Criminal Law - Hearsay - Confrontation Clause

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Recent Decision

CRIMINAL LAW—HEARSAY—CONFRONTATION CLAUSE—The Pennsylvania Superior Court has held that judicial creation of a tender years hearsay exception to provide for the admission of the hearsay statements of children in child sexual abuse cases is unjustified on evidentiary and constitutional grounds.


Following a conversation between his mother and brother in the late spring or early summer of 1982, four and one-half year old Darrell Leigh-Manuel made a comment which led his mother to suspect that he and five year old neighbor Jaclyn Predmore had been sexually abused.1 Separate interviews of the children conducted by their mothers elicited similar stories of specific abusive behavior.2 The police were contacted3 and the children underwent medical examination.4

On October 14, 1982, Edward M. Haber was arrested on criminal counts of corruption of a minor and indecent assault stemming from two incidents alleged to have occurred between May, 1982 and July, 1982.5 His arrest was the result of identifications made by the alleged child victims and other information provided by the children and their mothers.6

The trial court held a pretrial in camera competency hearing to determine the testimonial capabilities of the children.7 Darrell was adjudged competent to testify about both the purported events

2. Id. at 101, 505 A.2d at 285. The children claimed that a man named Ed had taken them to his home in a blue truck, tied them to trees, undressed them, put sticks in their rectums, and forced them to kiss each other’s genitalia. Record at 364.
3. Id. at 84, 505 A.2d at 274.
4. Id. at 100-01, 505 A.2d at 285.
5. Record at 368.
6. 351 Pa. Super. at 81, 505 A.2d at 274. The elapsed time between the alleged events and their disclosure was not determined. Id. at 82, 505 A.2d at 275.
7. Id. at 81, 505 A.2d at 274. Pretrial competency hearings were held only before the first trial. Id.
and the identity of the molester, while Jaclyn was found competent to testify only about the events.\footnote{Id.}

A first trial resulted in a hung jury.\footnote{Id.} Over Haber's hearsay objection before the second trial,\footnote{Id. at 100-01, 505 A.2d at 285. Appellant did not object to the hearsay testimony of the mothers at the first trial. Id. Hearsay is an out-of-court statement or assertive act which is offered in court to show its truth. Hearsay evidence which is relevant and material may nonetheless be inadmissible because it lacks trustworthiness, i.e., it is not subject to cross-examination, oath or inspection by the jury. Exceptions which provide for the admission of certain classes of hearsay evidence have evolved to account for hearsay which has indicia of trustworthiness and necessity. See, e.g., infra note 20.} the trial court permitted the mothers of the child victims to testify about what the children had said about the alleged events and the identity of the alleged abuser.\footnote{Id. at 81, 505 A.2d at 274. Specifically, the testimony at issue pertained to the nature and location of the assaults, how the children were taken to the location of the assaults, and the first name of the abuser. Record at 368-69.} Because the trial testimony of the child victims was often monosyllabic, contradictory and incomplete,\footnote{Id. at 81-82, 84-85, 505 A.2d at 274-75.} Haber's conviction on May 5, 1983,\footnote{351 Pa. Super. at 81, 505 A.2d at 274.} was largely due to the testimony of the mothers.\footnote{351 Pa. Super. at 86-87, 505 A.2d at 277-78.}

On appeal Haber made eight allegations of error in the trial court.\footnote{Brief for Appellant at 20-21, Commonwealth v. Haber, 351 Pa. Super. 79, 505 A.2d 273 (1986). Secondary issues raised by the appellant involved: 1) the trial court's failure to conduct additional competency hearings before appellant's second trial; 2) the trial court's admission of police testimony relating to the out-of-court identifications by Darrell; 3) the trial court's denial of a petition for reconsideration of sentence (based on a claim that the crimes merged for sentencing purposes); 4 & 5) the trial court's failure to grant a mistrial, strike testimony or give precautionary instructions concerning the police officer's testimony in view of the fact that he had destroyed his investigatory notes; 6) the trial court's refusal to allow comment about Jaclyn's lack of identification testimony; and 7) the trial court's failure to suppress in-court identifications. The superior court held that the trial court did not commit error in failing to conduct a second competency hearing because the initial hearing adequately established the children's competency; that the out-of-court identifications by Darrell were properly admitted because the testimony was merely corroborative; and that the police officer's testimony was properly admitted in the absence of his investigatory notes because the notes were not material and there was no evidence that the destruction of the notes followed a defense request for their production. The court did not address the issue of the merger of the crimes involved. Id. at 86-87, 505 A.2d at 277-78.} The essential question presented was the admissibility of the testimony given by the mothers of the alleged victims concerning what their children had told them. In an opinion delivered by Judge Cavanaugh, with Judge Olszewski dissenting, the superior
court agreed with appellant that the trial court committed reversible error in admitting the hearsay testimony of the mothers.\(^6\)

Judge Cavanaugh relied on traditional two-part hearsay analysis in deciding that the testimony of Mrs. Leigh-Manuel and Mrs. Predmore concerning the children's statements was inadmissible hearsay. After first determining that the testimony involved out-of-court assertions offered for their truth,\(^7\) the court considered whether the testimony fell within a recognized exception to the hearsay rule.\(^8\) Judge Cavanaugh focused this part of his discussion on the spontaneous declaration exception.\(^9\) In concluding that the exception did not apply, Judge Cavanaugh pointed to the dispassionate manner in which the alleged events were disclosed, the questioning of the children by their mothers, and the indefiniteness of time between the alleged events and their disclosure, as evidence that the statements were not made spontaneously under the stress of an exciting event.\(^10\)

Judge Cavanaugh next considered the Commonwealth's contention that a new exception to the hearsay rule should be judicially created to provide for the admission of the out-of-court statements of children in child sexual abuse cases.\(^11\) The court's analysis began with a review of contemporary legal thought concerning a tender years exception.\(^12\) Unable to find any recognition of a tender years exception in the rules of evidence of other states and in recognized legal treatises,\(^13\) Judge Cavanaugh declined to find legal significance in what he perceived as politically motivated legislative en-

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16. Id. at 80, 505 A.2d at 273.
17. Id. at 81, 505 A.2d at 274.
18. Id. at 82, 505 A.2d at 275.
19. Id. In so doing, Judge Cavanaugh noted that the spontaneous declaration exception (also known as the excited utterance exception) is the exception most frequently used for admission of out-of-court statements of children in child sexual abuse cases. Id.
20. Id. The spontaneous declaration exception to the hearsay rule provides for the admission of statements made spontaneously under the stress of an exciting event. Trustworthiness is derived from the lack of time for reflection and, concomitantly, fabrication, in making the statement. Id.
21. Id.
22. Id. The term "tender years" exception was used by Judge Olszewski in his dissenting opinion. Id. at 88, 505 A.2d at 278.
23. Id. at 82, 505 A.2d at 275. Judge Cavanaugh examined the rules of evidence both in the states which have codified the rules and in the states which, like Pennsylvania, apply the rules as a matter of common law. He also examined the Uniform Rules of Evidence as adopted by the National Conference of Commissioners on Uniform State Laws. Legal treatises referred to in Judge Cavanaugh's review included WIGMORE ON EVIDENCE, JONES ON EVIDENCE, MCCORMICK ON EVIDENCE, and BINDER'S HEARSAY HANDBOOK. 351 Pa. Super. at 82, 505 A.2d at 275.
actments which provide for the admission of out-of-court statements of children. Finally, the court examined the exception in light of the general theory behind exceptions to the hearsay rule. Noting that a tender years exception would depend on a finding that the out-of-court statements of children in child sexual abuse cases are trustworthy, Judge Cavanaugh concluded that there was no basis upon which the out-of-court assertions of children could be considered to be any more trustworthy than the out-of-court assertions of adults. Accordingly, finding little support for the exception in either practice or theory, Judge Cavanaugh held that judicial creation of a tender years exception to the hearsay rule was unwarranted.

In concluding this part of his opinion, Judge Cavanaugh noted that the admission of Jaclyn's hearsay statements relating to the issue of identity resulted in a denial of appellant's constitutional right of confrontation in view of the court's ruling which barred her from testifying on the issue.

In his dissenting opinion, Judge Olszewski advocated the judicial creation of a tender years exception in an analysis that focused primarily on what he perceived as the necessity for the exception in an era of increased victimization of children. Judge Olszewski began his analysis by noting, as did the majority, that numerous obstacles to prosecution in child sexual abuse cases often make it difficult to convict child abusers without admission of hearsay

24. Id. at 82 n.1, 505 A.2d at 275 n.1. Judge Cavanaugh explained that such legislation was enacted not for its merits, but rather for reasons of political expediency. He contended that a legislator who voted against such legislation would be perceived negatively by his electorate. Id.
27. Id. at 84, 505 A.2d at 276.
28. Id.
29. Id. Judge Cavanaugh, citing Davis v. Alaska, 415 U.S. 308, 315-16 (1974), as a case in which it was held that an accused's right to confrontation primarily consists of the right to cross-examine, concluded that appellant did not lose this right when Jaclyn's claims were presented through the hearsay testimony of her mother. 351 Pa. Super. at 84, 505 A.2d at 276.
30. Id. at 88-89, 505 A.2d at 278. Judge Olszewski's finding of necessity is based primarily on the limited admissibility of the out-of-court statements of children provided by existing hearsay exceptions. Id.
He differed with the majority, however, in viewing the inadmissibility of the hearsay statements of the children as a result of a defect in the rules of evidence rather than a defect in the evidence itself.

Judge Olszewski illustrated the ineffectiveness of existing hearsay exceptions in child sexual abuse cases in a detailed examination of the spontaneous declaration exception. He asserted that it was incongruous for an exception based on spontaneity to be the one most frequently used for a crime that often evades prompt and spontaneous discovery. Furthermore, he viewed the judicial expansion of the spontaneity requirement in several cases as implicit recognition by the courts of the inadequacy of the exception in child abuse cases and the need for new standards of admissibility.

Judge Olszewski next suggested an alternative standard to provide for the admission of extra-judicial statements of children. Citing an unenacted Pennsylvania statute, he outlined a three-part test for admissibility: 1) the court must find in an in camera hearing that the evidence is necessary and reliable; 2) the child must testify in court, or if the child is unable to testify, there must

31. Id. Judge Olszewski listed the lack of eyewitnesses, the reluctance of a child witness to testify against an offender who may be a parent, relative or acquaintance, and the inability of a child victim to testify because of his age, as impediments to prosecution of child sexual abuse cases. Id.

32. Id. at 91, 505 A.2d at 279-80.

33. Id. at 90, 505 A.2d at 279.

34. Id. Judge Olszewski cited Lancaster v. People, 200 Colo. 448, 615 P.2d 720 (1980) (one-half hour delay), Williams v. State, 427 So.2d 100 (1983) (twelve hour delay justified as first opportunity to complain), State v. Creighton, 462 A.2d 980 (1983) (eighteen hour delay) and State v. Padilla, 110 Wis.2d 411 (1982) (three day delay), as cases in which the spontaneity requirement had been judicially expanded. 351 Pa. Super. at 90, 505 A.2d at 279.

35. Id. at 92-93, 505 A.2d at 280-81.

36. Id. at 92, 505 A.2d at 280. General Assembly of Pennsylvania Senate Bill 1361, passed by both houses of the state legislature on November 29, 1984, and vetoed by the Governor on December 26, 1984. However, the hearsay provisions at issue were deleted in a prior amended version of the bill. Judge Olszewski also listed Colorado, Indiana, Kansas, Minnesota, South Dakota, Utah and Washington as states which have enacted statutes providing for a tender years exception. 351 Pa. Super. at 92, 505 A.2d at 280.

37. Id. at 94-95, 505 A.2d at 281-82. Judge Olszewski explained that in making a determination of reliability, the court should consider the totality of the circumstances. He likened this analysis to that used in Rule 803(24) of the Federal Rules of Evidence which provides for the admission of hearsay evidence which does not fall under a recognized exception. Specifically, factors to consider include: the time, content and context of the statement; the language used by the child; the age and maturity of the child; the nature and duration of the abuse; the relationship of the child to the offender; and any other factor relevant to the case. 351 Pa. Super. at 94-95, 505 A.2d at 281-82.
be other evidence which corroborates or supports his statements;\textsuperscript{38} and 3) there must be notice to the accused that the statements will be offered against him. Judge Olszewski opined that this test provided for flexible determinations of the reliability of the out-of-court assertions of children because it enabled a court to consider relevant factors that were not included in the analysis of traditional hearsay exceptions.\textsuperscript{39} Thus, while he agreed with the majority that the spontaneous declaration exception did not apply in the instant case, Judge Olszewski nevertheless concluded that the hearsay evidence of the children was properly admitted under the tender years exception,\textsuperscript{40} i.e., necessity was shown by the children’s testimonial deficiencies, reliability was shown by the similarity in the children’s stories, by the children’s identifications of appellant, and by corroborating medical evidence,\textsuperscript{41} and the notice requirement was satisfied in view of the use of the evidence at appellant’s previous trial.\textsuperscript{42}

Finally, Judge Olszewski contended that the confrontation clause was not violated by the admission of extra-judicial statements of a non-testifying child under the tender years exception.\textsuperscript{43} According to Judge Olszewski, all hearsay evidence would be inadmissible if the confrontation clause was in every instance a valid basis for its exclusion.\textsuperscript{44} In determining which hearsay evidence is admissible, the policies of the confrontation clause must be balanced against the interest of society in law enforcement and the necessity of the evidence.\textsuperscript{45} Based on his above stated findings that society has a compelling interest in prosecuting child abusers and

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  \item \textsuperscript{38} Id. at 94, 505 A.2d at 281-82. As contrasted with corroborating evidence, supporting evidence is probative evidence that need not be admissible, i.e., prior convictions for sexual abuse, complaints of other children, etc. The use of this evidence by a court making a determination of reliability of the extra-judicial statements of children is not prejudicial to the accused.
  \item \textsuperscript{39} Id. See supra note 37.
  \item \textsuperscript{40} 351 Pa. Super. at 99-100, 505 A.2d at 284-85.
  \item \textsuperscript{41} Id. at 101, 505 A.2d at 285. Abnormalities were found in Darrell which were believed to be related to sexual abuse. These injuries also provided a likely explanation for the recent episodes of incontinence experienced by Darrell. Brief for Appellee at 5, Commonwealth v. Haber, 351 Pa. Super. 79, 505 A.2d 273 (1986).
  \item \textsuperscript{42} Id. at 102, 505 A.2d at 285. See supra note 10.
  \item \textsuperscript{43} 351 Pa. Super. at 98, 505 A.2d at 283-84. Because Darrell was available for cross-examination, Judge Olszewski resolved the confrontation issue in regard to his hearsay statements on the authority of United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), which held that a child’s out-of-court statements were admissible when he was available at trial. 351 Pa. Super. at 98, 505 A.2d at 283.
  \item \textsuperscript{44} Id. at 97, 505 A.2d at 283.
  \item \textsuperscript{45} Id.
that the extra-judicial statements of children are often necessary for successful prosecution, Judge Olszewski determined that the scale was tipped in favor of admissibility.46 Furthermore, he asserted that the requirements of necessity, reliability, notice and corroborating evidence for admission under the tender years exception exceeded the general requirement that hearsay evidence contain indicia of reliability.47

In concluding his dissenting opinion, Judge Olszewski recounted that there were compelling reasons supporting the creation of new standards of admissibility for the hearsay statements of children in child sexual abuse cases.48 Having demonstrated that a tender years exception would protect both the interests of the accuser and the accused, he urged that the exception be judicially adopted to better serve the interests of justice in child sexual abuse cases.49

In the ten year period from 1976 to 1985, substantiated reports of sexual injury to children increased twelve-fold in Pennsylvania.50 The growth in the number of child sexual abuse cases primarily reflects the increased community awareness and reporting of the crime, rather than a significant increase in the incidence of

46. Id. at 98, 505 A.2d at 283.
47. Id. at 98-99, 505 A.2d at 283-84.
48. Id. at 102, 505 A.2d at 285.
49. Id.
50. In Pennsylvania, substantiated reports include founded and indicated reports of abuse. Founded reports are those in which a judicial adjudication that a child was abused has been made. Indicated reports are those in which the Child Protective Service determined that there was substantial evidence of abuse. Commonwealth of Pa. Dep't of Pub. Welfare, 1985 Child Abuse Report 1.
51. Id. at 3.
52. Child sexual abuse is defined as contact between a child and a more mature person where the "child is being used as an object for gratification for ... sexual needs or desires." Commonwealth of Pa. Dep't of Pub. Welfare, 1984 Child Abuse Report 27. Although the definition assumes the elements of unequal power and sexual activity, the elements of fear and secrecy also typify sexual abuse of children. Stiles & Armstrong, Facing the Abusers in Court: How Therapists Can Help Lawyers Help Children, 14 STUDENT LAW. 16 (1986).
53. Increased awareness of child abuse is the result of technological advances which enhance medical detection of non-accidental injury, societal changes which reflect an unacceptance of abusive practices and a willingness to intervene against adults on behalf of children, and laws which require that child abuse be reported. See generally Radbill, A History of Child Abuse and Infanticide, in THE BATTERED CHILD (R. Helfer and C. Kempe ed. 1968). One of the earliest examples of the trend toward unacceptance of child abuse makes for interesting reading. In the so-called "Mary Ellen Case," intervention on behalf of an abused child was forestalled by the absence of a legal basis upon which to proceed. Appeal was ultimately taken to the Society for the Prevention of Cruelty to Animals where it was successfully argued that animal cruelty laws applied to protect a human animal from physical abuse. The success of this effort led to the formation of protective agencies geared specifically to children and to legal reforms. Id.
child molestation. Unfortunately, the number of successful prosecutions of child molesters has not similarly increased.

The exposure of child abuse as a pervasive social problem has revealed weaknesses in the criminal justice system which often operate to impede successful legal resolution of child sexual abuse cases. Fundamentally, the problem is that of trying to achieve justice for child victims within a legal system designed for adults. Despite the fact that child abuse prosecutions often rely largely on evidence which is supplied by the child victims themselves, effective testimony by children may be precluded by courtroom procedures which cause stress or fear, suggestive and complex questioning tactics which cause confusion, and timing delays which adversely impact on a child's memory. The low rate of convictions in child sexual abuse cases in effect signifies a discrediting of children because of their testimonial inadequacies and improperly diverts attention from the systemic flaws.

Suggested legal reforms which would aid prosecution of child abuse cases by reducing the trauma experienced by a testifying child include mechanical means of testifying, procedural methods which enhance a child's comprehension and responsiveness to

54. Id. History clearly reveals that the victimization of children predates the recent explosion in the number of reported cases. Direct reference to child abuse can be found in the Bible and in the writings of ancient philosophers such as Plato, and indirect reference to child abuse can be found in historical studies of various cultures and societies. Child abuse has been justified as a means of discipline, a necessary component of education, and a part of religious practice. Furthermore, parental treatment of children, who were largely viewed as chattel, was generally unquestioned. (Dr. Radbill notes that Henry VI and Plato were among the few influential figures in history who were child advocates). Id.

55. See supra note 50. This is evident from the fact that substantiated reports in Pennsylvania include reports which were not concluded with a judicial determination of abuse.


58. Goodman & Helgeson, supra note 55, at 53. The physical isolation of the witness stand, the presence of the accused molester, the accusatory manner of defense counsel, and a child's unfamiliarity with courtroom formalities, all add to the trauma experienced by a testifying child. Id. It has also been suggested that parents often fail to report abuse or later opt to terminate cases in view of the trauma likely to be experienced by their child as a participant in the legal process. Id. at 55.

59. Id. at 56.

60. These include videotaping of testimony or statements and testimony via closed circuit television. Whitcomb, Assisting Child Abuse Victims in the Courts: The Practical Side of Legislative Reform, in PAPERS FROM A NAT'L POL'Y CONF. ON LEGAL REFORMS IN CHILD ABUSE CASES 15, 17-18 (1985).
questioning, relaxation of competency requirements and expanded admissibility of hearsay evidence. Although it may reasonably be concluded that the use of these methods would produce the desired result, the efficacy of these remedies must be measured not only by their ability to afford greater justice to child victims, but also by their ability to achieve that result without sacrificing the accused's right to a fair trial.

The tender years hearsay exception proposed by Judge Olszewski has been the subject of widespread analysis and debate. The exception has been challenged on both evidentiary and constitutional grounds; opponents claim that the exception fails to meet the standards for exclusion from the hearsay rule, and that it infringes upon the accused's confrontation rights by providing for the admission of statements of a non-testifying child. Nonetheless, by 1986 nearly half of the states had enacted legislation containing similar provisions, and the highest courts of two of the states had affirmed the validity of such statutes.

61. Id. at 20-21. Allowing a child to use visual aids such as dolls may not only clarify his understanding of the question and his response to it, but may also serve to redirect his feelings away from himself. The supporting presence of a parent or other trusted adult may similarly reduce courtroom fear. Id.

62. Id. at 17.

63. See supra text accompanying notes 36-39. Several variations of the hearsay exception proposed by Judge Olszewski are currently the subject of general consideration. Similar provisions in other states incorporate age restrictions, testifying requirements, and the absence of corroboration requirements for non-testifying children. R. Eatman & J. Bulkley, Protecting Child Victim/Witnesses 13-15 (1986).

64. This case represents the first instance of judicial consideration of a tender years hearsay exception in Pennsylvania. Although the legislature did consider the measure, the bill did not pass. See supra note 36.

65. See, e.g., Note, The Testimony of Child Victims In Sex Abuse Prosecutions: Two Legislative Innovations, 98 Harv. L. Rev. 806, 809 (1985) (concluding that legislative standards for establishing unavailability and sufficiency of corroborating evidence are improper and inadequate, rendering the tender years hearsay exception unconstitutional); cf. Myers, The Legal Response to Child Abuse: In the Best Interest of the Children?, 24 J. Fam. L. 149 (1985-86) (although not expressly objecting to such measures, rejecting revision of the criminal justice system in favor of developing therapeutic solutions to the problem of child sexual abuse).

66. R. Eatman & J. Bulkley, supra note 63, at 7. Twenty-two states have special hearsay provisions for child victims. See supra note 63.

67. R. Eatman & J. Bulkley, supra note 63, at 9. Although the Washington Supreme Court upheld the constitutionality of the state statute in State v. Ryan, the court struck down its application therein, concluding that the hearsay statements of the non-testifying child victims were admitted absent proper showings of reliability and unavailability. The court held that 1) the uncertainty about the competency of the children at the time the statements were made cast doubt on the reliability of the statements; 2) there was inadequate circumstantial indicia of reliability; and 3) unavailability could not be based on stipulated incompetency which stemmed in part from a misinterpretation of statutory incompe-
The objection to hearsay evidence is that its use may deprive an accused of the right to confront and cross-examine the witnesses against him. Although the trustworthiness of evidence which is untested in court may be suspect, the exclusion of some classes of hearsay evidence was excepted at common law when the evidence was necessary and had alternative guarantees of trustworthiness. To varying extents, the traditional common law hearsay exceptions have been embodied in both the federal and state rules of evidence. Furthermore, hearsay evidence which does not fall within a traditional exception, but has "equivalent circumstantial guarantees of trustworthiness," may be admitted in the federal courts under the residual exceptions. By providing a mechanism to promote "growth and development in this area of law, while conserving the values and experience of the past as a guide," the federal residual exceptions articulate the appropriateness of developing new exceptions to the hearsay rule.

The fundamental purpose of confrontation is to ensure adversarial fairness by entitling the accused to have his adversarial witnesses testify under oath, in the presence of himself and the trier of fact, and subject to cross-examination. Like the hearsay rule, an accused's right to confrontation functions to ensure that evidence is trustworthy but does not create an absolute bar to the admission of hearsay evidence. Although the purpose and scope...
of confrontation and the hearsay rule overlap in this way, the right of confrontation has independent significance in that it may provide a basis for the exclusion of hearsay evidence that would be admissible as an exception to the hearsay rule if the use of such evidence would result in unfairness to the accused. Primarily, this may occur when a hearsay declarant does not testify at trial.

Because the hearsay rule and the right to confrontation do not mandate the absolute exclusion of hearsay evidence, new hearsay exceptions must be individually scrutinized under both doctrines to determine if they qualify for admission. Accordingly, determination of the validity of the tender years hearsay exception proposed by Judge Olszewski requires a two-part analysis consisting of 1) a traditional examination of the necessity and trustworthiness of the hearsay evidence for its admission as an exception to the hearsay rule, and 2) consideration of the accused's confrontation rights in view of the provision allowing for admission of the hearsay statements of a non-testifying child.

A. Hearsay

Proponents of a tender years hearsay exception generally claim that the necessity for admission of a child's out-of-court statements is demonstrated in view of a child's testimonial deficiencies and the lack of other evidence in a particular case. These circumstances satisfy the legal definition of necessity that the proffered evidence is more probative on the point than any other evidence reasonably available. Viewed in a more pragmatic sense, because these circumstances decrease the likelihood that the prosecution could prevail without the admission of the hearsay evidence, the hearsay evidence is deemed necessary. Judge Olszewski reasoned in accordance with this rationale in concluding that the hearsay testimony of the mothers was necessary in the instant case.

In child sexual abuse cases, when the inclusion of hearsay evidence may be objectively viewed as a determining factor of convic-

77. Id. at 65. "The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay." See infra text accompanying notes 106-11.
78. Ohio v. Roberts, 448 U.S. at 66.
79. See supra notes 31 and 57. Necessity for this particular hearsay exception is based on the frequent inapplicability of traditional hearsay exceptions. See supra note 30.
80. Fed. R. Evid. 803 (24)(B). See also Fed. R. Evid. 804 (b)(5)(B). Although not explicitly labelled as such, these provisions implicitly denote necessity.
82. See supra notes 30-31.
tion or acquittal, the necessity requirement is easily resolved and rarely presents an evincing barrier against admission of hearsay evidence through a hearsay exception. Necessity was clearly demonstrated in the instant case where the different results of Haber's two trials could be traced to the inclusion of the hearsay evidence at his first trial and its exclusion at the second trial. 83

The reliability requirement for admission of a child's out-of-court statements is the more difficult prong of the traditional test. The reliability of a statement is a subjective determination generally relegated to the jury, which makes its determination after weighing the evidence as presented on direct and cross-examination. Hearsay exceptions provide for the admission of statements which have not been subject to examination in court, based on historically proven determinations that the evidence can be accepted as trustworthy. 84 Thus, the validity of a new hearsay exception rests on the ability to prove that the class of statements it encompasses can be accepted as reliable.

Proponents of a tender years hearsay exception have used various theories to support their conclusion that the out-of-court statements of child sexual abuse victims have the requisite reliability. These include: 1) the claim that out-of-court statements of children are inherently trustworthy; 85 2) the claim that the comparative trustworthiness of the out-of-court statements of children equals or exceeds the trustworthiness of the statements they make in court; 86 and 3) the claim that reliability can be established upon consideration of the circumstances surrounding the making of the statement. 87

The theory that a child's statements relating to sexual events have inherent reliability is premised on the notion that it is impossible for a child to fabricate events which are beyond the scope of his experience. 88 Scientific research which indicates that young children typically lack knowledge about sexuality adds support to this hypothesis. 89 Extreme caution must be exercised, however,

83. See supra note 14 and accompanying text.
84. See supra notes 68-69.
86. See, e.g., Note, supra note 57, at 1749.
87. See, e.g., supra note 37.
88. Goodman, supra note 85, at 69.
89. Id. The following studies were referred to: Berstein & Cowan, Children's Concepts of How People Get Babies, 46 CHILD DEV. 263-69 (1971); Kreitler & Kreitler, Children's
where a statement's reliability is being premised on the content of the statement itself. The nature and circumstances of the statements, the age of the child and possible reasons the child may have for making a false claim are factors which must be considered in determining whether the statements are based on knowledge gained through illicit experience. Furthermore, despite this research evidence, psychiatric professionals who retain the belief that young children are capable of fabricating sexual events can still be found. Thus, it appears that more research is necessary to confirm the inherent reliability theory before it can be accepted as a measure of reliability.

The comparative reliability approach favors admission based upon the belief that the out-of-court statements of children are at least as reliable as the statements they make in court. This claim essentially questions the efficacy of direct and cross-examination as a tool for truth determination in prosecutions involving children. It is argued that these traditional courtroom procedures are rendered ineffective in view of the adverse impact that the passage of time has on a child's memory and the distortion of testimony that might result from a child's fear of courtroom procedures, from coercion by an accused who is a family member or from improper questioning techniques. Additionally, it has been suggested that the extent of detail, the consistency of statements and other crite-

90. Note, supra note 57, at 1761.
92. Stiles & Armstrong, supra note 52, at 15.
93. In Commonwealth v. Seese, the Pennsylvania Supreme Court recently held that expert testimony concerning the inherent reliability of a child's statements about sexual abuse was prejudicial to the accused.

If testimony as to the veracity of various classes of people on particular subjects were to be permitted as evidence, one could imagine "experts" testifying as to the veracity of the elderly, of various ethnic groups, . . . etc. Such testimony . . . would encourage jurors to shift their focus from determining the credibility of the particular witness who testified at trial, allowing them instead to defer to the so-called "expert" assessment of the truthfulness of the class of people of which the particular witness is a member. . . .[V]eracity . . . is not beyond the facility of the ordinary juror to assess.

94. Goodman & Helgeson, supra note 56, at 52.
95. Id. at 53-54.
ria commonly used to assess the reliability of an adult’s statements during in court examination may not apply to children. Although these claims may have merit, their current utility as a measure of reliability is doubtful in view of insufficient scientific research to support them. Furthermore, the wholesale dispensation of traditional courtroom procedures which is implicitly advocated may result in an improper denial of the confrontation rights of the accused.

Finally, reliability is often established upon consideration of the circumstances in which the out-of-court statements were made. Judge Olszewski relied on this “indicia of reliability” theory in concluding that the hearsay statements in the instant case were trustworthy.

Establishing the reliability of the hearsay statements of a child victim of sexual abuse is best accomplished through consideration of the totality of the circumstances. Circumstantial indicia of reliability has been accepted in the federal courts as a “catch-all” basis for admission of hearsay evidence which does not fall within the parameters of a traditional hearsay exception. In the context of child sexual abuse cases, the recognition that spontaneity may not be the exclusive indicator of trustworthiness, especially where a delay can be explained, provides additional justification for the use of circumstantial indicia of reliability. Furthermore, the inherent reliability theory and the comparative trustworthiness theory, neither of which alone can establish reliability, may be used alternatively as additional circumstantial indicia of reliability.

The acceptability and facility of the “indicia of reliability” theory would be enhanced if the proposed hearsay exception enumerated the criteria that a court making a determination of reliability should consider. Additionally, it should be explicitly required

96. Goodman, supra note 85, at 69.
98. See supra text accompanying notes 74-75 and infra note 107.
99. See supra note 37.
100. See supra notes 71-72 and accompanying text.
101. See supra text accompanying notes 33-34.
102. These include, but are not limited to:
  1) character of declarant
  2) age and maturity of child
  3) inherent reliability of statements; likelihood of fabrication in view of the child’s age and probable knowledge of events
  4) possible motive to lie or distort the event
  5) child’s personal knowledge of the event
  6) certainty that the statement was made
that the court include in the record the factors upon which a determination of reliability was based.\textsuperscript{103} These inclusions would help not only to dispel claims that a court abused its discretion in making the determination, but would also apply to dispel confrontation challenges when the child does not testify by documenting that the statements were admitted as having "particularized guarantees of trustworthiness" as required under \textit{Ohio v. Roberts}.\textsuperscript{104}

In the instant case, the totality of the circumstances strongly supports a finding of reliability. Unlike the majority opinion, which focused on the non-spontaneous nature of the children's statements,\textsuperscript{105} the dissenting opinion considers other factors which are relevant to a determination of reliability.\textsuperscript{106} Logic dictates that the flexibility of the latter approach lends itself to greater accuracy.

\textbf{B. The Confrontation Clause}

The confrontation clause of the sixth amendment preserves the right of an accused to be confronted with the witnesses against him.\textsuperscript{107} Although the admission of out-of-court statements would seemingly always violate the express mandate of the confrontation clause, the proven admissibility of some classes of hearsay evidence illustrates that the confrontation right is not absolute.

The effect that the confrontation clause has on the use at trial of otherwise admissible hearsay evidence depends primarily on the role that the declarant plays at trial. It is well established that

\begin{itemize}
  \item 7) number of people who heard the statement
  \item 8) relationship of declarant and witness(es)
  \item 9) timing of the statement
  \item 10) circumstances of making the statement (\textit{i.e.}, spontaneously or in response to questioning)
  \item 11) whether the statement was made while the child was in pain or distress
  \item 12) language used by the child
  \item 13) nature and duration of abuse
  \item 14) opportunity of accused to commit the alleged acts
  \item 15) relationship of child to accused
\end{itemize}


\textsuperscript{103} R. \text{EATMAN} \& J. \text{BULKLEY}, \textit{supra} note 63, at 9.

\textsuperscript{104} \textit{Ohio v. Roberts}, 448 U.S. at 66.

\textsuperscript{105} \textit{See supra} text accompanying notes 19-20.

\textsuperscript{106} \textit{See supra} note 37 and text accompanying notes 40-41.

\textsuperscript{107} \textit{"[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI, made applicable to the states through the fourteenth amendment in \textit{Pointer v. Texas}, 380 U.S. 400 (1965). This right is also guaranteed in the Pennsylvania Constitution: \textit{"In all criminal prosecutions the accused has a right . . . to meet the witnesses face to face." Pa. Const. art. I, § 9.}
when a declarant testifies in court the confrontation clause does not represent a barrier to the admission of his otherwise admissible out-of-court statements. When a declarant is available at trial but does not testify, the confrontation clause will normally bar the admission of his otherwise admissible out-of-court statements. An exception to this general prohibition may be predicated upon a demonstration of overriding necessity and public policy interests, or the non-utility of confrontation. Finally, an unavailable declarant's hearsay statements are admissible only if they fall within a traditional hearsay exception or if the statements have "particularized guarantees of trustworthiness."

The tender years exception provides for the admission of the out-of-court statements of a non-testifying child subject to a showing of unavailability and notice to the accused. Although this provision apparently comports with the confrontation clause, the lack of a definition for unavailability in the proposed exception is a serious flaw. An accused's confrontation rights may clearly be infringed if a court makes an improper determination of unavailability and admits hearsay statements of a non-testifying available child.

The Federal Rules of Evidence define unavailability, in the context of the hearsay rule, as an exemption from testifying based on privilege, a refusal to testify despite a court order, a lack of memory, absence coupled with inability to procure attendance, or an inability to testify due to death, illness or infirmity. Several of these traditional factors will seldom apply to make a child witness unavailable. Furthermore, for purposes of the confrontation clause, a greater showing of unavailability may be necessary for the admission of evidence under a hearsay exception. These facts,

109. "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." Ohio v. Roberts, 448 U.S. at 66.
113. This statement is based on the presumption that the previous discussion concerning the reliability of the hearsay statements has been accepted. See supra text accompanying notes 99-104.
115. The traditional categories of unavailability which are most likely to apply to a child are refusal to testify and lack of memory.
116. "[A] witness is not 'unavailable' for purposes of . . . the exception to the confron-
coupled with a strong desire on the part of many courts to admit hearsay evidence in child sexual abuse prosecutions, may lead a court to improperly determine that a child is unavailable based on the poor quality of the child's testimony, an adjudgment of incompetency or the desire to protect a child from the trauma of testifying. Although many commentators believe that these are sufficient grounds upon which to find a child witness unavailable, the result of such determinations may be a denial of an accused's confrontation rights. This danger could be eliminated by including within the hearsay provision a list of the valid grounds upon which a determination of unavailability may be based.

When a child is truly unavailable, the requirement in the proposed exception of corroborating evidence for admission of hearsay evidence already determined to be reliable has the benefit of providing extra protection to an accused's rights. On the other extreme, however, is the danger that reliable evidence may be omitted if, as is often true in child sexual abuse cases, there is no corroborating evidence. In view of the unavoidable conflict posed by these considerations, the most reasonable approach is to include the requirement of corroboration to afford the greatest level of protection to the rights of the accused.

In the instant case, the confrontation rights of the accused were
clearly violated when the hearsay statements of the non-testifying child were admitted under the premise that the child's incompetency rendered her unavailable. The fact that her incompetency was based on one of the traditional criteria for unavailability, failure of memory, is not controlling; as noted previously, for confrontation purposes, a greater showing of unavailability may be required.

C. Conclusion

The dissenting opinion of Judge Olszewski is meritorious for its recognition that current judicial procedures and legal standards ineffectively serve the interests of justice in child sexual abuse cases. The tender years hearsay exception proposed, however, provides protection to the interests of the child victims at the potential expense of the rights of the accused. It is fundamentally flawed by its failure to include standards upon which determinations of the reliability of hearsay evidence and the unavailability of a hearsay declarant can be based. If these features were included, however, the exception would arguably withstand evidentiary and constitutional challenge.

Perhaps an equally significant flaw derives not from the content of the proposed exception, but from its source. Although the rules of evidence in Pennsylvania are applied as a matter of common law, a new hearsay exception would be more appropriately advanced by the legislature. That branch is in a better position to exhaustively study the relevant issues which need to be considered when a major revision of evidentiary rules and judicial procedures is contemplated.

Linda S. Amoroso

124. See supra text accompanying note 8.
126. R. Eatman & J. Bulkley, supra note 63, at 2.