and what their expert medical opinions on those facts are.[34]

3.1. Expert reports

Expert reports are written with a view to assisting the parties in the preparation of the case (e.g. in helping them decide whether a case has merits to proceed to trial) and/or to assist the court to reach a decision.[35] In forming and providing their opinion, they are privy to all disclosed information including statements and reports tendered by other parties to the proceedings, and attend conferences with counsel. Their opinion could also be based on their examination of the patient, which was carried out as an independent expert witness rather than as the treating doctor.[36] In relation to everything that comes into their possession after receiving their instruction (be it physical, written or electronically captured materials), they are under an obligation to retain these in order to help their instructing party with their statutory disclosure obligations.[37] They are also to keep records of works undertaken and the findings they made in connection to these.[38]

Like section 9 of the CJA 1967, section 30 of the Criminal Justice Act 1988 (CJA 1988) allows expert reports to be admissible in court whether or not their makers present oral evidence. But if it is proposed that they do not give oral evidence, the report can only be admitted by leave of the court. When deciding whether leave would be granted, the court would take into consideration: the contents of the report; the reasons for why it was proposed that the maker of the report shall not give oral evidence; any risk that its admission in this manner will result in unfairness to the accused; and any other circumstances which the court considers to be relevant.[39] When admitted, the report can be read to the jury and shall constitute evidence of any fact or opinion of which they could have offered oral evidence.[40]

A central dilemma usually facing forensic physicians when tasked with the role of expert witnesses is the tension between the duty of care owed to the party who retained them and their responsibility to the court. Before 2005, there were no specific rules which outline the expert's duty to the court nor the form in which expert evidence should be presented.[41] However, this changed in the wake of a number of wrongful convictions relating to what is now known as the sudden infant death syndrome (SIDS) where the role played by the expert witnesses, the most prominent of whom was Professor Sir Roy Meadow, was discovered to have contributed to miscarriages of justice.[42] Detailed rules were introduced through Part 33 of the Civil Procedure Rules 2005.[43] The latest version of these rules is now encompassed within Part 33 of the Criminal Procedure Rules 2013, according to which forensic physicians have a duty to assist the court by giving objective, unbiased opinion on matters within their areas of expertise. Included within this is a responsibility to apprise all parties and the court if their opinions have changed from those contained in a report served as evidence. Importantly, this personal duty to the court[44] is paramount and overrides any obligation which they owe to the party who retained them and by whom they are paid.[45]

Part 33 also outlines clearly the contents of an expert's report. Following this, forensic physicians must ensure that when preparing their expert reports that they provide details of their qualifications, relevant experience and accreditation; give details of any resources which they have relied on when preparing their report; provide a statement in the report which sets out the substance of all facts given to them which are material to the opinions expressed therein or upon which those opinions are based; and make clear which of the facts stated in the report are within their own knowledge. They are also to specify who carried out any examination, measurement, test or experiment which they have used for their report and provide the qualifications, experience and accreditation of those persons. They are to likewise state whether or not the examination, measurement, test or experiment was carried out under their supervision, and summarise the findings on which they have placed reliance. In the event where there is a range on opinion on the matters dealt with in the report, to summarise the range of opinion and give reasons for their opinion. If they are not able to give their opinion without qualification, they must state the qualification. Their reports must also include a summary of the conclusions reached; contain a statement that they understand their duty to the court, and have complied and will continue to comply with that duty; and contain the same declaration of truth as a witness statement.[46] In addition, they are to list all the materials in their possession which are not identified in the report in an index of unused material.[47]

3.2. Evidentiary rules

Just as in the case of forensic physicians acting as professional witnesses, those acting as expert witnesses are subject to the rules of evidence in criminal proceedings. However, the exceptions recognised to the rules against hearsay and the rule against evidence of opinion are broader in the case of expert witnesses. Like professional statements, expert reports are hearsay evidence since they consist of matters which forensic physicians stated on a prior occasion which are now to be presented in court to prove that the matters stated on that prior occasion are true.[48] But similar to section 9 CJA 1967, section 30 CJA 1988 renders the hearsay evidence contained within expert reports admissible in court although as mentioned previously, leave for this to be so tendered will not be given by the court if it is likely to be prejudicial to the accused. However, unlike professional statements, the contents of these reports are not restricted to matters within their personal

knowledge and information provided by the patients. As expert witnesses, forensic physicians can make reference in their reports to facts stated by third parties in resources like textbooks, journal articles, official reports, and lecture notes.[49] They can also be asked, and can offer, their opinion on issues like the cause or consequences of occurrences, or the motives behind any particular person's actions.[50]

Unlike professional witnesses, an exception is recognised to the rule against evidence of opinion since they were called forward to furnish the court with information related to their special skill and knowledge i.e. those outside the experience and knowledge of a judge or jury.[51] They can therefore state their opinions in the reports as these could help enhance the chance of reaching a fair and just ruling since they would be able to explain facts that could otherwise escape detection and consideration.[50] In the event that they are asked to attend court, section 120 of CJA 2003 similarly provides an exception to the rule against narrative, thereby enabling them to refer to the report to refresh their memory.

3.3. Legal liabilities

3.3.1. Perverting the course of justice

Although expert reports are not caught by section 89 of the CJA 1967, it is an offence at common law to do an act tending and intended to pervert the course of public justice. Thus just as in the case of witness statements, forensic physicians must ensure that their expert reports do not contain information which they know to be false or do not believe to be true. They must also not deliberately conceal relevant information. For anyone convicted of perverting the cause of justice, the maximum punishment is life imprisonment and/or a fine.[52] In determining the appropriate sentence, the courts will ensure that the sentence reflects the actions taken by the perpetrator which were intended to pervert the course of justice.[53]

3.3.2. Negligence

Forensic physicians acting as expert witnesses could also now face potential liability for unintentional or negligent wrongdoings in their written (and oral) evidence. This is an indirect consequence of the Supreme Court's ruling in the 2011 case of *Jones* v. *Kaney*[54] which reversed the centuries-old rule that expert witnesses have immunity from being sued for negligence. The full extent of how this affects forensic physicians is still unclear. There have yet been any known cases since 2011 where forensic physicians have been sued for negligence for the oral or written evidence they gave. More importantly, the case itself concerned the production of expert reports in civil proceedings. Thus while it is now clear that anyone writing expert reports in civil cases can be sued by the party who retained them,[55] it is still a matter of speculation if this applies to expert reports and witness statements written for criminal proceedings.[56]

To evaluate the possible implications of this ruling for forensic physicians, it is important to note the main reason for the abolition of the immunity. Immunity from suit, as pointed out by the Supreme Court, dates back to an era long before it became common for experts "to offer their services under contract for rewards".[57] But with increasing numbers of expert witnesses now giving evidence in return for monetary reward and where for some their work as experts could be their main source of income, the Supreme Court took the view that it is crucial that clients can now sue for compensation when the experts they retained breached the duty of care owed to them. In other words, their ruling had aimed to protect clients[58] who they believe should not be left without a remedy if they had been disadvantaged or harmed by their experts' negligence.[59] On this basis, it is arguable that forensic physicians who serve as professional witnesses are still immune from civil suit for the written statements (and any oral evidence) they made. Inasmuch as they cannot decline the request to act as professional witnesses, their motive for participation is not financial reward. Indeed, they are usually only paid a compensatory allowance and travel expenses, and do not receive a fee when acting in this capacity.[60] They may nevertheless claim a standard fee for providing the witness statements.

By contrast, forensic physicians can choose whether or not to become involved when invited to serve as expert witnesses.[61] If they are prepared to accept the task, they do so through a deliberate choice in return for financial reward from the party who retained them[62] and to whom they owe a duty of care. They may also stipulate terms in relation to the fee to be received.[61] There is therefore a strong alignment between their position and expert witnesses who participate in civil proceedings. In addition, Lord Hope had also opined in *Jones* v. *Kaney* that it is difficult to defend the retention of the immunity in settings other than the one before the court namely civil courts.[63] Against this background, it is arguable that forensic physicians are not immune from being sued for negligence if they do not exercise due care when preparing their expert reports (e.g. by overstating the seriousness of the injuries received) and when this breach of duty causes the party who retained him some harm (e.g. being sentenced to a prison sentence which is longer than what they would have had to serve had the expert exercised more care when performing their duty).

4. Conclusion

Forensic physicians are frequently called upon to assist in criminal proceedings either as professional witnesses or expert witnesses. The written evidence expected of them in these capacities is increasingly used in court without the corresponding need for them to appear in person, unless specifically requested to by the court. As discussed, they are required to make statements when acting as professional witnesses, and to produce reports when serving as expert witnesses. Witness statements set out the clinical findings made during their examination of detainees or complainants of crime and these are restricted to statements of fact as perceived directly by the forensic physicians themselves. Although they can include information which was conveyed to them by the patients they attended, as well as provide their opinions on the significance of their examination findings, they should not exceed these parameters since it is important that they comply with the rule against hearsay and the rule against evidence of opinion. In contrast, expert reports can incorporate information derived from third parties when these are extracted from resources like textbooks, journal articles and official reports. They can also express their opinions on matters that fall within their areas of specialism since they are allowed wider exemptions from the rule against hearsay and the rule against evidence of opinion compared with their brethren who serve as professional witnesses.

When preparing their written evidence, forensic physicians acting as professional witnesses and expert witnesses must also ensure that they do not intentionally include any information which they know to be false or which they do not believe to be true. Failure to do so would render those writing witness statements liable to be prosecuted under section 89 CJA 1967 and those writing expert reports to be prosecuted for perverting the course of justice. However, for reasons outlined previously, it would appear that professional witnesses have immunity from being sued for negligence. Those who act as expert witnesses, on the other hand, are arguably no longer protected from being sued for negligence if their expert reports were carelessly prepared and resulted in their clients suffering harm.

Forensic physicians acting as professional witnesses would therefore need to be vigilant that the contents of their witness statements comply with the conditions outlined in section 9 of CJA 1967. Although prosecutions under section 89 CJA 1967 are very rare, forensic physicians who are repeatedly called to court to clarify a section 9 statement would clearly need to improve the quality of their statements. This underlines the need for regular training and an appreciation of the law governing this area of their work.[64] This recommendation applies equally to those who serve as expert witnesses[65] whose reports need to comply with Part 33 of the Criminal Procedure Rules 2013. They would also need to ascertain that their professional indemnity insurance covers not only their medical work, but also their activities as expert witnesses.[66] To safeguard the public interest, strict guidelines should be put in place by professional bodies and/or the Crown Prosecution Service (CPS) outlining the minimum criteria which must be met by forensic physicians before they can qualify to serve as expert witnesses. Courts too would need to be more rigorous both when deciding who they would allow to serve as expert witnesses[67] as well as what expert opinion evidence they would allow to be admitted.[68] There is also merit in the introduction of an expert register listing the names of those who meet the required criteria, in addition to and separate from the register of medical practitioners currently held by the GMC.

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3. E.g. intimate samples taken in cases of sexual assault and blood samples taken in connection with road traffic offences.
4. The management of detainees in custody and the role that forensic physicians play in providing medical care for detainees and in the collection of evidence for the courts are governed by PACE and its associated Codes of Practice.
5. They can also be called as ordinary witnesses if they had, as members of the public, witnessed an incident which took place. However, this is outside the scope of this article which focuses only on their work as medical witnesses i.e. when they provide evidence in a professional capacity.
6. FFLM. *Forensic physicians as witnesses in criminal proceedings*; 2009.
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22. This phrase signifies that the information was received from the patient.
23. Dennis IH. *The law of evidence*. 5th ed. London: Sweet & Maxwell; 2013. p. 868.
24. FFLM (2009), *op. cit.* Forensic physicians could, for instance, state that "There was a 5 × 4 cm blue bruise on the left arm 10 cm below the tip of the left shoulder. This is consistent with the effects of blunt trauma and matches the dimensions of the baseball bat photographed and described in the statement given by Mr Tommy Atkins, the Scenes of Crime Officer. However, such a bruise could also be caused by any object of similar dimensions such as a piece of lead pipe".
25. Dennis IH, *op. cit.*, p. 869.
26. See discussion in Section 3.2 below.
27. Ministry of Justice. *Criminal justice system: quarterly update to December 2012*; 2013.
28. That said, forensic physicians whose statements are widely accepted may well be writing statements that are very conservative and non-contentious. Though not committing any wrongdoing, they may be denying the defendant the opportunity for the evidence to be tested properly.
29. Holburn CJ, Bond C, Solon M, Burn S. *op. cit.*, p. 48.
30. British Medical Association (BMA). *Fees: England and Wales – category A, B and D fees*; 2013.
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35. Ibid., p. 75.
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37. Crown Prosecution Service (CPS). *Guidance booklet for experts*; 2010. p. 10.
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42. E.g. *R v. Clark* [2003] EWCA Crim 1020; *R v. Cannings* [2004] EWCA Crim 1 and *R v. Anthony* [2005] EWCA Crim 952.
43. These were consciously modelled on Part 35 of the Civil Procedure Rules so as to align the two sets of rules for the benefit of those giving expert evidence in both civil and criminal cases – see Corker D, Parkinson S, *op. cit.*, pp. 173–174.
44. Ibid., p. 176.
45. Part 33.2(2). The guidance issued by the GMC to doctors who may be acting as expert witnesses adds that their duty to the court extends to cooperation with case management, thereby ensuring that the timescales for producing reports are met – GMC 2013, *op. cit.*, paragraph 5.
46. The GMC guidance mirrors the directions contained in Part 33 but adds riders concerning the need for the forensic physician to use language and terminology that can be understood by the lay person; and to ensure that they take reasonable steps to check the accuracy of any report they write and to not deliberately leave out relevant information. The expert witness is cautioned that a clear understanding of any instructions given by the instructing lawyer is required. They are to ask for clarification if unclear. If they are still then unclear, they should not provide expert advice or opinion – *ibid.*, paragraphs 6, 7 and 11.
47. This is to reveal to their instructing party all the unused materials in a structured, comprehensive and informative fashion – CPS, *op. cit.*, p. 15.
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57. *Per* Lord Phillips at paragraph 11.
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61. BMA (2013), *op. cit*.
62. *Per* Lord Phillips at paragraph 18.
63. *Per* Lord Hope at paragraph 153.
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65. GMC 2013, *op. cit.*, paragraph 18; Heaton-Armstrong A, Acker L, *op. cit.*, p. 128.
66. Cooper P. Call yourself an expert? *New Law Journal* 2011;**161**. 707–708 at 708.
67. The courts have thus far been very accommodating on this matter. See e.g. *R v. Silverlock* [1894] 2 QB 766; *R v. Oakley* [1979] Crim LR 657; *R v. Clare*, *R v. Peach* [1995] 2 Cr App R 333.
68. Law Commission. *Expert evidence in criminal proceedings in England and Wales*. Law Commission Number 325; 2011. Part 9.