Session 13: Appreciation of Evidence: Dynamics of Abuse and Medical Evidence

4-Day Judicial Training Program on Child Forensics and Implementation of POCSO (Sikkim Judicial Academy)

SAMVAD

Support, Advocacy & Mental health interventions for children in Vulnerable circumstances And Distress

(A National Initiative & Integrated Resource for Child Protection, Mental Health, & Psychosocial Care)

Dept. of Child and Adolescent Psychiatry

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(NIMHANS), Bangalore

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Learning Objectives

- To develop an understanding of the basics of appreciation of medical evidence in CSA cases
- To explore the gaps in the current research on the interpretation of medical findings in CSA medical examinations.
- To develop an understanding of the implications of indeterminacy of medical findings for appreciation of evidence in CSA cases.

Let’s begin with the Medical Examination…

- According to the Handbook on Medical Examination of Survivors of Sexual Violence (and POCSO), the following must be done during medical examination:
  - Obtaining informed consent,
  - History taking
  - Medical examination
  - Collection and documentation of evidence and maintaining chain of evidence
  - Providing therapeutic care including immediate treatment of physical injuries, mental trauma, provision of emergency contraception, pregnancy advice, STI care, etc.
  - Providing psycho-social support including counseling, rehabilitation and follow up care.
- While one of the key imperatives for medical examination is to collect and document evidence, this is NOT the only objective…

Medical Examinations: Responsibilities of Hospitals

- Body and genital evidence for both clinical and forensic purposes should be collected simultaneously after explaining the purpose and process to the survivor/victim.

- Maintaining the chain of custody of evidence collected is the responsibility of the doctor/ hospital. Every hospital should identify and designate key persons who will maintain the chain of custody till it is handed over to the police, hospital laboratory or the forensic laboratory.

- All collected evidence should be packed, labelled and sealed properly ensuring that there is prevention of loss, decay or deterioration of evidence by taking precautions such as adding suitable preservatives or air drying in shade, where ever appropriate.

Medical Examination: Legal Definitions for Examination & Reporting

- There are separate legal provisions for medical examination of the accused and the victim.
- However, while medical examination of the victim requires informed consent (or the parent's/guardian's assent), medical examination of the accused can be conducted even in the absence of their consent with 'reasonable force'.
- Following the examination, the medical report of the victim and the accused require the following details, as per the law:
  i. Name and Address of the accused/victim
  ii. Age of the accused/victim
  iii. Marks of injury (if any)
  iv. Description of material taken for DNA profiling
  v. General Mental Condition (ONLY applicable to the Victim)
  vi. Other material particulars in reasonable detail.

Basics of Medical Evidence: Evidentiary Value

- Medical evidence does not play a decisive role in the adjudication of a CSA case. It can only support stronger evidence (i.e., more substantive) like witness testimony. **Substantive evidence**, like witness testimony, is evidence that is capable of proving a fact on it's own (without corroboration).
- However, evidence obtained from the medical examination of the victim and the accused plays an important ***corroborative role***, for two predominant reasons:
  i. proving the penetrative act and;
  ii. establishing its link with the accused.

Types of Medical Evidence

- In Indian medical jurisprudence, there are typically 5 types of medical evidence. Each evidence-type has different implications for appreciation of evidence:

i. Trace Evidence

ii. Injuries

iii. Sexually Transmitted Infections (STIs)

iv. Pregnancy & its Complications

v. Evidence of Treatment

Type 1: Trace Evidence

- Based on Locard's principle of exchange, the trace evidence (which includes semen, spermatozoa, blood, hair, cells, dust, paint, grass, lubricant, fecal matter, body fluids, or saliva), if detected, (depending on the type of sexual violence), has good corroborative value as it is indicative of contact between the victim and accused.
- This evidence has several limitations in getting detected, because it depends on the time when the medical examination is carried out after the alleged crime. — with delays accounting for loss of trace evidence;
- Additionally, post-assault activities like washing, bathing, douching, urination, defecation ; affect availability of trace evidence or evidence of semen or spermatozoa.

Trace Evidence: Implications for Appreciation of Evidence

- With trace evidence, conclusive opinions are often drawn on mere absence of spermatozoa (negative spermatozoa results) that a '***sexual offence was not committed***' — which is contrary to the truth.
- There are several causes for absence of spermatozoa, even in a case of sexual offence—
  i. No ejaculation
  ii. Azoospermia (absence of spermatozoa in semen)
  iii. Vasectomy, use of condoms, OR
  iv. Delayed examination of the sample which led to disintegration of spermatozoa, or, special stains to detect spermatozoa were not employed in that case.
- What is needed, in this context, is a series of confirmatory tests, apart from the basic screening test i.e., Wood's lamp examination, to more conclusively prove the presence of semen.

Type 2: Injuries

- If injuries are present in a case, and the timing of the injuries is established, this will help in determining the likelihood of the accused's guilt.
- The 2003 WHO Guidelines for Medico-Legal Care states that in only 33% of cases of sexual violence, (penetrative cases), there are injuries. This means that in two out of three cases of penetrative sexual violence, injuries will not be present.
- Additionally, the timing of the medical examination will also impact detection of injuries, since healing of such injuries occurs within a short period of time.
- Typically, injuries are sustained when the victim offers resistance. Absence of injuries could be due to various reasons—the victim being unconscious, either due to trauma, or being drugged / intoxicated, overpowered, or silenced due to fear. The use of a lubricant in sexual violence cases also decreases the chances of infliction of injuries.

Injuries: Implications for Appreciation of Evidence

- The previous legal position was that absence of injuries was indicative of presence of consent. However, following changes to the law in 2013, after *Nirbhaya,* absence of resistance injuries cannot be construed as indicative of consensual sexual intercourse.
- Additionally, there is the issue of unreliability of micro-injuries as evidence, for the following reasons:
  i. Micro injuries could be inflicted on mucosa (of the penetrated orifices) even in consensual sexual acts
  ii. Even during medical examination of genitals, there is a possibility of infliction of micro injuries
  iii. Possibility of micro-injuries with penetration by body parts (fingering), or objects i.e., it may not be possible to establish the exact nature of sexual abuse.

Type 3: Sexually Transmitted Infections

- Based on Locard's principle of exchange, if either the victim or accused is suffering from a STI at the time of the incident, then there is a possibility of transfer of microorganisms (causing that STI), through body contact, from one person to another. Thus, properly conducting and interpreting the tests to detect the transmission of STIs, as a result of the abusive sexual contact, could help in corroborating the offence.
- However, this evidence is often not collected properly, as at least two medical examinations are warranted to detect these infections, —one as early as possible and the other, after the lapse of the incubation period, depending on the STIs in question (gonorrhea, syphilis, herpes, HIV, or hepatitis).

STIs: Implications for Appreciation of Evidence

- Given the different time-periods for incubation of various STIs (i.e., 3 - 4 days for gonorrhoea; 3 - 12 weeks for Syphilis; 1 Day - 3 Weeks for Herpes, 4 – 12 Weeks for HIV; and 6 - 24 Weeks for Hepatitis), the value of STI evidence will be entirely dependent on whether the first and second medical examinations were conducted on time.
- Additionally, given the nature of this evidence, findings from the victim's examination will need to be corroborated with findings from the accused's examination. This does not occur regularly, as medical examinations are either not done by the same doctor, or by the same hospital, or the findings are not corroborated by the Investigating Officer or the Prosecutor.

Type 4: Pregnancy and its Complications

- Unwanted pregnancy and/or miscarriage of an existing fetus and/or infertility and/or repeated unsafe abortions are often noticed post sexual violence.
- The physical and mental trauma accompanying the unwanted pregnancy, including the social implications, should be dealt with adequately and on priority.

Pregnancy Complications: Implications for Appreciation of Evidence

- The products of conception, in cases of medical termination of pregnancy, (MTP), if carried out, serve as medical evidence.
- If the baby is already born, then the DNA materials of the fetus, when compared with that of the mother and the alleged father, would help in identifying the biological father of the child.

Type 5: Evidence of Treatment

- This is a new piece of medical evidence available in the form of evidence of treatment and its documentation, in case sheets, discharge summaries, prescription sheets, and pharmacy bills, etc.
- With compulsory treatment in every case of rape/sexual assault, this evidence will be available in all cases in which the victim has visited a hospital and consulted a doctor, post sexual violence. If there is proof in the form of medical prescriptions /case sheets / discharge summaries / pharmacy bills / analgesic drugs/ antidepressant drugs consumed post-assault, then these could act as indirect evidence of the pain sustained by the victim after the assault.
- Finally, even proof of the psychological counseling sessions undergone could act as proof of psychological disturbances, post-assault, that warranted the need for counseling, post-assault.

Evidence of Treatment: Implications for Appreciation of Evidence

- These crucial pieces of medical evidence need to be understood by all the stakeholders, including the judiciary, so that they can adjudicate sexual violence cases based on such medical evidence of treatment, which almost always exists, rather than searching for medical evidence that may not exist, such as trace evidence, injuries, or STIs, as explained above.

Interpretation of Genital Findings: Guidelines for Practise

- To begin with, the Adams Guidelines reflect our current understanding of how genital trauma may (or may not) be sustained in the context of child sexual abuse, the timing and sequelae of healing of genital trauma and the dynamics of child sexual abuse.
- Significantly, the Adams Guidelines describe how these factors influence the interpretation of genital findings in children. There are 5 main categories of genital findings under these guidelines…

Normal anatomical variants (category A)

- The guidelines recognise a wide range of normal genital variants in the non-abused child.
- These include variations in hymenal shape (e.g. annular, crescentic, septet, redundant), findings such as hymenal tags and bumps, any notch or cleft of the anterior or lateral hymen (i.e. on or above the 3 or 9 o'clock position), partial notch or cleft of the posterior hymen and narrow posterior rim, as well as periurethral bands, intravaginal ridges, external hymenal ridges, dilatation of urethral opening, normal midline features and hyperpigmentation of the labial skin.

Findings caused by other conditions (category B and C)

Some genital findings are caused by conditions other than trauma or abuse. Findings such as generalised erythema and increased vascularity of the genital tissues, labial adhesions and friability of the posterior fourchette can be caused by medical conditions such as urethral prolapse, lichen sclerosus, vulval ulcers and non-sexually transmitted genital infections, which should be considered in the differential diagnosis.

Findings with no expert consensus (category D)

Several genital findings remain in the ‘indeterminate’ category due to insufficient evidence and lack of expert consensus. These include:

(a) notch or cleft at or below the 3–9 o’clock position that extends ‘nearly to the base of the hymen’ but is not a complete transection;

(b) complete transection at the 3 or 9 o’clock position.

Findings diagnostic of acute or past injury (category E)

Acute injuries to the genital tissues, including the hymen, for example, acute lacerations, bruising, petechiae or abrasions, indicate recent trauma. In the absence of an adequate explanation, for example, an accidental straddle injury, these findings are highly suggestive of abuse.

The only two non-acute hymenal findings that provide clear evidence of past trauma are:

(i) a complete transection of the hymen below the 3 to 9 o'clock position (defined as a hymenal defect that extends to or through the base of the hymen, with no residual hymenal tissue seen at that location); and

(ii) a scar of the posterior fourchette or fossa.