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Guest editorial

Interpreting evidence in court – the dangers and pitfalls ☆

Although the number of reported rapes represents only a tiny proportion of all recorded crimes, the severity of the impact on victims and the fear of the crime itself make it a subject of major importance within the criminal justice system. Given this background, the marked decline in the percentage of successful prosecutions for rape offences, which in the UK has dropped from 33% in 1977[1] to 5.6% in 2002,[2] is a cause for serious concern. Whilst there are many causes for the unacceptably high attrition rates, one of these is unquestionably the variable quality of medical evidence in court, particularly its objectivity and reliability.[3]

Perhaps, of all the sins of forensic physicians when giving evidence, the greatest is that of over interpretation. Over interpretation, which can apply to both normal and abnormal findings, may be borne out of ignorance; a lack of impartiality; a failure to recognise that there may be alternative accounts of what took place; or simply an eagerness for the medical evidence to be granted greater importance than it actually deserves.

The results of studies reporting the incidence of injuries to victims of serious sexual crimes have remained remarkably consistent over the last 30-years. It is now widely accepted that naked eye examination of the genitalia reveals genital injury in only about 20–30% of rape victims[4–7] and that the absence of genital injury on naked eye examination does not exclude rape. White and McLean (this issue, p. 172) point out that prosecutors still need educating that 'its normal to be normal' to ensure that they do not halt investigations in cases where the doctor describes what are perceived as "negative" findings. However, it is also important that "negative" is not over interpreted as "positive". Thus, the occasional practice of some doctors who state that the absence of genital injury is 'fully consistent' with an allegation of non-consensual intercourse should be discouraged. Although the doctor may not intend the words 'fully consistent' to be taken as excluding other possibilities, this is often not clear to lay members of a jury, who may mistakenly assume that the doctor considers the medical evidence to 'fully corroborate' the allegation. As the absence of genital injury is also 'fully consistent' with consensual intercourse and, indeed, no intercourse at all, the finding should properly be presented as being entirely neutral, i.e. neither confirming nor rebutting the allegation.

Whilst there are inherent dangers in over interpreting normal findings, those dangers are very much greater when interpreting the abnormal. Roberts reports the case of a complainant of sexual assault with a 2.0 cm long tear extending out from the hymen. In giving evidence to the court, the examining doctor opined that "normal sex does not involve inflicting injuries of this extent"[3] and comments such as this are not unusual. But is there actually evidence to support such dogmatic statements? As Brennan highlights (this issue, p. 194) those studies that have attempted to compare injuries from consensual and non-consensual intercourse almost invariably lack adequate controls, are not blinded, and/or have sample sizes that are too small to be statistically relevant.

However, it appears clear from the limited research available that consensual sexual intercourse can result in genital injury. For example, one study found that 8 of 75 (11%) women examined within 24-h of consensual vaginal intercourse had colposcopic evidence of tears, bruises and abrasions either to the posterior fourchette or hymen.[8] Although the authors do not comment on whether the injuries were visible without the aid of a colposcope, there is evidence that injuries following consensual intercourse can be visible to the naked eye and, on occasion, can involve serious vaginal lacerations and heavy blood loss. A retrospective review of admissions to a South African hospital over a 5-year period identified 19 non-virginal patients who sustained serious vaginal injuries during normal coitus. All of the patients presented with profuse or prolonged vaginal bleeding and seven of the 19 required blood transfusions.[9] In the light of this evidence, doctors should exercise caution when interpreting the significance of genital injury in a complainant of sexual assault and should consider very carefully before suggesting that such injury is entirely inconsistent with consensual intercourse.

The dangers of over interpreting the presence or absence of genital injury are primarily twofold. When over interpretation is exposed in court it can do serious damage to the Crown Prosecution's case resulting in guilty persons going

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free; conversely, if unchallenged, over interpretation can also lead to wrongful convictions. However, there is also the less obvious risk that the fear of being accused of over interpretation may either discourage doctors from giving any opinion evidence at all or encourage them to under interpret the evidence, both of which are just as likely to have an adverse influence on the outcome of a trial. This unsatisfactory state of affairs is unlikely to be fully addressed until further good quality research, concentrating in particular on the comparative frequency and types of injury seen after consensual and non-consensual intercourse, provides doctors with the confidence and knowledge to properly advise the courts. We hope that special journal editions like this one will stimulate such further research and provide the evidence-base for essential peer review and joint training of doctors, prosecutors and the police.

In the interests of both the victims and suspects of sexual assaults and the criminal justice system as a whole, it is essential that forensic physicians continue to provide medical opinions to the courts. However, it is equally essential that the opinions expressed are of the highest quality; that they are objective, impartial, evidence-based and, in particular, that they are free of dogma. There can be no other field of clinical forensic medicine where the forensic aphorism "seldom say always, seldom say never" is more apposite.

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Guest Editors
Dr. Guy A. Norfolk
Stockwood Medical Centre,
Hollway Road,
Stockwood,
Bristol BS14 8PT,
UK
E-mail address: guy.norfolk@btinternet.com

Dr. Cath White
St. Mary's Sexual Assault Referral Centre,
St. Mary's Hospital,
Hathersage Road,
Manchester, M13 0JH,
UK
Tel./fax: +44 161 276 6515
E-mail address: cathswhite@hotmail.com

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