

# NOTES

## DEFENDING SEXUAL MOLESTATION CLAIMS UNDER A COMPREHENSIVE GENERAL LIABILITY POLICY: ISSUES OF SCOPE, OCCURRENCE, AND EXPERT WITNESS TESTIMONY

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## I. INTRODUCTION

This Note responds to the avalanche of claims being submitted to insurers for sexual molestation exposures. Sexual molestation claims are not a new phenomenon. The seeking of defense and indemnity obligations from insurers is, however, a relatively new phenomenon.

This new phenomenon presents explosive verdict potential and long-term liability exposure to insurers.<sup>1</sup> Liability premiums were not contemplated to envelop sexual molestation claims when actuarially computed five years ago.<sup>2</sup> Claims are being paid today with premium dollars based upon the rates of the past.<sup>3</sup> These claims, by their very nature, present high risks to insurers who are reluctant to go to a jury with the facts inherent in a sexual molestation suit.<sup>4</sup>

Due to the potentially astronomical jury awards and the cost of defense associated with these claims, defendants have sought insurance coverage.<sup>5</sup> Typical defendants may include a day care center, church, school, or scout troop, who without insurance protection may be financially devastated by the suit.<sup>6</sup> This Note suggests strategies for defending sexual molestation claims presented to an insurer under a comprehensive general liability ("CGL") policy.<sup>7</sup> The Note reviews the clinical research of sexual molestation, analyzes the pertinent insurance policy provisions, and concludes with a review of the common-law decisions impacting the defense and indemnity obligations arising from the CGL policy.

This Note is not written with a view towards depriving sexually abused children of just compensation. The act of sexually molesting a child is a disgusting and repulsive antisocial act. The repulsiveness of the act, however, is not the sole determinant of the truth of the matter asserted, the

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1. See Elgin, *Liability Coverage for Sexual Molestation Claims*, FOR THE DEFENSE, July 1988, at 6 ("Over the last several years, an unprecedented number of sexual molestation claims, particularly involving child sexual abuse, have been pursued in the courts . . . . The cost of defending such actions is substantial and the jury awards are potentially astronomical. According to a confidential report prepared for the U.S. Catholic bishops, it is estimated that the Roman Catholic Church alone could face more than \$1 billion in legal claims through 1995 because of lawsuits against priests charged with child molestation.").

2. See *Occurrence and Claims-Made Triggers*, FC&S Bulletins (Nat'l Underwriter Co.) Public Liability, at Aat-1, Aat-2 (Jan. 1986) ("insurers have had to pay losses calculated by today's inflated standards . . . for which the insurer received a premium inadequate to pay").

3. *Id.*

4. See Murray, *Expert Testimony in Sexual Abuse Litigation*, FOR THE DEFENSE, July 1988, at 14 ("multi-million verdicts have been returned in sexual abuse actions where the sole injury is psychological damage").

5. Elgin, *supra* note 1, at 6.

6. *Id.*

7. This note analyzes the 1973 version of the comprehensive general liability policy.

indemnity or defense obligation of the insurer, or the proof of what, if any, long-term effects the molestation may have upon the child.

## II. SCOPE OF SEXUAL MOLESTATION

Sexual molestation of children is not a new phenomenon. However, empirical research conducted by behavioral scientists is relatively new.<sup>8</sup> In the 1890s Sigmund Freud categorized his female patients' complaints of sexual abuse as children's fantasies.<sup>9</sup> Freud's conclusion was based upon the "Oedipus complex" in women, which created hysterical symptoms derived from fantasy.<sup>10</sup> Freud's influence upon the behavioral sciences was in part responsible for society's belief that sexual molestation was a rare occurrence.<sup>11</sup> The problem of sexual molestation achieved notoriety during the 1980s<sup>12</sup> due to the children's protection movement, the women's movement,<sup>13</sup> growing public awareness, the proliferation of sexual maltreatment programs, and publicity. This notoriety and the behavioral scientist's freedom from the Freudian Oedipus myth marked the beginning of earnest research of child sexual molestation.

### A. Frequency of Molestations

It is estimated that at least fifteen to thirty-eight percent of adults were sexually abused as children.<sup>14</sup> This reflects that between 3,398,235 and 8,608,862 adults in the United States were sexually abused as children.<sup>15</sup> To bring this into perspective, research indicates that one out of every four women has a nonvoluntary sexual encounter during childhood.<sup>16</sup> These percentages are probably underestimated due to the victim's reluctance to re-

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8. McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 18 (1986).

9. *Id.* at 2.

10. Saunders, *A Comparative Study of Attitudes Toward Child Sexual Abuse Among Social Work & Judicial System Professionals*, 12 CHILD ABUSE & NEGLECT 83, 85 (1988).

11. McCord, *supra* note 8, at 2.

12. Suski, *Child Sexual Abuse—An Increasing Important Part of Child Protective Service Practice*, PROTECTING CHILDREN, Spring 1986, at 3.

13. McCord, *supra* note 8, at 3.

14. Bachmann, Moeller, & Bennett, *Childhood Sexual Abuse & the Consequences in Adult Women*, 71 CHILDHOOD SEXUAL ABUSE 631, 632 (Apr. 1988) [hereinafter Bachmann] (In Finkelhor's 1979 survey of 796 college students, 19% of females and 9% of males stated that they had experienced sexual abuse by the time they reached 18. In the 1956 Landis study of 1800 college students, 33% of the females and 24% of the males stated that they had been sexually abused. In the 1983 Russel survey of 933 adult women, 38% had experienced non-voluntary sexual experience before the age of 18.).

15. These figures are based upon a United States population of 226,549,010. United States Census Bureau (1988).

16. Bachmann, *supra* note 14, at 632.

port the molestation to authorities;<sup>17</sup> society's denial of the problem; an adult's failure to respond after the molestation is reported; and the shame, discomfort, and aversion this topic produces.<sup>18</sup>

The National Center on Child Abuse and Neglect registers 100,000 cases of child sexual molestations each year.<sup>19</sup> One researcher, Binder, has determined that the incidence reporting rate is only twenty percent of the total child molestations each year.<sup>20</sup> Other researchers have estimated that the incidence rate of sexual molestations per year is between 200,000 and 500,000.<sup>21</sup> Based upon these incident rates, the risk exposure to the insurance industry may be conservatively estimated at \$250,000,000 annually.<sup>22</sup>

### B. Onset of Molestations

In defending a child molestation claim, the reality of these incident rates cannot be ignored.<sup>23</sup> Children are molested. The defense strategy must focus on what, if any, damage the molestation has on the victim. Determining when in the child's life the molestation occurred helps to determine the value of the claim. In the initial behavioral science surveys, the onset of molestation was thought to coincide with puberty.<sup>24</sup> This was based on a focus on father-daughter incest, which psychiatrists attributed in part to the daughter's reemerging Oedipal interest in her father and her development of secondary sex characteristics.<sup>25</sup>

17. McCord, *supra* note 8, at 18.

18. Bachmann, *supra* note 14, at 631. See also Brody, *Therapists Seek Causes of Child Molesting*, N.Y. Times, Jan. 12, 1987, at 9Y, col. 1 ("abused boys may be particularly reticent about reporting the abuse because boys are taught to 'act tough' and not complain about victimization"); Finkelhor, *How Widespread Is Child Sexual Abuse?*, 13 CHILDREN TODAY —, 18-20 (1984) (because of these factors, probably no more than one-fifth of the molestations will ever be reported).

19. Bachmann, *supra* note 14, at 632. See also Koop, *The Surgeon General's Letter on Child Sexual Abuse*, HRS-M-CH-88-13 United States Dep't of Health & Human Services 1, 1 (1989) ("[A] million children are physically maltreated and abused" each year. "Over 110,000 of these children are sexually abused.").

20. Bachmann, *supra* note 14, at 632.

21. *Id.* See also Finkelhor, *supra* note 18, at 18-20 (in another 1984 study Finkelhor estimated that as many as 54% of all adult females were sexually victimized as children).

22. This figure presumes 250,000 child molestations per year, evaluated conservatively at \$50,000 per child.

23. See *infra* note 212.

24. Kendall-Tackett & Simon, *Molestation & the Onset of Puberty: Data from 365 Adults Molested as Children*, 12 CHILD ABUSE & NEGLECT 73, 73 (1988) [hereinafter Kendall-Tackett].

25. *Id.* See also Bachmann, *supra* note 14, at 633 ("this philosophy was influenced by the Freudian model of psychological development which believed that the patient's reports of sexual abuse were founded upon fantasies established in the Oedipal phase of childhood, during which a girl was characterized as developing incestuous wishes toward her father."). But see Saunders, *supra* note 10, at 85 ("Today, social work professionals dismiss Freud's contention[s] . . . [i]nvestigators now assume that the child who can describe an adult's erect penis and

Recent studies, however, have shown the onset of molestation is prepubescent.<sup>26</sup> In a comprehensive study conducted by Kendall-Tackett and Simon, 365 adults who had been molested as children were interviewed.<sup>27</sup> The ages of these adults ranged from eighteen to fifty-nine years of age, with a mean age of thirty.<sup>28</sup> The survey disclosed that the median time between the molestation and seeking of treatment was sixteen years.<sup>29</sup> The average age at the onset of the molestation was 7.5 years.<sup>30</sup> The average age of the child when the molestation ended was thirteen.<sup>31</sup> Kendall-Tackett opined that "[t]hese results soundly refute the notion that molestation generally starts when puberty brings on the development of secondary sex characteristics."<sup>32</sup> The researchers found that "[f]or the vast majority of our sample, the molestation started between the ages of 3 and 12."<sup>33</sup>

When confronted by the plaintiff utilizing these types of statistical surveys to show that a molestation "more likely than not" occurred, one defense strategy criticizes the surveys for lacking a standard definition of sexual abuse.<sup>34</sup> The lack of a standard definition results in conflicting usage of key concepts, such as incest and molestation.<sup>35</sup> Some researchers limit their use of the term "incest" to cases involving coitus.<sup>36</sup> The term "molestation," in contrast, refers to noncoital sexual activity such as exposure and fondling, whether committed by relatives, acquaintances, or strangers.<sup>37</sup>

The United States National Center on Child Abuse defines sexual abuse as "[a]n act perpetrated upon a child by a significantly older person with the intent to stimulate the child sexually and to satisfy the aggressor's sex-

ejaculation has had direct experience with them.").

26. Kendall-Tackett, *supra* note 24, at 74.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 76.

31. *Id.*

32. *Id.*

33. *Id.* The researchers also noted that these conclusions are supported by three other studies: Lukianowicz, *Parental Incest*, 49 *BRITISH J. OF ORTHOPSYCHIATRY* 436-45 (1979); Wehrspann, *Review of 125 Children 6 Years of Age & Under Who Were Sexually Abused*, 10 *CHILD ABUSE & NEGLECT* 223-29 (1986); Wyatt, *The Sexual Abuse of Afro-American & White American Women in Childhood*, 9 *CHILD ABUSE & NEGLECT* 457-67 (1985). See also Suski, *supra* note 12, at 4 ("[T]he average age of the molested children was 9. The age groups were broken down as: 0-5 years—27%; 6-11 years—35%; 11-17 years—38%.").

34. Bachmann, *supra* note 14, at 631. See also Brooks, *Familial Influences in Father-Daughter Incest*, 4 *J. PSYCHIATRIC TREATMENT EVALUATION* 117 (1982).

35. Bachmann, *supra* note 14, at 631.

36. *Id.*

37. *Id.* See also Carper, *Emergencies in Adolescents: Runaways & Father-Daughter Incest*, 26 *PEDIATRIC CLINICS OF N. AM.* 883 (1979); Lustig, *Incest: A Family Survival Pattern*, 44 *ARCHIVES OF GENERAL PSYCHIATRY* 31 (1966); Scherzer, *Sexual Offenses Committed Against Children: An Analysis of 73 Cases of Child Sexual Abuse*, 19 *CLINICAL PEDIATRICS* 679 (1980).

ual impulses."<sup>38</sup> Another source defines sexual molestation as "the involvement of dependent developmentally immature children and adolescents in sexual activities that they do not fully understand, to which they are unable to give informed consent."<sup>39</sup> In reviewing the variations of the definitions of sex abuse, Bachmann has identified four major components: "(1) the nature and purpose of the sexual activity; (2) the age and relationship of the perpetrator to the child; (3) the child's understanding of the activity; and (4) the type of coercion used."<sup>40</sup> According to Bachmann, "[t]hese variables are not only significant for defining the concepts of sexual molestation, but also in understanding the long-term consequences of the molestation upon children."<sup>41</sup>

When a plaintiff relies substantially upon a "more likely than not" allegation supported by statistical surveys, the inability of behavioral scientists to agree upon a uniform definition for child molestation is an effective defense strategy. Due to the wide variation in the definitions of molestation, the studies lack reliability and accuracy. Caution should be used, however, because the variations encompass sexual activities that the average juror finds repulsive.

### C. Who Are the Molesters?

In most molestation cases seeking insurance indemnity, the plaintiff offers proof that the insured failed to meet a reasonable person standard in hiring or supervising an employee or agent accused of molesting the child.<sup>42</sup>

38. National Center for Child Abuse & Neglect, *Child Sexual Abuse: Incest, Assault, and Sexual Exploitation*, Special Report, United States Dep't of Health Education & Welfare, Pub. # OHDS § 79-30166 (1978). See also Koop, *supra* note 19, at 1 ("Child sexual abuse occurs if a child—any person under the age of 18—is made to engage in, or help someone else engage in, any sexually explicit conduct, such as intercourse, sodomy, the fondling of genitals, and oral copulation.").

39. Bachmann, *supra* note 14, at 632. See also Mey, *The Sexual Victimization of Male Children: A Review of Previous Research*, 12 CHILD ABUSE & NEGLECT 61, 62-66 (1988) ("the term sexual victimization implies the aggressive and coercive exploitation of an individual which is sexual in nature and renders an individual a victim"); Simrel, Berg, & Thomas, *Crisis Management of Sexually Abused Children*, 8 PEDIATRIC ANNALS 59, 60 (1979) [hereinafter Simrel] ("child sexual abuse refers to: 1. incidents of sexual assault with physical force in which a child (under the age of 16) is the victim and/or 2. sexual contact or interaction (such as intercourse, fondling of the genitalia, exhibitionism, sodomy, etc.) between a child and another person of any age in which the child's participation has been obtained through undue means . . . and/or 3. sexual contact or interaction between a child and an adult, even with the free cooperation of the child, when activity is legally prohibited because of the age of the child and the assumed maturity of the other person").

40. Bachmann, *supra* note 14, at 632.

41. *Id.*

42. See, e.g., *American States Ins. Co. v. Barbor*, 826 F.2d 888, 891-92 (9th Cir. 1987) (partner was vicariously liable for child molestation perpetrated by co-partner in the course of operating nursery school partnership). But see *Scott v. Central Baptist Church*, 197 Cal. App. 3d 718, 722-23, 243 Cal. Rptr. 128, 130-31 (1988) (church was not vicariously liable for Sunday



The result of such a deviation from the standard of care is vicarious liability under a respondeat superior theory.<sup>43</sup> Defense counsel must be cognizant of the local standard of care in the community. A court will define the standard of care in terms of reasonableness and foreseeability.<sup>44</sup> In this author's opinion, a court may find that it is reasonable to expect an employer to contact a prior employer of a prospective employee, but that it is not reasonable to require the employer to be clairvoyant. In determining what is foreseeable or reasonable, what factors will be employed by the courts to establish the standard?

Research has been conducted to analyze and identify the adult perpetrator of the molestation.<sup>45</sup> Unlike the companion crime of rape, a sexual molester is normally not a stranger to the child.<sup>46</sup> In a study conducted by Suski, a parent was responsible for fifty-six percent of the sexual abuse suffered by the child.<sup>47</sup> Other relatives accounted for nineteen percent, and twenty-six percent of the molesters were classified as "other."<sup>48</sup> These statistics are supported by the Schwartz/Horowitz/Sauzier study, which demonstrated that sixty-two percent of the molesters were family members.<sup>49</sup> Another researcher estimates that the molester is not a stranger to the child in eighty-five percent of molestations.<sup>50</sup> As one commentator explained, "Perhaps most disquieting of all is the finding that the most likely abusers among the persons children know are persons whom they know very well and who have authority over them: relatives."<sup>51</sup>

Recognition of the preponderance of parents molesting a child is significant in analyzing a claim submitted under a liability policy. The child may be attempting to escape the intrafamilial molestation, but is fearful of a

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school teacher's sexual molestation of a student); *Milla v. Tamayo*, 187 Cal. App. 3d 1453, 1461, 232 Cal. Rptr. 685, 690 (1986) (archbishop is not vicariously liable for priests' acts).

43. See *supra* note 42.

44. See *Scott v. Central Baptist Church*, 197 Cal. App. 3d at 721-22, 243 Cal. Rptr. at 130.

45. See *infra* notes 46-47 and accompanying text.

46. See, e.g., Brody, *Therapists Seek Cause of Child Molesting*, N.Y. Times, Jan. 12, 1987, at 9Y, col. 1 (among the 311 sexually abused children treated at the Maricopa County General Hospital, only 18% had been molested by strangers).

47. Suski, *supra* note 12, at 4 (This study was based upon data gathered from the National Study on Child Neglect and Abuse Reporting, conducted by the American Assoc. for Protecting Children. The data examined included official reports submitted by a majority of the states from the years 1976 through 1984.).

48. *Id.*

49. Schwartz, Horowitz & Sauzier, *Severity of Emotional Distress Among Sexually Abused Preschool, School-Age and Adolescent Children*, 36 HOSPITAL & COMMUNITY PSYCHIATRY 503, 504 (1988) [hereinafter Schwartz] (study consisted of 156 children who were evaluated at the Family Crisis Program for Sexually Abused Children in the Greater Boston area between July 1980 and January 1982).

50. Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System* in U.S. DEPT OF HEALTH & HUMAN SERVICES, SEXUAL ABUSE OF CHILDREN: SELECTED READING 47 (1980).

51. McCord, *supra* note 8, at 4.

family breakdown, incarceration of the molesting parent, or economical consequences arising from reporting the parent to the authorities.<sup>52</sup> To avoid these consequences, while attempting to escape the molestation, the victim may accuse an individual other than the molesting parent who is known to the victim.<sup>53</sup> The accusation may be targeted at an authority figure or a new acquaintance. Once the accusation is made, the consequences to the accused are substantial, and the child then becomes committed to the story. A thorough fact-finding mission is required to determine if the child is attempting to escape a family member who is molesting him or her by making the accusation.

As the Suski study reported, twenty-six percent of the molesters were "other than family members."<sup>54</sup> Therefore, inquiry is needed to determine how the child was acquainted with the alleged molester. Was the accused the child's babysitter, teacher, coach, scout leader, camp officer, minister, youth director, or choir director?<sup>55</sup> If the accused is an authority figure to the child, was there a recent disciplinary act against the child? Was there a long-standing conflict between the child and the accused? Was a peer of the child recently selected by the accused instead of the child, prompting an allegation in revenge? After a review of the nature of the acquaintance between the child and the accused, a personal observation and interview with the accused is recommended. Does the accused have any explanation for the child's accusation? How will a jury view the accused?

Molesters do not have physical characteristics that easily identify their sexual preferences. In this author's investigations of sexual molestation claims, some alleged molesters have been quite normal in appearance and demeanor. They do not all fit the public image of "dirty old men in raincoats."<sup>56</sup> Not only are the physical characteristics nondefinitive, but the psychological profiles are too varied for identification.<sup>57</sup> Even the Minnesota Multi-Phasic Inventory ("MMPI") has failed to find a psychological profile that distinguishes molesters from other adults.<sup>58</sup> Failure to identify a definitive psychological profile is the result of a lack of research in this area.<sup>59</sup> The best information available at this time is not definitive of a psychological

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52. See H. Wakefield & R. Underwager, *Costs of False Allegations*, 111 (Institute for Psychological Therapies 1985) (unpublished manuscript).

53. *Id.*

54. Suski, *supra* note 12, at 4.

55. Brody, *Therapists Seek Cause of Child Molesting*, N.Y. Times, Jan. 12, 1987, at 9Y, col. 1.

56. Conte, *A Look at Child Sexual Abuse*, National Committee for Prevention of Child Abuse 1, 17 (1988).

57. Quinsey, *The Assessment and Treatment of Child Molesters: A Review*, 12 CHILD ABUSE & NEGLECT 61, 66 (1988).

58. *Id.*

59. *Id.* The research to date has been conducted on incarcerated sexual offenders and not on adults in community settings. *Id.*



profile to predict or identify a child molester.<sup>60</sup> Hoping to "break ground" in this area, one firm has devised a pre-employment test designed for child care centers to screen job applicants.<sup>61</sup> This Personnel Selection Inventory is designed to detect personality flaws, including emotional instability, violent behavior, disregard for safety, drug abuse, and dishonesty.<sup>62</sup> This attempt to identify possible molesters has not yet passed the test of time. As additional research is conducted in the child molestation field, perhaps a psychological profile will be identified, but to date, no unequivocal test for the detection of a molester exists. The standard of care a court will utilize in establishing the foreseeable and reasonable requirements that must be met by an insured should include the aforementioned traits of a molester.

#### D. *Pretrial Discovery Focus on the Insured*

If an insured or the insured's representative is accused of a molestation, the high incident rates of intrafamilial molestations and the inability to identify a molester physically or mentally are considerations for the defense lawyer. In preparing the case for trial or settlement, the defense lawyer should interview the peers of the accused, make a prior employment check, and personally observe the accused to prevent "surprises" at trial. Most legitimate allegations under a liability policy involve pedophiles.<sup>63</sup> Pedophiles are often drawn to jobs offering close contact with children.<sup>64</sup> This is not to suggest that every day-care employee, teacher, or youth director is a pedophile. Rather, pedophiles by definition are attracted to children and gravitate toward these types of occupations.

When the defense lawyer is interviewing the peers of the accused, an inquiry into the behavioral patterns of the accused should be made. Consider the following types of questions of the accused's peers: Did the accused spend an inordinate amount of time on retreats alone with children? Did the accused transfer jobs and follow the alleged victim when (s)he transferred to a new school or church? Did the accused have a low achievement orientation? Did the accused have subnormal self-esteem or a subnormal personality? Did the accused frequently entertain children in his/her home alone? Although these inquiries of peers are unlikely to identify all molest-

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60. *Id.*

61. Snyder, *Test For Child Care Centers To Screen Potential Abusers*, CRAIN'S CHICAGO BUS., Sept. 14, 1987.

62. *Id.* The London House, the originator of the concept, projects this test would have detected 88% of convicted molesters surveyed. *Id.* This company is not recommending this test to be an end-all type of procedure but rather a supplement to accepted screening processes. *Id.* Mr. Jack Jones, chief psychologist for St. Paul Insurance Co., is recommending this employment program to its child care facility policyholders. *Id.*

63. "Pedophile" is defined as an adult with sexual interest in or contact with children. Mey, *supra* note 39, at 66.

64. Faller, *Is the Child Victim of Sexual Abuse Telling the Truth?*, 8 CHILD ABUSE & NEGLECT 473, 481 (1984).

ers, it will supply needed facts, either negative or positive, which may inflame or defuse the jury. In any case, these facts must be known before trial.

In summary, some molesters may be socially adept but sexually fixated on children, others may have very poor social skills that impact their normal adult relations, and others may be socially inept and sexually fixated.<sup>65</sup> In lieu of the physical and mental "cloak" surrounding a molester, an employer or principal (insured) meets the standard of care required if a reasonable background check is conducted prior to hiring the accused and adequate supervision is employed to prevent a foreseeable molestation.<sup>66</sup> Before defense counsel decides whether to defend or settle a molestation civil suit, a thorough background check on employment, peer interviews, and a personal observation of the accused is necessary to confirm whether the insured has met this standard of care.

#### E. *The Victims: A Learning Experience?*

The defense counsel's determination of the local standard of care and measurement of the insured's conduct by that standard should be supplemented by an estimation of the credibility of the alleged victim. One of the most significant considerations in determining whether to proceed to trial or to settle the case is the credibility of the victim.

A plaintiff's attorney typically poses a relevance hypothesis under Federal Rules of Evidence 401 and 402 as follows: (1) a sexually abused child exhibits certain characteristics not common to children who have not been sexually abused, and these characteristics may be detected by trained experts; (2) this plaintiff exhibits these characteristics; (3) therefore, the defendant is responsible for the physical and emotional damage inflicted upon the plaintiff.<sup>67</sup> Because the molestation usually involves only the perpetrator and the victim, overcoming this hypothesis requires skill, ingenuity, and an acute courtroom awareness by defense counsel in attacking the credibility of the victim.

A powerful statement to overcome is that young children do not fabricate stories of sexual abuse.<sup>68</sup> This statement carries with it a presumption of truth.<sup>69</sup> The following techniques may be used by the defense counsel to burst the presumption bubble. The interviewing or interrogating of a child following a report of sexual abuse may be a learning process for the child.<sup>70</sup> A cluster of techniques are utilized during the interview process, including anatomical dolls, books (such as *Red-Flag*, *Green-Flag*), and the inter-

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65. *Id.*

66. See *Scott v. Central Baptist Church*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (1988).

67. *McCord*, *supra* note 8, at 9.

68. *Id.* at 38.

69. *Faller*, *supra* note 64, at 481.

70. *Id.*

viewer's establishment of rapport with the child.<sup>71</sup>

The use of anatomical dolls during the interview requires little or no training.<sup>72</sup> There is no research to verify or establish the reliability or the validity of the dolls as evaluation tools.<sup>73</sup> One researcher has described the dolls as being anatomically incorrect, since the genitals are disproportionately large in size.<sup>74</sup> Accordingly, the researcher argues that the child perceives that the questioner wants to discuss sexuality, and the child treats the questioning as a learning experience seeking to produce responses the interrogator wants to hear.<sup>75</sup>

Similarly, in the *Red-Flag, Green-Flag* coloring book, the child is led through a series of pages presenting "good touches and bad touches."<sup>76</sup> After several pages, the child is asked to color portions of a figure representing the child's body that may have been touched.<sup>77</sup> One researcher suggests that these books are programmed learning texts.<sup>78</sup> The validity of this progressive stimuli is a test of the book's effectiveness as a programmed text, not as a truth-seeking technique for the child's allegation of sex molestation.<sup>79</sup>

Developing interview rapport is also a learning experience for the child.<sup>80</sup> Through the interview process, the child learns the language of sexual behavior, how to reinforce responses from the questioner, what his expected attitude toward the alleged molester should be, and what the victim's role should be.<sup>81</sup> The direction of the interview is determined by the interviewer and introduces a bias even for the most skillful questioner.<sup>82</sup> The

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71. H. Wakefield & R. Underwager, *Excerpts From the Child Witness and Sexual Abuse 1* (Institute for Psychological Therapies 1985) (unpublished manuscript) [hereinafter H. Wakefield]. One of these techniques offered by J. Norton Group, is the EZ-4U Child Sexual Assault Investigation Kit. According to the J. Norton Group, the kit contains a book that "literally conducts the entire interview for the investigator." Letter from Jim Norton to Noel McKibbin, Feb. 14, 1989. The coloring book is represented to be "non-leading and most importantly, the investigator does not have to be specially trained to use the technique." *Id.* Further, the kit is described as having "five magic communication bridges . . . . These magic bridges are easily learned, performed, and taught magic tricks which when properly presented, develop a bond of trust, increase the victim's self-esteem and often initiate disclosure." *Id.*

72. H. Wakefield, *supra* note 71, at 2.

73. *Id.*

74. *Id.*

75. *Id.* at 3.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 5.

81. *Id.*

82. *Id.* Many of the clinical studies emphasize the establishment of rapport during the interviewing process. See, e.g., Simrel, *supra* note 39, at 69-70 (in describing the best interview, the author suggests a one-to-one situation because too many people may inhibit or overwhelm the child; anatomical dolls may be used to determine the child's view of human sexuality); Thomas & Rogers, *Sexual Abuse of Children: Case Finding & Clinical Assessment*, 16 *Nuas-*

result is a child's response that is what the child believes the adult wants to hear.<sup>83</sup>

If defense counsel is allowed to examine, depose, or interview the alleged victim, counsel should not accuse the child of fabricating the molestation. Rather, counsel must seek out the degree, kind, and type of influence that has been exerted upon the child throughout the entire process and specifically during the interviewing process. As one commentator stated, "There is no empirical evidence to support that children never lie about sexual abuse."<sup>84</sup> The commentator explained that "a false allegation can result from an [interviewer's] intent to do good, coupled with a preconceived idea of what has happened, a lack of awareness of the susceptibility of children to influence, and a lack of understanding of the stimulus value of an adult."<sup>85</sup> The child has already been exposed to publicity and educational programs concerning sexual molestations. The result may be a child seeking attention, or a misinterpreted answer to a hypersensitive parent's inquiry.<sup>86</sup>

Another important subject of the background inquiry is the child's conjugal family. If the allegation arose during a custody dispute against one of the spouses, the need for inquiry is heightened. Rosenfeld compiled a list of factors that should be examined concerning the molestation:

The report is less likely to be accurate if: the child is at an age where reality is difficult to distinguish from fantasy; the family setting is sexually over-stimulating and a family is worried that another family member may not be able to control sexual impulses; the child is psychologically disturbed or wishes to punish a hated adult; the child feels guilty for some unconnected matter and uses the accusation to express the guilt . . . ; or an actual molestation has occurred but the wrong person is

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ING CLINICS OF N. AM. 179, 186-87 (1981)[hereinafter Thomas] (Two essential elements to the interview are: (1) showing genuine interest in the child in a one-on-one setting; and (2) ascertaining the child's terms used to describe their anatomy. From the time suspicion first arises concerning sexual abuse the central focus is on collecting information relevant to the identity of the offender and their place of residence.); Thomas, *Yes, You Can Help a Sexually Abused Child*, RN, Aug. 1980, at 23, 25-28 (A suggested interview technique includes, "I know this is very frightening. Sometimes things happen that can be pretty scary. I'll be here with you." The author suggests these expressions be voiced over and over. The author proceeds with a discussion of toys, subjects in school, and then asks, "Have you spoken to the policeman yet?" The interview proceeds to elicit details of the molestation with "[l]et's play a game about what we call the parts of the body." Further details are elicited with the following questions: "When did he first take off your panties; what did he want to do with his peter; and how did he hurt your tookie?"). As stated above, in the text and illustrated with these interviewing techniques, even the most skillful interviewer will be unable to interview the alleged victim without some bias or prevent the child from undergoing a learning experience. The interview will inevitably include leading questions and selective reinforcement of responses.

83. H. Wakefield, *supra* note 71, at 6.

84. *Id.* at 15.

85. *Id.*

86. *Id.*

accused.<sup>87</sup>

Not every child's complaint of sexual abuse is a false allegation. Conversely, not every accusation is truthful. Therefore, discovery is required to determine whether the child's allegation is the result of a learning experience through the interviewing process, whether the child is seeking help and attention through a false accusation, or whether in fact the child was abused. The jury is the ultimate determiner of credibility. Although the accused faces substantial prejudice, including a presumption of truthfulness of the medical expert's testimony and the child's allegation of molestation, a skillful presentation of a thorough investigation by defense counsel will greatly assist the trier of fact in his analysis of credibility.<sup>88</sup>

### III. CONSEQUENCES OF MOLESTATION

Defense counsel normally has two choices for the ultimate conclusion of a child molestation claim: trial or settlement. As in any tort action, these options are affected by the legal culpability of the insured and the credibility of the victim. To determine whether to try or settle the case, defense counsel and the insurer must evaluate the claim and then review the plaintiff's demand. Factors to consider when evaluating sexual molestation claims include the duration of the molestation, the medical proof associated with the claim, and the behavioral ramifications resulting from the molestation.

#### A. Length and Type of Molestation

In a San Jose study based upon 365 adults who were molested as children, the mean age of the victims when the molestation ended was thirteen.<sup>89</sup> The researchers reported that "a surprisingly high number of as-

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87. Rosenfeld, *Fantasy and Reality in Patients' Reports of Incest*, 40 J. OF CLINICAL PSYCHIATRY 159, 159-64 (1979). Other factors that enhance the credibility of a child's allegation of abuse include: "multiple episodes occurring over time; progression of sexual activity from less to more intimate interaction; elements of secrecy, pressure, or coercion; and explicit details of sexual behavior." DeJong, *The Medical Evaluation of Sexual Abuse in Children*, 36 HOSP. & COMMUNITY PSYCHIATRY 508, 511 (1985).

88. One study focused upon five occupational group opinions on the child credibility factor for sexual molestation offenses. Saunders, *supra* note 10, at 84-88. The results were as follows: district attorneys found the children most credible with the child's credibility score of 4.1; social workers followed with a child credibility score of 3.9; judge's child credibility score was 3.64; police judged the child's credibility score to be 3.64; and public defenders viewed the child's credibility the lowest with a score of 3.19. *Id.* This study measured victim culpability, offender culpability, crime seriousness, and punishment. *Id.* The greatest discrepancy in the categories was the child's credibility. *Id.* at 87. The researcher concluded that victim credibility begged two questions: "[h]as a crime been committed and can the child be believed?" *Id.* at 89.

89. Kendall-Tackett, *supra* note 24, at 78. The 365 adults consisted of 89% females and 11% males, with a mean age of 30. *Id.* at 75. This study is significant for a duration analysis because the data was collected retrospectively; thus, the molestations ran their unimpeded courses without outside interference. *Id.* at 78.



saults lasted less than one year" and "presumably included victims who were assaulted only once."<sup>90</sup> Of the victims who were molested for less than one year, only twenty-two percent included intercourse.<sup>91</sup> The researchers confirmed previous findings that the longer the duration of the molestation, the more serious the progression of the sexual acts.<sup>92</sup> Specifically, the molestations lasting longer than one year in duration reflected a forty-four percent incidence of intercourse.<sup>93</sup>

In another clinical study, the one-time sexual molestation incidents accounted for fifty-eight percent of the sample; twenty-six percent were repeated activities lasting up to one year, and fourteen percent exceeded one year in duration.<sup>94</sup> The one-time molestation, or short-term molestation, generally included "exhibitionism, disrobing, genital manipulation, and fondling of breasts . . . ."<sup>95</sup> The cessation of the molestation coincided with the child reaching adolescence and a self-awareness of the implications of the sexual activity.<sup>96</sup> For females, this is the age when a fear of pregnancy emerges, and for males, it is the age when physical development provides the opportunity to ward off advances.<sup>97</sup>

The allegations must be carefully examined to determine the duration of the molestation. There is a direct correlation between the duration of the molestation and the somatic symptoms manifested in the victim.<sup>98</sup> During the discovery phase of the suit, a short-term molestation involving exhibition only must be distinguished from the long-term molestation that has evolved into intercourse. A direct correlation exists between the duration of the molestation and the value of the case. The consequences of a long-term molestation weigh heavily in evaluating the case due to the likelihood that sexual intercourse took place.

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90. *Id.* at 79. See also H. Wakefield, *supra* note 71, at 12 (in reference to the Kinsey Study, 80% of the women reported only a single experience and this experience involved only an approach or exhibition in 62% of the sampling).

91. Kendall-Tackett, *supra* note 24, at 79.

92. *Id.*

93. *Id.* This article analyzes and concurs with the Finkelhor postulate that "if the molestation happened more than once, it usually continued for more than one week; and if longer than one week, then it was likely to exceed one year." *Id.*

94. Sedney & Brooks, *Factors Associated with a History of Childhood Sexual Experience in a Non-Clinical Female Population*, 23 J. OF THE AM. ACADEMY OF CHILD PSYCHIATRY 215, 216 (1984) [hereinafter Sedney]. The sample for this study consisted of 301 college females who voluntarily completed questionnaires. *Id.* Sixteen percent of the sample reported a history of childhood sexual experience. *Id.* See also *infra* note 110 and accompanying text.

95. Bachmann, *supra* note 14, at 633. See also H. Wakefield, *supra* note 71, at 11 ("among heterosexual pedophiles, only a small minority engage in penetration and intravaginal coitus with their victims; and then mainly with the age over 14 and with their permission" and "vaginal penetration is not the intention of the pedophile and is in many cases anatomically unfeasible").

96. Kendall-Tackett, *supra* note 24, at 78.

97. *Id.* at 78-79.

98. Thomas, *supra* note 82, at 181.

### B. Medical Indicators

Perhaps the most compelling evidence the plaintiff can present are medical indicators of a molestation. Even though this evidence is not probative of the molester's identification, the child's credibility is bolstered by such evidence and the jury will react unfavorably toward the defendant. Medical indicators include: (1) the presence of bruises in the genital or anal areas; (2) unexplained vaginal or rectal bleeding; (3) the presence of a sexually transmitted disease; (4) urethral inflammation or genital infections; (5) penile swelling or discharge; and/or (6) pregnancy.<sup>99</sup>

Cases presenting inexplicable medical indicators (other than a molestation) should be identified quickly and settlement should be attempted expeditiously unless the identity of the molester is in serious doubt. Uncontroverted medical testimony of rectal bleeding or genital contusions provides a jury with tangible proof to justify a substantial verdict regardless of who is sitting at the defense table.

### C. Behavioral Indicators

Behavioral dysfunctions manifested by molested children have been described by Dr. Bachmann to include "inappropriate sexual play, preoccupation with sexuality, frequent exhibition of the genitals, and open masturbation."<sup>100</sup> These dysfunctions in school-age children are accompanied by fear of sexuality and confused sexual identity.<sup>101</sup> During adolescence, these dysfunctions involve promiscuity, pregnancy, and prostitution.<sup>102</sup> As the victim enters the adult stage, these dysfunctions include "[a] fear of intimate relationships, feelings of repulsion or lack of enjoyment, . . . and primary and

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99. *Id.* See also Simrel, *supra* note 39, at 65 (a physician should be alert for a history of suspicious stains or blood in the child's underwear); Bachmann, *supra* note 14, at 637 ("acute signs of sexual abuse include lacerations or abrasions of the hymen, labia, perineum, vagina, or fourchette; and breast and other extra-genital injuries, including lacerations, abrasions, ecchymoses, or fractures, . . . relaxation of the sphincter muscles on rectal examination, . . . perineal warts, . . . [and] oral infections").

100. Bachmann, *supra* note 14, at 638.

101. *Id.* See also Simrel, *supra* note 39, at 65 (school-age children experience school phobia, anorexia, an unwillingness to engage in physical or recreational activities because they are too painful, and nightmares); Thomas, *supra* note 82, at 181-82 (behavioral indicators of molestation include regressive behavior of bed-wetting or thumb-sucking; phobias of apparent sudden onset, particularly of the dark, men, or strangers; running away from home; substance abuse; and profound and rapid personality changes).

102. Bachmann, *supra* note 14, at 638. See also Mey, *supra* note 39 at 68 (adolescents may feel great shame, blame themselves, become engaged in pornographic enterprises, become self-destructive, or may, as adults, sexually victimize other children); Oates-Tong, *Sexual Abuse of Children: An Area with Room for Professional Reform*, 147 *MED. J. OF AUSTRALIA* 544, 545 (1987) (this study found that boys between the ages of 14 and 19 who had been molested had a criminal conviction rate of 21%, as compared to a national average of non-molested boys of the same age group of 3.6%).

secondary anorgasmia."<sup>103</sup>

### 1. Clinical Studies

These conclusions have appeared in a number of clinical studies. A particularly insightful study conducted by Sedney and Brooks consisted of two groups of college-age women.<sup>104</sup> One group consisted of fifty-one students (the molested group) who had reported sexual abuse in their history.<sup>105</sup> This group was compared to a similar group of fifty-one students (the control group) who had no sexual abuse history.<sup>106</sup> The data reported reflects, in part, the following:

SYMPTOM	MOLESTED GROUP		CONTROL GROUP	
	INSIDE FAMILY	OUTSIDE FAMILY	COMBINED MOLESTED	NON- MOLESTED
	%	%	%	%
Depression	66	63	65	43
Trouble sleeping	60	31	51	29
Drug use	3	6	4	4
Emotional problems	49	31	43	22
Suicide attempt	14	19	16	6 <sup>107</sup>

The researchers found the symptoms of depression, trouble sleeping, and emotional problems to be statistically significant.<sup>108</sup> In summarizing their findings, the researchers reported: "Although these correlational data do not conclusively establish a cause-effect relationship [between being molested and these symptoms], they do suggest that reports of childhood sexual experiences are frequently associated with symptoms of distress later in life."<sup>109</sup>

Another study sought to prove the behavioral impact on the child according to when the molestation occurred in the child's life.<sup>110</sup> The children

103. Bachmann, *supra* note 14, at 638.

104. Sedney, *supra* note 94, at 215.

105. *Id.*

106. *Id.* at 216. The students selected for the study represented diverse backgrounds. *Id.* The median age was 19, and no correlation could be found for the frequency of molestations based upon religion, race, or parents' occupation. *Id.* The participants were volunteers and the data was collected via questionnaires. *Id.*

107. *Id.* at 217.

108. *Id.*

109. *Id.* at 218. The researchers also concluded the stereotype of a sexually abused child only occurs in a poor, disorganized family is a myth. *Id.*

110. Schwartz, *supra* note 49, at 503. This data was collected from children who reportedly had experienced sexual contact within six months of the treatment. *Id.* at 504. The children interviewed alleged the following types of molestations: intercourse, 28%; other penetration (including oral-genital contact and penetration by a foreign object), 38%; fondling, 23%. *Id.* The Louisville Behavior Checklist was utilized for the study which consists of a true-false questionnaire completed by the parents. *Id.* The test used a control group of similarly aged

were grouped according to preschool, school, and adolescent ages.<sup>111</sup> The researchers generally concluded that "the level of psychological distress in [the children] range[d] from a complete absence of any conventional symptoms of childhood psychopathology to the presence of extreme and pervasive emotional problems."<sup>112</sup> More specifically, the researchers concluded that the preschool children were less able to comprehend the sexual nature of the experience and hence show *less enduring* emotional trauma.<sup>113</sup> The result was that "relatively few preschool youngsters demonstrated sufficient behavioral problems to be designated as seriously disturbed."<sup>114</sup> In contrast, the school-age children have the highest frequency of severe psychological difficulties because they are cognizant of the sexual nature of the experience.<sup>115</sup> The adolescents represented the lowest frequency of severe psychological difficulties of the three age groups.<sup>116</sup> The researchers found these results confusing, as the adolescents' cognitive recognition of the sexual nature of the conduct should be the highest of the groups.<sup>117</sup> The hypothesis posed by the researchers in an attempt to explain this anomaly was that "the adolescents in the study were less aggressive than the control group, the sexual contact was consensual, and those who were first victimized in adolescence were better able to cognitively process the experience."<sup>118</sup> The researchers also found that "each child's response to the stress of sexual victimization depends on his or her previous experiences."<sup>119</sup>

## 2. Pretrial Discovery Focus on the Expert

These two leading studies by Bachmann and Sedney/Brooks are not overwhelmingly conclusive of what long-term effects a molestation may have upon a child behaviorally. At trial, however, these types of studies are probative, particularly when they are introduced by an expert. The expert testimony is likely to recommend a long-term treatment modality program.<sup>120</sup>

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children to be compared to the molested children. *Id.* at 505.

111. *Id.* at 504. The chronological ages were as follows: preschool, ages 4-6; school age, ages 7-13; adolescents, ages 14-18. *Id.* at 504-05.

112. *Id.* at 507.

113. *Id.* (emphasis added).

114. *Id.* The researchers recommended that a child who exhibits little or no manifest distress should not be questioned repetitively for the details of the molestation. *Id.* Rather, treatment should focus upon the child's recognition of inappropriate approaches. *Id.*

115. *Id.* The school-age children were characterized either by internalized anxieties (e.g., inhibition) or by externalized rage (e.g., destructive behavior). *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 507-08.

119. *Id.* at 508.

120. See, e.g., *Mire v. Gauthier*, No. 86-52437 (15th D. Ct. La. 1988) (In *Mire* an expert explained the psychotherapeutic needs for the child and parents would require weekly or bi-weekly therapy. The child's therapy would address the sexual training and counseling required to avoid the high risk for sexual dysfunction and homosexuality. A complete, thorough psycho-

Diffusing expert testimony on the consequences of a molestation avoids an excessive verdict or an unreasonable settlement demand. While deposing the expert, defense counsel should explore the expert's opinion on the inconsistencies among the behavioral surveys. The expert should be asked if the consequences of a molestation and a rape are similar. Depending upon the expert's answer, defense counsel should bear in mind that a molestation usually involves permissive behavior, while the rape is nonpermissive. Trauma associated with a permissive act as compared to a nonpermissive act will have substantially less emotional impact.<sup>121</sup> If the expert opines that the molestation was long-term, what proof is he using to support the conclusion? Statistics support that molestations are usually of short duration and involve fondling or exhibition only.<sup>122</sup> If the expert predicts long-term effects of the molestations, how does he respond to the clinical studies that have not been conclusive of long-term effects?<sup>123</sup>

Additional questions that the expert should be asked include: what is the expert's opinion of the reliability of clinical studies versus scientific studies; what influence does each participant's unique personality and history have upon a clinical study result; could other life experiences produce similar symptoms? Sedney and Brooks conceded that long-term cause-effect relations are inconclusive.<sup>124</sup> The Schwartz study's major hypothesis was that the child most cognizant of the sexual nature of the incident will consequently suffer the greatest behavioral difficulties.<sup>125</sup> This theory was substantially contradicted by the data on the adolescent age group.<sup>126</sup> Neither of these clinical studies explained or considered the effect that an everyday crisis in a child's or a co-ed's life may have had upon the study. The inconsistencies, lack of scientific reliability, and infancy of clinical studies on molestations must be stressed in order to defuse the expert's impact.

#### IV. POLICY PROVISIONS

When presented with a claim alleging a molestation under a liability policy, the facts of the case must be analyzed and compared to the pertinent policy provision. For purposes of this note, analysis of sexual molestation claims will consider the language of the 1973 Comprehensive General Liabil-

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logical re-evaluation would include testing on at least a yearly basis for the next three years, and for future high-risk points in the child's life, *i.e.*, moving away from home, first year of marriage, birth of his first child, and when his offspring reaches pubescence. The present value of the estimated future medical treatment was \$102,650.00).

121. Thomas, *supra* note 98, at 181.

122. Kendall-Tackett, *supra* note 24, at 78.

123. Sedney, *supra* note 94, at 217.

124. *Id.*

125. Schwartz, *supra* note 49, at 507.

126. *Id.*



ity ("CGL") insurance policy.<sup>127</sup> The insuring agreement provides, "[T]he company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay because of bodily injury . . . to which this insurance applies, caused by an occurrence . . . even if any of the allegations of the suit are groundless, false, or fraudulent."<sup>128</sup>

### A. *Intentional Act Exclusion*

"Occurrence" is defined as "an accident including continuous or repeated exposure to conditions, which results in bodily injury . . . neither expected nor intended from the standpoint of the insured."<sup>129</sup> Traditionally, an accident has been defined as an event that is neither expected nor intended from the standpoint of the insured.<sup>130</sup> If the named insured is a corporation, then the entity is incapable of an intentional act.<sup>131</sup> Because only a person may commit an intentional act, the plaintiff's complaint will likely allege that someone acting on behalf of the corporation acted in a manner that legally obligates the corporation. The complaint will also probably allege that the individuals who acted on behalf of the insured corporation failed to supervise the alleged molester, were negligent in hiring the alleged molester, or ratified the alleged molester's acts.<sup>132</sup> For these causes of action, the CGL obligates the insurer to defend and indemnify the insured if a respondeat superior relationship is established between the named insured and the accused.

The question then becomes, is the insurer obligated to defend the accused as well as the insured? Courts have traditionally held that the duty to

127. The homeowner's policy contains similar language to the CGL. The major variance is that the intentional act exclusion under the homeowner's policy may excuse the insurer from its indemnity and defense obligations if the accused is a named insured. Because the CGL is designed for a corporate entity, the potential for vicarious liability is greater than under the homeowner's policy. See also *infra* note 131 and accompanying text.

128. The 1986 CGL policy does not contain the 1973 language of "even if any of the allegations of the suit are groundless, false or fraudulent." *Bodily Injury and Property Damage Liability*, FC&S Bulletins (Nat'l Underwriter Co.) Public Liability, at Aa-4 (Mar. 1988). The new language provides, "the insurer has the right and the duty to defend any suit seeking those damages." *Id.* Insurance Service Organization (ISO) commentary explains the omission of the language will require the insurer to defend allegations that are "potentially within coverage." *Id.*

129. *Id.*

130. *Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co.*, 17 Ohio App. 3d 127, \_\_\_, 477 N.E.2d 1227, 1233 (1984).

131. "[T]he only way in which a corporation can act is through the individuals who act on its behalf." *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

If the insured is a corporation, the definition of a named insured includes, "the organization so designated [in the declarations] and any executive officer, director or stockholder thereof while acting within the scope of his duties as such." *Bodily Injury & Property Damage Liability*, FC&S Bulletins (Nat'l Underwriter Co.) Public Liability, at Aa-1 (Jan. 1986).

132. See *infra* note 138 and accompanying text.

defend is broader than the duty to indemnify, and thus, if the allegations could fall within the policy coverage, the insurer is bound to defend.<sup>133</sup> The CGL policy excludes from coverage "bodily injury expected or intended from the standpoint of the insured."<sup>134</sup> The CGL also contains an exclusion for "personal injury arising out of the willful violation of a penal statute . . . committed by or with knowledge or consent of any insured."<sup>135</sup> Basic rules of contract construction require a court to give effect to the parties' intent as expressed in the terms of the contract.<sup>136</sup> Thus, even if the perpetrator qualifies as an insured by definition, the clear and unambiguous language of the CGL policy excludes the insurer's defense and indemnity obligations for the molester.<sup>137</sup>

### B. *Respondeat Superior and Summary Judgment Considerations*

The insured's vicarious liability poses a separate consideration for coverage analysis. The petition must be carefully reviewed to determine

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133. See, e.g., *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986); *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541 (S.D. Fla. 1987); *Reliance Ins. Co. v. Martin*, 126 Ill. App. 3d 94, 467 N.E.2d 287 (1984).

134. *Bodily Injury & Property Damage Liability*, FC&S Bulletins (Nat'l Underwriter Co.) Public Liability, at Aa-5 (Oct. 1986).

135. *Id.*

136. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 17 (1st Cir. 1982), cert. denied, 460 U.S. 1028 (1983) ("the dominant purpose is to give effect to the intentions of the parties. Where the policy language is unambiguous and the application of the policy to relevant facts is clear, that intent must be ascertained by the plain ordinary meaning of the contract language").

137. See, *supra* note 133.

Despite being excused from the duty to defend for the alleged perpetrator, consideration should be given to the consequences of a default judgment against the alleged molester, particularly in a case where there exists considerable doubt about the accused's culpability. Some courts have employed a subjective analysis of molestation claims and have determined that if the insured did not have the specific subjective intent of causing harm to the child, then his/her acts are deemed accidental and thus within the definition of "occurrence." See *State Auto Mut. Ins. Co. v. McIntyre*, 652 F. Supp. 1177 (N.D. Ala. 1987) (a grandfather's molestation of a grandchild was an unintentional consequence of an intentional act and not excluded); *Zordan v. Page*, 500 So. 2d 608 (Fla. Dist. Ct. App. 1986) (intentional act exclusion would not apply for a grandparent's molestation of his seven-year old step-granddaughter unless the insured acted with subjective intent to cause injury). But see *Landis v. Allstate Ins. Co.*, 516 So. 2d 305 (Fla. Dist. Ct. App. 1987) (child molestation acts by the child care facility operators were deliberate and intentional and thus excluded under the intentional act exclusion of the liability policy).

Other courts apply an objective analysis and infer an intent to inflict injury as a matter of law. See *Altena v. United Fire & Casualty Co.*, 422 N.W.2d 485 (Iowa 1988) (in sexual abuse cases the intent to inflict injury may be inferred as a matter of law from the nature of the act and the accompanying reasonable foreseeability of harm); *Horace Mann Ins. Co. v. Independent School Dist. No. 656*, 355 N.W.2d 413 (Minn. 1984) (high school basketball coach molesting a 9th-grade girl was not covered under a CGL policy because even if the insured did not subjectively intend to harm the girl, the intent to injure could be inferred from the nature of the acts).

whether a theory of respondeat superior has been pled. Often, the insured may be a school, church, day care facility, or a scouting organization, and the petition will allege the insured is independently responsible despite the intentional act exclusion. This allegation is premised upon the theory that the insured failed in its duty to properly supervise the employee/volunteer, negligently hired the person, or the insured ratified the person's acts by failing to remove the person once constructive notice of the molestation was received.<sup>138</sup>

A motion for summary judgment by the insured may be granted if an insured is not vicariously liable for the acts of its agent or employee. For example, in *Scott v. Central Baptist Church*<sup>139</sup> a Sunday school teacher was accused of sexually molesting a child.<sup>140</sup> Testimony at trial revealed that the child's mother did not suspect that her son was being sexually abused.<sup>141</sup> The molester had pled guilty to nine counts of child molestation in his criminal trial.<sup>142</sup> The church moved for a summary judgment claiming: (1) the molester's actions were not reasonably foreseeable; (2) the molester had no ostensible authority or agency with the church; and (3) the acts were independent self-serving pursuits unrelated to that of a Sunday school teacher.<sup>143</sup> The court, in granting summary judgment, held that the acts against the child were not incidental to a Sunday school teacher's duties nor were they foreseeable; therefore, they were not within the scope of the

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138. A strong argument exists that a ratification is not an independent act of negligence sufficient to constitute an occurrence. As the court explained in *Commercial Union Ins. Co. v. Superior Court*, 196 Cal. App. 3d 1205, 1210, 242 Cal. Rptr. 454, 455 (1987), the term "accident" is to be applied to the happening of an act itself and not the consequences of the act. *Id.*

The occurrence in a sexual molestation suit is the sexual contact act itself, not the ratification by the principal or employer of the agent's or employer's act. The ratification is not the injurious act.

Another consequence of a ratification theory may be seen in the following hypothesis: If you had a single act of molestation in one policy period and then a ratification by the principal or employer in a subsequent policy period, are both policies exposed? Under the theory that a ratification is not an occurrence, only the first policy is exposed and not the successive policy period.

139. *Scott v. Central Baptist Church*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (1988).

140. *Id.* at —, 243 Cal. Rptr. at 129. See also Brief for Respondent at 2, *Scott v. Central Baptist Church*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (1988). The teacher was not compensated by the church, had held this position for 19 years, and was generally reputed to be an excellent Sunday school teacher. *Id.* The specific duties of this position included teaching the Sunday school class for one hour in a church class room. *Id.* at 3. There were no other times in which the classes were taught and the classes were always taught on the premises with other adults present. *Id.*

141. *Scott v. Central Baptist Church*, 197 Cal. App. 3d 718, —, 243 Cal. Rptr. 128, 129 (1988). The court added that in fact the child's mother considered the accused to be a "perfect man and idealized him." *Id.*

142. *Id.*

143. *Id.*

teacher's employment.<sup>144</sup> The court applied the test of *Alma v. Oakland Unified School District*,<sup>145</sup> which stated that in order for an agency relationship to be established: (1) the act performed must be either required or incidental to his/her duties; or (2) the employee's misconduct must be reasonably foreseeable by the employer.<sup>146</sup> The court in *Scott* relied upon *Milla v. Tamayo*,<sup>147</sup> which applied the *Alma* test, to hold that the church was not responsible under a theory of respondeat superior, as "the connection between the duties [of a Sunday school teacher] and his wrongful actions had become so attenuated that the law [would] not hold the church vicariously liable."<sup>148</sup>

Faced with the intentional act exclusion of the molester's homeowner's coverage, the plaintiff may advance a public policy argument to compensate the victim under the CGL policy in his/her respondeat superior pleading. This theory, argued by the plaintiff in *Scott*, espouses that the employer is most capable of bearing the loss because of its ability to distribute the cost through pricing, rate charges, or liability insurance, thus shifting the costs to the community at large.<sup>149</sup> The weakness of this argument is that it ignores the purpose of the respondeat superior doctrine, which is to indemnify only those losses that occur in the conduct of the employer's business.<sup>150</sup> Simply stated, an employer in a legitimate corporate setting does not employ or establish an agency for the purpose of molesting children. When the moles-

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144. *Id.* at —, 243 Cal. Rptr. at 130-31. Plaintiff argued that the respondeat superior doctrine applied because the church placed the molester in a position of "trust and authority." *Id.*

145. *Alma v. Oakland Unified School Dist.*, 123 Cal. App. 3d 133, 139, 176 Cal. Rptr. 287, 289 (1981).

146. *Id.* In *Alma* a student allegedly was raped by the school's custodian on the premises and during regular business hours. *Id.* at 137, 176 Cal. Rptr. at 288. The court held that: molestation was not a part of the custodian's job duties; these alleged acts were prompted by wholly personal motivations; and even though the acts were performed on the premises, the molestations were clearly beyond the scope of the employment of a custodian. *Id.* at 140-41, 176 Cal. Rptr. at 290.

147. *Milla v. Tamayo*, 187 Cal. App. 3d 1453, 232 Cal. Rptr. 685 (1986). In *Milla* priests utilized their positions to have sexual intercourse. *Id.* at 1458, 232 Cal. Rptr. at 688. As a result of the priests' actions, the girl became pregnant and was secreted to the Philippine Islands where she was neglected and became malnourished. *Id.* A civil action followed, and the Archbishop of the Los Angeles Archdiocese was named a defendant on the theory of respondeat superior. *Id.* The court applied the *Alma* test and concluded:

[i]t would defy every notion of logic and fairness to say the sexual activity between a priest and a parishioner is a characteristic of the Archbishop of the Roman Catholic Church. There is simply no basis for imputing liability for the alleged conduct of the individual defendant-priests in this instance to the Archbishop.

*Id.* at 1461, 232 Cal. Rptr. at 690.

148. *Scott v. Central Baptist Church*, 197 Cal. App. 3d 718, 724, 243 Cal. Rptr. 128, 132 (1988).

149. Respondent's Brief at 15, *Scott v. Central Baptist Church*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (1988).

150. *Alma v. Oakfield Unified School Dist.*, 123 Cal. App. 3d at 144, 176 Cal. Rptr. at 292.

tation is unforeseeable and beyond the scope of employment or the agency, a motion for summary judgment is a viable defense.<sup>151</sup>

### C. *What Is the Occurrence in a Sexual Molestation Case?*

If the case is inappropriate for summary judgment based upon respondeat superior, the scope of exposure must be determined. Some sexual molestation claims involve a number of defendants or plaintiffs, and the acts may occur over an extensive time period.<sup>152</sup> With multiple plaintiffs and uncertainty of the specific dates on which the molestations occurred, the following issues arise: (1) is each sexual contact an occurrence; or (2) is each child's claim considered the occurrence; or (3) is each perpetrator an occurrence; or (4) is the independent act of negligence by the insured (i.e., negligent hiring/supervising) the occurrence; or (5) will each new policy year trigger a new occurrence? The occurrence must be established so that the legal liability among codefendants and their respective insurers can be determined.<sup>153</sup> The occurrence determination also impacts the insurer's financial responsibility, since the limit of liability for an insurer is based upon a "per occurrence limit."<sup>154</sup>

### D. *The Four "Trigger" Theories*

Few cases have addressed the occurrence issue in the context of molestation claims, but several cases have discussed the triggering of an occurrence for pollution liability claims.<sup>155</sup> Four distinct theories have emerged to define when the CGL insurance coverage is triggered.

First, courts look to the actual injury itself, or injury in fact.<sup>156</sup> This

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151. See also *Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346 (D.C. 1987) (part-time janitor who molested children at the church was not entitled to the respondeat superior doctrine as he exceeded the scope of his employment); *Big Brother/Big Sister Inc. v. Terrell*, 183 Ga. App. 496, 359 S.E.2d 241 (1987) (the organization was not liable under respondeat superior for a volunteer's sexual molestation of a child because the act was not within the scope of the volunteer's duties and was personal in nature).

152. See *supra* note 93 and accompanying text.

153. If the sexual molestation occurred over a period of 10 years, the insured may have had three to five different insurers during the decade. An additional party of interest will be the reinsurance carriers, who may be obligated by a follow-the-fortunes clause in the underlying CGL policy for the occurrence determination.

154. The CGL policy's insuring agreement states, "The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damage because of personal injury . . . caused by an occurrence." *Bodily Injury and Property Damage Liability*, FC&S Bulletins (Nat'l Underwriter Co.) Public Liability, at Aa-2 (Jan. 1986). The limit of liability is listed for each occurrence (i.e. \$500,000 each occurrence). *Id.*

155. See, e.g., *American Motorists Ins. Co. v. General Host*, 667 F. Supp. 1423 (D. Kan. 1987); *American Mut. Liability Ins. Co. v. Neville Chem. Co.*, 650 F. Supp. 929 (W.D. Pa. 1987); *Fisher & Porter Co. v. Liberty Mut. Ins. Co.*, 656 F. Supp. 132 (E.D. Pa. 1986).

156. See *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760 (2d Cir. 1984).



trigger theory provides that policies at issue provide indemnity coverage only for those injuries that occur during the policy term.<sup>157</sup> Under this theory, the policy is triggered even if the injury is not discovered, is not diagnosable, and is not compensable in a lawsuit for damages.

The second trigger theory is the manifestation theory.<sup>158</sup> This theory provides that only the policy in force at the time the damage first manifests itself is triggered.<sup>159</sup> The Fourth Circuit Court of Appeals in *Mraz v. Canadian Universal Insurance Co.*<sup>160</sup> explained the manifestation theory in the following passage:

There are situations . . . in which the existence or scope of damage remains concealed or uncertain for a period of time even though damage is occurring. The leaking of hazardous waste is a clear example. Determining exactly when damage begins can be difficult, if not impossible. In such cases, we believe the better rule is that the occurrence is deemed to take place when the injuries first manifest themselves.<sup>161</sup>

The third trigger theory is the exposure theory.<sup>162</sup> This theory provides that each policy covering the risk at the time the claimant was exposed to the hazard is triggered.<sup>163</sup> The CGL policy is, therefore, triggered even though the exposure has not yet resulted in any actual injury.<sup>164</sup> In *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, the manufacturer had been insured with five different insurance companies and was the defendant in 1370 lawsuits alleging asbestos injuries.<sup>165</sup> The Sixth Circuit

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157. *Id.* at 763. The court rejected the other trigger theories and held:

The plain language demands that the insured prove the cause of the occurrence (accident or exposure), the result (injury, sickness, or disease), and that the result occurred during the policy period. An exposure that does not result in injury during coverage would not satisfy the policy's terms. On the other hand, a real but undiscovered injury, proved in retrospect to have existed at the relevant time, would establish coverage, irrespective of the time the injury became manifest.

*Id.* (quoting *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1497 (S.D.N.Y. 1983)).

158. See *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), cert. denied, 460 U.S. 1028 (1983). The court in *Eagle* concluded that asbestosis is a disease and the policy language of "sickness or disease" in the CGL policy itself supports the manifestation theory. *Id.* at 19.

159. *Id.*

160. *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986).

161. *Id.* at 1328.

162. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), modified, 657 F.2d 814 (6th Cir.), cert. denied, 454 U.S. 1109 (1981).

163. *Id.* at 1222.

164. *Id.* at 1223. The court in *Forty-Eight* held that each insurer having a policy in effect during any stage of the asbestos exposure is jointly and severally liable. *Id.* at 1217.

165. *Id.* at 1214-15. On appeal some of the insurers sought to obtain a reversal based on a manifestation theory, while others sought reversal based on the exposure trigger theory. *Id.* at 1217-18. This is an example of the in-fighting inherent with multiple insurers, each arguing the most beneficial trigger theory for their respective position. Another option to consider in a case

opined, "Bodily injury should be construed to include the tissue damage which takes place upon initial inhalation of asbestos. This is both a literal construction of the policy language and the construction which maximizes coverage."<sup>166</sup>

The fourth trigger theory, and perhaps the broadest, is the continuous trigger theory.<sup>167</sup> Under this theory, every policy exposed from the time of the first exposure to the hazard through the time the damage first became manifested, is triggered and must respond to the risk.<sup>168</sup> Thus, all insurers covering the time frame of the exposure are jointly and severally liable for coverage.<sup>169</sup> This theory is significant because it appeals to judges and plaintiffs in a sexual molestation suit. Of the four theories, this approach guarantees the most coverage for the most claimants. Where damage is continuing over more than one policy period, the carrier on the loss at the time of the first manifestation of damage remains on the loss until all damage has ceased. Subsequent carriers providing coverage are also on the loss from the date of the commencement of their policy period until damage ceases, even though the damage commenced before their policies came into effect.<sup>170</sup>

In applying the various trigger theories to a sexual molestation exposure involving multiple insurers and multiple policy periods, the most likely to be applied, in this author's opinion, are the manifestation or the continuous trigger theories.<sup>171</sup> The manifestation theory would expose the CGL policy

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involving multiple defendants is to join with the plaintiff in a "high-low" agreement. This author has used this arrangement when a co-defendant refused to make a settlement offer. The details usually provide a minimum and a maximum dollar amount controlling your exposure to the plaintiff. If the verdict is above the high amount the plaintiff is limited to the agreed high amount. If the verdict is below the low amount the defendant pays the plaintiff the agreed low amount. This insures a limit on the insurer's exposure to the verdict rendered.

166. *Id.* at 1223.

167. *See Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

168. *Id.* at 1047. In *Keene* four different insurers provided coverage for the time period in question. *Id.* The court rejected the manifestation theory as the sole trigger theory because the medical evidence for asbestos-related injuries proved the injury is indivisible and the quantum of injury that occurs at any point during the injurious process is indeterminate. *Id.*

169. *Id.*

170. *See, e.g., California Union v. Landmark Ins. Co.*, 145 Cal. App. 3d 462, 464, 193 Cal. Rptr. 461, 464 (1983) (in a dispute between two successive insurers over coverage for damage caused by continuous leakage from a swimming pool for more than 18 months, the insurer whose policy was in effect at the time of the first manifestation was not absolved of liability after its policy expired, but instead was jointly and severally liable with the successor insurer).

171. Under the injury in fact theory, a CGL policy is triggered only when the cause and the injury fall within the policy period. In a molestation suit, the coverage is triggered only when the touching actually occurred and an injury is sustained. Under the exposure theory, every policy in effect during the sexual contact(s) is exposed regardless of the manifestations. Similar to the discovery rule of *Mastro v. Brodie*, 682 P.2d 1162 (Colo. 1984) (claimant's statute of limitations begins to run when the claimant has knowledge of facts which put a reasonable person on notice of an injury), under either the manifestation or continuous trigger theory, the possibility of a statute of limitation defense should be considered for claims presented by young

in effect when the child's behavioral or physical injuries manifested themselves. In *Mire v. Gauthe*<sup>172</sup> a number of children were molested by a number of perpetrators over an extended time frame. Many of the children's behavioral problems did not manifest themselves until the molestations became publicly known years after the alleged molestations.<sup>173</sup> Clinical psychologists in the case agreed that until the children were confronted by either their parents or other adults with the fact that they had been molested, they did not manifest any behavioral problems.<sup>174</sup> Under a strict manifestation theory, the insurance carrier's CGL policy that is in effect when the molestation becomes public (and thus manifests a behavioral problem) is exposed to the entire liability regardless of when the actual molestation occurred. The impact of this theory is most significant where the molestations occur over an extended period of time.<sup>175</sup>

The continuous trigger theory, if applied to a sexual molestation allegation, would expose the insurer's CGL policies from the time the sexual contact began through the manifestation, and only is extinguished when the sexual contact has stopped. This theory is the most appropriate trigger theory for a sexual molestation suit. Courts, because of the nature of the suit and the child's involvement, are influenced by the administrative convenience and the protection afforded to the insured.<sup>176</sup>

In a molestation suit, it is often impossible to precisely determine when each sexual contact took place or when a manifestation of an injury occurred. The rule of joint and several liability under the continuous trigger theory encourages insurers to settle rather than litigate their respective contributions. It also eliminates court apportionment of the loss among the coverage periods of the implicated policies. Judicial economy and the potential of increased availability of insurance funds to the victims appear to be compelling reasons for adoption of the continuous trigger theory.

#### V. DEFENDING AGAINST EXPERT TESTIMONY IN SEXUAL MOLESTATION LITIGATION

In most sexual molestation claims, the alleged molester and the child are the only witnesses to the molestation. Typically, no corroborating medical or other demonstrative evidence is available.<sup>177</sup> Due to this vacuum of

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adults alleging a molestation during their minority years.

172. *Mire v. Gauthe*, No. 86-52437 (La. Dist. Ct. June 17, 1988).

173. *Id.*

174. *Id.*

175. See *supra* notes 72-73 and accompanying text.

176. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1048. The court in *Keene* acknowledged that its determination of continuous coverage was not based upon contract interpretation but on the desire to avoid complexity and to expedite recovery by the victims. *Id.* at 1051 n.38.

177. Murray, *Expert Testimony in Sexual Abuse Litigation*, FOR THE DEFENSE, July

evidence, psychiatrists, psychologists, and social workers have been allowed to testify as to the ultimate issue in the case: did a molestation take place?<sup>178</sup> Objections to this type of testimony should be made on the basis that the scientific community generally does not recognize such testimony and that such expert testimony invades the province of the jury.<sup>179</sup>

#### A. *Is There a Causal Relation?*

The plaintiff in the sexual molestation suit may offer expert testimony regarding sexually abused child syndrome.<sup>180</sup> A theory frequently advanced by the experts attempts to identify, through clinical observational studies, those characteristics and behaviors commonly associated with abused children.<sup>181</sup> The expert who has recognized certain symptoms in the plaintiff extrapolates that the victim must have been sexually abused.<sup>182</sup> Expert testimony of this type is analogous to rape trauma syndrome testimony.<sup>183</sup> Like rape trauma syndrome, sexually abused child syndrome is a subpart of a larger phenomenon known as posttraumatic stress disorder.<sup>184</sup> Posttraumatic stress disorder is defined and described in *Diagnostic and Statistical Manual (DSM) III*, a book published by the American Psychiatric Association,<sup>185</sup> to include the possibility of a culmination of several traumatic events or stress in one's life.<sup>186</sup> The American Psychiatric Association states that the symptoms of the various types of posttraumatic stress disorder may be similar.<sup>187</sup> Among the stresses producing this disorder are: natural disas-

1988, at 14, 14.

178. *Id.* See *State v. Kim*, 64 Haw. 598, 645 P.2d 1330 (1982) (psychiatrist described characteristics of abused children and offered opinion that the expert believed the child); *Bussey v. Commonwealth*, 697 S.W.2d 139 (Ky. 1985) (psychiatrist allowed to testify that a child had been abused based upon child sexual abuse syndrome); *State v. Myers*, 359 N.W.2d 604 (Minn. 1984) (psychologist stated her opinion that child was truthful about having been abused).

179. *Murray*, *supra* note 177, at 15. Expert testimony invades the province of the jury by bolstering the child's testimony and serving as a legal conclusion. *Id.* at 18. These objections should be framed under the Federal Rules of Evidence 401, 403, 702, and 703, or their state counterparts.

180. *Kluft, An Update on Multiple Personality Disorder*, 38 *HOSPITAL & COMMUNITY PSYCHIATRY* 363 (Apr. 1987).

181. *Murray*, *supra* note 177, at 15.

182. *Id.*

183. *Feeney, Expert Psychological Testimony on Credibility Issues*, 115 *MIL. L. REV.* 121 (1987). Rape trauma symptoms include "fear, guilt, embarrassment, excessive motor activity, nightmares, and phobic reaction." *Id.* at 130 n.58. The victims manifest these symptoms by recanting, denying the event occurred, and suffering real or feigned memory lapses. *Id.* This pattern is frequently observed in the child sexual abuse cases as well. *Id.*

184. *State v. Black*, 109 Wash. 2d 336, —, 745 P.2d 12, 16 (1987).

185. *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, Am. Psychiatric Assoc. (3d ed. 1987).

186. *Hiers, Defending Against Testimony of Psychiatrists and Psychologists in Civil Cases*, Defense Research Institute, Inc., 4 *Monograph* 15 (1987).

187. *Id.*

ters (e.g., floods or earthquakes); accidental man-made disasters (e.g., car accidents with serious physical injury, airplane crashes, or fires); or deliberate man-made disasters (e.g., bombing or torture).<sup>188</sup> The report explains that "after experiencing the stress, many people develop symptoms of excessive autonomic arousal, such as hyperalertness, exaggerated startle response, and difficulty falling asleep. Some complain of impaired memory or difficulty in concentrating or completing tasks."<sup>189</sup> Empirical literature on child molestation also confirms that physical abuse, family chaos, and emotional neglect can also produce in the nonmolested child the same symptomology exhibited by children who have been sexually molested.<sup>190</sup> A noted child molestation expert, David Findelhor, has written:

The literature on child sexual abuse is full of observations about problems that are thought to be associated with a history of abuse, such as sexual dysfunction, depression, and low self-esteem. However, such observations have not yet been organized into a clear model that specifies how and why sexual abuse might result in this kind of trauma.<sup>191</sup>

The expert testimony on sexually abused child syndrome is not based upon scientific psychological tests, but rather clinical experience.<sup>192</sup> As the Sedney/Brooks and the Schwartz studies suggest, many factors in a child's life may attribute to the symptoms observed in the child during the expert interview process.<sup>193</sup> Sexually abused child syndrome, a sub-part of post-traumatic stress disorder, demands a thorough cross-examination of the expert to determine if *all* other causal factors have been eliminated before the diagnosis was assigned by the expert.<sup>194</sup>

### B. *The Frye Rule and Federal Rule of Evidence 702*

The rule established in *Frye v. United States*<sup>195</sup> is the prevailing standard by which the admission of expert testimony based on a scientific principle under Federal Rule of Evidence 702 is analyzed.<sup>196</sup> Under the *Frye*

188. *Id.*

189. *Id.*

190. Murray, *supra* note 177, at 16.

191. FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE 180 (1986).

192. Murray, *supra* note 177, at 16. Murray explains, "It simply does not follow that clinical experience provides the therapist with a crystal ball. It is certainly not a substitute for scientific research." *Id.*

193. See *supra* notes 94, 110, 114 and accompanying texts.

194. See Marcus, *Mental Disability Claims: A New Epidemic?*, CPCU J., June 1988, at 112, 113-18 ("a psychiatric diagnosis must be supported by positive findings, [which] meet the criteria established by the DSM and *must never be made solely by exclusion*; a bias of doctors is that they are trained to look for, and therefore expect to find a disease; and a diagnosis must be based upon sufficient objective testing").

195. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

196. The *Frye* rule was described by the court as follows: "[w]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle, the



rule, the expert testimony should be excluded because the scientific principle underlying the opinion is not "sufficiently established in the particular field in which it belongs."<sup>197</sup> As a Louisiana appellate court recognized in a child molestation case, "Appellants have failed to prove that future psychological or psychiatric treatment for 'CM' [child molestation] is anything more than a speculative possibility. None of the witnesses ventured to predict with certainty . . . the need for future counseling."<sup>198</sup>

Expert testimony requires reliability. Two aspects of reliability in the context of scientific evidence exist: accuracy and consistency.<sup>199</sup> Accuracy refers to how often the technique directly diagnoses what it purports to diagnose, and consistency refers to how often the same results are reached by different experts.<sup>200</sup> If scientific evidence gains general acceptance in the field in which it belongs, the scientific evidence has some basis for being reliable.<sup>201</sup> Expert testimony in child molestations has not reached a point of sufficient reliability. As one commentator explained:

Behavioral scientists have recognized that determining the credibility of a child sexual abuse complainant is not a task for which they are particularly well equipped. The simplest and most forthright statement to be found by behavioral scientists regarding this subject is '[l]ying is not easily detectable by psychiatrists.' There exist complex difficulties facing the clinician trying to separate fantasy from reality in children's reports of sexual abuse.<sup>202</sup>

Sexually abused child syndrome was not devised to determine the truth or accuracy of a particular past event, but rather, it was developed as a therapeutic tool to identify, predict, and treat emotional problems experienced by patients. To allow expert testimony that bolsters a child's credibility on

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thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014.

In some jurisdictions the *Frye* rule may be contradicted by the *Downing* rule. The *Downing* rule rejects the general acceptance standard of the *Frye* rule as the sole determinant of admissibility, and provides that this is but one factor for a district court to consider for the admissibility of expert testimony. *United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir. 1985). *Downing* emphasizes the "helpfulness" standard of Rule 702, but explains that reliability standards are to be established by: (1) the relation to more established modes of scientific analysis; (2) specialized literature on the subject; (3) the qualifications and professional stature of the expert; and (4) the rate of error recurrence in the field. *Id.* The *Downing* rule is equally supportive of non-admission of expert testimony due to the lack of scientific research on the subject matter of the testimony, sexually abused child syndrome.

197. *Frye v. United States*, 293 F. at 1013.

198. *McGraw v. Orleans Parish School Bd.*, 519 So. 2d 847, 850 (La. Ct. App. 1988).

199. McCord, *Admissibility of Non-Traditional Psychological Evidence*, 66 ORE. L. REV. 19, 98-99 (1987).

200. *Id.* The divergence of the clinical studies is *prima facie* evidence of the problems with the accuracy and consistency elements of sexually abused child syndrome.

201. *United States v. McBride*, 786 F.2d 45 (2d Cir. 1986).

202. McCord, *supra* note 199, at 44.

the ultimate issue but which is not even designed or proven to be a credibility measure is inconsistent with the spirit of Rules 702 and 703 and the defendant's right to a fair trial. The effect of the admission of such testimony is that the expert's testimony is substituted for the victim's testimony. A designated therapeutic tool is transformed into an expert's opinion which unduly influences the jury.

### C. Invasion of Jury Province

An additional objection to expert testimony is that the testimony invades the province of the jury.<sup>203</sup> The following three contentions support this objection: (1) the testimony does not assist the trier of fact, as the subject is not beyond the ken of the jury; (2) determining the credibility of a witness is for the jury; and (3) the testimony is unduly prejudicial because it overwhelms the jury with an aura of scientific reliability.<sup>204</sup> The essence of these objections was cogently expressed by the court in *State v. Fitzgerald*<sup>205</sup> as follows:

Credibility is a crucial issue because the children's and Fitzgerald's [defendant's] testimony directly conflict. It is improper for an expert to base an opinion about an ultimate issue of fact solely on the expert's determination of a witness' veracity. The physical evidence does not show whether sexual abuse of the children occurred. Dr. Griffith's opinion is based solely on her evaluation of the children's version of the events. "An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility."<sup>206</sup>

In a molestation case in which the only evidence of the act is the child complainant's testimony, the court should not allow an expert to bolster the child's credibility. If the expert is allowed to bolster the child's credibility, the result is a substitution of the expert's veracity for the child's, which is an invasion of the jury's function.

Federal Rule of Evidence 403 specifies that expert testimony "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."<sup>207</sup> The Advisory Committee Notes to Rule 403 explain the meaning of "unfair

203. *Id.* at 26.

204. *Id.*

205. *State v. Fitzgerald*, 39 Wash. App. 652, 694 P.2d 1117 (1985).

206. *Id.* at \_\_\_, 694 P.2d at 1121 (emphasis added). See also *State v. Middleton*, 294 Or. 427, \_\_\_, 657 P.2d 1215, 1221 (1983) (expert testimony may not go so far as expressing an opinion to whether the witness is telling the truth); *Kirkpatrick v. State*, 747 S.W.2d 833, 836 (Tex. Ct. App. 1987) ("[a] psychiatrist . . . may not be permitted, even implicitly, to advise the jury as to which witness is more credible, especially in cases lacking physical evidence or eye-witnesses, where the resolution of the pivotal issues entirely depends on the complainant's credibility").

207. FED. R. EVID. 403.

prejudice" as "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one."<sup>208</sup> Any adverse evidence introduced by the plaintiff is prejudicial to the defendant, thus, the salient inquiry for the court is whether the probative value of the evidence is substantially outweighed by its prejudicial effect.<sup>209</sup> A presumption of admissibility is attached to Rule 403.<sup>210</sup> In spite of this presumption, experts, because of their academic and professional status, do overawe the jury and thus substantially prejudice a defendant in a molestation trial. To allow an expert to testify on the ultimate issue is to invite the jury to abdicate its responsibility of factfinding. The special aura of scientific reliability inherent in the expert's testimony replaces the jury's fact-finding function. Because of the uniqueness of a child molestation case, an expert opinion offered for the purpose of determining the ultimate issue is substantially prejudicial and should not be permitted pursuant to Rule 403.<sup>211</sup>

## VI. CONCLUSION

The clinical studies, though inconclusive in many respects, support the fact that the frequency rate of molestations is substantial.<sup>212</sup> This fact alone is not enough to force insurers to discontinue writing liability insurance. From one perspective, it must be noted that even though a substantial number of adults have reported a childhood molestation, not all of these adults suffer from deep-seated permanent psychopathology now and for the rest of their lives. Clinical studies or an expert's clinical experience have not conclusively proven that every molested child will end up as an adult who is an unemployable drug addict or alcoholic, destined to be in and out of jail for the rest of his or her life.

The cost of a false accusation may be substantial to a defendant. Even in lieu of a complete recantation of the allegation, the defendant is socially marked in his community and employment arena. All cases require extensive preparation for trial, but the molestation claim must be exhaustively investigated during the discovery phase to provide an adequate defense for the insured.

The defense lawyer and the insurer must be prepared for a determination by the trier of fact that the child's credibility exceeds the defend-

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208. 56 F.R.D. 183, 218 (1976).

209. P. ROTHSTEIN, *RULES OF EVIDENCE FOR THE UNITED STATES COURTS & MAGISTRATES* 72 (1980). *Accord* 2 WEINSTEIN & BURGER, *WEINSTEIN'S EVIDENCE* ¶ 403-04 (Jan. 1986).

210. *Id.*

211. The unique characteristics include: the child's testimony is usually the only evidence of a molestation; the lack of scientific research concerning molestations; the contradictions within the clinical studies; the causal factors, other than molestation, which may attribute to the behavioral symptoms; and the child's learned behavior responses in the interview process.

212. In a molestation suit this author observed in California, during voir dire, as many as 33% of the prospective jurors reported some type of molestation during their childhood.

ant's.<sup>213</sup> This determination must be the jury's decision and not be the result of an expert's credibility being substituted for the plaintiff's. The jury was impaneled to make a decision. The responsibility of that duty to decide the issues of the case based upon the facts in evidence cannot be abdicated to an expert. The jury must reach its own conclusion and not rely upon an expert's opinion founded upon assumptions that have not yet been tested or accepted by the mainstream of the psychological, scientific community.

*Noel McKibbin*

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213. Hopefully, these results can be anticipated and thus settlement is consummated rather than a jury verdict.