

CANADA

FILE NO. 95-0512

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

BETWEEN:

L.J.M.

- APPLICANT

- AND -

K.A.M.

- RESPONDENT

[Cite as: **M. v. M.A., 2001 NSSF 16**]

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on April 9, 2008.

DECISION

HEARD: By The Honourable Justice Moira C. Legere on December 1, 1999;
October 2, 5, 6, 10, 12, 16, 31; November 1, 2000; January 3 & 4, 2001

DECISION: March 30, 2001

COUNSEL: Brian Hebert - counsel for L.M.
Cynthia Chewter - counsel for K.A.M.

LEGERE, J.

This application by L.J.M. to enforce his access commenced on January 12, 1998. On February 10, 1998 K.A.M. made an application to terminate access accusing L.J.M. of sexually abusing their daughter. On July 13, 1998 the parties agreed to have an access assessment completed. On June 18, 1999 L.J.M. agreed to participate in an assessment with the Nova Scotia Sexual Behavior Clinic at the Center for Psychological Services Limited.

The hearing of evidence commenced on December 1, 1999 to accommodate the attendance of Dr. John Anderson of the IWK Grace Health Care Center. Mary McGrath from the Center for Psychological Services Limited testified on October 2, 2000; Diane Wheeler, child play therapist with the IWK Grace Health Center and Gregory McGrath, the Phallometric Technician with the Center for Psychological Services on October 5 & 6, 2000; J.A.M. testified on October 6 & 10, 2000; K.A.M. and J.A.M. testified on October 10; on October 31, 2000 Dr. Brad Kelln, Psychologist and Pat Dougan (M.S.W.). On November 1st J.G.; R.M., P.M., and G.M.; J.B.; K.W.; J.A.M. and S.M. testified. Finally on January 3, 2001 L.J.M..

There are many reasons that interfered with the timely resolution of this matter. L.J.M. appeared before the court initially unrepresented until Mr. Wedderburn appeared with him in March of 1998. On April 15, 1999 counsel advised that his client could no longer afford to pursue an assessment. In June 1999 L.J.M. was represented by Legal Aid and continued to be so represented until November 19, 1999. There were adjournments made necessary with some of these changes. Delays were incurred when various assessments were requested and completed for both parties.

Historical Information

In September 1993, after K.A.M. became pregnant, L.J.M. took her into his home, long established as his family home. He sought to provide better accommodations for her during the pregnancy. The child S.A.M. was born [in 1993]. The parties separated on July 3, 1994.

I am satisfied L.J.M. genuinely wished to provide for K.A.M. and the child an environment he felt was cleaner, safer and offered more amenities to K.A.M. than that which she had available to her. L.J.M. was not embarking on a long term Amarital@ relationship with K.A.M.; he was simply providing for her. As they lived together the differences between the two became more pronounced. L.J.M. is at least ten years older than K.A.M.. He has established himself in his household and in his job. He previously raised two of his own children, having been called to Ontario by Child Protection. He recollects they placed his sons in his care after they were removed from their mother.

He is obviously neat and tidy, works very hard and maintains order within his own household. K.A.M. is younger, more carefree and was less conscious at the time of the need to conserve money. Generally their household standards were incompatible. It was as a result of this realization that L.J.M. indicated he felt it best that K.A.M. leave the household with the child which she did on July 3, 1994. He made a conscious effort to contact and address the mother and child=s financial needs in accordance with his responsibility.

The parties filed their separation agreement with the court on September 22, 1994.

L.J.M. is a contractor for [name of employer changed] and a self-employed floor installer. K.A.M. began part-time employment with the [name of employer changed] in September of 1994. L.J.M. agreed to pay for the support of S.A.M. \$500.00 per month, with a cost of living index, payments to commence September 1, 1994. The parties agreed that K.A.M. should have sole custody and that she was entitled to remove the child from the Province of Nova Scotia to relocate for employment purposes, should the occasion arise. She has, since the commencement of these proceedings, relocated to Ontario. K.A.M. agreed that L.J.M. would

have reasonable access upon reasonable notice for reasonable periods of time. Both parties received independent legal advice prior to signing the agreement.

On September 6, 1995 K.A.M. applied to the court for maintenance. They appeared before the Family Court on February 12, 1996. K.A.M. was represented; L.J.M. was not. I have read transcripts of these proceedings. It is clear that neither party considered access and custody an issue. The sole issue throughout these two appearances related to maintenance. L.J.M. was prepared to trust the court to make an objective evaluation of his financial responsibility to the child. Of the two, K.A.M., while the more inexperienced in life and with child care, was more sophisticated with respect to the proceedings.

It was agreed and the court included in the order that the Applicant would have sole custody of the child in accordance with the Separation Agreement dated September 23, 1994. Access by the Respondent to S.A.M. was set out in Paragraph 2. It states:

The Respondent, L.J.M., shall have access to S.A.M. on Sundays from 2:00 p.m. to 5:00 p.m. provided he gives 48 hours notice to the Applicant, K.A.M., of his intention to exercise access.

Maintenance was reduced to \$350.00 per month, indexed to the cost of the living and set to commence March 1, 1996. Arrears were fixed at \$954.00 to be paid in three equal installments.

In those February 1996 proceedings, the mother told the court that she encouraged access. L.J.M. worked six days a week and on Sundays would have S.A.M. with him from 9:00 a.m. - 8:30 p.m., advising her 48 hours in advance of his intent to exercise this access. On February 12, 1996 access was still on going on a regular Sunday basis, encouraged by K.A.M.. L.J.M. describes his activities on these Sundays as exposing S.A.M. to his extended family on a regular basis.

Counsel for K.A.M. advised the court on February 12, 1996 that access had been agreed upon between 9:00 - 8:30 on Sundays. Unfortunately when the order was typed access was defined more restrictively from 2:00 p.m. until 5:00 p.m. on Sundays with 48 hours notice. This was not intended by either party. Both parties agree that while the order restricted access the regular pattern of access continued for a full Sunday up until July 1997 when the alleged disclosures commenced.

K.A.M. confirmed that she would encourage L.J.M. to exercise regular weekly access, to take the child home with him, to keep the child for longer on Sundays and she agreed to the occasional overnight visits.

Her evidence on the number of overnights is inconsistent. This is important because the mother relied extensively on her written notes which formed the foundation of her information to professionals and the court. Some of the professionals decided credibility issues in her favor because she documented everything. In fact it appears that her reconstruction became unreliable.

For the period between the separation of July 1994 and through to July 1997 she told the Child Protection worker on July 17th, 1997 there were 5 - 6 times L.J.M. had overnight visits. She repeated that to the R.C.M.P. shortly thereafter. She told Mary McGrath 12 times; Diane Wheeler, overnights once in a while; Pat Dougan about 12 times and in her affidavit dated September 1998, 12 - 15 times. In her viva voce testimony she reconstructed events and confirmed it was at least 15 times. L.J.M. indicates they were only a few overnight visits. My conclusion is that neither party is intentionally unable to recall the exact amount and clearly overnight visits were the exception and not the norm. The father's estimate is closer to the mark and more consistent with the totality of the evidence and his statements were not given any weight with the assessors.

Subsequent to the Separation Agreement and the court orders in November 1996 and February 1997, K.A.M. testified she began to suspect that her daughter had been exposed to inappropriate sexual activity with her father. Thereafter, the extensive contact between father and

child was reduced and terminated altogether in August 1997. His last overnight visit was April 13, 1997.

An investigation with the police and child protection authorities was commenced and concluded. No charges were laid. The child entered play therapy with Diane Wheeler of the IWK Grace Hospital. L.J.M. has been denied access with his child for approximately 32 years.

The parties agreed on an access report. This report by Ms. Dougan dated November 17, 1998 recommended a referral to the Center for Psychological Services to have L.J.M. submit to testing at the Nova Scotia Sexual Behavior Clinic to better assess the risk the father might pose to the child. He cooperated with this assessment process. The report from this assessment recommended a polygraph. L.J.M. consented and cooperated. He was interviewed and cooperated with police and the child protection authorities. He has consistently denied the allegations and seeks restoration of contact with his child.

This court dealt with five main issues:

- (a) a motion to exclude polygraph results;
- (b) a motion to include and determine as admissible the phallometric testing and report completed at the Center for Psychological Services;
- (c) the admissibility of the child=s statements in accordance with *KHAN* principles without having called the child. I have reviewed the three video statements taken during the child=s interview and the audio tape of the interview conducted by the child protection worker, Mr. McConnell, and

with the mother, in addition to the evidence of disclosures as related in written and oral testimony;
- (d) a determination as to whether the evidence supports a finding of sexual abuse by the father;
- (e) a determination respecting access between the father and child.

The polygraph test was completed as a result of Mary McGrath's recommendation in the Assessment Report dated October 4, 1999. L.J.M. sought to admit the results of the polygraph

test. K.A.M. contested the admissibility of the test. The motion to admit the polygraph was denied as per the reasons set out on the court record on August 31, 2000.

The parties called extensive evidence relating to the phallometric testing and the child's "disclosures". I will deal first with the admissibility of the psychological report prepared by Ms. McGrath of the NS Sexual Behavior Clinic together with the results of the phallometric testing by Mr. McGrath.

McGrath Report/Center for Psychological Services/October 4,1999

In the November 1998 access report Ms Dougan recommended L.J.M. participate in this testing. The Applicant suggested he complete this as well. The Respondent was seeking access to his daughter and agreed to the assessment.

The technician who administered the phallometric test is Mr. McGrath. He is a former police officer with 26 years experience including experience as a polygraph examiner. His training in phallometric testing is limited to on the job training by the former technician, in addition to some seminars on the subject matter. He was not familiar with the written standards or operating manual. Nor did he appear familiar with the details of the computer software used to graph the arousal patterns. From my reading of other cases and literature presented this limited training is not unusual. In fact industry standards of training were not apparent in the evidence.

He controlled the instrument, scored the answers, analyzed them and passed them on to the psychologist to interpret. He did not profess and was not familiar with the written standards including the Ethical Standards and Principles for the Management of Sexual Abusers, although he confirmed his belief (as stated in Section 15: The Use of Physiological Measurements) that neither of the physiological assessments is appropriate for the determination of guilt or innocence. He was also aware that the test is not used in isolation as the sole criteria for treatment; it is to be used with other information.

The arousal response to the volumetric testing is divided into three categories: slight, moderate and large. Mr. McGrath, when scoring, does not report displacement from 0 -1; reported 1 as slight; 2 as moderate and 3 as strong. L.J.M. exhibited slight arousal to some of the slides and audio stimuli. In the course of the evidence it is clear that there may be discrepancies which can be explained by other than arousal patterns.

Mr. McGrath described the design of this instrument which uses an instrument identical or similar to a polygraph connected to a hockey cup fitted with a 9" long glass tube into which the client inserts his penis. The type of instrument used at this clinic is called volume metric testing; measuring the displacement of air in the cylinder as a result of arousal brought on by deviant and non-deviant stimuli. The arousal is measured by computer and graph results. This description is my simplification of the evidence describing the apparatus.

While the technician calibrated the instrument prior to each client I was not able to satisfy myself as to the industry standards and the compliance with industry standards. My sense was that the witness was not prepared to speak to the reliability and accuracy of the components of the instrument. He administered the test in accordance with his training on the machine available to him.

Absent evidence that confirmed that the operation of this machine was in accordance to all industry standards I would be unable to conclude that the actual administration of the test accorded with industry standards. I cannot be satisfied that the underlying principles and the methodology of the tests administered were reliable and applicable in a case of this nature where its only use was to support evidence of predisposition to imply or support a thesis that L.J.M. was an offender.

Ms. McGrath obtained her Bachelor of Arts in Psychology in 1991; Honours equivalency in Psychology in 1992 and a Masters of Science (Clinical Psychology) in 1994. Aside from her many professional involvements and courses, Ms. McGrath has child protection experience with victims of sexual abuse and experience with assessments. The majority of her clients are referrals

from Correction Services. She has not personally administered phallometric tests although she has been exposed to the raw data. She was accepted as a witness with particular expertise in the assessment and treatment of individuals for sexual behavioural problems.

Currently she administers psychological assessments of sexual offenders including the administration and scoring of personality tests, intelligence testing and writing reports for the Department of Corrections, the Department of Justice and Community Services.

This was not a parental skill assessment. Ms. McGrath volunteered that she is not an expert in child development or in child sexual abuse. She did not administer any tests to the child or the mother.

Ms. McGrath confirmed that L.J.M. was very cooperative. She had been told by K.A.M. that she saw L.J.M. had been a caring and gentle father when the child was born. She encouraged contact and encouraged the father to have the child in his bed when she stayed overnight with him.

The referral of L.J.M. to this Center was specifically to have a risk assessment completed. The consent order dated August 30th submitted by counsel confirmed that they sought a risk assessment. Ms. McGrath confirmed in her testimony that she was unable to complete an official risk assessment due to the fact that L.J.M. is a non-charged, non-admitting client.

In the absence of a formal risk assessment Ms. McGrath administered various tests and Mr. McGrath the phallometric testing. The goal of the assessment was to determine whether L.J.M. suffered from a mental or personality disorder. The assessor also looked for cognitive distortions, i.e. wrongful thinking about child/adult sex. She looked at the allegations, reviewed the tests that were administered and reviewed collateral sources to determine if the information was consistent with the allegations or the position adopted by the client. She confirmed that she was not in a position to determine whether L.J.M. did or did not commit the acts alleged.

Ms. McGrath had as background information the child protection notes from July 15 to September 18; the mother's case report summary; Dr. Anderson's report, D. Wheeler's reports, a transcript of the interview with child protection, the access assessment, the mother's diary, the mother's three untested affidavits, the mother's three police statements, and some signed and unsigned affidavits, all untested. Clearly this was an information base requiring an assessor to exercise extreme caution in relying on any impressions formed as a result of simply reading untested documentation.

She said, "... I can look at the evidence one way or another and point one way or the other. I can try to refute the evidence. My purpose is not to say whether he did it but to provide the court with as much information as possible".

That was not an acceptable role to assume. Nor was her role to make findings of credibility, that being the task of the court. However, the assessor made certain conclusions on which others relied and for that reason it is important to review the assessment carefully.

L.J.M. attended all appointments. The assessor experienced some difficulty in communicating with L.J.M.. She repeats that he is confused about time sequence frequently in the retelling of his history. She described his rambling style of speech. She said he could not stay focussed on the topic. She acknowledged that he had Grade 9 education. His verbal IQ is at the low end of the Low Average range at the 9th percentile; his performance IQ is in the average range at 50th percentile and the full scale IQ is within the average IQ range at the 21 percentile. She noted concern about the 20 point difference between the verbal and performance IQ. L.J.M. confirmed he did poorly at school. The assessor recommended that L.J.M. should be assessed for neuropsychological problems. She says:

It may very well be that part of L.J.M.'s life problems stem from early neuropsychological problems and that these problems are exacerbated with certain narcissistic traits. Apart from the possibility of such problems and traits increasing the potential for sexual abuse to a significant level, a reasonable concern given S.A.M.'s reports, such problems may also make for inconsistent

parenting, keeping rules and appropriate emotional responses to everyday events.

Ms. McGrath was not commissioned to do a parental capacity assessment. She admits she is not an expert in child development. Clearly she relied on the accuracy of the statements and disclosures communicated through the mother without an evaluation of their reliability. There is insufficient foundation in the factual underpinning of her report to allow the court to conclude that this is a reliable conclusion. Further the documentation forming the foundation of her report had never been tested yet had clearly influenced her assumptions. This recommendation might help understand if L.J.M. has cognitive difficulties, should that be his desire; it serves little useful purpose here given he has already consented to and cooperated in the most intrusive of assessments and scrutiny with little positive benefit.

The court can conclude that L.J.M. functioned poorly in school. I can also conclude that he rambles in conversation. I can conclude that while cooperative he appeared at times angry and defensive about the allegations. However, the evidence suggests he has used his manual skills and experience to support himself in steady employment since he left school, he purchased his home, he performed as an independent contractor, he raised two boys, although not entirely successfully and his outward behaviour has exhibited responsibility and a genuine concern for the well being of the Applicant and his child. These observations are aside from any notion as to his guilt or innocence respecting the allegation.

After concluding that the information he presented may be unreliable Ms. McGrath documents his personal history. She observed that he socialized with ease. He speaks as if his family loves him and wants to be around him. He believes himself to be popular. He bragged about himself. He admits that K.A.M. called him a perfectionist.

In testing his assertions about his commitment to all his step-children the interviewer used information from the mother to confront him about one step-child from whom L.J.M. was estranged. The interviewer uses this to imply a lack of credibility rather than weigh that with the other behaviours evident.

Ms. McGrath confirmed that the father maintained adamantly that he did not commit the acts alleged. She confirmed there was no diagnosis of mental disorder. There was also no diagnosis of paedophilia or paraphilia nor a diagnosis of personality disorder. L.J.M. did not show any deception. The results of the testing did not show a preference for deviant stimuli.

Ms. McGrath summarized the phallometric testing indicating L.J.M. showed undifferentiated arousal to both deviant and non deviant test stimuli. She described his response to some stimuli as significant arousal. Significant refers to the phallometric assessment report that showed slight arousal to certain slides and audio material. It is the interpretation of these results that cause considerable concern.

The literature on phallometric testing is consistent with the observation that this testing is not validated as a forensic tool. It cannot, in the absence of admission or conviction, determine guilt or innocence. Dr. Konopasky in *Athe Remaking of Relapse Prevention A* indicated, Plethysmography should never be used to determine whether someone has or has not committed an offence.

Dr. Kelln, a registered psychologist, with a doctorate in clinical Psychology from the University of Calgary in 1998, was hired by the Respondent to review the assessment completed at the clinic. He is currently employed in completing risk assessments for the Provincial Forensic Psychiatry Service, among other pursuits. He expanded on Dr. Konopasky=s comment above by indicating that in this circumstance the testing was contraindicated. In contrast to Ms. McGrath=s conclusion that there was a significant response (referring to the slight arousal in the PPG testing) Dr. Kelln notes that many non sex offending individuals would have a similar score. In referring to the wrongful thinking Dr. Kelln indicates that 2 or 3 items out of 60 or 80 fall well within the margin of error. It cannot be said to be definitive of anything. This validates the concerns expressed in the literature about the need for standardized scoring to assist clinicians in arriving at more standardized interpretations of arousal patterns to assist in a more reliable interpretation of the results.

Dr. Kelln confirmed the concerns already noted in the literature. He indicated that a risk assessment is aimed at people who are at risk to offend again. He confirmed that the reason one could not be undertaken this risk assessment here is that there is not a known offender or a known sexual history. He confirmed that L.J.M. did not score in the significant range for psychopathy. He confirmed that there was no indication that there would be an exclusive deviance of any kind. L.J.M. did not show any significant problems with drugs or alcohol. He confirmed that 15 - 25% of normal non-offending population can score in the deviant range on these tests without it meaning they are sexual offenders. People can have deviant preferences and still not pose a risk.

The literature confirms, as did Dr. Kelln, that one of the dangers in conducting an assessment of this type on an individual who has not admitted and is not convicted, is the difficulty in interpreting the results. There is a real concern about the reliance on those results by consumers. This is borne out in this case by the reliance on the recommendation by the access assessor and others.

Hindsight has an advantageous perspective. For reasons that will be apparent, the preferred course of action by L.J.M. should have been to refuse to engage in this testing and by the Center to refuse to administer the testing. However this testing was recommended by professionals who did not exhibit a thorough knowledge of its purpose, its limitations and who placed undue reliance on it based on a misinterpretation of the results. This reliance on the testing allowed the professionals to draw conclusions that cannot be supported on an objective analysis of the evidence. This impacted significantly and perhaps eternally on the course of action recommended and followed. It also impacted on the weight to be given to assessment results and reports that evidenced a reliance on the psycho-sexual assessment.

I find that the test results ought to be excluded. I have further observations in support of this conclusion. Counsel referred the court to some articles on the subject including:

- The Phallometric Assessment of Sex Offenders: Some Professional and Research Issues; Gilles Launay, Psychology Unit, HMP Maidstone.
- Problems in Sexual Preference Testing in Child Sexual Abuse Cases, A Legal and Community Perspective; Walter T. Simon, Peter G. W. Schouten Denver, CO
- Plethysmography in the Assessment and Treatment of Sexual Deviance: An Overview; Walter T. Simon, Ph.D. and Peter G.W. Schouten, M.A.
- Ethical Standards and Principles for the Management of Sexual Abusers, Association for the Treatment of Sexual Abusers.

I have some extracts from these articles relevant to this inquiry. As I consider the evidence offered as a result of the Psycho-sexual testing and in particular the phallometric assessment, these articles assist in allowing me to determine the strengths and limitations of this evidence. As I reviewed this material I reminded myself that L.J.M. was not charged; he was non-admitting and did not, subsequent to this testing, change his adamant denial that he engaged in any inappropriate activity with his daughter. This is critical to this evaluation of the usefulness of this testing with this individual.

Phallometry (or penile Plethysmography) is a technique for measuring penile erection in response to a variety of stimuli, used with many procedural variations in different sex offender assessment centers. The technique is ideally suited to challenge sex offenders= denials (although this has not been the case in this instance). It is also useful in planning treatment options and assessing the progress of such treatment in offenders. As a therapeutic tool it has been admitted in evidence subject to the proper foundation. However there are serious limitations to this testing as a forensic tool. Professionals in the child protection field and courts in custody and access evaluations ought to be aware of these limitations. They include:

on its own the tumescence measure does not allow the therapist to draw any conclusions as to the client=s past or future sexual behaviour.

It cannot be relied upon on its own to establish guilt or predict future deviant sexual behaviour. (My emphasis added).

The ability of subjects to fake the phallometric test is well documented (e.g. Henson & Rubin 1971; Rubin & Henson 1975; Card & Farrall,1990).

What constitutes deviant stimuli are culturally determined. For the purpose of assessment and treatment of offenders they are usually defined as erotic stimuli which involve children and/or exploitation and/or violence. (Phallometric assessment of sex offenders, Launay, p .52).

Unfortunately, only a few studies report reliability data but these suggest that the reliability of the phallometric test is adequate. (Launay, p.55)

There is no reason to believe that all sex offenders have deviant sexual interests ...; moreover there are good reasons to assume that some non-offenders have deviant sexual fantasies and interests. **The quality of the results of validation studies will depend on the extent to which the true sexual interest of each of the subjects in the criterion groups have been accurately identified.** (Launay, p.56)

There is a need for norms for men who report few or no deviant fantasies. The literature indicates a need to know the incidence of deviant fantasies among non-offenders and if non-offender subjects have sexual fantasies similar to those of offenders.(Launay, p. 57)

Many individuals (men and women) have deviant fantasies which they do not act upon: (Launay, p.61)

- We can deduce very little from a 'normal= phallometric pattern. A normal or conventional result can have several possible explanations.
- Deviant sexual arousal is not a necessary functional antecedent to sexual offending.
- An offender showing only a small or non-discriminative response also provides little information.

- A deviant sexual interest is neither a necessary nor a sufficient functional antecedent to sexual offending and only a deviant pattern of arousal provides useful information.

Not only must the operator be careful of the subject=s understanding regarding the results, reports to other practitioners should consist of an interpretation of the penile plethysmography results together with other assessment measure, *never the raw data*, **which on their own are liable to misinterpretation.**

The operator or therapist needs to possess a wide range of skills (Launay, p.62):

- a knowledge of how to feed back the assessment results in such a way that they are properly understood;
- an ability to assess the probable effects of the assessment on the subject and offer support and advice;
- up to date knowledge of the phallometric literature and technical expertise to prevent faulty assessment and faulty interpretations.

One of the deficits noted in this article was the absence of appropriate training. The technician did have a significant experiential component in administration of the polygraph as a police officer with 26 years experience. He appeared to have little more than on the job training together with some seminars on this instrument and the total apparatus and software associated with the testing.

The professional who reviewed the results and incorporated the results into their own reports admitted they were unaware of the limitations of this testing in this circumstance. The access assessor used her interpretation of the test results to support her conclusion and placed heavy reliance on most, if not all, of the statements made by the mother regarding the child=s disclosures. Over time these disclosures lost their reliability. The weakness in relying on the statements of disclosures following intervention and the reliance on the results of the testing

weakens the reliability of the access report. This affects the weight that can be placed on the conclusions.

We are reminded that the purpose of this testing is to evaluate deviant sexual preferences. A consistent distinction has been made in authoritative articles between the use of this testing to assist in the treatment of known offenders and the use of this testing to establish guilt or innocence. AWhere no abuse has occurred, a conclusion of deviance can lead to a wasteful and traumatic court process, unjust conviction, inappropriate treatment, the unnecessary removal of a child from a home and a misuse of limited child protective resources.@ (Simon, Schouten/Sexual Preferences Testing, p.503).

It is noted that although phallometric profiles are not accepted as evidence in criminal court they may be used in a child protective action. It is very important that we view this acceptance critically and cautiously.

Observed deviant sexual arousal cannot be interrupted as indicating that the individual has committed an offence (Marshall and Eccles (1991)). Although phallometric findings do not constitute proof of either criminal guilt or innocence, **these findings can influence a presumption of guilt once admitted into evidence (Mussack & Freeman-Longo,1986).**

Although the diagnosis of offenders who deny their crimes has been suggested as a possible use for phallometric treatment (Freund, Chan & Coulthart,1979), these tests have not been validated with non-admitters (Becker 1988). The author notes that the results may be used in an attempt to resolve the ambiguities that characterize cases in which admissions or clear evidence of guilt are absent. (1992 Simon and Schouten, Problems in Sexual Preference Testing in Child Sexual Abuse Cases, A legal and Community Perspective, p. 510).

One of the weaknesses of this testing is when making diagnostic inferences about individual cases. Phallometric research has generally been concerned with overall group differences rather than the accuracy of case-by-case decisions. Test profiles based on overall

group differences do not support the validity of phallometric tests with respect to individuals (Marshall and Eccles (1991)). In the December 1992 article the author notes the following:

The few studies that have been concerned with the diagnostic accuracy of phallometric tests have evaluated the ability of a range of cut scores to differentiate normals and deviants. Unfortunately, these studies have been based on offender samples so small as to provide little basis for generalization (Abel et al., 1981; Murphy, Haynes, Stalgaitis & Flanagan, 1986).

The phallometric testing of incestuous offenders has been particularly problematic, (Quinsey, Chaplin, and Carrigan (1979):

... In view of the conflicting evidence Marshall and Eccles (1991) noted that there is little agreement on the value of phallometric tests in the evaluation of incest offenders (page 511).

The few long-term treatment effectiveness studies reported to date have provided weak support for the predictive value of phallometric data (Marshall and Barbaree (1988), (Simon, Schouten/Sexual Preference Testing, p.511).

Finally procedural problems relate to scoring data. There is presently no consensus on what type of scoring is most appropriate (Marshall and Eccles (1991)). The manner in which the scoring occurs can directly influence the findings. ((Earls, Quinsey & Castonguay, 1987; Farkas et al., 1979; Laws, 1977) (Simon/Schouten, p.512)).

Clearly those aware of the limits of phallometric testing must become the educators of consumers of their product to ensure safe and reliable use of the test results. Users, particularly those users that advocate this testing in the course of custody and access work and child protection work, must become more sophisticated in the advocacy of this testing and the application of test results.

In this instance this referral could not and did not produce what was expected or requested. The tenor of the report is negative, the conclusions appearing to be outside the scope of the original request.

In administering the tests Ms. McGrath spoke to five of the tests although not as obvious to the reader included references to some of the twenty tests completed. The results of some of the testing is not evident to a reader. On the Child Molester Scale the assessor concluded that the father has a high score indicating few cognitive distortions with the exception to his answers to a few questions. He answered correctly the question: A child will never have sex with an adult unless a child wants to. The assessor indicates that this is an obvious question. However this question is restated in another form (Q.105) and L.J.M. had difficulty understanding that children might feel pressured to have sex with an adult. He explained his difficulty understanding the question. An 8-year old may feel that she has to cooperate even if she didn't want to but he said a 3-year old might not feel that way. What he is supposed to understand is that a child at any age might feel pressured. In discussing this with the assessor he did not understand that a 3-year old could understand the concept that a parent might withhold love if they did not comply. The result, says Ms. McGrath, is that in trying to make sense of that he showed a distorted view of a child's feelings. He should not have differentiated in age. He answered this question correctly when asked in an obvious way but left it blank when asked in a more complex manner.

The results of the ABC scales confirmed that the responses were non-indicative of cognitive distortions re adult/child sexual content.

Although Ms. McGrath was aware of the limitations of this assessment the balance of the report failed to adequately identify the limitations to ensure the readers of the report would clearly understand the limitations of the assessment.

Further Ms. McGrath admitted to making findings of credibility based on the allegations and discussions from the mother. The tenor of the report leads the reader to conclude that the assessor began with the premise that the father was not believable. If the assessor has been

dealing with an admitted offender, or a person found guilty or with a known history of offending, it would be appropriate for Ms. McGrath to place little reliance on self-reporting, and to challenge the client. Ms. McGrath begins her report with the following observation:

... the child=s mother ... provided information to the authorities that strongly suggested L.J.M. sexually abused their daughter ... in 1997 when she was three years old.

She confirmed in evidence that A... it is well known among professionals who work with sexual offenders that they are proficient at lying, at minimizing, at denying ... and anyone sophisticated enough can skew the results to suit their needs@.

The report did not make a clear distinction between this father and an admitted sex offender and did not appear to differentiate in style from the assumption that he was not telling the truth. The issue of overnights is an example of where the assessor relied on the statements made by the mother to suggest the overnight visits were twelve or more in number whereas the father estimated far fewer. Presumably the goal was to show opportunity to commit the alleged acts. In fact the balance of the evidence confirms the father was more correct in his statement than the mother. The father, in an effort to defend himself against the allegations, asserted that he was never alone with the child. While there were occasions where he was alone the bulk of the evidence points to the father having others around for visits including many occasions when the mother was present.

L.J.M. did show wrongful thinking in answering a few of the many questions put to him. When an offender is found to engage in wrongful thinking regarding child/adult sex there is an increased danger that the lack of understanding of the needs of a child might result in a lack of judgement or a victimization of the child in the offender=s care. This is important. However without evidence that would cause a court to conclude that L.J.M. is an offender or did in fact commit the acts alleged it is hypothetical to judge the risk based on these answers particularly

where there may be other reasons for the wrong answers (i.e. a lack of understanding of the concepts discussed or an inability to articulate his understanding).

Dr. Kelln did agree that there were a few answers that evidenced wrongful thinking on the subject of adult/child sex. However Dr. Kelln interpreted the results as revealing no attitudes or cognitions of L.J.M. that would be supportive of sexual deviance. He confirmed, as did Ms. McGrath, that L.J.M. understood sex with children was wrong.

There were some conclusions outside the area of expertise of the assessor about which there were comments that caused me concern. I was particularly concerned about the examples used to make the finding regarding his exaggerated sense of self-worth. She recounts the following as a criticism:

L.J.M. said he couldn't remember exactly why he fired his lawyers, and he became very confused when trying to explain these events and the significant court appearances concerning custody and child care payments over the past few years.

Given the history of this proceeding his confusion is reasonable. The interviewer implies that L.J.M. is difficult because he has had a number of lawyers. There was insufficient information before Ms. McGrath to support her conclusion.

Secondly, the assessor noted L.J.M. had some personality traits that could be problematic. To support this she concluded that L.J.M. was unable to take the perspective of another, that he may be able to indicate concern but could not back this up with words. She referred to this as shallow emotion. One example referred to the fact that L.J.M. sought disclosure of the complete file materials relating to the two assessments conducted involving him. He sought disclosure even when it meant others would be affected, their confidentiality invaded. This shows the assessor's fundamental misunderstanding about this trial process and the rights of L.J.M. to full disclosure to obtain the information respecting the allegations and the conclusions reached by the assessor. This is particularly relevant when one considers that the father is the person being assessed in two reports by the same assessor and there are two different

conclusions in each report. This shows a lack of understanding about the significance of the report to L.J.M. and the significance of this report on he and his child. His request, although belated, was reasonable and legitimate.

Further the hypothetical resulting from some of the testing on L.J.M. is not borne out by the evidence of his work ethic, his family connections and his concern about K.A.M. when she became pregnant. Indeed his behaviour after the separation is indicative of an individual who understands his responsibility. Immediately after the first discussions about a hickey and ADaddy rubbing too hard@ the father stops any overnight visits and insists the mother take the child to a doctor. When the mother comes back to him with more discussion and concern he adamantly insists that she take the child to a doctor. His cooperation with Child Protection authorities, police and assessors is not indicative of someone who is afraid of disclosure. While he clearly did not exhibit an understanding of the source or consequences of these discussions his response was not without some instinctive insight.

Ms. McGrath indicated she had difficulty with the Respondent saying he had been to church @thousands of times@ as indicative of his willingness to exaggerate for his benefit. When she asked him about the theme of the book of Genesis he could not answer. This failure was used to evidence an intent to present himself in a favourable light. There was not apparent in her analysis, a consideration whether the failure to know the theme of the book of Genesis related to what she considered was his neurological deficit and an inability to articulate his thoughts.

When asked about the absence of results for all testing done the assessor answered:

The point of this assessment and of any psychological assessment, is to point out the deficiencies or problems, if they exist. It=s not to tell all the good things about a person verses the bad ... if I don=t talk about the positive things, it does not mean I am being unfair to the client. It means that was not the point of the assessment.

In my view this misstates the role of assessor. The assessor is to fully report on the results of the testing to put before the court sufficient information to allow the court to weigh the results in light of the recommendations. The court and those who use the assessment would be missing vital information if they have only those reports that are negative or that define deficiencies. Having heard this it raises an issue about the appearance of fairness, about the assessment of risk and overall balance in the report.

The assessor completed two reports on L.J.M.. The first report was undertaken because he lived in the same household while the allegations made by K.A.M. were winding their way through the system. Child Protection commissioned an assessment to determine whether L.J.M. constituted a risk to his nephew. Ms. McGrath used the same test results and concluded in that instance that there was no compelling evidence to suggest that L.J.M. was a significant risk to sexually abuse the child in question. The difference in the reports is the presence of the mother=s allegations regarding the child=s disclosure and whatever reports were available at the time of the testing. It may be significant that his child is a girl and the other child was a nephew.

The assessor relied on the allegations by the mother as described by the access assessor and the play therapist. The mother=s allegations and the living circumstances of the child were never examined. There is a mutual reliance by the professionals on each other=s conclusions regarding the allegations. Considering there never was a process to evaluate the credibility of the allegations or to weigh both sides, this reliance is risky.

The most serious difficulty evidenced in this case in using these tests on L.J.M., a non-offender and non-admitting client, is the confusion created when interpreting the results. This is clearly illustrated when one reviews the access assessor=s comment:

Formal psychological tests indicate that while L.J.M. socializes with ease, he displays little personal insight or awareness.

Further, with S.A.M.=s allegations, together with the results of L.J.M.=s psychosexual assessment indicate he may well pose an unacceptable risk.

Having reviewed all the evidence I adopt Dr. Kelln=s perspective that there is little indication that L.J.M. lacks personal insight. He is a concrete thinker. He is uncomplicated and clearly unsophisticated.

Ms. McGrath acknowledged she was concerned about the split between the verbal and performance IQ scores. Using that together with the results of the phallometric testing which shows slight deviant arousal, some inappropriate beliefs about adult/child sex (noted above) and his defensiveness (a common trait in clients taking these tests) she concluded that if he committed these acts he would be a high risk. That is not helpful at this stage of the proceedings. Further it can heighten concern about a risk which has yet to be found to exist.

The literature shows that these tests are not foolproof. Having inconclusive results Ms. McGrath looked at the other sources including the mother=s testimony, the untested affidavits, and concluded in most cases that she preferred the mother=s version of events. She indicated she didn=t have any reason to disbelieve her. With respect to the hickey Ms. McGrath said she could not conclude either way, she didn=t know who to believe. She concluded that L.J.M. was so difficult to understand throughout the entire interview that the credibility of his self report was not as high as the mother=s credibility. There is a significant difference in the verbal ability of the mother and father. The mother is college educated and articulate. Ms. McGrath, after all the testing and reading was unable to tell whether or not a hickey existed. If one refers to my findings on what is admissible following the *Khan* argument we are left with very little.

It would have been far more appropriate to refuse to do the assessment or to indicate when approached by counsel that an assessment in this circumstance was of limited value. The assessor relied on her own findings of credibility, some of which are in conflict with the tested evidence and are beyond the scope of the assessment and speak to matters properly within the court=s duty. Had there been an appropriate investigative procedure followed in 1997 and a

finding or admission made, these tests may have been viewed in a different light. Given the unreliability of the results I exclude the testing in its entirety.

I have already discussed the serious reservations I have about the lack of conclusions supporting any finding of guilt or innocence, the lack of a finding of preference of deviant stimuli, the lack of a finding of personality disorder or mental disorder. In addition the reliance on personality traits with the inference that if he was an abuser this would place him at higher risk and the reliance on untested affidavits to bolster a negative inference. I am concerned about the over reliance on the mother=s affidavits, the effect this has had on professionals after the fact and the intended effect this was expected to have on the court.

In support of this conclusion I adopt the reasoning found in **R. v. J.-L.J.**, 2000 SCC 51, File No. 26830.III. In this case the trial judge excluded evidence from a psychiatrist to establish that in all probability a serious sexual deviant had inflicted the abuse ... and that no such deviant personality traits were disclosed in various tests including penile plethysmography.

The literature confirms, as does the Supreme Court and the experts involved, that the use of this tool as a therapeutic tool is acceptable. It has yet to be accepted as a forensic tool. In **R. v. J.-L.J.** the court noted the following:

The penile Plethysmography, as noted by Fish J.A. is generally recognized by the scientific community and is used by psychiatric facilities such as the Institute Philippe Pinel de Montreal to monitor the result of treatment for sexual pathologies. The Plethysmography enables the medical staff to assess the progress of therapy of known and admitted sexual deviants. This is inapplicable to the respondent. He denies he is part of such a group. He is not undergoing therapy. Dr. Beltrami is a pioneer in Canada in trying to use this therapeutic tool as a forensic tool where the problems are firstly to determine whether the offence could only be committed by a perpetrator who possesses distinctive and identifiable psychological traits, secondly to determine whether a Astandard profile@ of those traits has been developed, and thirdly to match the accused against the profile. Dr. Beltrami=s evidence is therefore subject to special scrutiny. While

the techniques he employed are not novel, **he is using them for a novel purpose.** A level of reliability that is quite useful in therapy because it yields some information about a course of treatment is not necessarily sufficiently reliable to be used in a court of law to identify or exclude the accused as a potential perpetrator of an offence.

And at paragraph 36 the court said:

Dr. Beltrami also purported to gain assistance from the personality inventory tests (MMPI2) about the propensity of the respondent for sexual deviance, but those tests are too broad and general for that purpose, although the results may well have provided useful background information to the more specific Plethysmography test.

And at paragraph 44 in relation to the attempt to identify personality traits that would speak to propensity or be used as evidence that sexual offenders have these personality traits the High Court said:

... the range and distinctiveness of personality traits attributed to perpetrators of difference offences will vary greatly. The requirement of a standard profile is to ensure that the profile of distinctive features is not put together on an ad hoc basis for the purpose of a particular case ...

The Ethical Standards and Principles for the Management of Sexual Abusers, section 15 states in part:

Several studies have linked the history of sexually deviant behavior and deviant sexual arousal to risk and recidivism. ... instruments that promote the collection of data in these areas are deemed to have significant clinical value. However, with any psychophysiological instrument, care must be taken to avoid misuse or over reliance on the instrument, procedure or the resulting data.

And in discussing the limitation in Appendix B, Plethysmograph Examination:

Failure to develop significant responses to deviant sexual themes cannot be used to demonstrate innocence of a specific allegation of sexually deviant behavior.

Development of significant arousal to deviant themes cannot be used to demonstrate guilt of a specific allegation of sexually deviant behavior.

It is inappropriate to use erection responses to determine or make statements about whether or not someone has engaged in a specific behavior or whether or not someone fits the Aprofile of a sexual abuser@.

This evidence cannot be used to show mere propensity. The results were not distinctive enough to assist in a definitive evaluation of a profile or to place L.J.M. in a category similar to someone with this profile.

I conclude that the assessment was relied upon by professionals to conclude that the results of the test place L.J.M. in a higher risk category escalating the concern and impeding his ability to obtain access to his child. Its purpose before the court is to endorse the applicant=s belief that L.J.M. can be safely determined to be an abuser and ought not to have access to his child.

The conclusions reached at page 15 of the assessment are not sustainable on the evidence and if admitted would distort the fact finding process. To find the assessment and conclusions admissible would seriously prejudice the Respondent. I have not found probative value in the evidence. I exclude this evidence in its totality.

DISCLOSURES

Historically we have some benchmarks. There is no evidence of any concern about sexual abuse as of the last court hearing in February 1996. The last overnight visit was April 13, 1997. All visits terminated after the July, 1997 disclosures. The mother=s indicates that the child began to make these disclosures on July 11, 1997 referring back to an April 1997 visit. Ms. Wheeler

speaks to “spontaneous statements” on October 16th and 23rd, 1997. The child’s maternal uncle speaks to an incident on October 21, 1997.

Given the number of times that some form of the disclosures have been restated by professionals, one is left with a confused amalgamation of allegations which inaccurately reflect the events in the sequence they actually transpire.

It is critical to analyze the context and timing of the disclosures to allow me to draw a conclusion on the *Khan* argument to determine admissibility and ultimately to weigh the nature of the current risk, if any, that exists.

As background information after the separation the child has lived in numerous different residences including the following:

July ‘94 - Nov.’94:	an apartment on [name of street changed], Dartmouth
Nov.1/94 -July ‘96:	[name of employer changed], Dartmouth
July ‘96 - Nov1/96:	Maternal grandparents’ home
Nov. 1/96 - June /97 [name of employer changed], Dartmouth	
June/97 - Sept./98:	[name of employer changed], including one month living with another family
Sept./98 - Nov.1/98:	Lived with maternal uncle in addition to 6 weeks with maternal grandparents

Nov.1/98 - Dec./99: [name of employer changed]

She apparently consistently attended the same day care.

It is also notable that in July 1997 the mother had an opportunity to relocate with the [name of employer changed] to Ontario. Because of the strong relationship between the child and the father she declined. She described the parents= relationship as a good relationship with open communication. Through her efforts the father had taken on a more extensive role with the child, such that at two years of age and at the mother=s instigation access was taking place outside the child=s home. Previous to that the father often visited the child in the mother=s home. She considered the father a reliable parent. The child was closely attached to her father. She also indicates that after the visits the child would be quite talkative and tell her in detail what she and the father did. She admits that R.M., the paternal niece, was frequently with the father on the access visits. This was confirmed by R.M.=s testimony.

According to the Running File records from the Children=s Aid Society, under the date July 15, 1997, Diane Wheeler, a social worker with the child protection team, IWK Grace, was contacted by a clinical nurse from the mother=s doctor=s office at the Abby Lane Hospital **on July 14, 1997**. K.A.M. was discussing with this nurse the possible sexual abuse of her child. Ms. Wheeler called K.A.M. and was told by *K.A.M.* the following:

In the past K.A.M. said S.A.M. complained of a **sore vaginal** area. As ADaddy rubbed her there@. She saw a mark on the child=s ear and called it a **hickey**. Asked the child and child said daddy sucked her there.

The mother said she spoke with L.J.M. and was comfortable with his explanation. She felt things Aimproved@.

K.A.M. said she was comfortable with L.J.M.=s explanation. The mother makes it clear that the child is very attached to the father.

The mother further told Ms Wheeler that in the **past weekend** (July 11th) the child had visited the paternal uncle in [name of place changed] and returned with many fly bites, one of which was on the child's neck and it resembled a **hickey** according to the mother. She asked the child and the child responded, **"Daddy sucked my neck"**. As described in the June 1998 affidavit this sucking on her neck occurred on Uncle P.'s swing@. These are the disclosures that triggered the concern and the mother's search for professional involvement. K.A.M. was concerned about Ms. Wheeler contacting the Agency because she said the child was attached to L.J.M..

The mother testified that one night the child had trouble sleeping and she asked the mother to rub her. K.A.M. asked her to show her how daddy rubs her and she **demonstrated by rubbing her neck, stomach and vaginal area.**

The Mother was interviewed by child protection on July 17, 1997. The interview was recorded. There was dispute about the accuracy of the transcript. I have used the original source, the audio tape for the purposes of hearing an accurate rendition. This interview by Mr. McConnell is perhaps the closest, most reliable recollection of the complete disclosure by the mother about the child's statements up to July 17, 1997. His source of information before this interview is from Ms. Wheeler.

He began the interview by attempting to establish the chronology of disclosure which brought the mother to him on that day. The mother confirmed she spoke to a clinical nurse at the Abby Lane Hospital who referred her to Diane Wheeler of the child protection team who further referred her to the child protection agency.

She stated she did not know what she was hearing, that she was scared of the content of the conversation on a regular basis and has only stayed over with her father **five to six times** since the separation. She confirms that the child enjoys the contact with her father. The **"triggering disclosure"** referred to by the mother **refers back to the last sleep over on April 13th. The child indicated that her bum was sore. The mother asked her why is your bum so sore? The child responded, "daddy rubbed me"**. The mother asked her to demonstrate, and the child took both hands and made a face rubbing, rubbed too hard@. The mother interpreted the child's direct physical description to include rubbing on the vulva and vaginal area.

The mother confirmed she spoke directly to the father about this and while he initially could not understand the explanation. The mother confirmed that the father was a caring and good father from all appearances. In that discussion the father agreed that perhaps the child should not sleep over until she gets over this foolishness. Overnight visits stopped for one month, although the regular access continued. Both the father and the child asked the mother if she could resume overnight visits. The child asked her mom, @Can I stay at daddy=s?@.

The mother agreed with the child=s request. She told the child, AIf you don=t want to stay, call me@. The child called her at ten o=clock at night, the mother came over and picked the child up. When asked why she didn=t want to stay, the mother says the child wanted to sleep in her own bed. The child wanted to return the next day to continue her visit with her father.

The mother says that on reflection, another incident **may have occurred**. She does not know when but indicates it was **prior to April 13th**. She noticed what she called a **“hickey” on the child’ earlobe**. She described it as a pink purple spot, a little prickly spot, no bruising. She admits that she suggested to the child, Awho=s been sucking on your ear?@ The child responded, Adaddy@. The mother responded, AI said silly daddy@.

The mother confirmed at this point that while the parents had differences they developed quite a good system and the child can=t wait to go with him.

The third reference of concern to the mother was an incident that arose out of a visit on July 6th. It was not an overnight visit. On July 6th, the child went with her father to the uncle=s home at [name of place changed]. **The child returned covered with fly bites. The mother noticed a mark she described as looking like a hickey on her neck amidst all of the fly bites.** She pointed to it and asked the child, Awhat=s this one?@. The child didn=t respond. The mother described it as not raised. **It was just flat, pinpoint marks.** The child responded, **“daddy’s sucking on my neck again”**. The mother asks, Awhy does daddy do that@, and the child says, Acause he loves me@, and the mother responds, Asilly daddy@. The mother said the child acted out strange sucking noises, and she showed me, and the child in the course of this description said, **“rub those coconuts out”**. The mother, not having heard this expression before, asked her, Awho says that@. The child responds, Adaddy@. The mother asked the **child to describe this, and the child begins to rub her chest, her belly, between her legs and then she looks up to her mother and says, very gently”**. The mother interprets this very gently to be the child=s way of assuring the mother that the father did not rub her hard, referring back to the first incident that occurred on April 13th. When the mother asked when this happened, it happened one evening when the child wanted the father to come over and stay with her at her mother=s home

while her mother went out. The father came, took her out for the evening and brought her back to her own bed in her mother=s home and he went to sleep on the couch until the mother came home. The child responded to the mother, Athe night daddy stayed over and slept in my bed@. That was **June 29th**. (It is important to note that the mother interprets the child=s reference to coconuts to mean breasts, not genitals.) (It is also important to note that the mother confirms elsewhere that the father took the child out that evening and returned the child to her home for sleep, and he was asleep on the coach when she arrived home at approximately 11:30p.m. to midnight.)

The mother admits at this stage in her conversation with Mr. McConnell on July 17th, *“that we’ve put so much language in her mind by asking her”*. Mr. McConnell asks whether quite a bit of conversation has gone on with the child. The mother has discussed these issues with the child, the mother and the father have discussed this in the presence of the child, the mother has discussed it with her sister who occasionally is a caregiver to the child and the mother has discussed it with a family with whom she is very close and with whom the child associates and at one point lived. The family has two adults and two children. The mother admits that she is overprotective and that she began this inquiry to see *if* there was a problem. She admits that the bond between the father and the child is so strong that although she has thought of moving away, she would rather not take her from the father.

In the course of the interview process, the mother appeared naive and inexperienced. She appeared to be seeking information and/or advice regarding the disclosures; a reasonable inquiry for a young mother.

In summary, as of July 17th, the complaints respecting possible sexual abuse (taken from the mother=s interview and the child protection notes respecting the conversation between Diane Wheeler and Greg McConnell of child protection) related to:

- | | |
|-----------------|---|
| April 13, 1997: | Asore bum@, Daddy rubs too hard. |
| July 6, 1997: | A mark on the child=s neck that Alooks like a hickey@ with an explanation from the child that Daddy sucks on my neck; Daddy rubs those coconuts out (what Daddy does when she can=t sleep, rubs neck, chest and between the legs (as demonstrated by the child) |

Daddy rubs here (when she has trouble sleeping, with the child demonstrating by rubbing her neck, stomach and then vaginal area - in mother=s words to Diane Wheeler, Diane Wheeler=s words) (rubs her chest, belly and between her legs, in Mother=s words to Greg McConnell) and on video; also see the July 31st,1997 interview with police and worker where the child=s description of Daddy rubbing coconuts out, involves an innocent contact as depicted by the child.

July11,1997: A series of fly bites on the child together with another flat red mark that Alooks like a hickey@ with the explanation that Daddy sucks on my neck, on the swing at uncle=s place.

On July 17, 1997: the police are informed.

K.A.M. began to put this information together with other behaviors *she had noticed* about her child, including trouble sleeping and about certain interactions between the father and child. In cross examination it appears that the trouble sleeping was not a serious or prolonged problem. In testimony about the interaction between the father and the child the mother referred to the father=s tendency to praise and in the mother=s words he appear to be Aslightly@ preoccupied about the child=s looks. She said the child had **bad dreams** when with the father. It is important to remember that the child stayed overnight rarely. All of these behaviors have multiple explanations.

R.M. was 11 years old when she used to visit L.J.M. when S.A.M. came for access visits. This was confirmed by others. She is now 15. She testified she stayed overnight twice. On one occasion she and S.A.M. slept in the living room. They got scared. L.J.M. told them they had to go to sleep. S.A.M. started crying when he came into the room and told them to go to sleep.

S.A.M. wanted to be with him so he took her into the bedroom. She remembers nothing unusual about the next morning.

It is critical to look at the contents and concerns raised in the taped conversation as constituting the issues of concern to the mother **as of July 1997**. It is particularly critical because the nature of the allegations expanded significantly over the course of the following months, culminating in the unilateral termination of the father=s access to the child.

The July 26,1997 Interview (no disclosure)

On July 26, 1997 the child is interviewed by Greg McConnell and Cst. Tammy Richard of the RCMP. The interview began at approximately 9:09 a.m. While the child initially presented as shy and reluctant to stay in the room or speak at all, after encouragement from Cst. Richard and Mr. McConnell the child relaxed visibly. The two adults tried to get the mother to leave. The child was extremely reluctant and very angry when her mother left the room. During the course of the interview the police officer, agent and child went to find a toy and by the time they returned to the room the child=s presentation was extremely different. The child was talkative, happy, involved, articulate and remained extremely active throughout the balance of the interview which ended at approximately 10:20 a.m. Both mother and father were mentioned through the course of the interview. The RCMP officer and the agent attempted in a very gentle and non-evasive way to invite the child to speak about the father and the mother. In particular they revisited the discussion about the child=s visits at the father=s place on numerous occasions. There is no indication of any fear or reluctance by the child to be with the father. The child indicated in answer to certain questions that she plays with her dad, she likes it when she goes to visit, she does not want to sleep there, she has bad dreams, she recalls a spider on her leg although it is not clear during the course of the interviews where this occurred, she spoke about other children and was very articulate, she talked about her friends, her mother and her father, she counted to five and painted, discussed the markers she drew with, they drew body parts and she was not preoccupied or did not disclose any extensive or sophisticated knowledge of sexuality. She disclosed no fear in the discussion including the discussion about who bathes her. She was clearly not fearful of the male social worker or the female RCMP officer (dressed in plain clothes). She was certainly not preoccupied with any negative concerns.

The second Interview July 31,1997(no disclosure)

A second interview was conducted on July 31 at 9:33 a.m. Again the child appeared slightly reluctant upon arriving and was very quickly won over by the RCMP officer and the child protection worker. When her mother left the room she was screaming and hitting the RCMP officer, turning her back to the RCMP officer who calmly began to read her a story and eventually turned the child around by the end of the story such that the child was actively engaged in the story. The child was independent. When she got bored reading she asked to color. She was not easily fooled. She knows the color of her eyes. She understands the questions she answered but was not overly preoccupied or prepared to dwell on any subject matter. She was childlike. She talked about her residential move very briefly without indicating any distress. She talked about P.E.I. She answered questions about where her dad lived and indicated that she was afraid because of a mask and someone said, Aboo@. She was asked what her father did when she was upset or woke up with a bad dream and she said, AHe hugs me@. She was not accurate in her sense of timing and responses to certain questions. When she was asked what else her father did if she couldn't sleep besides hug her and if he did anything else, she said ANo@. She did not appear afraid whatsoever of Mr. McConnell nor Ms. Richard. She described rubbing her belly and she described her dad rubbing coconuts out of her belly. The description was not suggestive of anything other than innocent contact. When asked where this happened she referred to it as happening in one of her friend=s rooms which, from a place perspective, was unlikely, if her father was the culprit. She indicated and was told at the end of this interview that if she had any concerns whatsoever about anyone who did anything to her that made her feel uncomfortable not to hesitate to tell her mother. The interview was ended subsequent to that.

On July 31, 1997 arrangements were made to allow the mother to view this videotape at 1:30 p.m.

The August 6, 1997 entry confirms that K.A.M. contacted the Agency inquiring as to whether a third interview had been scheduled for S.A.M.. K.A.M. stated that Cst. Richard and Mr. McConnell interviewed S.A.M. on August 22 & 31, 1997 and no disclosures were made by the child.

On July 31, 1997 the mother disclosed the following:

She returned home at 9:00 p.m.; S.A.M. was in bed and called her up because she could not sleep. K.A.M. hugged her and rocked her. **She started kissing her mother on the mouth and poked her tongue out in the mother's mouth. Mom asked, 'What are you doing'; she replied "kissing", and mom asked, "Who kisses like that?". The child replied, "Daddy". Mom described the child licking around her mouth and saying, "I'm making you smile and feel good". The child laid on the bed on her back, facing her mother and then S.A.M. stuck her tongue out and said, "This is what I do when I stick my tongue in daddy's bum" and the child said, "when I lick his peanuts". Mom asked, "where are his peanuts?". S.A.M. touched between her legs. Mom asked, "When he has his clothes off?". The child replied 'Yeah, when he's naked'. Mom asked, "What happens when you're there?". She held her throat with her two hands, opened her mouth, put her tongue out and making choking, gagging noises and said, "Sometimes I throw up all over daddy".**

Mom asked, "What sounds do you hear?" and S.A.M. made her own noises (choking). Mom asked, "What sounds does daddy make" or "what does daddy do?"; S.A.M. made a frozen face, poking her tongue out and her body was stiff. At one point, S.A.M. said, 'Daddy said, let's tell secrets but don't tell mommy'. Mom stated she put S.A.M. to bed and has not said anything since.

The mother informed the Intake Worker that she spoke to her parents and a friend this evening. She was informed by the worker to document any spontaneous comments and cautioned K.A.M. to have no dialogue or direct questions relating to these concerns. She recorded the statement and circumstances at approximately 2:00 a.m. on August 1, 1997.

A final interview was scheduled for **August 19, 1997**. K.A.M. advised she did not speak to S.A.M. since the last disclosure and had no contact with S.A.M.'s father since August 2, 1997 at which time she told L.J.M. that he could not see or speak with S.A.M. until an investigation has been concluded.

On August 19, 1997 L.J.M. contacted Mr. McConnell and inquired as to the status of the child protection proceeding. He was advised by Mr. McConnell that no access would take place

until the investigation was complete. L.J.M. told Mr. McConnell that K.A.M. was a good mother and he had experience as a good father and not Aa pervert or molester@.

The Third Interview: August 19,1997 (no disclosure)

On August 19, 1997, armed with the disclosures of July 31, 1997, a third and final interview took place. After the child was comfortable in the room, it was clear she was not fearful of either of the interviewers, Mr. McConnell or Cst. Richard. She was engaged quickly in conversation, was not shy, spoke about subject matter of interest to her and made no disclosures. Both interviewers reminded her of the need to speak about anything that made her uncomfortable and subsequently focused on her visits with her father, asked her about whether anything made her uncomfortable and **she indicated, "no"**. They asked her about visiting her father=s house and where he lived. It is clear that this child was not preoccupied with or fearful of her father; that she was clearly uninterested in pursuing conversation. The interview was terminated. The tape of the third interview was not complete because of a defect of the tape. There were, however, no disclosures in the course of the three discussions by the child to the police or child protection worker.

These disclosures set in motion a series of events which need to be placed in a time sequence and context for the purpose of this decision.

On August 26, 1997 the mother called again indicating there were more disclosures. There was no access at the time. On August 27, 1997 the mother called regarding a further disclosure and on August 27, 1997 the social worker forwarded the information to the Crown Prosecutor.

The police officer and the Agent for the Minister agreed that there would be no further interviews. On August 27, 1997 the worker met with a supervisor. The supervisor confirmed that no further interviews would take place, and they agreed to consult with Dr. John Anderson.

Dr. John Anderson, director of the Child Protection Team, completed a physical examination. Given the child=s age she was also referred to Diane Wheeler of the Child Protection Team (IWK Grace) for play therapy. An access assessment was done and a report from Pat Dougan is dated November 17, 1998 and an update on February 11, 2000. L.J.M. was

referred to the Psychological Services for phallometric testing with Mr. Gregory McGrath in August 1999. There is a further report from the Center for Psychological Assessment from Mary McGrath dated October 4, 1999. There is a report written by Dr. Kelln dated February 23, 2000 questioning the foundation of the conclusions from the Center for Psychological Assessment. Most did not question the reliability of the allegations as conveyed to them by the mother, her affidavits or through third parties and the reports containing references to these allegations. Some of the experts relied on the untested affidavit material.

On September 3rd, the worker met with the mother and took a copy of her diary. K.A.M. met with Diane Wheeler of the IWK Grace child protection team on September 3rd. On September 9th, the child protection branch of the Department of Social Services closed their file.

On September 9, 1997 Diane Wheeler contacted Mr. McConnell and indicated **the child was asking more frequently for visits with the father**. In her testimony Ms. Wheeler acknowledges that this desire for contact with her father was a predominant theme in her play therapy. Ms. Wheeler asked whether the Child Protection Agency could supervise access. The agency indicated they had no resources to supervise and this was not their role. **They suggested that the parties agree on a third party.**

What is notable about this suggestion is the approach adopted by the Agency who had previously recommended to the mother the cessation of all access during the visitation to a position that access could be explored, simply not with their resources.

The parties could not agree on a supervisor. The mother resisted all efforts at access. None took place.

It is important to examine the reports from professionals.

Dr. Anderson, September 22, 1997 (No physical evidence)

Dr. Anderson was qualified as an expert witness in the areas of child abuse and child development, having extensive credentials and experience. **On August 19, 1997** he requested the file for review with the child protection team to discuss the possibility of play therapy. He saw the child on September 22, 1997 at 11:15. His report is dated the same day.

His report confirms there was no physical evidence of sexual abuse. He speaks to the limits of his involvement. His purpose was to complete a physical examination. His knowledge of the allegations comes from discussions with Diane Wheeler, social worker with the Child Protection Team at the IWK Grace, and Greg McConnell from Dartmouth Community Services. He notes that the disclosures raise allegations that the child may have been sexually abused by her father, which sexual abuse may have involved **oral, genital contact and fondling of the child's vagina and anal region**. Dr. Anderson refers to allegations about the child's father's penis which may have touched the child's vagina and anus. This allegation was not contained in the taped interview of July 17. He states:

I have no comment to make about these allegations as I did not interview S.A.M. and did not discuss the allegations with her mother except in terms of explaining to her mother the results of the physical examination.

His involvement was solely to conduct a physical examination. He concluded that there was no physical evidence of sexual abuse. He cautions the reader that 80% of the children who are later proven, legally, to have been sexually abused, based on history alone, have normal physical examinations. In other words Dr. Anderson says a child can be involved in oral, genital sex or a child can be fondled and even have an erect male penis placed on top of her perineum and yet no physical findings will remain as proof that these sexual acts took place.

He describes S.A.M. as a delightful little girl.

I have reviewed the child protection recordings which are reflections of an agent's writing of recollections of conversations with K.A.M.. They are second and third hand statements made by the mother to an outside source or to Mr. McConnell of child protection. The

child protection authorities with the Department of Community Services have heard no direct statements from the child despite three lengthy interviews. Other than the recorded conversation of July 17th, the recordings cannot be said to reflect the child=s statements with any degree of reliability.

I have reviewed Ms. Wheeler=s report and Ms. P. Dougan=s report. These individuals relied heavily on the recollections of those who described the allegations after much discussion took place. I will deal with the disclosures to Ms. Wheeler by the child separately.

One can see in the recounting of the original allegations, the interventions, the sharing of information with the child and with those around her how the original allegations become embellished or re-stated out of context, using words not originally used or summarized in a manner that takes on a different and sometimes more sinister connotation, all for the purpose of updating a professional or preparing for court. The re-telling of the Astatements@ becomes distorted because of the passage of time, memory, re-telling, recollection and the passing of information from one person to another.

Diane Wheeler, Play Therapist

On August 28, 1997 K.A.M. contacted Diane Wheeler. By this time the mother had engaged in numerous and extensive conversations with the child and with the people surrounding the child regarding the original allegations. She has also engaged in considerable (she says daily at some point) barbie doll play enacting different possible scenarios about A good touch, bad touch@. K.A.M. reported to Diane Wheeler that S.A.M. had disclosed a lot of information re sexual touching/contact between her and her dad. K.A.M. recorded the conversations in writing.

It is now known that the mother, in educating the child, used proper terminology to describe body parts. This had been an issue causing conflict between the mother and father, who thought it was quite improper to educate a child this young about sexual matters let alone using this terminology. The father=s view reflected a more dated view of what was appropriate to speak to a young child about; the mother a more current view.

Given the child's age and stage of development play therapy was the recommended course of action. Other than the Adisclosures@ the child displayed no obvious effects from the alleged abuse. The play therapist saw S.A.M. on three occasions in **September 1997** and on four occasions in **October 1997**. S.A.M. was described as a very bright 3 2 year old who easily engaged in play. The therapist described S.A.M. as someone demonstrating Aa directive role in play and displaying control in what she would like to see happen in her story@. This conclusion and description of a child coincides with my viewing of this child through the course of three interviews. Other than her reluctance to leave her mother and stay in a room with strangers this child exhibited a bright and playful curiosity.

This therapist was not employed to investigate the allegations and draw conclusions about their veracity. Her role was therapeutic. She was contacted by the father and informed him that contact with him was unnecessary.

There appears to be an **underlying assumption that the mother's statements about the child's disclosures are accurate and reliable** in the writing of the report dated **October 27, 1997**. It is equally clear that **one of the predominant themes coming from the play therapy is the grief suffered by the child because of a lack of contact with her father.**

Ms. Wheeler notes that K.A.M. has continued to have concerns off and on, however, felt that she had nothing concrete to back these up. In the report it becomes apparent that the mother's concerns as expressed to Greg McConnell in the July 17, 1997 interview have taken shape. The mother confirms the first time she tied them to the father was in April **1997**. **Ms Wheeler said K.A.M's concerns began in summer of 1996 when the child had bed wetting, nightmares and temper tantrums following visits with her father. The mother admits this is not a true statement** and that these statements did not come from her.

The mother said the night terrors began in 1996. However, there was no mention of night terrors, bedwetting, reluctance to visit with her father and sleep disturbances in the conversation with Child Protection in 1997. In fact a review of that taped interview yields an entirely different

view of the father-daughter relationship. As time passes the mother *has reflected back* on the **summer of 1996**, pulling in behaviors from the child, to form the foundation in her mind of previously existing on-going sexual abuse. These behaviours include nightmares, bedwetting and more temper tantrums.

The translation of the original disclosure has now taken shape such that the recounting of this includes the child's difficulty going to sleep, the mother going to lie down with her and the child indicating that the father sucked her neck and asked her mother to touch her like her dad did and then demonstrated how her father rubbed her vaginal area. Important aspects of the context of the disclosures are now missing.

The therapist confirms, it is only at the **6th & 7th session** that the child engaged in play which while re-enacting with Beauty and the Beast dolls **constitutes the first disclosure to a therapist concerning the alleged course of events. She said to the therapist, "make Beast put his hand on her vagina" and when asked how to do that she took the Beast doll and put it on the vaginal area of the Beauty doll.** The therapist asked her, Awhat happens now?@ and she said, Aput him in jail so he can talk to a doctor@. In the report the child indicates in her play session with Ms. Wheeler, Athe daddy doll needs to get help so he can see his baby again@. The child described a bad person in the family and the bad person had to Ago away@. Testimony confirms this comment results from the mother=s explanation to the child that the father was ill and needed assistance before they could reinstate access.

The timing and sequence of these disclosures are important as Ms. Wheeler saw S.A.M. on September 8, 15, 22 and October 1, 7, 16, and 23. It was on the 16th that this discussion went on and when it was finished and the therapist accompanied the child to the waiting room, the mother prompted the child asking whether she had brought to the therapist=s attention a question that the child had asked the mother. They went back into the therapy room and the child asked the therapist, **"why does daddy put his penis in my bum?"**. **The therapist asked her, "did daddy do that?"; she said, "yes" and the therapist told her that daddy needed help.** The therapist stated her demeanor was quiet and calm.

In the last session on **October 23rd** the therapist described **more play around, “touching vaginas” and “putting the bad guy in jail”**. **The therapist reviewed safety issues with the child and talked about good touch and bad touch.**

All in all the therapist concluded that the child engaged well in a therapeutic relationship and feels safe and protected by her mother. She was not aware of the extent of play the mother engaged in with the child.

The therapist concluded that the **“spontaneous disclosure” of October 16** is indicative of advanced knowledge of sexuality for a 32 year old; that there was a possibility that she had been sexually abused and that this should be further explored.

In the entire context of the disclosures and intervention by the time this so-called Aspontaneous disclosure@ occurred this young child had been exposed to physical examination, three separate interviews with police and child protection worker and extensive play sessions and discussions with her mother respecting good touch and bad touch as well as at least five sessions with a therapist focusing on disclosure. She lived and had access to other children, day care, to friends of the family and was clearly at this stage unable to disclose anything that would be reliable because of the significant amount of contamination.

My conclusion is that this disclosure lacks the authority and reliability associated with a truly spontaneous disclosure. Any subsequent disclosures in this context lacks reliability and is certainly not spontaneous from an evidentiary perspective. Indeed the content of many of her discussions with her mother centered around good touch, bad touch. There are other possible explanations other than attributing this sexualized conversation/play and advanced sexual knowledge to sexual abuse perpetrated by the father.

J.M.

While the child was in therapy there were Astatements@ made to the mother=s brother on October 20th or 21st, 1997. He testified before me. I have no difficulty with his testimony. He

indicated that approximately 22 to 3 weeks prior to October 20th the child tried to kiss him in a way that made him uncomfortable. On October 20th he advised that the child told him sometimes her Daddy Aputs his penis in my bum@. I have no difficulty concluding that the child said that to J.M.. I do not believe that a conclusion can be drawn as to the accuracy or reliability of this disclosure. The mother admits at this time she had already reviewed with the child good touch/bad touch and some of the conversation can be traced directly to the literature the mother reviewed with the child. At this stage the possibility of outside influence and contamination is far too great.

The child spent time with the maternal grandparents and no disclosures were forthcoming to them. The day care had been contacted and they reported no difficulties or statements by the child.

December 12, 1997 Report of Diane Wheeler

Following the October 23rd session Ms. Wheeler saw S.A.M. on five subsequent occasions. Issues of a sexual nature **did not arise again** in the course of therapy; this despite the fact that the same techniques and therapeutic controls were used. The therapist confirms that the nightmares described by the mother had ceased as had the bedwetting. At this stage S.A.M. is 4 years old. K.A.M. confirms that there is no more talk with her about sexual things that her father did to her. They describe a confident young girl.

The therapist *concludes as a result of her overall involvement that S.A.M. has advanced knowledge of sex "which is consistent with children who have been sexually abused"*. She described her as a typical four-year old child and recommends that therapy be terminated.

My conclusion is that S.A.M.'s advanced knowledge of sexuality would be entirely consistent with the numbers and extent of discussions in which she has been involved in which sexual abuse has been a theme and it is equally consistent that this advanced knowledge of sexuality came from other sources other than actual sexual abuse. It may be consistent with

abuse by someone other than the father given her associates. There are a number of possible explanations that were never explored.

The therapist wrote a final letter in July 2000. In that letter she confirmed she had not seen the child since December 12, 1997 except to see her in passing. She did say the following:

I saw K.A.M. for an individual session on January 27, 1998. She discussed her concerns regarding S.A.M.; the increase in S.A.M.'s talk about what her father did to her, how she is worried about an incident that happened with a friend's father, who they were visiting in Toronto. S.A.M. had said that this man had turned off the light because he wanted to show me his penis. K.A.M. had been present and knew this was not true but was concerned ...
Again on January 4, 1999 K.A.M. called me to inquire about a situation that had occurred between S.A.M. and her friend as to whether she should be concerned.

K.A.M.'s Affidavit dated January 20, 1998

I read this affidavit in the chronological context in which it exists, post interviews, assessments, therapeutic intervention, etc. If one looks back at the original disclosure as spoken in the interview of July 17, 1997 and compares it to the disclosure written at Paragraph 6, one sees the frailties of this kind of recollection take shape.

I initially became concerned in April 1997, after seeing what appeared to be a hickey on S.A.M.'s ear. I became more concerned as S.A.M. began **to have bad dreams and resist overnight visits with her father**. On July 6, 1997 after returning from a visit with her father I noticed what appeared to be a hickey on her neck. On July 11, 1997 **she disclosed to me that her father had been rubbing her genitals and showed me what he did to her**. I contacted my family doctor's office, who alerted the IWK Child Abuse Team, the Department of Community Services and the RCMP.

The issue of sleep disturbance is also a troubling evidentiary issue. The issue was not addressed in the July 17th statement. However the mother was asked about this in the first police interview, August 19th, 1997. The mother told police she was not sure there was an issue here. The child was never a good sleeper. She said she occasionally has bad dreams, once and awhile, nothing unusual for that age. There were two bedwetting incidents, August 12 and 14, 1997 when awakening from naps. This was after visits terminated. There is one other reference to a bedwetting incident after August 14, 1997 date. The police asked does she normally wet the bed. She answered no. A She has been trained for a year. We had close friends visiting at the time. We were busy. Other than that there was nothing unusual going on. @ From April 1997 there was no other reference to bedwetting except for these two incidents. She confirms in her testimony that she is not suggesting the bedwetting incidents are a result of L.J.M. and were not tied in time to the father=s visits. However the bedwetting and nightmares are grouped together and reported in the assessors report. I suggest they have been relied on by the assessor, the play therapist and the mother to support the inference of abuse by the father.

The affidavit is a restating of the origins of the mother=s concerns in April 1997. In the affidavit K.A.M. refers to A the hickey @ and the growing concern because of bad dreams and resisting overnight visits with her father (One has to remember that overnight visits were not the normal pattern for this 3 year old and we have evidence of one visit when the child called at 10:00 to come home but wanted to return the next day). She refers to the disclosure of July 11, A that her father had been rubbing her genitals ... @, referring to the conversation respecting the rubbing out of coconuts. In the re-telling of that, the context in which it occurred the child rubbing her body and in the course of doing so, rubbing between her legs is now solely focused on rubbing the child=s genitals. This becomes important when one recognizes that this information assisted in forming the foundation of the reports and the evidence before the court. When the reports were written the affidavits were untested and the father was not involved in the investigative process or the therapeutic process.

On cross examination the mother admitted her conclusion that her child was resisting visits related to the one visit when the child asked to come home at 10:00 and asked to return the next day. The other behaviors that brought her to that conclusion including the child becoming clingy when the father came over to take her out. She would not always run and kiss her father as exuberantly as before. The father would have to take some time to encourage her to go. She said in court that the child was resisting visits. The previous testimony was not consistent with that. In particular, she indicated in July 1997 she made a decision not to move away because of the positive relationship between the father and the child. This in court clarification that between May and July 1997 the child was resisting visits is a subsequent reconstruction which is more of an analytic review rather than an accurate reflection of the circumstances at the time. This perspective was not included in the original July 17th taped conversation with Child Protection.

A review of the first conversation as documented between the clinical nurse at the Abby Lane, the records of the conversations between the child protection agency and the IWK Grace and the conversation recorded between the mother and the child protection agency, (which rightfully triggered some questions and follow up) are not accurately represented in paragraph 6 in the mother=s affidavit of January 20, 1998.

Certainly for individuals who have had access to these affidavits and relied on them to any extent, the integrity and reliability of the description of the disclosures is highly suspect at this stage.

Notably in this January 1998 affidavit the mother now has S.A.M. making dozens of additional disclosures@. The circle to whom she makes these disclosures was initially only her mother. She made the two limited disclosures to Ms. Wheeler and to her uncle. K.A.M., by this time, describes very sexualized behaviour and in describing this her examples include an attempt to kiss her mother by placing her tongue in her mouth and in the words of K.A.M., Agiving inappropriately long kisses to myself and relatives@ (In fact there is no evidence from relatives other than the mother and the brother who said how the child made him uncomfortable by kissing him on the mouth). The mother now has viewed the child rubbing her breasts and

genitals in a sexualized manner and indicating that her father touches her this way. She suggests that the child has felt her breasts, laid on top of her, opened her legs and has attempted to kiss her in a sexual manner.

It is disturbing that the mother describes the on-going disclosures as increasingly detailed and persistent on almost a daily basis. The mother indicates that the child told her on many occasions that her father puts his penis in her bum or has put his pee-pee in her bum and that it hurts. As a result of the disclosures on July 31, 1997 the mother concludes that the father has had oral sex with the daughter, i.e. that the father has ejaculated into the daughter's mouth.

It is disturbing because of the assumptions made and the lack of an appropriate investigation into the child's circumstances and the mother's circumstances. There was no evidence before me of an investigation that would rule out other factors in the child's environment. The mother's statements have never been challenged, if only to rule out other possible reasons or sources of this information including the child's day to day environment.

At this stage these disclosures are highly unreliable, questionable and certainly contaminated from numerous possible and possibly unknown sources.

In the affidavit of July 1998 the mother refers to an incident that occurred on September 19, 1997. In this incident she describes the following:

While playing barbies, she (the child) said to me,
Awhile he puts his pee-pee in my bum in the back
where my poop comes out and in the front out
where my pee comes out ... and when I am
pooping on the toilet he comes and sticks his pee-
pee in my bum and the poop comes out all over his
pee-pee and it gets all over the floor and then I
clean it up.

The mother testified at one point that she began to educate the child shortly after 3 years of age with good touch/bad touch. She used accurate body language. In her testimony the word pee-pee is the euphuism used for penis by the two children that the child lived with. The child was bathed with these two children when they lived together. The date of this disclosure is September 1997.

This information has not previously been disclosed to child protection or in the documentation before the court in this fashion. The mother testified that many other disclosures of a similar nature were said to her during play, before bed, in the car and at other times. When questioned about the frequency of discussions between the mother and child the mother testified first that between the summer of 1997 and June 1998 they played with barbies daily. At first she confirmed that abuse issues were reflected in 75% of the play, however on reflection she confirmed that it was greater than that in the late 1997 and less during the first half of 1998. As it evolved it included confirming with the child that her father was ill and ought not to have done those things to her. At this point she confirms her belief that her child has been sexually abused.

On July 16, 1997 she informed L.J.M. that there would be no further visits and he has not been able to see the child despite his attempts since July 13, 1997. This termination of access was well before the disclosure reported by the mother on September 19, 1997. Nonetheless, on September 21, K.A.M. asked L.J.M. to speak to the child to assure her he was not angry with her and that he was alright. He did so and he called her again on September 22, 1997.

There is no doubt as a result of the investigations and the intervention of the mother that the **child fully believes at this stage** that her father did something bad. It has not deterred her from loving her father and consistently asking to be reconnected with him. The mother, in the numerous play sessions, has explained to the child about the judge and about supervised access. In fact the child asked the mother to supervise so she could have a visit and when the mother said she was mad at the father, the child suggested her grandfather. The mother admits telling the child that her father has admitted he was wrong. The mother acknowledges that while this was

not a true statement she did tell this to the child nevertheless. The child has discussed the notion of the judge putting the bad guy in jail and making him get help.

There is further no doubt that the mother has resisted all efforts, including early therapeutic suggestions, that supervised access be undertaken.

Mother's second affidavit - June of 1998

In Paragraph 5 of K.A.M.'s affidavit I believe she refers to an incident that occurred in May 1997. This refers back to the original disclosures after S.A.M. complained of her father rubbing her too hard. In the affidavit it is clear that the mother was continuing to insist with L.J.M. that he maintain his scheduled access visit the next morning. This behaviour causes me to conclude that the mother did accept the father's explanation and did not consider anything untoward happening as a result of the April Adisclosures@. In fact she cajoled L.J.M. to overlook the child's statement and to insist on on-going access. Had this mother any belief that the father was a perpetrator at this stage it is reasonable to conclude in light of her behavior that she would not have continued to promote access.

When she describes the incident in Paragraph 6 of the June 1998 affidavit she describes the following:

She then asked me to rub her back and her belly. When I rubbed her belly she said, Agot to rub, rub, rub those coconuts out@. I asked her who said that and she answered, ADaddy@. Then I asked her to show how daddy did it and she rubbed her chest belly and then said, Aand bum very gently like this@ while rubbing her vulva. She asked S.A.M. when her daddy did this and she said, AWhen daddy slept over in my bed@.

Compare that to the original statement given to Mr. McConnell in which the mother described the father rubbing her vaginal area, with the demonstration before the police which was innocent of sexual connotation and with the mother's statement to Greg McConnell about

the child rubbing between her legs. We now have a specific allegation of the father rubbing the child=s vulva.

This apparently refers to the May 1997 evening, again after the April disclosures when the mother invited the father into her household to babysit the child.

In the June 1998 affidavit the mother raises the possibility that the child has indicated that the father has rubbed her vulva on two occasions, Aone night in the tub and another night in bed@. She indicates this took place on April 14, 1997. This is an expansion of the first disclosure and the original statements. In the 1998 affidavit the mother concludes:

I had spoken with L.J.M. several times about giving S.A.M. a tub bath rather than a sponge bath because she often (my emphasis) came home with a red and irritated vagina. I assumed it was the sponge baths that caused this.

When developing the 1998 affidavit the mother talks about learning about the fondling on July 11, 1997, believing there was a hickey on July 7, 1997, terminating access, yet on July 13,1997 she took S.A.M. to her father for a visit and stayed with her. She confronted him about the disclosures. She obtained a frank explanation from L.J.M. in front of the child about sponge baths. She proceeded to allow S.A.M. to be bathed that night in the father=s household with the mother present. L.J.M. insisted the child be brought to a doctor to clear this up.

In June 1998 K.A.M. carefully pieces together all of the external behaviour that causes her to conclude by July 17 that there has been significant sexually inappropriate behaviour. For emphasis she lists from (a - g) a series of incidents connecting each to the other to justify the basis for her conclusions yet in the audio interview between her and Mr. McConnell, on a number of occasions he asked if she had achieved full disclosure and the content was restricted to that which has been referred to above. Certainly the affidavit of July 19, 1998 expands and elaborates on incidents.

By 1998 the mother indicates that she approached the July 17, 1997 interview with a number of concerns that arise out of the pre-July 17, 1997 behaviour. This description of the behaviour portrays L.J.M. as a father who is focused on the sexuality of his young daughter and a daughter who has sexualized behaviour and physical symptoms which suggests sexual abuse. This description of behaviour does not reliably correspond with the disclosures.

The only disclosures that would pass the test of necessity and reliability for the purposes of determining whether this disclosure can be considered an accurate description of the child=s statements and for their truth, are the first disclosures as noted in the first taped interview with Mr. McConnell relating to the Arubbing too hard and the hickey@. I admit them.

The remaining disclosures are highly unreliable and contaminated such that if the child said some or all of them it would be equally valid to point to causes including the mother=s preoccupation with sexual abuse, reconstruction of past events in light of extensive reading of literature on sexual abuse, the child=s exposure to a family with children who have influenced her vocabulary, TV, therapeutic discussions, mother=s play, etc.

Admissibility of the Child's Statements

The child now professes to have no recollection of the activity. She would not be able to testify at her age about what transpired at age 3. I am satisfied that the test of necessity has been met.

I have already found the original conversations between the Abby Lane nurse and Diane Wheeler and the conversation between Diane Wheeler and the Child Protection Agency unreliable for the purpose of determining the accuracy of the child=s disclosure. While they are helpful in understanding the chain of events following the mother=s reporting, these conversations are hearsay; they are two and three individuals removed from the child, and in the context of the evidence they are unreliable as to the accuracy and truth of the contents. All descriptions or restatements subsequent to the July 17, 1997 recorded interview are unreliable and contaminated and cannot be admitted for the truth of their contents.

Access Assessment

Ms. Dougan, M.S.W., R.S.W., completed an interim access report on November 17, 1998, having met with both parties. She saw the mother on at least four occasions with the child. She reviewed affidavits, spoke to Diane Wheeler, Greg McConnell of Child Protection and the child's teachers. The teachers describe this child as a happy, cooperative, well-adjusted young child who functions well individually, socially and behaviorally within the school setting. The assessor described her as bright, social, cooperative and pleasant.

The mother/child interactions as seen by Ms. Dougan are positive. L.J.M. is seen as eager and anxious to clear up the allegations and resume contact with his daughter.

By this stage, from an evidentiary point of view, anything the child says about the father is highly suspect as contaminated by the mother, others and professional involvement. I place no reliance on the child's statements as accurately depicting the father's behavior. The kind of comments reflect a multitude of complaints about conduct unrelated to the previous Asexual allegations@. For example:

In describing >family= she said, @not my daddy cause he did bad things@

... @he forgot to go to the potty and he peed the bed - he said he was sorry@. She also said her father put on a mask which scared her and that Ahe didn=t wear his seatbelt in the van...@. When the assessor asked if she had ever seen a penis, she replied Ano - not allowed to A.

The assessor collected from the parties some personal history. K.A.M. confirmed that although the parties did not get along there was no physical abuse of her. L.J.M. responded to Ms. Dougan's question about wetting the bed, that the child and his niece were visiting at the time and staying overnight. His child was being toilet trained. She wet the bed. He told her that

he wet the bed to avoid her embarrassment as she was proud of her accomplishments with toilet training.

This assessor confirmed what other assessors found, that L.J.M. has difficulty in the process of assessment staying focused and presenting events or information in a chronological fashion. She described him as occasionally upset and teary, angry and frustrated. One need only see the entire process in context to understand that L.J.M. is an unsophisticated individual and that this arena would be very threatening to him to understand completely his difficulty. Unfortunately the assessor moved from an objective analysis of the concrete evidence, apparently accepting without serious evaluation the background information, as convoluted as it had become and drew the following conclusion:

Even S.A.M.'s specific and detailed account of inappropriate sexual contact with her father as reported to her mother, together with her advanced level of sexual knowledge, it is reasonable to assume this young child has had direct exposure to sexual behavior. Both her parents deny that she has witnessed sexual behavior or has had access to explicit sexual material such as videos or magazines while in their care. There appears to be little concrete or objective evidence supporting L.J.M.'s claim that S.A.M.'s mother has helped her child fabricate and sustain these allegations. In the absence of other plausible explanations for S.A.M.'s detailed and explicit allegations, which include descriptions of oral/genital and penile/vaginal contact by her father, her allegations must in my view be granted weight and credibility. Therefore I would recommend additional efforts to gauge her safety with her father are required. Therefore I would recommend that L.J.M. participate in a psycho-sexual risk assessment.

The assessor admitted to using the findings of the psychosexual assessment as indicative of a deviant sexual arousal pattern. This was clearly an error. She confirmed that in her discussions with Ms. McGrath there was no mention of the limitations of the testing. This assessor indicated that Ms. McGrath was quite confident in the results of the phallometric

testing. This witness confirms she did not appreciate the degree of arousal reported and what that meant. She thought that there was a diverse response to different stimuli that confirmed her initial suggestion that there was a possibility of sexual abuse consistent with the sexual disclosures. She acknowledged this was not her field and she relied on these findings. She was unaware that there was another report in which he was found not to be a risk to a nephew.

The child told the access assessor that she had never seen a penis before. The access assessor admitted that when she read the Wheeler report she assumed there was a fair amount of focus on sexual themes and sexual knowledge. In context this was not a true reflection of the entire therapeutic focus.

The role L.J.M. assumed in this child's life was that of access parent. Willingly he acknowledged with the mother from the beginning that she was the primary parent and that it was appropriate that most of the child care rightly rested with her. He assumed a role he was most comfortable with, a very traditional access father's role. He did not have access to the mother's history, her living situation or information about the child's associates (adults and children) that would put him in any position to respond to the notion that there may be other influences affecting this child.

There are immediate problems with the conclusions reached in the access assessment. Each professional a

There had been no process at this point to allow one to conclude that L.J.M. was the perpetrator. There was no comprehensive investigation that allowed any professional or court to draw findings of fact. The father was never involved in the investigative stage. Relations between the father and child were never observed. There has never been an appropriate process to determine or test the credibility of the child's statements to the mother. There has never been a process that affords the father equal opportunity to face the accusations, other than this

process occurring very late in the day. Certainly the father could have taken a more aggressive role in pursuing his application to enforce access, however if one looks back on his conduct one sees that he has essentially complied with every request even those which were, in retrospect, inappropriate requests, in an effort to clear up the allegations.

There have been multiple opportunities to hear and discuss sexual language in explicit terms. Aside from a physical exam by Dr. Anderson there have been three lengthy interviews engaging the child in talk about sexual touching. The mother played daily with the child specifically using sexually explicit language in an attempt to educate her to good touch/bad touch. She has by this time engaged in play therapy with a therapist who assumed the acts occurred and approached this in a therapeutic context, not to challenge the statements but to validate the child's play. The child has been exposed to multiple living situations and people.

K.A.M. recommended an assessment to assist in determining the risk. That tells me that at this stage none of the professionals are in a position to know the nature and extent of the risk and look to the experts who compiled the psycho-sexual assessment to establish a more definite analysis of L.J.M.. In the testimony of both the therapist and the assessor it is clear and they admit that they either misunderstood the frailties of the phallometric testing or were unaware that this testing was not recommended in situations such as this. As they relied on the untested allegations, affidavits forming the foundation of their collection of materials in their individual mandates, they relied on the psychosexual assessment to produce results that in scientific and evidentiary terms were unreliable.

L.J.M. complied with the Psycho-sexual assessment and the access assessor reviewed Ms. McGrath's report prior to her second report. In this report the assessor had the opportunity to talk to collaterals for L.J.M.. Her comments are consistent with my observations, that this man is well thought of by his family and known to be a hard worker, some describe as a workaholic. There are strong advocates of his work and personal ethic. His method of communication, his rambling response to the assessment and his unfocused approach to conversations remains a concern with the assessor, as with Ms. McGrath.

The assessor reinforces her positive assessment of K.A.M.: She says:

During my contact with K.A.M., she presented as a loving, sensitive, competent and concerned mother. Direct observation of mother/child interaction indicates that S.A.M. seems secure, trusting, responsive and comfortable with her mom. K.A.M.'s personal and professional collateral contacts unanimously corroborate this viewpoint. No one raised doubt or concerns about her credibility, personal integrity or motives...

The child is described by collaterals in much the same way, healthy, bright and secure, well adjusted.

I am conscious that L.J.M.'s collaterals speak in strong positive terms about him. I am also aware at this stage that he has a strong work ethic, has acted in the course of separation in a thoroughly responsible manner throughout the pregnancy and afterwards, and he has blindly cooperated with police, child protection direction, submitted to assessment, phallometric testing and waited anxiously for the investigation to be complete and the assessments finished to resume contact with his child. **This information is certainly not determinative of innocence but it is equally an essential part of the entire behavioral pattern that must be considered.**

Ms. Dougan moves to an assessment of the recommendations of the phallometric testing. She states as follows:

... this report, in my view, raises substantial concerns about his individual functioning, especially his patterns of sexual response ... his general clinical presentation as described by Ms. McGrath was quite congruent with my observations. For example, his style and pattern of interpersonal communication appears characterized by his tendency to be inconsistent, unfocused and defensive. In my opinion, these responses escalate in intensity when L.J.M. is presented with discrepant information or challenged to provide details or substantiation for his claims or descriptions of events.

The assessor comments that L.J.M. has minimal understanding of the rationale behind supervised access, seeing it as a means to get access for himself and establish his innocence.

If one assumes, as the assessor and Ms. McGrath obviously did, that L.J.M. is guilty then the manner of his speech and the unfocused rambling responses may be seen as evasive. The relentless pursuit of access may be seen as narcissistic, perhaps. However if one approaches this, knowing at this stage that the foundation for a finding of guilt was flawed, and one assumes from the father's perspective that he is innocent, his wish for access under any circumstances, so someone can see him with his child is entirely reasonable. His communication difficulties may be more properly seen as depicting an underlying deficit in verbal skills and development consistent with his scores. Knowing this one should approach more cautiously drawing any conclusion that somehow this disability makes him more likely to be guilty.

One must also understand that neither the child protection worker nor Ms. Wheeler ever recommended against access. The parties could not agree on a supervisor and the mother resisted allowing the father to have this opportunity. Had this been organized appropriate to the child's needs and wishes back when it was explored by Ms. Wheeler, the therapist and others would have had an opportunity to better assess the contact between father and child. Clearly even after some of the disclosures the mother approached the father to speak to the child by phone to allay her concerns. While one might understand that in certain circumstances a supervised visit would be contraindicated, this very healthy child might be a good candidate for supervised visits in the presence of a skilled therapist. At the time, there were skilled therapists involved in her life.

The assessor concludes that together with the disclosures and the results of L.J.M.'s psychosexual assessment he may well pose an unacceptable degree of risk. Other theories advanced by L.J.M. are not seen as credible or plausible. She concludes:

S.A.M.'s detailed description of past sexual victimization by her father is consistent with the findings of L.J.M.'s psychological

assessment, *which strongly suggests he may present an unacceptable risk to young children.* (my emphasis)

The mother is convinced of the abuse and introducing access in this situation would produce an inappropriate level of conflict. Therefore access is not recommended.

Whatever followed the disclosures the findings of the professionals appeared to be founded on an assumption that the father committed these acts. The critical investigative aspect was concluded without involvement of the father in a meaningful way such that reliable conclusions could not be made and culpability could not be established or eradicated. The foundation of the reports is unreliable because the process was fundamentally flawed and because they relied on unreliable materials created for a purpose other than their therapeutic involvement.

The police materials and the child protection materials were part of an unfinished investigative process aimed at determining whether there was sufficient evidence to proceed criminally or under child protection legislation. The untested affidavits were filed for the ultimate purpose of establishing civil liability. One can understand why therapeutic involvement ought not to be dependant on the criminal and civil liability issues and the finding of guilt. However, once embarking on the therapeutic process, without reliable determinations of fact, use of the reports is subject to findings of fact that support the conclusions. The reports are only valuable if the foundation is reliable and accurate. At the very least, if at all, extreme caution should be employed when relying on investigative information that remains untested and without formal conclusion if therapeutic involvement is pursued without a finding of guilt or innocent.

The access assessor did leave the court with a structure of access should the court find in favor of the father on the access issue. She set out a structure for the gradual introduction of access.

Conclusions

After four years there are limitations to the findings that can be made. The burden of proof to show the need for supervised access due to sexual abuse perpetrated by the father rests with the mother. I am satisfied that at this time there is insufficient reliable evidence that the father is the perpetrator of these allegations. K.A.M. has not met the civil burden of proof on the totality of the evidence on the balance of probabilities that L.J.M. engaged in sexually inappropriate behavior with his child.

I am also satisfied that there was not an investigative process conducted at the time of the disclosures that could rule out obvious other possibilities besides the father, including the child's environment, exposure to other families, exposure to sexually explicit talk with other children, on television, at day care and most obviously with the mother.

Further the original disclosures on July 17, 1997 are equally consistent with innocent contact with the child. I could not conclude that the father did not abuse the child. Nor could I conclude that the mother did not create an environment where the child was exposed to significant sexually explicit talk or an opportunity for the child to be exposed to others. Clearly the more expansive sexual talk that occurred between the mother and child as time went on are of concern, because of their graphic nature and preoccupation with sexually explicit behavior. I would want to know far more about the child's environment including a thorough analysis of the mother, the father and the child's closest associates before drawing any conclusions about the source of this talk or behavior.

The evidentiary dichotomy that exists is the sexually graphic discussions between mother and child and the objective professional observations about this child which are consistently positive. Whatever has transpired this child exhibits a strong personality profile including with her teachers.

For the purpose of determining what to do in the absence of a finding I must acknowledge that the statements I have previously excluded as unreliable are nonetheless statements which must be considered not for their truth but to understand the child's possible

state of mind. In determining what is in the best interests of this child, I must consider that she may not recollect why but she does know that her father is not in her life, grieves his absence, still asks for a daddy (possibly a new daddy) in order to complete her notion of what=s missing in her life.

Her mother moved this child to Toronto. The father is prepared to move as well and he is prepared to abide by any direction reintroducing him to his child. There has been a major disruption of contact. The recommendation of Ms. Dougan about structured access will be implemented because of this major disruption and the child=s state of mind.

The father may select an appropriate therapist experienced in child development to assist in the initial reintroduction. If the child remains in Ontario the therapist will be local to the child. The mother may have input. Given her reluctance to agree to supervised access in the past she may suggest a few names, the father may investigate, but with the advice of counsel his decision will be determinative.

The child will be introduced to the selected therapist, and when determined appropriate by the therapist the father may visit with the child on a regular weekly basis supervised by this therapist to assess and protect the child. The therapist will deliver a report at such time as they recommend moving the supervised visitation to a community based supervision program. The visitation will continue to be supervised until the community based program by written recommendation indicates that it is no longer necessary.

I structure this process to allow for the discretion of the supervisor, however, access shall be on a regular basis, starting for the first month on a weekly basis as arranged between the father and the therapist with notice to the mother. If the reports are negative either party is free to make application to the court.

The parties may schedule a review date within one month of this decision given the current residence of the parents to refine the structure of access and to set time lines.

A copy of this decision shall be given to the therapist responsible for supervising access.

Ms. Chewter will draft the order.

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Moira C. Legere, J.