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Evidence—Child Abuse and the Medical Diagnosis or Treatment Exception to the Hearsay Rule. *Goldade v. State*, 674 P.2d 721 (Wyo. 1983).

On August 13, 1982, the Campbell County Department of Public Assistance and Social Services (D-PASS) received a telephone call about possible child abuse involving four-year-old Tabatha Goldade. Patricia O'Brien, a social worker from D-PASS, and a deputy sheriff went to the Goldade home to investigate. Ms. O'Brien noticed bruises on Tabatha's face which had been covered with make-up, and upon closer examination discovered multiple bruises on other parts of Tabatha's body. Ms. O'Brien decided that Tabatha should be examined by a physician, and the child was taken to the hospital.¹

The hospital nurse on duty at the emergency room gave Tabatha a preliminary examination which was followed by an examination by a specialist in pediatrics. In the course of their examinations, both the nurse and the doctor asked Tabatha how she received the bruises. Tabatha replied to the nurse, "my mommy did it," and replied to the doctor, "my mother beat me."²

At a criminal trial in which Christine Goldade was convicted of child abuse in violation of section 14-3-101(a)(ii) of the Wyoming statutes,³ the doctor and nurse were permitted to repeat Tabatha's hearsay statements.⁴ A three-to-two majority of the Wyoming Supreme Court upheld the trial judge's use of rule 803(4) of the Wyoming Rules of Evidence⁵ as the appropriate hearsay exception, allowing Tabatha's statements to be admitted into evidence. The court held that where the diagnosis is "child abuse syndrome,"⁶ hearsay statements made by the child victim which identify the abuser are admissible because they are pertinent to treatment insofar as treatment might require protective custody or other measures that prevent further injury to the child.⁷

1. *Goldade v. State*, 674 P.2d 721, 723 (Wyo. 1983).

2. *Id.* at 724.

3. The statute provides that "[n]o parent, guardian or custodian of any child shall . . . [a]buse, torture, expose, or cruelly punish the child . . . WYO. STAT. § 14-3-101(a)(ii) (1977).

4. The state sought to have Tabatha testify at trial, but she was ruled incompetent to testify presumably because of shyness and awe in the courtroom. *Goldade*, 674 P.2d at 723. The trial judge allowed the doctor's and nurse's hearsay testimony under rule 803(4) of the Wyoming Rules of Evidence. Counsel for Christine Goldade properly objected and preserved the issue for appeal. *Id.* at 724.

5. This exception is for statements made for purposes of medical diagnosis or treatment. The entire rule is set out in the text. See *infra* text accompanying note 13.

6. What the court labelled "child abuse syndrome" is commonly referred to as "battered child syndrome," a recognized medical diagnosis with widespread acceptance. See McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 MINN. L. REV. 1 (1966); Note, *Evidence-Child Abuse-Expert Medical Testimony Concerning "Battered Child Syndrome" Held Admissible*, 42 FORDHAM L. REV. 935 (1974).

The Supreme Court of Utah stated that its research showed that all courts which addressed the question had affirmed the admission of expert medical testimony regarding the presence of battered child syndrome. *State v. Tanner*, 675 P.2d 539, 543 (Utah 1983).

7. *Goldade*, 674 P.2d at 727.

BACKGROUND

The hearsay rule is premised upon the conclusion that the evidence it excludes is generally less reliable than live testimony.⁸ There are four generally recognized "hearsay dangers."⁹ First, the interpretation placed on the statement by the trier of fact may not coincide with the declarant's intention (narrative skill). Second, the declarant may have intentionally misrepresented the truth (insincerity). Third, the declarant may have inaccurately recalled the matter which is asserted (faulty memory). And finally, the declarant may have misperceived the event about which the assertion is made (misperception).¹⁰ The exceptions to the hearsay rule embodied in Federal Rules of Evidence 803 and 804 are designed to encompass situations in which the four hearsay dangers are substantially lessened, giving the statements a greater degree of trustworthiness.¹¹ Rule 803 exceptions to the hearsay doctrine are made because the circumstances of the declaration indicate that the declarant's perception, memory, narration, or sincerity covering the matter asserted in the statement is trustworthy.¹²

Wyoming Rule of Evidence 803 provides in pertinent part as follows:

The following are not excluded by the hearsay rule even though the declarant is available as a witness:

* * *

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof as reasonably pertinent to diagnosis or treatment.¹³

Wyoming Rule of Evidence 803(4) is exactly the same as federal rule 803(4).¹⁴ Constructions, comments, and analyses of the federal rule are therefore instructive for the purposes of understanding and applying the identical Wyoming rule.

The Advisory Committee's Note to Federal Rule 803(4) provides that statements as to causation that are reasonably pertinent to diagnosis or treatment are admissible, but "[s]tatements as to fault would not ordinarily qualify. . . ."¹⁵ Because the note contains the word "ordinarily," the

8. *Hopkinson v. State*, 632 P.2d 79, 129 (Wyo. 1981). The *Hopkinson* court's discussion of the hearsay rule is based on 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 413, at 69-70 (1980) [hereinafter cited as LOUISELL & MUELLER].

9. *Hopkinson*, 632 P.2d at 129.

10. *Id.*

11. *Id.*; 4 LOUISELL & MUELLER, *supra* note 8, § 413, at 72.

12. *Id.*

13. WYO. R. EVID. 803.

14. Wyoming adopted the Federal Rules of Evidence effective 1978.

15. FED. R. EVID. 803(4) advisory committee note, 56 F.R.D. 183, 306 (1973). The note gives an example, stating that a patient's statement that he was struck by an automobile would qualify, but his statement that the car was driven through a red light would not qualify under this exception.

advisory committee might have intended that, under some circumstances, hearsay statements which attribute fault could be admitted.

Some commentators believe that the word "ordinarily" in the advisory note should be ignored. In his annotation to federal rule 803(4), Richard Gallagher asserts that "a declarant's statement as to who caused an injury or illness is not pertinent to medical treatment or diagnosis and is, therefore, inadmissible."¹⁶ In their commentary on the Federal Rules of Evidence, Professors Louisell and Mueller state that "the pertinency standard does impose a true limit. Embellishments attributing fault are not reasonably pertinent."¹⁷ These commentators correctly conclude that hearsay statements which attribute fault are not admissible under the diagnosis or treatment exception.

In his commentary on the Federal Rules of Evidence, Judge Weinstein does not indicate whether statements attributing fault should ever be admitted. He states that "[e]ach case will have to be determined on its own facts to determine which statements, or which portion of a statement pertains to treatment."¹⁸ Judge Weinstein asserts that "[c]ourtroom practice has tended to let in . . . statements to nurses and doctors fairly freely, leaving it to the jury to decide probative force."¹⁹ While courts may be generally liberal in admitting these statements, they almost uniformly exclude declarants' statements which identify the persons responsible for the declarants' injuries.²⁰

In *United States v. Nick*,²¹ a trial court allowed a physician to repeat a three-year-old boy's description of a sexual assault against him. "[T]he physician was permitted to testify only to those portions of the child's statement that were relevant to the cause of the injury, omitting the identity of the assailant."²² The Ninth Circuit affirmed.

In *United States v. Iron Shell*,²³ the Eighth Circuit held that statements of a nine-year-old victim of attempted rape, made to her examining physician, were admissible hearsay under federal rule 803(4). The trial court properly admitted those statements regarding the general cause of her condition because they did not identify her assailant. On appeal, the Eighth Circuit stated that "[i]t is important to note that the statements concern what happened rather than who assaulted her. The former in most cases is pertinent to diagnosis and treatment while the latter would seldom, if ever, be sufficiently related."²⁴

16. Annot., 55 A.L.R. FED. 694 (1981) (citation omitted).

17. 4 LOISELL & MUELLER, *supra* note 8, § 444, at 603.

18. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(4)[01], at 803-147 (1981) (citation omitted) [hereinafter cited as WEINSTEIN'S EVIDENCE].

19. *Id.* at 803-148.

20. The discussion of case law which follows illustrates this point.

21. 604 F.2d 1199 (9th Cir. 1979).

22. *Id.* at 1201-02.

23. 633 F.2d 77 (8th Cir. 1980).

24. *Id.* at 84. The court cited the advisory committee's note to the federal rules of evidence to support this holding.

The United States District Court for the Eastern District of Michigan stated in *United States v. Narciso*,²⁵ that rule 803(4) "has never been held to apply to accusations of personal fault, either in a civil or criminal context."²⁶ The court reasoned that accusations of fault are never reasonably pertinent to diagnosis or treatment.

In *State v. Garza*,²⁷ the South Dakota Supreme Court approved the trial court's admission of the statements of two rape victims, ages five and eight, under the South Dakota equivalent of federal rule 803(4).²⁸ The statements were made to the examining physician who repeated them at trial. The supreme court relied on *Iron Shell* and pointed out that the statements were primarily concerned with *what happened* to the children rather than who assaulted them.²⁹

The Washington Supreme Court has construed rule 803(4) in the same manner as the South Dakota Supreme Court. In *State v. Fleming*,³⁰ a physician was allowed to testify that he was told by the rape victim that she had been raped. The Washington court held that the "[s]tatements made to Dr. Juel by the victim were properly introduced as statements made to a physician for the purposes of diagnosis or treatment."³¹ The court then qualified its holding, stating that "[a] treating physician may testify as to what the victim has told him 'regarding the general nature or cause of the injury so far as it pertains to treatment and not fault'."³²

In summary, most courts have held that hearsay statements that describe the general cause of an injury, such as "I was raped" or "I was beaten," are admissible because they are reasonably pertinent to treatment or diagnosis. On the other hand, courts have consistently held that statements which identify the assailant, such as "X beat me," are outside the scope of rule 803(4) because attributing fault or blame is not reasonably pertinent to diagnosis or treatment.³³ Except for the advisory committee and Judge Weinstein, who *might* support admission of hearsay statements attributing fault, most commentators believe that those statements should not be admissible under either federal rule 803(4) or identical state rules.

25. 446 F. Supp. 252 (E.D. Mich. 1977).

26. *Id.* at 289.

27. 337 N.W.2d 823 (S.D. 1983).

28. South Dakota adopted Federal Rule of Evidence 803(4) in 1978. *See* S.D. R. EVID. § 19-16-8.

29. 337 N.W.2d at 825, *citing Iron Shell*, 633 F.2d 77 (8th Cir. 1980).

30. 27 Wash. App. 952, 621 P.2d 779 (1980).

31. *Id.* at 959, 621 P.2d at 783.

32. *Id.* at 959, 621 P.2d at 783-84, *quoting Kennedy v. Monroe*, 15 Wash. App. 39, 574 P.2d 899 (1976). Washington did not adopt federal rule 803(4) until 1979 after the 1976 decision in *Kennedy*.

33. Until *Goldade*, all courts but one have refused to allow hearsay statements attributing fault under rule 803(4). The decision contrary to precedent is *United States v. Rhodes*, 11 FED. R. EVID. SERV. (CALLAGHAN) 1520 (9th Cir. 1982). In the unpublished *Rhodes* decision, the Ninth Circuit retreated from its earlier holding in *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979), where it affirmed the trial court's admission of those portions of the child's hearsay statement which were relevant to the cause of the injury, omitting the identity of the assailant.

DISCUSSION OF THE PRINCIPAL CASE

In jurisdictions that have adopted federal rule 803(4), *Goldade v. State* and *United States v. Rhodes*,³⁴ are the only cases decided under that rule which allow hearsay statements that attribute fault. The *Goldade* court recognized the wealth of authority contrary to its holding,³⁵ but admitted Tabatha's statement despite the adverse precedent.

The court in *Goldade* outlined three reasons why statements made by an alleged child abuse victim which reveal the identity of the assailant should escape hearsay proscription. First, the court stated that under section 14-3-208(a) of the Wyoming statutes, physicians and other medical personnel must decide whether an abused child who they are treating is in imminent danger. If so, they may order temporary protective custody as a form of treatment for child abuse syndrome.³⁶ The court stated that in the absence of information identifying the child's assailant, the propriety of temporary protective custody cannot be rationally determined.³⁷ Thus, the identity of a child's assailant is pertinent to the child's diagnosis or treatment and is admissible under rule 803(4).³⁸

Second, the court reasoned that a fact upon which a physician bases his diagnosis or treatment is sufficiently reliable to escape hearsay proscription.³⁹ In *Goldade*, Tabatha's doctor testified that he based his treatment, in part, on her statement in which she identified Christine Goldade as her assailant. The supreme court concluded that Tabatha's statement was reliable because the doctor relied on it, and the court affirmed its admission by the district court.⁴⁰

34. See *supra* note 33.

35. The court stated:

We have no quarrel with the general rule that statements attributing fault usually are not admissible under rules identical to Rule 803(4). . . . If the goal of our court were simply to pursue the common-law tradition of *stare decisis*, then the cited authorities must be recognized as supporting the position of the appellant. In this instance, however, the function of the court must be to pursue the transcendent goal of addressing the most pernicious social ailment which afflicts our society, family abuse, and more specifically, child abuse.

Goldade, 674 P.2d at 725.

36. *Id.* at 726, citing WYO. STAT. § 14-3-208(a) (1977) which provides in part: When a physician treating a child or a medical staff member of a hospital in which a child is being treated has reasonable cause to believe there exists an imminent danger to the child's life or safety unless the child is taken into protective custody and there is not time to apply for a court order, the child may be taken into temporary protective custody without a warrant or court order and without the consent of the parents, guardians or others exercising temporary or permanent control over the child.

37. *Goldade*, 674 P.2d at 726.

38. *Id.* at 727.

39. *Id.* at 726. The court cited 4 WEINSTEIN'S EVIDENCE, *supra* note 18, ¶ 803(4)[01], at 803-129, as support for this principle. Professors Louisell and Mueller make no mention of this principle as a policy basis for rule 803(4).

40. *Goldade*, 674 P.2d at 726, citing 4 WEINSTEIN'S EVIDENCE *supra* note 18, ¶ 803(4)[01], at 803-129.

Third, the court claimed that its liberal interpretation of rule 803(4) was a logical extension of its relaxed standard of proof in child homicide cases.⁴¹ The court saw its holding as part of its policy to fulfill "the manifest need to protect the most helpless members of our society from violence. . . ."⁴²

ANALYSIS

None of the Wyoming Supreme Court's three rationales justify the result in *Goldade*. The court's application of the relaxed evidentiary standard in child homicide cases to child abuse cases is procedurally suspect. Statements made by a child to a doctor are not reliable simply because the doctor relies on them. And although the court may be correct that statements attributing fault in child abuse cases are usually pertinent to diagnosis or treatment, those statements may not be trustworthy. The underlying rationale for rule 803(4) is trustworthiness, and a statement, no matter how pertinent to diagnosis or treatment, should not be admitted if it is not trustworthy.

The Analogy to Child Homicide Cases

The Wyoming Supreme Court has created a relaxed standard of proof for cases in which children are the victims of homicide. Opportunity, together with injuries consistent with child abuse, is sufficient evidence to support a conviction for homicide.⁴³ The policy asserted by the court in support of this rule is that it "will assist in protecting the innocent victims of child abuse."⁴⁴ In *Goldade*, the court offered this same policy to justify its "liberal interpretation" of rule 803(4).⁴⁵

Implicit in the court's analysis is a determination that persons accused of offenses against children should be accorded fewer procedural rights than persons accused of similar offenses against adults. The court forgets that the defendants in child abuse cases are as innocent as any other criminal defendants until they are found guilty at the end of the fact-finding process. The court's abhorrence for child abusers can be properly expressed through harsh sentencing after a fair trial in which the defendants are actually found guilty.

Essential to a fair trial is the exclusion of unreliable evidence. Rule 803(4) was designed to admit certain hearsay statements that are particularly reliable. The rule should not be applied based on the court's perception of the depravity of the defendant, but on the rule's rationale, reliability. It may well be that there is a "manifest need to protect

41. *Goldade*, 674 P.2d at 727.

42. *Id.*

43. *Id.* See *Marshall v. State*, 646 P.2d 795 (Wyo. 1982); *Rinehart v. State*, 641 P.2d 192 (Wyo. 1982); *Grabill v. State*, 621 P.2d 802 (Wyo. 1980); *Seyle v. State*, 584 P.2d 1081 (Wyo. 1978); *Jones v. State*, 580 P.2d 1150 (Wyo. 1978).

44. *Goldade*, 674 P.2d at 727.

45. *Id.*

[children] from violence . . . ,”⁴⁶ but that need in no way justifies altering rules of evidence which are designed to protect the important rights of accused persons.

Physician's Reliance

In *Goldade*, the Wyoming Supreme Court emphasized a quotation from Weinstein: “Even in the case of a statement made for treatment the test is not only whether the declarant thought it relevant (thereby establishing reliability), *but also whether a doctor would have reasonably relied upon such a statement in deciding upon a course of treatment.*”⁴⁷ The court’s emphasis implies that it believed that a doctor’s reliance on a patient’s statement guarantees its reliability. This reasoning is not persuasive. Hearsay exceptions exist because the particular circumstances in which statements are made indicate that they are trustworthy.⁴⁸ Hearsay statements admitted under rule 803(4) are trustworthy because the *declarant* is motivated to be truthful,⁴⁹ not because a doctor relied on them in diagnosing or treating the declarant. In evaluating trustworthiness, courts should analyze the declarant’s motivation rather than the doctor’s response.

The Rationale Underlying Rule 803(4) Does Not Apply in Child Abuse Cases

The rationale underlying the hearsay exception for statements made for purposes of diagnosis or treatment is that the declarant’s motives guarantee their trustworthiness. The patient has every incentive to speak truthfully because he knows his treatment will depend in part on what he says.⁵⁰ The fact that a statement is made by a patient does not affect the declarant’s narrative skill,⁵¹ perception,⁵² or mem-

46. *Id.*

47. *Id.* at 726, citing 4 WEINSTEIN’S EVIDENCE *supra* note 18, ¶ 803(4)[01], at 803-129.

48. See *supra* notes 11 and 12.

49. FED. R. EVID. 803(4) advisory committee note; 4 WEINSTEIN’S EVIDENCE, *supra* note 18, ¶ 803(4)[01], at 803-144; 4 LOUISELL & MUELLER, *supra* note 8, at 593-94; United States v. Narciso, 446 F. Supp. 252, 288-89 (E.D. Mich. 1977).

50. See *supra* note 49.

51. There may be some incentive to speak carefully and accurately to a doctor because one knows that her treatment will in part be based on her statements. 4 LOUISELL & MUELLER, *supra* note 8, § 444, at 593-94. This incentive to avoid ambiguity is, however, not easily applicable to small children, who are probably either too young to possess this incentive, or who have insufficient language development to ensure clear narration. In *Goldade* the court held that Tabatha’s reference to “mommy” referred to her aunt, Christine Goldade, with whom she had been living, and not her true biological mother. *Goldade v. State*, 674 P.2d at 723. In her appellate brief, Christine Goldade argued that Tabatha’s use of the word “beat” was ambiguous. This argument is not compelling in cases where the diagnosis is battered child syndrome, because the nature of the child’s physical injuries is corroborative of intentional abuse. See *infra* note 52.

52. In Tabatha’s case, the danger of her misperceiving the event about which her statement was made was minimized by the existence of physical injuries confirming a pattern of intentional abuse. Battered child syndrome entails particular types of physical injuries which are normally only incurred at the hands of another person. For example, multiple bruises on a child’s stomach or back are not likely to occur in an ordinary play environment because children do not usually fall or hurt themselves so as to cause injuries of that nature. Admit-

ory⁵³ with respect to the event about which the statement is made. Thus, rule 803(4) is premised on the *sincerity* of the declarant.

The guarantee of trustworthiness, based on a motive to be sincere, is not convincing in child abuse cases. The *Goldade* case illustrates this point. There was no showing that Tabatha was motivated to be anything but truthful, but because of her age she was probably not aware that her treatment depended upon the truth and accuracy of her statements to the doctor. Her statements were not guaranteed to be trustworthy under the rule 803(4) rationale and should not have been admitted under that rule. The *Goldade* case demonstrates that in child abuse cases involving the very young, the rationale for the diagnosis and treatment exception does not apply.

A slightly older child may well develop her own reasons to falsely accuse a particular person of an assault and may misidentify her assailant. A child may also make a statement attributing fault under the influence of a threat or a promise by a third party. This second motivation for lack of sincerity is probably commonplace in child abuse cases. In fact, it has been stated that a child "may have changed his account of the incident to match the abuser's version. The victim of child abuse is far more susceptible to the influence of the alleged abuser than are most victims of other crimes."⁵⁴ The statements made by a victim of child abuse, regardless of the child's age, do not possess the guarantee of trustworthiness required for admission under rule 803(4).

The Wyoming Supreme Court, in *Goldade*, applied the language of rule 803(4) and held that Tabatha's statements describing how she was bruised were admissible because they were reasonably pertinent to the diagnosis and treatment of those bruises. The court also held that the part of her statement identifying Christine Goldade as her assailant was admissible because it was reasonably pertinent to her treatment for child abuse syndrome. While the rule seemed applicable on its face, the trustworthiness rationale of the rule was not present for either of these statements. Tabatha was too young to know that her statements were necessary to properly diagnose the syndrome or treat the bruises.

The other courts that have applied rule 803(4) to child abuse cases have failed to consider the rationale underlying the rule as well. They have

tedly, the nature of Tabatha's injuries corroborated only that they were intentionally inflicted and not *who* inflicted them. But the fact that part of her statement was an accurate perception and trustworthy suggests that the rest of her statement was probably trustworthy as well.

In making a diagnosis, the physician also considers statements by the caretaker which are inconsistent with, or insufficient to explain the nature of the child's injuries. See *McCoid*, *supra* note 6; *State v. Tanner*, 675 P.2d 539 (Utah 1983).

53. The danger of inaccurately recalling the matter asserted seems minimal in child abuse cases. It is difficult to conceive that a child of communicative age would forget the circumstances surrounding the receipt of serious painful injuries in a deliberate assault. A child could, however, be confused as to which injuries were inflicted by whom, if a pattern of abuse exists in which more than one party is abusing the child.

54. Comment, *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 *Geo. L.J.* 257, 259-60 (1974).

arbitrarily distinguished between a child's statement which reveals who assaulted her and her statements which reveal what happened. Both statements are pertinent to recognized medical conditions that require diagnosis or treatment. The Wyoming court recognized this and admitted both statements. But, as we have seen, the motivation to be truthful is not present for either of these statements. Because the child declarant is not motivated to be truthful under the rationale of rule 803(4), that rule should not be used to justify admitting those statements. Instead, the statements should attain admissibility because of the guarantees of trustworthiness of which they are indeed possessed.

The Catchall Exception

Hearsay evidence, if it is trustworthy and necessary to effectuate justice, should be admitted into evidence.⁵⁵ Rule 803(24),⁵⁶ the catchall exception, was created to limit the overly broad hearsay rule by providing courts with additional flexibility in admitting hearsay.⁵⁷ Rule 803(24) was designed not only to fill omissions in other exceptions but also to allow for the development of new exceptions to the hearsay rule.⁵⁸

Statements attributing fault, made by abused children to treating physicians, which fall outside the policies that underlie rule 803(4) ought to be admitted under rule 803(24) so long as all of the safeguards of that rule are met.⁵⁹ Courts often refuse to use rule 803(24) to admit hearsay in the absence of the factors which underlie the specific exceptions, particularly when there are no substitute guarantees of reliability, or the cir-

55. *Hopkinson v. State*, 632 P.2d 79, 130 (Wyo. 1981). See also 4 LOISELL & MUELLER, *supra* note 8, § 472.

56. Wyo. R. EVID. § 803(24) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(24) Other exceptions—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

57. 4 LOISELL & MUELLER, *supra* note 8, § 472, at 923. See also *Hopkinson v. State*, 632 P.2d 79, 130 (Wyo. 1981). Also, Judge Wisdom of the Fifth Circuit rebelled against the harsh effects of a strict application of the hearsay rule in *Dallas County v. Commercial Union Ass. Co.*, 286 F.2d 388 (5th Cir. 1961).

58. FED. R. EVID. 803(24) advisory committee note; WEINSTEIN'S EVIDENCE *supra* note 18, ¶ 800[02], at 800-14; *United States v. Mandel*, 591 F.2d 1347, 1368 (4th Cir. 1979).

59. In his dissenting opinion, Justice Brown suggested applying rule 803(24) to statements like Tabatha's. Justice Rose, concurring in Justice Brown's dissent, apparently agreed with this suggestion. *Goldade*, 674 P.2d at 731.

cumstances raise doubt as to the motives or accuracy of the declarant.⁶⁰ But the catchall standard should be qualitative rather than mechanical.⁶¹ If a statement appears to be trustworthy, it should make no difference for purposes of the rule 803(24) exception that the factors leading to this conclusion differ markedly from the guarantees of trustworthiness underlying the other exceptions.⁶²

Rule 803(24) requires five findings by the trial court before a statement can be admitted.⁶³ First, the statement must have circumstantial guarantees of trustworthiness equivalent to those surrounding statements within the specific exceptions.⁶⁴ This requirement can be satisfied in many child abuse cases similar to *Goldade* because a child's age, innocence, and lack of motivation to be untruthful tend to support the trustworthiness of his statement.⁶⁵

Corroboration is another important factor which tends to confirm the trustworthiness of a statement.⁶⁶ In most child abuse cases, the presence and nature of injuries strongly corroborate a child's assertion of intentional mistreatment.⁶⁷ In addition, "[t]he parents or parent substitutes are the perpetrators in the vast majority of [child abuse] cases."⁶⁸ Thus, a child's injuries confirm intentional mistreatment by someone, and statistics tend to corroborate a child's identification of his parent as the abuser.

As stated earlier, a child's statement is not trustworthy for purposes of rule 803(4), because a child does not know that his sincerity will lead to proper diagnosis or treatment. But trustworthiness under rule 803(24) can be shown by many different indicia. Corroboration of a child's statement as well as his youthful innocence, might indicate that the statement is indeed trustworthy and satisfies the first requirement under rule 803(24).

The second requirement is that the statement must be offered as evidence of a material fact.⁶⁹ Certainly, in a criminal prosecution for child abuse, identification of the defendant as the assailant is a material fact. Testimony that confirms the fact that the child's injuries were intentionally inflicted is material as well.

60. 4 LOUISELL & MUELLER, *supra* note 8, § 472, at 929-30.

61. *Id.* § 472, at 925.

62. *Id.*

63. 4 WEINSTEIN'S EVIDENCE, *supra* note 18, ¶ 803(24)[01], at 803-373.

64. WYO. R. EVID. 803(24).

65. A recent unpublished study by Dr. Jonathan Horowitz, Director of Psychiatry at Boston's Carney Hospital, concluded that roughly ninety-five percent of children's accusations in child sex abuse cases were accurate. See Silas, *Would a Kid Lie*, 71 A.B.A. J., Feb. 1985, at 17.

66. 4 LOUISELL & MUELLER, *supra* note 8, § 472, at 929.

67. See *supra* note 52.

68. Comment, *supra* note 54, at 258, citing D. GIL, VIOLENCE AGAINST CHILDREN 117 (1970). Gil conducted a survey of child abuse cases reported in 1967 and 1968 which revealed that over ninety percent of the abuses occurred in the home, and a parent or parent substitute perpetrated the abuse in 87.1 percent of the cases. Comment, *supra* note 54, at 258 nn.9 & 11.

69. WYO. R. EVID. 803(24).

Third, the statement must be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.⁷⁰ In some cases, a child's statement that her injuries were incurred through beatings may not be as probative of that fact as a doctor's learned diagnosis of battered child syndrome. On the other hand, where the diagnosis is questionable, the statement may well be more probative of that fact. Because evidence of the abuser's identity is often only circumstantial,⁷¹ the part of the child's statement which identifies the abuser will often be the best available evidence of that fact.

Fourth, admissibility must accord with the general purposes of the rules of evidence and the interests of justice.⁷² This requirement is met by an *ad hoc* determination by the trial judge that admission of the evidence is fair. The language might serve to remind the judge of her discretion under rule 403 of the Wyoming Rules of Evidence.⁷³ The emotional appeal of an abused child's statement could be unfairly prejudicial to the rights of the accused, particularly in a jury trial. The judge must, therefore, take pains to avoid admitting a child's statement where its probative value is questionable, or where the resulting prejudice would create an injustice. This vague requirement is not, however, an insurmountable hurdle where a child's statement meets the other requirements of rule 803(24).

Fifth, the proponent of the hearsay statement must sufficiently notify the adverse party in advance of trial to provide that party with a fair opportunity to prepare to meet it.⁷⁴ This requirement is procedural, and counsel should comply with it in child abuse cases as well as all other rule 803(24) cases. Thus, the requirement does not apply any differently in child abuse cases than in any other cases.

Hearsay statements made by victims of child abuse can meet the five requirements of rule 803(24). If a hearsay statement in which a child identifies his assailant meets the requirements, then it should be admitted under that rule. By doing this, a court need not expand the rule 803(4) exception to include statements which are trustworthy for reasons different from the rationale underlying that exception. Furthermore, precedent under rule 803(4), on which many courts rely to exclude statements attributing fault, need not be rejected.

Judicial Legislation

As the Wyoming Supreme Court recognized in *Goldade*, the legislature has expressed a policy of concern for children, and has passed many child

70. *Id.*

71. "Because child abuse cases occur primarily in situations that produce a dearth of available evidence, the prosecution often must rely almost exclusively on circumstantial, character, and hearsay evidence." Comment, *supra* note 54, at 273.

72. WYO. R. EVID. 803(24).

73. The rule states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WYO. R. EVID. 403.

74. WYO. R. EVID. 803(24).

abuse statutes, including mandatory reporting laws which affect physicians.⁷⁵ Yet, in its consideration of child abuse, the legislature has not addressed the hearsay inadequacy which the court found necessary to correct in *Goldade*. It may well be that specialized hearsay rules in the child abuse context are warranted, but the absence of legislative action to that effect does not justify judicial creation of a special hearsay exception in that context.

Special Evidentiary Rules

Because rule 803(24) is designed, in part, to allow the development of new exceptions to the hearsay rule,⁷⁶ a new exception designed to admit a child's hearsay statement which identifies his assailant may develop from the court's use of rule 803(24). This development would be both desirable and consistent with the judicial function of the court.

The State of Kansas has adopted a special rule which covers the hearsay statements of child abuse victims. The pertinent part of that rule provides that a hearsay statement is inadmissible except:

(dd) In a criminal proceeding . . . [when the] statement [is] made by a child, to prove the crime [and] [t]he child is alleged to be a victim of the crime, . . . and . . . the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.

If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor.⁷⁷

In light of the peculiar issues raised by hearsay statements of child abuse victims, the Kansas approach warrants praise. Because child abuse has in recent years become more publicized, perhaps more states will adopt special evidentiary provisions in the child abuse context.

CONCLUSION

Courts and commentators have generally held that hearsay statements which attribute fault are inadmissible under the diagnosis or treatment

75. *Goldade*, 674 P.2d at 725-26; WYO. STAT. § 14-3-206(c) (1977) empowers doctors and medical service personnel to document, at state expense, suspected child abuse by photographs and X-rays. See also WYO. STAT. § 14-3-205 (1977), subsection (a) and (b) in particular, in conjunction with the pertinent definitional section of that statute, WYO. STAT. § 14-3-201(a)(ii) (1977); see *supra* note 36 for the mandatory reporting law.

76. See *supra* note 58.

77. KAN. STAT. ANN. § 60-460(dd) (1982).

exception to the hearsay rule. The Wyoming Supreme Court departed from the great weight of authority and expanded the rule 803(4) exception to include a child's hearsay statement which identifies her abuser. Because the rationale for rule 803(4) is not what generally guarantees the trustworthiness of an abused child's statements, this exception should not be expanded to include hearsay statements attributing fault.

The provisions of rule 803(24), the catchall exception, are designed to admit trustworthy hearsay statements not covered by specific exceptions. In cases like *Goldade*, a trial court should admit a child victim's statements attributing fault if the requirements of rule 803(24) are satisfied. Furthermore, rule 803(24) is designed in part to advance the development of new hearsay exceptions. Because evidentiary issues in child abuse cases are unique, courts' use of the catchall exception to admit trustworthy hearsay statements could lead to needed legislative action in this area.

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