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Taint Hearing: Scientific And Legal Underpinnings

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Federal Rule of Evidence 602 and the corresponding state rules require that a witness must testify from personal knowledge. If witnesses are unable to testify from personal knowledge because their memories have been altered or manipulated, they are said to be tainted.[1] These tainted witnesses are not competent to testify at trial.

More often than not, the alleged victim in a child sexual abuse case has been questioned repeatedly by several authority figures in different settings. These authority figures may include anxious parents and other adult family members, schoolteachers, forensic interviewers, police officials, and social worker therapists. There is reasonable concern that the child witness's memory of events has been tainted by the questioning, interviewing, or counseling such that the witness is not competent under the rules of evidence. In this circumstance, a taint hearing is needed to ascertain whether the proposed witness is competent to testify from personal knowledge.

The focus of a taint hearing is on the manner in which the child witness has been questioned and the impact of this questioning on the witness's knowledge of events. By filing a motion for a taint hearing, the defense essentially asks a trial judge to consider whether the questioning or interviewing techniques employed by the investigators, counselors, parents, and others undermined the reliability of an alleged child victim's knowledge of events and subsequent statements. The defense asks a trial judge to determine whether the child witness is competent to make statements reflective of personal knowledge at all. An understanding of whether the questioning, interviews, interrogation or counseling of the child witness was unduly suggestive requires a highly nuanced inquiry into the atmosphere and demeanor surrounding verbal interactions between the child and adults.[2]

The Scientific Basis for Taint Hearings

Any witness, especially a child, is susceptible to influence through coercive, suggestive, or even apparently benign questioning. There is a constantly broadening body of scholarly authority existing on the question of children's memory and interrogation.[3] The expanse of that literature encompasses a variety of views and conclusions. Among the varying perspectives, however, there is a consistent and recurring concern over the capacity of the interviewer and the interview

process to distort the recollection of a child witness.[4] Many interview practices are sufficiently suggestive or coercive to alter irremediably the perceptions of child witnesses.

There are many other scientific and psychological propositions that courts have addressed in analogous contexts, including (1) the availability of battered women's syndrome as self-defense in criminal cases, (2) the determination of the reliability of hypnotically refreshed testimony, and (3) the consideration of testimony at pretrial hearings regarding taint.[5]

The notion that a child witness is peculiarly susceptible to influence, while comporting with our intuition and common experience, is in fact an extensively well-researched topic. In this regard, courts across the nation are recognizing this phenomenon and are taking concerted action to ascertain children's evidentiary competency.[6]

The broad question of whether children as a class are more susceptible to suggestion than adults is one that has been definitively answered in psychological research.[7] But this inquiry — vis-à-vis a taint hearing — is more focused. The issue a trial judge must determine is whether the interviewing, questioning and counseling techniques used with the child witness were so suggestive that they had the capacity to substantially alter the child's recollections of events and thus compromise the reliability of the child's personal knowledge.

That an investigatory interview or counseling of a young child can be suggestive and thus shape the child witness's recollection and responses has been generally accepted in the scientific community.[8]

A wide consensus exists among experts, scholars, and practitioners concerning questioning and interrogation techniques with children. This research indicates that the factors listed below can undermine the neutrality of an interview and create undue suggestiveness.

- Lack of investigatory independence
- Pursuit by the interviewer of a preconceived notion of what happened
- Lack of control for outside influences on the child's statements
- Lack of control for cooperative conversationalist effects
- Lack of control for source monitoring failures
- Use of leading questions
- Use of repeated questions[9]

The explicit vilification or criticism of the person charged with wrongdoing is another factor that can induce a child to believe inaccurately. Similarly, an interviewer's bias with respect to a suspected person's guilt or innocence can have a marked effect on the accuracy of a child's recall of events. The transmission of suggestion can also be subtly communicated to children through more obvious methods such as the interviewer or counselor's tone of voice, mild threats, praise, cajoling, bribes and rewards, as well as resort to peer pressure.

Scientific Case Studies

Mousetrap Study

Stephen J. Ceci of Cornell University and other researchers[11] examined how reinterviewing children can alter their recollection of events. For 10 consecutive weeks, preschool children were individually interviewed by a trained adult. During each brief interview, the interviewer would play cards with the child and ask: “Do you remember going to the hospital with a mousetrap on your finger?” After 10 weeks of thinking about both real and fictitious events, the preschool children were interviewed by a new adult who simply said: “Tell me if this ever happened to you. Did you ever get your finger caught in a mousetrap and have to go to the hospital to get the trap off?” Fifty-eight percent of the preschool children produced false narratives. Further, the elaborateness of their narratives by the final week astounded the experimenters. When pressed, the experimenters offered this hypothesis: “We think that these children are so believable because at least some of them have come to believe these false stories themselves.”

When the ABC news program 20/20 reported the research results, John Stossel, the 20/20 correspondent, met with one of the parents and her four-year-old son. Responding to their ethical obligations, the researchers explained to the children that the mousetrap event had never occurred. The mom said that her son initially refused to accept this debriefing. When Stossel challenged him — asking if it was not the case that his parents had already explained that this event never happened — the child protested. “But it really did happen. I remember it!”[12]

'Chester' Study

Goodman and Clarke-Stewart[13] describe a study conducted by Clarke-Stewart, Thompson, and Lenore[14] with five- and six-year-old children. The children interacted with a confederate named “Chester” who posed as the janitor and followed one of two scripts. In both scripts, Chester cleaned a classroom. Following this, in one script Chester cleaned various toys, including a doll. In the other script, Chester handled the doll roughly and suggestively.

Each child was then questioned about the event by an interviewer who was either (1) accusatory in tone, saying Chester had been inappropriately playing with the toys instead of cleaning; (2) exculpatory in tone, suggesting that Chester was just cleaning the toys and not playing; or (3) neutral and nonsuggestive. Each child was then questioned a second time by an interviewer who either reinforced or contradicted the first interviewer.

In response to neutral interviews, the children reported accurate information. When interviewers suggested inaccurate scenarios (whether accusatory or exculpatory), the children’s stories quickly conformed to the interviewer’s suggestions. At the end of the first interviews, 75 percent of the children’s stories about Chester were consistent with the interviewer’s suggestions. By the end of the second interview, 90 percent of the children complied with at least some of the interviewer’s suggestions. When the second interview was contradictory to the first, most children changed their answers to conform to the second interview.

Research undertaken by Ceci, Ross, and Toglia[15] yielded similar results. They found that children are very susceptible to modifying their story based upon suggestions made by an adult after an event has taken place. They also found that children are susceptible to suggestions by older children.

'Sam Stone' Study

Leichtman and Ceci[16] reported an experiment with a character named “Sam Stone.” Sam Stone was described to three- to six-year-olds over a one-month period as someone who was clumsy and who broke things that belonged to others. After this stereotype-induction period, Sam Stone visited the children’s nursery school where he spent two minutes amiably interacting with the children during story time. He did not behave clumsily or break anything.

The day after the visit, very few children accused “Sam Stone” of being the culprit responsible for a book being ripped or a teddy bear soiled. But, after a series of leading questions where the children were interviewed once a week for two minutes over a 10-week period, 72 percent of the children said “Sam Stone” had ruined at least one of the items. When explicitly asked, 44 percent of the three- and four-year-olds said they had actually seen him do these things.

Petit, Fagan, and Howie[17] examined how an interviewer’s information about events affected their style of questioning and the accuracy of three- to five-year-old children’s reports. The children participated in a staged event in their school and were later interviewed about it. Three sets of interviewers were used. The first set of interviewers was given full and accurate details about the staged event, the second set was given inaccurate information about the staged event, and the third set was given no information about the staged event at all.

All of the interviewers were told to question each child until they found out what had happened, but were cautioned against the use of leading questions. On average, the children were asked 50 questions each in 20- to 30-minute interviews. In this way, the children were put under a great deal of pressure to provide information.

Petit and the team found that, despite the cautions to avoid leading questions, 30 percent of all the questions were leading and 50 percent of these were frankly misleading. Interviewers with no information at all asked a greater amount of leading and misleading questions. As their interviews wore on, they obtained progressively increasing levels of inaccurate information from the children. Interviewers with inaccurate information asked four to five times as many misleading questions as the other interviewers. Children who were questioned by the misinformed interviewers provided the most inaccurate information. Across all groups, the children agreed with 41 percent of the misleading questions.

The Legal Basis for Taint Hearings

The legal basis behind a taint hearing is to determine whether the questioning, interrogation, and counseling utilized with a child witness undermined her ability to know and understand the allegedly abusive events. If, as the research and scientific literature clearly demonstrate, the

child's sense of what occurred has been tainted by adult questioning, interrogation and counseling, then any statement the child may make cannot be grounded in personal knowledge.

There is a great deal of jurisprudential precedent describing the deleterious effects of improper questioning, interrogation, or counseling on a child witness's memory. Many courts have recognized that once tainted, the distortion of the child's memory is irremediable.

Once this tainting of memory has occurred, the problem is irremediable. That memory is, from then on, as real to the child as any other.[18]

Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.[19]

[When] … a child's recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events.[20]

The debilitating effects of improper questioning, interrogation, and counseling have an even more pronounced effect on younger children.[21]

The conclusion that improper questioning, interrogation, or counseling generates a significant risk of tainting the memories of young children is confirmed by government and law enforcement agencies. Some of these agencies have adopted standards for conducting interviews designed to overcome the dangers of improper questioning, interrogation and counseling children. The National Center for the Prosecution of Child Abuse — in cooperation with the National District Attorneys Association and the American Prosecutors Research Institute — has adopted protocols detailing standards for the proper questioning, interrogation, and counseling of suspected child abuse witnesses. Those interview guidelines require that an interviewer remain "open, neutral, and objective."[22]

The prosecutor's research group recommends that interviewers (1) avoid asking leading questions, (2) never threaten a child, (3) avoid forcing a reluctant child to talk, (4) avoid telling a child what others, especially other children, have reported, and (5) avoid multiple interviews with various interviewers.

It is informative to note the way in which American law has developed in this regard. In Idaho v. Wright,[23] the U.S. Supreme Court noted with approval the conclusion of the Idaho Supreme Court that the failure to videotape interviews with alleged child victims made the interviews suspect. The Idaho court went on to point to the use of leading questions, and the presence of an interviewer with a preconceived idea of what the child should be disclosing, as indicative of tainted processes. Finally, the Court wrote that these phenomena, in addition to children's susceptibility to suggestive questioning, all indicated the strong potential for creating unreliable information.

In People v. Meeboer,[24] the Michigan Supreme Court analyzed a situation involving proposed hearsay from a young declarant. The Meeboer court determined that such hearsay must be

analyzed "with more precision because of the young age of the declarant."[25] The Meeboer court went on to describe an inquiry into interviewer and family influences and specified stringent criterion for inquiry and admissibility.

In Lloyd v. State,[26] the Florida Supreme Court determined that the standard for competency of a child witness is that the competence of a child witness to testify is measured by his or her intelligence, rather than by age, and by whether the child possesses a sense of the obligation to tell the truth. In making this determination, the court should consider (1) whether the witness has sufficient intelligence to receive a just impression of the events observed; (2) whether the witness has sufficient capacity to relate them correctly; and (3) whether the witness appreciates the need to tell the truth.

The Supreme Court of Nevada, in Felix v. State of Nevada,[27] reversed the conviction of Martha Helen Felix following an inquiry into the personal knowledge of a child witness. In State v. Huss,[28] the Minnesota Supreme Court conducted an inquiry into the personal knowledge of a child witness. The Huss court concluded that the use of suggestive methodology by a therapist completely undermined that child's capacity for unaltered personal knowledge of events.

In New Jersey v. Michaels,[29] the New Jersey Supreme Court reversed the conviction of a woman wrongly imprisoned for mass child abuse and instructed that in these situations taint hearings are a must. The Michaels court reasoned that "assessing reliability as a predicate to the admission of in-court testimony is a somewhat extraordinary step. Nevertheless, it is not unprecedented."[30]

The Michaels court went on to say that "to ensure defendant's right to a fair trial a pretrial taint hearing is essential to demonstrate the reliability of the resultant evidence."[31]

Responding to an extensive review of the conduct of therapists, interviewers, and police investigators by its court of appeals, the New Jersey Supreme Court in the Michaels case found:

A lack of objectivity also was indicated by the interviewer's failure to pursue any alternative hypothesis that might contradict an assumption of defendant's guilt, and a failure to challenge or probe seemingly outlandish statements made by the children. The record is replete with instances in which children were asked blatantly leading questions that furnished information the children themselves had not mentioned.[32]

It is the trial judge's responsibility to ensure that evidence admitted at trial is sufficiently reliable so as to aid the finder of fact. Obviously, our judicial system desires that only reliable evidence aids the trier of fact to draw ultimate conclusions of guilt or innocence. Reliability is the linchpin for determining admissibility of evidence under the fairness standard required by the Due Process Clause of the Fourteenth Amendment.[33] Competent and reliable evidence is the foundation of a fair trial; and therefore, competent and reliable evidence must be the basis upon which the fact finder determines the truth. If inculpatory evidence is obtained from unreliable sources, due process interests are at risk.

Reliability assessments with respect to the admissibility of out-of-court statements are commonplace. When faced with extraordinary situations in which police or prosecutorial

conduct has thrown the integrity of the judicial process into question, our courts have not hesitated to use the procedural protection of a pretrial hearing. This is most important to cleanse a potential prosecution of a tainted recollection. Seeing this as a predicate to any inquiry about the admission of in-court testimony is a recent phenomenon that has arisen in light of the scientific research.[34]

The law governing the admissibility of eyewitness identification testimony provides a helpful perspective in addressing the concerns at issue here. The U.S. Supreme Court has insisted that a pretrial hearing be held to determine the reliability and admissibility of proffered in-court testimony based on suggestive identification.[35] Like the investigatory interview in cases involving children, a pretrial identification procedure can be a critical moment in the course of a criminal prosecution.[36]

In a taint hearing inquiry, pretrial events relate not to the identification of an offender, but more crucially, to the occurrence of the offense itself. Those pretrial events — questioning, investigatory interviews, and suggestive counseling — are fraught with the elements of untoward suggestiveness and the danger of unreliable evidentiary results. To ensure the defendant's right to a fair trial, a pretrial taint hearing is essential to demonstrate the reliability of the resultant evidence.

Procedural Issues in Pretrial Taint Hearings

The basic issue to be addressed at a taint hearing is whether the pretrial events — the questions, investigatory interviews, interrogations and suggestive counseling — were so suggestive that they give rise to a substantial likelihood of irreparably mistaken or false recollection of material facts bearing on the defendant's culpability.

Consonant with the presumption that child witnesses are to be presumed no more or less reliable than any other class of witnesses, the initial burden to trigger a pretrial taint hearing is on the accused.[37] The defendant must make a showing of "some evidence" that the alleged witness's statements were the product of suggestive or coercive questioning, interviewing, or counseling techniques.

Through citation to the scientific literature, the law of pretrial taint hearings and, if necessary, additional expert testimony, the defense may meet that threshold. If the threshold is met, a trial judge has more than enough evidence to justify a taint hearing.

Procedurally, the prosecution proffering the child witness should then be made to prove, by clear and convincing evidence, that the statements and testimony elicited by the questioning, interviewing, interrogation, and suggestive counseling techniques nonetheless retain a sufficient degree of reliability to warrant admission at trial. Then, and only then, can the trial court safeguard the fairness of a defendant's trial. If proper testimony of the child survives the pretrial hearing, the trier of fact will have to determine the credibility and the weight to be assigned to such testimony.

Notes

1. For an excellent explication of the issue of competence, personal knowledge and taint, see LORANDOS & CAMPBELL, BENCHBOOK IN THE BEHAVIORAL SCIENCES 143-146 (2005).
2. See, e.g., Holden v. State, 202 Ga. App. 558, 562, 414 S.E.2d 910, 914 (1992).
3. Barlow v. State, 270 Ga. 54, 507 S.E.2d 416, 418 (Ga. 1998) ("Child sexual abuse cases are a special lot. A major distinguishing aspect of a child sexual abuse case is how the victim came to relate the facts which led to the bringing of criminal charges.").
4. See CHILDREN'S EYEWITNESS MEMORY (Ceci, Toglia & Ross eds., 1987); PERSPECTIVES ON CHILDREN'S TESTIMONY, (Ceci, Ross & Toglia eds., 1989); THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS (John Doris ed., 1991); CECI & BRUCK, JEOPARDY IN THE COURTROOM — A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY (1996); and T. CAMPBELL, SMOKE AND MIRRORS: THE DEVASTATING EFFECT OF FALSE SEXUAL ABUSE CLAIMS (1998).
5. Pickle v. State 280 Ga. App. 821, 824 (Ga. Ct. App. 2006); Hall v. State 261 Ga. App. 64, 68 (Ga. Ct. App. 2003); Gilbert v. California, 388 U.S. 263 (1967).
6. See Pyron v. State, 237 Ga. App. 198, 199, 514 S.E.2d 51, 52 (Ga. Ct. App. 1999); People v. Meeboer; 439 Mich. 310, 324-325; 484 N.W.2d 621 (Mich. 1992); State v. Huss, 506 N.W.2d 290 (Minn. 1993); Felix v. State of Nevada, 849 P.2d 220 (Nev. 1993); New Jersey v. Michaels, 136 N.J. 299, 642 A.2d 1372 (N.J. 1994).
7. See note 3, supra.
8. See Goodman & Helgeson, Child Sexual Assault: Children's Memory and the Law, 40 U. MIAMI L. REV. 181 (1985); Myers, The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment, 18 PAC. L.J. 801 889 (1987); Younts, Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions, 41 DUKE L.J. 691 (1991).
9. See Lorandos & Campbell, Myths and Realities of Sexual Abuse Evaluation & Diagnosis: A Call for Judicial Guidelines, 7 ISSUES IN CHILD ABUSE ACCUSATIONS 1 (1995).
10. Poole & White, Effects of Question Repetition on Eyewitness Testimony of Children and Adults, 27 DEVELOPMENTAL PSYCHOL. 975 (1991); D. Poole & M. Lamb, INVESTIGATIVE INTERVIEWS WITH CHILDREN (1999).
11. Ceci, Crotteau-Huffman, Smith & Loftus, Repeatedly Thinking About Non-Events, 3 CONSCIOUSNESS & COGNITION 388-407 (1994).
12. CECI & BRUCK, JEOPARDY IN THE COURTROOM — A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 218-220 (1996).
13. G.S. Goodman & A. Clarke-Stewart, Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations, in THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS: IMPLICATIONS FOR EYEWITNESS TESTIMONY 92–105 (J. Doris ed., 1991).
14. A. Clarke-Stewart, W. Thompson & S. Lenore, Manipulating Children's Interpretations Through Interrogation, Presented at the Biennial Meeting of the Society for Research in Child Development (April 1989).

15. S.J. Ceci, D.F. Ross & M. Toglia, Suggestibility of Children's Memory: Psycholegal Implications, 116 J. EXPERIMENTAL PSYCH.: GEN. 38–49 (1987); S.J. Ceci, D.F. Ross & M. Toglia, Age Differences in Suggestibility: Narrowing the Uncertainties, in CHILDREN'S EYEWITNESS MEMORY 79-91 (S.J. Ceci, M.P. Toglia & D.F. Ross eds., 1987).
16. M. Leichtman & S. Ceci, The Effects of Stereotypes and Suggestions on Preschoolers' Reports, 31 DEVELOPMENTAL PSYCHOL. 568-578 (1995).
17. Petit, Fagan & Howie, Interviewer Effects on Children's Testimony, Paper Presented at the International Congress on Child Abuse and Neglect (September 1990), cited in S.J. Ceci, & M. Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 PSYCHOL. BULL. 403, 421-422 (1993).
18. State v. Wright, 775 P.2d 1224, 1228 (Idaho 1989).
19. Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 3149-3151 (1990).
20. New Jersey v. Michaels, 136 N.J. 299, 642 A.2d 1372, 1377 (N.J. 1994).
21. See note 15. Also see King & Yuille, Suggestibility and the Child Witness in Children's Eyewitness Memory, in CHILDREN'S EYEWITNESS MEMORY (Ceci et al. eds., 1987).
22. AMERICAN PROSECUTOR'S RESEARCH INSTITUTE, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 7 (1987).
23. Idaho v. Wright, 497 U.S. 805 (1990).
24. People v. Meeboer, 439 Mich. 310, 324-331; 484 N.W.2d 621 (Mich. 1992).
25. Meeboer, 439 Mich. at 326.
26. Lloyd v. State, 524 So. 2d 396 (Fla. 1988).
27. Felix v. State of Nevada, 849 P.2d 220 (Nev. 1993).
28. State v. Huss, 506 N.W.2d 290 (Minn. 1993).
29. New Jersey v. Michaels, 136 N.J. 299, 642 A.2d 1372 (N.J. 1994).
30. 136 N.J. 299, 642 A.2d 1372, 1381 (N.J. 1994) (citing Mason v. Braithwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) and Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)).
31. 136 N.J. 299, 642 A.2d 1372, 1382 (1994).
32. Michaels, 136 N.J. 299, 642 A.2d 1372, 1380 (N.J. 1994).
33. Nugin v. State, 176 Ga. App. 38, 39, 334 S.E.2d 921, 922 (Ga. Ct. App. 1985).
34. See Green v. State, 219 Ga. App. 878, 880, 467 S.E.2d 203, 206 (Ga. Ct. App. 1996), ruling that evidence would be excluded if pretrial identification procedures "give rise to a very substantial likelihood of irreparable misidentification." See also Mason v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243 (1997), authorizing hearing to determine admissibility of in-court identification testimony because of pretrial suggestiveness, and Jackson v. Denno, 378 U.S. 368 (1964) requiring pretrial taint hearing to determine admissibility of evidence.
35. Mason v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243 (1997).
36. United States v. Wade, 388 U.S. 218 (1967).
37. Watkins v. Sowders, 449 U.S. 341 (1981).