

An Express Train¹ for Child Sex Abuse Cases: What All Defenders Should Have, Read and Know²

At the 1999 DPA Annual Public Defender Conference, I spoke on a number of topics related to the defense of the person who is accused, in one form or another, of child sex abuse. During one talk, I referenced various works which, in my opinion, should be read and frequently referenced by attorneys who find themselves embroiled in these awful cases. Following the conference, I was asked to “do a short Advocate piece” on the works I discussed. I believe that what follows may be of benefit to both short and tall advocates, alike.

In defending a child sex abuse case (CSA), it is incumbent on the defense attorney to understand certain scientific principles and precepts. For example, the suggestibility of young children, “normalcy” in ano-genital medical examinations, and how people can come to believe things that are not factually accurate, are but three matters upon which much research has been conducted and for which scientific principles have been developed. Also, counsel needs to have more than a passing familiarity with terms such as “confirmatory bias,” “inter-rater reliability,” “diagnostic sensitivity,” “diagnostic specificity,” “confabulation,” and “recovered memory”³ or there is simply no way counsel is competent to handle these cases.

Of course, having said that, I will now be bombarded with anecdotal accounts by defense attorneys, both public and private, who will say to me, “Why, I have been defending these cases for years and I’ve never even heard of that psychological mumbo-jumbo. I do pretty well. Why, I even got an acquittal in the last case I tried. I don’t need to learn all of this nonsense to do my job. And, who are you, anyway, to tell me that I’m not competent?” To these folks I can only respond by saying the following three things:

- 1) With regard to your last great trial victory: Even a blind squirrel finds a nut now and then.
- 2) With regard to your unfamiliarity with, and disdain for, social science research: Why would you willingly forego an entire body of research which, on the whole, can make your job easier, result in more victories and make you a better lawyer?
- 3) With regard to my credentials: I have been where you are now; wondering whether I should take the time to study the science in order to be able to separate the myths from the reality in these cases. I decided that these cases had to be fought on a plane that was different than that dictated by the police, the social workers, and the prosecutors. I can tell you that you’re not competent because, looking back, I can see that I was not competent.

I understand that, the truth is, some people just seem to do well in this business without ever learning anything new. Fortune smiles on these people and Luck, companion and protector of children and fools, alike, guides their day-to-day professional efforts. If you are one of these people, your luck is, eventually, going to run out; sooner or later the dice come up craps. When that happens, expect the worst for you and your client. Moreover, on the odds, you are not one of these people.

¹ From C.H. Spurgeon, *Gems from Spurgeon*, (1859): “If you want a lie to go round the world, it will fly; it is as light as a feather, and a breath will carry it. But, if you want truth to go round the world, you must hire an express train to pull it.”

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³ To name but a few!

Still, for the rest of us, taking the time to understand the science, the myths and the realities behind the allegations of abuse, as well as investigations into those allegations, will help us be stronger advocates, more powerful persuaders and increasingly ferocious warriors for our clients. For the rest of us, hard work and constant preparation will produce luck just as surely as wood and heated air produce fire. For the rest of us, understanding that learning is a lifelong process and that knowledge is power, ensures that we will never give our opponents our tacit permission to beat us in court. For us, I offer the following assistance.

Child Abuse-Related Case Law⁴

The following cases ought to be read and understood by defense counsel. The principles set out in these cases can be applied in a number of situations.

1. Idaho v Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). Incriminating statements, admissible under the exception to the hearsay rule, are inadmissible under the confrontation clause unless the prosecution produces, or demonstrates the unavailability of, the declarant whose statement it wishes to use and unless the statement bears “adequate indicia of reliability.” Reliability requirement can be met where the statement either falls within a firmly rooted hearsay exception or is supported by a showing of particularized guarantees of trustworthiness.
2. Coy v Iowa, 108 S.Ct. 2798 (1988). Confrontation Clause provides the right to “confront” witnesses face-to-face. The placement of a screen between the defendant and the child witness, therefore, violated the defendant’s right to confront his accuser.
 1. Section 11 of the Kentucky Constitution states, “In all criminal prosecutions, the accused has the right to meet the witnesses face to face....”
 2. See, Commonwealth v Willis, 716 S.W.2d 224 (Ky. 1986) and George v Commonwealth, 885 S.W.2d 938 (Ky. 1994).
 3. But, see, Maryland v Craig, 497 U.S. 836, 110 S.Ct. 3157 (1990). Confrontation Clause did not categorically prohibit child witnesses from testifying outside defendant’s physical presence by one-way closed circuit television but, the finding of such necessity is to be made on a case-by-case basis.
3. Daubert v Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Evidence rule 702 places appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. An expert’s testimony must pertain to “scientific knowledge.” “Scientific” implies a grounding in science’s methods and procedures. “Knowledge” connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds.
 1. Daubert has been fully incorporated into the Kentucky law of evidence. Mitchell v Commonwealth, 908 S.W.2d 100 (Ky. 1995), [DNA]; and, Stringer v Commonwealth, 956 S.W.2d 883 (Ky. 1997) [judicially engrafting FRE 704 into Kentucky’s Rules of Evidence. An expert may give an opinion on the ultimate issue in the case]
 2. Collins v Commonwealth, 951 S.W.2d 569 (Ky. 1997). Daubert is applicable only to testimony of a scientific nature. This case will probably be overruled in the near future because of the United States Supreme Court’s recent decision in Kuhmo Tire.
 3. Kuhmo Tire v Carmichael, _____ U.S. _____ (1999). Daubert analysis under Rule

⁴ With apologies for the, sometimes rather incomplete, citations.

702 does not distinguish between “scientific,” “technical,” or “other specialized” knowledge. This gives to all expert witnesses a testimonial latitude not accorded to other witnesses. The Daubert gatekeeping responsibilities of the judge apply to all expert testimony not just to scientists.

4. State v Michaels, 136 N.J.299, 642 A.2d 1372 (1994). The preeminent case dealing with the concept of “taint hearings.” ‘Nuff said.⁵
5. State v Kelly, 456 S.E.2d 861, (N.C. 1995). Discovery violations, and improper lay opinions.⁶
6. Tome v United States, 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed. 2d 574 (1995). A prior consistent statement introduced to rebut a charge of recent fabrication, improper influence, or improper motive is only admissible if the statement was made prior to the time the alleged fabrication, influence or motive came into being and, otherwise, is inadmissible.
 1. Fields v Commonwealth, 905 S.W.2d 510 (Ky. App. 1994); and, Smith v Commonwealth, 920 S.W.2d 514 (Ky. 1995). State law counterparts to Tome.
7. Pennsylvania v Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Defendant’s rights under 6th and 14th Amendments can require a trial judge to make an in camera inspection of child services records which would otherwise be confidential.
 1. Commonwealth v Lloyd, 567 A.2d 1357 (Pa. 1989). Pennsylvania Supreme Court has ruled that the Ritchie analysis does not apply under state constitutional law because it is insufficient to protect a defendant’s rights under the confrontation and compulsory process clauses. Realizing that the Kentucky Constitution is based upon the Pennsylvania Constitution, this case and its reasoning may be particularly applicable here.
 2. Anderson v Commonwealth, 864 S.W.2d 909 (Ky. 1993). Where trial judge conducts in camera inspection and fails to disclose information which defendant had a right to know (discoverable or exculpatory), it is reversible error.
 3. See, also, KRS 620.050(d). Statutory right of an accused to CFC records.
8. Kyles v Whitley, 514 U.S. ___, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The most important pretrial discovery case since Brady; imposing on prosecutorial authorities the duties to ferret-out exculpatory information and to provide it to the defense.
9. United States v Whitted, 11 F.3d 782 (11th Cir. 1993). An examining physician’s opinion that findings are “consistent with” history of sexual abuse given by complaining child is admissible. However,

⁵ The opinion in the New Jersey Supreme Court case is important. The opinion by the intermediate appellate court is just as important. For that opinion, see, 264 N.J.Super. 579 (1993). Additionally, the brief filed on behalf of an amicus group, the Committee of Concerned Social Scientists, is extraordinary and is **a must read** for anyone defending these cases.

⁶ *Michaels and Kelly* are two of the most famous—and, in all probability, infamous—child sex abuse cases in the history of the United States. Both involved day care situations where numerous allegations were made against staff/owners of the day cares. Both defendants were convicted, their sentences were set aside and new trials were ordered. Both are free today.

vouching for the child's truthfulness or diagnosing "sexual abuse" is not permitted.

10. *McNamara v United States*, 867 F. Supp. 369 (E.D. Va. 1994). Failure of trial counsel to conduct an investigation into either the law or the facts can be ineffective assistance of counsel. Counsel must have some way to keep up with changes in the law.⁷
11. *State v Gersin*, 76 Ohio St. 3d 491, 668 N.E.2d 486 (1996). A defendant in a child sex abuse case can present expert testimony as to the proper protocol for interviewing child victims regarding their abuse.
 1. However, see, *Stringer v Commonwealth*, supra, where that issue was decided differently in Kentucky. Given the decision in *Kuhmo Tire v Carmichael*, supra, this issue may be decided differently now.
12. *Kansas v Hendricks*, _____ U.S. _____, _____ S.Ct. _____, _____ L.Ed.2d _____ (1997). Kansas' Sexually Violent Predator Act is constitutional.
 1. Kentucky does not have such a law yet. However, it is expected that two such bills will be introduced and debated in the 2000 General Assembly.

Books and Other Publications with which to be Familiar

1. *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*
Stephen J. Ceci and Maggie Bruck
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This is "the Bible" for lawyers handling CSA cases. All of the relevant social science research (through 1994) is reviewed and conclusions are made; all supportable by the research. The book is neither pro-defense nor prosecution. It takes a scholarly approach to the issues involved in many—if not, most—CSA cases and comes down on the side of truth.

⁷ Specifically, this case dealt with counsel's failure to know that a particular issue in his case had been accepted on a petition for *certiorari* by the United States Supreme Court.

In assessing the relevant research, the authors reference seven case studies: (1) the Salem witch trials; (2) the Little Rascals Day Care case (*State v Kelly*, supra.); (3) the Kelly Michaels case (*State v Michaels*, supra.); (4) the Old Cutler Presbyterian case; (5) the Country Walk Babysitting Service case; (6) The rape on Devil's Dyke case; and, (7) the Frederico Martinez Macias case. Against these factual backdrops, the authors evaluate the issues of the prevalence and statistics on child abuse; memory and suggestibility; the dynamics of structured and therapeutic interviews of children; repressed memories; age differences in reliability of children's reports; and proper guidelines for the interviewing of children.⁸ The authors wrote the amicus brief which was quoted by the New Jersey Supreme Court in the Michaels decision, referenced above.

2. Believed in Imaginings: The Narrative Construction of Reality
Joseph de Rivera and Theodore R. Sarbin, Eds.
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The subject of this book is quite simply: How we may come to believe in the reality of phenomena that spring from our imaginations and the function of imaginings in our emotional lives. Though, I suspect, we rarely think about it, concepts such as imagining, believing and remembering are definable. The parameters of the definitions of those terms explain how it is that we can believe in something that we have only imagined.

Frequently, we are confronted in a CSA case with the question, "If the allegation is not true, why is the child saying it?" The answer, which may be nothing more complicated than, "Because the child believes it," may tell us nothing of primary importance and may, ultimately, spell doom for our client with the jury. Perhaps in our efforts to redefine the issue and, hence, shape the trial, the question is better put, "How can this child have come to believe this story is true in the absence of a basis in fact for the story?" The various authors in this work provide some answers that we can explore and build on in our own cases to create theories and themes which will resonate as the truth to the jury.

3. Investigative Interviews of Children: A Guide for Helping Professionals
Debra A. Poole and Michael E. Lamb
Copyright 1998 by the American Psychological Association.

We are rarely provided with audio or video tapes of investigative interviews with child complainants in a CSA case. However, when we do get them what do we do with them? How do we know if an interview has been done properly? If the interview has been done improperly, what can we make of that in the process of defending against the accusations which came from the poorly-conducted interview? How should we conduct interviews if we have an opportunity to do so?

Poole and Lamb, both developmental psychologists, provide guidelines for interviewers based on the latest social science research. They also present a flexible interview protocol which can be tailored to fit the particularized needs of each case. They also discuss language development and its impact on the interview process. With a knowledge of what should be done and—more importantly—why, we can better understand the shortcomings of the interviewers in our cases.

4. Expert Witnesses in Child Abuse Cases: What Can and Should Be Said in Court
Stephen J. Ceci and Helene Hembrooke, Eds
Copyright 1998 by the American Psychological Association

Given the Daubert and the Kuhmo Tire decisions referred to, above, the title of this book says it all. In this work, lawyers, psychologists, and social workers discuss the vexatious aspects of testimony and provide advice on the proper scope of expert testimony. The authors include discussions of the uses of expert testimony, the ethical standards to which psychologists who serve as experts should adhere, the kinds of evidence most offered in CSA cases, the admissibility of such evidence, the effects of this evidence on jurors, and, in the end, the authors

⁸ The issues listed are not exclusive.

provide analysis in an effort to achieve a sort of consensus of what constitutes ethical testimony.

The book is important to us in two respects. First, it helps us to see and understand when the expert against us is not being forthright and ethical. Second, it helps us guide our own presentations so that our experts do not fall victim to the same sorts of criticisms.

5. Smoke and Mirrors: The Devastating Effects of False Sexual Abuse Claims
Terence W. Campbell
Copyright 1998, Insight Books (a division of Plenum Publishing Corporation)

How do false allegations occur? The usual situation is that a claim originates with a vague, ill-defined statement by a young child. Well-intentioned, but terribly misinformed, adults misinterpret these ambiguous statements and conclude that the child has been sexually abused. In response to the adult's misinterpretations, the child undergoes numerous interviews. The sheer number of the interviews and the biased nature of the interviewer leads the child into describing things which never occurred. The child, then, finds himself in therapy where the therapist further contaminates what he thinks and remembers. The combined effects of this spiral can result in innocent people facing criminal charges and parents losing their children.

Dr. Campbell provides a number of cases detailing the false allegations of CSA and the issues raised in those cases. The DPA employee will enjoy reading Chapter 4 which details a case handled by Carolyn Clark-Cox, now of the Somerset field office.

Dr. Campbell discusses rumors and how false allegations grow in the same way rumors grow; interviewing children properly; the need for videotaping of interviews; fabrications; play therapy; repressed memories, "imagination inflation;" and, many other topics of professional interest to those of us who defend "perps." He provides an excellent basic understanding of how and why children can come to make such allegations as well as a lethal source for cross-examining everyone in the chain of contamination, from the parents of the complaining kids to the therapists.

6. House of Cards: Psychology and Psychotherapy Built on Myth
Robyn M. Dawes
Copyright 1994, The Free Press (A division of Simon and Schuster, Inc.)

Dr. Dawes takes on psychology and psychotherapy in a marvelously readable, and thought-provoking book. He explores common beliefs and "understandings" within these fields and reveals that the emperor is wearing no clothes. For example, he shows that Rorschach tests are nonsense; that greater clinical experience has nothing to do with being a better therapist; statistical analysis is a better indicator of a person's future behavior than clinical expertise; and, how fraudulent claims of psychologists in court pose a real threat to the justice system. Simply because of the style in which it is written, it is a worthwhile read.

7. Color Atlas of Child Sexual Abuse
David L. Chadwick, Carol D. Berkowitz, David Kerns, John McCann, Michael A. Reinhart, and Sylvia Strickland
Copyright 1989 by Year Book Medical Publishers, Inc.

Very simply, if you handle CSA cases and have never seen color pictures of the ano-genital areas of children who have, and have not, been abused, then how would you know what to look for if, in your next case, you received such photographs in discovery? How would you know if the state's expert actually saw something that was indicative of abuse or if she saw something that was common to non-abused children? The fact is, you wouldn't. Therefore, this reference tool should be in every library.

The authors break down their Atlas into four sections. The first is just the techniques of conducting physical examinations of the children. The second section shows normal findings. The third section illustrates positive findings from non-sexual sources. The fourth section depicts findings that commonly result from sexual abuse. The differences are important and can mean the difference between jail and freedom for our clients.

8. Child Abuse: A Quick Reference for Healthcare Professionals, Social Services, and Law Enforcement
James A. Monteleone, M.D.
Copyright 1998 by G.W. Medical Publishing, Inc.

This volume is also a quick reference for us in defending allegations of abuse. This work does not limit itself to sexual abuse, but deals pictorially with physical abuse of all kinds, as well. It shows us what the “other side” is looking for when it is looking for signs of abuse. We are well advised to remember that abuse does occur; with some regularity. We need to remember that when abuse does occur it has a face and fingerprints. This book can help us to identify the faces and the prints.

It is important to remember that the above-described cases and books do not constitute an exhaustive list. This is not a “laundry list” of reading which guarantees that counsel will be effective. We have an obligation to constantly update ourselves in order to provide the highest quality defense we can for our clients. There are many other cases and volumes that I have not dealt with in this article. Perhaps I will be able to update this list in the future. Perhaps, readers will be able to do that themselves after reading some of the works, above, and there will be no need for me to do so. In either case, we can all become better “trial artists” by taking the time to improve ourselves.