

AMBIGUOUS CSA EVIDENCE IN FAMILY COURT MATTERS

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For convenience, let us assume a situation of a Family Court dispute in which a mother is making an allegation in respect of a daughter concerning the conduct of the father during contact visits.

A few years ago, it was commonplace for virtually all participants in such matters - the complainant parent, investigators, experts and judicial officers - to accept that young children told the truth as they saw it, that they were hard to manipulate into giving false evidence, and that genuine sexual abuse may appear bizarre and even include highly unusual features such as satanic rituals. A jargon entered the field perpetrator, victim, validators, behavioural indicators and many more. Children's memories were regarded as less fallible than adults.

Bitter experience and sound research have led to new conclusions - that at least in the shadow of the Family Court context, allegations by young children may arise for a number of reasons and that they often did not reflect that the child has indeed been sexually abused. By the same token, malice, the obvious culprit, does not seem to be a key factor. These allegations had often arisen unintentionally in a climate of fear and suspicion. But more of that soon.

Without reviewing them in detail, three key areas of research have informed a new practice. First, in the late 1980s a body of research accumulated which indicated clearly that many of the physical findings in children's genital areas reflected no more than anatomical diversity and were not the scars of sexual assaults. Similarly, simplistic pseudo-medical tests like the anal dilatation test fell into disrepute.

Second, starting in the early 1980's and extending until the present, a substantive body of research on children's memory and children as witnesses indicated firstly, that children as young as three have reliable memories and secondly, that under the right circumstances children can be excellent witnesses to events which had intimately involved them.

The third body of research flowed from the memory research. This work was concerned whether leading questions and social reinforcement could make children believe something that was patently false. Without reviewing these studies in detail, there is now clear evidence that this is the case. The two best known researchers in the area are Professor Richard Ceci and Dr. Elizabeth Loftus from the United States.

This research has demonstrated that what may appear to be often is not, and more importantly, that worried questioning by people who are genuinely concerned that a child may have been sexually abused may even inadvertently put into a child's mind beliefs which would appear to confirm such a risk. I would note that these are basically the same processes as seems to be operating in the false memory cases which have recently achieved considerable prominence, such as the Bunbury case in Western Australia, which is so elegantly detailed in Richard Guilliat's book "Talk of the Devil".

Significant harms accrue from these false, albeit innocently contrived, allegations. First of course, a person is falsely accused and may be stigmatised for life. Secondly, the child herself does believe that these things have happened to her and if that belief is not removed, the evidence we have is that she will experience her life as being as blighted as do genuine victims of child sexual abuse. Third, the parent who raised the allegations in the first place also often carries a terrible burden of guilt over her own negligence. Although some of these women want to believe that their ex-husband is a sexual criminal, most are more child-centred and wish it wasn't true, although they are afraid it is.

As a result of these recent findings, I believe we are in a better position to investigate allegations. It is clear of course that one needs to continue to obtain statements from the child as well as medical and other corroborative evidence. But it is also clear that a systematic investigation must proceed into the possible presence of factors which may provide a context in which such a false allegation could arise, the presence of factors which may be a source of contamination of the child's beliefs, and the presence of reinforcement of these beliefs. Certainly this is the approach which I take at the moment.

I would like to now briefly describe these factors as they arise in the sort of investigations which I embark on.

The first element to the context is the people. The most difficult allegations to appraise are those which involve young children, usually aged between 2 and 5 years. After that point, it is more difficult to shape children's thinking with misleading questioning. Of course it isn't impossible as the Bunbury case has demonstrated. So the first player is a young child.

The second player is a mother who is anxious about the child's contact with the other party. Often this is a well founded anxiety, based on her experience of a relationship in which she felt that her husband dominated family life at best, or at worst abused and victimised her. The abuse may have been verbal, or physical or even sexual. There may be a subjective element to this, but there may also be a compelling objective element as well. These women are so distrustful that they worry that since the father was the way he was to them, he may go a step further and sexually abuse their child. This of course is amplified if they feel that the father has attempted to continue some exploitation of them in the course of the Family Law proceedings. The father may deal with the accusations in a dismissive way which the mother perceives as indifference. They may even parody the mother's concerns in such a way that the mother feels that he is laughing at her powerlessness.

The environmental context is the nature, quality and content of contact visits. In my experience, there is usually an element of acrimony about the contact visits, and there may be hostility over perceived or real infidelity. The children are usually quite aware of the conflict between the parents, as there have been disputes in front of the child at the time of handover, and one or both of the parents may talk in disparaging ways about the other parent to the child, despite their young age. There may be anxiety by the child about attending contact visits, or insecurity on return home, manifested by refusal to separate from the mother on leaving or on return, being very clinging or attention seeking, or coming into the mother's bed.

Conduct on contact visits may also cause tensions. What I have seen happen in a number of cases has been that the child comes home from a contact visit and talks about something that the father did during bathing, dressing or toileting the child which leads the mother to ask certain questions and the ball gets rolling. It is important to emphasise that once the suspicion is raised, there may be a remarkable number of people who get in on the act and say things to the child or to the parent and thence to the child which influences the way the child thinks, and ultimately believes and responds. Typically, the mother's first contact is with another member of her family, or a neighbour, or another person who has had an acrimonious divorce who may provide the mother with other things which she should check with the child about and also with whom the mother should next communicate.

Let me digress here to describe the problem interactions which can lead to contamination. In a word, I refer to leading questions. For instance, a child comes home and says "I had a bath with Daddy", "What!", "I saw his willie", "Did you touch it?", "Yes", "Did you touch his?", etc.

Sometimes some parents who are being scrupulously honest and have good memories put dialogue such as this in their affidavits. Often though, the affidavit is not prepared until some time afterwards and the statements it contains reflects the parent's memory, which is already prejudiced and represents a conflation of what was said and what they were afraid they were going to hear or they did hear a little down the track after a few more leading questions. Indeed, looking at some of these statements which often involve quite long and complex questions to children and long and complex replies, it is obvious that they represent not just three or four statements back and forth but actually a dialogue involving multiples of the apparent number of interactions. It is also important to recognise that the other players, including the so-called experts, may fall into the same trap.

Leading questions have a particular force if the questioner wears their concerns and prejudices on their sleeve. In other words, the parent or questioner radiates an attitude that they want, or are afraid that, the child will give an affirmative response. Particularly if the child is caught in a conflict of loyalty between the parents in the way delineated already, the likelihood is increased that the child will dutifully say what they think the questioner wants to hear. Soon this motivation will be lost in the sands of time and the child will be believing what they are saying and repeating.

Lets get back to the process. Next, the barrackers point the mother in the direction of one or several of their own lawyer, the Department of Community Services, the Police or a Hospital Child Protection Unit. Usually all three get involved, although not necessarily in the same order. Commonly though the sequence is DOCS, Child Protection Unit then possibly the Police.

There is no guarantee that the so-called professionals at DOCS and the Child Protection Unit will do much better than the parent in asking leading questions and vibrating with prejudice. Certainly the Child Protection Units these days are getting much better at it, but some staff still radiate prejudice. In the case of DOCS, it is often the case that the investigating officer will be relatively inexperienced or will simply not have been informed about how to properly question children under these circumstances. The same may be said for the Police.

In any investigation of these cases, it is vital that the original records of every interview with the child is sighted and examined in chronological order, starting with the parent's first statements. Don't be misled into believing that four records of interview involving a parent and the child, DOCS and the child, Police and the child, and the Child Protection Unit and the child, mean that the child has only been interviewed four times. Unsuccessful interviews may not necessarily be recorded and more importantly, casual remarks made in front of the child as well as ill-informed questioning along the way, particularly by parents and barrackers, can assist in the contamination process a great deal.

A third domain of importance then is the actual process of investigation, the quality and qualifications of the investigators, and the chronology of interviews in which one is interested in matters such as how many formal interviews occurred, how much informal interviewing and casual commenting occurred, whether additional detail accrued over time, and whether or not the mother or another person on whom the child was dependent was present in interviews. Often in these cases I find the child says much more when the mother is there. If there is a video tape of the interview, one might even be able to see why this is so - with the child looking to the parent and even asking what they should be saying. These little asides are commonly not included in the written record.

I should point out that children who have a strong sense of shame or guilt about sexual abuse also may not tell the whole story at the first interview and additional elements may emerge over time. However young children have a less well formed sense of shame and guilt about these sorts of things than do, for instance, teenagers. In the cases I see, this factor tends to be overstated.

One should also be alert to other possible reinforcers apart from direct contamination by leading questions. Some interviewers and some centres have a reputation for prejudiced investigations. Certainly there is no reason why DOCS or the Child Protection Unit cannot interview the alleged offender, and the practice of not doing so to my mind betrays a form of prejudice. As well, one service may communicate to another their opinion, which prejudices the objectivity of subsequent interviews.

A final issue is the content of the child's statement. Internal and external consistency are of obvious importance, however emotional tone can be misleading as it is also susceptible to contamination, if the child believes in good faith. I have noticed an interesting inclusions in later statements in the course of emotionally charged matters - the introduction of apparently bizarre elements such as the adult inserting children's toys into orifices or the addition of childish excretory elements to more commonplace erotic activities. These acn suggest that the child is under pressure to disclose further 'naughtiness' and is adding elements which fall within her day-to-day 'naughty' experiences.

The whole exercise is oriented towards the development of additional hypotheses to the hypothesis that the child has been sexually abused in the manner described by the offender nominated. There are three principal alternative hypotheses. First, that the mother has innocently but zealously pursued her concern that her ex- ' husband was capable of a whole lot of things, and now appears to be capable of sexual abuse. Secondly and occasionally, that the mother has a psychosis (usually schizophrenia) and she has developed the delusion that the children have been sexually abused. Usually in these cases, they require a much less specific stimulus from the child than the statement that the father touched their genitals while drying them after the bath. Thirdly and rarely, that the allegations are purely, or largely, malice.

It is vital that all of us who participate in the process - from the time these allegations first arise through to Family Court judges - should be open-minded to all possibilities, that whatever investigation is underway is conducted in an as objective a manner as possible, and that the child's statements may be significantly contaminated or that false statements may be reinforced by the conduct of the parent and family or by the investigators themselves.

I would note that there has been a significant improvement in the Organisation of investigations between the three relevant Departments. It is now a matter of policy that Health Department facilities, including Child Protection Units, do not conduct investigations. Rather, they collect medical evidence. DOCS and the police are charged with investigation. In two regions in New South Wales (South Western Sydney and the Central Coast) there are Joint Investigation Teams between these two Departments which in my limited experience seem to be doing a generally very good job. The staff of these teams are also specially trained. However most of New South Wales does not have access to these coordinated teams and the quality of investigation is often flawed.