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# **Child Sexual Abuse Accommodation Syndrome: Issues of Admissibility in Criminal Trials\***

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*ABSTRACT: In 1983, Roland Summit published a paper describing the Child Sexual Abuse Accommodation Syndrome (CSAAS). Summit asserted that there are five reactions children can exhibit who have been sexually abused: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, unconvincing disclosure, and (5) retraction. He stressed that the CSAAS is not a diagnostic tool but an explanatory tool to give clinicians, investigators, and courts an understanding of the coping behaviors of children who have been sexually abused, as well as to dispel myths and prejudice about sexual abuse in children. This article examines the methodology and reasoning behind the CSAAS and focuses on how it has been used in criminal trials.*

In 1992 the Pennsylvania Supreme court in *Commonwealth v. Dunkle*<sup>1</sup> held that introduction of the Child Sexual Abuse Accommodation Syndrome (CSAAS) was reversible error because the CSAAS was not scientifically valid and was not generally accepted within the field of child psychology. In 1987 the Delaware Supreme Court in *Wheat v. State*<sup>2</sup> held that introduction of the CSAAS was not reversible error because evidence on the behavior of sexually abused children was relevant to the issue of determining if sexual abuse occurred. Each court reviewed the testimony submitted by expert witnesses on children and their reactions and behaviors to the event of sexual abuse, but dealt with the legal question of admissibility differently. The *Dunkle* court held that the CSAAS was not derived through the scientific method or that it was accepted in the discipline to which it belonged, thus it was inadmissible. The *Wheat* court held that the CSAAS provides the fact finder with an explanation other than deceit for behavior that appears inconsistent with the claim of sexual abuse; thus CSAAS evidence is relevant to a material issue in the case and is admissible.

These two cases reflect two approaches to the admissibility of CSAAS evidence. The court in *Dunkle* focused on the reliability of CSAAS evidence as scientifically viable and reliable. The court in *Wheat* focused on the CSAAS as a tool to aid the jury in making a determination on a material fact at issue: the superficially inconsistent behavior of a child who claims to be a victim of sexual assault.

Part One reviews the scientific and theoretical basis of the CSAAS and the behavior the theory attempts to explain.

[Part Two](#) examines the use of the CSAAS in criminal trials. It will be asserted that the CSAAS is not a diagnostic tool to prove a child was sexually abused, nor should it be used to support the credibility of the child who claims to be abused. Rather, the CSAAS is an explanatory tool that should be used in criminal trials to rebut defense claims or implications that the child's behavior shows deceit. The CSAAS is properly used to show that behavior that seems inconsistent with sexual abuse may not be when the dynamics of the pressures placed on the child by other family members are taken into account. In addition, it will be asserted that the CSAAS should only be introduced in criminal trials in cases of intrafamily sexual abuse.

[Part Three](#) focuses on expert testimony and reviews the admissibility of CSAAS evidence under the rules of evidence, using four cases that have addressed this issue, including two courts that used the Daubert formulation. Part Four draws final conclusions.

## **PART I**

### **The Child Sexual Abuse Accommodation Syndrome (CSAAS)**

The Child Sexual Abuse Accommodation Syndrome (CSAAS) is intended to explain seemingly inconsistent behaviors in a child who has been sexually assaulted.<sup>3</sup> The CSAAS, first formulated by Roland Summit in 1983, is a description of a set of behaviors that can explain how a child *who has been sexually abused* views that abuse and attempts to cope with it. It describes the child's fears of disclosing the abuse and how the child responds to the reactions and pressures from adults after the disclosure. An awareness of these dynamics is necessary to understand the behavior of a sexually abused child.<sup>4</sup> Summit wrote:

Child victims of sexual abuse face secondary trauma in the crisis of discovery. Their attempts to reconcile their private experiences with the realities of the outer world are assaulted by the disbelief, blame and rejection they experience from adults. The normal coping behavior of the child contradicts the entrenched beliefs and expectations typically held by adults, stigmatizing the child with charges of lying, manipulating or imagining from parents, courts and clinicians. Such abandonment by the very adults most crucial to the child's protection and recovery drives the child deeper into self-blame, self-hate, alienation and revictimization.<sup>5</sup>

Summit asserted that the first problem a child encounters when the abuse is disclosed is adult disbelief or suspicion of the child's motives:

The identified child victim encounters an adult world which gives grudging acknowledgment to an abstract concept of child sexual abuse but which challenges and represses the child who presents a specific complaint ... [because] "Everybody Knows" that adults must protect themselves from groundless accusations of seductive or vindictive young people. ... What everybody does not know, and would not want to

know, is that the vast majority of investigated accusations prove to be valid and that most young people were less than eight years old at the time of initiation. Rather than being calculating or practiced, the child is most often fearful, tentative and confused about the nature of the continuing sexual experience and the outcome of disclosure. Disbelief and rejection by potential adult caretakers increase the helplessness, hopelessness, isolation and self-blame that make up the most damaging aspects of child sexual victimization. Victims looking back are more embittered toward those who rejected their pleas than toward the one who initiated the sexual experiences.<sup>6</sup>

The fear of a child that she<sup>7</sup> will not be believed should not be viewed as unreasonable, because a child knows what types of claims will cause difficulty within the family. If a child hesitates to confess that she broke a favored piece of furniture for fear of repercussions, it is easy to understand why she would hesitate to tell her mother that her father or stepfather is having sexual contact with her. Even a small child knows that such news will not be accepted with joy and total belief by her mother. Another way to consider the problem of sexual abuse disclosure is to picture yourself in a room full of strangers where you are asked to state in detail your last sexual encounter with your wife or husband. If you think it would be at least slightly difficult to tell a room of strangers how your husband undressed you and touched you and what it felt like, then you have an idea of what a small child would feel about describing sexual matters in regard to her father's activities.

## **The Five Categories of the CSAAS**

Summit describes five categories included in the CSAAS, of which the first two are "preconditions to the occurrence of sexual abuse" and the remaining three are "sequential contingencies which take on increasing variability and complexity."<sup>8</sup> These categories are (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, unconvincing disclosure, and (5) retraction.

### *Secrecy*

As a basic tenet, it should be obvious that if a child is being sexually abused by a parent, the abuse is committed in secret and the child is told to keep the abuse their "little secret." The request for secrecy usually includes threats of negative consequences if the secret is disclosed. The negative consequences can include the child being told that if she tells, the family will break up, the abuser will go to jail, "mommy will be angry at us," "mommy will be angry at you," or that the abuser will harm the child or other family members. "However gentle or menacing the intimidation may be, the secrecy makes it clear to the child that [disclosing the sexual abuse] is something bad and dangerous. The secrecy is both the source of fear and the promise of safety."<sup>9</sup> Due to the relationship between the trusted family member and the child, and the power imbalance of that relationship, the child is "entirely dependent on the intruder for whatever reality is assigned to the experience."<sup>10</sup> Summit noted that

contrary "to the general expectation that the victim would normally seek help, the majority of the victims in retrospective surveys had never told anyone during their childhood. Respondents expressed fear that they would be blamed for what had happened or that a parent would not be able to protect them from retaliation."<sup>11</sup> Untimely reporting due to fear increases the secrecy because the child fears that she will not be believed because she did not report the abuse soon after it occurred.<sup>12</sup>

### *Helplessness*

A close companion to the fear produced in the child is the fact that the child is not in a position to stop the abuse. There is a total power imbalance between a child and her parent. Children are expected to obey their fathers. Thus the child will acquiesce to the abuse due to the inability to stop it. Although some children may fight or scream out for help, many other children will not. Many children will "play possum, that is to feign sleep, to shift position and to pull up the covers. Small creatures simply do not call on force to deal with an overwhelming threat."<sup>13</sup>

Victims of intrafamily sexual abuse don't have to suffer physical force. The child can, as a physical matter, be easily picked up, undressed and sexually assaulted without the need for large amounts of physical exertion by the abuser, and non-physical force can gain the same result of total surrender by the child. "Adults must be reminded that the wordless action or gesture [or eye contact] of a parent is an absolutely compelling force for a dependent child and the threat of loss of love or loss of family security is more frightening to the child than any threat of violence."<sup>14</sup>

### *Entrapment and Accommodation*

Assuming the abuser is not caught in the first act of abuse, the abuse will continue because the child feels helpless to stop it and will keep the secret. Therefore, the child has to find a way to adapt to this situation. Summit states that the child can enter altered states of consciousness, escape into her own mind, enter a state of dissociation when the abuse occurs, or even create dual personalities in which different feelings of rage and love are displaced. The child, unable to see the abuser as evil, may blame herself for the abuse. She reasons that, "If daddy is not evil then I must be bad." She feels trapped by the abusive situation because of threatened consequences of disclosure. The abuser has told her that the family will collapse if she discloses the abuse, thus "the child is given the power to destroy the family and the responsibility to keep it together. The child, *not the parent*, must mobilize the altruism and self-control to insure the survival of the others."<sup>15</sup>

The child is trapped between allowing the sexual abuse on the one hand and destroying the family with disclosure on the other. As a result there "is an inevitable splitting of conventional moral values. Maintaining a lie to keep the secret is the ultimate virtue, while telling the truth would be the greatest sin."<sup>16</sup> If the child can't accommodate the

situation within her mind, the rage and sense of helplessness can manifest itself physically. The child could accommodate her anger and self-hate into behavior that is self-destructive by becoming promiscuous or engaging in anti-social or delinquent behavior which only reinforces her perception that she is "bad" and not worth loving or protecting. This anti-social or disruptive behavior will add to the level of disbelief if she discloses the abuse.

### *Delayed, Conflicted, and Unconvincing Disclosure*

It is said that timing is everything. A delayed disclosure can add to the level of disbelief the child encounters. If the sexual abuse has been taking place for many years, the child will have developed rage and anger towards her mother for not protecting her from her father and towards her father for his possessiveness of her as she grows up and attempts to have a life outside of her family.<sup>17</sup>

Family conflict may trigger the disclosure. "After an especially punishing fight and a belittling showdown of authority by the father" the anger within the child created by the fight, not the abuse, can produce the disclosure.<sup>18</sup> Clearly, the wrong time to disclose that her father has been having sex with her for perhaps years is right after a fight over a curfew or whether she can see her boyfriend. The authorities may assume she has invented the story of abuse. "She seeks understanding and intervention at the very moment she is least likely to find them."<sup>19</sup> The child may be seen as a rebellious teenager lying to get revenge on her father.<sup>20</sup> If antisocial behavior reaches delinquent or criminal activity, disclosure during a judicial proceeding could be viewed as lying to defect responsibility for unlawful behavior. In any event, the child has disclosed at the wrong time, and from the outside the child is viewed as a liar. As Summit notes:

Whether the child is delinquent, hypersexual, counter-sexual, suicidal, hysterical, psychotic, or perfectly well-adjusted, and whether the child is angry, evasive or serene, the immediate affect and adjustment pattern of the child will be interpreted by adults to invalidate the child's complaint.<sup>21</sup>

### *Retraction*

"Beneath the anger of impulsive disclosure remains the ambivalence of guilt and the martyred obligation to preserve the family. In the chaotic aftermath of disclosure, the child discovers that the bedrock fears and threats underlying the secrecy are true."<sup>22</sup> After disclosure the family is in turmoil. The father denies the abuse, the mother is upset, siblings may be angry at the child for disclosing and causing "Daddy to leave or go to jail" and the child reasons that if she says she lied about the abuse, peace in the family will be restored. "Once again, the child bears the responsibility of either preserving or destroying the family. The role reversal continues with the bad choice being to tell the truth and the good choice being to capitulate and restore the lie for the sake of the family."<sup>23</sup>

*If the child is not supported by other family members or if they are hostile to her due to her disclosure, recantation can be seen as the only option for peace and the return of love and support by her family. A recantation with an explanation that places blame on herself will fulfill the expectations of adults:*

"Unless there is special support for the child and immediate intervention to force responsibility on the father, the girl will follow the 'normal' course and retract her complaint. The girl 'admits' she made up the story [because she was angry at her father for applying honest discipline]. ... This simple lie carries ... credibility [and the retraction] restores the precarious equilibrium of the family.<sup>24</sup>

### **Usefulness of the CSAAS**

Not all children who are sexually abused go through the above steps described by Summit. Some children cry out during the assault or reveal the sexual assault soon after it occurs. Some are able to fight off the assault. Some may go through some of the dynamics noted in the CSAAS, but not others. But some children may not (due to emotional development, personal characteristics, family dynamics, or social environment) be able to deal with sexual abuse by a parent as well as others, and may show some of the behaviors explained by the CSAAS. Just as some adults are more resilient to sexual assault experiences than others and as some adults have an easier time handling social problems and stress that occur as a result of sexual assault disclosure than do other adults, so do the reactions of child victims of sexual abuse vary from child to child. *The CSAAS is useful for children who react in ways that seem, at least superficially, opposite to expected behaviors of a child who has been sexually assaulted by a family member.*

Other researchers and practitioners who study child sexual abuse have made observations of common characteristics of children who have been abused. Some of the behaviors include sudden irritability in the child, loss of self-esteem, fear of the offender, isolation, reduction in school performance, withdrawal from friends and favored activities, inability to concentrate, low self-esteem, anger towards the offender, untrue positive statements about the relationship between the child and the offender, and confusion as to the proper roles of members within the family.<sup>25</sup> Burgess and Holmstrom note that a child who is being sexually abused holds a deep sense of fear caused by keeping the abuse a secret.<sup>26</sup> This fear can produce somatic reactions such as stomach aches, urinary tract infection, pneumonia or mononucleosis.<sup>27</sup> The child could also exhibit fear upon sight of the offender or lack of fear (because the child knows that abuse will not occur when others are present), sleep disorders and flashbacks.

The types of fear that a child can have include: fear of punishment, fear of repercussion from disclosing the abuse, and fear of abandonment.<sup>28</sup> Additionally, the child may be too young to have the communicative skills to tell another of the abuse<sup>29</sup> or lack the

emotional or cognitive skills to know that what is being done is wrong and abusive.

## Misunderstanding and Misuse of The CSAAS

Nine years after Summit published his original paper, he observed that the CSAAS "is a clinical observation that has become both elevated as gospel and denounced as dangerous pseudoscience."<sup>30</sup> The reason for this dichotomy is that the CSAAS has been misunderstood and misapplied to legal cases involving child sexual abuse.<sup>31</sup> Some practitioners and prosecutors have viewed the CSAAS as a diagnostic tool that can establish sexual abuse.<sup>32</sup> Myers explains that this mistake originated with the confusion of the CSAAS with the Battered Child Syndrome developed by Kempe in 1962.<sup>33</sup> The Battered Child Syndrome is a diagnostic tool that examines bruising and other physical injuries on a child and establishes that such injuries can only occur from physical abuse. According to Myers, the courts

quickly and correctly accepted expert testimony on battered child syndrome to prove physical child abuse. By 1983 the legal community had become accustomed to syndrome evidence to prove *physical* abuse. When child sexual abuse accommodation appeared on the scene, some attorneys made the mistake of comparing the accommodation syndrome to battered child syndrome, concluding — erroneously — that the accommodation syndrome, like battered child syndrome, is a diagnostic tool. Laboring under this misconception, some prosecutors used the accommodation syndrome as evidence of abuse. Of course, the accommodation syndrome is not a diagnostic device, and the misuses of the accommodation syndrome led to confusion that persists to this day.<sup>34</sup>

Summit also explains that

[S]ome of the "distortion stems from misunderstanding of the word *syndrome*. In medical tradition it means a list, or pattern of otherwise unrelated factors which can alert the physician to the possibility of disorder. Such a pattern is not diagnostic. ... In court circles, syndrome seems to mean a diagnosis which an expert witness contrives to prove an injury. Syndrome evidence has become a generic term for diagnostic medical or psychological testimony which must be closely scrutinized for scientific reliability. ... Had I known the legal consequences of the word [syndrome] at the time, I might better have chosen a name like the Child Sexual Abuse Accommodation Pattern to avoid any pathological or diagnostic implications."<sup>35</sup>

The CSAAS is a non-diagnostic tool which does not purport to prove the presence of sexual abuse, but is a clinical tool to be used to understand the behavior of a child who has been sexually abused.<sup>36</sup> The purpose of CSAAS is to explain the behavior of sexually abused children and explain what factors of interaction between the child and the adult world impact the child's behavior. "The focus is ... on the conflict between the child's experience and the perverse indifference of the outer, adult world," not in proving

sexual abuse or establishing factors that tend to prove sexual abuse of children.<sup>37</sup> Summit notes that the

CSAAS is socially, not clinically, determined. It reflects the pathology not of a child who can't convince us of his or her experience, but of an adult society which won't be convinced.<sup>38</sup> ... Evaluation of the responses of normal children to sexual assault provides clear evidence that societal definitions of normal victim behavior are inappropriate and procrustean, serving adults as mythic insulators against the child's pain. Within this climate of prejudice, the sequential survival options available to the victim further alienate the child ... [and] ironically, the child's inevitable choice of the "wrong" options reinforces and perpetuates the prejudicial myths.<sup>39</sup>

## **PART II**

### **Use of the CSAAS in Criminal Trials**

Expert testimony involving CSAAS in criminal trials<sup>40</sup> is controversial because syndrome evidence has been used as a scientific diagnostic tool or as a credibility bolster.<sup>41</sup> As noted previously, the proper use of the CSAAS is for the expert to explain to the jury that a sexually abused child may not disclose immediately, or not at all, because she feels shame and confusion or fears she will not be believed.<sup>42</sup> In addition, if the abuser has threatened her, the child may fear repercussions or fear the abuser will hurt other family members. She may be too young to understand the wrongfulness of the abuser's acts or she may suppress the whole experience.<sup>43</sup> *The reactions of the family are significant in regard to recantations of the child because they may place pressure on the child to recant her story so the family can return to normal. The child can feel guilty that the family has been separated due to her accusations and recant in order to get the family back together.*

Controversy involving the CSAAS occurs in the manner it is introduced. If a court allows expert testimony, in whole or in part, on the CSAAS to prove the truth of the claim made by the child that sexual abuse occurred<sup>44</sup> or to bolster the child's credibility,<sup>45</sup> the court has committed reversible error. In addition, expert testimony on the CSAAS should not be used to explain the ability of the child to perform as a witness in open court.<sup>46</sup>

The prosecution should only use expert testimony on the CSAAS to explain seemingly inconsistent behavior or recantation by the child and to rebut the defense contention that the abuse never occurred because of the child's delayed and unconvincing disclosure, recantation, or other inconsistent behaviors. Used in this way, expert testimony explains how recantation or other behaviors can be understood by reasons other than deceit. The prosecution expert can explain the behavioral dynamics resulting from feelings of betrayal caused by the actions of the abuser and the rest of the family who failed to protect her or did not believe her eventual disclosure. Summit notes:

The proper foundation for relevance of CSAAS testimony is the inference raised by the defense that an inconsistent pattern of disclosures by the child is indicative of deceit. An abstract presentation of the CSAAS by an expert who has never seen the child and knows virtually nothing about the case provides the jury with a demonstrably objective refutation. There is no possibility that such an expert has couched the testimony to buttress the credibility of percipient witnesses. Ideally, the jury will be allowed to understand what is normal and real for child victims as a class, even if courts persist in seeing such conditions as pathological.<sup>47</sup>

### **Relevance and Admissibility under *Daubert***

On June 28, 1993, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>48</sup> The United States Supreme Court held that the *Frye*<sup>49</sup> test was overruled by the passage of the Federal Rules of Evidence (F.R.E.). The *Frye* test requires that expert testimony is admissible only if there is general acceptance within the field that it belongs. But F.R.E. rule 702 declares that expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact at issue." The rule does not require that there be general acceptance of the evidence presented. The court reasoned that the *Frye* test was in conflict with the statute. Since (1) the statute postdates the *Frye* decision, (2) Congress was aware of the decision when it (3) approved the rule of scientific expert testimony that would govern the federal courts and (4) since the rule did not require "general acceptance," (5) the *Frye* test was overruled by Congress.

The court addressed the question of, "when does evidence reach the point that it can be considered scientific" for purposes of rule 702. The court held that the word scientific "implies a grounding in the methods and procedures of science."<sup>50</sup> The court held that for expert testimony "to qualify as scientific knowledge, an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation. ... [T]he requirement that an expert's testimony pertain to scientific knowledge establishes a standard of evidentiary reliability."<sup>51</sup> The court made clear that the lack of peer review or agreement of a scientific theory does not in and of itself regard the evidence as non scientific, for "the fact of publication (or lack thereof) ... will be ... relevant, though not dispositive" to the issue of admissibility.<sup>52</sup>

The court held that there are at least four factors that a judge should consider in a determination of whether to allow expert testimony at trial. The court held that the judge should consider:

1. whether a theory or technique . . . can be (and has been) tested;
2. whether the theory or technique has been subjected to peer review and publication;
3. the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation; and
4. general acceptance . . . [is] an important factor in ruling particular evidence admissible.<sup>53</sup>

If the evidence is determined by the judge to be scientific and will "assist the trier of fact to understand and determine a fact at issue,"<sup>54</sup> then the evidence is admissible as far as Rule 702 is concerned. The court pointed out that: Rule 703, which governs hearsay testimony of experts; Rule 706, which allows the court to appoint its own expert; and Rule 403, which excludes relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice are applicable to the determination of admission of scientific evidence even if such evidence is admissible under Rule 702."<sup>55</sup>

The application of the *Daubert* admissibility test to the social sciences has caused new debate into the admissibility of such sciences into criminal trials.<sup>56</sup> Some commentators have suggested that *Daubert* does not apply to the social sciences and psychological testimony because these disciplines are not derived from the scientific method.<sup>57</sup> Although the CSAAS was not derived through the scientific method (experimentation and observation),<sup>58</sup> "recent studies have confirmed the existence of CSAAS behaviors."<sup>59</sup> Two courts have recently reviewed the CSAAS based on the reasoning of *Daubert* and ruled that CSAAS is admissible under a *Daubert* analysis.<sup>60</sup>

## **PART III**

### **Expert Testimony and the CSAAS**

#### ***State (Louisiana) v Foret (1993)***

In *Foret*, Hypolite Foret was "convicted of attempting to molest his stepdaughter over a one-and-a-half to two-year period, when the child was 12 to 14 years old."<sup>61</sup> The abuse was discovered after the child was returned home after she ran away. "The victim had been having problems with both the defendant and her mother, namely that they were strict and steadfastly refused to allow her to date an older ... boyfriend. Upon her return home, she was interviewed by a child protection worker . . . and during that interview, she detailed molestations allegedly made by her stepfather."<sup>62</sup> (Note: disclosure after (1) a long period of time and (2) after antisocial behavior and conflict with parents).

During the trial, the child's mother, siblings and a family friend testified that they had not seen any abuse, and that the child had wanted "to get out of the house," a claim the child denied. (Note: lack of family support after disclosure). The child admitted that she told her mother that she wanted to come home and was thinking about telling the prosecutor that she had lied about the molestation, but she claimed she only said she would retract to comfort her mother.<sup>63</sup> (Note: recantation in order to regain family support and acceptance).

The prosecution, over the objection of the defense, introduced the testimony of an expert on child sexual abuse who testified that after "he interviewed the victim on three separate occasions ... concluded that, in his expert opinion, she was telling the truth about being the victim of sexual abuse."<sup>64</sup> Foret was convicted of attempted molestation of a juvenile under his control and sentenced to three years' imprisonment

at hard labor. The Louisiana Court of Appeals, in an unpublished opinion, affirmed the conviction.

The Louisiana Supreme Court held that, since the Louisiana rule for the admission of expert testimony was identical to the FRE 702, it would follow the logic of the *Daubert* decision.<sup>65</sup> The court held that under Louisiana law, introduction of *expert testimony can be admitted into evidence if it will* (1) "assist the trier of fact to understand evidence or to determine a fact at issue"<sup>66</sup> and (2) that such *testimony must "rise to a threshold level of reliability"*<sup>67</sup> in that (3) there must be a "valid scientific connection to the pertinent inquiry [of the material fact at issue]. This connection is to be examined in light of a preliminary assessment by the trial court of (4) *whether the reasoning or methodology underlying the testimony is scientifically valid* and (5) *whether the reasoning or methodology properly can be applied to the facts at issue.*"<sup>68</sup>

The court held that, under a *Daubert* analysis, the expert testimony allowed in Foret's trial did not meet the requirements of *Daubert*.<sup>69</sup> The court held that, assuming that the testimony was based upon the science of clinical psychology and psychodynamic theory and thus derived from the scientific method, there are "misgivings [by] many experts and courts [utilizing] Child Sexual Abuse Accommodation (and its progeny) as a basis for determining whether or not abuse has indeed occurred."<sup>70</sup> The court correctly noted that CSAAS was not intended or designed as a diagnostic tool for sexual abuse detection. The court held that in Foret's trial the expert used the CSAAS precisely for that purpose, and it reversed the conviction on that basis.<sup>71</sup> The court held that peer review of CSAAS has not received support in regard to its use as a diagnostic tool.<sup>72</sup>

The court also held that the use of CSAAS as a diagnostic tool is not testable because, since the CSAAS is a psychodynamic theory, the only way to test this type of theory is "by proposing theoretical explanations for behavior and then testing the theories upon patients."<sup>73</sup> The court held that psychodynamic theories are basically opinions on human behavior that are difficult to test for accuracy.<sup>74</sup> The court also found that evidence for the rate of error of a diagnostic test for child abuse, if one exists at all, has a lack of consensus in the scientific literature.<sup>75</sup> The court held that since the CSAAS did not have peer support, nor could be it tested, nor could it establish a rate of error as a tool for child abuse detection, it could not be used as a diagnostic tool in child abuse cases.<sup>76</sup>

The court also addressed the issue of using the CSAAS as a means of supporting the credibility of the victim's assertions that she was sexually abused.<sup>77</sup> The court noted that although this issue "has generated much litigation in other jurisdictions, [it] is *res nova* in this state."<sup>78</sup> The court held that credibility is for the trier of fact alone to determine and "we have said before, and we will say it again, this time with emphasis — we really mean it — *no psychotherapist may render an opinion on whether a witness is credible in any trial conducted in this state.*"<sup>79</sup> The court accordingly held that CSAAS evidence cannot be used to bolster the claim of the victim of being sexually abused.

The court held that the use of the CSAAS "for the limited purpose of rebutting attacks on the victim's credibility based on inconsistent statements, limited disclosures, or recantations of the testimony" is appropriate.<sup>80</sup> The court<sup>81</sup> recognized there are certain dynamics that occur when a child is sexually abused, and the trier of fact may not be aware of how those dynamics affect a child victim of sexual abuse. Expert testimony used for the limited purpose of enlightening the trier of fact about those dynamics and the possible behavior patterns of children due to those dynamics would aid the jury in its determination of the credibility of the child and her behavior.<sup>82</sup>

### ***Steward v. State (Indiana) (1995)***

*Steward* involved a 52-year-old police officer who was convicted of various charges of sexual assault against two teenage girls who were the children of a family friend.<sup>83</sup> At trial the prosecution "presented evidence at trial that S.M.'s [one of the child victims] behavior was consistent with that of other victims of child sexual abuse, in order to prove that sexual abuse occurred."<sup>84</sup> *Steward* was convicted of two counts of child molestation. The Indiana Court of Appeals affirmed the conviction of child molestation in regard to A.M., the other teenage girl, but reversed the conviction of molestation against S.M. because the trial court had precluded the introduction of evidence proffered by *Steward* that S.M. had been molested by someone else.

*Steward* asserted that the Court of Appeals did not address his claim that his conviction should have also been reversed on the grounds of the use of expert testimony regarding "the child sexual abuse syndrome [in that it] is unreliable and unscientific and thus inadmissible, citing ... *Daubert*" and other cases.<sup>85</sup> The Supreme Court of Indiana decided to hear the case "solely to address the defendant's further argument that, [child sexual abuse accommodation] syndrome testimony is scientifically unreliable evidence and is thus unreliable."<sup>86</sup>

After reviewing how other courts have ruled on the admissibility of CSAAS evidence and articles by Roland Summit and other legal commentators on the proper and improper use of the CSAAS,<sup>87</sup> the Supreme Court of Indiana held that the use of CSAAS evidence, explicitly or implicitly, to prove that sexual abuse occurred was in violation of Indiana Rule of Evidence 403, which requires the exclusion of evidence if its probative value is outweighed by its unfair prejudicial effect.<sup>88</sup> The court also held that the CSAAS was not designed to be a diagnostic tool, and "the reliability of such evidence for the purpose of proving abuse is at present extremely doubtful and the subject of substantial and widespread repudiation by courts and scientists."<sup>89</sup>

The court reasoned that the "concerns driving *Daubert* coincide with the express requirement of the Indiana Rule of Evidence 702(b) that the trial court be satisfied of the reliability of the scientific principles involved [and] the federal evidence law of *Daubert* ... is helpful to the bench and bar in applying Indiana Rule of Evidence 702(b)."<sup>90</sup> The court specifically noted the *Daubert* concern that (1) scientifically valid evidence for one purpose or area is not necessarily scientifically valid or reliable in another area and (2)

that there be a "valid scientific connection" between the proffered scientific evidence and the material fact at issue<sup>91</sup> was relevant to its analysis. The court held that the use of the CSAAS as a diagnostic tool for sexual abuse had no scientific validity or reliability. The court properly observed that the CSAAS is not a diagnostic tool but a behavior pattern explanation tool. The use of the CSAAS as a diagnostic tool does not meet the Daubert rule that the expert testimony and science behind it have a "valid scientific connection" to the material fact at issue-whether the sexual abuse occurred.<sup>92</sup>

The court did recognize that the CSAAS had scientific validity as an explanation of behavior patterns of a sexually abused child, "once a child's credibility is called into question."<sup>93</sup> The court held that "research generally accepted as scientifically reliable recognizes that child victims of sexual abuse may exhibit unexpected behavior patterns seemingly inconsistent with the claim of abuse, such evidence may be permissible under Indiana Evidence Rule 702(a)" which allows for expert testimony that provides the trier of fact with knowledge that will assist the trier of fact to understand evidence or a material fact at issue.<sup>94</sup>

The court held that "if the defense discusses or presents evidence of ... unexpected behavior by the child [implying or stating the behavior is consistent with deceit], or if during trial testimony the child recants ... a trial court may consider permitting expert testimony, if based upon reliable scientific principles, regarding the prevalence of the specific unexpected behavior within the general class of reported child abuse victims."<sup>95</sup> The court agreed with the Arizona Supreme Court that "when the relevant inquiry is the syndrome's reliability and probative value for rehabilitative and related purposes '[s]uch evidence may harm the defendant's interests, but we cannot say it is unfairly prejudicial; it merely informs jurors that commonly held assumptions are not necessarily accurate and allows them to fairly judge credibility.'"<sup>96</sup>

## **Pennsylvania and Delaware: Two Approaches to CSAAS Evidence**

More than half of the states have addressed the issues of admissibility of the CSAAS, but the Pennsylvania Supreme Court is one of a few courts that have prevented the use of the CSAAS in a rehabilitative manner as a rebuttal to the defense claim that the behavior of the child is not consistent with that of a child who has been sexually abused. This rejection has been noted as a minority view by legal commentators and by other state courts.<sup>97</sup> It is for this reason that the reasoning of the Pennsylvania case is reviewed. The Delaware case is reviewed to show how a neighboring state court has viewed the same issue and came to a different conclusion through a different analysis.<sup>98</sup>

### ***Commonwealth v. Dunkle (1992)***

The Supreme Court of Pennsylvania in *Commonwealth v. Dunkle* held that evidence of the CSAAS is inadmissible.<sup>99</sup> The case involved allegations that Neil Dunkle sexually assaulted his 14-year-old stepdaughter in April, 1983. The state charged that Dunkle

entered the bathroom where his stepdaughter was showering, forced her to the floor, forced her to have oral intercourse, and then raped her. The crime was not reported until April 1986, three years later.

Over objection of the defense, the prosecution called an expert on child sexual assault who testified as to the reactions and behaviors of children who have been sexually assaulted. The expert testified as to why a victim would not report the assault early, why the victim would not be able to give a clear recollection of the assault, and why details of the assault may be omitted and then recollected after time. The prosecution also called witnesses to testify to the character of the child witness both before and after the date of the alleged attack.

Dunkle was convicted on several charges including involuntary deviate sexual intercourse, but was found innocent of the rape charge. The Superior Court vacated and remanded the case<sup>100</sup> ruling that the evidence of the CSAAS should not have been admitted on the grounds that it was used to buttress the credibility of the victim.

The Pennsylvania Supreme Court affirmed the Superior Court remand of the case but decided the case on different grounds. While the Superior Court reversed because the expert was used to support the credibility of the witness and thus a reversible error, the Supreme Court found reversible error on the grounds that the syndrome evidence did not have the proper scientific validity to be admitted as scientific evidence. Justice Cappy delivered the opinion of the court. Chief Justice Nix and Justices Flaherty and Zappala joined. Justice Larsen issued a dissent which was joined by Justice Papadakos and Justice McDermott issued a separate dissent, both of which are summarized below.

The court asserted that the symptoms claimed to be the result of the CSAAS<sup>101</sup> are such that "even a lay person would recognize are not necessarily unique to sexually abused children. They are common to children whose parents divorce and to psychologically abused children."<sup>102</sup> The court asserted that there is no uniform agreement on the characteristics of a sexually abused child that are exclusive of any other type of abuse. The court asserted that "in order for an expert to testify about a matter, the subject ... must have been sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>103</sup> The court maintained that the symptoms of the syndrome had not been "sufficiently established" nor had they gained "general acceptance in the particular field in which it belongs." As a result, the evidence did not reach the level of scientific reliability necessary for it to have been admitted as evidence. The lack of specificity of the symptoms and the lack of a scientific agreement as to the existence of exclusive behaviors of sexually abused children as a class was what he called a "fatal flaw."<sup>104</sup>

The court explained that it was not convinced there were symptoms of sexual abuse that were exclusive to sexual abuse. The court noted that it "is virtually impossible to clinically describe the elements of the child abuse syndrome with any realistic degree of specificity."<sup>105</sup> The court noted that the "principle flaw" with child sexual abuse

syndrome evidence is that there is "no evidence indicat[ing] that it can discriminate between sexually abused children and those who have experienced other trauma."<sup>106</sup>

The problem with this assessment is that the CSAAS as formulated by Summit is not intended to discriminate between sexually abused children and nonabused children, nor is it intended to be diagnostic of sexual abuse. Summit notes that the CSAAS was not created out of the scientific method.<sup>107</sup> The fact that there are no characteristics of sexually abused children exclusive to sexual abuse has nothing to do with the CSAAS, which is based on the assumption that the child in question is, in fact, a victim of sexual abuse. The CSAAS attempts to explain behavior that is seemingly inconsistent with being a victim of sexual abuse.

The court asserted that, on the issue of relevance, there were two reasons why CSAAS evidence should not have been admitted. First, the CSAAS evidence did not "render the desired inference more probable than not. ... Rather, it merely attempts ... to suggest that the victim was, in fact, exhibiting symptoms of sexual abuse."<sup>108</sup> The court decided that the CSAAS expert testimony was inadmissible because the jury and not the expert makes the determination if the child witness is, in fact, a victim of sexual abuse.

Second, the symptoms and the psychology of a child who is a victim of sexual abuse are such that a lay person could understand without expert explanation, thus expert testimony is not needed. The court noted that an expert is not needed to explain to a jury why a 14-year-old girl would not report a rape by her stepfather without delay to her mother, or why she would have gaps in her testimony, or why she would be unable to give specific dates and times of an attack. The court ruled that a lay person would understand the child would be afraid of her attacker, embarrassed, afraid she would not be believed or not have the maturity to know the wrongfulness of the act or the ability to communicate the abuse.

The court concluded that the evidence of the CSAAS was introduced to address the failure of the child to come forward and add to the child's credibility, which is in violation of state law.<sup>109</sup> Since a jury is well qualified, without expert testimony, to understand why a 14-year-old would not come forward without delay and can judge the credibility of the girl for themselves with this common knowledge in mind, an expert is not needed to explain to them how to do so. The court ruled that the judgment of credibility of the child belongs to the jury alone and an expert on the CSAAS cannot testify as to the truth and credibility of the victim by inference.

Justice McDermott issued a dissenting opinion questioning the court's assertion that a jury can understand the psychology and reactions of a child who had been raped by her stepfather. He argued that the "majority is ascribing to the average juror incredible sophistication regarding the effect of sexual abuse on the workings of a young mind."<sup>110</sup> McDermott argued that the court unreasonably trivialized the field of child psychology in its assertion that all people know how children react to sexual abuse.

Justice Larsen rejected the assertion that the psychology of sexually abused children is well known to all laymen and professionals alike. Larsen also rejected the court's opinion that there was no scientific ground for the syndrome. He noted that the expert had made over 500 observations of children who were sexually abused and all she testified to was the pattern of behavior that she noted in her studies. Secondly, the testimony as to why a child will delay in reporting the incident "was presented in response to the inference raised by Dunkle that the victim's three-year delay in reporting the assault was a result of insincerity or fabrication."<sup>111</sup> The expert's testimony as to the child's inability to recall specific dates and times, which is explained by the child's repression of the event, was introduced when Dunkle attempted to impeach the child's credibility due to inability to recall the dates and times of the attack and abuse she claimed occurred. Larsen noted that the purpose of the expert and her testimony was not to state that the victim was credible or that the accused was guilty as charged. "The testimony of the expert provided a background against which the jury could assess the behavior of the victim."<sup>112</sup> As to the possibility that the child might be insincere, Larsen asserted that in "the absence of the expert testimony, the jury would not have known that insincerity is *not* the only possible explanation for the delay of [reporting] a sexual assault."<sup>113</sup> Lastly, since the expert did not give a specific statement as to the truth of the charge, the expert's testimony did not enter upon the sole area of the jury as to determination of credibility of the victim.

The court was correct that the "symptoms" of child sexual abuse are not exclusive of other explanations, but that is beside the point. The presence of "symptoms" of sexual abuse does not prove that a child was sexually abused. *The CSAAS is an explanatory tool to explain the circumstances and family dynamics around a child who has been sexually abused.* The court assumed that the average juror would understand why a child would be hesitant to disclose sexual abuse by a family member and understand the fears that a child may have in regard to the abuse. Thus formal explanation by an expert was not needed.

### ***Wheat v. State (Delaware) (1987)***

The Delaware Supreme Court is an example of different reasoning on the issue of what the average juror would know about sexual abuse of children as well as when the CSAAS can be properly introduced to a jury.<sup>114</sup> The case involved an allegation of sexual abuse by Wheat's 10-year-old stepdaughter. After Wheat was arrested and incarcerated, his first wife visited the complainant and her mother (Wheat's second wife). During the visit the complainant and Wheat's first wife were alone, and during the conversation, the girl recanted her story of sexual abuse. The girl repeated the recantation to her mother and later to the police officers in charge of the case. During Wheat's trial, seven months after his arrest, the girl recanted her recantation and again claimed that Wheat had sexually abused her. She testified that "after Wheat abused her, he told her that if she told her mother, her mother would tell the state, and that when Wheat went to jail, he was going to break out and kill me and my mother."<sup>115</sup> (Note: demand on the child for secrecy coupled with threats.)

In regard to the recantations, the "state and defense counsel offered opposing explanations ... The complainant explained her recantation by stating Wheat's first wife scared her by telling her, at a time when no one else was around to protect her, that ... if she didn't have [Wheat] out by Easter ... the [other] kids were going to get really mad at [her]."<sup>116</sup> (Note: family equilibrium disrupted and blame for disruption placed on the child.)

To further explain the recantation, the state introduced expert testimony on the CSAAS. "Over defense objection, the trial judge allowed [Margaret Jackson] to testify as an expert in the field of intrafamily sexual abuse, ruling, however, that she could not opine whether the complainant was being truthful or not."<sup>117</sup> Jackson did not state directly whether the little girl was telling the truth, but she stated that according to her studies "thirty percent to forty percent of children recant ... but fewer than five percent recant and maintain the altered statement."<sup>118</sup> Ms. Jackson gave additional testimony as to why recantations occur.<sup>119</sup>

Wheat was convicted of first degree rape and appealed to the Supreme Court asserting that (a) Jackson did not have the qualifications to be an expert witness and (b) Jackson's testimony impermissibly interfered with the function of the jury in that her testimony of percentages of children who recant and then retract the recantation bolstered the credibility of the complainant and implied that the girl was telling the truth.<sup>120</sup> The court agreed with Wheat's second assertion and reversed his conviction, but accepted introduction of "what we will term the child sexual abuse syndrome."<sup>121</sup>

Justice Walsh, writing for the court, held that Jackson had the education and experience to testify in regard to child sexual abuse. The Court stated that the next issue was whether testimony involving child sexual abuse would "assist the trier of fact to understand the evidence or determine a fact in issue."<sup>122</sup> The Court argued that the testimony of Ms. Jackson, "concerning intrafamily child abuse [consisted of] specialized knowledge which will assist the trier of fact to understand the evidence [and] determine a fact in issue."<sup>123</sup> The Court held that, under Delaware Rules of Evidence 702, the testimony of Ms. Jackson was relevant because it assisted the jury with a material fact in the case, the interpretation of behavior of the claimant. The Court held that evidence of child sexual abuse is admissible for the purpose of educating the trier of fact to observed behaviors of sexually abused children and explanations of the recantation, a subject it would not have otherwise understood. The Court noted that CSAAS educates the jury in "the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the family [and such knowledge assists] the jury in evaluating the credibility of the complainant."<sup>124</sup>

The Court accepted and recognized

the materiality of expert testimony, in cases where there has been a delay in reporting the incident and/or a recantation, which seeks to explain the significance of such a delay or recantation. This holding applies only where the complainant has displayed behavior (e.g. delay in reporting) or made statements (e.g. recantation) which, to

average lay people, are superficially inconsistent with the occurrence of sexual abuse and which are established as especially attributable to intrafamily child sexual abuse rather than simply stress or trauma in general.<sup>125</sup>

The court correctly limited the use of the CSAAS to intrafamily sexual abuse because the CSAAS is based on the premise that the dynamics involved in recantations and other behaviors arise out of the family relationship between the victim and perpetrator.<sup>126</sup> The court also limited the use of the CSAAS to cases where the behavior of the child is such that simple stress over the event or trauma caused by the event are not the causes of the recantation. The court correctly understood that the CSAAS deals with family pressures on the child after the child discloses sexual abuse.

The court reversed Wheat's conviction because it recognized that CSAAS evidence may be interpreted by the jury as corroboration of the child's allegation. Ms. Jackson, who used her statistics to state that most victims recant and then recant the recantation, implied that Wheat's daughter was telling the truth. She thus impermissibly made a determination as to the truth of a material matter, a role which is for the jury alone.<sup>127</sup>

## **PART IV**

### **Conclusion**

Intrafamily sexual assault can be difficult to prosecute because the child may be too frightened and confused to be a strong witness. Family pressures on the child can be severe because the allegation of a little girl that the man her mother lives with is molesting her will not be easily accepted. Thus, the wholesale rejection of evidence that explains why a child recants, has faulty memory, or does not disclose the abuse immediately is incorrect and unfair to the child and the pursuit of justice. CSAAS evidence allows the jury to consider the inconsistencies, recantations and other behaviors that appear to show deceit as behavior explainable by other reasons. The CSAAS is relevant because it allows the jury to better understand a fact at issue-behavior that appears to show deceit on the part of the child.

The CSAAS should be admissible under a *Daubert* analysis because (1) it is based on observations, knowledge and experience in child sexual abuse and how that abuse affects the child and her family, (2) this information would aid a jury in determining a material issue in the case and aids the jury in understanding why recantation and delay in reporting sexual abuse is not inconsistent with sexual abuse, (3) the CSAAS has been the subject of peer review and judicial review for more than 13 years and has been accepted by various state supreme courts, and (4) the CSAAS has received general acceptance when used as a tool to aid the jury in understanding the dynamics of behavior of children who are sexually abused. So long as expert testimony does not indicate that CSAAS is diagnostic and can determine if sexual abuse occurred, the evidence will remain within its scope and scientific validity and be helpful to the jury.

The admission of CSAAS should be carefully limited, as done in *Wheat v. State*. The Delaware Court was correct in noting that evidence of statistics on recantation implied that the child was indeed sexually abused. CSAAS evidence should be only admitted to rebut the defense assertion or implication that the child's behaviors are evidence of deceit. Once the defense introduces recantations, delayed disclosures, or other seemingly inconsistent behavior as evidence of deceit, the state should be able to use the CSAAS to rehabilitate the child witness and educate the jury about the family dynamics that occur when sexual abuse is claimed. Since the CSAAS is concerned with family dynamics, it should only be introduced in cases of intrafamily sexual abuse.

When used properly, CSAAS evidence provides an alternative explanation for a child's seemingly inconsistent behaviors. The jury is given two explanations for the same behavior and can make the determination as to whether the child is telling the truth based on enlightened decision making.

As previously noted by this author in regard to issues of investigation and proving child sexual abuse, "it should never be forgotten that the goal of the criminal trial is to convict the guilty and allow the innocent to go on his way."<sup>128</sup> It is just as important that the victim have a fair hearing so that the guilty are punished and the child sees justice done.

### [Endnotes](#)

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