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2021

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# Litigating Child Sex Abuse in Domestic Relations Cases

Mike McHenry

## IN RULING ON PARENTING TIME DISPUTES COURTS ARE SOMETIMES CALLED UPON TO MAKE FINDINGS REGARDING WHETHER A PARENT HAS ABUSED A CHILD, INCLUDING SEXUAL ABUSE.

Sometimes these abuse allegations are handled in criminal court, and if a conviction enters then the matter is considered resolved. However, if the accused parent is acquitted, or if the prosecuting authority feels the evidence is inadequate to justify a criminal prosecution, then the obligation to assess the allegation's merits falls to the domestic relations court, where busy dockets and inexperienced practitioners can present a challenge for the judge.

In these circumstances, it is understandable that attorneys and judges alike would seek some authoritative guidance from an expert. Frequently such guidance is sought from psychologists or licensed clinical social workers. Many legal practitioners believe therapists, particularly those experienced at counseling sexually abused children, are qualified to guide the court in weighing the merits of a child sex abuse allegation. But is this true? It depends on what we mean by "guide."

By analyzing the state of the science in this area, this article is intended to disabuse legal practitioners of the notion that psychologists have a unique ability to determine whether a child was sexually abused. Be warned: the field of forensic psychology itself is split on this issue, and the various camps are deeply entrenched. However, a scientific consensus has yet to emerge which is strong enough to meet the *Daubert*<sup>1</sup> standard of admissibility. By analyzing how to think about this type of expert testimony, this article might provide some consolation to those litigants and psychologists who deeply believe their opinion is bullet-proof and who fervently desire to advocate for the child from the witness stand.

Before surveying the science in this area, let's begin by laying out some foundational knowledge about the investigation of child-sex-abuse claims.

## HOW CHILD PROTECTIVE SERVICES CATEGORIZES ABUSE CLAIMS

The primary mission of any child protective services agency (CPS) is to investigate claims of child abuse. In this writer's jurisdiction, CPS reports that two-thirds of reported child sex abuse allegations are not criminally prosecuted by the state because the evidence is insufficient. Therefore, it is no surprise that many adjudicated allegations of child sex abuse first appear in the court system in a domestic relations case. CPS typically classifies their investigations as *Substantiated*, *Inconclusive*, or *Unfounded*. However, it is important to understand that CPS's opinion is not

legally dispositive—it is merely the basis for that agency's prosecutorial decision. Although many litigants accept CPS's opinion as conclusive, no litigant is legally required to do so in a civil matter.

## HOW FORENSIC PSYCHOLOGISTS CATEGORIZE ABUSE CLAIMS

Forensic Psychologists categorize abuse claims according to the type of evidence that supports the claim. Abuse claims are divided between those with *hard evidence*, such as physical injury resulting in a medical diagnosis of abuse, a credible third-party eyewitness, a confession, digital images of the act, or DNA from a sex assault nurse examination, and those with *soft evidence*, such as the child's statements and/or behavior. Obviously, those cases with hard evidence are usually criminally prosecuted and pose no unique issues for the court. However, it is the soft cases that CPS usually deems inconclusive or unfounded and that the judicial system sees for the first time in domestic relations court.

## TYPES OF CHILD VICTIMS

For our purposes, child victims can be divided into three types: (i) infants, distinguished by the fact that they are pre-linguistic and do not make statements; (ii) school age children, that is, children who are old enough to articulate their experiences but lack meaningful sexual knowledge—they are unlikely to lie about sex but are highly prone to suggestion; and (iii) post-pubescent teens—they are highly articulate, have sexual knowledge, and are much less prone to suggestion, but they understand human motivations enough to be able to form ulterior motives for the claim of abuse.

## A COMMON PROXY FOR ABUSE: RELATIONSHIP DYNAMICS

As domestic relations practitioners know, some parent-child relationships are plagued by animosity, discomfort, and emotional distance. This can be so even when no abuse has occurred. If a weakly supported abuse claim is thrown into the mix, the troubled parent-child relationship can become a proxy basis on which parenting time disputes are decided, allowing court-appointed investigators and the court itself to sometimes avoid making findings regarding the abuse allegation. However, a lack of an apparently troubled relationship is not a reliable reverse-proxy. Many children *accommodate* the abuse out of guilt or fear of losing or harming the abusing parent.

## A FREQUENT ARGUMENT FROM THE ACCUSED PARENT

In those cases where the prosecuting authority has refused to

### Footnotes

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993).

file criminal charges and the abuse allegation is raised in domestic relations court, the accused parent sometimes argues: “If the DA and CPS are comfortable with me having custody of my child, then divorce court should certainly feel comfortable.” However, it is important to keep in mind that a decision to not file criminal charges (or a dependency and neglect action) is not synonymous with the DA or CPS “being comfortable.” Prosecutors have an ethical obligation to only prosecute those cases in which they have sufficient evidence to meet their burden of proof, a burden very different from that in a domestic relations case.

### COUNTERCLAIMS OF ALIENATION ARE COMMON

The psychological literature warns about the possibility of parental alienation when the claim of abuse appears unfounded and arises in the context of a custody battle. Alienation is a real phenomenon in some families, and some parents are not above hurling unfounded claims of sexual abuse. A parent who would fabricate a sex abuse allegation without sufficient evidence is worthy of concern by the court regarding that parent’s ability to act in the child’s best interests.

### THE MOST DIFFICULT TYPE OF PARENTING TIME DISPUTE

One of the most difficult issues a domestic relations court can face is a parenting time dispute in which one parent accuses the other of having sexually abused the child and

- (i) the child is a young, school-aged child;
- (ii) the claim is supported only by statements and behavior of the child;
- (iii) the parent-child relationship appears untroubled;
- (iv) the abuse allegation pre-dates the custody battle; and
- (v) no prosecution by the DA or CPS has occurred.

### WHY WOULD A PARENT PRESS THE ABUSE CLAIM IF THE DA & CPS WON’T PROSECUTE?

A parent could rationally choose to press the abuse allegation in domestic relations court because either (i) the accusing parent genuinely believes they are protecting the child, or (ii) because the accusing parent wants an advantage in the custody hearing, or (iii) because the burden of proof is lower in domestic relations court than it is in criminal court, or (iv) because the accusing parent may have newly discovered evidence not previously considered by authorities.

### THE MOST COMMON TYPES OF NEW EVIDENCE

The accusing parent may have heard new statements made by the child that support the claim of abuse and which were not considered by the DA or CPS at the time the allegation was reported to authorities. Or the accusing parent may have taken the child to a therapist who opines “the child is telling the truth; father is guilty; the abuse happened.” Frequently, the therapist becomes the accusing parent’s star witness in a hearing to determine parenting time.

### THE PERFECT STORM

Judges need to recognize that this factual scenario presents a high risk of injustice, because (i) many domestic relations practitioners are inexperienced in litigating sexual abuse cases, (ii)

soft-evidence cases involving young school age children are the most challenging type of case, (iii) the admissibility of expert testimony by a therapist on a forensic matter is highly questionable, and (iv) when the preponderance standard of proof is applied to a credibility match between accuser and accused, expert testimony can easily tip the scales, particularly if the judge is unschooled in the state of forensic science in this area.

**“Which outcome is worse—an abusive parent wins shared custody of the child, or an innocent parent loses custody ...?”**

### WHICH IS WORSE?

Which outcome is worse—an abusive parent wins shared custody of the child, or an innocent parent loses custody due to a false allegation? Judges must keep in mind that unlike criminal law, the civil burden and standard of proof do not give the benefit of the doubt to the accused. Child safety typically trumps doubts.

### FACT PATTERN

It will be instructive to discuss the science of forensic psychology in the context of a fact pattern. Assume the following facts:

- Parents separate and share the child in a 50/50 parenting time arrangement; the child is five years of age.
- Upon the child’s return from Father’s house, Mother notices the child playing sexually. (There is no need to specify the particular behavior.)
- Mother interrogates the child:  
Q: “Where did you learn that?”  
A: “At Daddy’s.”
- Mother presses the child for details but only gets ambiguous statements in return.
- Mother notes redness on the child’s genitals.
- Mother contacts CPS.
- CPS investigates—Father denies.
- Investigation results in “Unfounded.”
- Mother takes child to a therapist who concludes the child was sexually abused by Father.
- Mother wants full custody and endorses the therapist as an expert witness.

Is this a soft case? Note that we have three types of evidence: (1) physical evidence in the form of skin redness, (2) the child’s statement “at Daddy’s,” and (3) the child’s behavior—sexual play. This means we are interested in three topics: Medical Diagnostics, Lie Detection, and Behavioral Diagnostics. If we assume the redness is minor and could have been caused by any common skin irritant, then yes, this is a soft case.

### WHAT BEHAVIORS ARE MOST LIKELY TO BE SEEN AS CORROBORATIVE OF ABUSE?

The following behaviors are sometimes associated with abuse:

- Sexual play
- Depression
- Regressive behaviors, such as nightmares, bedwetting,

**“[A]nxious and obsessive interrogation will taint the investigation ...”**

or a drop in school grades

- Protective behaviors, such as not wanting to get undressed, only wearing bulky clothes, or locking bedroom doors.

These behaviors alone are almost never sufficient to begin an investigation. However, when the evidence is sufficient to begin an investigation, law enforcement starts by preserving evidence. In a soft case this means preserving the child's statements and memory. The first step is to take the child to a children's advocacy center (CAC) where a forensic interviewer will conduct a structured, non-leading interview with the child, which is videotaped. This interview is designed to avoid suggestion, and multiple interviews are highly discouraged, because the risk of suggestion is too great with young children.

### **WAS MOTHER WRONG TO PRESS FOR DETAILS?**

Of course, any parent would be alarmed at the prospect of abuse, and superficial inquiry is to be expected; however, anxious and obsessive interrogation will taint the investigation, because young children are highly suggestible.

### **HOW THIS CASE TYPICALLY GOES IN MANY COURTROOMS**

Some parties accept a decision by the DA not to file criminal charges as conclusive; others do not. For settlement negotiations in the domestic relations matter, Father hires a polygrapher who finds Father is telling the truth. Mother doesn't trust Father's polygrapher, because polygraphs are unreliable and inadmissible. Mother endorses the child's therapist. The therapist's testimony goes un-scrutinized under *Daubert*, because many domestic relations practitioners are unfamiliar with such litigation. The court either avoids the abuse issue by relying on troubled relationship dynamics and Mother wins, or the court gives custody to Mother because the therapist's opinion carries the day.

But what would happen if the court asked a few questions? Here are three questions the court should be asking itself:

- 1) Is sexual play in a 5 year old evidence of sexual abuse?
- 2) By what standard did the therapist form an opinion?
- 3) What is the proper scope of testimony by a therapist in a forensic setting, that is, in a hearing designed to determine whether the allegation is true?

### **IS SEXUAL PLAY EVIDENCE OF ABUSE?**

How do you answer such a question? By intuition? By personal experience? By psycho-social-behavioral data? Judges are regularly confronted with having to form judgments based exclu-

sively on the evidence presented in the case, but they are not expected to leave their common sense at the door. What is common sense here? Is it reliable? Or do we need an expert? Certainly, sexual play is *relevant*, but how *probative*, that is, how *diagnostic* is it?

Expert testimony regarding psycho-social behavioral statistics would be very helpful. Note there are several analytical questions to ask here:

- (a) What percentage of kids out of the overall population have been abused?
- (b) In the population of kids who have been abused, what percentage play sexually?
- (c) In the population of kids who have not been abused, what percentage play sexually?
- (d) What is the likelihood that a random child who plays sexually was abused?

These questions are asked in the field of Behavioral Diagnostics. It is the final question that we need the answer to, but it cannot be answered without answering the first three questions. Note that judicial fact finders intuitively ask similar questions but with less precision. Judicial fact finders are trying to assess the probative value of human behavior by using their life experience as a guide, otherwise known as common sense.

It turns out that if we look at the latest data and make assumptions which maximize the chance of confirming Mother's intuition, an assumption that a child who plays sexually has been abused will be wrong almost 50% of the time. (See inset.)<sup>2</sup> Sexual play is not very probative evidence—it is close to flipping a coin. Further, science has been unable to find any behavioral trait that is reliably diagnostic of abuse.<sup>3</sup>

### **SCIENTIFIC RESEARCH ON LIE DETECTION**

Science has sought the holy grail of lie detection for a long time. Research has been done on polygraphs, statement analysis, voice stress analysis, MRI studies of the brain, body language analysis, artificial intelligence techniques, and professional clinical judgment. None have passed the *Daubert* standard for admissibility in court with the exception of one type of polygraph result being admissible in New Mexico. However, most state and federal courts have either banned the use of polygraphs due to their unreliability, or they have severely restricted their use.<sup>4</sup>

So why do some attorneys and judges believe psychologists can detect lies in children regarding abuse? The American Psychological Association proudly proclaims on its website:

[R]esearch has consistently shown that people's ability to detect lies is no more accurate than chance, or flipping a coin. This finding holds across all types of people—stu-

2. See, Mark Wolraich et al., *Chapter 25: Sexuality*, in DEVELOPMENTAL-BEHAVIORAL PEDIATRICS: EVIDENCE & PRACTICE (2008); See also, William Bernet, *American Academy of Child & Adolescent Psychiatry: Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused*, 36 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 423 (1997).

3. Wolraich, *supra* note 2; Bernet, *supra* note 2; Steve Herman, *Chapter 11: Forensic Child Sexual Abuse Evaluations*, in THE EVALUATION OF CHILD SEXUAL ABUSE ALLEGATIONS: A COMPREHENSIVE GUIDE TO ASSESSMENT AND TESTIMONY (Kathryn Kuenhle. & Mary Connell eds., 2009).

4. U.S. v. Scheffer, 523 U.S. 303 (1998).

dents, psychologists, judges, job interviewers and law enforcement personnel.<sup>5</sup>

Science has not been able to validate clinical judgment for the detection of lies or status as a sex assault victim.<sup>6</sup> To date, studies show error rates in clinical judgment to be around 50%.

The publication of Hershkowitz et. al.'s (2007) study may eventually prove to be a defining historical moment for research on forensic evaluations of allegations of Child Sex Abuse. . . . It is unlikely that a diagnostic procedure with a false positive error rate that is approximately 50% would be considered admissible under the Daubert standard, or under any other reasonable legal standard.<sup>7</sup>

### THE DSM DOES NOT RECOGNIZE "VICTIM" AS A DISORDER

The Diagnostic and Statistical Manual of Mental Disorders does not recognize victimhood as a disorder, so what exactly is Mother's therapist diagnosing? The nearest recognized disorder is Post Traumatic Stress Disorder (PTSD). However, a PTSD diagnosis is a therapeutic aid, rather than a tool for the detection of sexual abuse. It does not reliably prove the nature of the stressor. Diagnosing someone with PTSD necessarily assumes there was a traumatic event. When that traumatic event cannot be verified objectively, the diagnostician must depend exclusively on the patient's claim that it occurred. Unless the clinician is a reliable lie detector or has the resources to conduct a full forensic investigation, they do not know what caused the trauma. The DSM specifically states, "nonclinical decision-makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the causes of the individual's mental disorder or its associated impairments."<sup>8</sup>

Yet, there is ongoing debate among forensic psychologists about the role of clinical judgment in detecting child sex abuse.<sup>9</sup>

### THE SCIENTIFIC DISPUTE REGARDING CLINICAL JUDGMENT

So, if no behavioral trait is diagnostic, and if no lie detection technique is admissible, is it even possible to reliably decide a soft case? Yes, sometimes, under certain facts. It depends on (a) the age of the child, (b) the degree of detail in the child's statement, (c) whether the child's statement betrays sexual knowledge atypical of the child's age, and (d) the likelihood the child's statement is untainted by alienation, coaching, or suggestive questioning by parents, therapists, or others.

Picture a situation where a young child testifies in a manner that betrays probative and atypical sexual knowledge. A fact-

finder's finding of abuse may be reliable, because atypical sexual knowledge in a child has a limited number of possible sources—abuse, suggestion, porn, or prostitution. If an investigation can reliably rule out suggestion, porn, and prostitution, then abuse is common enough to be reliably ruled in—not because psychologists are good lie detectors, but on a purely *statistical* basis. This means the expert's focus must be on analyzing the integrity and thoroughness of the investigation. This means the expert must be knowledgeable about the known frequency of sexual abuse of children and of false reports of sexual abuse. The debate about the efficacy of clinical judgment involves asking whether the objective probability of identifying a child's source of sexual knowledge can be high enough to meet forensic standards even if this probability cannot be precisely quantified.

**"Science has not been able to validate clinical judgment for the detection of lies ..."**

### BY WHAT STANDARD DID MOTHER'S THERAPIST FORM AN OPINION?

The ethical canons for psychologists highly discourage them from performing the dual roles of therapist and forensic investigator in the same case.<sup>10</sup> Therapists help patients heal. They take an *instrumentalist* approach to their work, which means they prioritize healing over determining causation. Their focus is on making the patient whole—not on scientifically determining etiology. Therapists build rapport with their client through empathy; therefore, they typically do not show skepticism or critically confront the client. In contrast, the primary purpose of most forensic investigations is to ascertain etiology, that is, to determine what caused a patient's symptoms. The patient is not the forensic investigator's client. The skeptical and critical eye of a detective is needed to do the job.<sup>11</sup>

Forensic investigations require knowledge of professionally recognized practice parameters.<sup>12</sup> These parameters require knowledge of sociological data regarding the rate of false reports of sexual abuse, the diagnosticity of behavioral traits, suggestibility in children, how to spot false confessions, and all other aspects of conducting a forensic investigation. Therapists do not typically work by these standards.

A therapeutic diagnosis is a working hypothesis developed pursuant to psychological criteria. Its purpose is to decide the best course of treatment in the future. The therapist asks *What is the best path forward for achieving health?* Whereas a forensic diagnosis is developed pursuant to legal criteria. Its purpose is to decide what occurred in the past. The forensic investigator asks *What is the historical truth?*

5. Laura Zimmeramn, *Deception Detection*, 47(3) MONITOR ON PSYCHOL., 46 (March 2016) citing Charles F. Bond Jr. & Bella Depaulo, *Accuracy of Deception Judgement*, 10(3) PERSONALITY & SOC. PSYCHOL. REV. 214 (Aug. 2006).

6. Herman, *supra* note 3.

7. *Id.*

8. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at 25 (5th ed., 2013).

9. SEE, CONTESTED ISSUES IN THE EVALUATION OF CHILD SEXUAL ABUSE: A

RESPONSE TO QUESTIONS RAISED IN KUEHNLE AND CONNELL'S EDITED COLLECTION (Kathleen Coulborn Faller & Mark D. Everson eds., 2014).

10. See, American Psychological Association, *Specialty Guidelines for Forensic Psychology*, 68(1) AM. PSYCHOL. 7 (Jan. 2013) § 4.02.01 Therapeutic-Forensic Role Conflicts & 4.02.02 Expert Testimony by Practitioners Providing Therapeutic Services.

11. See generally, American Psychological Association, *Specialty Guidelines for Forensic Psychology*, 68(1) AM. PSYCHOL. 7 (Jan. 2013).

12. Wolraich, *supra* note 2.



**“[T]here is a big difference between providing therapy and conducting a forensic investigation.”**

### **THERAPEUTIC AND FORENSIC DIAGNOSES ARE BOTH DIFFERENTIAL DIAGNOSES**

Case law recognizes the methodology of differential diagnosis, that is, the process of systematically ruling in and ruling out possible causes of a patient's symptoms. This is also known as *deduction by the process of elimination*. Recall Sherlock Holmes.

Both therapeutic and forensic diagnoses are formed by the process of differential diagnosis, thus both are admissible. However, there is a big difference between providing therapy and conducting a forensic investigation. The court may consider this difference when deciding the proper weight to give the testimony.

All of this results in a crucial difference in the type of testimony each is allowed to give. A therapist is allowed to testify to the historical facts of treatment, but they may not comment on etiology. As stated in *Irreconcilable Conflict Between Therapeutic and Forensic Roles*:

Psychologists may appropriately testify as treating experts regarding the facts of treatment, e.g. the care provided, the clinical diagnosis, the patient's response, and the prognosis. These matters, presented in the manner of descriptive "occurrences" and not psycho-legal opinions, do not raise issues of judgment, foundation, or historical truth. . . . [However] therapists do not ordinarily have the requisite database to testify appropriately about psycho-legal issues of causation, i.e. the relationship of a specific act to a claimant's current condition.<sup>13</sup>

The court cannot assume that clinicians will police themselves or that the adversarial process will always place a sufficient check on out-of-bounds testimony. The judge is ultimately responsible for the integrity of the proceedings, and this type of expert testimony may be one of the few situations where some degree of proactivity on the part of the court is appropriate.

### **SHOULD THE THERAPIST TESTIFY IN THE CUSTODY HEARING?**

The question of whether a therapist should be allowed to testify on a forensic matter has three components, only two of which can be answered by the court:

#### **(i) Is the therapist conflicted by acting in a dual capacity?**

This question must be answered by the therapist pursuant to the ethical canons in the field of psychology.

**(ii) Is the therapist qualified?** This question is answered by the court. If the therapist intends to opine on a forensic issue, i.e., whether father is guilty of sexually abusing the child, then

the court typically assesses the therapist's credentials and familiarity with forensic practice standards, not therapeutic practice standards. The court is primarily looking for whether the therapist shows fidelity to the profound distinction between being a loyal, supportive healer versus being an independent investigator loyal only to the scientific method.

#### **(iii) Does the therapist's methodology comport with Daubert in each relevant field?**

For example:

- (i) Did the therapist use leading questions when interviewing the child?
- (ii) How many times did the therapist discuss the sexual abuse allegations with the child?
- (iii) How thorough was the therapist's differential diagnosis, that is, did the therapist consider all other possible sources of the child's sexual knowledge?
- (iv) Did the therapist do a full forensic investigation, for example, did the therapist interview witnesses, review police reports and medical records, and interview the accused?
- (v) Is the therapist acting as a lie detector?
- (vi) Does the therapist have psycho-social behavioral statistics or are they simply offering their own subjective opinion wrapped in the aura of professional expertise?
- (vii) Did the therapist use a psychometric instrument? If so, has the instrument been validated for determining causation?

As of the date of this article, clinical judgment has not been validated for determining whether a child has been sexually abused in soft evidence cases.<sup>14</sup> Therefore, it appears a proponent of such testimony is unlikely to prevail at a *Daubert* hearing.

### **WHY ARE THERAPISTS SOMETIMES WILLING TO TESTIFY OUTSIDE THE BOUNDS OF THEIR EXPERTISE?**

As stated in the article cited above, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*:

"The temptation to use therapists as forensic experts falls on fertile ground because clinical psychology and psychiatry graduate students often do not receive adequate training in forensic ethics. . . . When these clinicians eventually testify in court, they see themselves as benignly telling the court about their patients and perhaps even benevolently testifying on behalf of their patients. Therapists are not typically trained to know that the rules of procedure, rules of evidence, and the standard of proof is different for courtroom testimony than for clinical practice."

13. Stuart A. Greenburg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28(1) PROF. PSYCHOL. RES. & PRAC. 50 (1997).

14. Herman, *supra* note 3.

## CONCLUSION

Some therapists view their therapeutic function as including advocacy for their client. Some may be under the misimpression that their clinical methodology is sufficient for forensic settings. And some may simply believe the court will accept their individual, subjective opinion. However, as the gatekeeper of expert testimony, the trial judge must make sure all expert opinion has a sufficient evidentiary foundation and a reliable methodology. To properly litigate a *Daubert* motion in this area, attorneys and judges may need to acquaint themselves with the debate within forensic psychology about the proper role of clinical judgment.



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### IS SEXUAL PLAY DIAGNOSTIC? CONVINCING YOURSELF:

Given a random sample of 100 kids: Assume 15% have been abused. (The actual number is not precisely known, but 15% is thought to be a high estimate. See website for National Center for Victims of Crime.) This means you have 15 abused and 85 non-abused kids. Statisticians would word this as "the base rate of abuse is 15%."

In order to attempt to confirm Mother's intuition, assume a high prevalence of sexual play in the abused population, say 50%. (Anything over 50% would start to become diagnostic. Science has yet to find any behavior which is diagnostic of abuse, therefore the percentage can be no higher than fifty.) This means  $.5 \times 15 = 7.5$  kids in our sample of 100 play sexually. Statisticians would word this as "the base rate of sexual play among the abused population is 50%."

Again, in order to attempt to confirm Mother's intuition, assume a low prevalence of sexual play in the non-abused population, say 7%. (Pediatricians report that some children play sexually even without having been abused.) This means  $.07 \times 85 = 6$  non-abused kids in our sample of 100 play sexually. Statisticians would word this as "the base rate of sexual play among the non-abused population is 7%."

Thus,  $7.5 + 6 = 13.5$  kids out of the 100 play sexually, that is, the base rate of sexual play in the sampled population is 13.5%.

Under these assumptions, what are the odds that a child who plays sexually has been abused? « This is what the court needs to know. From here, the calculation is easy:

$7.5$  out of  $13.5 = 56\%$  of those who play sexually have been abused,  $6$  out of  $13.5 = 44\%$  of those who play sexually have not been abused.

If you assume a child who plays sexually has been abused, you will be wrong 44% of the time, and yet these numbers were chosen to maximize the chance of confirming Mother's intuition. This is not very probative evidence. It is close to flipping a coin. Your intuition may have deceived you because you failed to appreciate how population sizes and base rates should inform your judgment. An error rate around 50% will likely not pass the *Daubert* standard for any type of expert.