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STATE v. SORENSON¹

THE ADEQUACY OF THE RESIDUAL EXCEPTIONS IN CHILD SEXUAL ABUSE CASES: FIVE-PART TEST PUTS AN END TO THE CRITICISM

INTRODUCTION

Child sexual abuse. Nobody likes to think about it. Most people would like to think it does not happen -- but it does -- with shocking frequency. Although statistical estimates vary, all studies indicate the severity of the problem. One study has indicated that possibly “160,000 women per million in this country may have been incestuously abused before the age of eighteen, and 45,000 per million may have been victimized by their fathers.”² Some studies have projected that “a child is molested every two minutes in the United States; the majority of the victims are between the ages of eight and [thirteen].”³ Long-term effects of incestuous relationships include, “[p]romiscuity, inability to assume a wife/mother role, alcoholism, drug abuse, prostitution, sexual dysfunctioning, delinquency, depression, and suicide”⁴

In *State v. Sorenson*,⁵ a seven-year-old girl’s father and uncle had sexual intercourse with her.⁶ The court allowed a social worker to testify as to what the girl had told her.⁷ Finally, a court has set forth a detailed test for use in determining the admissibility of hearsay evidence in child sexual abuse cases. This casenote will analyze the court’s five-part test, and discuss how it was applied in *Sorenson*. The casenote will then compare the *Sorenson* test (used in conjunction with the residual exceptions) to statutes providing for specific hearsay exceptions in child sexual abuse cases.

FACTS

In *Sorenson*, a social worker interviewed L.S., a seven-year-old girl, regarding possible sexual abuse.⁸ During the interview, L.S. used “anatomically-correct dolls, and crude, explicit language” to reveal that her father, Ronald Sorenson, and her

¹ 143 Wis.2d 226, 421 N.W.2d 77 (1988).

² D.E.H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* 10 (1986).

³ Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged, American Bar Association (1985) (citing McCall, *The Cruellest Crime: Sexual Abuse of Children*, LIFE, Dec. 1984, at 35).

⁴ B. VANDER MEY & R. NEFF, *INCEST AS CHILD ABUSE: RESEARCH AND APPLICATIONS* 69 (footnotes omitted).

⁵ 143 Wis. 2d 226, 421 N.W.2d 77 (1988).

⁶ *Id.* at 233, 421 N.W.2d at 79.

⁷ *Id.* at 232, 421 N.W.2d at 80.

⁸ *Id.* at 233, 421 N.W.2d at 79.

uncle, Donald Sorenson, had sexually assaulted her.⁹ The social worker reported her findings to a deputy sheriff.¹⁰

At Ronald Sorenson's preliminary hearing, L.S. admitted that her uncle assaulted her, but would not answer questions regarding her father's assault on her.¹¹ However, L.S. admitted that she had told the social worker a "secret about daddy."¹² Pursuant to section 908.04(1)(b), Stats.,¹³ the trial court declared L.S. an unavailable witness.¹⁴

The trial court allowed the social worker to testify regarding L.S.'s statements.¹⁵ The social worker testified that L.S. reported that both her uncle and her father had sexually abused her, that her father had abused her when her mother was at the doctor's office, and that "she had to wipe herself off after her father assaulted her and that her father told her to tell her mother that she had 'wet her pants.'"¹⁶ The social worker further testified that L.S. distinguished between her uncle's assault, which occurred on the living room couch, and her father's assault which took place in the bathroom.¹⁷ The social worker also testified that L.S. informed the social worker that she did not testify against her father because "she [L.S.] was not going to have Daddy go to jail, Mommy would be mad at her, she wouldn't get to go back home."¹⁸ The social worker also testified that between the time L.S. was removed from her home and her father's arrest,¹⁹ L.S.'s father had contacted the social worker to see whether L.S. had talked about her father at all.²⁰

During the trial, the examining physician testified that L.S. had had sexual intercourse repeatedly over a period of time,²¹ that L.S. had voluntarily reported that

⁹ *Id.*

¹⁰ *Id.* Ronald Sorenson was arrested three days after Donald Sorenson and was charged with one count of first degree sexual assault Wis. STAT. ANN. § 940.225(1)(d) (West 1975). *Id.* at 233-34, 421 N.W.2d at 80. Section 940.225(1)(d) provides in pertinent part as follows: *Sexual assault.* (1) First Degree Sexual Assault. Whoever does any of the following is guilty of a Class B felony: . . . (d) Has sexual contact or sexual intercourse with a person [twelve] years of age or younger.

¹¹ *Sorenson*, 143 Wis. 2d at 234, 421 N.W.2d at 80.

¹² *Id.*

¹³ Section 908.04(1)(b) provides in pertinent part as follows: "*Hearsay exceptions; declarant unavailable; definition of unavailability.* (1) 'Unavailability as a witness' includes situations in which the declarant: . . . (b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so." See also corresponding FED. R. EVID. 804(a)(2).

¹⁴ *Sorenson*, 143 Wis.2d at 234, 421 N.W.2d at 80. The trial court did not order L.S. to testify since "it would have been 'fruitless' and 'inappropriate' because of her young age." *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 235, 421 N.W.2d at 80.

¹⁷ *Id.*

¹⁸ *Id.* at 235-36, 421 N.W.2d at 80.

¹⁹ L.S.'s father, Ronald Sorenson, was informed that L.S. was being placed in a foster home due to suspected sexual abuse by Donald Sorenson. *Id.* at 233, 421 N.W.2d at 79-80. Three days later, Ronald Sorenson was also arrested. See *supra* note 10.

²⁰ *Id.* at 236, 421 N.W.2d at 80.

²¹ *Id.* at 237, 421 N.W.2d at 81. According to the examining physician, the last act occurred approximately between four to seven days before L.S.'s initial interview with the social worker. *Id.*

her father and uncle sexually abused her,²² and that L.S. “spontaneously drew a picture” depicting a man, whom she identified as “daddy,” with an “enormously distorted,” “erect” penis.²³

At the trial, L.S. used anatomically-correct dolls to describe her father’s acts of sexual intercourse with her.²⁴ Three videos of L.S.’s testimony were shown to the jury.²⁵ The first video was taken at Ronald Sorenson’s preliminary hearing.²⁶ The second video was taken for use at a juvenile placement hearing.²⁷ The third video was taken during Donald Sorenson’s preliminary hearing.²⁸

At the trial, Ronald Sorenson testified that he did not sexually abuse L.S., but that he believed her uncle did assault L.S. over a period of time.²⁹ He also testified that he had not been alone with L.S. for any long period of time four to seven days before her interview with the social worker.³⁰

Based primarily on the social worker’s testimony,³¹ the trial court found probable cause to bind Ronald Sorenson over for trial.³² Before trial, Ronald Sorenson moved to dismiss, claiming that the trial court had based its determination of probable cause on inadmissible hearsay;³³ therefore, the trial court lacked jurisdiction.³⁴ Ronald Sorenson also moved to enjoin the testimony of both the examining physician and the social worker, again claiming inadmissible hearsay.³⁵ The trial court denied Ronald Sorenson’s motions.³⁶

The trial court admitted the hearsay testimony under an “expanded” interpre-

²² *Id.* The physician also testified that L.S. distinguished between the different locations in her house (*see supra* text accompanying note 17) where her father and uncle had assaulted her. *Id.* A clinical psychologist also examined L.S. and testified that L.S. admitted she was assaulted by Ronald as well as Donald Sorenson, and described L.S. as “deficient in being able to ‘sequence acts and times,’” “distractible,” “verbal ability impaired,” and “very anxious.” *Id.* at 238, 421 N.W.2d at 81-82.

²³ *Id.* at 237, 421 N.W.2d at 81.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* In this video, L.S. stated that she was sexually assaulted by “Daddy” and that she did not tell her mother because “it was a secret.” *Id.*

²⁸ *Id.* In this video, L.S. answered “yes” when she was asked if the defense attorney assaulted her, then nodded “no” when asked the same question again, and then nodded “yes” to answer that she was confused. *Id.* at 238, 421 N.W.2d at 81.

²⁹ *Id.* at 239, 421 N.W.2d at 82.

³⁰ *Id.* This is when the last act of sexual abuse occurred. *See supra* note 21. L.S.’s mother also testified that “she had told L.S. not to say anything about her father at that [preliminary] hearing.” and that both Donald and Ronald Sorenson had had opportunities to be alone with L.S. *Id.* at 238, 421 N.W.2d at 81.

³¹ *Id.* at 236, 421 N.W.2d at 81.

³² *Id.*

³³ *Id.* “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c).

³⁴ *Sorenson*, 143 Wis. 2d at 236, 421 N.W.2d at 81.

³⁵ *Id.* at 236-37, 421 N.W.2d at 81.

³⁶ *Id.* at 237, 421 N.W.2d at 81.

tation of the hearsay exception for former testimony.³⁷ The jury convicted Ronald Sorenson of first degree sexual assault.³⁸

The court of appeals reversed the judgment, holding that no probable cause existed because the testimony given at the preliminary hearing was inadmissible; accordingly, Ronald Sorenson was improperly bound over for trial.³⁹ L.S. appealed to the Supreme Court of Wisconsin, which reinstated the trial court's conviction.⁴⁰

The Wisconsin Supreme Court began its analysis by discussing the admissibility of the hearsay statements under the traditional hearsay exceptions.⁴¹ First, the court determined that the former testimony exception was inapplicable because the testimony was not given "at a prior judicial hearing or proceeding, or in a formal deposition," and opposing counsel did not have the opportunity "to develop testimony on cross-examination" as required by section 908.045(1), Stats.⁴² The court then stated that it would not address the exception for statements against the declarant's interest because the record was not fully developed as to whether, at the time of the social worker's interview with L.S., L.S. was aware of the impact of her statements regarding her father.⁴³

Instead, the court analyzed the residual hearsay exception⁴⁴ and its application

³⁷ *Id.* at 240, 421 N.W.2d at 82. Section 908.045(1) provides in pertinent part as follows: "*Hearsay exceptions; declarant unavailable.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition . . . at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination" See also corresponding FED. R. EVID. 804(b)(1).

³⁸ *Sorenson*, 143 Wis. 2d at 239, 421 N.W.2d at 82.

³⁹ *Id.* at 239-40, 421 N.W.2d at 82.

⁴⁰ *Id.* at 232-33, 421 N.W.2d at 79.

⁴¹ *Id.* at 240, 421 N.W.2d at 82-83. The other issues addressed by the court including the sufficiency of the complaint, the State's failure to prove a single date of offense, and the defendant's post-*Miranda* silence will not be discussed in this casenote.

⁴² *Id.* at 240-41, 421 N.W.2d at 82-83; see *supra* note 37.

⁴³ *Id.* at 241, 421 N.W.2d at 83. The court of appeals held that this exception was inapplicable. *State v. Sorenson*, 135 Wis. 2d 468, 472, 400 N.W.2d 508, 510 (Wis. App. 1986). Section 908.045(4) provides in pertinent part as follows: "*Hearsay exceptions; declarant unavailable.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (4) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, . . . or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true" See also corresponding FED. R. EVID. 804(b)(3).

⁴⁴ Section 908.045(6) provides in pertinent part as follows:

Hearsay exceptions; declarant unavailable. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (6) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having comparable circumstances guarantees of trustworthiness. Sec. 908.03(24) is similarly worded and applies when the declarant is available as a witness. The two federal residual, or "catch-all," exceptions now provide in pertinent part as follows: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the

to child sexual abuse cases. The court noted that the Wisconsin Judicial Council Committee Note⁴⁵ specifically lists child sexual abuse cases as falling within the residual hearsay exception domain.⁴⁶ The court recognized that children are often unable or unwilling to express themselves in court.⁴⁷ Therefore, a “compelling need for admission of hearsay” is created because the perpetrator and the victim are usually the only witnesses to the crime.⁴⁸ The court held that if a state legislature has not provided the courts with a specific hearsay exception for child sexual abuse cases, “use of the residual exception is an appropriate method to admit these statements if they are otherwise proven sufficiently trustworthy.”⁴⁹

The *Sorenson* court first recognized the *Bertrang v. State*⁵⁰ factors for assessing guarantees of trustworthiness.⁵¹ The *Sorenson* court then followed the same path as *Bertrang*, detailing a five-factor test for use in assessing admissibility of a child abuse victim’s statements under the residual exception:

First, the attributes of the child making the statement should be examined, including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant, expressed by the child which might affect the child’s method of articulation or motivation to tell the truth.

Second, the court should examine the person to whom the statement was made, focusing on the person’s relationship to the child, whether that relationship might have an impact upon the statement’s trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.

statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence

FED. R. EVID. 803(24) and 804(b)(5).

⁴⁵ 59 Wis. 2d R301 (1974).

⁴⁶ *Sorenson*, 143 Wis. 2d at 243, 421 N.W.2d at 83.

⁴⁷ *Id.* at 243, 421 N.W.2d at 83-84.

⁴⁸ *Id.* at 243, 421 N.W.2d at 84.

⁴⁹ *Id.*

⁵⁰ Wis. 2d 702, 184 N.W.2d 867 (1971) (defendant sexually assaulted his nine-year-old stepdaughter in his home while his wife was in the hospital, having given birth to a child the day before).

⁵¹ *Sorenson*, 143 Wis. 2d at 244, 421 N.W.2d at 84; The *Bertrang* factors are: “the age of the child, the nature of the assault, physical evidence of such assault, relationship of the child to the defendant, contemporaneity and spontaneity of the assertions in relation to the alleged assault, reliability of the assertions themselves, and the reliability of the testifying witness.” *Id.* (quoting *Bertrang*, 50 Wis. 2d at 708, 184 N.W.2d at 870).

Third, the court should review the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors which might enhance or detract from the statement's trustworthiness.

Fourth, the content of the statement itself should be examined, particularly noting any sign of deceit or falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age.

Finally, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be examined for consistency with the assertions made in the statement.

The weight accorded to each factor may vary given the circumstances unique to each case. It is intended, however, that no single factor be dispositive of a statement's trustworthiness. Instead, the court must evaluate the force and totality of all these factors to determine if the statement possesses the requisite "circumstantial guarantees of trustworthiness" required by section 908.045(6), Stats.⁵²

Applying this five-part test to the *Sorenson* facts, the court concluded that L.S.'s statements to the social worker were admissible.⁵³

In analyzing the first factor, the court noted that L.S. had the mental and emotional capacity of a four-year-old and concluded that "a child at such a young age is unlikely to review an incident of sexual assault and calculate the effect of a statement about it."⁵⁴ The court noted that L.S.'s belief that the sexual assaults were a "secret", her fear of being taken away from her family and home, and her fear of her mother's anger were "strong influences which might have otherwise impeded free and immediate communication."⁵⁵ The court also considered the intimidating effects of the courtroom on a young child, and gave less weight to her "confusion and unresponsiveness."⁵⁶ Finally, the court noted that there was no evidence that L.S. had fabricated any part of her statements.⁵⁷

⁵² *Id.* at 245-46, 421 N.W.2d at 84-85.

⁵³ *Id.* at 250, 421 N.W.2d at 86.

⁵⁴ *Id.* at 246, 421 N.W.2d at 85 (citing *State v. Padilla*, 110 Wis. 2d 414, 422, 329 N.W.2d 263, 266 (Ct. App. 1982); *United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979)).

⁵⁵ *Id.* at 247, 421 N.W.2d at 85 (citing Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 n.13-15. (1985)).

⁵⁶ *Id.*

⁵⁷ *Id.*

The court then analyzed the second factor, giving weight to the social worker's experience in handling child sexual abuse cases.⁵⁸ The court noted that the social worker had no motive to fabricate the statements because the uncle's assault on L.S. was enough to get a court order removing L.S. from her home.⁵⁹ "[T]he social worker refrained from even mentioning her father until L.S. raised the matter herself."⁶⁰

Regarding the third factor, the court stated: "[T]he fact that the assertions [concerning sexual assault] are not made within a few minutes or even hours of the alleged assault is not controlling, nor is the fact that they are not volunteered but made in response to questions."⁶¹

Proceeding to the fourth factor, the court examined the content of L.S.'s statements.⁶² It noted her descriptions of the assaults, her familiarity with sexual organs and crude terminology, her knowledge of sexual intercourse, and her differentiation between her uncle's acts on the living room couch and her father's acts in the bathroom.⁶³ In the court's view, these statements indicated knowledge not normally possessed by a seven-year-old child.⁶⁴

Finally, as to other corroborating evidence, the court noted the physical evidence of assault⁶⁵ and the fact that because L.S. and her father lived in the same house, he had the opportunity to be alone with her.⁶⁶

BACKGROUND

Child Sexual Abuse and Its Inherent Evidentiary Problems

One of the problems with child sexual abuse cases is that they are difficult to

⁵⁸ *Id.*

⁵⁹ *Id.* at 247-48, 421 N.W.2d at 85.

⁶⁰ *Id.* at 248, 421 N.W.2d at 85.

⁶¹ *Id.* at 248, 421 N.W.2d at 86 (quoting *Bertrang*, 50 Wis. 2d at 707, 184 N.W.2d at 870).

⁶² *Id.* at 249, 421 N.W.2d at 86.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 250, 421 N.W.2d at 86. The court permitted the physician's testimony at trial under § 908.03(4). *Id.* at 252, 421 N.W.2d at 87. Section 908.03(4) provides in pertinent part as follows: "Hearsay exceptions availability of declarant immaterial." The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." See also corresponding FED. R. EVID. 803(4). The court adhered to *State v. Nelson*, 138 Wis. 2d 418, 432, 406 N.W.2d 385, 391 (1987), noting that young children understand that doctors and psychologists use statements made to them "to ease the child's physical and emotional or psychological pain." *Sorenson*, 143 Wis.2d at 252, 421 N.W.2d at 87.

⁶⁶ *Id.* at 250, 421 N.W.2d at 86.

prosecute.⁶⁷ Usually the perpetrator and the child are the only witnesses to the crime.⁶⁸ The perpetrator is frequently the child's relative or close friend, having ample opportunity to be alone with the child.⁶⁹ Corroborative physical evidence may be non-existent.⁷⁰ Most crimes are non-violent; children often "do not resist their attackers and succumb easily."⁷¹ Children's out-of-court reports of sexual abuse may be more reliable than testimony given in court⁷² due to a child's inability to accurately recall facts and details, the remoteness in time between the offense and the trial, the intimidating effects of the courtroom, and the coercive pressures on a child to "change her story" before trial "[when] the perpetrator is a relative or close family friend."⁷³

Children rarely make false reports of sexual abuse.⁷⁴ It is more common for children to make false denials or retract their statements than to make false accusations.⁷⁵ "Of the few reported false accusations, the child is usually coaxed to lie by an adult and readily admits the lie upon direct questioning."⁷⁶

A child may retract the report out of fear, guilt, shame, or self-blame. In cases of incest, even more pressures on the child to retract the report exist. If the child is removed from the home for protection, the child may feel punished and lonely. If the child is kept in the home and the offender is removed, the child may feel responsible and guilty for causing the offender to be taken away. The child may also have to deal with the mixed feelings of other family members. Many children fear that

⁶⁷ Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MARSHALL L. REV. 1, 6 (1984).

⁶⁸ Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1750 (1983).

⁶⁹ *Id.* (citing *Nick*, 604 F.2d at 1201 (babysitter); *State v. Ritchey*, 107 Ariz. 552, 553-54, 490 P.2d 558, 559-60 (1971) (family friend); *Oldham v. State*, 167 Tex. Crim. 644, 646, 322 S.W.2d 616, 618 (1959) (neighbor)).

⁷⁰ *State v. John Doe*, 105 Wash. 2d 889, 897, 719 P.2d 554, 558 (1986) (Utter, J., concurring) (citing *Berliner, The Child Witness: The Progress and Emerging Limitations*, 40 U. OF MIAMI L. REV. 167, 171 (1985); *Berliner & Barbieri, The Testimony of the Child Victim of Sexual Assault*, 40:2 J. SOC. ISSUES 125, 127 (1984)).

⁷¹ Note, *supra* note 68, at 1750. However, the fact that many crimes are non-violent does not mean the child does not experience a great deal of pain. See e.g., *State v. Hunt*, 48 Wash. App. 840, 841, 741 P.2d 566, 567, *review denied*, 109 Wash.2d 1014 (1987) ("[The child] cried while sitting on the toilet for an unusually long time."); *State v. Robinson*, 44 Wash. App. 611, 614, 722 P.2d 1379, 1382, *review denied*, 107 Wash.2d 1009 (1986) ("hurt very much when she went to the bathroom.").

⁷² Skoler, *supra* note 67, at 38 (citing Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, Child Sexual Abuse and The Law, National Legal Resource Center for Child Advocacy & Protection, American Bar Association (J. Bulkley 4th ed. 1983)).

⁷³ Note, *Minnesota's Hearsay Exception for Child Victims of Sexual Abuse*, 11 WM. MITCHELL L. REV. 799, 806-07 (1985) (footnote omitted); See also, *Hunt*, 48 Wash. App. at 844, 741 P.2d at 569 & n.3 ("In cases of child sexual abuse, there may often be a substantial delay between the alleged crime and the child's statement and another substantial delay between the statement and the time of trial").

⁷⁴ Skoler, *supra* note 67, at 44-45 (citing Goodwin, Sahd & Rada, *Incest Hoax: False Accusations, False Denials*, 6 BULL. AM. ACAD. PSYCHIATRY & L. 269 (1978)).

⁷⁵ *Id.* at 45.

⁷⁶ *Id.*

participation in the process of legal intervention, could cause the offender to be sent to prison. In cases of incest, the child victim may have mixed feelings toward the offender. By making the report, most children are simply asking for their parents to love them in the right way.⁷⁷

Hearsay Exceptions

In the past, the excited utterance (*res gestae*) exception has been applied to child abuse cases.⁷⁸ The excited utterance exception focuses on “contemporaneity” and “spontaneity.”⁷⁹ However, this exception has proven inadequate because the courts are forced to expand the time interval,⁸⁰ causing the hearsay statements to lose their “spontaneity” as required by the exception. “Either the court is bound by the inherent limitations of the excited utterance exception, which does not and cannot fit even the typical report of abuse, or the court is forced to liberalize the exception until it has lost its original meaning.”⁸¹

The inadequacy of the traditional exception has produced two primary methods for handling child sexual abuse cases: (1) creating a separate hearsay exception altogether specifically for child sexual abuse cases, or (2) liberally using the residual exceptions as done in *Sorenson*.⁸²

ANALYSIS

Many commentators feel that child sexual abuse cases should not fall under the residual exceptions; instead, a new exception should be created specifically for this type of case.⁸³ These commentators believe that the residual exceptions are inadequate because “judges, without guidance and with varying appreciation of the problem of child sexual abuse, will decide these issues on a case by case basis.”⁸⁴

⁷⁷ *Id.* at 41-42.

⁷⁸ See e.g., *State v. Simmons*, 52 N.J. 538, 540-42, 247 A.2d 313, 314-15, (1968), *cert. denied*, 395 U.S. 924 (1969). The defendant attacked his sister, a sixteen-year-old deaf-mute with a mental age under seven years. At the hospital emergency room, the victim was confronted by the defendant and became hysterical. The court held that the *res gestae* exception was applicable since she was still in a state of excitement.

⁷⁹ *Bertrang*, 50 Wis.2d at 706, 184 N.W.2d at 869.

⁸⁰ Courts are forced to expand the time intervals since “children may not immediately complain because of threats, fear, guilt and other pressures to keep the incident ‘a secret.’” Skoler, *supra* note 67, at 7 (citing Bulkley, *Child Sexual Abuse And The Law*, *supra* note 72).

⁸¹ *Id.* at 8.

⁸² When utilizing the residual exceptions, the main concern is whether the hearsay testimony provides “equivalent circumstantial guarantees of trustworthiness” as compared to the other specifically enumerated exceptions. E. CLEARY, *MCCORMICK ON EVIDENCE* § 324.1, at 908 (3d ed. 1984). There has been an ongoing debate as to whether the residual exceptions should be used liberally, see e.g., Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239 (1978), or sparingly, see e.g., Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867 (1982).

⁸³ E.g., Skoler, *supra* note 67; Note, *supra* note 68.

⁸⁴ Skoler, *supra* note 67, at 8-9.

As pointed out in the above quote, the biggest criticism of using the residual exceptions in child sexual abuse cases is that child sexual abuse is a unique area of the law and the residual exceptions simply do not provide enough guidance to the courts. "Beyond requiring the presence of circumstantial guarantees of trustworthiness, the exception, as it exists in Wisconsin [referring to *Bertrang*], provides no guidance to the courts in considering the special circumstances of these statements . . . These exceptions require more particularized standards of need and trustworthiness."⁸⁵

Some states, such as Washington,⁸⁶ have enacted statutes which provide for a specific hearsay exception in child sexual abuse cases. The remainder of this casenote will compare and contrast the Washington statute to the *Sorenson* court's adoption of the residual exception. The *Sorenson* court's five-part test is comparable to the Washington statute as it provides the much-needed guidance to the courts.⁸⁷

The Washington Statute

The Washington statute providing for a specific hearsay exception in child sexual abuse cases reads, in part, as follows:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.⁸⁸

⁸⁵ Note, *supra* note 68, at 1763.

⁸⁶ WASH. REV. CODE ANN. § 9A.44.120 (1988).

⁸⁷ It should be noted that this casenote does not oppose the Washington statute. Indeed, the Supreme Court of Washington has upheld its constitutionality. *State v. Ryan*, 103 Wash. 691 P.2d 165, 691 P.2d 197 (1984). This casenote only advocates that if a state has not enacted legislation regarding hearsay exceptions in child sexual abuse cases, the residual exceptions provide as much guidance as statutes.

⁸⁸ WASH. REV. CODE ANN. § 9A.44.120 (1988).

The Washington statute has been acclaimed for “requir[ing] courts to look for alternative indicia of reliability if the statement falls outside all of the established class exceptions,” and “therefore ensur[ing] that courts will not be limited to traditional hearsay analysis,”⁸⁹ “[T]he Washington exception mitigates the possibility of judicial abuse of discretion and provides detailed guidance to the courts seeking to apply it.”⁹⁰

Sorenson Test Comparable to Washington Statute

As previously noted, the primary criticism of using the residual exception in child sexual abuse cases is that it provides little guidance to the courts.⁹¹ Although the Washington statute sets out four factors to consider (“that the *time, content, and circumstances* of the statement provide sufficient indicia of reliability” and “*corroborative evidence* of the act”),⁹² the statute itself gives courts little guidance. It does not explain *which* time, *which* content, and *which* circumstances are important, and it leaves unanswered *which types of* corroborative evidence are significant.

In contrast, the *Sorenson* court’s five-factor test is quite explanatory. When broken down, the test actually consists of sixteen sub-factors. First, the test examines the *attributes of the child* (including age, verbal communication skills, comprehension of statements, knowledge of truth and falsehood, and fear of punishment or other personal interest which might affect the child’s articulation or motivation to tell the truth).⁹³ Second, the test focuses on the *recipient of the child’s statement* (including relationship to the child, the relationship’s impact on the statement’s trustworthiness, and the recipient’s motivation to fabricate or distort the statement).⁹⁴ Third, the test explains the *circumstances of the statement* (including relation to the time of assault, availability of a confidant, and other contextual factors which might enhance or detract trustworthiness).⁹⁵ Fourth, the test reviews the *statement itself* (including any sign of deceit or falsity, and whether the statement contains matters not ordinarily attributable to a child of similar age).⁹⁶ Fifth, the test examines the consistency of the statement with *other corroborative evidence* (including physical evidence of assault, statements made to others, and opportunity or motive of the defendant).⁹⁷

Clearly, the *Sorenson* test is much more defined and detailed than the Washington statute. The Washington statute fails to provide for examining the

⁸⁹ Note, *supra* note 68, at 1765.

⁹⁰ *Id.*

⁹¹ See *supra* text accompanying note 85.

⁹² WASH. REV. CODE ANN. § 9A.44.120.

⁹³ *Sorenson*, 143 Wis. 2d at 245, 421 N.W.2d at 84.

⁹⁴ *Id.*

⁹⁵ *Id.* at 245-46, 421 N.W.2d at 85.

⁹⁶ *Id.*

⁹⁷ *Id.*

statement's recipient. It does not elaborate on "circumstances" or "corroborative evidence". It does not list personal attributes of the child. The only mention of the child in the Washington statute is the ten-year age limit.⁹⁸ The Washington statute does not make an exception for an eleven-year old with cognitive skills of a seven-year old or vice versa. With the *Sorenson* test, the court can take a child's mental age (which is what the courts are truly concerned with) into consideration rather than just the chronological age. The *Sorenson* test also provides guidance to the court in weighing each factor,⁹⁹ and further requires that the "totality" of the factors insure that "the statement possesses the requisite 'circumstantial guarantees of trustworthiness' required by section 908.045(6), Stats."¹⁰⁰

Cases Interpreting the Washington Statute

Reviewing the Washington courts' applications of the Washington statute further supports the conclusion that the *Sorenson* test is comparable to the Washington statute.

1) Indicia of Reliability

Under the Washington statute, the "time, content and circumstances of the statement [must] provide sufficient indicia of reliability."¹⁰¹ The Washington courts consider whether the child had a motive to lie. In *State v. Frey*,¹⁰² the court concluded that there was no evidence suggesting a motive to lie to people "relatively unknown to her".¹⁰³ Similarly, the *Sorenson* court concluded there was no evidence that L.S. fabricated her statements to the social worker who was unknown to her.¹⁰⁴ In *Frey*, the court also noted that the child's low mental development rendered it "unlikely [that the child would] fabricate a graphic account of sexual activity because such activity is beyond the realm of [her] experience."¹⁰⁵ In *Sorenson*, the court noted that

⁹⁸ WASH. REV. CODE ANN. § 9A.44.120 (1988). The reason for establishing an age limit around ten years is not that older children are more likely to make false accusations (See *supra* text accompanying notes 74-76), but rather "[a]t this age, children are not physically or psychologically sexually developed, nor have they developed the cognitive facilities of adulthood." Skoler, *supra* note 67, at 45. "[T]he lack of the child's cognitive skills increase rather than decreases the inherent reliability of reports of sexual abuse." *Id.* at 46.
⁹⁹ *Sorenson*, 143 Wis. 2d at 246, 421 N.W.2d at 85.

¹⁰⁰ *Id.* See *supra* text accompanying note 52.

¹⁰¹ WASH. REV. CODE ANN. § 9A.44.120 (1988). In *Ryan*, the Supreme Court of Washington set forth nine factors for the courts to consider when determining reliability of hearsay testimony under the Washington statute. 103 Wash. 2d at 175-76, 691 P.2d at 205. To be considered reliable, the hearsay testimony must substantially meet these nine factors. *State v. Griffith*, 45 Wash. App. 728, 738-39, 727 P.2d 247, 254 (1986).
¹⁰² 43 Wash. App. 605, 718 P.2d 846 (1986).

¹⁰³ *Id.* at 610, 718 P.2d at 849. (Six-year-old girl made statements to the children's director of an emergency support shelter and a social worker).

¹⁰⁴ 143 Wis. 2d at 247, 421 N.W.2d at 85.

¹⁰⁵ 43 Wash. App. at 610-11, 718 P.2d at 849-50 (quoting Comment, *Sexually Abused Infant Hearsay Exception: A Constitutional Analysis*, 8 J. JUV. LAW 59, 67 (1984)).

seven-year-old L.S. had the mentality of a four-year-old.¹⁰⁶

In *Griffith*,¹⁰⁷ the court found a motive to lie: "Uncle Jimmy would hurt her father if she did not say he did it."¹⁰⁸ Similarly, the first factor of the *Sorenson* test requires the courts to determine if there is "any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant . . . which might affect the . . . motivation to tell the truth."¹⁰⁹

In *State v. Cooley*,¹¹⁰ the court noted that several people had heard the child's statement -- initially the child's mother and a social worker, and later a detective, defense counsel, and a deputy prosecutor.¹¹¹ Similarly, in *Sorenson*, the social worker, physician, and psychiatrist all testified that L.S. made the same statements.¹¹²

In *State v. Henderson*,¹¹³ the court interpreted "spontaneity" to include statements "volunteered" in response to questions.¹¹⁴ The *Henderson* court noted that the detective, like other professionals, was "trained to be objective" in investigating child sexual abuse cases.¹¹⁵ The detective had never met the child before investigating the case and was therefore not personally attached to the child.¹¹⁶

Once again, the *Sorenson* decision is in accord.¹¹⁷ The court noted the social worker's experience with child sexual abuse cases¹¹⁸ and that she had no motive to fabricate the statements.¹¹⁹

The *Cooley* court concluded that the content of the child's statements showed that the child distinguished between the defendant and his brother,¹²⁰ thereby

¹⁰⁶ 143 Wis. 2d at 246, 421 N.W.2d at 85.

¹⁰⁷ 45 Wash. App. 728, 727 P.2d 247.

¹⁰⁸ *Id.* at 739, 727 P.2d at 254.

¹⁰⁹ 143 Wis. 2d at 245, 421 N.W.2d at 84.

¹¹⁰ 48 Wash. App. 286, 738 P.2d 705, *review denied*, 109 Wash. 2d 1002 (1987) (A five-year-old boy stated that the defendant made him engage in oral sex).

¹¹¹ *Id.* at 294, 738 P.2d at 709; *See also, Robinson*, 44 Wash. App. at 620, 722 P.2d at 1385 ("Remarkably similar statements were given to four different people on four separate occasions").

¹¹² 143 Wis. 2d at 235-38, 421 N.W.2d at 80-82. *See also, supra* note 22.

¹¹³ 48 Wash. App. 543, 740 P.2d 329, *review denied*, 109 Wash. 2d 1008 (1987).

¹¹⁴ *Id.* at 550, 740 P.2d at 333. In *Henderson*, the detective asked the seven-year-old child why her vagina hurt when her father touched her vagina. The child voluntarily told the detective that her father stuck his fingers in her vagina. "His question was neither leading nor suggestive. Thus, the statement qualifies as 'spontaneous'." *Id.*

¹¹⁵ *Id.* at 551, 740 P.2d at 334.

¹¹⁶ *Id.* at 550-51, 740 P.2d at 333-34.

¹¹⁷ 143 Wis. 2d at 247, 421 N.W.2d at 85.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 247-48, 421 N.W.2d at 85.

¹²⁰ 48 Wash. App. at 295, 738 P.2d at 709. *See also, supra* note 110. The child used "two dolls of different sizes to demonstrate the difference in size between the boys' [the defendant and his brother] genitalia." 48 Wash. App. at 289, 738 P.2d at 707.

“making the possibility of his faulty recollection remote.”¹²¹ Similarly, the *Sorenson* court noted that L.S. had consistently distinguished between her father’s acts in the bathroom and her uncle’s acts on the living room couch.¹²²

In *State v. Jackson*,¹²³ the court held that a nine-year-old girl’s statements, made approximately one month after the assault, were admissible.¹²⁴ In *Sorenson*, the court permitted the hearsay testimony even though the social worker did not interview L.S. until approximately four to seven days after the last act of sexual assault.¹²⁵

In summation, the *Sorenson* court looked to the same principles in determining the “reliability” of hearsay that the Washington courts have applied, and did so by utilizing the residual exception.

2) Other Corroborating Evidence

Both the Washington statute and the *Sorenson* test require the court to consider other corroborating evidence. In *Hunt*,¹²⁶ the court held that “‘corroborative evidence of the act’ requires that there be ‘evidence of sufficient circumstances which would support a logical and reasonable inference’ that the act of abuse described in the hearsay statement occurred.”¹²⁷

In *State v. Gitchel*,¹²⁸ the court found that the following evidence corroborated the charges of sexual abuse: “[The doctor’s] finding of partial vaginal penetration and [the child’s] inappropriate behavior during the doctor’s examination,”¹²⁹ and “‘testimony about [the child’s] nightmares.’”¹³⁰

In *State v. Justiniano*,¹³¹ a four-year-old girl’s ten-year-old brother testified to seeing the defendant’s hand in the girl’s pants during Christmas vacation.¹³² The court held: “‘Clearly, the brother’s testimony corroborated [the girl’s] hearsay statement to her mother.’”¹³³

¹²¹ *Id.* at 295, 738 P.2d at 709.

¹²² 143 Wis. 2d at 249, 421 N.W.2d at 86.

¹²³ 42 Wash. App. 393, 711 P.2d 1086 (1985).

¹²⁴ *Id.* at 397, 711 P.2d at 1088-89.

¹²⁵ 143 Wis. 2d at 237, 421 N.W.2d at 81.

¹²⁶ 48 Wash. App. 840, 741 P.2d 566.

¹²⁷ *Id.* at 849, 741 P.2d at 571-721 (citing *Bremerton v. Corbett*, 106 Wash. 2d 569, 578, 723 P.2d 1135, 1140 (1986)).

¹²⁸ 41 Wash. App. 820, 706 P.2d 1091, *review denied*, 105 Wash. 2d 1003 (1985). *See also, John Doe*, 105 Wash. 2d at 897, 719 P.2d at 558 (Utter, J., concurring) (corroborative evidence includes “confessions and expert testimony on whether victim’s behavior is typical of children who have been sexually abused”).

¹²⁹ 41 Wash. App. at 828, 706 P.2d at 1096.

¹³⁰ *Id.*

¹³¹ 48 Wash. App. 572, 740 P.2d 872 (1987).

¹³² *Id.* at 581, 740 P.2d at 877.

¹³³ *Id.*

In *Robinson*,¹³⁴ the defendant sexually abused a three-year-old girl after making her lie on her stomach on a blanket. Although the physical examination of the girl showed “no evidence of penetration or physical injury,”¹³⁵ the court held that the semen stain found on the blanket was sufficient corroborating evidence even though the stain could not be phenotyped.¹³⁶

In applying the corroborative evidence requirement, the *Sorenson* court noted the physical evidence of multiple assaults, Ronald Sorenson’s opportunity to be alone with L.S., and the consistency of the evidence with L.S.’s statements.¹³⁷ Thus, a review of Washington decisions reveals that both the *Sorenson* court and the Washington statute apply the corroborative evidence requirement in the same manner.

CONCLUSION

Child sexual abuse is an ever-increasing problem in our society. These cases are difficult to prosecute because the perpetrator and the child are usually the only witnesses to the crime.¹³⁸ Recognizing the seriousness of the problem, the *Sorenson* court set forth a detailed, five-part test for use in determining the admissibility of hearsay testimony in child sexual abuse cases.¹³⁹

The primary criticism of utilizing the residual exceptions in child sexual abuse cases is that these exceptions provide little guidance to the courts.¹⁴⁰ However, the *Sorenson* test, used in conjunction with the residual exceptions, gives courts as much guidance in child sexual abuse cases as statutes providing for a specific hearsay exception. In addition, the *Sorenson* court’s application of the test is in accord with the Washington courts’ application of the Washington statute.

If a state legislature has not created a specific hearsay exception for child sexual abuse cases, use of the residual exception, coupled with *Sorenson*’s five-part test, is the most appropriate and reliable approach a court can take.

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¹³⁴ 44 Wash. App. 611, 722 P.2d 1379.

¹³⁵ *Id.* at 614, 722 P.2d at 1382.

¹³⁶ *Id.* at 621, 722 P.2d at 1385.

¹³⁷ 143 Wis. 2d at 250, 421 N.W.2d at 86.

¹³⁸ Skoler, *supra* note 67 and accompanying text; Note, *supra* note 68 and accompanying text.

¹³⁹ 143 Wis.2d at 245-46, 421 N.W.2d at 84-85.

¹⁴⁰ Note, *supra* note 68 at 1763. See *supra* text accompanying note 85.

