

A Cure for a Non-problem

It is to understand whom counterintuitive behavior (delayed disclosure, piecemeal disclosure, etc.) actually applies to and why expert testimony is needed. **The focus on counterintuitive behavior is jurors' perceptions of how a victim should react, not the complaining witness's behaviors.** This distinction is potentially confusing but is a critical point. Pause for a moment to consider this point. At the start of voir dire the members state under oath they do not believe there are any standard reactions for a victim of sexual assault. Their questioning will often include specific aspects of the case, i.e.; delayed reporting, piece-meal disclosure, or continued positive relationship with the accused. If prosecution doesn't ask these specific questions in voir dire, defense should ask them. Members' sworn responses can be used to challenge the need for the CSA expert's testimony point during a Daubert challenge.

Regarding the member's sworn testimony in voir dire, Dr. Dutton states; "*Lay persons and potential jurors typically lack knowledge or have misconceptions concerning the characteristics of child sexual abuse victims, memory, and suggestibility.*"

Areas of Inquiry and Summary for Expert Testimony and Supporting Research Citations
Wendy A. Dutton, M.A., Ph.D., LPC, February 2022

Dr. Dutton cites two studies for justifying testimony by a counterintuitive expert: Cossins et al, 2009 and Quas et al., 2005. Let's take a look at these.

Children, Sexual Abuse and Suggestibility: What laypeople think they know and what the literature tells us.

Anne Cossins

Psychiatry, Psychology and Law. Volume 15 Number 1 2008, pp. 153-170.

Abstract:

This article summarizes the extensive research literature on laypeople's and jurors' beliefs about children's memory, suggestibility and responses to child sexual abuse. In particular, it discusses the extent and types of misconceptions held by laypeople/jurors, as well as the effects of age, education and gender on those misconceptions. The results from an analysis of mock jury studies where different types of expert testimony were presented are then considered in order to understand the types of expert testimony that would be admissible in courts in Australia, with a particular focus on the Uniform Evidence Act. As a result of this analysis, particular reform options are discussed and recommended in order to counter juror misconceptions in child sexual abuse trials.

It is important to note that the author is a lawyer, not a psychologist. Ms. Cossins describes her core beliefs:

Overall, the studies listed in Table 1 show that there are a number of key beliefs held by jurors and laypeople that have been consistently reported in the research literature over the last 10 – 15 years: (a) that children are easily manipulated into giving false reports of sexual abuse; (b) that retraction and inconsistencies are evidence of lying; (c) that abuse claims often prove to be false; and (d) that child sexual abuse can be detected by a medical examination. (pp. 156-157)

Who exactly decided these were false beliefs? It's interesting that an Australian legal advocate has decided that:

1. The volumes of research into suggestibility of children has no validity.

2. There is no need for the development and implementation of professional standards for forensic child interviews because children's reports can't be contaminated or manipulated.
3. Retraction of a report by a child is actually a sign that they were abused.
4. Inconsistencies in a child's report always means the child was actually abused.
5. Multiple research studies by scientists showing unproven and false rates of sexual abuse are irrelevant. Ironically Dr. Dutton relies upon a study for her testimony that demonstrates up to 55% of child sexual abuse claims are ultimately determined to be unfounded or false.

University of New South Wales's website describes Dr Annie Cossins as:

"an Associate Professor in Law at the Faculty of Law, University of New South Wales. She is the pre-eminent Australian expert on legal reform in the area of sexual assault and a scholar in theoretical criminology. She is presently the holder of an ARC Discovery Grant (along with J Delahunty) entitled: "Countering misconceptions in child sexual assault cases with expert evidence and judicial directions".

She is the founder and Convenor of the National Child Sexual Assault Reform Committee - a high-level committee which was comprised of all Directors of Public Prosecution, various District Court judges, academics, and Children's Commissioners (amongst others) which met annually for the past 8 years. A link to its discussion paper on reforms for the prosecution of child sex offences around Australia is available under Dr Cossins' publications.

Dr Cossins was also a member of the Criminal Justice and Sexual Offences Taskforce which was established by the NSW Attorney-General in 2004 after a submission by her and the NSW Rape Crisis Centre to the Attorney-General for the establishment of a taskforce to examine changes to the laws of evidence in NSW and the feasibility of specialist courts for sex offences in NSW. As a result of this Taskforce, a number of legislative changes were made to the substantive criminal law as well as procedural laws concerning the conduct of sexual assault trials in NSW.

She was a founding member of the NSW Working Party Concerning the Confidentiality of Sexual Assault Counsellors' Notes and the main author of submissions to the NSW Attorney-General's Department which were used as the basis for the introduction of s 126H, Evidence Act 1995 (NSW), the first sexual assault communications privilege enacted in Australia. She was also a member of the Child Protection Internet Taskforce, Ministry of Police, 2003-2004, a member of The Innocence Panel, (NSW Ministry for Police) between 2001-2003, a member of the Child Sexual Assault Jurisdiction Working Group on Practice and Procedure (NSW Attorney-General's Department) 2002, and a consultant to Parliament of New South Wales, Legislative Council, Standing Committee on Law and Justice, Inquiry into Child Sexual Assault Prosecutions in NSW, 2002. She was the only academic member of the Advisory Committee of the Australian Institute of Judicial Administration on a Guide to Children Giving Evidence and as a member of this committee, co-authored the first Australian benchbook on children's evidence, published by the AIJA. In 2005, she was nominated for the Law and Justice Foundation Justice Medal. She is a member of the board of the Centre for Gender Related Violence Studies at the University of New South Wales and is the Chair of the Advisory Committee of that Centre.

In 2010, she organised a group of judges and lawyers from Australia to visit the New York Sex Offenses Courts. In conjunction with the NY Center for Court Innovation, she

organised the tour with the aim of studying the rationale for these courts and all procedural and practical measures that were involved in their establishment. As a result of her written report, the Premier of NSW recently announced the establishment of a pilot specialist sex offences court for NSW.

She was appointed as a consultant to the Australian Law Reform Commission in 2010 to work on its family violence reference which resulted in the publication: ALRC and NSWLRC (2010) Family Violence - A National Legal Response (Final Report). Several of her recommendations were adopted in the report.

This Australian attorney is clearly an advocate for children with no semblance of neutrality. Her article lacks critical thinking for how her a priori assumptions might be wrong. She is offering advice for how courts in Australia and New Zealand should handle scientific matters about child abuse.

A review online (October 2022) shows that this article has only been cited 31 times since 2008, which suggests no mainstream acceptance in the scientific community. Should her perspective be allowed into the American judicial system to promote her belief that American jury members are ignorant about child sexual abuse issues and need to be “fixed”? This citation is ripe for a Daubert challenge.

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Let’s look at Dr. Dutton’s second citation – Quas (2005)

Do Jurors “Know” What Isn’t So About Child Witnesses?

Jodi A. Quas, William C. Thompson, and K. Alison Clarke-Stewart
Law and Human Behavior, Vol. 29, No. 4, August 2005
DOI: 10.1007/s10979-005-5523-8

Abstract:

Are expert witnesses needed in child sexual abuse cases to educate jurors about children’s memory, suggestibility, and reactions to abuse, or do jurors already know what such experts could tell them? To cast light on this question, we surveyed jurors and jury-eligible college students and compared their beliefs with what is known via scientific research regarding children’s memory and ability to testify, reactions to interrogation, and reactions to sexual abuse. We also asked participants to infer results of four widely cited studies of children’s suggestibility. Participants’ beliefs were consistent with findings from research on some issues (e.g., that children can be led to claim that false events occurred) but diverged from the scientific consensus on other issues (e.g., whether children can remember painful events in infancy). Similarly, participants sometimes overestimated and sometimes underestimated the level of suggestibility observed in empirical studies. Individual differences in accuracy were related to participants’ gender, education and ethnicity, and there was considerable disagreement among participants on many questions. Implications of findings for the admissibility of expert testimony in child abuse cases are discussed.

Here are some sections from their article:

Academic psychologists responded to this concern by conducting several hundred empirical studies on the accuracy of children’s memory, children’s suggestibility, and variables that influence the reliability and completeness of children’s statements about

their experiences (see Bruck, Ceci, & Hembrooke, 2002; Quas, Goodman, Ghetti, & Redlich, 2000, for reviews). This large body of research has greatly advanced scientific knowledge and has produced consensus among experts on a number of key issues (Ceci & Bruck, 1993; Kovera & Borgida, 1997; Morison & Greene, 1992). However, decisions about whether to believe children are often made by individuals unfamiliar with the scientific literature, most often jurors chosen to be representative of the community. A critical question thus concerns whether jurors have adequate knowledge of children's memory, suggestibility, and eyewitness abilities to make good decisions, or whether it would be helpful to inform jurors, through expert testimony, about results of scientific studies on children's reliability as witnesses. (pp. 425-426)

It appears that prosecutors were the first to present social framework testimony about children's reliability as witnesses (Cacciola, 1986; McCord, 1986; Myers et al., 1989; Morison & Greene, 1992; Roe, 1985; Summit, 1983). This testimony was designed to bolster children's credibility by rebutting certain misconceptions about children that, it was feared, jurors might hold; for example, that children have difficulty distinguishing fact from fantasy, that delays in reporting signal unreliable claims, and that truthful claims are never recanted. Several legal scholars (Myers, 1993; Myers et al., 1989; Roe, 1985) advocated the use of such expert testimony to inform jurors about psychological studies indicating that children above 3 or 4 years of age are capable of distinguishing fact from fantasy (e.g., Johnson & Foley, 1984), are not unduly suggestible (e.g., Brigham, Van Verst, & Bothwell, 1981; Rudy & Goodman, 1991), often delay reporting abuse (e.g., Kellogg & Huston, 1995; Elliot & Briere, 1994), sometimes recant truthful charges (e.g., Elliot & Briere, 1994; Gordon & Jaudes, 1996), and are capable of providing accurate accounts of salient, personal experiences (e.g., Fivush, Hudson, & Nelson, 1984; Saywitz, Goodman, Nicholas, & Moan, 1991).

This type of expert testimony sparked some criticism (e.g., Cirelli, 1991; Flint, 1995). Some commentators suggested that the testimony failed to meet conventional standards for the admissibility of scientific evidence (Levy, 1989) and that partisan experts overstated the evidence (Underwager & Wakefield, 1992). For example, Levy (1989) complained of prosecution experts who were "fiercely committed to the role of children's advocate, devoted to preferring child protection to any other value" (p. 427).

During the 1990s, a new wave of studies emerged that focused on children's reactions to suggestive interview techniques (e.g., Ceci, Loftus, Leichtman, & Bruck, 1994; Poole & Lindsay, 1995; Thompson, Clarke-Stewart, & Lepore, 1997). These studies clearly demonstrated that children's accounts of events can be radically altered through the use of highly suggestive interrogation practices. In conjunction with these new studies, defense attorneys began presenting expert testimony to help jurors evaluate the credibility of children who had been (or might have been) interviewed in a suggestive manner. Thus, social framework testimony about children's accuracy was no longer exclusively the tool of prosecutors seeking to bolster children's accounts - it began to be used by defense lawyers to challenge children's statements. This development also sparked controversy. . . The second issue, which is addressed here, concerned whether testimony about the studies is helpful to jurors. Lyon argued that the evidence gleaned from the studies is unnecessary, basing this argument on results of a few surveys of individuals' attitudes that suggest they already believe that young children are prone to false reports, and thus expert testimony unfairly stokes the skepticism of jurors who already distrust children's claims. Ceci and Friedman argued that the studies and psychological research in general provide important

insights that go beyond jurors' conventional wisdom regarding children's suggestibility. Because prior surveys have only included a few items relevant to children's disclosure of abuse, and no surveys have examined, in a comprehensive manner, what jurors believe concerning children's memory, suggestibility, reactions to and disclosure of abuse, it has not been possible to resolve the debate. (pp. 427-428)

Our descriptive analysis reveals both accuracies and inaccuracies in participants' knowledge. There were no statements that were responded to correctly by all participants. Yet, respondents demonstrated considerable accuracy in (a) their understanding of children's general memory abilities (e.g., that children can recount single and repeated events accurately and can remember events well enough to be reliable witnesses), (b) their beliefs about child suggestibility (e.g., that children can be led by an adult into reporting entirely false events, including alleged sexual abuse), and (c) their understanding of how child sexual abuse is disclosed (e.g., that disclosures may be delayed, retracted and inconsistent over time). At least two thirds of the participants gave responses indicating that they held accurate beliefs about these issues. At the same time, a substantial number of participants (more than half) lacked accurate knowledge regarding (a) infantile amnesia—children's inability to remember events from infancy, (b) which interview tactics are more or less likely to lead to errors (e.g., direct or leading questions vs. open-ended questions, asking children to demonstrate "bad things" that happened with dolls vs. neutral naming of body parts with the assistance of dolls), (c) limitations in professionals' abilities to detect abuse and memory inaccuracies, (d) symptoms of child abuse (e.g., that most abused children do not display bizarre sexualized behavior), and (e) the fact that children may actually believe the false events they describe and can describe and make up stories about sexual acts without having experienced them. One function of an expert witness might be to reduce the variability in jurors' knowledge of all these issues and to provide empirically based information about the latter issues in particular.

Despite the need for further research assessing both experts' perceptions and the generalizability of our findings, what can we tentatively conclude from our study? Do jurors already have requisite knowledge regarding children's memory, eyewitness abilities, and disclosure of abuse, or are jurors overly skeptical? Our results do not suggest a simple answer. Instead, the study revealed considerable variability in individuals' knowledge about children's eyewitness abilities and reactions to abuse and indicated that individuals possess both accurate and inaccurate beliefs. A critical and much needed role for experts is to reduce this variability and correct the misperceptions of a majority (or a large minority) of jurors. Indeed, Ceci and Friedman (2000) highlighted that, as long as a sizable minority of jurors hold incorrect beliefs, expert testimony is important in juror education. Our findings reveal that, even when a majority of individuals held correct beliefs, a large minority did not. Of importance, however, experts need to go beyond simply stating that children can be misled to make false claims of abuse and explain the conditions under which children are more (and less) likely to err. This point was made by Lyon (2002) who noted that experts' testimony may be useful in providing insight into specific research findings concerning the reliability of children's testimony that are not well understood by laypersons. Overall then, the knowledge provided by experts could reduce both unwarranted skepticism and naive trust in children's claims of sexual abuse. (p. 452)

Observations by Dr. Simpson

The Quas article is a much more scholarly and objective exploration of jurors' understanding about child suggestibility as compared to the advocacy article by Cossins

(2009). A review online (October 2022) shows that the Quas article has been cited 171 times since 2005. It is more accepted in the scientific community (as compared to Cossins).

Notice the Quas article is narrowly tailored to address the topic of suggestibility in children and whether experts should provide education to members. It does not recommend counterintuitive testimony about a myriad of other topics. Now mind you, the foundation for introducing other topics of testimony might be found elsewhere. But it is not to be found in these two articles. What is the justification for introducing a counterintuitive expert to educate on topics the members have already sworn under oath is not problematic? Be sure to review the abstracts of similar research on the next page.

Finally, Quas, et al. make an interesting observation.

... the surveys were conducted in the 1980s and 1990s. Empirical research on children's suggestibility has increased exponentially in the past decade. It is not known as to whether jurors' knowledge has changed since this new scientific evidence has been collected and disseminated. (p. 430)

It has been almost two decades since Quas noted the exponential increase in research on children's suggestibility. How might the information the typical juror has now be different in the age of the Internet, social media, and the "Me too" movement?

The Bottom Line:

If members have already said they do not have any preconceived notions for how a child victim of sexual abuse should react, why is testimony needed to correct non-existent preconceived notions? Are the members lying under oath? Why is a cure needed for a non-problem? What fact of consequence does a cold expert's testimony make more-or-less probable where the expert is not testifying about the complainant specifically, and the members have already agreed all victims might react differently to an assault?

Here's how your questioning of the CIB expert **in Daubert** might look like (you're not allowed to discuss voir dire during the trial phase).

Q: Dr. Smith, assume the jury members have sworn under oath they have no preconceived notions for how a child might behave, remember or report in reaction to suspected sexual abuse.

A: Okay

Q: How might that change the necessity for your testimony today?

A: I don't know.

Q: Okay. Well do you believe some of the members of this jury were lying under oath when they said they did not have any preconceived notions for a child's reactions, recall or disclosure?

A: Well, no.

Q: Can you point out which jury members you think are lying about this?

Remember that an expert might be there to rebut the other side's expert. So that might be their legitimate response on cross.

Don't underestimate this point for *Daubert* or on cross in the trial phase.

Additional Research on Expert Testimony in Child Sexual Abuse Cases

A judicial dilemma: Expert witness testimony in child sex abuse cases.

Mason, Mary A.

Journal of Psychiatry & Law, Vol 19(3-4), Fal-Win 1991. pp. 185-219.

Abstract:

Examined the content of 122 appellate court decisions in which expert witness testimony on the characteristics of sexually abused children was challenged. Most courts were willing to admit testimony regarding the characteristics of sexually abused children, particularly on rebuttal. Few of the courts questioned the content or the scientific basis of the testimony, and even fewer questioned the credentials of the experts or their relationship with the child. It is suggested that expert testimony directed to the capabilities of child witnesses, rather than to the credibility of a particular child, may be more helpful to the court system.

The prosecution's use of social science expert testimony in child sexual abuse cases: National trends and recommendations.

Bulkley, Josephine A.

Journal of Child Sexual Abuse: Research, Treatment, & Program Innovations for Victims, Survivors, & Offenders, Vol 1(2), 1992. pp. 75-95.

Abstract:

Six categories of social science expert testimony presented by the prosecution regarding behaviors of child sexual abuse (CSA) victims are described and analyzed in relation to national case law trends. Problems with the admissibility of several forms of such testimony are discussed in terms of legal requirements for expert testimony, prior knowledge of the issues held by jurors, reliability of the social science research regarding CSA, and the prejudicial impact on jurors. Recommendations are made to limit the use of most forms of testimony (except rehabilitative testimony) and to convene a multidisciplinary symposium.

Expert testimony regarding child sexual abuse.

Myers, John E.

Child Abuse & Neglect, Vol 17(1), Jan-Feb, 1993. Special Issue: Clinical recognition of sexually abused children. pp. 175-185.

Abstract:

Discusses legal issues relating to expert testimony in child sexual abuse cases, including (1) when expert testimony is permitted, (2) qualifications of expert witnesses on child sexual abuse, (3) permissible bases supporting expert testimony, (4) expert testimony on ultimate factual and legal issues, (5) the reasonable certainty standard of expert testimony, (6) the inappropriateness of equating clinical decision making with the legal degrees of proof, and (7) application of the doctrine of res judicata in litigation regarding child sexual abuse in family court. The article also provides a summary of contemporary case law regarding expert testimony offered in child sexual abuse litigation. (

Doing justice and doing good: Conflicts for mental health professionals.

Melton, Gary B.

The Future of Children, Vol 4(2), Sum-Fal 1994. pp. 102-118.

Abstract:

The primary role of mental health professionals in cases of child abuse should be to treat the victims and the offenders. Currently, however, mental health professionals are often involved in the investigation and adjudication of child sexual abuse claims. This article

discusses the conceptual and practical conflicts this involvement creates with the mental health professional's therapeutic role. The author concludes that mental health professionals should not be involved in investigating child sexual abuse cases. Furthermore, he contends that mental health testimony about the victim should never be allowed during the adjudication stage and that mental health testimony about the defendant should be allowed only if the defendant puts his character into question. The scientific knowledge base for such testimony is very limited, and the testimony is likely to be more misleading and prejudicial than helpful. Mental health professionals, however, could appropriately help children and adults prepare for legal proceedings and facilitate mediation.

Expert testimony in child sexual abuse cases: Effects of expert evidence type and cross-examination.

Kovera, Margaret Bull, et al.

Law and Human Behavior, Vol 18(6), Dec, 1994. pp. 653-674.

Abstract:

Examined the effects of varying the type of expert testimony, the strength of an expert witness's cross-examination (CE), and gender on 161 undergraduates' (aged 18–47 yrs) perceptions of the expert, the alleged victim, and the defendant in a child sexual abuse (CSA) trial. Ss viewed a control version of the trial (no expert testimony) or 1 of 6 versions containing expert testimony about CSA accommodation syndrome, witness credibility, or anatomically detailed dolls. Ss then completed a questionnaire in which they rendered a verdict, answered recall questions, and evaluated aspects of the trial. Ss who heard any type of expert testimony were more likely to convict the defendant and had better recall for the judge's instructions. Doll and witness credibility evidence were more influential than syndromal evidence, while the strength of CE of the expert influenced few judgments. Women were more likely than men to have a pro-prosecution orientation.

Scientific Expert Testimony in CSA Cases: Legal, Ethical, and Scientific Considerations.

Gratz, Kim L. and Orsillo, Susan M.

Clinical Psychology: Science and Practice, Vol 10(3), Fal 2003. pp. 358-363.

Abstract:

We strongly agree with T. P. Sbraga and W. O'Donohue (see record 2003-07528-007) that the science and ethics of clinical psychology, as well as the legal standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), prohibit testifying that a child has been sexually abused based on the child's postabuse psychological functioning. Moreover, based on a review of the literature, we argue that it is highly unlikely that a symptom marker of childhood sexual abuse (CSA) will ever emerge that could be used in court to prove a history of childhood abuse. In light of the current status of literature on CSA, we offer some practical suggestions and guidelines for practitioners who accept the role of expert witness in this area.

A comparison of expert evidence and judicial directions to counter misconceptions in child sexual abuse trials.

Goodman-Delahunty, Jane, Cossins, Anne, and O'Brien, Kate

Australian and New Zealand Journal of Criminology, Vol 44(2), Aug, 2011. pp. 196-217.

Abstract:

Studies on the influence of expert evidence and judicial instructions in child sexual abuse (CSA) cases have produced mixed outcomes. Using repeated measures, we tested the effectiveness of expert evidence and judicial directions in challenging common

misconceptions about children's memory and responses to sexual abuse. A CSA Misconceptions Questionnaire was administered to 118 psychology undergraduates who later served as virtual jurors in a simulated criminal trial. Specialized CSA knowledge was provided by a psychologist or via judicial directions. Expert evidence had two levels: clinical versus scientific testimony. Timing of judicial instructions had two levels: directions presented before the child testified versus during the judge's summing up. In a fifth control condition, no specialized CSA information was included. After reading a trial transcript, mock-jurors assessed witness credibility, rendered verdicts and again completed the CSA Misconceptions Questionnaire. All four interventions significantly increased jurors' CSA knowledge. The more they knew, the more likely they were to convict. Perceived victim credibility fully mediated the effect of CSA knowledge on verdict: information presented via expert testimony or judicial directions enhanced perceptions of victim credibility, which in turn increased convictions. Conviction rates were significantly higher in response to expert testimony from a clinical psychologist and a judicial instruction provided in the trial summation. These results are promising for courts and policy-makers grappling with low conviction rates in CSA jury trials.

Expert testimony in a child sex abuse case: Translating memory development research.

Bruck, Maggie and Ceci, Stephen J.

Memory, Vol 21(5), Jul, 2013. Special Issue: Memory and The Law: Case Studies. pp. 556-565.

Abstract:

In this paper we describe a custody case that centred on allegations of child sexual abuse. A pair of preschool-aged sisters accused their biological father of various sexual acts, though their allegations were made under problematic conditions and were contradicted by other statements they made. In an affidavit written by one of us (MB), we describe the relevant memory development research in the course of presenting the court with a scientific analysis. We find compelling evidence of multiple risk factors in the way the daughters' recollections were elicited. Although the 'ultimate question' of guilt is beyond our purview, our identification of risks was instrumental in the legal system's decision that the children's allegations were not valid. We put this analysis forward as an example of evidence-based testimony in which scientific findings from the memory literature can be used to frame an expert's analysis.