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Criminal Law - Child Sexual Abuse - Expert Testimony as to Credibility

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RECENT DECISIONS

CRIMINAL LAW—CHILD SEXUAL ABUSE—EXPERT TESTIMONY AS TO CREDIBILITY—The Supreme Court of Pennsylvania has held that in a child sexual abuse case expert testimony as to the veracity of a class of children of which the victim-witness is a member, is an improper invasion of the jury's function of assessing the credibility of a witness.

Commonwealth v. Seese, 512 Pa. 439, 517 A.2d 920 (1986).

On November 18, 1982 Harry Ray Seese was convicted of statutory rape and corruption of an eight year old girl.[1] The child victim's testimony was relied upon by the prosecution to obtain a conviction.[2] The young girl testified that on July 15, 1982, her mother went shopping and she was left with her brother and sister in the care of Mr. Seese.[3] She further testified that while the other children were playing, Mr. Seese picked her up, carried her to her mother's bedroom and placed her on the bed.[4] The child stated that Mr. Seese then warned her not to tell anyone what was going to happen and removed his and the child's clothes.[5] The child's testimony then

1. Commonwealth v. Seese, 512 Pa. 439, 517 A.2d 920 (1986). A jury trial was conducted by Judge William E. Pfadt in the Court of Common Pleas, Erie Co. No. 1197 of 1982. Brief for Appellant at 3.

2. *Seese*, 512 Pa. at 444-45, 517 A.2d at 922. The charges of involuntary deviate sexual intercourse and indecent assault were dismissed on demurrer during trial. Brief for Appellant at 3.

3. *Seese*, 512 Pa. 439, 517 A.2d 920. Mr. Seese was the boyfriend of the child's mother. Brief for Appellee at 2.

4. Brief for Appellee at 2.

5. *Id.* The child's testimony included various details of the incident including the fact that she was wearing a sunsuit and underpants while Mr. Seese was wearing blue pants. *Id.*

indicated that Mr. Seese had both sexual and oral intercourse with her.[6] When Mr. Seese was finished, the child stated that he threatened to slap her if she told anyone about what had happened.[7]

After the child testified, the prosecution also called to the stand a board certified pediatrician as an expert in cases of child abuse.[8] The pediatrician stated that she examined the child a week after the incident and found the child's vaginal opening to be slightly enlarged.[9] The doctor further stated that the child told her that she observed "white stuff coming out" of Mr. Seese's penis.[10] The pediatrician testified that identification of ejaculate is not consistent with the sexual maturation level of an eight year old girl.[11]

The pediatrician was then asked if, in her experience,[12] eight year old children were truthful in verbalizing complaints of sexual abuse.[13] Over defense counsel's objection,[14] the expert testified that prepubertal children such as this victim,[15] do not usually lie in making sexual complaints.[16] The pediatrician continued by stating that the

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6. *Id.* The eight year old child testified that Mr. Seese put his buggy (penis) between her legs and inside of her garage (vagina). She also testified that he put his tongue in her garage (vagina). She said that she saw a white substance come out of "the thing between his legs." *Id.*, *quoting* trial transcript at 20.

7. Brief for Appellee at 3. The child did not tell her mother what had happened until a week later. *Id.*

8. *Seese*, 512 Pa. at 441-42, 517 A.2d at 920-21. Dr. Linda Fagenholtz is a graduate of Tuft's University School of Medicine and was a pediatric intern and resident at Harvard Medical School from 1972 through 1975. She also taught pediatric medicine at Harvard and at St. Vincent's Health Center in Erie. Dr. Fagenholtz also testified that she had treated approximately 90 to 100 cases of child abuse during the preceding four years. Brief for Appellee at 3.

9. Brief for Appellee at 3. Dr. Fagenholtz examined the child on July 22, 1982. *Id.*

10. *Id.*

11. *Id.*

12. *Seese*, 512 Pa. at 441, 517 A.2d at 921. Initially, the pediatrician was also asked if the medical literature contained any information on the veracity of children in making sexual complaints. The court sustained counsel's objection on this question as it pertained to the review of medical literature, but allowed Dr. Fagenholtz to express her own opinion on this subject. *Id.*

13. *Id.* Specifically, the prosecutor's question was, "Based upon your experience and your pediatric specialization, does the medical literature say anything about children of the age of eight in giving complaints of sexual abuse or rape as far as their veracity?" *Id.*

14. *Id.* Defense counsel objected on the grounds that the expert's testimony gave an impermissible opinion as to the child's veracity. *Id.*

15. *Id.* The pediatrician stated, "Prepubertal children, which she (victim, eight years old) fits into the category of essentially that, do not lie." *Id.*

16. *Id.* The pediatrician testified that, "It is very unusual that a child would lie about sexual abuse." *Id.*

reason for such truthfulness is because children in this age group do not have the life experience regarding sex to fabricate details of sexual activity.[17] Finally, the pediatrician concluded that since children generally do not know how to lie about sex, their complaints are based on events that they have seen or experienced.[18]

At the close of testimony,[19] the trial judge instructed the jury as to how they should consider the pediatrician's opinions.[20] These instructions included the statement that the jury was not bound to accept the doctor's testimony.[21] Mr. Seese was convicted and sentenced to a term of confinement of three to eight years.[22] The conviction was appealed to the Pennsylvania Superior Court in Pittsburgh, which affirmed without opinion.[23] Appeal was then taken to the Pennsylvania Supreme Court which reversed sentence and granted a new trial.[24]

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17. *Id.* at 441-42, 517 A.2d at 921.

18. *Id.* The doctor said, "The sexual abuse literature is fraught with articles, and prepubertal children usually do not lie about matters of sexual abuse no matter how chaotic or uncomfortable their home situation is, one, because they don't know how to lie about it. They don't know what to say. It's not part of the life experience, so everything they say is something they have seen or experienced. It would be very unusual for them to lie. I have seen one child in four years that I have been doing this that I think was lying." *Id.*

19. In defense of the charges, Mr. Seese testified that he was being framed by the victim and her mother. Brief for Appellee at 4.

20. Brief for Appellee at 9-10.

21. *Id.* The judge stated:

> Dr. Fagenholtz, who testified in this case, would be called an expert witness, members of the jury. Ordinarily and as a general rule, a witness can only testify about things that he or she may have seen or heard. He or she may not give an opinion or draw conclusions. An exception to this rule is the so-called expert witness rule. Such a witness is one who by training, education or experience has acquired a special level of skill or knowledge in some art, science, profession or call. By virtue of his or her special skill or knowledge, an expert is permitted to give explanations and draw inferences not within the range of ordinary knowledge, intelligence, and experience, and to give an opinion and state his or her reasons for it. In deciding whether or not to accept Dr. Fagenholtz's opinion, you should consider the evidence as to her training, education, her experience as well as the reasons and facts on which her opinion is based. Also, in deciding whether or not to accept Dr. Fagenholtz's opinion, you should bear in mind that you are not bound to accept it merely because it is the testimony of an expert witness or someone having special skill or knowledge.

Id., *quoting* trial transcript at 125-26.

22. Brief for Appellant at 3. Sentence was issued on July 22, 1983. *Id.*

23. Commonwealth v. Seese, 344 Pa. Super. 626, 495 A.2d 615 (1985).

24. Appeal granted, Commonwealth v. Seese, 508 Pa. 607, 499 A.2d 579 (1985).

Justice Flaherty, writing for the majority,[25] held that expert testimony as to the veracity of a class of children of which the victim is a member, improperly invaded the jury's province of assessing the credibility of a witness.[26] This testimony was also found to be prejudicial to the defendant because the prosecution's case relied upon the credibility of the child's testimony.[27]

The majority's opinion focused on an analysis of past Pennsylvania case law concerning the admissibility of expert testimony.[28] The court viewed prior case law as establishing the proposition that expert testimony is admissible only if an ordinary juror cannot formulate an opinion on a subject using their own knowledge, information or skill.[29] Conversely, phenomena and events which are matters of common experience or knowledge are not proper subjects for expert testimony.[30]

In applying this rationale to the present case the court reasoned that "lying" is within the range of ordinary experience.[31] A witness's veracity, therefore, is to be left for the jury's assessment.[32] Justice Flaherty also pointed out that determining a witness's credibility has traditionally been placed within the jury's sole province.[33] To allow expert testimony on this issue would, according to the majority, be

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25. *Seese*, 512 Pa. at 440, 517 A.2d at 920. The majority included Chief Justice Nix and Justices McDermott, Hutchinson, Zappala and Papadakos with Justice Larsen writing a concurrence. *Id.*

26. *See supra* note 15 and accompanying text.

27. *Seese*, 512 Pa. at 444-45, 517 A.2d at 922. *See also supra* notes 2-7 and accompanying text.

28. *Seese*, 512 Pa. at 442-44, 517 A.2d at 922.

29. *Id.* at 442, 517 A.2d at 921. *See* Commonwealth v. Leslie, 424 Pa. 331, 227 A.2d 900 (1967) (Expert's suspicion of arson without facts in record is not admissible); Commonwealth v. Nasuti, 385 Pa. 436, 123 A.2d 435 (1956) (Expert's opinion of arson based on facts in record is admissible); Collins v. Zediker, 421 Pa. 52, 218 A.2d 776 (1966) (How fast a person walks is within jurors' ordinary experiences and not a proper subject for expert opinion testimony).

30. *Seese*, 512 Pa. at 442, 517 A.2d at 921. *See* Burton v. Horn and Hardart Baking Co., 371 Pa. 60, 88 A.2d 873 (1952) (Expert testimony is inadmissible if the situation can be adequately described to the jury and evaluated by them using ordinary knowledge and experiences).

31. *Seese*, 512 Pa. at 443, 517 A.2d at 922. *See* Danovitz v. Portnoy, 399 Pa. 599, 161 A.2d 146 (1960) (Evaluation of a witness's veracity is made by jurors based on their own life experiences and observations of a witness's demeanor while testifying).

32. *Seese*, 512 Pa. at 443, 517 A.2d at 922. *See* Commonwealth v. Shaver, 501 Pa. 167, 460 A.2d 742 (1983).

33. *Seese*, 512 Pa. at 443, 517 A.2d at 922. *See* Commonwealth v. Brockington, 500 Pa. 216, 455 A.2d 627 (1983); Commonwealth v. O'Searo, 466 Pa. 224, 352 A.2d 30 (1976).

an impermissible encroachment upon the jury's duty in a trial.[34] Additionally, the majority cautioned that the consequences of allowing such testimony would lead to a host of veracity experts on other categories of people such as the elderly and ethnic groups.[35] Further, jurors may delegate their task of determining credibility to a so-called expert's opinion on the veracity of a witness.[36] According to the majority, the expert witness would have an unwarranted appearance of reliability.[37] The majority opinion also found that the admission of the expert's testimony was prejudicial to the appellant as the credibility of the eight year old's testimony was primarily relied upon by the prosecution in proving its case.[38]

Justice Larsen's concurring opinion urged the adoption of the rationale employed by the Eighth Circuit in *United States v. Azure*.[39] In *Azure*, the accused was convicted of carnal knowledge of a female under the age of sixteen.[40] During this trial, a pediatrician was called as a government expert witness on child abuse.[41] The doctor was permitted to testify as to the believability of the minor's story about the abuse.[42] On appeal to the United States Court of Appeals for the Eighth Circuit, the conviction was reversed as the reviewing court

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34. *Seese*, 512 Pa. at 443, 517 A.2d at 922. *See also* Commonwealth v. O'Searo, 466 Pa. 224, 352 A.2d 30 (1976) ("Traditionally, we have recognized not only the jury's ability to determine the credibility of the witnesses but also we have placed this determination within their sole province.") *Id.* at 229, 352 A.2d at 32.

35. *Seese*, 512 Pa. at 443, 517 A.2d at 922. The credibility issue would then be decided by a battle of experts. *Id.*

36. *Id.* at 444, 517 A.2d at 922. The court stated, "In addition, such testimony would imbue the opinions of experts with an unwarranted appearance of reliability upon a subject, veracity, which is not beyond the facility of the ordinary juror to assess." *Id.*

37. *Id.*

38. *Id.* at 444-45, 517 A.2d at 922.

39. *Id.* at 445-48, 517 A.2d at 922-24. Justice Larsen cites three pages of United States v. Azure, 801 F.2d 336 (8th Cir. 1986) which was decided two days prior to oral argument in *Seese*, 512 Pa. at 445-48, 517 A.2d at 922-24.

40. *Azure*, 801 F.2d at 338. The court reasoned that because the crime was committed on land held in trust for Indians and that the accused is 50% Chippewa Indian, there is federal jurisdiction over the case and a violation of 18 U.S.C. § 2032. *Id.*

41. *Seese*, 512 Pa. at 445, 517 A.2d at 923. The trial court found the doctor's testimony admissible under Federal Rule of Evidence 702, which allows expert opinion testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." *Azure*, 801 F.2d at 339, *citing* 18 U.S.C.A. § 4, 1151, 1153, 2032, FED. R. EVID. 702, 28 U.S.C.A.

42. *Seese*, 512 Pa. at 445, 517 A.2d at 923. The doctor stated he could "see no reason why she would not be telling the truth in this matter. . . ." *Azure*, 801 F.2d at 339.

determined the pediatrician's testimony improperly invaded the jury's function of evaluating credibility.[43]

The *Azure* court reached its conclusion by first pointing out that the admissibility of expert testimony is determined by the trial judge and that decision should not be overturned absent an abuse of discretion.[44] In addition, if the expert testimony assists the trier of fact in understanding the evidence, then such testimony is admissible.[45] Reviewing past federal cases involving expert testimony relating to a witness's credibility, the *Azure* court determined that the Federal Rules of Evidence have limited expert's opinion testimony to character evidence.[46] Thus, both Justice Larsen's concurrence in *Seese,* by adopting the rationale employed in *Azure,* and Justice Flaherty's majority opinion in *Seese* are in agreement that credibility issues are to be left for a jury's evaluation.[47]

Unlike the *Seese* majority, however, the *Azure* court did concede that in child sexual abuse cases, expert testimony would be helpful to the jury in determining facts.[48] In dicta, the Eighth Circuit suggested that experts may be permitted to generally testify as to a child's ability to distinguish reality from fantasy, to express an opinion on whether medical evidence is consistent with sexual abuse, and by drawing comparisons between the victim's testimony and

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43. *Seese*, 512 Pa. at 447, 517 A.2d at 924. The Federal Court of Appeals, Eighth Circuit stated, "We agree that in these types of special circumstances (child sexual abuse) some expert testimony may be helpful, but putting an impressively qualified expert's stamp of truthfulness on a witness' story goes too far in present circumstances." *Azure*, 801 F.2d at 340.

44. *Seese*, 512 Pa. at 446, 517 A.2d at 923. The *Azure* court cites United States v. Rose, 731 F.2d 1337 (8th Cir. 1984), *cert. denied*, 469 U.S. 931 (1984) (The trial judge's decision permitting a witness to testify as a police expert on the subject of shoe-print comparisons in an armed robbery trial was not an abuse of discretion). *Azure*, 801 F.2d at 340.

45. *Seese*, 512 Pa. at 446, 517 A.2d at 923, *citing* United States v. Azure, 801 F.2d at 340. *See supra* note 29 and accompanying text.

46. *Seese*, 512 Pa. at 446, 517 A.2d at 923. The *Azure* court cites United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974). (Trial judge did not abuse his discretion by disallowing a psychiatrist's testimony as to the credibility of a witness, a known sociopath accused of conspiracy to import marijuana). *Compare with* United States v. Awkard, 597 F.2d 667 (9th Cir. 1979), *cert. denied*, 444 U.S. 885. (Trial judge did abuse discretion by allowing an expert to give opinion on the reliability of hypnotically refreshed memory.) *Azure*, 801 F.2d at 340.

47. *Seese*, 512 Pa. at 447, 517 A.2d at 924, *citing Azure*, 801 F.2d at 340-41. *See supra* notes 14, 20-22.

48. *Seese*, 512 Pa. at 447, 517 A.2d at 924, *citing Azure,* 801 F.2d at 340. *See supra* note 31.

common patterns of other known cases of sexual abuse.[49] Directly commenting on a witness's credibility, however, is viewed by both the *Azure* and *Seese* courts as an impermissible usurpation of the jury's duty in a trial.[50]

By urging the adoption of the *Azure* decision, Justice Larsen's concurrence presents a more lenient standard of admissibility of expert testimony in child abuse cases.[51] While Justice Flaherty's majority opinion based its reasoning on whether "lying" is within the juror's common knowledge and experience,[52] Justice Larsen advocates, *via* the *Azure* decision, that there is much outside an ordinary juror's knowledge and experience concerning child sexual abuse.[53] Although both opinions agree that an expert cannot give an opinion on a witness's veracity, there is some disagreement on where to place limits on expert testimony.[54]

One proposed limit on the admissibility of an expert's testimony was considered in a turn of the century Pennsylvania Supreme Court case.[55] In this early decision the court determined that an expert's opinion was not admissible if the circumstances of the case could be fully explained and understood by the average juror.[56] More than

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49. *Seese*, 512 Pa. at 447-48, 517 A.2d at 924. "[Expert] might have aided the jurors without usurping their exclusive function by generally testifying about a child's ability to separate truth from fantasy, by summarizing the medical evidence and expressing his opinion as to whether it was consistent with Wendy's [the child's] story that she was sexually abused, or perhaps by discussing various patterns of consistency in the stories of child sexual abuse victims and comparing those patterns in Wendy's story." *Id. citing Azure*, 801 F.2d at 340.

50. *See supra* notes 31-36 and 43-47 and accompanying text.

51. Admissibility determined by an estimation of what is common knowledge to ordinary jurors would exclude more testimony than a standard which only excludes testimony if it is found to be unhelpful to jurors in determining facts. For example, how fast a person walks would be a common experience of almost all jurors but it may be helpful to the jurors to have an expert give an opinion as to how long it may have taken a person to walk twenty feet. *See* Collins v. Zediker, 421 Pa. 52, 218 A.2d 776 (1966) (Judge held that expert may not testify as to how fast a person walks).

52. *Seese*, 512 Pa. at 443, 517 A.2d at 922. *See supra* note 31.

53. *Seese*, 512 Pa. at 447-48, 517 A.2d at 924, *citing Azure*, 801 F.2d at 340. *See supra* note 43 and accompanying text.

54. *See supra* note 51 and accompanying text.

55. *See* Dooner v. Delaware and Hudson Canal Co., 164 Pa. 17 (1894) (In a negligence case, expert testimony that ordinary freight carts without grab handles are dangerous to brakemen is within the ordinary knowledge of jurors.)

56. *Id.* at 33. "Hence, whenever the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible." *Id.*, *citing* Graham v. Penn. Co., 139 Pa. 149, 153 (1892).

fifty years later, a trial judge's instruction to a jury regarding the low evidentiary value to be given a psychiatrist's opinion testimony, was found to be appropriate.[57] Within the last thirty years, however, expert opinion testimony has been permitted to determine the incendiary origin of a fire,[58] whether an accused in a homicide case acted in the heat of passion,[59] and whether an accused had the mental capacity to form the specific intent in a first degree murder trial.[60] In *Commonwealth v. Potts,*[61] the Pennsylvania Supreme Court went so far as to hold that an attorney's failure to present expert psychological testimony on the accused's state of mind in a murder trial sufficiently damaged the defendant's case so as to constitute ineffective assistance of counsel. The court awarded the defendant a new trial.[62]

A limiting standard on expert opinion evidence, however, was outlined by the Pennsylvania Supreme Court in *Commonwealth v. O'Searo.*[63] During this first degree murder trial, the defense sought to introduce a clinical psychologist's testimony to corroborate the accused's story that the alleged murder was the result of an accident and that the accused did not intend to harm the victim.[64] In deciding that such expert testimony went to the credibility of the defendant's

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57. Commonwealth v. Heller, 369 Pa. 457, 87 A.2d 287 (1952). A psychiatrist's testimony that the accused in a homicide case had a "disturbed state of mind," was, according to the trial judge's instructions to the jury, to be given little weight in deciding the facts of the case. *Id.* at 461.

58. Commonwealth v. Nasuti, 385 Pa. 436, 123 A.2d 435 (1956). (Expert allowed to testify in an arson case that, in his opinion, the fire was on incendiary origin).

59. Commonwealth v. McCusker, 448 Pa. 382, 292 A.2d 286 (1972). (Judgment reversed on appeal because the trial judge refused to allow a psychiatrist to testify that an accused murderer acted in the heat of passion).

60. Commonwealth v. Walzack, 468 Pa. 210, 360 A.2d 914 (1976) (The trial court erred in disallowing expert testimony on the defendant's capacity to form the specific intent required for a first degree murder charge when the defendant had undergone a lobotomy before the alleged crime was committed).

61. Commonwealth v. Potts, 486 Pa. 509, 406 A.2d 1007 (1979).

62. *Id.* at 513, 406 A.2d 1009. "Fact finders today, be they judge or jury, are sufficiently sophisticated to evaluate psychiatric and psychological testimony and determine the extent to which such testimony contributes, in a particular case, to the object of all trials—the quest for truth and justice." *Id.* "In the interest of reaching a just decision, the fact finder should have such relevant information before it." *Id.*

63. Commonwealth v. O'Searo, 466 Pa. 224, 352 A.2d 30 (1976).

64. *Id.* at 228, 352 A.2d at 33. Defendant contended that he produced a gun during an argument with the victim, which occurred in a restaurant, as an effort to stop the struggle and that someone grabbed his hand which caused the gun to fire. *Id.*

story the court stated, "[t]o permit psychological testimony for this purpose would be an invitation for the trier of fact to abdicate its responsibility to ascertain the facts relying upon the questionable premise that the expert is in a better position to make such a judgment."[65]

More recently, two Pennsylvania Superior Court decisions, *Commonwealth v. Baldwin*[66] and *Commonwealth v. Gallagher*,[67] have seemingly stretched the expert witness limits announced in *O'Searo*.[68] In *Baldwin,* the defendant was found guilty of incest and rape against his teenage daughter.[69] A social worker's expert testimony, describing both the behavioral patterns of a victim of such abuse and the family dynamics of incest cases, was found to be admissible despite the accused's contention that such testimony effectively made the victim's story more believable.[70] In *Gallagher*, an expert was permitted to testify concerning "rape trauma syndrome"[71] and its effect on the victim's identification of her assailant.[72] Again, despite the defendant's claim that the expert's testimony invaded the jury's function of determining credibility,[73] the Pennsylvania Superior Court found that the jury was free to accept or reject the expert's opinion and found the evidence to be admissible.[74] The rationale of both decisions

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65. *Id.* at 229, 352 A.2d at 32.

66. Commonwealth v. Baldwin, 348 Pa. Super. 368, 502 A.2d 253 (1985).

67. Commonwealth v. Gallagher, 353 Pa. Super. 426, 510 A.2d 735 (1986).

68. Both the *Baldwin* and *Gallagher* courts allowed expert testimony on patterns of behavior to corroborate the witness' testimony, while the *O'Searo* court disallowed expert testimony on an individual's pattern of behavior. *See supra* notes 63-65 and accompanying text.

69. *Baldwin,* 348 Pa. Super. 368, 502 A.2d 253.

70. *Id.* at 373, 502 A.2d at 256. The social worker, who also counseled the victim, testified generally regarding the effects of incest on the victim's self-esteem, why the victim kept the incestual relationship a secret for many years, and why victims have difficulty recalling specific details of the sexual abuse. *Id.*

71. *Gallagher*, 353 Pa. Super. at 433, 510 A.2d at 738. Rape Trauma Syndrome describes the symptomology of adult victims of rape. *See* McCord, *Expert Psychological Testimony About Child Complaints in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence,* 77 J. CRIM. L. 10 n.47 (1986).

72. *Gallagher*, 353 Pa. Super. at 432-33, 510 A.2d at 746. The victim failed to identify her attacker two weeks after the rape. *Id.* More than four years later, the victim identified the rapist who was arrested and later convicted of rape. *Id.*

73. *Id.* at 433-34, 510 A.2d at 747. *See supra* note 70.

74. *Gallagher*, 353 Pa. Super. at 444, 510 A.2d at 752. "We believe that the lower court properly found that such testimony imparted information beyond the knowledge of the average lay person and would assist the jury in making its determination of the complainant's credibility." *Id.* "Without expressing any opinion about the complainant's veracity, Dr. Burgess explained the basis of her opinion that the complainant suffered from rape trauma syndrome, and the jury was free to accept or reject this testimony." *Id.*

was based upon a finding that the subject matter of the expert testimony was beyond the ordinary knowledge and experience of the jurors.[75]

As previously mentioned,[76] the majority's opinion in *Seese* distanced itself from the issue of expert testimony on the child victim's common responses to abuse and focused on whether a witness's veracity was able to be determined by jurors using their common knowledge and experience.[77] Justice Larsen's concurrence, however, was more in line with the Pennsylvania Superior Court's decisions in *Baldwin*[78] and *Gallagher*.[79] By proposing through reference to the *Azure* case that experts be allowed to testify regarding common behavior patterns of child victims,[80] Justice Larsen seemingly extends the rationale of the "rape trauma syndrome" testimony to cover child victims of sexual abuse.[81] It is not clear if the majority would approve of this extension.[82] A review of the problem of child sexual abuse and other jurisdictions' approaches to fairly trying the abuser may provide some guidance.

A noted researcher in the field of child sexual abuse has stated that "sexual victimization" occurs in the lives of an important minority of all children.[83] It is estimated that between twelve and twenty-two percent of females and between five and six percent of males are abused as children.[84] As the public has become more aware of the extent of this offense, the criminal justice system has been pressured to prosecute more cases of reported abuse.[85] Increasing numbers of children are now testifying in court because a common

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75. *See Gallagher*, 353 Pa. Super. at 444, 510 A.2d at 752 and *Baldwin*, 348 Pa. Super. at 377, 502 A.2d at 258.

76. *See supra* notes 31-32 and accompanying text.

77. *See supra* note 29 and accompanying text.

78. *Baldwin*, 348 Pa. Super. 368, 502 A.2d 253.

79. *Gallagher*, 353 Pa. Super. 426, 510 A.2d 735.

80. *See supra* notes 49-51 and accompanying text.

81. *See supra* notes 70-74 and accompanying text.

82. Commonwealth v. Seese, 512 Pa. 439, 442, 517 A.2d 920, 921 (1986). *See supra* note 29.

83. *See* McCord, *supra* note 71, at 4 (citing Finkelhor, *Sexually Victimized Children* at 56).

84. McCord, *supra* note 71, at 4. Estimates for cases of sexual abuse of female children range from 8 to 28 percent, while male children are abused from three to nine percent. *Id.* at 3.

85. Berliner, *The Child Witness: The Progress and Emerging Limitation*, 40 U. MIAMI L. REV. 167, 169 (1985). (The establishment of rape crisis centers for women in the early 1970's led to an identification of increasing numbers of child sexual abuse cases and a realization by communities of the extent of this problem).

circumstance of child sexual abuse cases is that the child is often the only witness.[86]

Courts have historically been wary of a child's ability to testify accurately.[87] Accordingly, Pennsylvania courts require the judge to conduct a competency hearing once it becomes known to the court that the witness is less than fourteen years old.[88] The fact that a competency hearing takes place at all tends to support the perception that a child's testimony may note be worthy of belief.[89]

The judge's ruling on the admissibility of a child's testimony may satisfy the court that the child's story is competent as evidence, but the child may still have to overcome his youthfulness to be believable to a jury.[90] Jurors may have a difficult time finding that a child's accusations against a seemingly rational adult are true.[91] As a result, prosecutors have tried to bolster their case by using expert testimony to overcome this credibility gap.[92]

The *Seese* case is typical of child sexual abuse prosecutions in that the child's testimony was relied upon to make a case against the abuser.[93] In addition, the defense offered by Mr. Seese consists of denying the charges and claiming that he was being framed by the victim and her mother.[94] In order to substantiate the child victim's

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86. *Id.* at 171. *See also* Radbill, *A History of Child Abuse and Infanticide, in the Battered Child*, (R. Helfer & C. Kempe eds. 1974).

87. *See* Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643 (1982) (Both courts and jurors may tend to believe that children are not competent witnesses).

88. *See* Rosche v. McCoy, 397 Pa. 615, 156 A.2d 307 (1959).

> The question of competency of persons said to be mentally immature due to infancy is to be determined in the discretion of the trial judge after an inquiry as to mental maturity once the fact of infancy appears on the record or is obvious to the judge. . . . There must be (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering *what it is* that she is called to testify about and (3) a consciousness of the duty to speak the truth.

Id. at 620-21, 156 A.2d at 310 (emphasis in original).

89. Berliner, *supra* note 85, at 175.

90. *See* Roe, *Expert Testimony in Child Sexual Abuse Cases* 40 U. MIAMI L. REV. 97 (1985).

91. *See* Silas, *Would a Kid Lie?*, 71 AMER. BAR ASSOC. J. 17 (Feb. 1985). The article summarizes a study of 200 child sex abuse cases conducted by the University of Denver and concluded that approximately 95% of the children's accusations were true. *Id.* at 17-18.

92. *Id.* The study also suggests that juries are uncomfortable relying on a child's testimony to convict an adult. *Id.*

93. *See supra* notes 2-7, 86 and accompanying text.

94. Commonwealth v. Seese, 512 Pa. 439, 517 A.2d 920 (1986). Brief for Appellee at 4.

story, the prosecution introduced the pediatrician's testimony to show that eight year old children would not be knowledgeable of sexual acts and, therefore, could not have fabricated their testimony.[95] The defense contends that the pediatrician's opinion that eight year old children do not usually lie about sexual encounters was an impermissible usurpation of the jury's function to decide on the witness's veracity.[96] The Pennsylvania Supreme court decided this issue in favor of the accused.[97]

While Pennsylvania's rule on admissibility of expert testimony is dependent upon the court's ruling of whether the proposed testimony is on a subject outside the ordinary knowledge and experience of jurors,[98] other jurisdictions have held that jurors could benefit from testimony by knowledgeable experts on child abuse.[99] Those courts which have proceeded beyond the general admissibility requirement are in disagreement as to the limits to be placed on such testimony.[100]

The Supreme Court of Hawaii has been the most lenient in allowing expert testimony.[101] This court allowed an expert to give his opinion that the child witness was telling the truth.[102] The Hawaiian court reasoned that the benefit the jurors received from the expert's opinion far outweighed any prejudicial impact on the accused.[103] This has

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95. Commonwealth v. Seese, 512 Pa. 439, 517 A.2d 920 (1986). Brief for Appellee at 12.

96. *See supra* notes 13-18 and accompanying text.

97. *Seese*, 512 Pa. at 444, 517 A.2d at 922.

98. *See supra* notes 16-19 and accompanying text.

99. *See* Smith v. State, 100 Nev. 570, 688 P.2d 326 (1984) (Permitting an expert to explain a child's reasons for delays in reporting abuse); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (Allowed expert testimony on ability of child to recall details of abuse); People v. Dunnahoo, 152 Cal. App. 3d 560, 199 Cal. Rptr. 796 (1984) (Expert allowed to testify to explain a child's reluctance to tell the truth about sexual assaults); State v. Keen, 309 N.C. 158, 305 S.E.2d 535 (1983) (Symptom testimony by expert in child abuse was inadmissible); State v. Danielski, 350 N.W.2d 395 (Minn. App. 1984) (Typical symptom testimony by a expert on child abuse was considered not to be a help to the jury and, therefore, is inadmissible).

100. *See generally* McCord, *supra* note 71, at 2-10.

101. State v. Kim, 64 Hawaii 598, 645 P.2d 1330 (1982). (The prosecution's expert in a child sexual abuse case testified that he found the child's testimony to be credible).

102. *Id.* at 600, 645 P.2d at 1334. The court noted in its opinion that the jury's common experiences did not form an adequate foundation for assessing the credibility of a child victim of sexual abuse. *Id.* at 607, 645 P.2d at 1337.

103. *Id.* at 607-08, 645 P.2d at 1338. The Supreme Court of Hawaii stated their fears that the expert may usurp the jury's function and that the trial may degenerate into a battle of experts. *Id.*

been the most liberal decision on admissibility and no other court has followed that finding.[104]

A more moderate approach, taken by four jurisdictions,[105] allows an expert to explain such phenomena as why children delay in reporting abuse, occasionally recant their testimony, and minimize the frequency of abuse.[106] The courts apparently allow an expert to testify as to a child's reactions but do not allow an expert to give their opinion regarding the victim witness's credibility.[107] This approach provides a balancing between supporting an immature witness and allowing the jury to perform its task of assessing the credibility of testimony.[108]

Justice Larsen's concurrence in *Seese* appears to be more in line with other jurisdictions' determination of admissibility of expert testimony than the majority opinion.[109] Jurisdictions which have adopted Justice Larsen's view contend that an expert's explanation of the child victim's symptomology can assist the trier of fact in evaluating a witness's credibility.[110] Those jurisdictions supporting the opposing view assert that such testimony improperly bolsters the credibility of witnesses.[111] Behavioral research in this area may side

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104. McCord, *supra* note 71, at 41-43.

105. *See* Smith v. State, 100 Nev. 570, 688 P.2d 326 (1984) (Expert permitted to explain child's delay in reporting abuse); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (Held that a jury needs expert testimony to understand the dynamics of child sexual abuse in relation to a child's delay in reporting the abuse); People v. Roscoe, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985) (Expert allowed to testify to common reactions of sexual abuse by children); State v. Danielski, 350 N.W.2d 395 (Minn. App. 1984) (Typical symptoms of a child who has been sexually abused is proper subject of expert testimony).

106. Roe, *supra* note 90, at 104-08.

107. *Id.* at 97-103.

108. McCord, *supra* note 71, at 64-66.

109. *See supra* notes 51-57 and accompanying test.

110. *See* State v. Myers, 359 N.W.2d 604 (Minn. 1984) (A clinical psychologist's testimony concerning characteristics and emotional conditions of a child victim of sexual abuse used to demonstrate that the child's emotional state is not inconsistent with the common profile of a sexually abused child was found to be admissible); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (This court found that a social worker's testimony concerning the typical reactions of a child victim of sexual abuse, which may include inconsistent statements, is admissible if it assists the jury in deciding if the rape occurred).

111. *See* State v. Castore, 435 A.2d 321 (R.I. 1981) (A medical doctor's testimony on whether a child was sexually assaulted was found to be inadmissible because his opinion was based on evidence outside of his medical expertise); State v. Maule, 35 Wash. App. 287, 667 P.2d 96 (1983) (A counselor's testimony that the majority of child sexual abuse cases involve a male parental figure, the most common being the biological father, was found to be inadmissible because such evidence invites the jury to conclude that the defendant, who is also the biological father, is more likely to have committed the crime).

with the latter position as it is difficult to predict how a particular child may react to sexual abuse.[112]

In conclusion, the *Seese* majority opinion, which declares that an expert's opinion on the credibility of a witness is an improper usurpation of the jury's role,[113] is supported by all but one jurisdiction.[114] Continued societal pressures to convict child sexual abusers,[115] however, may bring about expert testimony on typical symptomology of child victims as suggested by Justice Larsen's concurrence.[116] If such symptomology testimony is found to be admissible, a workable standard must be developed which considers and properly balances both the child-victim's inherent lack of credibility and the jury's tendency to rely on expert testimony.[117]

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112. McCord, *supra* note 71, at 19-22.
113. *See supra* notes 32-34 and accompanying text.
114. *See supra* notes 13-18 and accompanying text.
115. *See supra* note 85 and accompanying text.
116. *See supra* notes 48-54 and accompanying text.
117. *See supra* notes 35-37, 87-92 and accompanying text.