

# Cultural Sensitivity of Child Abuse

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## LAW

### Expert testimony on children's suggestibility: Should it be admitted?

by Brian K. Holmgren, JD

There is a growing trend in child sexual abuse litigation toward admitting defense expert testimony on children's memory and the effect of suggestive interviewing techniques. Such testimony is frequently based on the research and writing of Stephen Ceci and Maggie Bruck. In their book, *Jeopardy in the courtroom: A scientific analysis of children's testimony*, Ceci and Bruck argue that expert testimony is needed to inform judges and jurors of the factors that may influence a child to make a false allegation (Ceci & Bruck, 1995).

Ceci and Bruck's arguments are based on their belief that there is "highly consistent" (p 299) research on children's suggestibility. Although they refer to legal decisions and evidentiary rules governing the admission of expert testimony and scientific evidence, they make no attempt to apply these principles. They simply assume such evidence is admissible in forensic settings.

Whether such expert testimony should be admitted must be analyzed under the evidentiary standards for expert testimony and scientific evidence. In *Daubert v. Merrell Dow Pharmaceuticals* (1993), the United States Supreme Court analyzed the admissibility of scientific testimony or evidence

under the Federal Rules of Evidence. First, the Court held that scientific testimony or evidence must be reliable and relevant. The Court offered several criteria for determining the reliability of scientific testimony or evidence: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and published; (3) the technique's known or potential rate of error; (4) the existence and maintenance of standards controlling a technique's operation, and (5) whether the theory or technique is generally accepted in the relevant scientific community. Scientific knowledge requires more than subjective belief or unsupported speculation (p. 590).

*Daubert's* relevancy standard requires that the expert's testimony must be sufficiently tied to the facts of the case to assist the jury. A scientific technique or theory may be perfectly valid, yet inadmissible, if

inapplicable to the facts in issue. Finally, the Court noted that expert evidence can be both powerful and misleading because of the difficulty in evaluating it (p. 595). Therefore, even if an expert is testifying to scientific knowledge, and that knowledge will assist the jury, the judge should nevertheless consider excluding the testimony if its prejudicial impact—the extent to which it overwhelms a lay jury—substantially outweighs its evidentiary value.

Research on children's memory and suggestibility has been subjected to peer review and has been published. This criterion under *Daubert* appears to be met. Does this research satisfy the remaining *Daubert* criteria? Has the theory or technique been tested?

Although a substantial body of research exists regarding children's suggestibility, significant gaps remain in the scientific knowledge. The studies most

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frequently cited are on preschool children (Ceci & Bruck, 1995), yet the majority of children testifying in court are years older (Whitcomb et al., 1994). Because the research typically finds significant age differences, research on 3- to 5-year-olds has no direct application to older children. Nevertheless, experts in a num-

ber of cases have inappropriately applied research involving younger children to older victims (*Commonwealth v. Allen*, 1996; *People v. Michael M.*, 1994; *United States v. Geiss*, 1990). Ceci and Bruck emphasize that preschool children are particularly vulnerable to suggestion, but downplay the significance of age differences and the paucity of research involving older children when discussing whether older children are suggestible (Ceci & Bruck, 1995, pp. 236-237). They make no attempt to clarify the point that experts testifying on suggestibility effects cannot apply research involving preschoolers to older children.

Most abuse involves a trusted family member or caregiver known to the child, so that the child's emotional bond with the abuser and others involved is strong. Such a bond makes it difficult for the child to

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disclose abuse and to maintain the disclosure over time (Lawson & Chaffin, 1992; Summit, 1983; Sorensen & Snow, 1991). Little research has been conducted on the emotional components of disclosure and their relationship to suggestibility. The extent to which the child's affection for the abuser may inhibit disclosure and mitigate the influence of suggestive questioning to produce inaccurate information has been noted by others in commenting on the limitations of this research (Lyon, 1995; 1996). This shortcoming is compounded by the fact that for obvious ethical reasons research has not been conducted on abuse populations, and nonabused children have not been tested for their willingness to accuse a loved one of abuse.

Experts on interviewing have emphasized the importance of making children aware of the unique task demands of forensic interviews in order to reduce suggestibility. This can be accomplished by alerting children to the serious nature of the interview and the need to learn what really happened, the importance of understanding the questions, the potential need for repeated questioning, and the appropriateness of "I don't know" or "I can't remember" responses (Myers et al., 1996; Reed, 1996; Saywitz et al., 1992; Warren et al., 1991). Researchers focused on eliciting incorrect responses through suggestive questioning have by and large ignored such techniques in their experiments. These researchers cannot legitimately claim to know the effect of suggestive questioning when no attempt is made to explore the alternative hypothesis that some techniques reduce suggestibility.

Most investigative interviews follow a child's initial disclosure to a friend or caregiver. The importance of the initial disclosure in assessing suggestibility has been ignored. Ceci and Bruck (1993a) argue that professionals who assess abuse allegations should consider the impact of prior interviews on a child's current responses, emphasizing the danger that a child may have incorporated prior suggestions. The alternative hypothesis that disclosures prior to an interview may insulate against suggestion is not discussed

A cardinal principle in scientific research is results must be replicated before generalizations can be made from data. Research studies commonly referenced by defense experts in court have, for the most part, not been replicated. Given the wide variety of factors that may influence children's suggestibility, the lack of testing of many of these factors, and the inconsistencies in research findings within and between studies, courts should require further testing before admitting such research. Ceci and Bruck's proposal that experts should simply identify those con-

ditions that might limit any generalization from the science to the case at bar is not legally adequate (Ceci & Bruck, 1995, p. 273).

## What is the rate of error?

Scientists know very little about the degree to which any particular child from a particular age group is likely to produce an incorrect response when exposed to suggestion. The inability to account for individual differences in children's responses means that a child's accuracy cannot be estimated by the percentages quoted in research findings. Suggestibility in research is gauged by the child's response to target questions, not in terms of the overall reliability of the information provided by the child. Jurors, however, must evaluate the totality of circumstances in deciding the truth. Statistically significant findings in research may have no relevance to credibility assessments in court. Ceci and Bruck acknowledge the need for experts to explain statistical significance but fail to discuss how this factor limits any generalizations from the highly consistent literature to determinations of the overall reliability of the child's account (Ceci & Bruck, 1995, pp. 272-273). Ceci and Bruck also warn that "[r]esults sometimes vary dramatically among studies, and children's behavior sometimes vary dramatically within studies. Thus, even in studies with significant suggestibility effects, there are always some children who are highly resistant to suggestion . . . On the other hand . . . Some children incorporate suggestions quickly, even after one short interview" (p. 273). In practical terms, this means that researchers are still a "long way . . . from predicting which children will succumb to suggestions and which will not" (Ceci & Bruck, 1995, p. 300). In legal terms, this unknown "rate of error" means that application of research findings to a specific child is unreliable.

Another factor that limits applicability of the research is the fact that "no study perfectly mimics the constellation of variables observed in any particular case" (Ceci & Bruck, 1995, p. 299). Most research examines one or a few variables while controlling for other factors. However, in the real life setting of an actual case, each factor likely interacts with other factors.

Suggestibility is an extremely complex, multiply determined phenomenon. Situational factors, such as the interview context, the nature of the questions used, and the strength of one's memory of the event in question interact with personality variables to influence the suggestibility of both children and adults. Therefore the same individual may be highly susceptible to being misled in one situation yet highly

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resistant to being misled in a different situation (Reed, 1996, p. 107; see also Myers et al., 1996). Simply because a study parallels one or more of the real-world circumstances of sexual abuse does not mean that the study is useful in a forensic setting.

Instead, it is necessary to evaluate the social, cognitive, and emotional contexts of the research event and compare that evaluation with a similar analysis of the forensic context (Yuille & Wells, 1991, p. 122). Ceci and Bruck (1995) suggest that real cases contain more suggestive influences than research, making it likely that research underestimates suggestibility. This conclusion is true only if one ignores factors that may mitigate the effects of suggestive interviews such as a child's fear of or loyalty to the alleged perpetrator.

In scientific terms, these problems concern the role of individual differences in suggestibility and the limited ecological validity of research. Ecological validity refers to the extent to which a research study replicates the real world. In the language of *Daubert*, these problems translate into an unknown rate of error in generalizing from the research to particular interviews and particular children. Any expert opinion regarding an individual's suggestibility would amount to little more than unsupported speculation and therefore not qualify as scientific knowledge. Moreover, the fact that individual differences among children are significant yet poorly understood means that a party offering expert testimony on suggestibility research will be hard pressed to establish that such testimony is sufficiently tied to the facts of the case to assist the jury. An honest expert would have to concede that he or she simply doesn't know to what extent the research can be applied in the particular case.

## Are there standards for the technique?

Although Ceci and Bruck (1995) refer to what they call a highly consistent literature, (p. 299) they also concede that results vary both among and within studies (p. 273). Inconsistencies among studies are probably attributable to the methodologies employed and the agenda of the researcher. Ceci and Bruck (1995) acknowledge that their book is slanted toward the negative dimensions of children's testimony, other social scientists focus on children's ability to resist suggestive influences. The methodologies employed by the different groups reflect their divergent interests.

There is nothing scientifically inappropriate about differences in philosophies and methodology. However, these differences must be clearly identified, and their influence on research design openly acknowledged, before the research is marketed to the

courts as highly consistent. Psychologists who offer forensic reports and testify have an ethical obligation to identify limitations to their opinion (American Psychological Association, 1991). This should include the disclosure of research with a biased focus when that research forms the foundation for the expert's opinion.

A number of factors vary widely among suggestibility studies. In addition to the factors influencing suggestibility mentioned above, the form of suggestive questioning varies from mildly suggestive questioning to forced choice questions to purposefully misleading questions that inhibit the child's ability to contradict the suggested information (Lyon, 1995). Language plays an important part in influencing children's responses to questions (Carter et al., 1996; Walker, 1994). However, research does not control for these potential effects, and published reports rarely comment on how such effects might limit the significance of research findings that children are suggestible. The number of times suggestive questions are asked in successive interviews, and the delay between the event and the interviews also varies. Some studies involve only a single interview whereas others involve a series of suggestive interviews over a protracted period. The research may involve participatory or observed events of varying significance for the child, and may or may not contain an emotional component. Research has suggested that these factors influence children's disclosures, memory, and suggestibility (Ceci, Ross, & Toglia, 1989; Doris, 1991; Faller, 1996; Myers et al., 1996). With such wide variability in methodology, and little or no replication of previous findings, the expert witness is free to pick and choose the research that fits his or her preconceived notion regarding scientific truth, without clear standards by which that truth is validated.

Is the theory or technique accepted in the relevant scientific community?

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Discrepancies in research between and within studies suggests that there is not a scientific

consensus sufficient to permit expert testimony in court. Ceci and Bruck's research is well-respected by many scientists and professionals dealing with child abuse cases. The conclusions they draw from the research for use in expert testimony, however, have generated a fair amount of peer critique in the professional literature. This critique focuses not only their research methodology, but also on their lack of objectivity in generalizing from their data (Chaffin, 1994; Faller, 1996; Lyon, 1995; Lyon, 1996; Manshel, 1996; Myers, 1995; Myers et al., 1996). Other scientists emphasize the continuing debate over the

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propriety of generalizing from research findings to actual cases (Yuille & Wells, 1991)

Scientific consensus is lacking on acceptable practice for interviewing children, and on the conclusions to be drawn from research that highlights suggestibility (Saywitz, 1995). Expert testimony critiquing the use of leading questions ignores the view among many professionals, supported by research, that leading questions are sometimes necessary to elicit true reports from children who have difficulty telling what they know (Faller, 1996; Lyon, 1995; Myers, 1994; Myers et al., 1996; Reed, 1996; Saywitz et al., 1991). Ceci and Bruck acknowledge that scientists disagree whether suggestibility effects render the child's original memory inaccessible (Ceci & Bruck, 1993b). If the child's original memory remains intact, the arguments supporting a need for expert testimony are substantially diminished. Cross-examination of the child should correct errors made during the suggestive interview without the need for expert testimony (Lyon, 1995)

## Is the testimony sufficiently tied to the facts of the case?

The problems with the research on suggestibility discussed above lead one to conclude that in many if not most abuse cases, expert testimony on such research will not sufficiently fit the facts of the case to assist the jury. In order to assess fit, the courts should consider the age of the child, the relationship of the child to the alleged offender, the instructions given the child by the interviewer, and whether the child made a disclosure before being questioned. Even in a case where a preschool child accuses a virtual stranger for the first time after coercive questioning, expert testimony on suggestibility research will be of marginal value to jurors, both because of the differences between the events studied by researchers and real cases of sexual abuse, and because of the large individual differences in children's suggestibility.

When it is only marginally relevant, expert testimony is subject to exclusion on the grounds of unfair prejudice. Expert testimony is especially likely to be prejudicial, because of jurors' difficulty in critically evaluating what experts assert and in jurors' corresponding tendency to defer to expert opinion. Research on the effects of expert psychological testimony regarding adult eyewitnesses reveals that such testimony increases juror skepticism regarding an eyewitness's accuracy (Leippe, 1991). Research suggests that other types of expert testimony in child abuse cases is similarly persuasive (Kovera & Borgida, 1996). Expert testimony arguing that children are prone to suggestive influences can be expected to produce similar effects. To the extent that

application to an individual case can be questioned, such testimony creates a high probability of unfair prejudice (Federal Rules of Evidence 403).

It should also be apparent from the brief discussion here of the scientific issues that any foray into these research findings is likely to lead to juror confusion, and will be of little assistance to jurors in understanding the relevant trial issues. Any competent and ethical presentation of expert testimony on this topic should include a thorough discussion of the methodology, conflicting results, and limitations of the research (American Psychological Association, 1991; Ceci & Bruck, 1995). Jurors who lack backgrounds in psychology, child development, scientific research, and statistical analysis can hardly be expected to sift through the myriad of complexities inherent in any battle of experts.

An alternative might be to confine expert testimony to a generic presentation of some of the factors that may influence children,

without permitting exposition of the research. However, to the extent such testimony rests for its foundation on a conflicting body of research, it would be unethical for an expert to fail to reveal the conflicts. In so doing, they would necessarily have to discuss the research in greater detail. Generic information is unlikely to advance jurors' understanding of the subject much beyond their collective wisdom prior to receiving the expert testimony. If the interview is so suggestive it warrants expert testimony, its suggestive quality should be readily apparent to jurors without an expert. Conversely, if the interview is not highly suggestive, the need for expert testimony might be greater. However, the less suggestive the interview process, the less applicable the research findings in supporting an expert's opinion.

## Conclusion

Ceci and Bruck (1995) make a number of disclaimers regarding responsible and ethical expert testimony, and these points are well taken. All experts should heed their advice that "scientific experts should advocate for the truth, not for or against a defendant" (p. 283). However, this advice presupposes that the expert should be in court in the first place. A careful legal analysis of Ceci and Bruck's query whether scientists have "accumulated a sufficient body of information to be helpful to the court" (Ceci & Bruck, 1995, p. 299) reveals that the answer is no. The research has not met the level of certainty or relevance that the law demands.

For those experts who suggest otherwise, some additional advice from Ceci and Bruck should be followed: "Wise counselors and judges should put these

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experts' feet to the coals, forcing them to provide scientifically adequate evidence for their interpretations. [T]o do otherwise would seem akin to accepting the testimony of a forensic astrologer" (p. 282).

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