

FOLEY'S | LIST

SEX OFFENCES: MEDICAL EVIDENCE

Author: Elizabeth McKinnon

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Chapter 17

Medical Evidence

MEDICAL EVIDENCE IN SEX CASES

Introduction

Medical evidence in criminal cases, particularly sex cases, can be a challenging area to deal with for legal practitioners. The medical evidence can cover a broad area, from the analysis of DNA, to the cause of physical injury, to toxicological analysis of the effect of drugs and alcohol on a complainant's capacity to consent. This paper will serve as a guide for solicitors dealing with medical evidence in sex cases.

Part of the challenge is understanding the medical and scientific terms and concepts sufficiently to confidently, and critically, use them. Also challenging are the procedural and tactical aspects, such as preparing the Form 32, subpoenaing medical records and confidential communications, and the use of expert witness statements by the defence.

Demands on the time of legal practitioners can make it difficult to brief counsel at an early stage, and together discuss and prepare a strategy for a case. The reality is that often counsel is briefed later on, and he/she will be relying on the solicitor to have prepared the Form 32, or subpoenas or expert witness statements. It is best to involve counsel early so that a consistent strategy can be set.

The Allegation

An allegation is made, the police investigate. The Victoria Police *Code of Practice for the Investigation of Sexual Assault* describes the way police must respond to reports of sexual assault.¹ The Code is worth looking at. It provides an outline of police investigation, including police involvement with the Centre Against Sexual Assault (CASA) and the Victorian Institute of Forensic Medicine (VIFM), and where the complainant is a child, the Victorian Forensic Paediatric Medical Service is used (VFPMS).²

Police must consider whether the complainant needs to be taken to the nearest CASA or Hospital Crisis Care Unit (HCCU), or even the nearest Emergency Department. At this stage medical attention is a priority, and should occur within two hours of the arrival of the first police member.³ Note: if a complainant is admitted to a hospital, CASA are able to attend to provide *crisis care*.

Where a complainant suffers from a mental illness their case manager, support worker, or the Crisis & Assessment Team (CAT) may be contacted. This support is in addition to crisis support offered by CASA. Where the complainant has a cognitive impairment, CASA usually provides crisis care and an Independent Third Person (ITP) is not required to attend the forensic medical examination. Where the complainant is a child, police are required to notify the Department of Human Services, child protection area (DHS)⁴ and the Sexual Offence and Child Abuse Unit (SOCAU).⁵

Statements made to police where the complainant suffers from mental illness, has a cognitive impairment or is a child should be obtained by way of a Video and Audio Taped Evidence

¹ Victoria Police *Code of Practice for the Investigation of Sexual Assault* p.1.

² VIFM and VFPMS are available 24 hours a day to offer advice on medical or forensic issues relating to sexual assaults.

³ Victoria Police *Code of Practice for the Investigation of Sexual Assault* p.5.

⁴ *Children, Youth and Families Act 2005* section 184.

⁵ Victoria Police Manual 108-9.

(VATE) statement. Where the complainant has a cognitive impairment, an ITP will also be present.

Forensic Examination

A complainant will be advised about the need for police to retain forensic evidence, and accordingly, a complainant will often be asked to submit to a medical examination by a Forensic Medical Officer (FMO), or a Forensic Nurse Examiner (FNE). Note: the FNE is part a team that includes FMOs. The FMO/FNE in consultation with the complainant, decides on which medical or forensic procedures are to be conducted. The examinations are in private, therefore only the FMO/FNE should be present.

The purpose of the forensic medical examination is to collect evidence, including DNA, that can be used to support a charge of sexual assault. A Sexual Assault Investigation Kit is used by the FMO/FNE who is qualified to perform forensic examinations to collect DNA and other forensic evidence. They may only conduct the procedure with the consent of the complainant, and where the procedure is in the best interest of the complainant.

Causation of injury is a core issue that the FMO/FNE is required to address to assist the court. The FMO/FNE will take swabs for DNA evidence, look for, *inter alia*, bruising, swelling, cuts and scratches, bite marks, bleeding and fissures. The forensic medical examination can involve the taking of specimens such as vaginal, anal, oral or penile swabs, semen samples from the complainant's body or clothing, and blood and urine samples, particularly where it is alleged drugs or alcohol were involved in the sexual assault.

Just as importantly, the FMO/FNE usually takes a detailed history of, *inter alia*:

The identity of the alleged perpetrator (including whether the sexual assault is ongoing in nature and the complainant is still at risk);

When and where the sexual assault occurred; and

The nature and circumstances of the sexual assault.

The FMO/FNE will then prepare a report for the police, which will form part of the police brief of evidence. Much, but not all, of the information collected finds itself in the report of the FMO/FNE. Note that most expert witnesses will bring to court a range of documents, including their notes, documents or records that they have generated or relied upon in the process of conducting their tests and experiments or in interviewing the complainant in the formation of their professional opinions. To err on the side of caution, this documentation should be specifically requested either on the Form 32 for committal, or via subpoena, or both.

DNA

The analysis of Deoxyribonucleic acid (DNA) can be an enormously useful forensic tool. It can be challenging to present DNA evidence in a comprehensible way to the court, particularly to a jury. DNA profiling evidence, particularly statistical interpretation, can be complicated. Further adding to the challenge, is that it carries with it a misconception of infallibility, when DNA evidence in reality has great potential for error. Causes of error can be human error such as contamination, switching of samples, continuity, secondary transfer, or natural causes such as degradation. Issues of illegality and impropriety of procurement should also be considered when preparing for this area of medical evidence.

A good example of the fallibility of DNA evidence is seen in the *Farah Jama Case* which was in the Court of Appeal in 2009. This case involved an allegation of rape, and the reliance solely upon DNA evidence to secure a conviction. After serving 16 months of the sentence, the conviction was quashed after the possibility of contamination of DNA evidence was raised.⁶ Refer to Peter Chadwick SC's paper regarding DNA evidence for a more detailed account and analysis of the case.

The moral of the story is when dealing with DNA evidence, don't be blinded by the science. This evidence is collected and analysed by human beings who at times make mistakes. Further, request full disclosure of laboratory records including case notes and methods used in the

⁶ An enquiry conducted by the Hon Frank Vincent QC to the Secretary of the Department of Justice, concluded that a wrongful miscarriage of justice had occurred, and that Jama had been wrongly convicted.

analysis. Lastly, if possible, engage an independent expert to review the analysis and opinion. Such a review may expose a reasonable doubt.

Committal

When drawing the Form 32, make sure you request all witnesses dealing with the medical evidence for cross-examination. It is far better to cross-examine on the collection and analysis of medical evidence at this stage, than before a jury. Don't waste a valuable opportunity. At committal you can cross-examine about, *inter alia*, causation of injuries, history provided by the complainant, DNA analysis, continuity of exhibits and toxicological analysis of the effect of drugs and alcohol on a complainant's capacity to consent, with no fear of the answer given, and the ability to ameliorate or deal with this evidence when the time comes at trial before a jury. Remember, you want concessions!

In the Form 32, where the request to cross-examine a witness must be supported in the section labelled "issue / relevance / justification" consider questions of causation of injury, method or technique of analysis, collection and continuity of evidence obtained and the basis of opinion as reasons.

Subpoenas / Summonses

One is able to subpoena a person to attend a proceeding to give evidence, produce documents or both.

In relation to medical evidence, at both committal and trial you may want to consider subpoenaing / summoning the following:

CASA;

Hospital (because of attendance upon the HCCU or Emergency Department or both);

Victoria Police, specifically the Chief Commissioner (and specifically state the relevant members of SOCAU);

VIFM for adults or VFPMS for children;

DHS (specifically DHS child protection area);

The treating psychologist / psychiatrist / medical practitioner / counsellor;
Ambulance Victoria; and

The Department of Education and Early Childhood Development (where a complaint has been made to a school counsellor / nurse).

The limitations on evidence involving confidential communications will need to be considered, regarding the requirements of notice, leave to issue and compel the production of, leave to release and inspect, and finally leave to adduce protected evidence.⁷ Confidential communication is defined as communication 'made in confidence by a person against whom a sexual offence has been, or is alleged to have been committed to a *registered medical practitioner* or *counsellor* in the course of the relationship of medical practitioner and patient or counsellor and client'.⁸ Section 32D of the *Evidence (Miscellaneous Provisions) Act 1958* sets out the test. It considers the probative value of the evidence, the availability of other evidence of similar or greater probative value, and the public interest in preserving the confidentiality and protecting the confider with the public interest in admitting the evidence. Leave is granted if the court is satisfied on the balance of probabilities.⁹ Note, the relevant medical practitioner, counsellor and confider may, with leave of the court, appear in the proceeding and make submissions in relation to the production and release of the confidential communications.¹⁰ There has been a trend for some organisations, such as CASA, to minimise the information recorded in anticipation of any documentation being subpoenaed.

The confidential communication may have substantial probative value of a fact in issue because, *inter alia*:

It demonstrates that a witness is not able to give reliable evidence; and/or

It reveals a disposition to make false complaints of sexual abuse.

Note, the mere fact that the witness had been the subject of other sexual offences and made confidential statements regarding those offences does not itself reveal a disposition to make false complaints.¹¹

⁷ *Evidence (Miscellaneous Provisions) Act 1958* sections 32C, 32D and 32E.

⁸ *Evidence (Miscellaneous Provisions) Act 1958* section 32B.

⁹ *Evidence (Miscellaneous Provisions) Act 1958* section 32D; See *R v Al-Assadi* VSCA 111.

¹⁰ *Evidence (Miscellaneous Provisions) Act 1958* sections 32C(5).

¹¹ See *R v Al-Assadi* [2011] VSCA 111.

The County Court Practice Note PNCR 2-2010 outlines the process in the County Court for the issue of subpoenas relating to confidential communications. The party must file a notice, and the notice must describe the material sought and a brief statement of the matters relied upon to satisfy the test for leave. The Magistrates' Court Practice Direction No. 5 of 2007 outlines the procedure for witness summons in the Magistrates' Court regarding confidential communications in criminal proceedings.

Finally, remember that the documents released are accessible by all parties to the proceeding, not just the party that issues the subpoena or summons, whether the prosecution will have the time or inclination to inspect the documents is another matter.

Opinion Evidence

As a rule opinion evidence is inadmissible, unless it can fall into one of the exceptions.¹² Section 79 of the *Evidence Act 2008* allows for opinion evidence based on specialised knowledge because of a person's training, study or experience. Section 79(2) specifically refers to specialist knowledge of child development and child behaviour, including knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse. This evidence may be relevant to testimonial capacity, credibility of a child witness, beliefs and perceptions held by a child, and the reasonableness of those beliefs and perceptions.¹³

Note, the *Criminal Procedure Act 2009* section 388 also provides for evidence of specialist knowledge in criminal proceedings that relate wholly or in part to sexual offences. The court may receive evidence of a person's opinion that is based on that person's specialised knowledge of the nature of sexual offences, and social, psychological and cultural factors that may affect the behaviour of a person who has been a victim.

¹² *Evidence Act 2008* sections 76, 77, 78, 78A and 79.

¹³ Explanatory Memoranda to the *Evidence Act 2008* clause 79.

Experts in medical evidence are crucial in sex cases, and an expert can often tip the balance.

Expert opinion may be admissible even though:

The opinion is about an issue the fact finder, the judge or jury, must determine;

The opinion is a matter of common knowledge;

The facts upon which the opinion is based have not been proven or rely on potentially unreliable scientific or technical knowledge; and

The reasoning of the expert is not expressly stated or is inaccessible to the fact finder, the judge and jury.¹⁴

Note that the above may provide a basis for discretionary exclusion under *Evidence Act 2008* sections 135, 136 and 137. These sections deal with the exclusion or limited use of evidence that is unfairly prejudicial, misleading and confusing, or might cause or result in undue waste of time.

It falls upon the legal representatives of the opposing party to make the expert accountable for his or her opinion. The basis of opinion must be given. "*An expert should explain the basis of theory or experience on which the expert conclusions are said to rest.*"¹⁵

In order for expert evidence to be admissible, the subject must be specialised. It must be agreed or demonstrated that there is a field of specialised knowledge, and that it is unlikely that the jury would be capable of forming a correct judgment without the assistance of an expert.¹⁶ The provision of expert evidence in sex cases is broader than evidence on physical injury, and increasingly involves innovative psychological evidence or syndrome evidence, such as rape trauma syndrome, child sexual abuse accommodation syndrome, repressed memory syndrome, and false memory syndrome. Expert evidence dealing with the suggestibility of children, infantile amnesia and repressed false memory syndrome is very common.¹⁷

¹⁴ For further analysis on opinion evidence see Jeremy Gans & Andrew Palmer, *Uniform Evidence*, Oxford University Press, 1st ed. 2010.

¹⁵ *R v J* (1994) 75 A Crim R 522 (Vic CCA) at p.531 per Brooking J.

¹⁶ *Makita (Aust) Pty Ltd v Spowles* (2001) 52 NSWLR 705 (CA) at p. 743-4 per Heydon JA.

¹⁷ See for example *R v BDX* (2009) 24 VR 288. For further reading see Ian Freckelton & Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy*, Lawbook Co., 4th edition 2009.

Generally speaking, when expert evidence is unanimous it must not be rejected, unless it disagrees with the remainder of the evidence, the facts upon which the opinion is based are not present, the process of reasoning used is unsound, or there is some factor that casts doubt in the validity of the opinion.¹⁸ Where there is conflicting expert opinion, the fact finder must resolve that conflict.¹⁹

When preparing to deal with the evidence of an expert called by the opposing party, take time to look into their qualifications and expertise. You may discover, for example, that whilst the expert witness works at the VIFM they are no more qualified at providing evidence as to causation of physical injury, than a general practitioner. You may also find that there are experts better placed to provide an opinion, such as a medical specialist. These concessions can prove to be very valuable before a jury, and weaken any evidence the expert provides that is damaging to your case. Frankly, you'd be amazed by what a Google search can uncover!

Lastly, the expert witness must be impartial, and an objective authority who has been brought to the court to assist the judge or jury by the provision of his or her expert knowledge. Expert witnesses have ethical obligations and must abide by the Expert Witness Code of Conduct. In the running of cases don't be afraid to enquire of the expert witness, particularly the FMO/FNE: who they have spoken to prior to and during the forensic examination of the complainant, for example the informant or members of the complaint's family; the amount of work he/she does at the request of Victoria Police; and how many times the witness has given similar testimony.

In some cases this will call into question the witness's independence.

Defence – Expert Witness

The *Evidence Act 2008* provides for certificates of expert evidence.²⁰ Specifically, evidence of a person's opinion may be adduced by tendering a certificate (expert certificate) signed by that person that sets out a person has specialised knowledge and an opinion that the person holds

¹⁸ *Taylor v R* (1978) 22 ALR 599; *R v Matusevich & Thompson* [1976] VR 470; *R v Klamo* [2008] VSCA 75.

¹⁹ *Hocking v Bell* (1945) 71 CLR 430 at p.440 per Dixon J; *Velevski v R* (2002) 187 ALR 233.

²⁰ *Evidence Act 2008* section 177.

and that is expressed to be wholly or substantially based on that knowledge. The expert certificate must be admissible on the basis of evidence to be lead in the trial. The provision of an expert certificate saves the expert from attending court to give *viva voce* evidence. However, the opposing party can require the person that signed the certificate to give evidence.²¹

If an accused intends to call a person as an expert witness at a trial the accused must serve with the prosecution and file with the court a copy of the statement of the expert witness in accordance with section 189 of the *Criminal Procedure Act*. The statement must set out the substance of the evidence it is proposed to adduce from the witness as an expert. Refer to *R v J* (1994) 75 A Crim R 522 (Vic CCA) for how to lead expert evidence, and *Farrell v R* (1998) 194 CLR 286 regarding what one is entitled to call expert evidence about.

A final word of warning to legal practitioners settling expert reports, there is no problem with a legal practitioner engaging the services of an expert consulting with that expert to ensure the report is directed to the issues before the court, and guiding the expert to ensure the content is admissible. However, the legal practitioners must not seek to distort the substance of the witness's opinion so that it loses its expert integrity and compromises the expert's independence. The legal practitioner should not make a contribution to the content, and tamper with the expert's opinion.

Written by Elizabeth McKinnon

²¹ *Evidence Act 2008* section 177(5).