

Children's Testimony

A Handbook of Psychological
Research and Forensic Practice

Edited by

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Children's Disclosure Statements as Evidence in the United States Legal System

JOHN E.B. MYERS

Key Points

- Children's disclosure statements are powerful evidence that can be used to protect children and that need to be documents and recorded correctly by all those involved in child abuse investigations.
- A child's disclosure can provide evidence needed to arrest a suspect.
- Children's disclosure statements are typically hearsay, and all US states have a rule against hearsay.
- What is hearsay?
- There are exceptions to the rule against hearsay, and this chapter describes the three exceptions that are most important in child abuse litigation: (i) excited utterances; (ii) statements for purposes of medical diagnosis or treatment; and (iii) residual or catch-all exceptions.

Children experience crime as direct victims and as eyewitnesses to the victimization of others. In a case from the US state of Illinois, for example, a mother drove her 4- and 5-year-old sons to a shopping centre. While parked outside the centre, a man with a gun approached

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the car and demanded the mother get out. When she refused to leave her children, the man dragged her out of the car and shot her. The man then drove away with the children in the back seat. When the killer realized the children were in the car he ordered them out. Six years later the killer was brought to trial and the older boy, then 11, testified to the murder of his mother (*People v. Banks* 2010).

In the aftermath of crime, a child may discuss what happened with parents, friends, teachers, and others. If the case comes to official attention, the child may be interviewed by police officers, social workers, doctors, forensic interviewers, mental health professionals, and attorneys. What children reveal often provides critical evidence, and this chapter discusses the forensic uses in US law of children's disclosures.

INVESTIGATIVE DECISIONS BASED ON CHILDREN'S DISCLOSURE STATEMENTS

Long before proceedings are commenced in court, children's disclosure statements have important roles. Police officers often begin investigations based on children's disclosures. If investigation points to a particular suspect, a police officer wishing to make an arrest must have probable cause to believe the suspect committed a crime. Probable cause exists when a police officer possesses reasonably trustworthy information that would lead a cautious officer to believe there is a fair probability of criminal activity (*Illinois v. Gates* 1983). A child's reliable disclosure can constitute probable cause for arrest. In *Burke v. County of Alameda* (2009), the court wrote, 'A victim's report of abuse . . . is compelling evidence' (p. 731). However, not all disclosures are sufficiently reliable for probable cause. In *Stoot v. City of Everett* (2009), the court ruled that a police officer acted improperly in relying solely on the uncorroborated inconsistent statements of a 4-year-old in deciding to arrest the teenager suspected of molesting the child. The court wrote, 'Law enforcement officers may obviously rely on statements made by the victims of a crime to identify potential suspects. But such information does not, on its own, support a finding of probable cause if the information is not reasonably trustworthy or reliable' (p. 919). The court was troubled by the victim's youth, her inconsistency, and the fact that at one point she confused the suspect with another boy. The court wrote, 'These three circumstances, considered together, point to the need for further investigation and corroboration to establish probable cause' (p. 920).

Although a child's reliable disclosure can suffice for probable cause to arrest, in most cases police look for evidence to corroborate the child's

words. In *Brodnicki v. City of Omaha* (1996), for example, a 9-year-old provided police a detailed description of the man who tried to kidnap her. The child's description was corroborated by other evidence and was sufficient for probable cause to arrest the suspect.

In addition to supplying probable cause for arrest, a child's reliable disclosure can support probable cause for a search warrant of a suspect's home.

Changing the focus from police to child protection social workers, a child's disclosure is sufficient to launch an investigation into possible maltreatment. A recurring theme in child protection work is the amount of evidence social workers need to remove an endangered child from the home over parental objection. US law requires a social worker to obtain a court order *before* removing a child. In emergencies, however, when there is no time for a court order, a social worker (typically working with police) may remove a child in imminent danger.

Emergency removal is justified when a social worker has sufficient evidence that maltreatment occurred or is very likely to occur. A 'mere possibility' of maltreatment will not suffice (*Gomes v. Wood* 2006). Some US courts require that the evidence of danger must rise to the level of 'probable cause' (*Doe v. Kearney* 2003). Other courts require 'reasonable cause' to suspect maltreatment (*Greene v. Camreta* 2009). It is unclear the difference (if there is one) between 'probable cause' and 'reasonable cause'. Still other courts hold that evidence less than probable cause will suffice for emergency removal. In *Gomes v. Wood* (2006), the court specified that 'reasonable suspicion' is required for emergency removal. The filaments separating probable cause, reasonable cause, and reasonable suspicion are elusive. Moreover, the fact that different courts in different parts of the country impose slightly different standards for emergency removal causes uncertainty among professionals. Hopefully, the US Supreme Court will some day clarify the law in this area. Obviously, the stronger the evidence of risk, the more confidence a social worker can take in the decision to remove. Children's disclosure statements are often the most cogent evidence of danger, particularly in cases of suspected sexual abuse.

Clearly, children's disclosure statements have a central role at the investigative stage of child protection, and every reasonable effort must be made to enhance the reliability of children's disclosures.

CHILDREN'S DISCLOSURE STATEMENTS IN COURT – HEARSAY

When children's disclosure statements are repeated in court to prove maltreatment, the statements are hearsay (Lyon & LaMagna, 2007).

Hearsay has a critical role in child abuse litigation. The Delaware Supreme Court observed, 'Admission of hearsay evidence is sometimes essential in these cases' (*McGriff v. State* 1996, p. 1028), and a federal court noted that in child sexual abuse cases, 'the need for the victim's out-of-court statements about the crime is likely to be great' (*Guam v. Ignacio* 1993, p. 612).

The law governing hearsay developed in England, and was applied in England's colonies. Thus, the rule against hearsay evidence was thoroughly established in North America by the time the United States gained independence. Since then, hearsay law evolved along parallel but not identical lines in England, Australia, Canada, New Zealand, and the United States (for analysis of hearsay outside the United States see Hoyano & Keenan, 2007).

Hearsay is a statement that is made *prior* to court proceedings, and that is repeated in court. Hearsay has three components:

1. A person made a statement describing an event (e.g., 'The car went through the red light,' 'He touched my privates');
2. The person made the statement prior to court proceedings where the statement is repeated (the statement was *out-of-court* and is repeated *in court*); and
3. The statement is repeated in court to prove that what the person said actually happened (the car went through the red light; the defendant touched the victim's private parts).

In every US state, hearsay is inadmissible unless it meets the requirements of an exception to the rule against hearsay.

It should be noted that in the United States, as in other nations, the rule against hearsay is enforced most assiduously in criminal cases. In non-criminal cases, including juvenile and family court proceedings to protect children from maltreatment, many US states relax the rule against hearsay.

To come to grips with the definition of hearsay, consider an example. Sally is being examined by a physician for possible sexual abuse. The doctor asks, 'What happened?' and Sally says, 'Uncle Fred took off his clothes and my clothes. His pee-pee was big and hard, but soft too, and he made me touch it, and white glue popped out and got all over me.' Fred is charged with child sexual abuse. At Fred's trial the prosecutor asks the doctor to testify and repeat Sally's graphic description of abuse. Before the doctor can repeat Sally's words, however, Fred's defence attorney objects that Sally's words are hearsay and thus inadmissible in court. Is the defence attorney correct? Is Sally's disclosure hearsay? First, Sally described something that happened.

Secondly, Sally's disclosure was out-of-court, that is, prior to the court proceeding where the doctor is asked to repeat Sally's words. Thirdly, the prosecutor wants to use Sally's words to prove that Fred sexually abused Sally. Thus, Sally's disclosure is hearsay, and will not be allowed in court unless the prosecutor can convince the judge that the disclosure meets the requirements of an exception to the rule against hearsay.

Most people understand that there are limits on the use of hearsay in court. Few people outside the legal community, however, fully understand *why* these limits exist. Why is there a rule against hearsay? The answer is that the rule against hearsay is intended to keep unreliable evidence out of court. To understand the rule against hearsay, it is necessary to understand the adversary system of litigation employed in the United States and other countries modelled on English law.

In the adversary system, each side of a lawsuit prepares for trial by marshalling the evidence that is most favourable to its position. Evidence consists of anything that is presented to the senses of the jury or judge (the trier of fact) and that has a tendency in logic to prove something that is relevant to the case. Thus, evidence includes the testimony of witnesses, documents, things (e.g., drugs in a drug trafficking case; money in a bank robbery), and *hearsay*.

In a trial, the parties take turns presenting the evidence they hope will convince the trier of fact. Each party has the right to challenge the evidence presented by the opponent. Lawyers use a set of tools to challenge the opponent's evidence. When it comes to challenging witnesses, the chief tool is cross-examination. The cross-examiner can ask questions to determine whether the witness: (i) accurately perceived the event in question; (ii) correctly remembers what happened; (iii) is narrating a coherent story; and (iv) is lying or telling the truth. Cross-examination is the principal mechanism for challenging testimony. If a witness cannot be cross-examined, it is not possible to test the witness's perception, memory, narration, and sincerity.

A person who makes a hearsay statement is, in a very real sense, a witness even if the person never sets foot in court. Consider Sally who disclosed abuse to the doctor. Sally's words – repeated in court by the doctor – are powerful evidence of abuse. Yet, if Sally does not testify, Fred's defence attorney cannot cross-examine Sally to test her perception, memory, narration, and sincerity. It is true that the defence attorney can cross-examine the doctor, but the evidence comes from *Sally*, not the doctor. The doctor is a mere conduit for Sally's hearsay.

The hearsay rule exists because it is not possible to cross-examine the person who made the hearsay statement. Cross-examining the person

who testifies and repeats the hearsay statement is not a satisfactory substitute for cross-examining the person who made the statement. In the final analysis, the goal of the rule against hearsay is to exclude evidence that has not been examined under the microscope of cross-examination.

In some cases, the person who made a hearsay statement *does* testify in court and repeats their own out-of-court statement. Suppose, for example, that Sally testifies and repeats what she told the doctor: 'I told the doctor, "Uncle Fred took off his clothes and my clothes. His pee-pee was big and hard, but soft too, and he made me touch it, and white glue popped out and got all over me."' Because Sally testifies, she *can* be cross-examined about her statement. Is Sally's statement nevertheless hearsay? The traditional answer is yes. Sally's disclosure meets the three-part definition of hearsay: an out-of-court statement repeated in court to prove the truth of the statement. There is a gradual movement in the United States to remove out-of-court statements from the definition of hearsay when the person who made the statement testifies and is subject to cross-examination.

Before leaving the definition of hearsay, it is important to avoid confusion by clarifying what *is* and *is not* hearsay. The rule against hearsay does not prohibit Sally from testifying in court and describing the abuse. Sally may testify, 'Uncle Fred took off his clothes and my clothes. His pee-pee was big and hard, but soft too, and he made me touch it, and white glue popped out and got all over me.' What Sally may not do without offending the rule against hearsay is testify, 'I told the doctor, "Uncle Fred took off his clothes and my clothes. His pee-pee was big and hard, but soft too, and he made me touch it, and white glue popped out and got all over me."' It is the repetition of an earlier out-of-statement that runs afoul of the hearsay rule.

In summary, the rule against hearsay is intended to exclude unreliable evidence from court. Judges and lawyers have long understood, however, that not all hearsay is unreliable. Indeed, hearsay is sometimes *more* reliable than testimony in court. Over the centuries, judges carved out exceptions to the rule against hearsay. Today there are more than 30 exceptions to the rule against hearsay. Exceptions are based on the belief that certain types of hearsay are sufficiently reliable that they should be allowed in court despite lack of cross-examination.

In child sexual abuse litigation in the United States, the three most important hearsay exceptions are: (i) the excited utterance exception, (ii) the medical diagnosis or treatment exception, and (iii) the residual hearsay exception. These three exceptions to the rule against hearsay are described below. (For in-depth analysis of these and other hearsay exceptions in US litigation see Myers, 2011.)

THE EXCITED UTTERANCE EXCEPTION

An excited utterance is a hearsay statement that describes a startling event. The statement must be made while the child is under the emotional stress caused by the startling event. The theory behind the excited utterance exception is that statements made under significant stress shortly following a traumatic event are likely to be true. All US states have a version of the excited utterance exception. Other countries with legal systems founded on English law refer to this exception as *res geste* (Hoyano & Keenan, 2007).

When a judge is considering whether a hearsay statement is an excited utterance, the judge evaluates the following factors:

Nature of the event Some events are more startling than others, and the judge considers the likely impact a particular event would have on a child of similar age and experience. In many cases sexual abuse is sufficiently startling to satisfy the excited utterance exception.

Amount of time elapsed between the startling event and the child's statement relating to the event The more time that passes between a startling event and a child's hearsay statement describing the event, the less likely a judge is to conclude that the statement is an excited utterance. Although passage of time is important, elapsed time is not the only factor judges consider. Judges have approved delays ranging from a few minutes to many hours.

Indications the child was emotionally upset when the child spoke The judge considers whether the child was crying, frightened, or otherwise upset when the statement was made. If the child was injured or in pain, the judge is more likely to find an excited utterance.

Child's speech pattern In some cases the way a child speaks (e.g., pressured or hurried speech) indicates excitement.

Extent to which child's statement was spontaneous Spontaneity is a key factor in the excited utterance exception. The more spontaneous the statement, the more likely it meets the requirements of the exception.

Questions used to elicit child's statement Asking questions does not necessarily destroy the spontaneity required for the excited utterance exception. As questions become suggestive, however, spontaneity may dissipate, undermining the exception.

First safe opportunity In many abuse cases, children remain under the control of the abuser for hours after an abusive incident. When the child is finally released to a trusted adult, the child has the first safe opportunity to disclose what happened. A child's statement at the first safe opportunity may qualify as an excited utterance even though considerable time has elapsed since the abuse occurred.

Rekindled excitement A startling event such as abuse may be followed by a period of calm during which excitement abates. If the child is later exposed to a stimulus that reminds the child of the startling event, the child's excitement may be rekindled. Rekindled excitement sometimes satisfies the excited utterance exception to the rule against hearsay.

The excited utterance exception and other hearsay exceptions were created by judges based on their knowledge of law and their lay understanding of psychology. The psychological premise of the excited utterance exception is that statements made under stress are (as a group) more reliable than statements in the absence of stress. But is that true? Very little psychological research has been carried out to evaluate the assumptions undergirding hearsay exceptions. Myers, Cordon, Ghetti, and Goodman (2002) are among the few to examine hearsay exceptions in light of psychological science. After reviewing the available research, Myers *et al.* wrote, 'The heart of the excited utterance exception is the belief that traumatic stress inhibits lying. On this key point, psychology has little direct evidence, although there is indirect evidence indicating that individuals may lie with more difficulty under stressful circumstances' (p. 8). Although the excited utterance exception may stand on shaky psychological ground, the thousands of excited utterance cases attest to how firmly ensconced this exception is in US law.

MEDICAL DIAGNOSIS OR TREATMENT EXCEPTION

All US states have a 'diagnosis or treatment' exception to the rule against hearsay. This exception to the rule against hearsay allows use in court of certain out-of-court statements made to professionals providing diagnostic or treatment services. The professional to whom the child spoke may be a physician, psychiatrist, psychologist, nurse, clinical social worker, paramedic, or medical technician.

The diagnosis or treatment exception includes a child's statements describing medical history as well as statements describing present symptoms, pain, and other sensations. The exception includes the

child's description of the cause of illness or injury. Unlike the excited utterance exception, the child does not have to be upset for the medical diagnosis or treatment exception to apply.

In many cases the child is the one who makes the hearsay statement that is admissible under the diagnosis or treatment exception. However, sometimes an adult describes the child's history and symptoms to the professional. So long as the adult's motive is to obtain diagnosis or treatment for the child, the adult's statements are admissible under the exception.

The rationale for the diagnosis or treatment exception is that hearsay statements to professionals providing diagnostic or treatment services are reliable because the patient has an incentive to be truthful with the professional. This rationale is applicable for older children and adolescents. Some young children, however, may not understand the need for accuracy with healthcare providers. When a child does not understand that the child's personal well-being may be affected by the accuracy of what is said, the rationale for the diagnosis or treatment exception evaporates.

Psychology sheds light on whether young children understand the clinical significance of providing accurate information to medical professionals. Psychologists have studied children's developing understanding of illness, medical care, and the role of medical professionals (e.g., Bibace & Walsh, 1981; Steward & Regalbuto, 1975; Steward & Steward, 1981). Herbst, Steward, Myers, & Hansen (1999) studied the medical knowledge of 3- to 6-year-olds. Herbst *et al.* wrote, 'Our data indicate that young children are more likely to report painful than benign touch and that they understand the necessity to provide an accurate narrative to persons in authority' (p. 247). Herbst *et al.* asked children about lying to a doctor. Three- and 4-year-old children thought the doctor would be angry. One child said, 'You're in big trouble now.' About half the older children (5- and 6-year-olds) understood that the doctor needed accurate information to help them. Kato, Lyon, and Rasco (1998) examined the understanding of healthy and chronically ill 3- and 4-year-olds regarding illness and treatment. Kato *et al.* wrote, 'When children as young as 4 years of age are asked to recognize the causes of illness rather than to generate causal explanations, they show an impressive understanding. . . . As in many other contexts, children can recognize what they cannot articulate' (p. 69).

Psychological research provides a measure of insight into whether the rationale supporting the diagnosis or treatment exception – the patient has a personal incentive to tell the truth – applies to young children. Medical professionals can increase the likelihood children will understand the importance of telling the truth by informing children of

their professional role, 'I'm a doctor, and I'm going to give you a check up today.' The child can be informed of the importance of telling the truth, 'I'll ask you some questions. When you answer my questions, it is important for you to tell me the truth. Tell me only things that really happened, OK?'

RESIDUAL HEARSAY EXCEPTIONS

Most US states have a hearsay exception known as a residual or catch-all exception. This exception allows use in court of reliable hearsay that does not meet the requirements of one of the traditional hearsay exceptions (e.g., excited utterance, medical diagnosis or treatment). In addition to the residual exception, which applies in all types of litigation, a majority of states have a specialized residual exception that allows use of children's reliable hearsay in child abuse cases.

When a child's hearsay statement is offered under a residual exception, the most important question for the judge is whether the statement is reliable. Judges consider the factors listed below to assess reliability. Myers *et al.* (2002) reviewed the psychological research on these factors.

Children's disclosure statements often have a ring of veracity. Indeed, Sir William Blackstone, the most famous expositor of English common law, observed centuries ago that children 'often give the clearest and truest testimony' (Blackstone, 1769, p. 214). With very young children, disclosures indicating developmentally inappropriate sexual knowledge often provide disturbing and powerful evidence of abuse. A young child said, for example, 'white bubbly stuff' came out of his penis (*Bockting v. Bayer* 2007). Another child said, 'His too-too spit on me' (*Bishop v. State* 2008). A third youngster said, 'Penises grow and then melt' (*Re L.N.* 2004). Statements like these can be utilized to prove abuse and protect children.

Spontaneity The more spontaneous a child's statement, the more likely a judge is to find it reliable.

Statements elicited by questioning The reliability of a child's statement may be influenced by the type of questions asked. When questions are suggestive or leading, the possibility increases that the questioner influenced the child's statement. The smaller the number of suggestive and leading questions, the more likely a judge is to conclude that a child's statement is sufficiently reliable to be admitted in evidence.

Consistent statements Reliability may be enhanced if the child's description of abuse is consistent over time.

Play or gestures that corroborate child's hearsay statement The play or gestures of a young child may strengthen confidence in the child's statement.

Developmentally unusual sexual knowledge As mentioned above, a young child's developmentally unusual knowledge of sexual acts or anatomy can support the reliability of the child's statement.

Idiosyncratic detail Presence in a child's statement of idiosyncratic details of sexual acts points to reliability. Jones (1992) wrote, 'The interview can be examined for signs of unique or distinguishing detail. This may be found both within the account of the sexual encounter and/or in unrelated recollections. Examples include children who describe smells and tastes associated with rectal, vaginal, or oral sex' (p. 53).

Child's or adult's motive to fabricate Evidence that the child or an adult had or lacked a motive to fabricate affects reliability.

Medical evidence of abuse The child's statement may be corroborated by medical evidence.

Taped interviews When a child's disclosure of abuse is audiotaped or videotaped, the judge can evaluate first-hand whether improper questions were asked. In *United States v. Cabral* (1996), the 4-year-old victim of sexual abuse was interviewed by an agent of the Air Force Office of Special Investigations. The agent videotaped the substantive portion of the interview, but did not tape the rapport-building phase. Although the Air Force Court of Criminal Appeals found the taped interview reliable, the court wrote, 'We do not encourage investigators to selectively videotape their contact with child witnesses - all of the interview should be taped, including "rapport building" sessions. In a closer case, an investigator's failure to tape an initial "rapport" session could be the scale-tipper' (p. 811). In *State v. Branch* (2005), the New Jersey Supreme Court considered whether a child's statement to the police detective was admissible. The detective destroyed his initial notes of his interview with the child. The Supreme Court wrote, 'We register our displeasure that police officers engage in the seemingly routine practice of destroying their contemporaneous notes of witness interviews after the preparation of formal reports' (p. 690).

Mental health counselling before statement Following abuse, the victim may receive mental health services. During counselling sessions, the child may be asked about abuse. In *State v. Carlson* (1991), the Washington State Court of Appeals considered whether a child's participation in counselling undermined the reliability of statements the child made following counselling. The court wrote:

We recognize that a lapse of time and intervening counseling could affect the reliability of a child's statements regarding abuse. However, these factors will not affect reliability in all cases. Such a rule would be unworkable in any event. Were the courts to hold as a matter of law that counseling affects a child's reliability, an abused child would be prevented from receiving much needed help until after trial. We hold, therefore, that a trial judge may find child hearsay statements unreliable on the ground that there has been a lapse of time and intervening counseling between the abuse and the statements at issue only when the evidence demonstrates that the lapse or counseling somehow affected the child's statements. (*State v. Carlson* 1991, p. 540)

There are thousands of US cases where children's hearsay statements describing abuse have been allowed in court under a residual exception (Myers, 2011). The residual exception has a vital role in child protection in the United States.

CONCLUSIONS

Given the forensic importance of children's disclosure statements regarding abuse, what steps should professionals take to increase the likelihood children's statements can be used in court to protect them?

First, professionals who interact with children – teachers, police, mental health and medical professionals, child care providers – should be trained on the importance of documenting precisely what children say when they disclose abuse.

Secondly, it is not enough to preserve children's exact words. In addition, professionals should watch for and document the factors – outlined above – that judges consider in deciding whether children's statements meet the requirements of hearsay exceptions. Although it is a lawyer's responsibility to suggest a hearsay exception to a judge, and a judge's responsibility to decide whether a child's hearsay statement fits an exception, it is non-legal professionals in the field and the clinic who are in the best position to document the factors that are essential to deciding

whether a child's hearsay statement is admissible in court. Even the most skillful attorney may fail to convince a judge to admit a child's hearsay statement if the professional in the field who heard the statement failed to document the factors that are essential for admission of hearsay in court. Unfortunately, there is little training for front line professionals on what hearsay factors to look for and document.

Thirdly, the most important factor in admitting hearsay is reliability. Judicial findings of reliability are tied closely to the suggestiveness of questions used to elicit children's statements. The more suggestive the questions, the less likely a child's hearsay will be allowed in court. Thus, it is vital to train all professionals – not just forensic interviewers – about the legal dangers of suggestive questions when talking to children about maltreatment.

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