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## Family Violence-Investigating child abuse and learning from British Mistakes

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# Articles

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Alastair Bissett-Johnson\*

Family Violence—Investigating  
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## 1. *Introduction*

It seems appropriate at the onset to set out something of what the disciplines of law, medicine and social work know about family violence and when, during recent years, this knowledge came to the attention of professionals, the public and legislature. We can then, perhaps, judge whether our existing laws, rules of evidence and procedure take this information adequately into account in dealing with cases of violence within the family. Whilst solving these problems takes time, and law often lags behind the behavioural sciences, the question arises whether the lag is too long and whether differences between experts in the behavioural sciences have become an excuse for inactivity. Moreover, many ostensibly neutral legal rules have differential impact on the family members. For example, in the field of spousal violence if the existing criminal law rules on self defence and provocation,<sup>1</sup> with their emphasis on imminent danger, reasonable force, the dignity to retreat and immediacy of response, do not provide women with as useful a defence to a woman who commits an assault following repeated assaults by her partners as they do a man who finds his partner having sexual relations with another person and seriously injures or kills either or both of them. The existing rules arose in a different age when it was judged appropriate to make allowance for assaults between males done in “the heat of the

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1. The Canadian approach, as exemplified by *Lavallee v R* [1990] 1 S.C.R. 853 seems to concentrate more on self-defence than provocation. See Donna Martinson Q.C., Marilyn MacCrimmon, Isobel Grant and Christine Boyle, *A Forum on R v Lavallee: Women and Self-Defence* (1991), 25 B.C.L.R. 23.

moment.”<sup>2</sup> The obvious solution of excluding violent husbands and fathers from the family home has been beset, in Nova Scotia and some other provinces, by the problem of constitutional restrictions on Provincial Family Court Judges’ powers to make the necessary orders.<sup>3</sup> In an attempt to overcome this difficulty, the Report of the Nova Scotia Court Structure Task Force recommended the creation of a Unified Family Court,<sup>4</sup> a view recently approved by the Law Reform Commission of Nova Scotia.<sup>5</sup> The Law Reform Commission’s recommendation shows how interlinked are the needs of children and parents in cases of family violence.

A more major theme of this article, but consistent with my theme that whilst family violence is a problem of recent discovery, albeit long history, is the law has yet to fully come to terms with the law’s treatment of child abuse. Whilst there have been substantial attempts made to update our substantive child protection laws in Nova Scotia in the *Children and Family Services Act, 1990*,<sup>6</sup> procedural questions arising out of the investigation of such cases and the admissibility of evidence

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2. The Women’s Movement in Britain recently drew attention to the inappropriateness of modern conditions to the present rules on provocation and self defence (most recently the Southall Black Sisters). An earlier case, involving Mrs. Sarah Thomson a year ago, had also failed to get a conviction for murder reduced to manslaughter on the basis of provocation. The English Court of Appeal recently allowed the appeal of a wife who had been convicted for the murder of her husband. She had set fire to him. He was violent and domineering man who had battered her for years. In allowing the appeal the Court of Appeal relied on fresh medical evidence suggesting that Mrs. Kiranjit Ahluwalia might have been suffering from diminished responsibility for her actions as a result of suffering from the “battered wife syndrome;” but it declined to reconsider the law of provocation which Lord Chief Justice Taylor said was for Parliament to alter.

The Courts were, according to the Lord Chief Justice, unable to bend the law simply because the accused was serving what might seem to be an unjust mandatory life sentence for murder.

See *The Scotsman* and *London Times*, Saturday August 1st 1992 for more detail.

The point about the appropriateness of some of the criminal law defences to women’s conditions had already been made by Christine Boyle *et al.* in “A Feminist Review of Criminal Law” (Minister of Supply Canada, 1985).

3. *Re Ref. Re: s.6 of the Family Relations Act 1978 of British Columbia.* (1982) 26 R.F.L.(2d)113, and the Nova Scotia Court of Appeal decision in *Rudderham v. Rudderham* (1988), 85 N.S. R. (2d) 267 (N.S.C.A.).

4. Government of Nova Scotia, March, 1991, pp.67-110 and in particular Recommendations 5 to 9. *The Act to Reform the Courts of the Province* S.N.S 1992 ch 16 only amalgamates the Supreme and County Courts.

5. Discussion Paper on “Enforcement of Maintenance Obligations” Law Reform Commission of Nova Scotia, July 1992.

6. S.N.S. 1990.

were largely left untouched by that legislation.<sup>7</sup> Perhaps we are still trying to digest the growing body of knowledge derived from the social sciences, a body of knowledge that threatens to grow faster than we can assimilate it. The Nova Scotia *Children and Family Services Act, 1990* was deliberately delayed in coming into force for 15 months to allow for adequate training of staff. It is another purpose of this paper to emphasise the need to keep training under constant monitoring, both to keep up skills and to keep abreast with developments in the field of the behavioural sciences so as to avoid some of the problems that have recently emerged in Britain. Training is rarely a once and for all job and in social work the high “burn up rate”; senior social workers with managerial skills often move from one field, such as child protection, to areas of emerging needs, such as care of the elderly in the community. Thus training and expertise should be on-going, like the testing of airline pilots on simulators to maintain their ability to respond to an emergency. Budgets for on-going training are often vulnerable in times of financial restraint but the experience in Britain is that even the largest social work authorities can get into trouble if training, both initial and ongoing, is inadequate. I should add that I am primarily concerned with investigating child protection cases rather than “Evidential and Procedural Issues in Child Sexual Abuse Prosecutions” which has already been examined by Nicholas Bala<sup>8</sup> in a recent speech within the Province. My tentative hypothesis is that whilst the law has progressed from relying on the fantastic claims by children found in the Salem Witchcraft trials of 1662, it then overreacted in the next 300 years to an over sceptical approach to the evidence of children. The current position of behavioural scientists is probably along the lines that the credibility of children is likely to be directly related to the skill of the adult interviewer and the circumstances in which the

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7. Though note s.96(3) which permits, amongst other things, the court to permit “the admission into evidence of out-of-court statements made by the child.” More recently the decision of the Supreme Court of Canada in *R v. Khan* (1990), 79 C.R. (3d) 1 may have a “spin off” effect in civil proceedings. The effect of *Khan* is to diminish the weight attaching to the age of a child, (in the instant case aged four and a half year old girl) and to allow such children to give unsworn testimony provided only that the child understands the duty to speak the truth in terms of ordinary, every day social conduct. The artificiality the inquiry into the child’s understanding to tell the truth is examined in more detail by Professor Bala at p.16 of his paper delivered at the Nova Scotia Judicial Seminar on Feb 22nd, 1992. Part of that paper can be found in “Double Victims: Child Sexual Abuse and the Canadian Judicial Justice System.” 15 *Queens Law Journal* 3-32.

8. See the paper delivered at the Nova Scotia Judicial Education Seminar, Halifax, Feb. 22nd 1992, and Bala’s earlier paper “Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System” (1990), 15, *Queens Law Journal* 3-32. The decision of the Supreme Court of Canada in *R.v. Khan* 59 C.C.C. (3d) 92 has obviously widened the exceptions for admitting hearsay evidence in cases of sexual offences against very young children.

interview was conducted. However, it is open to doubt whether our burgeoning knowledge of violence in the family has been reflected in the rules of child protection law, evidence and procedure keeping pace with these developments. Indeed Michael King and Judith Trowell have recently argued<sup>9</sup> that the legal system in England at present has aspects, including an emphasis on what they term “juridification” of child welfare without the injection of the necessary resources, which are incompatible with what is known in the behavioural sciences about promoting children’s welfare. Finally, as has been suggested in the section on “child perpetrators,” there is a question about whether we have responded to the developing social science knowledge by creating the facilities to respond to the needs of both child victims and child perpetrators.

## 2. *The Stages of Awareness of Family Violence*

Before embarking on the detail of investigating child abuse it is perhaps worth considering the total picture of violence perpetrated in a family context, our relatively recent concern about it and the interrelatedness of its component parts. After the Second World War a growing awareness emerged from research in the behavioural sciences that an understandable desire to extend “privacy” to the family’s internal workings could translate into a “wall of secrecy” behind which (in the main) men could ill-treat their wives and children. The interrelatedness of the components of family violence can be seen in the case of children who have seen their fathers abuse their mothers. Such children may repeat that behaviour against their partners on attaining adulthood and also believe that force is the only way of correcting their children<sup>10</sup> when they are old enough to

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9. M. King & J. Trowell, *Children’s Welfare and the Law—the limits of legal intervention* (London: Sage Publications, 1992).

10. This raises the vexed question of what are acceptable social norms on raising children. In the *Scottish Law Commission’s Report 135* on “Family Law”, H.M.S.O. Edinburgh, 1992, it was recommended that it should be no defence to civil or criminal proceedings against any person purportedly exercising parental rights that they struck a child with (a) a stick, belt or other object, or (b) in such a way as to cause, or risk causing, injury, or (c) in such a way as to cause, or to risk causing, pain or discomfort lasting for more than a very short time. See Recommendation 11(a) and paras 2.67 to 2.105. Contrast this with s. 11 (2) of the *Yukon Children’s Act, 1984* (R.S.Y.T. 1986 c. 22) which I helped to draft, which concentrated instead on a variety of factors such as (a) the age of the child, (b) the type of instrument used in corporal punishment, (c) the location of injuries on the person of the child, (d) the seriousness of the injuries which resulted, or which might have been expected to result to the child, (e) and the reasons for which it was felt necessary to discipline the child and any element of disproportion between the need for discipline and the amount of force employed. Head (c) concentrates on the risk of eye injury or sub-dural haematoma and (e) on problems of children being disciplined for not being toilet-trained at an age at which it would be unusual for a child to be toilet trained.

have them. The need is to break this repetitive cycle and to provide the treatment facilities to do this.

### *Physical Abuse of Children*<sup>11</sup>

In historical terms it would be probably true to say that, though it was an American Radiologist, Dr. John Caffey,<sup>12</sup> who in 1946 first wrote up<sup>13</sup> his x-ray evidence of repeated signs of trauma in children in different stages of healing. It was probably Dr. Henry Kempe's coining of the phrase "the battered child syndrome" in 1961<sup>14</sup> which first raised current professional and public awareness of the problem. In Canada the late Mary Van Stalk's book<sup>15</sup> (and her tireless advocacy of the topic) did much to bring the matter to public attention. Child abuse takes some bizarre forms including a parent who repeatedly presents an elaborate and fictitious medical history of his/her child, thus subjecting the child to painful and elaborate medical tests—the so called "Munchausen by Proxy Syndrome."<sup>16</sup>

### *Spousal Abuse*

Although known about for years, this phenomenon first came to wide public attention when the Women's Movement questioned the legitimacy of violence by men against their partners, and questioned public acceptance of "chastisement" of women by their partners. Books such as Kate Millet's *Sexual Politics*<sup>17</sup> or Errin Pizzey's *Scream Quietly or the Neighbours will Hear*<sup>18</sup> and the academic writings of Straus, Gelles and

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11. For further detail on a history of child abuse see chapter one in S.X. Radbill, "The Battered Child" in R.E. Helfer and R.S. Kempe (eds.), *The Battered Child*, 4th ed. (Chicago: University of Chicago Press, 1987).

12. See Kempe and Helfer, *ibid.*, p.18.

13. Caffey J. (1946), "Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma" 56 (2), *Am. J. of Roentgenology*, 163-73.

14. A riveting title for a/the multidisciplinary conference held in 1961.

15. Mary Van Stalk, *The Battered Child in Canada* (Toronto: McClelland & Stewart, 1972).

16. See Helfer and Kempe, *supra*, note 11, pp. 275-6 and Professor Roy Meadow's chapter 4 in Dr. Fred Stone (ed.), *Child Abuse: the Scottish Experience* (London: British Agencies for Adoption and Fostering, 1989). In one Nova Scotian Case, Dr. John Anderson revealed a personal conversation with a child who was subjected to repeated tests after a serious electrolyte imbalance which was detected in the child. The tests were inconclusive and the child's electrolytes returned to normal soon after admission to hospital. The procedure had to be repeated each time the electrolyte imbalance returned after the child was discharged. Finally, the child was listened to by the nursing staff and, perhaps surprisingly, it was learned that the child was being force fed salt by her parents.

17. (Garden City, N.Y.: Doubleday, 1970). See also Germaine Greer's *Female Eunuch* (London: McGibbon and Kee, 1970).

18. (Short Hills, N.J.: R. Enslow Publishers, 1977).

Steinmetz<sup>19</sup> and the Dobashes<sup>20</sup> were highly important in publicising the problem. A whole literature emerged around the topic of marital rape.<sup>21</sup> One might date this from the early- to mid-1970's and in Britain led to the 1975 Commons Select Committee on Violence in Marriage.<sup>22</sup> In Canada, part of the response was to set up "Transition Homes" for women such as Bryony House in Halifax. However, we still have not found legal solutions to get violent men out of the home, or to provide adequate preventative measures for women to protect them from violent men<sup>23</sup> or defences of provocation or self defence which recognise the different physical situations of men and women.

### *Emotional Abuse of children and spouses*

This topic has been known to be associated with both physical abuse of spouses and children, but has been bedeviled with questions of definition and proof.<sup>24</sup> An approximate date of the mid-70's might be attached here. "A child's failure to thrive" probably most comfortably fits here, though its causation is complex and may involve both factors within and without the definition of child abuse and neglect. Failure to thrive also raises formidable problems of proof using "growth charts, percentiles or standard deviations from the mean" with which the law is not entirely comfortable.

### *Child Sexual Abuse*

Although the number of cases involving proceedings against persons for sexual abuse (in Scotland the criminal charge is termed "lewd and

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19. "Violence in the American Family" 1978. See also Straus's chapter 2 in *Family Violence*, Eekelaar and Katz, (eds.), (Toronto: Butterworths, 1978).

20. "Violence against wives," (London: London Open Books, 1980).

21. For example, Susan Brownmiller's *Against our will: Men, Women and Rape* (London: Secker and Warburg, 1975); and Lorenne Clark and Debra Lewis, *Rape: The Price of Coercive Sexuality*, (Toronto: The Women's Press, 1977).

22. H.C. Paper 1975 Paper 553-I. Published September 18th 1975.

23. See the sad case of Gail Naughler in which a woman from Bridgewater, who had a court order in her favour to protect her from her violent partner, was murdered by that partner. *Chronicle-Herald*, Halifax, Sept. 20, 1989.

24. See s. 22 (1)(f) and (g) of the *Nova Scotia Children and Family Services Act*, 1990 for the local attempt to define emotional harm to children.

libidinous practices”) has remained fairly constant,<sup>25</sup> the public awareness of this topic probably does not date much before 1977 when, as part of the Conference of the International Society on Family Law held in Montreal in 1977, a number of papers were published on the topic.<sup>26</sup> In Canada the Badgely Committee on Sexual Offences against Children reported in 1984.<sup>27</sup> Since then there has been a wealth of publications.<sup>28</sup> The scope of this topic has been widened to include the problems of what one might term institutional abuse as revealed in the “Royal Commission of Inquiry into the response of the Newfoundland Criminal Justice System to Complaints”—the Mount Cashel Orphanage Affair.<sup>29</sup> In Britain after the Butler Sloss Report<sup>30</sup> the area attracting the most interest has now passed very much to the question of the credibility of child witnesses in criminal and child protection proceedings. Definitions of what consti-

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25. In Scotland the number of persons proceeded against in court on this charge has risen from 164 in 1940 to 240 in 1990. However, no clear trends emerge from the figures over this 50 year period. Thus, in 1960 466 persons were proceeded against, whilst the lowest figure, 123, occurred in 1984. The discretion inherent in the decision to prosecute is important and it may be that civil proceedings for child protection have become a more popular remedy in view of the lower standard of proof. Care should be taken in looking at the figures since the figures of people initially charge with lewd and libidinous practices may not correspond to the number of persons proceeded against in court on those charges as a result of a decision to change the charge to another sexual offence or minor non-sexual assaults which may be easier to prove. I am indebted to Ms. Fiona Hird, Statistician to the Scottish Home and Health Department for these figures.

26. *Family Violence—an International and Interdisciplinary study*, Eekelaar and Katz (eds.) (Toronto: Butterworths, 1978), see especially Part V.

27. *Report of Committee on Sexual Offences Against Children and Youths*. (Ottawa: Minister of Supply & Services, 1984).

28. See for example in Britain, Jean La Fontaine, *Child Sexual Abuse* (Cambridge: Polity Press, 1990). La Fontaine has been commissioned by the Government, see below, to investigate the existence of “ritual abuse.” Other recent publications include *Intervening in Child Sexual Abuse*, K. Murray and G. Gough (eds.) (Edinburgh: Scottish Academic Press, 1991.)

29. *The Hughes Commission*, (St. John’s: Government of Newfoundland, 1992).

30. *Report of the Inquiry into Child Abuse in Cleveland 1987*. Cm. 412 H.M.S.O.



tutes child abuse differ considerably,<sup>31</sup> which makes estimates of its prevalence difficult.

### *Abuse of the Elderly*

This was a very much later phenomenon, perhaps the early 1980's,<sup>32</sup> including as it does physical abuse of older people, financial exploitation of such people by their care givers,<sup>33</sup> as well as emotional abuse of such people including denying them privacy and dignity. Some of the abusers are family members, others abusers, with the decline in the extended family as a means of care of the elderly, involve non-family members or even institutions or their employees.

### *Ritual or Satanic Abuse*

This may have been going on for longer than we like to think and the whole topic is the subject of a British Government funded study by Emeritus Professor Jean La Fontaine, a social anthropologist at the London School of Economics.<sup>34</sup> Although cases of ritual and satanic

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31. The definition accepted by Butler Sloss (and derived from Schecter and Roberge) was "the involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend and to which they are unable to give an informed consent or that violates the social taboos of family roles" (p.4). This should be contrasted with La Fontaine who at p.42 of her book defines sexual abuse in terms of bodily contact of all sorts ... having a child victim and an adult offender for the sexual gratification of the adult.

Freeman in his seminal article "Cleveland, Butler Sloss and Beyond" (1989) *Current Legal Problems* 85 at 91) accepts the following definition: "Any child below the age of consent may be deemed to have been sexually abused when a sexually mature person has, by design or by neglect of their usual societal or specific responsibilities in relation to a child, engaged or permitted the engagement of that child in any activity of a sexual nature which is intended to lead to the sexual gratification of the sexually mature person. This definition pertains whether or not this activity involves explicit coercion by any means, whether or not initiated by the child, or whether or not there is discernible harmful outcome in the short term." This definition obviously is wider than La Fontaine's in that contact is not necessary, although the element of sexual gratification is common to both, as is the lack of a legally effective consent by the child.

32. See A. Bissett-Johnson, "Domestic Violence—A Plethora of Problems and Precious Few Solutions" 5 *Can. J. Family Law* 253-276.

33. See the wide-ranging educational materials produced by Judith Wahl and the "Advocacy Centre for the Elderly," 120 Eglinton Avenue, Suite 3902, Toronto M4P 1E2. A good example of their materials is "Elder Abuse—the hidden crime," presented at the Ontario Police College, June 1988.

34. See *Scotsman* for March 29th 1991.

abuse have been alleged to occur by some Christian groups,<sup>35</sup> proof in court, particularly under the rules in criminal cases allowing an accused to confront a witness, including a child witness, and where proof beyond a reasonable doubt is required, has proved to be a problem. Recent changes in England and Wales,<sup>36</sup> Scotland,<sup>37</sup> and a number of other jurisdictions<sup>38</sup> allowing for a closed circuit link between a court in which an accused is facing criminal proceedings<sup>39</sup> and a separate room in which

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35. Maureen Davies, one believer in this form of abuse, held a Conference in Aberdeen shortly before the Orkney story broke. See *Sunday Times Scotsman Supplement* for March 17th 1991. However, proof of such cases has posed problems and in the *Sunday Times Colour Supplement* for September 29th 1991 Sir John Woodcock is reported to have said that police had no evidence of ritual or satanic abuse being inflicted on children in England and Wales.

This has not stopped the Metropolitan police from setting up a special enquiry to investigate alleged cases of this sort of abuse. A briefing paper issued on January 1st 1992 indicates that the enquiry is conducted under the auspices of the Sexual Steering Committee headed by Commander David Stevens. It will consist of two officers whose names and location are withheld for security reasons and will undertake to research over a period of at least one year to see whether former organised child abuse cases have a satanic element and to try to devise procedures to identify such cases in the future. This may well have been prompted by problems of proof in a case in London involving alleged Satanic Abuse reported in *The Independent* for November 20th in which 20 charges of rape, buggery and indecent assault and conspiracy had been dismissed after the 10 year old girl, the younger of two victims, had broken down in the witness box under fierce cross-examination. Problems of proof had emerged in the Pekala Holland case in 1987 when more than 100 children from 63 families were alleged to have been abused. (See the article by John Cornwell in the *Sunday Times Supplement* for September 29th 1991).

36. Forty courts have "live link television facilities". *London Times Law Report* September 17th 1992—Practice Direction (Crown Court Centres).

37. Pursuant to the *Law Reform (Miscellaneous Provisions) (Scotland) Act, 1991*, discussed further by Fraser Davidson "The Evidence of Children" 1990, *S.L.T.* 185. The launch of the scheme in Scotland was announced by the Lord Justice-General on September 30th, 1991.

38. In England the *Criminal Justice Act, 1991* provides that a video-interview with a child may be admissible in the Crown Court or Youth Court but not a Magistrates Court. The child will not be examined in chief in respect of matters which, in the opinion of the court, have been dealt with in the child's recorded testimony. Thus, the questioning of the child by the police or a social worker will take the place of examination of the child by an advocate in open court. The Act goes no further, however, because cross examination and reexamination of the child (if necessary by a live television link such as has been described in Scotland will still occur. The hope seems to be that, having seen the tape, the accused will plead guilty. There seems no evidence so far that guilty pleas, which are not very common in this sort of case, will result from the change in the law.

39. Gordon Sloan was surely right to point out in his evidence in Orkney (See *Scotsman* for January 22nd, 1992) that it was surprising that similar aids were not available in care proceedings. The decline in prosecutions referred to in the child sexual abuse section may even suggest that the availability of these facilities in child protection cases should be a greater priority.

a child witness may give evidence, may solve some of these problems.<sup>40</sup> But so far only a limited number of courts are equipped with the necessary equipment.<sup>41</sup> There is also an increased use of videotape evidence in the hope that the accused will plead guilty and thus spare the child victim from having to testify in court. Since ritual or satanic abuse, if it exists, seems to be a sub-species of child sexual abuse, the over-refining of the categories of child abuse may actually lead to those dealing with the problem losing sight of the fact that, regardless of the sub-species, it still involves child abuse. The *Goler cases*<sup>42</sup> of child abuse from the Annapolis Valley in Nova Scotia revealed a wide variety of cases of physical and child sexual abuse against children. In practical (as opposed to academic terms) terms it may be an over-refinement to create sub-categories of “multiple” or “organised” physical or sexual abuse of children. The emotional overtones of ritual or Satanic abuse may only serve to complicate the matter further.

### *Children as perpetrators of abuse*

One of the last taboos to be exploded by recent social science knowledge is of Rousseau’s theory of the innate innocence and proper education of children.<sup>43</sup>

In 1992, the British charity The National Children’s Home published a report entitled “Children Sexually Abusing Other Children—the Last Taboo.”<sup>44</sup> This revealed that from official English Home Office figures

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40. The facilities involved are not extensive and involve fixed focus T.V. cameras in each room linked to monitors in both rooms. The child can thus see and hear the lawyer asking the question without confrontation with the alleged perpetrator and his or her reply can be seen and heard in the court room.

41. See the press release dated Monday, September 30th 1991 of comments by the Lord Justice General on the launch of the links at the Edinburgh High Court and the Glasgow Sheriff’s Court. Extension to other areas is expected to follow.

42. The child protection cases do not appear to have been reported but the criminal proceedings can be found sub nom. *R v. Johnstone* (1985), 68 N.S. R. 302 (N.S.S.C.); *R v. Johnstone, Johnstone and Goler* (1986) 68 N.S.R. 302 (N.S.C.A.); *R v. Goler* (1985) 68 N.S.R. 311. All the criminal cases involved a variety of assault, sexual assault and acts of gross indecency committed by male and female accused in a small rural community of Nova Scotia, as well as Waterville in an extended family setting. The victims were family members ranging in age from eight or nine onwards at the time of the offence. It is understood that in the unreported child protection proceedings other children than those forming the basis of the criminal proceedings were alleged to have been involved.

43. Mainly in “*Emile*.” For a convenient translation see Barbara Foxley, (London: Everyman Classics). For a summary of Rousseau’s views on children and education see Ronald Grimsley’s contribution to Vol. 7 of the “*Encyclopedia of Philosophy*” p. 220 et seq. (New York: MacMillan, 1972).

44. ISBN 0 900984 23 6. Available from the National Children’s Home, 85 Highbury Park, London N5 1 UD. Price £15.

in 1989, of all offenders cautioned or found guilty of sexual offences 32% were under 21 and 16% were under 16.<sup>45</sup> Having regard to the chronic underreporting of such offences and the fact that in England children under 10 are exempt from criminal liability, as are children under eight in Scotland, these figures may be on the low side.<sup>46</sup> Although the report concentrated on sexual abuse against children it may also have significance for emotional and physical abuse against children by child abusers.

The report revealed:

- (i) a lack of facilities to deal with such sexual abuse;
- (ii) a tendency to regard sexually abusive acts by children as “childhood experimentation” or “boys will be boys”;
- (iii) that a passive attitude by the authorities to sexual abuse by the young can lead to this behaviour, which the N.C.H. suggested could start as young as three, continuing into adulthood. Unlike general delinquency, it was suggested that the young abuser is more likely to grow into a pattern of sexual abuse than out of it;
- (iv) although this behaviour might be part of a cycle of abuse in which a young person might sexually abuse another young person as a consequence of his or her having been sexually abused, this was not always so and the perpetrator might be reacting to other traumatic childhood events. The ease with which pornographic material can be obtained was also raised in relation to the development of sexually abusive behaviour; and,

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45. The Report can be described as a preliminary attempt to address the problems since at p.45. para 7.14-16 the Report suggests as a matter of urgency that further research be undertaken in the following areas:

(i) *Incidence*: to develop agreed data collection systems across agencies to obtain a more systematic of the number of children and young persons to be worked with along with a more comprehensive analysis of the statistics relating to sex offending, this would involve the relationship between age and sentence or other disposal;

(ii) *Intervention Outcomes*: which methods of treatment and approaches are appropriate with which types of children or young people? Pilot studies would form the basis of thorough longitudinal evaluative studies over a period of time. This aims to acquire information about the meaning of abuse from the point of view of the abuser and victim.

(iii) *Causation*: why do children or young people offend or behave in this way. Are there factors or parts of the personal histories of abusers that aid or inhibit the process of becoming an adult sex offender?

(iv) *Sexuality*: is it possible to define “normal” sexual development and knowledge? Can we explain why there are so many male abusers and why do women become abusers?

In addition it was suggested that, independent of longitudinal studies, workers with abusers should be encouraged to write up their work to develop a knowledge base. There was also felt to be a need in training of professionals who work with young abusers to keep them constantly aware of research developments which are pertinent to their area of practice.

46. It is possible that children may be more willing to report cases of being abused by other children than by adults.

- (v) sexually abusive incidents were often alleged to be carefully planned.

In response to this a number of suggestions were made to develop an overall, systematic approach to the problem. These suggestions involved the creation of special facilities to deal with the abusive youngster as well as training for all workers with young children: foster carers, residential workers, social workers and judges.

The report recommended that a suspected child abuser, even when in need of care, should never be placed in foster care where there were younger or developmentally less advanced children present, and that the school should be kept in the picture. In all foster placements the foster carers should be fully informed.

The cost of setting up the facilities to cope with the assessment and treatment of such offenders was considerable—the National Children's Home placed a figure of £50 million as the price for the facilities. As a contribution the National Children's Home was spending £4 million to create a unique network of facilities to assist the children and their families to come to terms with the trauma of abuse and the disclosure of abuse. The Glasgow pilot centre for this project had so far helped 67 children, aged two to twenty, and from 30 families, since its opening nearly two years ago in the autumn of 1990. The project has identified three main sets of circumstances which may predispose a child to act in a sexually coercive way towards younger children:

- (i) when an adult abuser made the child take part in sex abuse with another child or brother and sister;
- (ii) when, as a result of abuse, a child has become highly sexualised. The example was given of a child who had been abused from age nine months so that he never knew life without some form of sexual experience. When the abuse was discovered and stopped at the age of seven the child started seeking sexual encounters with other children.
- (iii) when a child acts sexually towards other children as a way of exercising power over them. Children who have been abused often feel powerless, worthless and angry about the abuse that they have suffered, and try to resolve their feelings by initiating sexual acts with other children.

Training may enable the family and professionals to cope with the child's behaviour whilst encouraging *the child* to explore in detail how he or she had planned to initiate the sexual contacts and to persuade the victims to remain silent.

The lesson to be learned from this brief survey is that our knowledge is recent, imperfect but growing, and that the topic of family violence

needs to be worked at diligently, and across the whole spectrum. The law needs to keep up with the growing body of knowledge in the behavioural sciences. I now turn to the detail of my argument.

### 3. *Investigating Child Abuse*

Investigating cases of child abuse and the interviewing techniques employed in the investigations reveal special problems:

- (a) the offences are such that independent evidence, other than from young children themselves, is rarely available. In particular, medical evidence to support a conclusion of child sexual abuse may be absent in a majority of cases even where abuse has occurred.<sup>47</sup>
- (b) obtaining credible evidence from children poses problems both in the legal and behavioural science field.

#### (A) *Credibility of Adult Witnesses & Confessions in Criminal Cases*

Before discussing the credibility of child witnesses it may be appropriate to discuss the credibility of adult witnesses. If adult witnesses subjected to certain types of questioning will admit to crimes which they did not commit, it seems difficult to hold children to more rigorous standards. Unusual as it may seem, there have been a number of recent<sup>48</sup> British cases in which adult accused have confessed to serious crimes which it can be shown that the accused did not commit, or in which it would be seriously unsafe to rely on the ostensible confession of the adult. One such case involved Jacqueline Fletcher, who was freed on February 28th, 1992 after the English Court of Appeal decided that it would be unsafe to rely on her ostensible confession that she had murdered her baby son. The case was one of the latest in a series of cases in which vulnerable people of low

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47. W.F. Enos, T.B. Conrath and J.C. Bayer claimed in an article entitled "Forensic Evaluation of the Sexually Abused Child" in *Pediatrics* 78, 385-39 that in a forensic study of 162 cases, even when the extra expertise of a medical examiner was employed, only 40% of the cases of alleged sexual abuse produced evidence of abuse acceptable in court.

48. Rosemary Pattenden in her article "Should Confessions be corroborated?" (1991), 107 *L.Q.R.* 317, at p.318 gives some older examples e.g. *R v. Evers* *The London Times* Aug. 15th 1959 in which the accused falsely confessed to an offence to avoid separation from his criminal friend; *Boyle v. H. M. Advocate* (1976), J.C. 32 in which a private in a Scottish Regiment who was absent without leave falsely confessed to a bank robbery in order to face imprisonment in a civilian jail rather than military confinement. Perhaps most surprisingly of all, Edward Radin in his book *The Innocents* (New York: Morron, 1964) recounts the case of an American woman who was prepared to face life imprisonment rather than admit that she had been in bed with a man at the time of the crime.

intelligence have been convicted after having made disputed confessions. The case was originally believed to have been one of sudden cot death until the mother jokingly told her landlady that she had drowned the child in a bath. The landlady told social work authorities who in turn told the police. The police then obtained what purported to be a confession from the mother which, although later retracted by the mother, seemed to confirm the view that the baby had been drowned. The matter was compounded when the jury at the murder trial was told by a pathologist that the baby's lungs appeared to be "water logged." This unfortunately left the jury, who returned a majority verdict, with the impression that the baby must have inhaled water, even though the condition of the baby's lungs was consistent with cot death. The other evidence in the case was overwhelmingly consistent with cot death and the confession had been obtained without there being any notes of the interview at which the confession was obtained. The explanation for this was that the woman police officer who conducted the interview was unable to take notes since she was comforting Mrs. Fletcher and holding her hand.<sup>49</sup>

The same problem had appeared almost contemporaneously with the *Kiszko case* in which Mr. Kiszko was finally freed after 16 years in prison, most of them in solitary confinement, for a murder that he did not commit. When Mr. Kiszko was finally freed, allegedly broken by the experience, it was on the basis that, notwithstanding his uncorroborated confession, the semen found at the scene of the crime on the victim's clothing could not have come from Mr. Kiszko, who was infertile and incapable of producing sperm. The crucial forensic evidence never reached the defence, which elected, or was forced to run a defence that implied that the police had got the right man, notwithstanding that the accused had no access to a solicitor at the time of his confession.<sup>50</sup>

A further example could be found in the *Judith Ward Case*<sup>51</sup> in which seventeen and a half years after she was convicted for bomb explosions in London and on the M62 motorway, the Court of Appeal quashed the convictions for material irregularities in the original trial. The prosecution case had been based (a) on voluntary admissions by Miss Ward, an Irish Republican sympathiser, and (b) on scientific evidence of nitro-glycerine being found on Miss Ward and her property. The defence had alleged that the forensic experts who gave scientific evidence for the prosecution had withheld evidence relating to the reliability of the tests

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49. *The Guardian*, March 29th, 1992.

50. See *The Guardian*, February 19th, 1992.

51. For more detail see (1992), 142 N.L.J. 813 and *The Independent* between May 28th and June 5th, 1992.

that they had done on the basis that it might prejudice the prosecution case. Moreover there had been a second withholding of evidence which was relevant to Miss Ward's proclivity for attention-seeking, fantasy making and withdrawing untrue confessions. All of this was relevant to the defence's case that Ward was a sort of "female Walter Mitty."

To those who have read the Royal Commission on the Donald Marshall Prosecution,<sup>52</sup> the withholding of evidence from the defence is nothing new but the point on which I wish to concentrate is the extent to which these three decisions tend to confirm the academic literature which casts doubts on the reliability of admissions and confessions.

Gudjonsson and Mackeith describe<sup>53</sup> the case of a 17 year old youth who falsely confessed to two murders during police interrogations at which he was not legally represented. He later made a further confession while a duty solicitor was present and made further misleading admissions to prison staff and an inmate at the start of his remand. The confession obtained by the police appeared to be very detailed and convincing but nevertheless subsequently turned out to be completely false. It appears to have resulted from the persistent pressure and psychological manipulation of a man who, at the time, was distressed and susceptible to interrogative pressure. The man was, nevertheless, of average intelligence and not suffering from any mental illness or obvious personality disorder. Following the withdrawal of the charges and the subsequent conviction of someone else for the offences, a detailed psychological assessment indicated a clear improvement in the man's ability to cope with interrogative pressure. Thus "false confessions" are not restricted to those of below normal intelligence, although the accused's level of intelligence is a relevant factor.

In a recent case, *R. v. McKenzie*<sup>54</sup> the English Court of Appeal fine-tuned the English Common Law relating to the relating to confessions by recognising that cases where the prosecution case depended solely or mainly on confessions, like cases depending upon identification evidence, had given rise to miscarriages of justice.

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52. Published by Province of Nova Scotia 1989.

53. "A Proven Case of False Confession: psychological aspects of the coerced-compliant type." (1990), 30 *Med. Sci. & Law* 329.

54. *London Times Law Report* September 28th, 1992 and *The Dundee Courier*, July 25th, 1992. The case involved convictions for manslaughter on the ground of diminished responsibility which were held by the Court to be "unsafe and unsatisfactory." The accused was mentally disordered, and though some considerable detail had been given during the confession, the accused had also confessed to other offences which he could not possibly have committed. The detail in the confession might have been gleaned from the massive publicity attendant on the offences and certain significant details in the offences had been omitted from the confessions.



“Where:

- (i) the prosecution case depended wholly upon confessions;
- (ii) the defendant suffered from a significant degree of mental handicap; and
- (iii) the confessions were unconvincing to a point where a jury properly directed could not properly convict upon them, then the judge, assuming that he had not excluded the confessions earlier, should withdraw the case from the jury.

Their Lordships were of the opinion that when the three conditions mentioned above [not corroborated, unconvincing and mental handicap] applied at any stage of the case, the trial judge should, in the interest of justice, take the initiative and withdraw the case from the jury.”

The conditions appear to be read conjunctively and cumulatively, rather than disjunctively. It should be pointed out, however, for reasons soon to be dealt with, that mental handicap should not be a prerequisite to requiring corroboration in cases where the interrogative process has taken a wrong turn.

This would seem to bring English law into line with the long existing Scottish requirement of corroboration<sup>55</sup> in criminal cases. However, the adoption of the Scottish law might not necessarily have solved all the problems with disputed confessions since in Scotland relatively little additional evidence is required to constitute corroboration of a confession. The limitations of this rule can be seen in an aspect of the *Kiszco Case*<sup>56</sup> mentioned previously. One reason, no doubt, which led the police

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55. It is difficult to encompass the Scottish requirement of corroboration in criminal but not civil cases (see the *Civil Evidence Act, Scotland*, 1988) within a short space. The need for corroboration is consistent with both civilian systems of law and canon law though not with the general Anglo-Canadian rule permitting a court to act on the uncorroborated evidence of a single witness. There are, however, statutory exceptions in Anglo-Canadian law either requiring corroboration as a result of statutory provision or, perhaps more importantly, a warning may be required to be given to the jury of the danger of the dangers of convicting without the existence of corroboration. The Scottish rule clearly goes beyond this by requiring corroboration as a general rule in all criminal cases. Sheriff McPhail in chapter 22 of his authoritative book *Evidence* (Edinburgh: Law Society of Scotland, 1987) divides facts into (i) crucial facts; (ii) evidential facts; and (iii) procedural facts. Evidential facts are those in a criminal cause which establish an accused's guilt. Such facts, in the absence of a statutory direction to the contrary, require "full proof" by two or more witnesses, or two or more evidential facts (defined below) spoken to by separate witnesses, from which a crucial fact may be inferred, or by a combination of the direct evidence of one witness and one or more evidential facts spoken to by other witnesses which support it. An evidential fact is one which individually establishes nothing but, in conjunction with other such facts, allow a crucial fact to be inferred. A single witness can establish an evidential fact. "Procedural facts" refer to incidental facts or matters of procedure in a criminal trial which are not crucial because they relate neither to the commission of a trial or the accused's implication in it. In the context of a confession freely given and unequivocal in its terms McPhail (*op. cit.* para. 22.30) states that very little corroboration of a confession is required citing the words of Lord Dunpark in *Hartley v. H.M. Advocate* 1979 *S.L.T.* 26 at 33: "the confession of guilt by an accused person is prejudicial to his own interests and may therefore be assumed to be true. Accordingly, one is not then looking for extrinsic evidence which is more consistent with his guilt than his innocence, but for extrinsic evidence which is consistent with his confession of guilt." In the same paragraph (23.30) McPhail remarked that corroboration of confessions does not seem to have caused major difficulties in recent years. Developments since 1987 render it unlikely that McPhail would write in the same terms today. A further area of interest lies in corroboration by means of the so called *Moorov Rule* based on *Moorov v. H.M.A* 1930 J.C. 68. by which two or more single witnesses to separate incidents may corroborate each other if the offences are closely linked in time, character and circumstances. In the context of inexpert interviewing of separate child witnesses by a common interviewer in a child abuse case the "common story" obtained by the interviewer may be more highly corroborative of inexpert interviewing than the substance of the allegations. For those wishing to read some recent Scottish cases on corroboration see: *Russell v. HMA* 1990 SCCR 18, *Lees v. Roy* 1990 SCCR 310; *Gilmour v. HMA* 1990 SCCR 590; *Sinclair v. Tudhope* 1987 SCCR 690; *Horne v. HMA* 1991 SCCR 248; *Moore v. HMA* 1990 SCCR 586; *Gracey v. HMA* 1987 SCCR 260; *Stephen v. HMA* 1987 SCCR 570; *Mongan v. HMA* 1989 SCCR 25. For a recent article on reform of the English law see R. Pattenden "Should Confessions be Corroborated" (1991), *L.Q.R.* 317.

56. See *Legal Action* June, 1992, p.4.

to believe that they had correctly identified the suspect was the fact that apparently corroborating evidence had been found on Kiszco in the form of a piece of paper with a car registration number on it. The number was that of a car known to have been driven past the murder scene, and also tallied with Kiszco's confession, later proved to be false, that he was at the scene of the murder.

The piece of paper was later found to be used for Kiszco's hobby of car spotting and thus had a completely innocent explanation. It was this that led an experienced criminal lawyer, Stephen Sedley Q.C. (now Mr. Justice Sedley)<sup>57</sup> to suggest that corroborative evidence should *unequivocally point to guilt*.

Anticipating some of these case-law developments academic writers such as McConville, Sanders and Leng<sup>58</sup> have suggested that the following problems may exist with interrogation:

- (i) where the anxiety and stress of the interrogation produces an admission in which, in order to end an atmosphere of suspicion and hostility, the suspect will say anything which seems to produce, for a moment, a more favourable feeling;<sup>59</sup>
- (ii) widespread, but accepted, police practice may occasionally produce a definite psychiatric condition in the suspect leading to a false or erroneous confession. Such a confession might be of the "*coerced-compliant confession*" in which the confession is elicited by the nature of the interrogation process, but in which the suspects remain aware that they did not commit the crime in question e.g. where they confess to achieve some immediate gain such as a release from custody on bail. The alternative "*coerced-internalized confession*" involves a confession in which the suspect becomes convinced, at least temporarily, during the interrogation that they might have, or did, commit the crime.<sup>60</sup>

McConville *et al.* suggest that a third species, called a "*coerced-passive confession*,"<sup>61</sup> exists in which the process of questioning induces the

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57. See *Independent* Sept. 17th, 1992.

58. McConville, Sanders and Leng, *The Case for the Prosecution—Police Suspects and the Construction of Criminality*, (London: Routledge, 1991, esp. ch.4).

59. Adopting the words of Williams in "The authentication of statements to the police" (1979), *Crim. L.R.* 6.

60. McConville *et al.*, *op. cit.* p.67, adopting the language of Gudjonsson and MacKeith in their paper "False Confessions—psychological effects of interrogation. A discussion Paper," in Trankell (ed.), *Reconstructing the Past: The Role of Psychologists in Criminal Trials*, Deventer, The Netherlands, Kluwer. McConville *et al.*'s book has an excellent bibliography which is too extensive to set out here.

61. *Op. cit.*, note 60, p.68.

suspect to adopt the confession form without even understanding the substance of what is accepted or adopted as a consequence of *heightened interrogative suggestibility*. By way of example McConville *et al.* give four forms of this:

- (i) *leading questions*;
- (ii) *statement questions* in which statements masquerade as questions which the suspect is defied to contradict or invited to confirm—"you took the money after displaying the knife and threatening the victim—didn't you?"
- (iii) *legal-closure questions* which purport to invite the suspect to provide information, but in reality force information into a legally significant category in the hope that the suspect will adopt it. Thus in a shop-lifting case in which the suspect admits taking the goods but denies that it was done dishonestly, the interrogator might say "so you admit stealing the goods." This thus bypasses the need to establish *mens rea*, a necessary element in the crime.
- (iv) *Imperfect syllogistic questions* involve the suspect being invited to accept that a debatable proposition follows from a prior unarguable proposition. Often this will relate to the existence of *mens rea* merely from the existence of the *actus reus*. Thus if a suspect admits to breaking an item he will be invited to agree that he acted "*recklessly*."

In short, if adults confess to crimes they did not commit because of the pressure of the interrogative process it seems that children may make inaccurate or misleading statements if the interview process is improper.

#### (b) *Interviewing Children so as to Maximise their Credibility*

Child Abuse, of whatever kind, is often surrounded by secrecy. Even medical examinations in suspected cases of child sexual abuse may produce no legally acceptable evidence or the evidence may be equivocal. In an American study in 1986 Enos *et al.* concluded that of 162 cases of suspected child abuse only 40% of cases where the special forensic skills of a medical examiner were used (as opposed to doctors with lesser forensic skills) produced legally acceptable evidence.<sup>62</sup> My recent discussions with British and Canadian pediatricians has suggested that the 40% figure may well be optimistic and the true figure much lower,

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62. F. Enos, T.B. Conrath, and J.C. Byer, "Forensic Evaluation of the Sexually Abused Child" *76 Pediatrics*, 385-398.

possibly as low as 10-15%.<sup>63</sup> Since there may well be little evidence of child abuse (of whatever kind) other than the word of the child, it is important to discuss the credibility and suggestibility<sup>64</sup> of children and ways of interviewing children to maximise their credibility and minimise their suggestibility. I am not here concerned with the rules about competency by which children below a certain age are presumed to be incompetent to give evidence and simply not permitted to give evidence in court,<sup>65</sup> or can only do so after satisfying a special enquiries about their verbal abilities and ability to distinguish between truth and falsehood.<sup>66</sup>

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63. A.R. De Jong, G.A. Emmett, and A.R. Hervade, in "Sexual Abuse of Children," 136 *Am. J. of Diseases of Children*. suggested that 24% of children suspected of abuse showed some signs of trauma. However, when the physical and psychological categories of trauma are excluded the remaining figure is 14%.

64. The most helpful recent review of the literature is that entitled "The Suggestibility of the Child Witness: A Historical Review and Synthesis" by S. Ceci and M. Bruck, *Psychological Bulletin*. (in press). The authors define suggestibility as the degree to which a child's encoding, storage, and reporting of events can be influenced by a range of social and psychological factors. The article contains an invaluable bibliography. See also S. Ceci, Leichtman and T. White, "Interviewing Preschoolers," D. Peters (ed.), *The Child Witness in Cognitive, Social and Legal Context* (Kluwer, Netherlands—in Press). In addition, see D. Lorenzen, "The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child" (1988), 42 U. of Miami L.J. 1033-1072, Sol Gothard "The Admissibility of Evidence in Child Sexual Abuse Cases" (1987), 66 *Child Welfare*:13-24; L.G. Schultz, "Social Workers as Expert Witnesses in Child Abuse Cases" (1990), 5, *J. Of Independent Social Work*: 69-87; H.N. Weissman, "Forensic Psychological Examination of the Child Witness in Cases of Alleged Sexual Abuse" (1991), *Am. J. of Orthopsychiatry* 61:48-58; H.M. Hughes, "Psychological and Behavioural Correlates of Family Violence in Child Witnesses and Victims" (1988) *Am. J. of Orthopsychiatry* (1988) 58:77-90. In Canada, see J.C. Yuille, "The Systematic Assessment of Children's Testimony" (1988), 29 *Canadian Psychology*:247-262; M. Mian, K. Haka-Ikse, M. Lefkowitz and C. McGoey's 1990 paper "The Child as a Witness". (1991) 4 C.R. (4th) 359, "Assessment of Children's Recall" (1988) 29 *Canadian Psychology* 2888. On the topic of children's evidence in custody cases see Madam Justice Carol Mahood and Jean Charlotte Ensminger's "Hearing the Voice of Children" (1991-92), 8 *C.F.L.Q.* 95.

65. In England this is commonly about age 7. See the *Scottish Law Commission Report on the Evidence of Children and other Potentially Vulnerable Witnesses* (No 25). H.M.S.O. Edinburgh, 1990 p.11. The position in Scotland is that children are legally competent subject to their verbal abilities and ability to understand the difference between truth and falsehood.

66. In Scotland the question centers on the verbal abilities of the child and the child's ability to distinguish truth from falsehood, whereas the position in Canada, as in England, is also affected by the question of whether children are old enough to give sworn testimony having appreciated the "nature and consequences of an oath." Children unable to swear an oath may give unsworn testimony in civil and criminal cases but corroboration of their testimony is usually required. See further the "Report of the Federal/Provincial Task Force on the Uniform Rules of Evidence", Carswells 1982. ch.18. Bala in his article (f.n.7 *supra*) discusses the artificiality of this enquiry).

(A) *Knowledge from the behavioural sciences*(i) *Suggestibility*

In their invaluable review of the research literature “The Suggestibility of the Child Witness: a Historical Review and Synthesis,” Ceci and Bruck<sup>67</sup> suggest that the available studies tend to fuel rather than resolve disagreements amongst researchers about the suggestibility of children’s statements.<sup>68</sup>

It is sometimes alleged that young children, or at least some young children, find it difficult to distinguish fantasy from reality. Early studies suggested that even five year old children could quite easily distinguish fantasy toys from toys depicting realistic subjects.<sup>69</sup> More recent studies

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67. Ceci & Bruck, *supra*, note 64.

68. Representative of the studies supporting the view that children are more suggestible than adults is that of S.J. Ceci, D. Ross and M. Tolia (1987), “Age Differences in Suggestibility: Psycho-legal Implications” 117 *J. of Experimental Psychology*, 38-49 in which stories accompanied by illustrations were shown to children between three and 12 years of age. One day later, half the children were provided by the researchers with misleading information about aspects of the stories. Two days later the researchers tested the children’s memories of the stories by having them select from a series of four pictures the two that had actually appeared in the stories. Age differences were obtained only for those children who were given misleading information. Pre-schoolers were more likely than the older children to select pictures that were described in the misleading session and not pictures that appeared in the actual story.

In contrast, and representative of another group of studies that younger children are not more suggestible than older children is the study by R. Flin, J. Boon, A. Knox, “Children’s memories following a five month delay” (1992), *British J. Psychology* (in press). This suggests that younger children are not more suggestible than older children. The research groups of six and ten year-olds being exposed to a realistically staged argument during a presentation on foot hygiene given by a nurse in a school auditorium. Half the subjects were interviewed next day about the event and all were interviewed five months later. Three of the questions asked contained erroneous information. In both groups, responses were highly accurate across all age ranges. Few of the subjects of any age accepted the erroneous information.

Ceci and Bruck suggest a number of factors which might help to reconcile the apparent contradictions in the two studies mentioned. One factor is sample size. A second suggests that the Ceci *et al.* study might have been affected by its experimental nature in contrast to studies such as that by Flin *et al.* which involved a more naturalistic setting. However, this approach does not explain age related differences found in more naturalistic and stressful settings e.g. P.A. Ornstein, B.N. Gordon and D. Larus (1992), “Children’s memory for a personally experienced event: Implications for testimony,” 6 *Applied Cognitive Psychology*, 49-60.

A third factor may involve the linguistic complexity of the misleading questions in the appearance (or otherwise) of age related differences in suggestibility.

69. P. Morison and H. Gardner, “Dragons and Dinosaurs: The child’s ability to differentiate fantasy from reality,” 49 *Child Development*, 642-648.

have suggested that the earlier claim needs some qualification<sup>70</sup> and Ceci and Bruck<sup>71</sup> suggest that if children are not brought back to reality by their adult interviewers after being invited to indulge in fantasy play problems may emerge.

Ceci and Bruck<sup>72</sup> point out some of the social and motivational factors which may make children prone to suggestibility or to change their minds. Amongst the most important is the fact that children from an early age regard adults as cooperative, truthful and not deceptive. Adults are highly credible and competent sources of information and children place more credibility on adult's statements than those of other children. Ceci and Bruck state that the effect of repeated questions on children's recall has been explored in a number of studies which seem to suggest that repeated "open-ended" questions produced little effect (in terms of change of mind) on either children or adults. However, when repeated "yes/no" questions were employed four year old children were more likely to change their stories than six or eight year olds.

In addition to the types of questions asked interviews were also affected by the emotional tone or disposition of the interviewer. Since importance is placed on interviewers building a rapport with young clients interviewers try to encourage and reinforce answers and, on rare occasions, chastise children for their failure to disclose information. These techniques have been claimed to be inconsistent with the accurate gathering of information. Ceci and Bruck<sup>73</sup> report that while "positive interviewers" may elicit the most accurate information from children, the unpublished study by Geiselman, Saywitz and Bornstein suggests that they also elicit more inaccurate statements than those obtained by neutral interviewers.

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70. See P. Harris, E. Brown, C. Marriott, C. Whittal and S. Harmer, "Monsters, Ghosts and Witches: testing the limits of the fantasy-reality distinction in young children," 9 *British Journal of Developmental Psychology*, 105-123. The study involved 4 and 6 year old children who, after correctly identifying ghosts, monsters and witches as unreal, were then asked to imagine that a pretend character was sitting in a box. After a very short period many of the children began to act as if the figure was real. Half the children had been told that the pretend figure was a rabbit and half that it was a monster. When the experimenter then told the children that she had to leave the room 25% of the four year old children who had been told that there was a monster in their box would not let her leave the room—even after seeing and stating that the box was empty. None of the other children acted in this way and yet for some of the children fantasy had become reality.

71. *Op. cit.* p.26.

72. *Op. cit.* p.28.

73. *Op. cit.* p.32.

The tone or disposition taken by the interviewer during the course of an interview may also be affected by the amount of information possessed by that interviewer. In a study of interviewing,<sup>74</sup> some student interviewers of three to five-year-olds were given different amounts of information, some were given full accurate information about the event, some were given a report containing inaccurate information while others were given no information. All the interviewers were asked to find out what happened but were each warned not to ask leading questions. Despite this 30% of the question asked were leading. Interviewers with inaccurate information asked more (four to five times as many) leading questions as other interviewers and thus obtained more inaccurate information. The conclusion seems to be that the interviewers' knowledge influences their style of questioning. There is also some suggestion that the problem is more acute where the interviewer is a stranger than a parent.<sup>75</sup>

Since for a child events may have more than one interpretation, the question becomes compounded when children, in a court context, are interviewed several times by interviewers for whom the event has different interpretations. Studies<sup>76</sup> tend to show that when interviewed by a neutral interviewer or one whose interrogations were consistent with what the child had witnessed children's accounts were most accurate. If interviewed by a second interviewer in a way inconsistent with the first interview a large number of students, particularly the younger ones, were likely to answer interpretative questions in agreement with the second interviewer rather than in accordance with what had happened. Ceci and Bruck recognise<sup>77</sup> that whilst there are many examples supporting the effect of interview bias on children more research is needed, and they

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74. F. Pettit, M. Fegan, and P. Howie (1990), "Interviewer effects on children's testimony." Paper presented at the International Congress on Child Abuse and Neglect, Hamburg Sept. 6th-9th, 1990.

75. G.S. Goodman, A. Sharma, M. Golden and S. Thomas, "The effects of mothers' and strangers' interviewing strategies on the children's reporting of real-life events." Paper Presented at the Biennial Meeting of the Society for Research on Child Development, Seattle, WA., April 20th, 1991.

76. A. Clarke-Stewart, W. Thompson, and S. Lepore, (1989), "Manipulating children's interpretations through interrogation." Paper presented at the Biennial Meeting of the Society for Research on Child Development, Kansas, MO, May 2nd, 1989.

77. Ceci & Bruck, *supra*, note 64, p.35.



point to actual court case examples where repeated relentless interviews<sup>78</sup> that were suggestive or even threatening did not produce a change in the child's testimony.

A particular concern has been exhibited over the use of anatomically correct dolls and the credibility of evidence obtained from children's reactions and play with such dolls. The use of such dolls is widespread.<sup>79</sup> Those with reservations about their use emphasise that the dolls are suggestive<sup>80</sup> and may encourage a child to engage in sexual play even if the child has not been sexually abused and, in the absence of information on the use of such dolls by non-abused children or standardised procedures about the use of such dolls, interpretation of the child's interaction with the dolls is difficult. Ceci and Bruck<sup>81</sup> summarise the studies on the use of such dolls as equivocal. Whilst some studies show differences between abused and non-abused children in the use of such dolls, and some researchers claim that non-abused children rarely, if ever, exhibit sexually explicit play with dolls, other workers claim the contrary.

A crucially important fact is that the context of the use of dolls differs markedly between research studies and their use in the investigation of, and therapy in, suspected child-abuse cases. In a forensic or therapeutic situations the children will be likely to have had repeated exposure to the dolls, they may have been invited by the interviewer to have use the dolls in fantasy play, to give the dolls names of people allegedly involved in the case under investigation,<sup>82</sup> or to berate the dolls for abusing children. Given this it is not difficult to see that differences in response to abused and non-abused children might be found. It is also possible that whilst the example of children berating dolls for abusing children to giving the dolls the names of alleged abused may have a cathartic and therapeutic effect

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78. For examples see Ceci and Bruck's quotations (*op. cit.* pp.35 to 37) from the transcripts of interviews in two United States cases—the *Kelly Michaels Case* (by a social worker) and in the *Country Walk Case* (by the defence lawyer). It is worth pointing out in the latter case that despite the child being forced into eye contact and having to deal with the questions of an angry and accusatory lawyer in the strange and threatening venue of a court room, the child maintained his contention that the accused had oral sex with him, a story later supported by the accused's wife.

79. In a 1988 survey, in the U.S.A., 90% of professionals were reported to be using anatomically correct dolls. B. Boat, and M. Everson, "The use of anatomical dolls among professionals in sexual abuse evaluations" 12, *Child Abuse and Neglect*, 171-186.

80. Yuille quotes from studies emphasising that the genitals in the dolls may be one third bigger (proportionally) than in people. *Op. cit. supra* f.n.58 p.256. It is this that perhaps prompted the reference by Flin and Spencer in *The Evidence of Children*, Blackstone, 1990 p.281 the fact that the dolls were more properly "anatomically optimistic" than "anatomically detailed."

81. Ceci & Bruck, *supra*, note 64, p.39.

82. As in the *Ayr Case* post.

it may also prejudice this approach in a non-therapeutic context such as the quest for reliable evidence.

(ii) *Do Children lie?*

The word “lie” in this context suggests a range of behaviour in children (as with adults) ranging from an attempt to deceive all the way to the so called “white lies” based on politeness or tact. In terms of motivations Ceci and Bruck<sup>83</sup> identify five motivations:

- (i) *to avoid punishment*—mothers in two studies have reported that this is the most frequent motivation for lies by four year olds;
- (ii) *to sustain a game*—here the evidence seems to be that the stronger the coaching by an adult the greater the rate of deception;
- (iii) *to keep a promise*—if an adult asks a child to promise not to say that an event has occurred because the adult will get into trouble, children as young as three will omit information;
- (iv) *to achieve personal gain* such as being accepted in a group;
- (v) *to avoid embarrassment*. Ceci *et al.*<sup>84</sup> in an article in press mention an experiment in which parents were instructed to kiss their children in the bath and then, when the parents were absent, a third party then told the children that it was “naughty” to kiss someone when they had their clothes off. The attempt here was to create in the child a motivation to omit information. Other children who had not been kissed in the bath were told that parents who loved children often kissed and hugged them in the bath thus providing an incentive to include information so as to avoid embarrassment. Both errors of commission and omission were produced in this study. The fear of embarrassment can be an important feature for children being interviewed in a child abuse context.

(iii) *Stress and other causal factors in lying*

Although there has been some suggestion that the stress of an incident may serve to etch events onto the child’s memory ( the so-called “flash-bulb” effect) the greater weight of research suggests that stress does not improve and might even impair recall. The “flash-bulb” effect may be better understood in terms of people rehearsing certain events and

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83. Ceci & Bruck, *supra*, note 64, p.41.

84. S. Ceci, M. De Simone, and M. Putick, (eds.) (1992), (in press), “Cognitive and social factors in early deception” (Hillsdale N.J. Erlbaum).

it is the rehearsal which enhances recall. Alternatively children may have been prepared by their parents for certain unpleasant experiences such as inoculations or having blood taken off and this “script” or preparation rather than the event itself may serve to enhance recall. For younger children their experience and more limited knowledge might make them more suggestible in stressful situations of which they had little experience or understanding.

(iv) *Conclusions*

Ceci and Bruck suggest<sup>85</sup> that there are significant age differences in suggestibility and rely, *inter alia*, on the work of Goodman *et al.*<sup>86</sup> for compelling evidence that young children do make false claims about central events, particularly concerning events that could be construed as sexual abuse. In the anatomically detailed dolls study mentioned above, Goodman and Aman found that three to five year olds frequently gave “false answers” to questions such as “did he touch your private parts?” (32% of three year olds and 24% of five year olds gave inaccurate answers to this sort of question). Ceci and Bruck conclude that in an attempt to understand the different motives for lying more research is needed to find out whether there are age related shifts. Notwithstanding this there is evidence that even preschoolers are capable of recalling much that is forensically relevant. Ceci and Bruck conclude that:

“what is important is that the court should have the following information if the child’s evidence is to be evaluated:

- (i) the circumstances under which the initial report of concern was made;
- (ii) the number of times the child was questioned;
- (iii) the hypotheses of the interviewers who interviewed the child;
- (iv) the kinds of questions that the child was asked; and
- (v) the consistency of the child over a period of time.

Assuming that disclosure of events was made in a non-threatening, non-suggestible atmosphere, if the disclosure was not made after repeated interviews or questioning, if the adults who had access to the child prior to the child giving testimony are not motivated to distort the child’s testimony through relentless and potent suggestions, if the child’s report remains highly consistent over a period of time, then a young child would be judged to be capable of providing much that is forensically relevant.”<sup>86a</sup>

85. Ceci & Bruck, *supra*, note 64, p.50.

86. G. Goodman and C. Aman (1990), “Children’s use of anatomically detailed dolls to recount an event.” 61 *Child Development*, 1859-1871.

86a. Ceci and Bruck, *op. cit.*, note 64, p.53.

In short, provided that the correct questions are asked, and answered satisfactorily, then children's evidence can carry considerable weight in court and its exclusion or rejection may deprive the court of vital evidence in a child protection case.

(B) *The strengths and weaknesses of children's memories*

Related to, but to some extent separate from, the question of the suggestibility of children is the question "what sort of things do children remember best?" For lawyers this tends to revolve round the "W" questions: who, where and when and was anybody else present?" Some of the information has already been dealt with above, but the child's developmental state and questions of suggestibility are not quite the same thing.

A few basic points are worth making;

- (i) children, especially young children, more readily memorise events and details in which they were centrally and directly rather than peripherally involved;<sup>87</sup>
- (ii) When it comes to identification, children find it difficult to make accurate judgments of adults' age, height or weight or colour.<sup>88</sup> Very young children e.g. below age three, find it difficult to deal with photographic identification, especially after delay;<sup>89</sup>
- (iii) Children's errors of memory tend to be of omission rather than inclusion of false information;
- (iv) Although the Scottish Law Commission has suggested<sup>90</sup> that children's recall of events may fade more quickly than adults, the empirical evidence of this is inconclusive since few of the more realistic studies of children's eyewitnessing abilities have included both adults and children;<sup>91</sup>
- (v) children, especially young children, find it difficult to deal with abstract concepts such as time, the "when" question;<sup>92</sup>

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87. J.R. Spencer and R. Flin, *The Evidence of Children—the law and the psychology* (London: Blackstone Press, 1990) p.252.

88. Yuille, *supra*, note 64, p. 251.

89. *Ibid.*, p.242.

90. Scottish Law Commission Report on *The Evidence of Children and Other Potentially Vulnerable Witnesses* (Scottish Law Com 125) H.M.S.O., Edinburgh: 1990) p.3.

91. *Ibid.*, p. 251.

92. Yuille, *supra*, note 64, p.251. See also D.J. Friedmann, "The Development of Children's Memory for the Time of Past Events" (1991), 62 *Child Development* 139-155. *The English Memorandum of Good Practice* on video recorded interviews with child witnesses for criminal proceedings. (H.M.S.O, London, 1992) para.2.6 recommends the use of anniversaries (like birthdays) or other events to help a child to pinpoint events.

- (vi) questions turning on linguistic skills (even a reference in a question to *a* rather than *the* car may tax a young child's comprehension) or knowledge that a child does not have may pose acute problems for a young child.

These matters should be born in mind in assessing a child's evidence. It would be wrong to assume that because a child cannot give certain pieces of evidence which are beyond the child's state of development or cognition, that other pieces of evidence which a child can be expected to give should have their weight or credibility discounted. It does not follow that a child who cannot estimate *when* an event happened, or the age or weight of a suspect should have their credibility discounted by this when matters of direct concern to the child, such as whether they were sexually abused, produces apparently relevant evidence.

#### 4. *The Context & Process of Interviewing*

It is important at the onset to distinguish between "forensic interviewing" in which the aim is to gather evidence for use in subsequent civil or criminal proceedings, and "interviewing as part of a therapeutic process" e.g. to enable an abused child to overcome the trauma of the abuse. Legally there will be much less need to worry about the interviewing technique used in the latter as the risks of a court receiving evidence which has resulted from "coaching a witness," or from answers to "leading questions" or the attempt to "trigger a response" will not be present. Even within the "forensic perspective" it may be necessary to distinguish between "child protection cases," where the welfare of the child is paramount, and the rules of evidence less strict and criminal cases where detection and successful prosecution of the offender is the object in view but in which the rules of evidence are stricter. Where both are concurrent there is the risk that the preparation of the case for criminal proceedings becoming the dominant force and the interests of the child recede, unless restrained by provisions like s.44 (7) of the English *Children's Act* 1989.<sup>93</sup> This section allows a child of sufficient age and understanding to make an informed decision and decline to submit to medical examinations or other assessments (and presumably unwanted

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93. For a closer analysis see A. Bainham, "Children—the new law," in S. Cretney and J. Masson, *Principles of Family Law* (5th ed.) (London: Sweet and Maxwell, 1990).

questioning).<sup>94</sup> The tensions of joint police and social work investigations emerge in the judgment of Douglas Brown J. in the *Rochdale Case* dealt with in more detail below. In that case the judge formed the view that early morning raids were likely to have been initiated by the police. Even where, as is commonly the case in Britain, investigations are undertaken by special joint police/social work investigators the question arises: “will one discipline or personality assume the upper hand?” In the Orkney Inquiry Lord Clyde asked the question “what happens if one investigator is busting to get the truth out of a child and the other investigator has the child’s welfare at heart?”<sup>95</sup>

Joint interviewing has the potential to allow each interviewer to acquire the skills of the other discipline, a point stressed by Angus Skinner, the Chief Scottish Social Work Adviser in his evidence to the Orkney Inquiry.<sup>96</sup> However, the two pronged approach raises a potential problem in which the specialist skills of each discipline become “blunted” by the acquisition of different skills from their partner—e.g. the police’s forensic skills become blunted by a desire to help the child in a way that might assist the child’s welfare but compromise the evidence derived from interviewing the child.

A further problem arises from the differing standards of proof and evidence admissible in in criminal and child protection proceedings. In England and Wales (but not yet Scotland) a “Memorandum of Good Practice on video recorded interviews with child witnesses for criminal proceedings has just been released.”<sup>97</sup> The Guide is primarily intended for criminal proceedings, and allows the examination-in-chief of children (but not cross-examination or reexamination) to be by a videotaped interview by the police or social workers rather than by an advocate in open court. The procedure is governed by the *Criminal Justice Acts, 1988 and 1991*, and is only available in Crown Court or Youth Court but not the Magistrates’ Court. A precondition under s. 34A of the 1988 Act, as

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94. *The English Memorandum of Good Practice* on video recorded interviews with child witnesses (H.M.S.O., London, 1992) is rather coy about the question of consent to interviews on children. At p.14 there is an exhortation to obtain the consent of a child mature enough to understand the concept of consent. Where the child is too young the interviewers are advised to listen to the views of the carers whilst guarding against the possibility of their being abusers of the child. Where neither the child nor the parents consent to the interview the authority for an interview is not made clear.

95. *Aberdeen Press and Journal*, March 1st, 1992.

96. *Ibid.*

97. H.M.S.O. (Home Office in conjunction with the Department of Health) London August 1992.

amended by the 1991 Act,<sup>98</sup> to the reception of the videotape evidence is that the court has enough evidence about how the video-tape was made to ensure that the relevant rules of court have been complied with. In order to protect the child once the video-tape has been made, no further interviews or questioning are to occur unless the interviewing team, in consultation with the Crown Prosecution service, deem this to be necessary. The problem here of a single interview is that an interview complying with the less strict rules of evidence governing civil cases such as child protection proceedings<sup>99</sup> may well result in questions being asked that are not admissible in a criminal case where the rules of evidence are more strict.<sup>100</sup> The consequence of this tension also emerges in the less likely case of the criminal investigation preceding the civil investigation since questions relevant to the civil investigation may not be asked for fear of infringing the stricter rules applying in criminal cases.<sup>101</sup> The alternative is to put the child through the process a second time to pose questions properly admissible in the criminal case but at the risk of either traumatising the child or opening up arguments that the child has been “coached” or “rehearsed” by the earlier interviews. The English legislation seems to be predicated on the effect of the video-taped evidence on the accused and the accused’s likelihood of pleading guilty. In fact, the requirement that the child be available for cross-examination, and a reluctance on the part of the accused to plead guilty to serious sexual offences may still leave the child open to the trauma of giving evidence in open court albeit protected by the “live television link” from seeing the accused. The protections felt necessary to protect the accused may result in the civil law of child protection being of greater use to the child than the criminal law.

A particular problem area in child protection interviews is the so-called “disclosure interviewing” which attracted much scrutiny in the *Cleveland* and *Rochdale* cases and is likely to be at the heart of the *Orkney Inquiry*. The words of Chapter 12 of the *Cleveland Inquiry* are worth repeating verbatim:

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98. Further supplemented by a Practice Direction (Crime: Children’s video evidence) on the admission and editing of video-taped evidence of children. *London Times*, Sept. 17th, 1992.

99. The child protection investigation may well be the first to occur.

100. This is particularly true in Scotland under the *Civil Evidence (Scotland) Act 1988* which allows the admissibility into evidence of “hearsay on hearsay.”

101. At pp. 3 & 4 of the *Memorandum of Good Practice* the difference between civil and criminal proceedings having been first recognised is then diminished by the statement that an interview for civil proceedings” may well come first. In such circumstances the [protection] interview might need to serve objectives which are additional to, and no less important than, those which this Memorandum is primarily concerned. There is no reason why such objectives cannot be met within a single interview, provided that it is properly prepared.

para.12.18-19

“the problem arises when there is reason to believe that there may be abuse and the child may need help to tell....this is the second or facilitative stage which needs further consideration.

There is a great danger, which should be recognised and avoided from the experience in Cleveland, that this facilitative stage may be seen as a routine part of the general interview, instead of a useful tool to be used sparingly by experts in special cases”

Later at para.12.24 Dr Jones described the fundamental problem of “disclosure work” is that it is inherent to the concept that there is *something* to disclose. All the experts were of the opinion that all interviews required the interviewer to have training, experience and aptitude and the interviewer needed to approach each interview with an open mind. This is particularly true of “disclosure interviews” (though *The Cleveland Inquiry* disliked the term) for, as Rhona Flin,<sup>102</sup> and John Spencer<sup>103</sup> state in their book, *The Evidence of Children*,<sup>104</sup> “a central thread (of the empirical research) has been that the quality or reliability of the a child’s evidence is a function of the skills of the interviewer.” This will be no great revelation to those of you who have read the work of Ceci and Peters, or Goodman and others previously mentioned. When Peters and Ceci spoke at Dundee University in April, 1991 at a Conference on “The Child Witness” they emphasised the need for interviewers to have more than one hypothesis when they approached an interview with a child if they were to avoid falling into error.<sup>105</sup> The problem is not so much with the children who are suggestible (though there is some evidence of this, but to a lesser extent than might have been supposed) or given to flights of fantasy (for though children may suffer from these faults they are not necessarily unduly so) rather it is likely that the problem lies with the adult

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102. Of the Robert Gordon University, Aberdeen.

103. Of Cambridge University.

104. R. Flin and J. Spencer, *The Evidence of Children* (London: Blackstone Press, 1990), p.276.

105. This again is an issue in the *Orkney Case*, since it was put to the R.S.S.P.C.C. interviewer that since she had already admitted to believing the first three children she had interviewed, this might have influenced her approach to an interview with another child who, according to the earlier interviews, had already been abused (see *Aberdeen Press and Journal* for Feb 18th, 1992). In her testimony reported in the *Aberdeen Press and Journal* for March 18th, 1992, Dr. Judith Trowel of the Tavistock Clinic, the independent psychiatrist retained by the Inquiry to review the interview techniques used, commented that one interview with the child WB suggested that the interviewers did not have an open mind. She was also critical of the decision to let the same interviewers, who had interviewed the “W” children, to interview some of the other nine children who had been taken into care. The use of other interviewers might have enhanced objectivity and impartiality.



interviewer.<sup>106</sup> For instance, a failure to appreciate the impact of over-interviewing children<sup>107</sup> may run the risk of “leading”<sup>108</sup> or “coaching” the children, it may “sexualize” the children interviewed<sup>109</sup> and may also leave them with a vocabulary in advance of their development, thus casting doubt on their evidence for forensic purposes. Interviews need to be carefully structured to ensure that they make sense on replay and examination by viewers. Lack of structure may lead to what the children say in response to questions not making sense.<sup>110</sup> There may be equally issues about whether the use of “triggers” to “jog” a child’s memory is appropriate.<sup>111</sup> Integration of such knowledge from the behavioral sciences into the law may necessitate amendment of a number of existing evidential rules, including in Scotland the so called *Moorov Rule* on corroboration, so as to use a series of independent allegations following interviewing by a common interviewer or interviewers as possible proof of unskilled interviewing rather than of the substance of the allegations.<sup>112</sup> It may also be necessary to consider further the recourse to such

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106. Dr. Trowel described one interview of the child WB in Orkney as a “superb example of how not to do an investigative interview”. *Aberdeen Press and Journal* March 18th, 1992.

107. See Dr. Trowel’s comments in the *Aberdeen Press and Journal* for March 18th, 1992 for comments of over-interviewing in *Orkney*.

108. For example in the *Aberdeen Press and Journal* for February 12th, 1992, there was an admission of error by Mrs. Liz McLean, which the paper termed a “crucial error”—no doubt because it was a nine year old boy’s answer to a leading question which led police and social workers to conclude that they had enough evidence to detain two children whose involvement in the alleged activities had previously always been in doubt. One interview in *Orkney* was said to have resulted in the interviewers having given a girl WB so much information about what was alleged to have happened that all later interviews, were invalidated. Dr. Trowel, the independent consultant retained to review the interview techniques used, also indicated that so many leading questions were put that objective conclusions became impossible. See *Aberdeen Press and Journal*, March 18th, 1992.

109. See the evidence of Phil Greene, the Strathclyde area manager, describing the evidence of this in *Orkney* during his testimony reported in the *Scotsman* for Jan. 12th, 1992.

110. See the comments of Dr. Judith Trowel, *Aberdeen Press and Journal*, March 18th, 1992.

111. See the reference to the use of a “turtle poster” in the *Orkney Case*, *Scotsman* for Feb 13th, 1992.

112. *Moorov v. H.M. Advocate* (1930), JC 68. This rule though subject to criticism—see McPhail 23.32 for more detail—is based on two heads. The first head dealing with interrelation of character, circumstances and time runs: “Where an accused is charged with two or more crimes and only one witness implicates him in each, they afford mutual corroboration if the crimes are so inter-related by character, circumstances and time as to justify an inference that they are parts of a course of criminal conduct systematically pursued by the accused.”

The second head runs: “A similar rule applies where several crimes charged are all directed to the same end.”

The assumption is that each witness is telling the truth. There could be circumstances, however, where a series of similar assertions by child witnesses in response to improperly carried out interviews would carry more weight as corroboration of the impropriety of the interviewing than of the truth of the substantive allegations.

commonplace interviewing aids as anatomically detailed dolls (or perhaps more correctly anatomically optimistic dolls).<sup>113</sup>

Testing whether or not the interviewing of children was done expertly can be a time consuming process since it involves almost certainly each side or party calling their own expert witnesses, who are not readily available to the court at the drop of a hat. Even if the techniques used to interview children were not sound the question then arises:

“what should be done in the face of evidence which may represent a blend (in unknown proportions) of reality, inaccuracy, and pressured responses?”<sup>114</sup>

One solution may be to re-interview the children with a more expert interviewer,<sup>115</sup> perhaps under judicial authority—though if a child has been repeatedly improperly interviewed it may never be possible to get to the truth—which is an especially worrying problem where there is a suspicion that, despite the improper interviewing, the child may have been abused. Moreover, repeated interviewing of the child is not without the risk of further traumatising the victim, even if the re-interviewing is done sensitively. Interviewing may be a non-invasive technique in terms of physical medicine—however it may be intrusive in terms of psychological medicine. This is especially true if the interviews are accompanied by physical examinations even though these are often likely to produce inconclusive results.<sup>116</sup> This is the result in the majority of cases even where sexual abuse is known to have occurred.

The consequences of poor interviewing can be almost incalculable since they are the basis of the decision about whether or not to release the child or, if the case is to go to court, the decision to have the child detained pending the proceedings. Unless the interviews are recorded or videotaped it is unlikely that a subsequent investigator will be able to assess the quality of the interviewing. He will only get answers to questions. It must be admitted that the availability of videorecording facilities in many

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113. See further for more detail: M.D.A. Freeman “Butler Sloss and Beyond” (1989), *Current Legal Problems* 85, especially p.111 and in particular p.113 f.41 where Freeman concludes that such dolls cannot be used to distinguish abused from non-abused children. See also Spencer and Flin, *supra*, note 104, p.279.

114. See Sarah Nelson’s article in the *Scotsman* for January 2nd, 1992.

115. See the comments of Dr. Trowell, the consultant psychiatrist retained by the *Orkney Inquiry* to advise on interviewing techniques. She categorised the suggestion of Angus Skinner, the Chief Social Work Adviser to the Scottish Office, that five or 10 days training would be sufficient to equip a social worker to work in child protection cases as “pretty minimal,” *Scotsman* March 19th, 1992. Something in the nature of a University type course extending over several months seems required to train specialist interviewers.

116. See f.n.48\_+~ ante.

jurisdictions, including Scotland, is not widespread and the acceptance of it by courts variable. In Scotland the problem of evaluating the evidence is now compounded by the fact that most evidence is admissible in civil (but not criminal cases) even "hearsay on hearsay." In other words since the *Civil Evidence (Scotland) Act*, 1988, the battle had shifted from admissibility to weight.<sup>117</sup>

In Canada the effect of the decision in *R. v. Khan*<sup>118</sup> may be to a similar, though less drastic effect, by relaxation of the rules of evidence. Small wonder then that there is a risk of those dealing with serious allegations of sexual abuse and the question of what to do with the child whilst an abuse inquiry is ongoing to "err on the safe side" and to detain (or retain) children outside until the question of proof has been fully dealt with.<sup>119</sup> In Scotland the recent decision of Scotland's senior appellate court in *Sloan, Acting Reporter for Orkney*<sup>120</sup> does nothing to facilitate even quite serious procedural challenges to the detention of children outside their home in such circumstances. As Mrs. Scarth, who chaired two of the Orkney Children's Hearings<sup>121</sup> which deal with interim decisions on custody in such cases, is reported to have said, "this doesn't get any easier but we must consider the worst case scenario."<sup>122</sup>

In Nova Scotia the *Children and Family Services Act 1990*, s.39(4) and (6) attempt to solve this problem by encouraging the return of children

117. See for example the comments in *Harris v. F.* (1991), S.L.T. 242, p.245 letter K that grounds of referral under s.32(2)(d) or (dd) of the *Social Work (Scotland) Act 1968*, [that the child has been subjected to an offence under the Sch.1 to the *Criminal Procedure (Scotland) Act 1975* or is or is likely to become a member of the same household who has committed an offence against Sch.1 of the same Act] can be established without corroboration but relying on hearsay evidence. However, there can be cases where it is nevertheless desirable to lead other evidence to corroborate otherwise uncorroborated hearsay evidence. See *Lynda Gordon v. Grampian Health Board*, [1991] S.C.L.R. 213.

118. *R. v. Khan* (1990), 59 C.C.R. (3d.) 92 (S.C.C.); see also *Regina v. K.O.S.* 63 C.C.C. 91.(B.C.S.C.).

119. The test then would appear to be "on the most favourable view of the social work agency's evidence, might grounds for intervention be established even if some technical or procedural errors have been made."

120. See (1991) SLT 530. For a brief analysis of this decision, see A. Bissett-Johnson (1992), 4 J. of Child Law 129; and a fuller analysis can be found in Elaine Sutherland's "The Orkney Case" (1992), *Juridical Review* 93.

121. Scotland has a unique system by which lay people deal with children outside the court system who are involved in delinquency or child protection situations. However their powers are restricted when the parents (or the child) do not accept the allegations ("grounds of referral") made against them. In such cases the matter has to go before a judge (the sheriff) within 28 days. The Children's Hearing can, however, make certain interim orders before the case is heard by the Sheriff. For an introduction to the Scottish Children's Hearing system, see Scott and Ferguson (1991), "In the Scottish Child's Best Interests" 21 *Fam. Law*. 320. For further detail see Kearney, *Childrens Hearings and the Sheriff Court*, London: Butterworths, 1987.

122. See her words as quoted in *The Scotsman* for Wednesday, March 1991.

pursuant to interim hearings unless the court is satisfied that continued contact with the parent or guardian would not be in the child's best interests because of a substantial risk to the child's health or safety. The risk here arises from individual judges' personal values and their assessment of substantial risk in the context of suspicions of sexual abuse, for example.

Yet from what we know of the child's sense of time, bonding<sup>123</sup> and attachment and the disruption of such links, detaining a child even under a place of safety order or other judicial authority is rarely neutral—it may be beneficial or harmful but it is rarely neutral. There can be cases in which the worst case scenario is that children have been removed from their homes for extended periods for what, in due course, turns out to be reasons which lack substance. This is the question to which, in Britain in the *Orkney Case*, the social work department in *Orkney*, the Reporter<sup>124</sup> and the Children's Panel do not seem to have addressed their minds, despite the unusual circumstances of the case.<sup>125</sup> It may well be possible to prevent potential risks to children in other ways, for example by frequent supervision of the children whilst they continue living at home and the mere fact that the possible perpetrators know that they are under close scrutiny.<sup>126</sup> The trouble with cases involving sexual abuse is that the risks may wrongly lead people to err on the side of caution in the mistaken belief that it is neutral. Yet in Britain we know from Rochdale and Cleveland that errors in professional judgment may well be made in such circumstances—though in fairness to the authorities in Cleveland it should be pointed out that it was never established (not having been in the inquiry's remit) how many of the children had, or had not, been sexually abused. Although in the great majority of cases removal of children from their homes may be justified, it is at best an unsatisfactory alternative to

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123. Interestingly, Dr. Segal of the Faculty of Medicine, University of British Columbia, was talking as early as 1966 of the desirability of encouraging mothers of premature babies to visit and handle their children despite obvious medical concerns which had previously placed a potential schism in the maternal-child relationship. See (1966), *Pediatric Clinics of North America* 3:1149, esp.1163.

124. This is a technical name for an official, not a journalist, whose job it is to evaluate evidence to see whether a case should be brought before a lay Children's Panel for disposition. For more detail on the Scottish system see Scott and Ferguson, "In the Scottish Child's Best Interest," (1992), 21 *Fam. Law* 320.

125. When Philip Jackson, a reporter to a children's panel who assisted Gordon Sloan in the uplift of the children, was asked why he supported the retention of the children in care he talked of "the potential harm to the children of returning them home." *Scotsman* Jan 29th, 1992. He did not talk of the risk of harming the child by the use of inadequate evidence.

126. See the comments of Mr. John Chant, Director of Social Work, Lothian Region, to the *Orkney Inquiry* as reported in the *Scotsman* March 24th, 1992. He emphasised that in suspected child sex abuse cases children should only be removed when their lives were at risk.

a child living in a functioning family with two (or increasingly one parent) and one should not be over-sentimental about children in institutional care. The comments of one of the Orkney mothers about her fear of her child being subjected to homosexual acts and contracting AIDS<sup>127</sup> seem like a clear over-reaction until one remembers that in England at least, we have recently read about children sexually abused in Leicester Children's Homes,<sup>128</sup> "Pindowned" in Staffordshire,<sup>129</sup> a child apparently in care raped by another two children also apparently in care<sup>130</sup> and 17 people charged with physical and sexual abuse of children in the Bryn Estyn Home in Wrexham.<sup>131</sup> These comments can be seen in the light of the criticisms in *Orkney* of the interviewing there. Even before the publication of the Inquiry the criticisms, many of them from the Inquiry's own expert witness retained to review the interviewing techniques used in the case, have included:

- (i) overinterviewing children;
- (ii) putting the children under pressure too early on in the interview—adult interviewers following their own agendas rather than that of the child;
- (iii) having badly structured interviews so that the children's answers were incomprehensible;
- (iv) tantalising the children by offering them a choice not to return to the interview when in reality that choice did not exist;
- (v) putting so many leading questions to children (including the interviewers' own beliefs) that objective conclusions became impossible; and,
- (vi) allowing the same interviewers who had interviewed the children making the initial allegations of abuse to interview the children against whom the allegations related.<sup>131a</sup>

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127. See *Aberdeen Press and Journal* for November 29th, 1991.

128. See *Independent* for November 30th, 1991 for the case in which the former Head of a Home in Leicester received five concurrent life terms after conviction on 17 charges against children in homes in which he was employed.

129. See *The Independent* for May 30th and August 12th, 1991. The latter issue reports that the 123 victims will share something of the order of £ 2,000,000. Regimes in other homes were subjected to criticism in *The Independent* for May 29th, 1991 and an inquiry is currently going on into the Ty Mawyr Home in Gwent.

130. See *Scotsman* for December 16th, 1991.

131. *Independent*, March 16th, 1992.

131a. See *Aberdeen Press and Journal* for March 18th, 1992 and the *Orkney Report* (see *Update* at the end of this article).

The harm to the children in detention can be compounded by leaving the children, as in *Orkney*, uncertain when (if ever) they will see their parents or siblings again, by separating the siblings in their placements, denying access by older siblings to the children detained and placing the children with untrained foster parents who have little professional support or backup.<sup>132</sup> All this seems to have occurred in *Orkney* and the mere fact that it is done under legal authority does not prevent it being a form of abuse from the child's perspective regardless of whether sexual abuse occurred or not.

Our system of checks and balances is inadequate, and could all too easily lead to children who turn out ultimately not to need protection, being separated from their parents for unacceptable periods. If the children, as in *Orkney*, are then returned home, then they and their families may require assistance in overcoming problems caused by the separation. The families may well be predictably bitter with the social work department, especially if errors in judgment have been made. In order to overcome a reasonably perceived apprehension of bias there is a need to present an alternative form of support from outside the social work department which initially intervened. It may be desirable to bring into the family an independent social worker or workers who can work with the family. Although such a race of independent social workers does not exist in Scotland there is a case for creating such a body. One of the most surprising aspects of *Orkney* was to hear that the team leader involved was surprised at the length and depth of hostility of the parents to the social workers involved. The removal of children on grounds which are disputed, and may in due course turn out to be mistaken, is almost bound to lead to hostility. Whilst some social workers and parents can work through these problems many cannot and a change of face and lines of authority may be necessary. Parents live in a consumer society which is more assertive of rights and less tolerant of errors of judgment. Hopefully the *Children and Family Services Act* in Nova Scotia will avoid these faults and yet one must be vigilant that errors in interviewing techniques do not set in motion a process whose own momentum makes it difficult to stop so as to correct errors that may have been made.

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132. The use of specially paid and trained foster parents was pioneered in Kent; see Nancy Hazell, "Fostering Teenagers—2 innovative schemes," National Foster Care Association booklet published: 1990. For the authorities which have followed in providing a similar service, see "Foster Care Finance" N.F.C.A., 1991. Locally in Tayside the service is provided under the name "Mainstay" and details can be obtained from the Dundee Office - ph.503388.

### 5. *Some Problems in Recent British Cases of Child Protection*

#### *The Rochdale Case*<sup>133</sup>

It may now be appropriate to examine in detail some recent British cases where the training of social workers has been inadequate or where the investigation process has created problems for the children concerned and damaged the credibility of the social work profession in the process. Since some of the Social Work Departments involved were amongst the biggest in Britain this is obviously a matter of concern.

In the *Rochdale Case*, as a result of concerns by teachers in Greater Manchester that children were being subjected to satanic or ritual abuse, 20 children from six families were made wards of court, the majority of the children being removed from their homes. The claims had originated from a severely disturbed boy who talked to teachers of ghost families and ghosts. Subsequent interviews raised allegations that the children had been drugged with hallucinogenic drugs which explained their stories of "flying" and killing babies.

- (i) The children were overinterviewed;
- (ii) the interviews with the children were either not videotaped or the video-taping was defective;
- (iii) no proper records of the interviews were kept, but it appeared that leading questions had been asked, anatomically detailed dolls had been used in an incorrect way, and joint interviews with children had involved disclosure of what other children had said;
- (iv) the social workers had been so obsessed that what the children had said was true they had decided to remove the children without independent appraisal from a consultant child psychiatrist or psychologist.
- (v) there was no medical evidence of sexual abuse and the expert pharmacological evidence was that the administration of hallucinogenic drugs was highly improbable.

In the end Douglas Brown J. concluded that the most likely explanation was that the children were fantasising from many sources including videos, television and children's own inventiveness. The children from five of the families were returned to their parents, though in some cases subject to the court's control through the mechanism of wardship.<sup>134</sup>

133. *Rochdale Borough Council v. A and ors.*, [1991] 2 F.L.R. 192 (Fam. Div.).

134. On the English concept of wardship which is similar to but not identical with the "*parens patriae*" jurisdiction see N. Lowe and R. White, *Wards of Court*, 2nd ed. (London: Butterworths, 1986).

Douglas Brown J made a number of recommendations:

- (i) There should be proper and intensive training of those engaged in interviewing children in cases where ritual or sexual abuse of children is suspected. That training should be carried out by those skilled in the task, such as child psychologists, although that was not a closed list. As a minimum all the social workers engaged in this work should read the whole of the Cleveland Report;<sup>135</sup>
- (ii) Where social workers suspect satanic or ritual abuse, and the evidence consists of children's behaviour and statements, they should not remove children from their family home until they have taken the advice of an experienced child psychologist or child psychiatrist. That advice was certainly readily available close at hand in Rochdale, and experts familiar with satanic or ritual abuse are increasingly available in different parts of the country. The court, on *ex parte* application to remove children, should be slow to act in a ritual abuse case in the absence of an expert overview;
- (iii) It is potentially harmful to children to be removed early in the morning when, as here, they were aroused from sleep in many cases and, as Professor Newson put it, they were needlessly traumatised. If, as is almost certainly the case, it is the police who insist on such timing, the social workers should be prepared to act independently of the police and remove the children later in the day, for example at the end of the school day;<sup>136</sup>
- (iv) Affidavits, particularly those for use in an *ex parte* hearing, should be drawn with care and should be accurate, balanced and fair, and by analogy with *Mareva*<sup>137</sup> or *Anton Piller*<sup>138</sup> injunctions, *ex parte* injunctions should contain any information, if known, which militates against the relief sought. Local authority solicitors should be particularly aware that they owe a duty to the court;

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135. Regrettably, the Director of Social Work for Orkney admitted to the *Orkney Inquiry* that he had only read the short version of the *Cleveland Report* (*The Scotsman* August 29th, 1991) despite statements that there was no substitute for reading the complete report. See the note by two practitioners, "The Fruits of Cleveland" by D. Hershmann and Andrew McFarlane in (1988), *Family Law* 320.

136. In Orkney there were a series of dawn raids allegedly because of the difficulty in organising flights off the islands to the mainland where the children were to be fostered.

137. *Mareva* [1975] 2 Lloyd's Rep. 509; [1980] 1 All E.R. 213 (C.A.). For the latest Canadian position on *Mareva* Injunctions see *Aetna Financial Services v. Feigeman* (1985), 15 D.L.R. (4th) 161 (S.C.C.) and on *Anton Piller* orders see Berryman, *Anton Piller Orders: A Canadian Common Law Approach* (1984), 34 U. of T. L.J. 1.

138. *Anton Piller K.G. v. Manufacturing Processes Ltd.*, [1976] 2 W.L.R. 162.



- (v) All interviews, and particularly the first interview with a child, should be video-taped. The practice of the Chief Constable of Manchester of not permitting video-taping of joint police/social work interviews should cease, failing which social workers should be prepared to act independently of the police. Where the court gives leave for interviews to take place it should be on a clear condition that it is only permitted if interviews are video-taped or, at the least audio-taped. No discretion should be permitted to local authorities over this. The video-taping should be efficiently done, using equipment which produces a clear picture and clear sound; and,
- (vi) Very properly in this case, the local authority whose attitude to the discovery of documents was fair and sensible, made available to the court, without dispute, a number of case minutes which had been helpful, but it emerged in cross-examination that they contained, in some instances, startling inaccuracies. They were all circulated to those present, but Miss X said that although it was realised that errors ought to be corrected if they were noticed, it was generally a waste of time to correct errors. The result was that these documents, which were a vital social work tool, could be dangerously misleading. If minutes were worth taking then they were worth taking accurately, and if the opportunity was given for correction it should be accepted.

As will be seen when examining the *Orkney, Re A* and *Ayr* Cases mentioned below, far too many of the lessons do not seem to have filtered through to the field worker level.

### *Re A*

It might be thought that after the problems revealed in the *Cleveland Child Abuse Inquiry*,<sup>139</sup> the *Rochdale Case*<sup>140</sup> and the legislative improvements in English Child Protection laws in the *English Children's Act of 1989*, that most British problems in this area would have been solved. In fact this has not been the case. In *Cleveland 125* (or *121*)<sup>141</sup> children had

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139. *Report of the Inquiry into Child Abuse in Cleveland 1987* Cm.412 H.M.S.O. For more detailed analysis of the immediate facts of *Cleveland*, see C. Lyon & S.P. de Cruz, "Child Sexual Abuse and the Cleveland Affair" (1988), *Family Law* 370d; for the future implications, see M.D.A. Freeman, "Cleveland, Butler Sloss and Beyond" (1989), *Current Legal Problems* 85.

140. *Rochdale Borough Council v. A and others* [1991] 2 F.L.R. 192.

141. Note the discrepancies between paras 64 and 9.3.22.1 (b) of the *Cleveland Report*—a point raised by Lyons and de Cruz, *supra*, note 139, p.371.

been taken into care on the basis of 276 place of safety orders not one of which was refused.<sup>142</sup> The main basis for intervention in Cleveland seems to have been an overreliance on the so called “anal dilatation reflex” as an indicator of child sex abuse.

The fact that similar mistakes may still be made after the *Cleveland* and *Rochdale Cases*,<sup>143</sup> and even after the proclamation of the *English Children Act*,<sup>144</sup> is illustrated by the recent decision of Hollings J in *Re A and ors (minors)*.<sup>145</sup> That case had concerned a trial lasting 11 weeks involving 13 children who had been removed from home because of allegations of sadistic ritual abuse. Orders were made in respect of five of the children, but in respect of the remaining children the plaintiffs ultimately conceded that there was no evidence justifying the removal of the remaining children. His Lordship, with the help of an unnamed but highly experienced clinical psychologist, identified a number of faults with the interviews of the children which had been numerous and prolonged and in breach of the Cleveland Guidelines which his Lordship said ought to have been followed in this sort of case.

The additional faults were:

- “(i) grossly inadequate recording in both video and audio records or tapes;<sup>146</sup> I found both kinds of tapes difficult to hear and the videos sometimes obscure;
- (ii) there was over-interviewing of the children,<sup>147</sup> that is too many interviews;
- (iii) there was a lack of background information in the possession of the interviewers so that the interviewers could not understand in some case what the children were saying;

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142. More than one order was sought for each child. 227,174 were granted by a series of individual magistrates at their own homes, though during ordinary court hours, thus raising the suspicion that the evidence required to be proved in such cases is relatively low.

143. *Rochdale Borough Council v. A and others*, [1991] 2 F.L.R. 192.

144. See further A. Bainham *Children—the new law*. (London: Family Law, 1990) or S. Cretney and J. Masson *Principles of Family Law* (5th ed.) (London: Sweet & Maxwell, 1990).

145. *Re A and ors (minors)*, [1992] 1 All. E. R.159.

146. Although Flin and Spencer have reported (*supra*, note 104, p.165) the virtues of contemporaneous recordings as a way of obtaining the “best of the child’s evidence,” the attitude of Scottish Courts to accepting video evidence probably exhibits considerable variation, even if the facilities were available to police and social workers. This point was again emphasised by Douglas Browne J. in *Rochdale Borough Council v. A and Others*, [1991] 2 F.L.R. 192 when he talked of videotapes of interviews being an “essential tool.” See also *Re M*, [1987] 1 Fam. L.R. 293, p.295 and *Re Z (minors) (Child Abuse Evidence)*, (1990) F.L.R. 440.

147. This is a real issue in the *Orkney Case* where Liz McLean of the Royal Scottish Society for the Prevention of Cruelty to Children admitted to interviewing five children 40 times over a period of 13 days. Some interviews were, however, little more than meetings. See *Aberdeen Press and Journal* for Feb 18th, 1992.

- (iv) the use of too many interviewers, both at the same time and one after another;
- (v) telling a child what another child has said using fantasy play or “stories”;
- (vi) above all in my judgment, pressure and anxiety to obtain results; and,
- (vii) no overview at all of the work with the children with regard to the possibility that they may be describing information gained from readily available sources such as books, magazines, video or television.....

In addition there were countless inaccuracies in the transcriptions of the videos and audio tape, some of the inaccuracies were very misleading”

In the light of this Hollings J. felt obliged to point out that removal of a child should not be sought *ex parte* or for the initial purpose of securing a medical examination unless there was an immediate apprehension of an emergency and in particular early morning removal of children by police with social worker’s assistance should only occur where there were clear grounds for believing significant harm would otherwise occur to the child.<sup>148</sup> Some of these comments have a curiously similar ring to those made both by Sheriff Kelbie in his judgment in the *Orkney Case* mentioned below,<sup>149</sup> but also to those of Val Mellor, the experienced clinical psychologist retained by the parents in the *Orkney Case*.<sup>150</sup>

### *The Orkney Case*<sup>151</sup>

This case started when nine children, aged from eight to 15, were detained in care as a result of a “dawn-raid” early in the morning on February 27th, 1992. The grounds alleged sexual abuse of the children and the use of “ritual music” which produced the tart comment from Sheriff Kelbie when he later heard the case that he was uncertain what was meant by this:

“depending on which child tells it, it is either Kylie Minogue, Michael Jackson, possibly Andrew Lloyd Webber’s “Phantom of the Opera,” Strip the Willow, or the Grand Old Duke of York.”<sup>152</sup>

Although the Report by Lord Clyde has yet to be released, the interviewing techniques used on some of the children already in care and

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148. *Ibid.*, p.158, letter f and g.

149. See (1991), S.L.T. 534, especially at 538.

150. See *Sunday Times Scotland Supplement* for April 7th, 1991.

151. (1991), S.L.T. 530, See further E. Sutherland, “The Orkney Case” (1992), *Juridical Review* 93-107, and A. Bissett-Johnson, “An analysis of the Appeal in the Orkney Case.” (1992), 4 J. of Child Law 129-133.

152. (1991), S.L.T. 500. The Sheriff Court decision starts at 534, with the particular passage at p.538.

on the nine children after they came into care allegedly left a great deal to be desired. The children seem to have been:

- (i) over-interviewed;<sup>153</sup>
- (ii) subjected to leading questions, unfair interviews<sup>154</sup> and coaching by the workers;<sup>155</sup>
- (iii) attempts were made to “trigger” their memories;<sup>156</sup>
- (iv) when children denied that anything untoward had occurred their statements were not listened to;<sup>157</sup>
- (v) during interviews children were told what other children had allegedly disclosed in their interviews;<sup>158</sup>
- (vi) the independent expert retained by the Inquiry to evaluate the interviewing technique used in the case found it defective and described one interview of the child WB as “a superb example of how not to do an investigative interview”;<sup>159</sup>
- (vii) The independent consultant who evaluated the techniques of interviewers added the following additional criticisms:
  - (a) that the children were put under pressure too early in the interviews and the interviewers followed their own agendas rather than that of the child;
  - (b) that the interviews were badly structured so that it was difficult to get a sense of what the children had said;
  - (c) the children had been tantalised about whether to return to the interviews when a choice not to return did not in reality exist;
  - (d) the interviewers had indicated so many of their personal beliefs that objective conclusions were impossible.

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153. One social worker admitted to the *Orkney Inquiry* that she had interviewed five children 40 times over a period of 13 days. (See *Aberdeen Press and Journal*, for Feb. 18th, 1992). For comparable overinterviewing in the *Ayr Case*, see below.

154. See the admission by the policewoman reported in *The Scotsman* for Feb. 25th, 1992.

155. *Supra*, note 152.

156. Part of the allegations were that the children had been abused whilst dressed in Ninja Turtle suits and that turtles were amongst a number of words or devices used by the alleged adult abusers to control the children. See *Aberdeen Press and Journal* for Feb. 6th, 1992 and *Scotsman* for Feb 13th, 1992.

157. See the judgment of Sheriff Kelbie, (1992), S.L.T. 530, p.538.

158. See *Press and Journal* for February 12th, 1992.

159. See the comments of the independent child psychiatrist Dr. Judith Trowell who was retained by the *Orkney Inquiry* to evaluate the interviewing techniques. See *Scotsman* and *Aberdeen Press and Journal Press* for March 18th, and 19th, 1992.

(viii) there were no audiotapes of the critical interviews, when tapes existed of interviews lasting one hour the tapes did not cover the whole hour, and the transcriptions of the tapes were grossly inaccurate.

Sheriff Kelbie, having heard and seen the evidence in order to familiarise himself with it before it was formally admitted into evidence, decided to recommend the return of the children home on that ground and on the basis of a substantial procedural flaw—the allegation, accepted by the Children’s Hearing, that the children (including an intelligent 15 year old boy) could not understand the allegations involved in the case.

The children were allowed home but an appeal was raised in view of the importance of the case to the law of Scotland notwithstanding the fact that even if the appeal were allowed, as it ultimately was, the merits of the case would not be further litigated on a rehearing because the publicity attendant on the case would have prejudiced the authorities in the presentation of their case.

The Inner House of the Court of Session, Scotland’s senior Appellate Court, held that the Sheriff’s referral to evidence before it had been formally admitted into proof was seriously irregular, and added, regretably in the author’s opinion, the view that procedural irregularities should be dealt with only at the end of the case. The full proof in the case was likely to have led to the children being separated from their parents and siblings with no access to either for up to 16 weeks. In addition the 15 year old boy had been placed in a vocational school which was unable to deal with his academic needs.

The case became the subject of an Inquiry under Lord Clyde, which cost allegedly over £6,000,000, and whose publication is expected in late 1920.

### *The Ayr Case*

The *Ayr Case* involves an interlocking set of allegations in relation to four families over a two year time span. The case has not so far been the subject of proceedings reported in official law reports and the facts have had to be gleaned as best they can from media coverage.<sup>160</sup>

Initially the case was triggered by Mrs. A who had anxieties about her husband’s behaviour after he returned to their holiday caravan from the pub the worse for drink, sought and was refused sexual intercourse by his

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160. See the *Daily Record* for most of May and the early part of June 1992, *Scotland* on Sunday June 7th, 1992 and the B.B.C. “Special Assignment” Radio Programme broadcast on May 29th, 1992.

wife and was later found asleep in a state of undress on top of their boys' double bed—with the boys in it. The mother suspected for some time that the father might be sexually interfering with the boys—apparently on occasions they would bleed after going to the toilet. In May 1990 she went to her mother-in-law and then to her G.P., police and social workers. An investigation began and allegations were made that not only her husband but other members of his family were involved.

On June 18th, 1990 the 36 year old mother was rehoused by the council and her three sons were taken into care together with six other children from two other families<sup>161</sup>, the B family and the C family. The children were detained under place of safety orders signed by Justices of the Peace.<sup>162</sup>

The only evidence was hearsay evidence and the suspicions of the social workers.<sup>163</sup> At this stage neither the children nor the parents had been interviewed.

Once in care the mother, who admitted to being in a disturbed state of mind, was inclined to give a sexual slant to almost anything that her children told her. Her evidence plus evidence taken from the children<sup>164</sup>

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161. According to Mandy Rhodes in *Scotland* on Sunday for June 7th, 1992, there were six children from two related families whilst the *Daily Record* for May 28th, 1992 suggested that there may have been seven children from three related families involved.

*The Record* described the families as Family B consisting of four children, three girls aged 10, eight and one and a boy aged three. It was alleged that sexual games involving these children took place at their home. Although a police surgeon and a woman doctor took the view that there could be medical evidence to support the allegations of abuse, this is disputed by other witnesses.

Family C was also related to Family A and had a daughter aged eight. Whilst the daughter was not alleged to have been abused or taken part in the "games" she was alleged to have been present, as had her mother. She was removed from her home and currently may be fostered.

Family D had two children whose proceedings, unlike those of the children mentioned above, were heard by Sheriff Crozier rather than Sheriff Gow.

162. It has been a feature of child protection cases in both Scotland and in England, under the procedure in force prior to the *Children Act, 1989*, that when faced with such applications involving serious allegations made outside the ordinary court process the tendency seems to be grant the orders. In the *Cleveland Case* chapter 10 of the *Butler Sloss Report* reveals that of 276 orders sought not one was refused. Anecdotal evidence in Canada and Britain has revealed rumours of place of safety orders being signed "in blank", "just in case they are needed." The new procedure for obtaining such orders, and the length of such orders, has been tightened up in the *Children's Act* ss. 44 and 45. (See further Cretney and Masson, *Principles of Family Law*, 5th ed. (London: Sweet & Maxwell, 1990), p.634 *et seq.*)

163. This is admissible in Scotland under the *Civil Evidence (Scotland) Act, 1988*.

164. The right of police and local authorities to interview children detained under place of safety orders against the wishes of the children or their parents is limited by the fact that the children are not technically in the local authority's care. See further the *Scottish Child Care Review* (1990), p.31 and Thomson "Parental Rights of Children in Care" (1991), *S.L.T.* 379-383.

in a series of interviews running for virtually 43 days continuously,<sup>165</sup> the inexpert use of sexually optimistic dolls<sup>166</sup> which no record was kept, led to wider inquiries under which up to 50 children were targeted as being at risk.

On or about July 10th, Mrs A was asked to leave the home where she and her children were living because she was now believed by social workers to be a possible abuser of her own children. For whatever reason, perhaps a reflection of her own distressed state or perhaps in order to get help for her children, Mrs A accepted the grounds of referral of the allegations against her which routed the case to the Children's Hearing.

The B and C families objected to the allegations (grounds of referral as they are called in Scotland) and the matter was heard before Sheriff Gow, who, on August 11th, after 11 days of proof, said that he found clear evidence of "systematic abuse and corruption" notwithstanding serious irregularities in the way that the evidence was gathered and which emerged when the case was appealed to the Inner House. An important fact may be that though the parents denied any involvement in abuse they did not challenge medical evidence that two of the girls had suffered sexual penetration. A month later, on the basis of further allegations made by the children, another two girls (from the D family) were detained under place of safety orders.

When one of these two last children to be detained said, the day after being taken into care, that she had never been to the location where the alleged abuse was supposed to have occurred, this information was allegedly not placed before the hearing held to determine whether she should remain in detention. When her brother was reported to have talked of being murdered with a shot gun and watching women being killed, it was never considered that he might find it difficult to separate fact from fantasy. These last two children were later returned home after Sheriff Crozier found that the social workers involved—who had also been involved in the earlier cases—had "massaged the evidence." The social workers' notes revealed that basic rules of investigation had been ignored and that though the case-notes were typed, these were not based on hand written notes or verbatim account of the conversations with the children. The children had been interviewed virtually every day for 43 days—since

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165. Some of the interviews occurred in a special "telling room," a fact criticised by the parents lawyers on the basis that the children were being conditioned that there was something to tell. See *Daily Record* for May 28th, 1992.

166. It was alleged that the interviewers had little training in the proper use of such dolls and may even have suggested to the children the names to be given to the dolls. Clearly in an intra family case the choice of a name like "Auntie" or "Uncle" may have profound repercussions.

no accurate accounts of dates had been kept it was difficult to be more specific than that-and had lasted for much more than an hour. The case notes were based on generalisations which were allegedly heavy in self-interpretation by the social workers and grounded in recollection rather than fact. They were also contaminated by discussion with one child what another child was alleged to have said, by allowing more than one child to attend an interview and taking the children to a special "telling room" for the sessions.<sup>167</sup> One interview at Strathven, the R.S.S.R.C.C. centre in Lanarkshire which lasted 50 minutes produced a one paragraph entry of 120 words. In another interview with a three year old boy who had referred to being hit on the bottom with a stick which the child described as a metal stick with a button on it, the social worker had written the word "penis."<sup>168</sup> It was this child who, with his sister, was returned home by Sheriff Crozier. Although there had been calls that the other eight children should be returned home, Sheriff Crozier said that he believed that two of these other children had been repeatedly sexually assaulted.

When the A family sought to have their three children returned and Sheriff Gow's finding that three of the boys had been abused set aside the Court of Session refused the appeal. Essentially the Court held that the credibility of the witnesses and the weight attaching to their testimony was for the Sheriff to determine. Although Sheriff Gow criticised the social workers as "perhaps overzealous" and "somewhat out of their depth" this did not alter his assessment that there was "an evil ring of vice" that had been operating amongst several Ayrshire families. It seems likely that in addition to the social work evidence Sheriff Gow was strongly influenced by the medical evidence that two of the children had been subjected to sexual penetration though rebutting medical evidence was subsequently obtained by the family. Sheriff Gow's notes of evidence reveal quite serious irregularities and failure to meet accepted social work standards:

- (i) that neither the social worker nor the policewoman who did the interviewing had any special experience of, or training in, the interviewing of children;
- (ii) that three children, particularly a five year old, had been interviewed virtually every day for 43 days;
- (iii) that no records were kept of the dates, times or duration of interviews; and,

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167. Thus implying that there was something to tell.

168. See the article by Mandy Rhodes in *Scotland* on Sunday June 7th, 1992.



- (iv) that no notes were taken at the time of what the children said, and that evidence had been admitted at court of hearsay evidence and evidence based on the social workers' recollections.

The Appeal Court<sup>168a</sup> declined to interfere with the Sheriff's view of the evidence notwithstanding the fact that by the time of the appeal the A family, whose mother had initially triggered the investigations, had retained Mrs. Val Mellor, Director of the Jubilee Centre for Child Abuse at Booth Hospital Manchester, and who has given expert evidence in a number of other important cases,<sup>169</sup> to give an opinion on the A children. The opinion was, in essence, that as a result of misinterviewing of the

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168a. The Second Division of the Court of Session held in *J.F. v. Kennedy* 1992 S.C.L.R. 750 that the Sheriff was entitled to treat the children's statements as reliable notwithstanding the lengthy interviewing of the children and serious criticisms of the experience and interviewing techniques employed by the social workers. The fact that the guidelines established in the Cleveland Report had not been followed was not crucial since though generally the recommendations should be followed they should not be elevated to the status of "gospel" and their breach treated accordingly.

169. See for example *Re A and ors (a minor) (wardship; child abuse guidelines)*, [1992] 1 All. E.R. 153, and the well known *Rochdale case*.

children little credibility could be placed on their evidence. This was a matter of some concern since they might have been telling the truth.<sup>170</sup>

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170. The substance of the *Report* was submitted in July, 1991 and was reported in the *Daily Record* for June 4th, 1992. She had only been allowed to see the children in the presence of Iona McDonald, the safeguarder appointed by the court to represent the children's interests. Initially the three boys, then aged six, four and three and who were in care, seemed highly anxious about having to deal with somebody new yet again. Soon, however, they were chatting readily at a superficial level. There was, however, an underlying level of tension between the adults and the children which made talking to the children individually impossible. Mrs. Mellor was, however, able to play with each child separately for a short while whilst the other children were talking to the safeguarder or playing alone. There was nothing of any sexualised behaviour evident, though the eldest boy was very ready to come up to a stranger, and the two younger children readily related to Mrs. Mellor and the safeguarder, who they did not remember, not having seen her for several months. The children drew pictures appropriate to their ages but there was nothing in the pictures that could be interpreted in a sinister way. The children were a bit giddy in the circumstances, which was thought to be understandable. J., the eldest, was described as a rather shy little boy who was anxious that he might have to repeat his story. Mrs. Mellor tried to assuage these fears by indicating that she would not be asking for details of his story, as this would have been inappropriate. When asked about who of his family he saw, he said that he didn't see anybody and when asked "why," sadly explained that this was not his decision to make and others had decided that he wasn't to see his family. Mrs. Mellor thought it improper to have this sort of discussion with the two other children. W. was described as a very lively boy who was very keen to show some of his belongings and who wanted to play outside, but with Mrs. Mellor present. G. presented as an emotionally deprived little boy who was badly in need of mothering. He put his hand in Mrs. Mellor's and gave the impression of being prepared to go with anybody who would take him and give him affection. The boys had received hats from their father and one of them adjusted his hat to fit Mrs. Mellor. Mrs. Mellor then went on to suggest that Mr. W., an educational psychologist who had interviewed the children earlier, had breached guidelines on the interviewing of children by not having any recording of the many, many interviews he had had with the children. It was thus impossible to know whether the children had been coached or had said their stories so many times that they had come to believe in them. Mrs. Mellor regarded the interviewing process of the Strathclyde Department of Social Services as "absolutely appalling, breaching all guidelines and creating a situation in which one could not rely on anything that the children had said." She regarded this as particularly unfortunate as some of the children's allegations might have been true. The problems of the interviews had been compounded by the presence of the mother at the interviews. The mother had clearly been very disturbed and distressed. The same educational psychologist had objected to the father having access to the children and adduced as one of his reasons in support of this that the father had refused to accept the abuse of his children. Mrs. Mellor noted that since the father had an appeal pending, his attitude did not seem surprising. Mrs. Mellor recommended a restarting of access partly because of the appeal and partly because the children appeared to be exhibiting signs of distress from the loss of both parents.

## 6. Conclusion—Some Basic Dos and Do Nots in Interviewing Children<sup>171</sup>

### (a) Training

1. Do ensure that those whose job it is to train others in how to interview children have themselves received adequate training. In the U.S.A. “trainers” in virtually all States are required to have completed courses and passed exams organised by the American Humane Association, Denver, Colorado.

It may be a mistake to assume that because somebody has experience in interviewing children that they necessarily have the theoretical underpinning to do the job correctly. Experience without training may simply replicate mistakes.<sup>172</sup> Not every social-worker is necessarily temperamentally well suited to do interviewing.<sup>173</sup> Over-identification with the child can lead to the tone of the interview and the hypothesis on which it is based being misconceived by the interviewer.

2. Do not assume that training is a “once and for all job.” Staff skills may need to be checked periodically as are airline pilots who are required to retest their skills on flight simulators to ensure that their ability to deal with emergency situations has been maintained. Moreover as personnel move out of child protection work, which has a high “burn out” rate, or are promoted out of the front line there will be a need to train new intakes of social workers and to provide follow up training in “varying tiers” of expertise.

### (b) Interviewing

1. Before starting the interview ask *what* is the purpose of the interview? Is it “*forensic*” i.e. to gather evidence, or is it “*therapeutic*” to provide treatment or support to the child? Second, if the interview is forensic, the question should be further asked “is it to

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171. Many of these recommendations are obtained from the *Memorandum of Good Practice*, *supra*, note 92.

172. Some of the worst interviews done in the *Orkney Case* were undertaken by experienced personnel. The independent psychiatrist retained by the Inquiry to evaluate the interviewing skills of the interviewers in the cases which led to the inquiry asked to be allowed to keep one video for her students as a lesson in how not to do it. See *Aberdeen Press and Journal* March 18th, 1992.

173. See the comments of Dr. Judith Trowell, the independent child psychiatrist retained by the *Orkney Inquiry* to evaluate the interviewing techniques employed in the *Orkney Case*. See the *Aberdeen Press and Journal* for March 18th, 1992.

be used for *child protection or criminal proceedings*?" This may affect the questions that can be asked.

It is essential to try to embark on the interview with an open mind and to retain the possibility of an alternate hypothesis throughout the interview until all alternatives have been excluded. Ceci & Bruck<sup>174</sup> point out the dangers of "blinkered thinking" and the importance of the Manner of the interview in obtaining accurate information from the interview. Allied to this is the need to "listen" to what the children are saying even if this is at variance with what the interviewer is expecting to hear.<sup>175</sup>

2. Be open and honest with the child (even a young child) and ask the child's permission to audio or videotape. Most children will enjoy hearing their own voices or seeing themselves.

In the case of a young child it may also be necessary to seek the parents' permission. *The English Memorandum of Good Practice* warns of the danger of the possibility of those implicated in abusing a child pressuring the child not to be interviewed. There is no indication, however, about what to do if the parents declines to consent or seeks to impose terms about access to the tape or its ownership with which the interviewers are unhappy.<sup>176</sup>

Failure to obtain permission and secretly taping children may lead to allegations of dishonesty.

#### *Location of Interviews, necessary facilities, and timing of interviews*

3. Do try to interview the children:
  - (a) as soon as the specialist interviewers are available. Delay is likely to add to the stress for the child as well as maximising recall of important details of evidence;
  - (b) in a special suite outside the home. This is essential in cases where the abuse occurred inside the home and where the home represents the abuser's "power base" and helpful in

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174. See Ceci and Bruck, *supra*, note 64.

175. This was a feature of the *Orkney Case*. See, for instance, the allegations in *Scotland* on Sunday April 7th, 1991, for which there is some confirmation in Sheriff Kelbie's comments in *Sloan v. B.* (1991), S.L.T. 527, at 538 letter c, even in the Inner House in the same case reversed Sheriff without commenting on the views he expressed on the interviewing technique. The final confirmation of the children's views can be found in Dr. John Powell's comments as reported in *The Scotsman* for January 28th, 1992. Dr. Powell was the independent psychiatrist retained by the Inquiry for the express purpose of establishing the children's views—many were angry that their denials that anything untoward had occurred had simply not been listened to.

176. *Memorandum of Good Practice, supra*, note 92, p.14.

most cases since it avoids the need to carry around the special video or audio recording equipment which are increasingly used in child protection and criminal cases. If such a facility exists it is more likely to have the lavatory and other facilities such as refreshments (though these should never be offered as a bribe), and toys and waiting areas for the child and the child's family. The furniture for the child should be of a suitable size. Whether such "taping" facilities should be in a police station or elsewhere seems to an open question. The police station may be associated by the child with wrongdoing by him or herself. On the other hand it may create a greater feeling of safety than elsewhere. What is clear is that the use of interviewing facilities in police stations where suspects are interviewed is undesirable.<sup>177</sup>

### *Equipment*

4. Problems have arisen over the sound and picture quality resulting from inexpensive or hand held equipment. Most of the value of the interview is lost if a good quality of picture and sound is not obtained. Hand held equipment should only be used *in extremis*.

### *The Interview itself*

5. If the interview is forensic do not ask *leading questions* i.e. those which by their terms suggest a particular answer. Equally do not introduce facts or the name of a person into the question which may trigger a particular response—"Does Daddy tuck you in at night?"<sup>178</sup> Try to avoid "jolting the child's memory" e.g. in the *Orkney Case* one of the allegations was that children had been abused whilst they were wearing "Ninja Turtle suits." Against that background the presence of a Ninja Turtle Poster on the wall of one of the special interviewing suites at which the children were interviewed must arouse suspicion about the skills of the interviewers.<sup>179</sup> In some cases asking a leading question may be necessary. In such cases an audio or video tape record may be

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177. *Memorandum of Good Practice*, supra, note 92, p.7.

178. Sometimes the point of questions which avoid being "leading questions" may not be seen by the child and there may be no option but to ask a potentially leading question. At this point the value of a videotape may well be in showing the court that *bona fide* attempts were made to avoid asking leading questions.

179. See *Aberdeen Press and Journal Coverage of the Orkney Inquiry* for Feb. 13th, 1992.

helpful to show how the interviewer tried to elicit the information without recourse to “leading questions.”<sup>180</sup>

The preferred sequence of the interview is to have phases or steps:

*phase (i)* This involves checking that the equipment is working, introducing everybody to the child, and stating the time and place of the interview and explaining to the child that it is quite proper to answer a question with “I don’t know” and that there is a need to tell the truth and that the child understands the difference between the truth and a “fib.” An apparently approved form of words referred to in the *English Memorandum of Good Practice* is “Please tell everything that you can remember. Don’t leave anything out or make anything up.” The interviewer should try to put the child at ease during this phase of the interview, to explain that their job is to talk to children but without suggesting that problems, especially particular problems, are under investigation unless the child is of an age at which the basis of the interview is readily apparent to the child. This “first neutral phase” is dealt with in Yuille’s discussion of Statement Validity Analysis.<sup>181</sup> It is desirable for the child to be interviewed alone and in the absence of their parent (this is particularly important where the other parent or parent substitute is the alleged abuser) unless the child is so disturbed that the presence of the parent is necessary for anything of value to emanate from the interview. In this sort of case the parent should be out of sight of the child to avoid any question of “prompting by eye contact.”

*phase (ii)* If it has not already occurred it is also appropriate at this stage to assess the linguistic, cognitive, behavioural and social skills of the child.<sup>182</sup>

- (e) The critical information to be obtained at the first interview is to try to determine:
- (i) who is the alleged abuser;
  - (ii) where the abuse is alleged to have occurred;
  - (iii) when the last abuse occurred (with younger children this is likely to be the best remembered event. It is also helpful to establish if possible when the child believed that the abuse started so that the court can get a concept of how the abuser “escalated the level of abuse,” a common feature in these cases, and how young the child was when it started. One must

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180. See *The English Memorandum of Good Practice on Video Recorded Interviews*, *supra*, note 92, at p.27.

181. Yuille, *supra*, note 64.

182. Yuille, *supra*, note 64, p.255.

recognise, however, that some abusers will so subtly start abuse that a child may not recognise when it first started. One should also recognise that between the first and last abuse intervening events may get conflated and that young children's sense of time may be less reliable than their recollection about whether events took place; and

- (iv) it is also desirable to learn who else knows about the alleged abuse so that the question about whether it is safe to send the child home can be addressed.

This phase should involve the child being encouraged to narrate (in what psychologists refer to as free recall)<sup>183</sup> in his or her own words at his or her own pace an account of the relevant events. Sometimes children may need encouragement to talk about distressing events and it may be appropriate to say "I can see you find this difficult but you are being very brave." The temptation should be resisted to break the child's running narrative by intervening to fill in long pauses other than by "active listening" to show that the adult has understood what the child has said.

*If nothing significant has emerged during this stage the interviewer(s) should consider concluding the interview.*

*phase (iii)* At this stage open ended questions (not requiring a "yes" "no" answer or from a limited range of options) related to what the child has already said are appropriate e.g. "can you tell us did anything else happen?" The words "telling" or explaining are supposed to be very helpful when working with children. Only one question should be asked at a time. Questions involving complex grammar or language should be avoided. Immediate interruptions should be avoided even to clarify something which is unclear. Clarity can be obtained by returning to the matter later. Towards the end of this phase "closed" questions with a limited choice of answer may be asked e.g. "was the coat you mentioned earlier brown, or blue or white or some other colour, or can't you remember?" Leading questions or ones involving "hearsay" should only be asked after careful consideration and possibly consultation with the appropriate senior social work authorities. In order to help assess what further questions to put to the child and to test the credibility of the child is to see whether a child has made spontaneous corrections. According to Yuille,<sup>184</sup> children, being unsophisticated liars, wrongly believe what may be taken by adults as an indication of lying. Children, Yuille suggests, will not attempt to make corrections when fabricating an

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183. Yuille, *ibid.*, p.255.

184. Yuille, *ibid.*, p.258.

account. Yuille recommends that the concluding phase of the interview should attempt to check the suggestibility of the child.<sup>185</sup>

*phase (iv)* This involves closing the interview by ensuring that the child is not distressed and, as far as possible, in a positive frame of mind. Any “recapping” should be in the child’s and not the adult interviewer’s language. The child should be thanked for his or her efforts and asked if there are any questions he or she wishes to ask. These may involve having to explain what may happen next and a contact name and telephone number should be given to the child or if appropriate, the accompanying adult, if further queries arise.

6. Don’t overinterview children as in the *Ayr Case* mentioned earlier in which they appear to have been interviewed for almost 43 days continuously; don’t have the children subjected to unnecessary medical examinations. Having a joint interview with both a specially trained police officer and a social worker present helps to minimise the problem of overinterviewing or unnecessary medical examinations, though do remember that the evidential rules differ in criminal cases and child protection cases which may limit the questions that can be asked in an interview used in a criminal case. However, the *English Memorandum of Good Practice*’s hope that one interview will do, and that the use of a second interview should be regarded as exceptional, may be overly optimistic. Overinterviewing may also extend to the *length* of the interview. Complying with this in the context of a young child may be difficult particularly if the admonitions to establish rapport with the child, to proceed at the child’s own pace whilst avoiding leading questions, etc. mentioned above, may be very difficult.

7. After the interview appropriate security has to be taken to ensure the confidentiality of the tapes and against accidental erasure. The interview should be logged, a brief index prepared, and a log book set up to control copying and access so that unauthorised access is controlled. The defence lawyers may be required to return the tape at the end of proceedings.

This “step sequence” or “statement validity analysis” interview technique is already widely used in Canada and training of it is just being introduced in England and will be shortly in Scotland. Only the “bare bones” have been given but details of the contents of the teaching manuals can be obtained from the American Humane Association in Denver,

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185. Yuille, *ibid.*, p.255.



Colorado and the appropriate local Provincial variants through the Provincial Social Work Departments. The *English Memorandum of Good Practice in Videotaping Child Witnesses*<sup>186</sup> is also helpful but very much geared to interviewing in the context of a criminal prosecution.

The lesson for lawyers to learn from the above is that the credibility of evidence obtained from children will be a function of the skill of the interviewer rather than any question of the inherent unreliability of children's evidence. The rules of evidence must keep up with what we know of the emerging research in the social sciences. Legislation and procedures may need frequent monitoring to ensure that they reflect the current state of knowledge in the behavioural sciences.

For social workers the message is similar save that there the emphasis must be on training to acquire the necessary interviewing skills, and the maintenance of skills once acquired of those conducting interviews with children.

For politicians the lesson to learn is that these skills require the provision of resources in terms of facilities and high quality training over an extended period.

## *Interviewing*

### *Before the Interview*

1. Ensure that the interviewers and their trainers have been adequately trained—experience alone is not enough. The value systems of the interviewers and their ability to keep an open mind may be crucial.
2. Before interviewing the interviewer(s) should determine whether the interview is *forensic* or *therapeutic*. If *forensic* consider whether it is for *civil* or *criminal proceedings*. This may effect the questions that can be asked.
3. Make sure that permission to interview the child is obtained from the child if old enough or from the person with parental rights.
4. Ensure that the interview venue is comfortable for the child—with furniture of the right scale, toilet facilities etc. This should normally be in a special suite outside the home.
5. Ensure that the equipment used to record the interview produces a high quality of image and sound—hand held recorders rarely do this.
6. Don't over-interview the child either in terms of number or length of interviews.

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186. *The English Memorandum of Good Practice*, supra, note 92.

*The Interview Itself*

7. Use a step-sequence of interviewing with language appropriate to the child's age. Don't ask more than one question at a time.  
The sequence involves:
  - (a) a neutral stage of putting the child at ease and learning something of the stage of the child's cognitive faculties and whether the child understands the difference between "truth" and "fibs";
  - (b) narrative by the child;
  - (c) open ended questions and *possibly* closed questions; and
  - (d) A proper closing of the interview, thanking the child, giving the parent a contact number and safely storing the tape and limiting unauthorised access.
8. The critical questions to which answers are sought are:
  - "What happened"
  - "Who was involved"
  - "Where"
  - "When"
  - "Who else knows".
9. Refrain from asking leading questions or trying to "jog" the child's memory.

*UPDATE*

Since this paper was delivered the Orkney Report\*\* has been published. The key recommendations have been noted by the author,\*\*\* and include:

- 1) A recommendation that any reform of Scottish child protection laws inform the *European Convention of Human Rights* and the *U.N. Convention on the Rights of the Child*.
- 2) Procedures to tighten up the investigation of child protection cases were recommended. These included increasing the training of interviewers of children and reinforcing the need to avoid falling into the trap of confusing taking what children say seriously, with believing what they say was true.
- 3) Removal of children from their home was to be restricted, by statutory amendment, to cases where there was: "reasonable cause to believe that a child is likely to suffer imminent and significant harm of any kind and will not enjoy adequate protection from such harm if not at once removed to, or retained in a place of safety."
- 4) Child Protection Orders were hence forth, wherever possible, to be obtained from a Sheriff, a Scottish Judge, rather than a J.P. and the Sheriff should retain a continuing role in the case.
- 5) A number of recommendations were made about giving children the right to decline to undergo medical examinations or to specify the sex of the doctor undertaking the examination.
- 6) The pressure on legislative time and the need to take into account other Scottish Reports on children make a full and speedy introduction of Lord Clyde's Recommendations unlikely.

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\*\* *The Report of the Inquiry into the Removal of Children from Orkney* in February 1991. (Scottish Office, H.M.S.O., 1992).

\*\*\* "The Orkney Report - key issues for lawyers," (1993), 5 *Jo of Child Law* 91.