

A CRITICAL EVALUATION
OF SOUTH AFRICAN LEGISLATION
PERTAINING TO THE ABUSED CHILD

By:

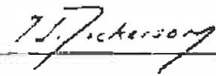
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I Declare that the contents of this thesis are as a result of my own original work except where otherwise acknowledged.



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Jesus called a small child over to him and set the little fellow down among them, and said, 'Unless you turn to God from your sins and become as little children, you will never get into the Kingdom of Heaven. Therefore anyone who humbles himself as this little child, is the greatest in the Kingdom of Heaven. And anyone of you who welcomes a little child like this because you are mine, is welcoming me and caring for me. But if any of you causes one of these little ones who trusts in me to lose his faith, it would be better for you to have a rock tied to your neck and be thrown into the sea.'

(Matthew 18: 2-6)

ABSTRACT

The physical and sexual abuse of children is primarily a complex, insidious socio-psychological problem, and secondly, a legal concern. Accordingly, any attempt to examine the phenomenon from a legal perspective, requires by necessity, an acknowledgement of the multi-dimensional nature of the problem.

This thesis attempts to provide the reader with a comprehensive overview of the current state of medical, psychological and social knowledge on child physical and sexual abuse. Following on this, an examination is made of the legislation pertaining to the protection of the abused child within the home and the courtroom.

In respect hereto, review is made of the development of the legal response to child abuse, those provisions within the Child Care Act 74 of 1983 pertaining to child protection, the issue of a legal definition of child abuse, corporal punishment and the rules of evidence and procedure impinging upon the child witness.

During the course of this thesis, regard is had primarily to current psychological research findings. This is particularly apparent in respect of issues dealing with the alleged inferiority of the child witness in the courtroom. Here, psychological evidence is provided to show that major discrepancies exist between the positive view of the child witness, which is emerging from current experimental studies, and the skeptical approach to such a witness by the legal system.

Throughout the thesis, a call is made for the realignment of the law with medical, psychological and social realities. Unless such takes place, the legal response to child abuse will remain an ineffective and harmful experience for any unfortunate child victim.

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CHAPTER 1

A HISTORICAL OVERVIEW OF CHILD ABUSE AND THE SOCIO-LEGAL RESPONSE TO THE EXISTENCE OF THIS PHENOMENON

'The neglect and abuse of children has been evidenced since the beginning of time. The natural animalistic instincts of the human race have not changed with the passing of the centuries. Children have been crippled or killed either through ignorance or superstition, by shame or in secrecy. This wastage of children's lives continues and appears to be increasing, even in our enlightened modern day.'¹

V. Fontana

'What we learn from history, is that we don't learn from history.'

Benjamin Disraeli

1. INTRODUCTION

Throughout the history of mankind, violence has been an integral part of life and children, innocent victims of forces, over which they have had no control, have not escaped the cruelty, atrocities and horror that man has so often inflicted upon his own.²

Since time immemorial, children have been killed, abandoned, mutilated, starved, beaten, tortured, sodomized and raped. The attention which the media has over the last few years devoted to this socio-legal problem has led to the mistaken assumption that child physical and sexual abuse is a modern phenomenon of temporary duration, invented by man, committed by animal!

This is not so. For many children across the ages, childhood has been a time of anguish, despair, exploitation and abuse. A state

¹Fontana, V. *The Maltreated Child* (1971) 3.

²See generally: Radbill, S. 'Children in a World of Violence' in *The Battered Child* eds Kempe, H.C. & Helfer, R.E. 3 ed (1980); Breiner, S.J. *Slaughter of the Innocents - Child Abuse Through the Ages and Today* (1990); De Mause, L. *The History of Childhood* (1974); Bakan, D. *Slaughter of the Innocents* (1971).

to be endured rather than enjoyed.³

Lloyd de Mause, writes that:

"The history of childhood is a nightmare from which we have only recently begun to awaken. The further back in history one goes, the lower the level of child care, the more likely children are to be killed, abandoned, beaten, terrorised and sexually abused".⁴

The aim of this chapter will be to assess the veracity of this statement in light of modern day child abusive practices.

2. THE HISTORY OF INFANTICIDE

(a) Pagan Society

Throughout the centuries, one of the primary causes of the death of legitimate and illegitimate children was as a result of the widespread practice of infanticide.

Theo Solomon, in tracing the history and demography of child abuse, writes;

'Infanticide has been practised in almost every nation, both civilised and uncivilised since recorded time. This act has been responsible for more child deaths than any other single cause in history, other than possibly bubonic plague.'⁵

Infanticide, or the killing of the new born infant with the explicit or implicit consent of parents and the community was an

³Tucker, M.J. 'The Child As Beginning and End' in *The History of Childhood* ed. De Mause, L. (1974) 229-234.

⁴De Mause op cit 1.

⁵Solomon, T. 'History and Demography of Child Abuse' (1973) 51 *Paediatrics* 773-776.

every day occurrence in antiquity.⁶ Children were regularly thrown into rivers, flung into dung heaps and cess trenches. Potted in jars to starve to death and exposed on every hill and roadside.⁷ The rationale for this heinous practice was deeply woven into the fabric and the culture of a society, for, not only was the killing of infants an approved means of serving a religious belief, but superstitious belief also required the killing of the infant for the appeasement of an angry god or goddess.⁸

The pervasiveness of this practise in pagan society was, to a large extent, due to the absence of a principle recognising the sanctity of human life.⁹ It would appear that pagan society embraced the idea that human value was acquired rather than being inherent.¹⁰ A child in pagan times possessed no right to life simply by virtue of being born - such right had to be ceremonially bestowed.¹¹ Prior to the bestowment of such right, the infant could, be disposed of with as little compunction as that for an aborted foetus.¹²

The acquisition of the right to life took its form in many ways. Some cultures embraced the idea that the child acquired the right to life upon the acceptance of some form of nourishment - i.e., a drop of milk, or honey, or even water - while others believed

⁶Thomas 'Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives' (1971-72) 50 *Northern Carolina Law Review* 293.

⁷De Mause op cit 25.

⁸Thomas op cit 293.

⁹Amundsen, D.W. 'Medicine and the Birth of Defective Children: Approaches of the Ancient World in *Euthanasia and the Newborn* eds. McMillan, R.C. Engelhardt, H.T. & Spicker, S.F. (1987) 7.

¹⁰Amundsen op cit 6-7.

¹¹Breiner op cit 8.

¹²Radbill op cit 3-4.

such right could only be bestowed by a principal or the the head of the household.¹³

(b) Ancient Greece and Rome

Justification for the practice of infanticide was often based primarily upon eugenic grounds, hence the widespread acceptance of the killing of the weak, infirm, premature or deformed infant. In ancient Greek society the predominant belief was that the genetic defects possessed by such infant could be easily transmissible, and not wishing upon themselves a society of crippled and deformed subjects, they readily consented to the practice.¹⁴

Numerous Graeco-Roman philosophers such as Aristotle, Seneca, Plato, Epicurus, and Plottinus also showed support for the practice in their writings.¹⁵ For example, Seneca, a first century A.D. stoic philosopher writes in his treatise On Anger:

'..mad dogs we knock on the head, the fierce and savage ox we slay, sickly sick we put to the knife to keep them from infecting the flock, unnatural progeny we destroy. We drown even children who at birth are weakly and abnormal. Yet it is not anger, but reason which separates the harmful from the sound'.¹⁶

While, Aristotle, in The Politics writes:

'As to exposing or rearing the child born, let there be a law that no deformed child shall be reared'.¹⁷

Although the primary justification for infanticide was based upon

¹³Radbill op cit 4.

¹⁴Amundsen op cit 3-18.

¹⁵Bakan op cit 31.

¹⁶De Mause op cit 27.

¹⁷Amundsen op cit 10.

eugenic grounds, certain cultures such as that of Ancient Sparta justified the exposure and subsequent death of the newborn infant upon both eugenic and non-eugenic grounds. Plutarch, in The Life of Lycurgus describes the practice in Ancient Sparta:

'Offspring was not reared at the will of the father but was taken and carried away by him to a place where the elders officially examined the infant, and if it was well built and sturdy, they ordered the father to rear it but if it was ill born and deformed, they sent it to .. a chasm like place at the foot of Mount Taygetu, in the conviction that the life of that which nature had not well equipped at the very beginning for health and strength, was of no advantage, either to itself or the State.' ¹⁸

In ancient Rome, The Twelve Tables of Romulus, the alleged founder of Ancient Rome, reveals that the exposure of newborn infants was a rather frequent occurrence.¹⁹ Dionysius of Halicarnassus, a first century B.C. historian writes of Romulus:

'He obliged the inhabitants to bring up all their male children and the first born of the females and forbade them to destroy any children under three years of age, unless they were maimed or monstrous from their very birth. These he did not forbid their parents to expose, provided they first showed them to their five nearest neighbours and these also approved.'²⁰

Other evidence indicating the prevalence of the practice in ancient Rome is that of the Soranus, a second century A.D. physician who, in the Treatise On How to Recognise the Infant that is Worth Rearing, writes :

'Now the midwife, having received the newborn, should first put it to the earth, having examined beforehand whether the infant is male or female and should announce by signs, as is the custom of women. She should also consider whether it is worth rearing...the infant which is

¹⁸Amundsen op cit 10.

¹⁹Bakan op cit 31.

²⁰Amundsen op cit 11.

suiting by Nature of rearing will be distinguished by the fact that its mother has spent the period of pregnancy in good health, for conditions which require medical care, especially those of the body, also harm the fetus and enfeeble the foundation of its life. Second, by the fact that it has been born at the due time, best at the end of nine months, and if it so happens, later, but also after only seven months. Furthermore, by the fact that when a woman puts it to the earth it immediately cries with proper vigor, for one that lives for some length of time without crying or cries but weakly is suspected of behaving so on account of some unfavourable condition, also by the fact that it is perfect in all its parts, members and sensors, that its ducts - namely on the ears, nose, pharynx, urethra, anus, are free from obstruction, that the natural function of every (member) are neither sluggish nor weak, that the joints bend and stretch, that it has due size and shape and is properly sensitive in every respect. This we may recognise from pressing the fingers against the surface of the body, for it is natural to suffer pain from everything that pricks or squeezes.' ²¹

The position in Rome differed however, to that of ancient Greece, in that this society recognised the concepts of *paterfamilias* and *patria potestas*. The *paterfamilias* - the head of the household who was *sui juris*, and who, *in domo dominium habet* - possessed supreme authority over the other members of the household. His will was regarded as being absolute. His was the power to accept a child at birth or to choose to have it killed.²² His exercise of the *Ius Necisque* was in early antiquity practically unfettered.²³

Abrogation of this power over life and death took place during the Imperial Period.²⁴ By the time of the reign of the emperor Constantine (306-330 A.D.) the practice was completely prohibited.²⁵

²¹Amundsen op cit 14.

²²Breiner op cit 106.

²³Amundsen op cit note 4 at 19.

²⁴Amundsen op cit 19.

²⁵Amundsen op cit 19-20.

The dwindling population and the growth of Christianity in the fourth century A.D., led to the enactment of laws, prohibiting the practise of exposure and infanticide in Greek and Roman society.²⁶ In 318 A.D. it became a punishable offence to commit the crime of parricide; in 329 A.D. the sale of children became legalised, thereby enabling parents unable to afford a family to financially dispose of them as opposed to murdering them; in 331 A.D an edict reversing the law concerning *exponere filium* was enacted commanding that those who had raised an exposed child could be compelled to return it to its natural parents, and in 374 A.D. the practice of infanticide was criminalised.²⁷

Notwithstanding the enactment of these laws, detailed historical studies reveal that infanticide continued.²⁸ The continuing growth of Christianity and the acceptance of concepts of 'Imago Dei' and 'extra ecclesiam nulla salus' did however serve to check the frequency of occurrence of the practice.²⁹ The concept of Imago Dei stressed that man is made in the image of God and based upon this assertion, it was emphasised that as it was God who had caused the birth of each child - both the perfect and the imperfect - that consequently, the deformed, feeble-minded and retarded had an intrinsic right to life.³⁰ While the concept of 'extra ecclesiam nulla salus' stressed that anyone excommunicated from the Church lost his salvation.³¹ The active involvement of the church in the community, and its active

²⁶De Mause op cit 28.

²⁷Ferngren, G.B. 'The Status of Defective Newborns from Late Antiquity to the Reformation' in *Euthanasia and the Newborn* eds. McMillan, R.C. Engelhardt, H.T. & Spicker, S.F. (1987) 47-48.

²⁸De Mause op cit 29 writes: '..(d)etailed studies are just beginning but it is possible that infanticide may have been only sporadically punished prior to the 16th Century..'

²⁹De Mause op cit 28-29; Ferngren op cit 47-61.

³⁰Amundsen op cit 16.

³¹Ferngren op cit 48.

involvement in condemning the practice of infanticide led to the establishment of Xenodochia (hospitals) and foundling homes for orphaned children.³² A major problem which the founders of these foundling homes however, experienced, was that often the number of children requiring shelter exceeded the number of places available for shelter.³³ As a result, the death toll for children during this period continued to remain relatively high.³⁴

(c) Infanticide - South Africa

In our modern law infanticide is a criminal offence and falls within the category of murder.³⁵ Notwithstanding this classification, the offence is seldom, if ever, punishable with death.³⁶ The courts have in the past recognised that there are usually a number of mitigating factors present in such act, which would call for the imposition of a sentence less severe than that required in the case of murder.³⁷ In the case of *S v Jokasi*³⁸ it was held per Gubbay J:

'Faced with this situation, adverse though it may be to the offender, there are, to my mind, at least three reasons why the killing should be regarded as less reprehensible than for ordinary murder.

In the first place, the injury done to the newly born infant is less, for it is incapable of the kind of suffering that might be felt by an adult or teenage victim of a murder. Its level of consciousness is not

³²Ferngren op cit 54-55.

³³De Mause op cit 29.

³⁴De Mause op cit 29.

³⁵Burchell, J. & Milton, J. *Principles of Criminal Law* (1991) 417.

³⁶Burchell & Milton op cit 417.

³⁷*S v Jokasi* 1987(1) SA 431 (ZSC)

³⁸1987(1) SA 431 (ZSC)

sufficiently developed to enable it to agonise upon the contemplation of approaching death. It is incapable of exhibiting fear or terror. Secondly, the loss of a newly born infant leaves no gap in the family circle, deprives no children of their breadwinner or their mother, and no-one of a friend, helper or companion. Thirdly, the crime does not create the sense of insecurity in society which other murders cause. No-one feels less safe because of it.'

With due respect to the learned judge, it is submitted that regarding the killing of an infant as less reprehensible than that of an adult, upon the premise that the approaching death of the infant provides less pain, fear, or terror, is without medical support. 1

(d) Infanticide - United Kingdom

The position in the United Kingdom concerning infanticide is governed by the operation of The Infanticide Act 1938. Sections 1(1) and 1(2) permit a charge of murder to be reduced to infanticide, in cases where a woman, by any wilful act or omission, causes the death of her child under the age of 12 months, where 'at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child'.

The existence of a separate offence of infanticide on the statute books has recently undergone re-appraisal in Britain. In a report issued by the Select Committee of the House of Lords on Murder and Life Imprisonment it was suggested that the application of the defence of diminished responsibility be utilised in lieu of utilisation of the 1938 Act.³⁹ No decision has to date been made concerning the recommendation. In the Criminal Code Bill drafted by the Criminal Law Revision Committee, the proposed defence of infanticide has undergone transformation, only in so far as

³⁹House of Lords, Report of the Select Committee of the House of Lords on Murder and Life Imprisonment (H.L. Paper 78) Vol 1 Para 84

greater latitude for the application of the defence is now afforded women:

'A woman who, but for this action, would be guilty of murder or manslaughter of her child is not guilty of murder or manslaughter, but is guilty of infanticide, if her act is done when the child is under the age of twelve months and when the balance of her mind is disturbed by reason of the effect of giving birth or of circumstances consequent upon the birth.'⁴⁰

Commenting upon the situation, Mackay writes that the position of the courts concerning infanticide has always been to assume a more lenient approach to the offence when it is perpetrated by women.⁴¹ The rationale for the approach being based upon the premise that 'the ordinary conditions of childbirth and lactation have a potentially disruptive effect on the mental state and behaviour of women'.⁴² Whilst conceding that the criteria of the 1938 Act are psychiatrically unsound, Mackay holds '...if the lenient sentences which women receive when convicted under the 1938 Act are to be ensured then there appears to be a continued need for a separate offence of infanticide and clause 64 of the Draft Criminal Code Bill seems an appropriate vehicle to secure

⁴⁰ A Criminal Code for England and Wales, Law Com. No. 177 (1989) Vol 1 Report and Draft Criminal Code Bill at clause 64(1)

⁴¹Mackay, R.D. 'The Consequences of Killing Very Young Children' 1993 *Crim.L.R.* 21-30.

⁴²Wilczynski, A. & Morris, A. 'Parents who kill their Children' (1993) *Crim L.R.* 35.

this'.⁴³

(e) The Selective Non-Treatment of Handicapped Infants

While it is evident that the practice of infanticide in its 'pure' form continues in the present day, a far greater number of infants are victims of this abusive practice in its more modern guise, i.e., the selective non-treatment of handicapped neonates within a controlled medical setting.

Neonatal killing in a medical setting is essentially an act of omission as opposed to commission i.e., the 'abnormal' neonate is allowed to die naturally without the aid of remedial medical intervention. While the frequency of decisions to selectively withhold treatment from handicapped or malformed neonates, has not been recorded - possibly because of the private nature of such decisions - it is believed that yearly figures are substantial.⁴⁴ In a survey conducted in the United States, concerning the attitudes of physicians towards handicapped infants, it was revealed that a vast majority of physicians condoned the withholding of life-sustaining treatment in certain circumstances.⁴⁵

⁴³ Mackay op cit 30

⁴⁴Gostin, L. 'A Moment in Human Development: Legal Protection, Ethical Standards and Social Policy on the Selective Non-Treatment of Handicapped Neonates (1985/86) 11 *American Journal of Law and Medicine* 31-78.

⁴⁵ Gostin op cit 34-35. In accordance with the Quinlan standard operative within a number of states in America, justifiable instances include: anencephaly, hydronencephaly, and extreme forms of hydroencephalus. The narrow application inherent in the Quinlan standard has compelled a number of states to call for a broader approach to the issue: i.e., neonaticide is justifiable in the conscious, sapient neonate whose potential for responding appropriately to sensory information or experiencing thought is *de minimis*. Infants falling within this category include those infants with progressive, degenerative disorders of the brain, infants with chromosomal disorders, infants with gross life-threatening abnormalities, and infants with severe brain damage. Commenting upon this category, Gostin writes, '...Most infants with afflictions such as these have massive physical malformations and will

While the prevailing ethos in the medical and legal domain holds that the decision to withhold medical treatment from severely handicapped infants should fall entirely within the province of the parents and the attendant physician,⁴⁶ some legal systems have enacted statutes to protect both the interests of the infant and to regulate the decision-making process of the parents and the attendant physician. The United State's Child Abuse Prevention and Treatment Act Amendments of 1984 is one such enactment. Section 3 of the Amendment Act defines the term 'withholding of medically indicated treatment' as:

'the failure to respond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the physicians reasonable medical judgement will be most likely to be effective in ameliorating or correcting all such conditions...

In accordance with the directives of the Act, all instances of withholding 'appropriate' nutrition, hydration or medication constitute medical neglect. Withholding of such treatment does not however constitute medical neglect in cases where:

subsis t at the most rudimentary level of consciousness fo r their entire lives. Qualitatively, it is difficult to differentiate such infants' existence from those who are comatose'. A third category of justifiable neonaticide has been added by some academics. This category, whose parameters are essentially incapable of exact delineation, holds that the withholding of treatment should be permissible in those circumstances where, though the handicapped infant is capable of minimal engagment with their physical environment, there exists a clear prognosi s of imminent death. Gostin writes that terminal illness is the primary justification for the non-treatment of the infants, but that it is not sufficient justification in the absence of the following characteristics: (1) severe or progressively increasing pain and suffering; (2) severely impaired cognitive and learning potential precluding social or human interaction; (3) multiple physical disabilities preventing significant voluntary movement; and (4) multiple severe impairments or absence of sense perception, particularly sight and hearing.

⁴⁶Gostin op cit 32-33.

- (a) The infant is chronically and irreversibly comatose;
- (b) The treatment would either prolong dying, not be effective in ameliorating or correcting all of the infant's life-threatening conditions or be otherwise futile in terms of the survival of the infant; and
- (c) The treatment would be virtually futile in terms of the survival of the infant and would under the circumstances be inhumane.⁴⁷

While the position in America would appear to be relatively straightforward, factors such as parental reluctance to rear a severely handicapped child falling outside the parameters of justifiable non-treatment, create a number of ethical problems:

'...Who is to determine the minimum quality of life? Whose life should we be considering, the infants? - or are we also taking into account that of the parents and, indeed the well being of society? Do we, in fact, want a society where the right to life is dependent of achieving a norm which is largely measured in material terms? Should the abnormal foetus who resolutely refuses to die be helped on its way? - and, if so, is this help to be through omission or should positive steps be taken to end life?'⁴⁸

The Australian courts have assumed a very rigid approach to the issue. In the unreported case of *Re F* the court held that '..No parent, no doctor, no court, has any power to determine that the life of any child, however disabled that child may be, will be deliberately taken from it...[the law] does not permit decisions to be made concerning the quality of life, nor does it enable any assessment to be made as to the value of any human being..⁴⁹

⁴⁷ For a comprehensive examination of the Child Abuse Prevention and Treatment Amendment Act 1984 see Gostin op cit 58-78.

⁴⁸ Mason, J.K. & McCall Smith, R.A. *Legal and Medical Ethics* (1983) 103.

⁴⁹ Mason & McCall Smith op cit 104.

In South Africa, the legal system has not as yet had to address itself to the problem of determining the legality of the selective non-treatment of a severely handicapped newborn infant.⁵⁰ Academics have noted in the event of such matter coming before the court, the legal system would possibly take a position akin to that used in justifiable abortion cases i.e., that since a child so born, would only enjoy a minimal quality of life, upon humanitarian grounds, it would be more merciful not to allow it to survive.⁵¹

3. THE HISTORY OF THE PHYSICAL ABUSE OF CHILDREN

(a) Pre-Nineteenth Century

Excessive and severe physical violence has long been the legacy of the child. The infliction of violence, perpetrated by adults against innocent, helpless victims has, throughout the ages been a socially accepted child-rearing practice.⁵² A review of available literature reveals the history of childhood to be characterized by widespread cultural acceptance of brutal flogging and denigration of the child.⁵³

The above is best illustrated by reference to the *Domostroi*, a Russian handbook on child rearing compiled in the early Sixteenth century. It advocated the repression of the child's will by stating "do not give him (the child) .. his will in his youth, but crush his ribs while he is not yet grown, or else he will harden and cease to obey you, and then there will be grief and

⁵⁰ This is not to say that the practice does not take place daily within the paediatric wards of the South African hospitals

⁵¹ Burchell & Milton op cit 417.

⁵² De Mause 40.

⁵³ See generally the writings of Radbill op cit; Thomas op cit; De Mause op cit.

vexation for your soul ..".⁵⁴ With this kind of recommendation, it is small wonder that society was initially indifferent to the reality of the child's suffering.⁵⁵

In 1895, the Society for the Prevention of Cruelty to Children summarised the ways in which London children were battered - by boots, crockery, cans, shovels, straps, ropes, thongs, pokers, fire and boiling water.⁵⁶ Beating instruments included whips of all kinds, including the cat-o'-nine-tails, canes, iron and wooden rods, bundles of sticks, 'the discipline' (a rod with a pear shaped apperage and round hole) to raise blisters (6) and the 'verges' - a bundle of switches tied to a handle and applied to either bare, or covered buttocks.⁵⁷

Justifications for excessive, harsh, or severe, discipline were to a large extent contingent upon the standards and customs dominant within a particular society. Rationalisation offered varied greatly:

- (1) Beatings maintain discipline;
- (2) Beatings establish a proper atmosphere for teaching and learning;
- (3) Beatings satisfy religious imperatives; and
- (4) Beatings curb youthful high spirits ⁵⁸

⁵⁴Dunn, P. 'Childhood in Imperial Russia' in *The History of Childhood* 396.

⁵⁵ One cannot doubt the reality of child abuse in the early centuries. One must however bear in mind, that although violence in the form of physical abuse was an integral part of life for the majority of children, the possibility exists that the vast majority of parents did indeed love their children, but felt the views propounded by the 'experts' of the day to be correct.

⁵⁶Radbill op cit 3.

⁵⁷Marvick, E.W. 'Nature vs Nurture' in *The History of Childhood* ed De Mause, L. (1974) 276.

⁵⁸Cruikshank, M. 'Children and Industry' in *The History of Childhood* ed. De Mause, L. (1974) 2; Thomas op cit 298.

The disciplining of the child was not confined solely to the parent. The rise of industrialism, the establishment of factories, foundling homes, work houses and schools led to the creation of a situation wherein children were increasingly disciplined by strangers.⁵⁹ Probably some of the worst examples of child physical abuse occurred within the classroom as a result of the educational fraternity's endorsement of corporal punishment.⁶⁰ Virtually every picture of the classroom has shown a master with a birch in hand, ready to inflict punishment at the slightest provocation.⁶¹ Vegio, a historian, in writing of his own experiences at school in *De Educatione*, characterises his first school master as being a 'harsh, rigid, wrathful' man who frequently resorted to the use of physical violence, even where such action was unnecessary. A man who, 'frightened me with threats, oppressed me with fear, drove me into isolation, never allowed my spirit to breathe.'⁶²

(b) The Nineteenth Century

Societal and legal responses to the existence of child abuse in the years prior to the nineteenth century were rare. Society, in paying lip service to the cultural assumption that a complementary relationship existed between the exercise of parental power and acts of parental wisdom was loathe to intercede on behalf of the child, except where evidence of gross parental misconduct was present.⁶³

Professor Thomas writes :

'The few reported early criminal cases indicate that the criminal law

⁵⁹Thomas op cit 298.

⁶⁰Walter, J.F. 'The Period of Ambivalence' in *The History of Childhood* ed. De Mause, L. (1974) 369.

⁶¹Walter ibid.

⁶²Ross, J.B. 'The Middle Class Child in Urban Italy' in *The History of Childhood* ed. De Mause, L. (1974) 213.

⁶³Thomas op cit 304-305.

provided very little protection to children from parental cruelty. Parents were considered immune from criminal prosecution except where the punishment was grossly unreasonable in relation to the offence; where the parents inflicted cruel and merciless punishment, or where the punishment permanently injured the child. The legal presumption of the court was generally in favour of the reasonableness of parental action...'⁶⁴

The dawn of the nineteenth century saw the move towards providing greater protection for the abused child '...beginning around 1825, it was increasingly acknowledged that public authorities had a duty to intervene in cases of parental abuse or neglect...'⁶⁵ The result of this was the enactment of legislation empowering public authorities to remove children from home environments regarded as being 'unwholesome, unsafe or neglectful'.⁶⁶

A major flaw contained within these statutes was that they failed to differentiate between neglect and poverty. The effect of this was the widespread discriminatory enforcement of the laws against the poor and those economically dependant upon the state for financial support.⁶⁷ The failure on the part of the public authorities to comprehend that neglect was not inextricably linked with poverty is apparent from a review of a provision contained in the Massachusetts's Neglect Laws enacted during the early part of the nineteenth century.

'...whenever any child, under 14 years of age, by reason of orphanage, or of the neglect...of his parents is growing up without any education or salutary control...or, is dependant upon public charity, (he should

⁶⁴Thomas op cit 304.

⁶⁵Thomas op cit 314.

⁶⁶Thomas op cit 314.

⁶⁷Pfhol, S.J. 'Discovery of Child Abuse' in *Child Abuse - Commission and Omission* eds. Cooke & Bowles (1980) 325.

be)...commit(ted) to (state) custody...⁶⁸

According to the provisions contained within the legislation, a parent who was unable to show ability to provide financial support for the child was obligated to cede custody of the child to the state.⁶⁹

Criticism directed against the enactment of the Neglect Laws centered around the argument that these laws failed to provide sufficient safeguard against abuse or neglect in the foster environment.⁷⁰

Garrison in criticising these laws, writes:

'Children were sent out by the thousands where they were handed over to any person who wanted a child - little attention was devoted to substitute parents, hence no guarantee was given that the child would not suffer a cruel fate at the hands of its foster parents.'⁷¹

The first substantial recognition of child abuse can be dated back to 1874 with the infamous case of Mary Ellen. This was a case in which the plight of a seven year old girl came to the attention of a social worker. By virtue of a lack of legal basis for interceding on behalf of the battered child, all attempts to obtain legal recourse to remove the child from her adopted parent's custody were unsuccessful. The plight of Mary Ellen came to the attention of the American Society of Cruelty to Animals and the accounts of the child's maltreatment activated its members to take up the case on behalf of the little girl. Basing their argument on the premise that a person is a member of the animal kingdom, and hence is protected under the

⁶⁸Garrison, M. 'Why Terminate Parental Rights?' (1983) 53 *Stanford Law Review* n58 at 436.

⁶⁹Garrison op cit 435.

⁷⁰Pfhol op cit 325; Thomas op cit 306-311.

⁷¹Garrison op cit 440-441.

protection of domestic animals against cruelty acts, the society was successful in obtaining a writ of *Habeas Corpus* removing the child from its abusive home environment.⁷²

As a result of the widespread media coverage this case received, concerned citizens, believing that children deserved at least as much protection as that which would be offered to a domestic animal, set about in establishing the New York Society for the Prevention of Cruelty to Children. By 1908 as many as four hundred private societies aimed at providing protection for the child had been formed.⁷³ The issue of physical abuse thereafter receded from the public limelight.

(c) The Twentieth Century

In the second quarter of the 20th Century renewed attention was centered upon child abuse as a result of the medical professions' increased interest in the medical aspects of child abuse. Hitherto the profession had remained remote from the issue, preferring not to acknowledge the existence of child abuse. '... (e)xcept for medical care of the injured child, the problems of the battered child in the past ordinarily were not the concern of the physicians..' ⁷⁴ The medical profession, in keeping in line with its sacred Hippocratic Oath, attempted at all costs to avoid any issues of a social, political, cultural, religious, or moral nature.

The initial reluctance to become involved in the issue of child abuse, was as a result of it's being perceived of as being an issue of an ethical and moral nature.⁷⁵ Physicians did however gradually begin to accept the reality of such abuse following on

⁷²Freiman, M.R. 'Unequal and Inadequate Protection under the Law - State Child Abuse Statutes' (1981-1982) 50 *George Washington Law Review* 244.

⁷³Freiman op cit 245.

⁷⁴Bakan op cit 49.

⁷⁵ibid.

the discovery by Madame Curie of the X-ray photograph - the objectivity of which enabled physicians to identify irregular bone deformations.⁷⁶

A major breakthrough in medical perception relating to child abuse occurred with the radiologic investigations of paediatric radiologist - John Caffey - a Physician at the College of Physicians and Surgeons, Columbia University and the Babies Hospital of New York City ⁷⁷. He questioned the relationship between subdural haematoma - a localised blood mass found in the outermost of the three membranes covering the brain and spinal cord ⁷⁸ - with that of atypical fractures of the ribs and long bones.⁷⁹ He hypothesized that a relationship between the two conditions existed and that both conditions were of traumatic origin. In presenting his paper, he stated :

'Some of the fractures in the long bone were caused by the same traumatic forces which were presumably responsible for subdural haematoma..'⁸⁰

Caffey did not however attempt to define the source of the trauma.⁸¹ The major significance of John Caffey's work at the time was that it prompted further medical investigation in the fields of bone-injury, trauma of the skeletal bones, and multiple atypical fractures of the long bone.⁸²

⁷⁶ibid.

⁷⁷Bakan op cit 50-51.

⁷⁸Black's Medical Dictionary 4 ed (1979) 1310.

⁷⁹Caffey, J. 'Multiple Fractures in the Long Bones of Infants Suffering From Chronic Subdural Haematomas' (1946) 56 *American Journal of Roentgenology* 163ff.

⁸⁰Caffey op cit 163.

⁸¹McCoid, A.H. 'The Battered Child and Other Assaults Upon the Family: Part 1' (1965) 50 *Minnesota Law Review* 4.

⁸²Pfhol op cit 329.

Extending the pioneering work of Caffey, Fredric N Silverman attributed injury to the long bones to 'parental carelessness'. In a paper published in the American Journal of Roentgenology, he asserted :

'It is most surprising that physical trauma, probably the most common bone disease during infancy, should have certain roentgen manifestations which perplex physicians when discovered accidentally.....It is not often appreciated that many individuals responsible for the care of infants and children...may permit trauma and be unaware of it, may recognise trauma but forget it or be reluctant to admit it, or may deliberately injure the child and deny it..' ⁸³

In 1955, Drs Wooley and Evans extended on the work of Caffey and Silverman, asserting that multiple injuries of the long bone was of traumatic origin caused by intentional assault upon the child as a result of the 'indifference, immaturity, and irresponsibility' of the parents.⁸⁴ Two years later, the pioneer in this field - John Caffey - returned to the issue of multiple injuries in the long bone of infants and acknowledged parental misconduct as being the source of this injury.⁸⁵

For a few years thereafter, the issue subsided until finally, in 1961, the American Academy of Paediatrics hosted a multi-disciplinary conference on the 'Battered Child Syndrome'. This did much to revive public interest in the existence of this hitherto officially unrecorded form of maltreatment.⁸⁶ Following on this conference, the American Medical Association published an article written by six physicians amongst them Drs. Kempe and Silverman, wherein they presented by far the most comprehensive

⁸³Bakan op cit 53.

⁸⁴Pfhol op cit 329.

⁸⁵Pfhol op cit 329.

⁸⁶Kempe, C.H. Silverman, F.N. Steele, B.F. Droegmuller, W. Silver, H.K. 'The Battered Child Syndrome' (1962) 181 *Journal of the American Medical Association* 105.

study on child battery available at that time. They asserted the need to perceive child physical abuse as being a medical syndrome and described it in the following manner :

'The battered child syndrome, a clinical condition in young children who have received serious physical abuse, is a frequent cause of permanent injury or death. The syndrome should be considered in any child exhibiting evidence of fracture of any bone, subdural hematoma, failure to thrive, soft tissue swellings, or skin bruising, in any child who dies suddenly, or where the degree and type of injury is at variance with the history given regarding the occurrence of the trauma...'⁸⁷

The effect of recognition of 'the battered child syndrome' led to further reawakening of public awareness as to the existence of the syndrome and the campaigning for the enactment of laws pertaining to the protection of children from abuse and neglect.⁸⁸ In 1963, the Development of the Children's Division of the American Humane Association presented guidelines for legislation aimed at protecting the battered child. Within the guidelines proposals for reform of the existing situation were set forward, the most important of which was the call for the mandatory reporting of inflicted injuries. At the time of publication of these guidelines, the Children's Bureau of the

⁸⁷Kempe, Silverman, Steele, Droegmuller & Silver op cit 105. It should be noted that criticism has in the past been directed against the medical professional for having failed to involve itself at an earlier stage in history with the issues inherent in the problem of child abuse. Critics have questioned the medical profession's initial failure to identify the existence of child abuse and have asked why it was that society had to wait for such a long period of time before child abuse could be recognised as being a medical problem. In reply to the criticisms directed against it, the medical profession has put forward the argument that because of the similarity of the symptoms in various conditions , i.e. in the case of rickets, scurvy, osteogenesis imperfecta, and syphilis with those of child physical abuse, it was previously difficult to diagnose such 'disease' positively. The medical profession's silence in the past is perhaps now more understandable.

⁸⁸Freiman op cit 245.

United States Department of Health, Education and Welfare held a national conference to discuss the existence and incidence of child abuse. As a result of this conference they issued a similar guideline in the form of a 'model statute' wherein it was made a mandatory duty for all licensed medical doctors, osteopathic physicians, interns and residents to report cases of suspected child abuse; failure to do so constituting an offence.⁸⁹

The guidelines in rationalising the confinement of this duty upon medical doctors stated :

'Children who have suffered physical abuse at the hands of parents or other persons responsible for their care and protection are most frequently brought or come to the attention of physicians, either in private practice or at hospitals, for care and treatment. Physicians, because of the nature of the injuries and the case histories of these children, are in an optimum position to form reasonable, preliminary judgments as to how the injuries occurred.'⁹⁰

The effect of the publication of the "model statute" led to the adoption of Child Protection Statutes by all states in America. The aim of the statutes being to call attention to possible cases of child abuse and thereby activate state investigation. In 1974 the Child Abuse Prevention and Treatment Act was enacted and by 1978 all states in the USA contained some form of legislation in their statute books criminalizing such activity and providing

⁸⁹Freiman op cit 247ff.

⁹⁰Mitchell, M.H. 'Must Clergy Tell? Child Abuse Reporting Requirements versus The Clergy Privilege and Free Exercise of Religion' (1987) 71 *Minnesota Law Review* 726-727. Further recommendations made by the model statute was the abrogation of the physician-patient as well as the husband-wife privilege. Physicians and psychologists have in the past criticised this abrogation of the patient-doctor relationship upon the grounds that disclosure of a suspected case of child abuse would ultimately lead to the destruction of the relationship and thereby eliminate all possibility of resolving the problem.

protective services for the welfare of the abused child.⁹¹

The United Kingdom possesses similar legislation, criminalising the physical abuse of children and providing protective services. Under the new Children's Act, Act of 1989, the English Legislation has replaced the main instrument of child protection: 'The Place of Safety Order' with the 'Emergency Protection Order', and the 'Child Assessment Order'. The former empowers the courts to make an emergency protection order in the event that there is reasonable cause to believe that the child is suffering, or likely to suffer harm should he not be removed from his environment, whilst the latter - the most contentious innovation in the act - empowers the court to remove the child in order that an assessment of the child can be made - in cases where the parents themselves do not permit such removal for assessment and where a suspicion of abuse exists.⁹²

In respect of South Africa, the South African legal system makes provision for the protection of the child under the Child Care Act.⁹³ Section 50(1) of this Act makes it an offence to ill treat or abandon a child:

'Any parent or guardian of a child or any person having the custody of a child who -

- a) ill-treats that child or allows it to be ill-treated,
- b) abandons that child,

or any other person who ill-treats a child, shall be guilty of an offence.'

Provision is made in s 50(3) for a fine not exceeding R5000 or a maximum sentence of five years, or both, in the event of violation of this section.

⁹¹Mitchell op cit 727.

⁹²Freeman, M.D.A. 'England's New Children's Charter' (1990-1991) 29 *Journal of Family Law* 343-357.

⁹³74 of 1983.

In terms of s 42 of the Child Care Act of 1983 ⁹⁴ and s 4 of the Prevention of Family Violence Act of 1993 ⁹⁵, an obligation is placed upon persons to report ill-treatment of children.

Section 4 of the latter Act provides that:

'Any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from any injury the probable cause of which was deliberate, shall immediately report such circumstances-

- (a) to a police official; or
- (b) to a commissioner of child welfare or a social worker referred to in section 1 of the Child Care Act, 1983 (Act No. 74 of 1983).'

Section 42 of the former Act places a duty on dentists, medical practitioners, nurses and social workers to report their suspicion of ill-treatment to the Director-General of the Department of Health and Welfare or any official designated by him.

While examination of the Acts shall be dealt with more succinctly under Chapter 7, it suffices for this Chapter to point out that under the Child Care Act, the legislature has included: (1) a penalty provision for failure to report suspicions of ill-treatment to the authorities ⁹⁶ and (2) immunity from civil and criminal liability for reports made in good faith in accordance with the provision of s 42(1).⁹⁷ Section 6 of the Prevention of Family Violence Act of 1993 provides that failure to comply with the provision of s 4, shall result in the person being guilty of an offence and liable on conviction, to a fine or imprisonment for a period not exceeding three months or to both such fine and

⁹⁴Act 74 of 1983.

⁹⁵Act 133 of 1993.

⁹⁶Section 42(5) read in conjunction with s 58.

⁹⁷Section 42(6).

such imprisonment.⁹⁸ No provision is made in this Act for immunity from civil or criminal prosecution for wrongful reporting of suspicions of ill-treatment.

Finally, s 2(1) of the same Act ⁹⁹ empowers a judge or magistrate in chambers to grant an interdict to any party to a marriage or any other person having a material interest in the matter, prohibiting the respondent from-

- (a) assaulting or threatening the applicant or a child living with the parties or with either of them;
- (b) entering the matrimonial home or other place where the applicant is resident, or to a specified part of such home or place or a specified area in which such home or place is situated;
- (c) the respondent from preventing either the applicant or a child who ordinarily lives in the matrimonial home from entering and remaining in the matrimonial home or a specified part of the matrimonial home; or
- (d) committing any other act specified in the interdict.

Subsection 2 of the same provision provides that in granting the interdict, a judge or magistrate shall make an order (1) authorising the issue of a warrant for the arrest of the respondent; (2) suspending the issue of the warrant subject to certain conditions; and (3) advising the respondent that he may after 24 hour's notice to the applicant and the court concerned, make application for amendment or setting aside of the interdict

⁹⁸No mention is made in the Act or in any regulation published in the Government Gazette as to the value of the fine to be imposed. Under s 58 of the Child Care Act, 1983, a fine to the maximum of R 4 000 can be imposed for failure to report suspicions. Possibly, the legislature intends the same value fine to apply to instances of failure to report under s 4 of the Prevention of Family Violence Act, 1993.

⁹⁹Act 133 of 1993.

issued in accordance with subsec (1).¹⁰⁰

The interdict and order contemplated under subsections (1) and (2) respectively, shall be of no force and effect until served on the respondent in the prescribed manner.¹⁰¹ The warrant for arrest of the respondent may be executed by a peace officer upon receipt of an affidavit wherein it is stated that the respondent has breached any of the conditions of the order, made under s 2(2)¹⁰². Section 3(2) provides that upon arrest, the respondent must be brought before a magistrate, judge or peace officer, who shall enquire into the alleged breach of conditions of the order made in terms of s 2(2)¹⁰³ and thereafter order that the respondent be released from custody; or convicted of the offence contemplated in s 6 of the Act.¹⁰⁴

(d) Munchausen Syndrome by Proxy - A New Form of Abuse

Society has indeed progressed with its recognition that child physical abuse is a reality. The legal profession has kept apace by not only enacting child protective legislation but also by setting down precedent to protect the child against excessive,

¹⁰⁰Section 3(3) provides that the provisions of the Criminal Procedure Act 51 of 1977 in respect of form and manner of execution of warrants of arrest, the arrest, detention, searching and other treatment necessary for the control of persons named in warrants of arrest, shall apply *mutatis mutandis* in respect of warrants of arrest issued under s 2(2).

¹⁰¹Section 2(3).

¹⁰²Section 1 of the Criminal Procedure Act 51 of 1977 defines a peace officer as: 'any magistrate, justice, police official, member of the prisons service as defined in section 1 of the Prisons Act, 1959 (Act 8 of 1959) and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334(1), any person who is a peace officer under that section'.

¹⁰³Section 3(4). Section 3(5) provides that the provisions of s 170 of the Criminal procedure Act, 1977 (Act No. 51 of 1977) shall apply *mutatis mutandis* to enquiries conducted under subsec (4).

¹⁰⁴Section 3(4).

and unreasonable infliction of violence. There is however, one area of child abuse still requiring multi-professional attention. And that is the issue of Munchausen Syndrome by Proxy.

Munchausen Syndrome by Proxy is a bizarre form of child abuse which has only recently come to the attention of the medical profession.¹⁰⁵ The syndrome is named after the Baron Karl Fredrick Von Munchausen,¹⁰⁶ and presents itself in a manner akin to that of Munchausen Syndrome (MS).

The latter Syndrome occurs predominantly in males. The presentation of which is the fabrication of histories and symptoms of illness which result in needless medical

¹⁰⁵Meadow, R. 'Munchausen Syndrome by proxy' (1982) 57 *Archives of Disease in Childhood* 92 at 97; Nicol, A.R. & Eccles, M. 'Psychotherapy for Munchausen syndrome by proxy' (1985) 60 *Archives of Disease in Childhood* 344; Jones, J.G. Butler, H.L. Hamilton, B. Perdue, J.D. Stern, H.P. Woody, R.C. 'Munchausen Syndrome by Proxy' (1986) 10 *Child Abuse & Neglect* 33; Craig, L. & Biley, F. 'Munchausen by proxy: Fact not Fiction' (1991) 4 *Nursing* 11Williams, C. 'Munchausen Syndrome by proxy: A Bizarre form of Child Abuse' *Family Law* 32; Sigal, M. Gelkopf, M. Levertov, G. 'Medical and Legal Aspects of the Munchausen by Proxy Perpetrator' (1990) 9 *Medical law* 739. There are no figures concerning the exact incidence of Munchausen Syndrome by Proxy. However, a review of available literature on the Syndrome reveals the incidence to be significant. Meadow writing in the early 1980's refers to 19 cases which he himself studied, and 6 other known cases. Jones and associated provide 4 case reports on the Syndrome at the Arkansas Children's Hospital, and there exists a host of literature providing illustrative single case studies. Meadow in his case studies, writes: 'How common is Munchausen Syndrome by Proxy? It is certainly more common than reports suggest. Six of these children are from Yorkshire and so the number of cases occurring in Britain during the same period is likely to be at least 60. Moreover, recent reports from America confirm that it is not merely a British disease. Goethe wrote "We only see what we know". As doctors we recognise only what we know to be possible. Now that we know Munchausen Syndrome by proxy exists we may recognise it more readily'.

¹⁰⁶Baron Karl Fredrick Von Munchausen was famed as an eighteenth century storyteller of repute, who regularly entertained guests with apocryphal stories of his adventures.

investigations.¹⁰⁷ Munchausen Syndrome by Proxy (MbP), on the other hand, is the fabrication of symptoms and illnesses by a third party. The primary perpetrator in cases of MbP is the mother.¹⁰⁸ What makes (MbP) a perturbing disorder is the fact that the fraudulent clinical histories and fabricated signs of illness are usually so realistic, that even trained medical personnel have difficulties in identifying them as manipulations.¹⁰⁹ A distressing consequence of this, is the fact that the child victim is often exposed to painful and damaging medical investigations with possible harmful psychological and physiological sequela.¹¹⁰

Meadows cites the classic example of a six-year -old victim of (MbP) who spent 13 months away from school; 5 months in hospital; and incurred 1 month of intravenous fluids; 2 barium meal procedures; 2 lumbar punctures and electroencephalograms; an intravenous urogram; skeletal survey; brain scan; biopsie of the

¹⁰⁷Sigal, Gelkopf & Levertov op cit 739 write that the self-inflicted injury and damage of these individuals usually stops short of suicide.

¹⁰⁸Jones op cit notes that the victims of the Syndrome are usually below eight years of age. It is obvious why this group would be targeted: the younger the child, the less likely the potential for discovery of the abuse.

¹⁰⁹Meadow op cit 96 writes that the false histories and fabricated signs were quite often reflective of background medical knowledge and study, and that nurses and former nurses are at the greatest risk of perpetrating Munchausen Syndrome by Proxy.

¹¹⁰Jones op cit 36 writes: ' The physical consequences of the unrecognised or inadequately managed syndrome include painful tests, long and frequent hospitalizations, and potentially harmful treatment...Recently reported was a 2 year old who was taken to the operating room four times before a diagnosis of Munchausen Syndrome by proxy was made. Some children die as a result of induced illness. In a small series of cases of this syndrome, the mortality was approximately 10%. The psychological consequences have not been adequately studied. Some of the children have Munchausen syndrome as adults.' Meadows op cit 92 reveals that of the 19 children studies by him, 2 of those children died from the Syndrome.

bone, kidney and skin; 120 venepunctures; and the prescription of 27 different drugs including among others hydrocortisone, penicillin, ampicillin, cephaloridine, chlorpromazine and phenylbutazone, before the deception was uncovered by a doctor.¹¹¹

Manipulation of illness in the child may be as a result of:¹¹²

1. the mother adding her own blood - menstrual or otherwise - to the faeces, vomit or urine of the child;
2. the mother producing faeculent vomitus by means of adding soft faeces to the child's vomit;
3. producing high fever in a child by means of rubbing thermometers or immersing them in hot water;
4. creating biochemical confusion by adding salt or other chemicals to blood specimens taken from the child;
5. fabricating rashes by continual rubbing with a sharp object, applying caustic solutions to the skin, or using the dye phenolphthalein,
6. giving the child heavy tranquilisers or sedatives to produce confusion, dizziness or non-responsiveness; and
7. applying pressure to the child's neck to produce seizures.

Meadow warns that the following are warning signals of (MbP):¹¹³

1. unexplainable persistent or recurrent illness;
2. medical signs or symptoms which are at variance with the general appearance of the child - e.g., readings of high fever when the child looks normal;
3. unusual signs and symptoms which do not make sense even to the most experienced doctor;
4. signs and symptoms only apparent when the mother is with the child;

¹¹¹Meadow op cit 93-94.

¹¹²Meadow op cit 93.

¹¹³Supra 95.

5. a mother constantly at the bedside of her child, refusing to leave the child alone even for short spaces of time;
6. failure to respond to medical treatment;
7. a very rare disorder;
8. a mother, who despite her child's problems is not as concerned about the recovery of the child as the hospital staff¹¹⁴
9. seizures which do not respond to anti-convulsants.

Where fabrication is suspected the doctor in charge of the child must:¹¹⁵

1. separate the mother and child in order to ascertain whether the signs persist in her absence;
2. investigate the family background i.e., whether the mother has ever been treated for (MS), whether the mother has had any previous medical training, the possibility of other areas of fabrication such as place of employment, occupation, and schooling;
3. chart the temporal relationship between signs, symptoms and the mother's presence;
4. retain all specimens taken for possible evidence in court;
5. investigate the reliability of the signs i.e., whether the rash has been caused by phenolphthalein and washes off in water;
6. consult with a psychiatrist.

In respect of the legal issues of (MbP). Section 42(1) of the Child Care Act ¹¹⁶ requires that suspicions of ill-treatment of

¹¹⁴Meadow op cit 94 writes that on one occasion when he was particularly upset and desperate because of a general failure to treat a child, who unbeknown to him, was a victim of (MbP), the mother of the child sat he down, gave him tea, comforted him, expressed her admiration for his persistence and said to him that 'he should not worry so much about the child'.

¹¹⁵Supra

¹¹⁶Act 74 of 1983.

children must be reported to the relevant authorities.¹¹⁷ Provided the doctor is acting in good faith, no legal proceedings shall lie against him for an unfounded allegation of such ill-treatment.¹¹⁸ Upon notification of the suspicion, the Director-General or any other official designated by him, will issue a warrant for the removal of the child to a place of safety or a hospital.¹¹⁹ Where the child is already in hospital, the hospital will for the purposes of s 42(2) become the place of safety for the child. The Director-General or the said official shall thereupon arrange the necessary treatment for the parent and child.¹²⁰ In the case of (MbP), this will possibly consist of an initial prohibition of contact between the mother and the child, symptomatic treatment of the child, and psychotherapy. During the period of no contact between the parent and the child, psychotherapeutic investigations should be conducted on the mother in order to appraise the potential success of future therapy. This would facilitate the court decision-making process concerning placement of the child. The dismal failure rate of successful psychotherapeutic intervention in the vast number of cases, however, warrants the removal of the child and siblings from the home.¹²¹ Where the prognosis for recovery from the disorder is however good, close medical, legal and social supervision must be provided.

As Munchausen Syndrome by proxy constitutes child ill-treatment, the mother is likely to be charged under s 50(1) of the Child Care Act with the charge in the alternate being assault or assault with intent to do grievous bodily harm. The general rule governing criminal liability is that the conduct of the accused

¹¹⁷For a more detailed analysis of s 42(1) of the Child Care Act 74 of 1983, see Chapter 7.

¹¹⁸Section 42(6).

¹¹⁹Section 42(2).

¹²⁰Section 42(3).

¹²¹Williams op cit 32; Niccol & Eccles op cit 348.

must be (1) unlawful, (2) accompanied by criminal capacity and (3) there must be fault.¹²² In respect of (MbP), points 1 and 3 are satisfied. The conduct is unlawful, and secondly, consciousness of the deception is evident in all the cases studied.¹²³ Questions remain however concerning point 2.

In legal parlance, criminal capacity denotes the individual's psychological capacities for insight and self-control.¹²⁴ As noted by Burchell and Milton, assessment of criminal capacity revolves around the questions: 'Did the accused have the capacity to appreciate the wrongfulness of his or her conduct and the capacity to act in accordance with this appreciation?'¹²⁵ Determining an accused's capacity is a subjective test. Youth, insanity, intoxication, provocation and mental stress are possible defences which may be raised to negate criminal capacity. The defences of youth, intoxication and provocation are defined by the common law while, the defence of insanity is defined by statutory law.¹²⁶

Section 78(1) of the Criminal Procedure Act¹²⁷ provides that:

'A person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or defect whci makes him incapable

- (a) of appreciating the wrongfulness of his act; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his act,

shall not be criminally responsible for such act.'

¹²²Burchell & Milton op cit 71.

¹²³Nicol & Eccles op cit 347; Sigal, Geldkopf & Levertov op cit 744.

¹²⁴Burchell and Milton op cit 195.

¹²⁵Op cit 195.

¹²⁶Van Oosten 'The Insanity Defence: Its Place and Role in the Criminal Law' (1990) 1 SACJ 5 at fn 28.

¹²⁷51 of 1977.

No definition as to what constitutes 'mental illness' or 'mental defect' is provided in the Act, however, the courts will accept as valid, the defence of non-pathological incapacity.¹²⁸ Assessment of the accused's criminal responsibility requires recourse to expert evidence made against the backdrop of the facts of the case.¹²⁹ In all such cases the onus of proving criminal capacity rests upon the courts.¹³⁰ While some assert that (MbP) is incapable of a diagnostic label¹³¹ others have labelled it a form of Narcissistic Personality Disorder.¹³² To date there has been no recorded case dealing with the Syndrome, and it remains to be seen how the court would approach the defence of temporary non-pathological incapacity in such cases.

4. THE HISTORY OF THE SEXUAL VICTIMIZATION OF CHILDREN

(a) Introduction

The history of child sexual abuse is one of unadulterated ugliness. Historically, the perpetration of sexual offences against children was a common phenomenon. Children were often perceived as being mere chattels, the property of their father, their function, the gratification of his and his guests needs.¹³³

History records, that in certain cultures it was considered the norm, an act of hospitality to loan one's daughter, or one's wife to one's guests for an evening of pleasure. In other cultures it

¹²⁸See: *S v Wiide* 1990 (1) SACR 560 (A); *S v Calitz* 1990 (1) SACR 119 (A); *S v Kalogoropoulos* 1993 (1) SACR 12 (A).

¹²⁹Botha JA in *S v Kalogoropoulos*.

¹³⁰*S v Rittmann* 1990 (3) SACR 110 (NmHC) per Muller AJ.

¹³¹Meadow op cit 96.

¹³²Sigal, Geldkopf & Levertov op cit 740.

¹³³Radbill op cit 9.

was considered the norm to view one's children in terms of their being marketable commodities - capable of being sold into slavery or prostitution, for a price.¹³⁴

1.4.1 INCEST

History abounds with descriptions of the intra-familial sexual use of children. Sexual union between father and daughter, mother and son, brother and sister was not an infrequent occurrence, despite the existence of the deeply ingrained social taboo against such union.¹³⁵

It is interesting to note that the taboo against incest was so pervasive, that in some cultures, notably those of the Egyptians and the Maya of Yucatan, members of the royal castes deliberately violated the taboo in an effort to emphasize their "superhuman" status.¹³⁶

Often incest was practiced by these members of the royal castes in an attempt to ensure the purity of the royal line. In Egypt, the establishment of incestuous relationships were not confined to father-daughter, father-grand daughter, or, mother-son, sibling incest amongst the royal members was widespread.¹³⁷ Half-brothers and sisters who were in the royal line, were expected as a matter of course to engage in sexual relations with

¹³⁴ibid.

¹³⁵In respect of the incest taboo, Radbill op cit 12 writes: 'Many reasons have been discussed by anthropologists as to why incest was taboo. While the taboo was primarily ethical and religious, exogamy extended to preserve family unity and to maintain better intrafamily and community relationships. A moral code imposed psychological restraint and seemed to have certain genetic advantages, in line with the general belief that family inbreeding intensified hereditary traits. Because incestuous mothers were so young, there was an increased morbidity and mortality among the offspring. Never was there a claim that it was healthy.'

¹³⁶Tannahill, R. *Sex in History* (1992) 67-68.

¹³⁷ibid.

one another. Justification given for such practice rested upon the assumption that such activity was a necessity for the preparation of marriage, which usually took place between the thirteenth and fifteenth year of life.¹³⁸

Greek mythology abounds with tales referring to the existence of incestuous relationships. The tragedy of Oedipus Rex, written by Sophocles, a 5th century B.C. tragician, tells the story of Oedipus who in fulfilling an ancient prophesy murders his father and marries his mother, Jocasta, the widowed queen of Thebes.

The Hebrews rigorously observed the taboo against incest. Prohibition against the engaging in such activity was contained both in the talmudic order which simply commanded, 'Do not profane thy daughter to cause her to become a whore ' and the bible which stated, 'You shall not uncover the nakedness of a woman and her daughter...'¹³⁹ Violation of this prohibition usually resulted in death either through flagellation, stoning or burning.¹⁴⁰

While much is known about ancient Egyptian and Greek sexual practices, less is known about these practices in the Middle and Present Ages. Commenting on this de Mause writes :

'The history of sex in childhood presents even more

¹³⁸ibid. One can see quite clearly from a review of historical records that incest was tolerated in Ancient Egyptian society. History records Akhenaton's (the 'mystic pharaoh' of the Eighteenth Dynasty (1570 - 1320 B.C.)) first wife as having been his mother, his second wife as having been his maternal cousin, and his fifth wife as having been his post-pubescent daughter. History also records that his two sons both married their half-sisters. Ancient papyri reveals a prohibition against the establishment of incestuous relationships with pre-pubescent children.

¹³⁹Leviticus 18:17.

¹⁴⁰Tannahill op cit 66.

difficulty than usual at getting at the facts, for added to the reticence and repression of our sources is the unavailability of most of the books, manuscripts, and artifacts which form the basis of our research. Victorian attitudes towards sex still reign supreme among most librarians, and the bulk of works which relate to sex in history remain under lock and key in library storerooms and museum basements all over Europe, unavailable even to the historian....." ¹⁴¹

While a veil of secrecy surrounded the occurrence of this heinous act in the past, history records that during the 1890's, Sigmund Freud - the father of Psychoanalysis - stumbled upon society's secret vice. Freud at the time was practicing in Vienna, Austria, - the centre of culture and learning - the majority of his patients at the time were women from well-to-do, prosperous but conventional families. Time after time his patients recounted childhood histories of sexual abuse. At first, stunned by these revelations of child sexual abuse, Freud believed the veracity of his patient's stories. In 1896, he wrote a paper asserting that the root cause of hysteria in women was as a result of premature sexual experiences. Freud's peers would not accept the revelation and as a result, Freud denied his initial observation, declaring his patient's stories to be mere fantasy, a form of wishful thinking. Upon this denial, Freud's Oedipal Theory and the Theory of Infantile Sexuality was born.¹⁴²

Legal response to Intrafamilial child sexual abuse began in earnest in the early part of the twentieth century. In 1908, following widespread public campaigning against the violation of the child's integrity, the practice of incest became a criminal offence in both England and Wales.¹⁴³ Prior to the enactment of

¹⁴¹De Mause op cit 42.

¹⁴²Spencer, J.R. & Flin, R. *The Evidence of Children - The Law and The Psychology* (1990) 261-263.

¹⁴³Smart, C. *Feminism and the Power of the Law* (1990) 53.

the Incest Act, the occurrence of incest was left to the remit of the ecclesiastical courts, which in effect meant that incest was neither effectively controlled nor regulated during this period.¹⁴⁴ It should however be noted that it was possible to bring a charge of incest against an adult during this period but that such action was fraught with so many obstacles that it was often not a feasible course of action. To bring a charge of incest, the victim had to rely upon the 1885 Criminal Law Amendment Act. This Act deemed it a criminal offence to engage in sexual relations with a girl below the age of sixteen years. The restriction which was however placed on laying a charge, was that the accuser had to be below the requisite age of consent and in addition had to lay such charge within three months of the occurrence of the offence - obviously, neither the legal profession, nor society were informed at this stage of the 'continuing element of exploitation inherent in such offences'.

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Arguments against the incorporation and subsequent amendment of the Act, were based primarily upon the grounds that such would create opportunity for the "blackmailing of innocent men".¹⁴⁶

'..(I am) very much afraid, however, that by making this a new crime, (you) are opening the doors very wide to blackmailers, and to charges being brought against persons without proper foundation. (You know) very well that in regard to an offence of a similar character, charges (are) brought by young girls which (have) no foundation whatever in fact'.¹⁴⁷

In South Africa, incest, which is the unlawful and sexual intercourse between two persons who on account of consanguinity, affinity or adoptive relationship may not marry one another, is

¹⁴⁴ibid.

¹⁴⁵ibid.

¹⁴⁶Smart op cit 54.

¹⁴⁷Smart op cit 54-55.

a punishable offence.¹⁴⁸

1.4.2 PEDERASTY AND CHILD PROSTITUTION

(a) Greece and Rome

The child in antiquity lived his earliest years in an atmosphere of sexual abuse. Growing up in Ancient Greece between the sixth and the fourth century A.D. often meant having to make oneself available for the sexual use of older men. Pederasty, which in essence denoted the love of an older man for a boy who had not yet reached the age of maturity, was rife throughout all parts of Greece and Sparta. Socrates, Plato, Alcibades, Xenophon were all known to glorify the practice of "pederastic" love. Scholars have noted that the prevalence of the pederastic relationship in the ancient world - in particular Greece - was in a large part due to: (1) the widespread deprecatory attitude which men held towards women, (2) their denigration of the institution of marriage, (3) the extensive sexual freedom they enjoyed which permitted them to abuse children, (4) the practice of homosexuality, and (5) the employment of boy prostitutes for the satisfaction of their sexual needs.¹⁴⁹

It is interesting to note that pederasty, which originated in Sparta and was imported to Athens in the sixth century B.C. was perceived of by the Greeks as being a necessary form of higher education.¹⁵⁰ What happened was that when a boy finished his orthodox schooling he was taken under the wing of an older man. He then made himself responsible for the boy's moral and intellectual development, treating him with kindness and understanding and warming him with that pure love whose only intention, according to Socrates, was the cultivation of moral

¹⁴⁸Burchell & Milton op cit 477.

¹⁴⁹Tannahill op cit 76-89.

¹⁵⁰Tannahill op cit 76.

perfection in the beloved.¹⁵¹ Pederasty with a kept lover was an expensive practice and hence restricted itself to the upper classes.¹⁵² As a result boy-brothels serving the needs of the lower-classes flourished everywhere - boys were hired out by the hour, and in the case of a 'wealthier' patron on a contractual basis.¹⁵³ Prohibition against pederastic and homosexual activity did exist. Reay Tanahill, in tracing the sexual practices predominant in Greece states that Solon - a known pederast - enacted legislation (1) prohibiting pederasty with a boy below the age of puberty, (2) sexual connection between free-boys and slaves, and (3) the solicitation of young men.¹⁵⁴ Notwithstanding the enactment of these laws, the practices of homosexual activity and pederasty continued to prevail.¹⁵⁵

'On the whole, however, the general impression conveyed by Athenian sources is that most pederastic offences, like towaway-zone parking today, were recognised as illegal only by those who were unfortunate enough to be caught...' ¹⁵⁶

The position was not much different in Ancient Rome. Like the Greeks, the Romans also adhered to the fashion of denigrating children for the satisfaction of lust. Boy-brothels were everywhere. Free-boys walked around with slaves, in order to protect themselves against ravishment by older men, and prior to entering into public bathhouses, they were required to wear distinctive necklaces, lest their fathers mistake them for slave boys and engaged in sexual intercourse with them.¹⁵⁷

¹⁵¹ibid.

¹⁵²Tannahill op cit 77.

¹⁵³Tannahill op cit 81.

¹⁵⁴Tannahill op cit 82-83.

¹⁵⁵ibid.

¹⁵⁶Tannahill op cit 82.

¹⁵⁷On the history of sex in Ancient Rome see generally, Tannahill op cit 96-127.

The sexual use of children was not however, limited to pubescent boys, pre-pubescent boys were the frequent victims of lecherous old men. Both Plutarch and Quintillian refer in their works to the widespread sexual debauchery which often took place in the classroom despite the existence of laws prohibiting such conduct. Aeschines, in his work, *The Speeches of Aeschines*, describes the extent to which the legal system attempted to protect children from the sexual attack by pedagogues :

'...consider the case of the teachers...it is plain that the lawgiver distrusts them..he forbids the teacher to open the school room, or the gymnastics trainer the wrestling school, before sunrise, and he commands them to close the door by sunset, for he is exceedingly suspicious of their being alone with a boy, or in the dark with him..' ¹⁵⁸

The satirist, Petronius wrote extensively on the debauchery present during the reign of the emperor Nero the most degenerate of all the emperors - and described how adults often played with the genitals of little children as a form of amusement, as well as of his own rape of a seven year old girl. The historian, Suetonius, well-known for his writings on the depravity and corruption of Roman life wrote that the emperor Tiberius, known for his depravity and cruelty towards children corrupted the innocence of children by forcing them to engage in debauched acts. ¹⁵⁹

(b) (i) The Victorian Era and Child Pornography

Not much is known on the sexual exploitation of children after this period. During the Victorian Period, sexual abuse and prostitution of children became a lucrative business. Especially for the 'madams' and pimps who supplied 'virgins' as a cure for a host of venereal diseases. ¹⁶⁰ Child pornography is also

¹⁵⁸De Mause op cit 30.

¹⁵⁹Marais, C. *Children of Sorrow - Child Sex Abuse in South Africa* (1990) 90.

¹⁶⁰Tannahill op cit 367-372.

documented as having begun during this period.¹⁶¹ The earliest known pornographic photographer was a clergyman from Oxford University's Christ Church College, a Charles Ludwig Dodgson (1832-1898), 'who took special pleasure in photographing young girls "...in any amount of undress".'¹⁶² Charles Ludwig Dodgson was also known as Lewis Carroll, the author of '*Alice's Adventures in Wonderland*' and '*Through the Looking Glass*'. It is interesting to note that the celebrated playwright and author of *Peter Pan*, J M Barrie, was also a paedophile. Nude photographs of the Llewellyn-Davies brothers, the youngest of whom was the model for his classic hero - Peter Pan, are still in existence.¹⁶³ Oscar Wilde and Ernest Dowson are two other names associated with paedophilic love.¹⁶⁴

(b) (ii) Pornography Today

The nude photography of children taken in the Victorian and Edwardian Era do not constitute 'hard core' child pornography by today's standards, they do however point to the beginning of an industry, which today, although underground, constitutes a fast-growing multi-million dollar sexploitation of children. For obvious reasons, statistics on the actual extent of the problem are not available - production, distribution and sale of the material takes place in secret - most would however agree that a significant number of children, between three and sixteen years of age, are being sexually exploited in this way.¹⁶⁵

¹⁶¹Tyler, R.P. & Stone, L.E. 'Child Pornography: Perpetuating the Sexual Victimization of Children' (1985) 9 *Child Abuse & Neglect* 313-314.

¹⁶²Tyler & Stone op cit 314. The authors note that while the photographs would not by today's standards, be considered pornographic. In the Victorian era, and form of nudity was in itself scandalous and shocking, and thus, the photograph of Beatrice Latham, aged 6 "sans habilement" can rightfully be considered the beginning of child pornography.

¹⁶³Marais op cit 94.

¹⁶⁴Supra.

¹⁶⁵Marais, C. *Children of Sorrow - Child Sex Abuse in South Africa* (1990) 103; Tyler & Stone op cit 314.

The manner of introducing a child to pornographic activity is usually accomplished by the child molester first 'befriending' and establishing a relationship of 'trust and affection' with the potential victim and then introducing the victim to 'kiddie porn' by means of either allowing the victim to 'accidentally' discover the material, or by using the material under the guise of 'sex-education'. The purpose of the introduction is always to lower the inhibitions of the child, raise the child's levels of curiosity concerning what they have seen and to entice them to experiment with similar activity.¹⁶⁶ Not all introductions to child pornography take place in the above-mentioned manner. Sometimes in their first pornographic film, the child is raped, other times, as with the suspected situation in the notorious Joey Haarhof and Gert van Rooyen story, the child is abducted and sold into a prostitution-cum-child pornography racket.¹⁶⁷

The growing societal awareness of child pornography and the existence of child prostitution rings, has resulted in stringent laws being enacted worldwide to outlaw this form of sexual abuse. Article 34 of the United Nation's Convention on the Rights of the Child, obliges signatory-states to take appropriate national, bilateral and multilateral measures to prevent: (1) the inducement or coercion of a child to engage in any unlawful sexual activity; (2) the exploitative use of children in prostitution or other unlawful sexual practices; and (3) the exploitative use of children in pornographic performances and materials. Article 35 obliges States to prevent the abduction, sale or traffic of children. An outline to the legal response to child sexual abuse, including child pornography and prostitution, will be reviewed in more depth under the next section.¹⁶⁸

(c) An Outline of the Socio-Legal Response to Child Sexual Abuse

¹⁶⁶Tyler & Stone op cit 316.

¹⁶⁷Marais op cit 53-74; 89-109.

¹⁶⁸The United Nations Convention on the Rights of the Child are discussed in greater detail in Chapter 4.

The United Kingdom

The development of the socio-legal response to child sexual abuse was to a large extent dependant upon the growing public awareness of the need to protect the innocence of children. Beginning in the 1500's the image of the state as protector of the sexual integrity of the child began to develop.¹⁶⁹ As a result, legislation aimed towards the protection of boys from incidents of forced sodomy was enacted in England in 1548. In 1576, legislation was passed to protect girls under ten years of age from incidents of forcible rape. In 1885, the Criminal Law Amendment Act was enacted. The aim of certain provisions within the act being to raise the age of consent for girls from 13 to 16 years, to criminalize the establishment of brothels, and male homosexuality, and to impose penalties for the procuring of women and children.¹⁷⁰ In 1908, the legal system recognised a need to provide protection for the child not only against extrafamilial sexual abuse, but for cases of intrafamilial sexual abuse as well. As a result, the Punishment of Incest Act was enacted.¹⁷¹ In 1956, both the Criminal law Amendment Act of 1885 and the Punishment of Incest Act of 1908 were consolidated in the Sexual Offences Act.¹⁷²

(c)(ii) America

In America, early attempts by the courts to protect the sexual integrity of the child occurred in two areas - the first area

¹⁶⁹For a review of the development of the legal response to child sexual abuse in the United Kingdom, see, Smart op cit 50-65.

¹⁷⁰Smart op cit 51-52. The reason for enactment of provisions within this piece of legislation dealing with the sexual abuse arose as a result of widespread public campaigning against the sale of children into prostitution. Prior to the enactment of this act, it was commonplace for children to be bought for the ostensible purpose of being sexually violated.

¹⁷¹Smart op cit 53-55.

¹⁷²Smart op cit 55-56.

being the area of the criminal law and the second being in the area of the juvenile courts. In the former, activities such as sodomy, incest, forcible rape and prostitution were criminalised, whilst in the latter, juvenile courts attempted to enforce the prevailing community concepts of morality upon children by means of the creation of status offences. During the last quarter of the nineteenth century, American society witnessed the formation of the Social Purity Alliance whose aim it was to preserve childhood sexual innocence by means of campaigning for a raising of the age of consent for girls, and the formation of the White Cross Society which directed its energies into teaching boys sexual self-control. The first half of the twentieth century saw the establishment of Moral Courts throughout the USA. The aim of these courts being to prevent the increase of adolescent prostitution.¹⁷³

Advancement of interest in the field of the protection of sexual integrity of the child came about as a result of the medicalisation of the battered child syndrome in the early 1960's.¹⁷⁴

The high level of visibility resultant from the widespread media coverage given to the plight of the abused child resulted in public campaigning for the enactment of laws designed specifically for the child. In 1974, the American legislators enacted the Child Abuse Prevention and Treatment Act. The aim of the act being the provision of federal resources to states for the research and treatment of abuse.¹⁷⁵

Attempts directed towards the protection of the sexually abused child has resulted in greater reliance being placed upon the intervention of the criminal justice system. A major disadvantage of such intervention has been the occurrence of the secondary

¹⁷³See Radbill op cit 17-18.

¹⁷⁴Radbill op cit 18-19.

¹⁷⁵ibid.

victimization of the child in the courtroom.¹⁷⁶

In America and the United Kingdom, the past five years have witnessed the enactment of legislation attempting to accommodate the needs of the child witness, whilst ensuring that the rights of the defendant are not violated.¹⁷⁷

The position in South Africa is that the 'criminal law is, as yet, but only partially adapted to dealing with child sexual abuse'¹⁷⁸ The South African legal system does not possess within its laws a separate and distinct crime of 'child sexual abuse'. Sexual abuse committed against children¹⁷⁹ may be punishable under the offences of rape¹⁸⁰, incest¹⁸¹, indecent assault¹⁸², indecency¹⁸³ and sodomy¹⁸⁴. Section 14(1)(a) of the Sexual

¹⁷⁶See chapter 8-10.

¹⁷⁷See Chapter 10.

¹⁷⁸Burchell & Milton op cit 564.

¹⁷⁹Section 1 of the Child Care Act 74 of 1983 defines a child as any person below 18 years of age.

¹⁸⁰Burchell & Milton op cit 435- 449. Rape consists of the intentional, unlawful sexual intercourse with a female without her consent. There exists in our law, an irrebuttable presumption that a girl below 12 years of age, can never consent to sexual intercourse. The authors note at 443 that this is a fiction given that such child may well understand the nature of the act. Public policy however necessitates the existence of this rule.

¹⁸¹Burchell & Milton op cit 477-482. Incest consists of the unlawful and intentional sexual intercourse between two persons who on account of consanguinity, affinity or adoptive relationship may not marry one another. This offence covers instances where the sexual intercourse takes place by means of normal heterosexual copulation between a two relatives, where the 'child-party' is over 16 and consents to the sexual intercourse.

¹⁸²Burchell & Milton op cit 431-434. Indecent assault consists in the unlawful and intentional application of force to the person of another or the inspiring of a belief that force is to be immediately applied to him, the force is by its nature or design, indecent in character.

Offences Act of 1957 criminalises sexual intercourse perpetrated by any male with a girl under the age of 16 years. Section 14(3)(a) criminalises female intercourse with a boy under the age of 16. In both cases the penalty is imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such punishment.¹⁸⁵ In addition to subsections (1)(a) and (3)(a), s 20(1)(aA) makes it an offence for a person to commit an act of sexual intercourse or indecency with another person for reward.

In respect of the issue concerning the possible secondary victimization of the child by the legal system, in 1989, the South African Law Commission conducted an investigation into the giving of evidence by children, in litigation involving allegations of indecent acts. The recommendations of the commission which were published under the title: '*Protection of the Child Witness*'¹⁸⁶, later formed the basis for a number of amendments to the law. The most notable of these is contained within the Criminal Law Amendment Act and deals with the tendering of evidence through an intermediary.¹⁸⁷

Finally, it should be noted that the social response to child sexual abuse has resulted in the establishment of Safeline, Childline, and Helpline. The aim of these specialised organisations being to assist both the abused child and abusive parent, and to curb the frequency of child sexual abuse.

¹⁸³Burchell and Milton op cit 579. See ss 14(1)(b) 14(3)(b) of the Sexual Offences Act 1957. See also *R v H* 1959 (4) SA 427 (A) at 431.

¹⁸⁴Burchell & Milton op cit 571. Sodomy consists of the unlawful and intentional sexual intercourse *per anum* between human males.

¹⁸⁵Section 22(f).

¹⁸⁶Working Paper 28 Project 71.

¹⁸⁷Act 135 of 1991. See also Chapter 10.

1.5 CONCLUSION

In the earlier part of this chapter reference was made to the writings of De Mause who stated:

"The history of childhood is a nightmare from which we have only recently begun to awaken. The further back in history one goes, the lower the level of child care, the more likely children are to be killed, abandoned, beaten, terrorised and sexually abused".

It is submitted that the veracity of this statement should be questioned. Given that, (1) not only has child abuse persevered over time, but new forms and methodology of abusing children are increasingly coming to the attention of authorities; and (2) current empirical evidence reveals that upon disclosure of abuse and involvement of the legal system therein, children suffer a far more debilitating form of victimization.

It is imperative in the final analysis of child abuse in society, that steps be taken to ensure that in years to come, historians don't look back and label the system designed to protect the interests of the child, as a major perpetrator of abuse.

CHAPTER 2
THE DYNAMICS OF CHILD ABUSE -
KEY CONSIDERATIONS FOR LAWYERS

1. INTRODUCTION

It is trite that child physical and sexual abuse is a multi-dimensional problem, which has important effects upon a number of professional disciplines. This chapter provides the reader with a comprehensive overview of the social and psychological aspects of child physical and sexual abuse which impinge upon the legal response to the phenomenon. A call for the establishment of a singular multi-disciplinary organisation dealing with all aspects of the phenomenon, is made.

2. THE CREATION OF A MULTI-DISCIPLINARY ORGANISATION

The past decade has witnessed a growing awareness among professionals of the need for a co-ordinated response to child abuse.

Fundamental to the effective co-ordination of professional response to abuse, is the need for extensive inter and intra-departmental co-operation and communication. Given that 'no single agency, be it health, social services, police or volunteer organisations have the pre-eminent responsibility in the assessment of child abuse generally and child sexual abuse specifically..(and that) each agency has a prime responsibility for a particular aspect of the problem..' ¹ it is imperative that the objective for collaboration, is the complementing of skills and expertise acquired by the respective agencies.

The advantages emanating from implementation of the above proposal range from (1) the achievement of greater insight into the

¹Report of the Inquiry into Abuse in Cleveland, 1987 (1988 CM 412 HMSO).

dynamics inherent in the phenomenon of child abuse as witnessed by each individual discipline; (2) the increased ability to identify in advance, potential flaws which may obstruct the cohesive attempt to respond effectively to child abuse in society; (3) the provision of group support for the individual involved in a difficult case; and (4) the enhancement of commitment and morale between inter-departmental organisations.

While, numerous academics have acknowledged the need for inter-departmental co-operation between the medical, social work, psychological and child protection professions involved in a child abuse case study, little attention has to date been given to the need for legal presence in such study. The legal system has a crucial role to play in a multi-disciplinary organisation. Legal rules impinge upon nearly every aspect of the societal response to abuse and it is accordingly essential that the professional bodies dealing with different aspects of the phenomenon, possess an understanding of their legal obligations, as well as a general comprehension of the rules of evidence and procedure which operate within the court room.

Notwithstanding the above, the legal system could in turn, acquire substantial benefit from membership of a multi-disciplinary organisation. Legal intervention in child abuse gives birth to a magnitude of complex issues of a medical, psychological and social nature which are intricately intertwined. To provide more than just a cosmetic response to the problem of abuse, the legal system needs to come to grips with the issues surrounding child abuse. This would be best effected through participation in a multi-disciplinary organisation. The legal practitioner could also via such participation acquire vital background awareness of the aetiology and dynamics of abuse, the operation of the 'Child Sexual Abuse Accomodation Syndrome', the general levels of competency and reliability of the child witness, and the acquisition and development of

cognitive and language abilities in the child.²

In general, a sharing of information between the key players involved in child abuse, would lead to a more accurate and systematic knowledge on the phenomenon and the management thereof, as well as ensuring that the concomitant problems associated with abuse of this nature, are not exacerbated by the possible secondary victimization of the child in the court room.

3. THE DYNAMICS OF ABUSE

In an attempt to acquire greater insight into the phenomenon of child physical and sexual abuse, the demographic, social, and economic factors believed to facilitate the widespread abuse of children have been studied.

Empirical research into the demographic factors correlating with child abuse reveal mothers and mother-substitutes to be among the highest category of perpetrators of child physical abuse, especially for the age group 0 - 3 years. In a study conducted by Gil, it was found that 47.6% of reviewed cases of physical abuse involved the mother or mother-substitute as the perpetrator, as opposed to 39.2% which involved the father factor.³

Providing possible explanation for this, Gelles and Cornell write:

'Mothers tend to spend more time with children, especially younger children and infants. Irrespective of the time actually spent with children, in our society, mothers are considered more responsible for

²See Chapter 8.

³See: Zigler, E. & Hall, N. 'Physical Child Abuse in America - Past, Present, and Future' in *Child Maltreatment - Theory and Research on the Causes and Consequences of Child Abuse and Neglect* eds. Cichetti, D. & Carlson, V. (1989) 51-52.

the child's behaviour than fathers.'⁴

Research reveals that in respect of the demographic factors associated with sexual abuse the highest incident of such abuse is perpetrated by persons known to and trusted by a child.⁵ Contrary to societal perception, men are not the only perpetrators of sexual abuse upon a child. Women, in particular, women assuming a protective, nurturing role over a child form a formidable percentage of cases of sexual abuse.⁶ Difficulties in obtaining evidence of this, makes the task of identifying this group of perpetrator more arduous:

'..women are permitted such a degree of physical familiarity with children that it is difficult to know when it becomes abuse..⁷

Other demographic factors providing high correlation with abuse include: single parent families, families where the parents are young and financially insecure, families where the father figure has no biological link to the child, and extended families.⁸

In respect of the relationship between economic factors and child abuse, research reveals that factors such as poverty, unemployment, lack of adequate housing facilities, lack of higher education, and urbanisation, are possible precipitators of abuse.

While research findings reflect that child abuse cuts across all sectors of society, a disproportionate occurrence is shown to

⁴Gelles, R.J. & Cornell, C.P. *Intimate Violence in Families* 2 ed.(1990) 57.

⁵La Fontaine, J. *Child Sexual Abuse* (1990) 109.

⁶La Fontaine op cit 106.

⁷La Fontaine op cit 106.

⁸Deare, J. 'Family Dynamics in the Abusing Family' in *Causes of Child Abuse - From a Southern African Perspective* Conference of the Southern African Society for the Prevention of Child Abuse and Neglect (Pmb) 1988 58-64; Fox, P. 'The Role of the Child in the Child Abuse Pattern' in *Causes of Child Abuse - From a Southern African Perspective* 5.

occur in the lower socio-economic strata of society.' Poverty and poverty-related factors such as unemployment; lack of adequate housing and necessary housing amenities; overcrowding and the insufficiency in money supply, with the concomitant lack of food, clothing, and other basic necessities, are all sources of stress from which the poor have little hope of escaping. The culmination of such stress factors serve to weaken the psychological mechanisms of self-control and '...under these circumstances, even minor misbehaviours and annoyances presented by powerless children may trigger abuse..' ¹⁰

As a word of caution, the linking of child abuse with poverty related circumstances does not, preclude the possibility of incidents of child abuse taking place among more affluent sectors of society. Child abuse cuts across all economic strata. The lack of reflection of abuse among higher income families, is possibly as a result of the ability of these families to utilise their financial resources to cover up such incidents. ¹¹

Some academics have blamed the under-representation of abuse in this group, on medical reluctance to consider abuse as a diagnosis for the injury of a child from a wealthy background. Affirming the above, Pelton writes that '...the existence of a personal relationship between the physician and the parent may be a possible factor accounting for the physician's reluctance to report his suspicions of child abuse to the relevant authorities. In the absence of a personal relationship between physician and parent, there appears nonetheless a general reluctance on the part of the medical profession to consider abuse as a diagnosis for the injury of a child within the middle

⁹Gelles, R. 'Child Abuse as Psychopathology' in *Child Abuse and Violence* Gil, D.G. 2ed. (1979) 55.

¹⁰Gelles op cit 55.

¹¹Pelton, L.H. 'Child Abuse and Neglect - The Myth of Classlessness' in *Child Abuse - Commission and Omission* eds Cooke & Bowles (1980) 93.

or upper income sectors of society.¹²

This statement is possibly too generalised. In a survey conducted by the writer, among 42 medical practitioners, based at Edendale Hospital in Pietermaritzburg. 65% revealed themselves to be very willing to report their suspicions of abuse to the authorities, regardless of the socio-economic class of the child.¹³ These findings are not an accurate reflection of the position of medical doctors on child abuse. And may possibly contain a bias, given the subject's awareness of the legal nature of the survey. These findings do however bring into question assertions that under-representation of middle to upper income children in the statistics, is as a result of medical reluctance to diagnose a case as one of child physical or sexual abuse.

The social factors isolated as predisposing a family to acts of intrafamilial violence, reveal that often the time and intensity of relationships between members of the dysfunctional family unit, far exceeds the time and intensity of relationships with outsiders. Consequently, a heightening of irritation, anger, or sexual interest among dysfunctional family members may predispose the family to physical and sexual abuse.¹⁴

Studies reveal that abuse is more likely to flourish unabatedly, in situations where the family isolates itself from society. The establishment of single autonomous units, well removed from societal interference, heightens the possibility of a lack of an adequate support structure in times of need and crisis.¹⁵

Other social factors implicated as playing a causal role in child physical and sexual abuse include: alcoholism, drug dependency,

¹²Pelton op cit 93.

¹³See Chapter 7 for a review of the survey.

¹⁴Bentovim, A. 'Child Abuse' (1992) *Medicine International - South African Edition* 3953-3955

¹⁵Fox op cit 4.

difficulties during pregnancy and labour, unwanted pregnancy, single parent families, young parent families, families characterized by marital discord, and the cultural and social sanctioning of corporal punishment upon children.¹⁶

4. FACTORS ANTECEDENT TO CHILD ABUSE

Helfer and Kempe have identified the following factors with child abuse:

1. the presence of caretaker with a predisposition for abuse;
2. the development of a stressful crisis for the caretaker;
3. the lack of access to available support networks in times of crisis; and
4. the presence of a child, who in the eyes of the caretaker, possesses flaws, rendering him less than satisfactory.

5. CHARACTERISTICS OF CHILD ABUSERS

An awareness of the factors precipitating abusive behaviour should be supplemented with an awareness of the constellation of emotional states found to be common in abusive parents or child caretakers.¹⁷

Identifying the characteristics of child abusers is a task fraught with difficulty. Numerous research efforts have been conducted in this area, most of which reveal that there are few characteristics which would allow for differentiation between child abusers and other members of society.¹⁸ In this respect Summit writes:

'(w)e can believe that a man might normally be attracted to a nubile child-woman. Only perversion could explain attraction to an undeveloped girl or boy, and the men implicated in most ongoing sexual molestations

¹⁶Zigler & Hall op cit 52; Deare, J op cit 58-64.

¹⁷Steele, B. 'Psychodynamic factors in Child Abuse' in the *Battered Child* eds Kempe, H.C. & Helfer, R.E. (1980) 51

¹⁸Cornell & Gelles op cit 50.

are quite obviously not perverted. They tend to be hard-working, devoted family men. They may be better educated, more law-abiding, and more religious than average.¹⁹

Notwithstanding this, researchers have isolated the following characteristics as being present in a vast majority of physical and sexual abusers:²⁰

1. Immaturity
2. Dependency
3. Low self-esteem
4. Poorly integrated sense of identity
5. Lack of impulse control
6. Uncontrollable expressions of anger
7. Depression
8. Low tolerance towards inevitable childhood behaviour (excessive crying, soiling of diapers, etc) - common in the category of physical abuse.

Finally, under this section, the role of the mother in child sexual abuse cases should be examined. Popular belief would have it that the mother plays an integral part in the sexual abuse and that her ambivalence concerning her wifely duties results in the father transferring his attention to the other female (sometimes male) presence in the home. Summit negates this proposition on the basis that the institution of marriage often requires blind trust in one's spouse, and that rarely, if ever, will someone commit themselves in marriage to a person they know will sexually abuse their children. Where clues are presented of such abuse, they are often, upon the basis of the above, denied. It is usually only with retrospective review that the clues which pointed to abuse, become obvious.²¹

¹⁹Summit op cit 182.

²⁰Steele op cit 49-82.

²¹Summit op cit 23.

Summit asserts 'our assumption that the mother "must have known" merely parallels the demand of the child that the mother must be in touch intuitively with invisible and even deliberately concealed family discomfort.'²² He argues that the position for the mother is that as '...someone substantially dependent on the approval and generosity of the father, the mother in the incestuous triangle is confronted with a mind splitting dilemma analogous to that of the abused child.' The mother is forced to determine the veracity of each party's allegation. Either the child is telling the truth in which case the father is bad or the child is lying, in which case it is bad. Her dilemma may be further compounded by the father's use of the logical challenge to the allegation. ' "Are you going to believe that lying little slut? Can you believe I would do such a thing? How could something like that go on right under your nose for years? " ' Whatever, the mother's decision it is obvious that she would ultimately want to believe the father, as this would mean continued marital and domestic security.

In the final analysis however, the decision she eventually takes will obviously be dependent upon how she perceives herself and whether she feels capable of supporting her family in the absence of the father. ²³

6. THE CHARACTERISTICS OF AN ABUSED CHILD

Factors which may precipitate a child being physically abused include:²⁴

1. Being a child of an unwanted or difficult pregnancy
2. Premature children
3. Illegitimate children
4. Children born during a period of heightened family stress
5. Children possessing congenital abnormalities

²²ibid.

²³Summit op cit 182.

²⁴Steele op cit 67-68.

6. Children with physical or mental handicaps
7. Hyperactive children
8. Children who cry excessively
9. Children unresponsive to caretaker affections
10. Children with recurrent illness or disease

In respect of sexual abuse, research has revealed that girls are more vulnerable to abuse than boys, that abuse within the domestic setting perpetrated by the natural biological father is more likely to occur where no firm parent-child attachment has been established, and that where one child is a victim of incest, a great likelihood of abuse of siblings exists.²⁵

Where sexual abuse has taken place, a perpetrator may attempt to justify his actions on the basis that (1) the child provoked the attack by acting in a seductive and provocative manner;²⁶ or (2) the child consented to the act and that the mechanical reactions of the child's body to the sexual caresses was indicative of the pleasure the child received from the sexual experience. The child's physical responses to any such sexual stimuli can in no way mitigate against the seriousness of the crime committed.²⁷ Summit writes that '(g)iven the assumption that an adolescent can be sexually attractive, seductive and even deliberately provocative, it should be clear that no child has equal power to say no to a parental figure or to anticipate the consequences of sexual involvement with an adult caretaker. Ordinary ethics demand that the adult in such a mismatch bear sole responsibility

²⁵La Fontaine op cit 208.

²⁶Summit writes that in reality the a child partner is most often neither sexually attractive nor provocative in the ordinary sense. The stereotype of the seductive child is 'an artifact both of delayed disclosure and a prevailing adult wish to define child sexual abuse within a model that approximates logical adult behaviour.' In chapter 8 the issue of adult egocentricity in the interviewing situation is reviewed. It is possible that the above is another instance of displays of adult egocentrism.

²⁷La Fontaine op cit 72.

for any clandestine sexual activity with a minor.²⁸

7. CONSEQUENCES OF ABUSE

Empirical evidence of the cognitive, emotional, and social sequelae of child physical and sexual abuse reveals abuse - in particular sexual abuse - to have a deleterious effect on the normal bio-psychological development of the child.

Documented consequences of physical abuse record:²⁹

1. The increased risk of mental retardation
2. The possibility of language acquisition delays
3. The possibility of speech disorders
4. The possible formation of dysfunctional interpersonal relationships
5. Heightening of aggression and hostility levels
6. Juvenile delinquency

In respect of sexual abuse, the preliminary manifestations of the abuse include:³⁰

1. Physical disorders
2. Psychological disorders
3. Behavioural disorders

1. Physical Disorders

Headaches; stomach aches; urinary tract infection; rectal

²⁸Summit op cit 182.

²⁹Hasewinkel, S. 'The Characteristics of the Victims of Abuse' in *Causes of Child Abuse from a Southern African Perspective* conference of the Southern African Society for the Prevention of Child abuse and Neglect, Pietermaritzburg (1988) 32-42; Erikson, M.F. Egeland, B. & Pianta, R. 'The Effects of Maltreatment on the Development of Young Children' in *Child Maltreatment - Theory and Research on the Causes and Consequences of Child Abuse and Neglect* eds Cicchetti, D. & Carlson, V. (1989) 647-681.

³⁰Hartmann, C.R. & Burgess, A. 'Sexual Abuse of Children' in *Child Maltreatment - Theory and Research on the Causes and Consequences of Child Abuse and Neglect* eds Cicchetti, D. & Carlson, V. (1989) 105-112.

bleeding; sexually transmissible disease.

2. Psychological Disorders

Anxiety; depression; shyness; withdrawal symptoms; overt passive compliance with authority or rebelliousness; hyperactivity; aggression or hostility.

3. Behavioural Disorders

Obsessive preoccupation with sex orientated activities; regression to earlier stages of childhood behaviour such as nocturnal bed wetting, excessive crying or the making of unrealistic demands.

The severity and extent of such manifestation is dependent upon the interplay of a number of factors. These factors include among others: the sexual assault experience and the extent to which threats or the use of force and aggression was an integral part of the abuse; the age of the child - its current developmental level and ability to understand the nature and sequence of the events in question; previous sexual experiences; duration and frequency of the sexual assault; the age and gender of the perpetrator.³¹

8. THE INTERGENERATIONAL TRANSMISSION PHENOMENON

The focus of this chapter has thus far been on the dynamics of abuse. A secondary consideration when dealing with this aspect, is to question whether the knowledge acquired, allows for identification of potential abusers, and the capacity to predict which persons have a predisposition to abuse.

A number of researchers have been affirmative in this regard, asserting that maltreatment during childhood is inextricably linked with later acts of abusive behaviour.³² Other researchers, while acknowledging the possible generational repetition of

³¹Hartman & Burgess op cit 105-107.

³²Steele op cit 51-52.

physical and sexual abuse, assert that the uncritical acceptance of such hypothesis lacks substantive evidence.³³ The latter group attests that while '...a history of abuse...(may be)..a considerable risk factor associated with the aetiology of maltreatment..' the presence of compensatory factors in the victim's environment, can serve to reduce the transmission of abuse.³⁴

The utilisation of the intergenerational transmission hypothesis as a means of predicting future abuse, has limited application. Mitigating factors against the likelihood of the transmission include:³⁵

1. An awareness of early abusive experiences and the effect thereof.
2. A resolution not to become an abuser.
3. A high intelligence quotient
4. A positive relationship with one parent
5. Having physically healthy children
6. Involvement in a relationship with a supportive spouse
7. Possessing good social supports
8. Possessing few stressful life events - economic security
9. A strong religious foundation
10. Psychotherapy

An awareness of factors mitigating against the transmission of abuse, allows for the disparaging of the intergenerational myth and negates the theory of the 'inevitable consequences' emanating from abuse. Kaufman and Zigler write that the past uncritical endorsement of the intergenerational hypothesis has had many negative consequences. (1) It has impeded progress in understanding the aetiology of abuse, and led to misguided judicial and social policy interventions. (2) It has resulted in

³³Kaufman, J. & Zigler, E. op cit 129-147.

³⁴Kaufman & Zigler op cit 137.

³⁵Kaufman & Zigler op cit 138-141.

innocent victims of abuse being unjustly stigmatized.³⁶

9. THE CHILD SEXUAL ABUSE ACCOMODATION SYNDROME

The final issue to be reviewed hereunder, is that of the 'Child Sexual Abuse Accomodation Syndrome'. Summit writes that the syndrome presents a '..simple and logical model for use by clinicians to improve understanding and acceptance of the child's position in the complex and controversial dynamics of sexual victimization.'³⁷ He writes further that application of the syndrome, results in 'challenges to the entrenched myths and prejudices, providing credibility and advocacy for the child within the home, the courts, and throughout the treatment process.'³⁸

Summit writes that the accomodation mechanism intrinsic to child sexual abuse, induces adult sceptism concerning the veracity of the allegation, reinforcing the belief that children are only rarely legitimate victims of sexual abuse, and that when an allegation is made, this is often the product of fantasy. He asserts that knowledge of the categories, listed below, is essential for the provision of a counter-prejudicial understanding of the behaviour of the sexual abuse victim.³⁹

The categories of the child sexual abuse accomodation syndrome are:⁴⁰

1. Secrecy
2. Helplessness
3. Entrapment and accomodation
4. Delayed, conflicted and unconvincing disclosure

³⁶Kaufman & Zigler op cit 147.

³⁷Summit op cit 177.

³⁸ibid.

³⁹Summit op cit 178-180.

⁴⁰Summit op cit 181.

5. Retraction

9.1 SECRECY

The frightening reality of child sexual abuse is that it often takes place in secret, accompanied by threats which are both sources of fear and promises (i.e., 'Everything will be alright if you just don't tell').⁴¹

Summit provides examples of such threats for secrecy:

' "This is our secret; nobody else will understand." "Don't tell anybody." "Nobody will believe you." "Don't tell your mother; (a) she will hate you, (b) she will hate me, (c) she will kill you, (d) she will kill me' (e) it will kill her, (f) she will send you away, (g) she will send me away, or (h) it will break up the family and you'll all end up in an orphanage." "If you tell anyone (a) I won't love you anymore, (b) I'll spank you, (c) I'll kill your dog, or (d) I'll kill you." ⁴²

It has been found that where attempts are made to communicate the secret to a non-offending adult, the reaction may be such as to reinforce the child's fear of blame for the incident: ' "Don't worry about things like that; that could never happen in our family." "Nice children don't talk about things like that." "Uncle Johnnie doesn't mean you any harm; that's just his way of showing how he loves you." "How could you ever think of such a terrible thing?" "Don't let me ever hear you say anything like that again!"⁴³

Summit cautions that the effect of the above is that '(u)nless the victim can find some permission and power to share the secret and unless there is the possibility of an engaging non-punitive response to disclosure, the child is likely to spend a lifetime in what comes to be a self-imposed exile from intimacy, trust and

⁴¹Summit op cit 182.

⁴²Summit op cit 182.

⁴³Summit op cit 182.

self-validation.'⁴⁴

9.2 HELPLESSNESS

'The adult expectation of child self-protection and immediate disclosure ignores the basic subordination and helplessness of children within authoritarian relationships. Children may be given permission to avoid the attention of strangers, but they are required to be obedient and affectionate with any adult entrusted with their care.'⁴⁵

The reality of abuse being perpetrated by someone familiar with the child, serves to augment the power imbalance and emphasizes the helplessness of the child. Describing the helplessness of the child, Summit writes:

'Children often describe their first experiences as waking up to find their father (or stepfather, or mother's live-in companion) exploring their bodies with their hands or mouth. Less frequently, they may find a penis filling their mouth or probing between their legs..The normal reaction is to "play possum" that is to feign sleep, to shift positions and to pull up the covers. Small creatures simply do not call on force to deal with overwhelming threat. When there is no place to run, they have no choice but to try to hide. Children generally learn to cope silently with terrors in the night. Bed covers take on magical powers against monsters, but they are no match for human intruders.'⁴⁶

9.3 ENTRAPMENT AND ACCOMODATION

Child sexual abuse is frequently of an ongoing nature. Summit explains this as follows: '(t)he adult may be racked with regrets, guilt, fear and resolutions to stop, but the forbidden quality of the experience and the unexpected ease of accomplishment seem to invite repetition. A compulsive, addictive pattern tends to develop which continues either until the child achieves autonomy or until discovery and forcible prohibition overpower the secret.'⁴⁷

⁴⁴Summit op cit 183.

⁴⁵Summit op cit 183.

⁴⁶Summit op cit 183.

⁴⁷Summit op cit 184.

Entrapment of the child is usually accompanied by the promise of reward for compliance. For example, 'It's a good thing I can count on you to love me; otherwise I'd turn to your little sister'; 'If your mother ever found out it would kill her'; 'If I couldn't count on you, I'd have to hang out in bars and look for other women'; and, 'If you ever tell, they could send me to jail and put all you kids in an orphanage'. The effect of the entrapment is essentially that the child is forced to assume many of the role functions assigned to the mother-figure. The child assumes the obligation of maintaining the family unit and keeping the father happy. The effect of this is that conventional moral values are re-interpreted. Keeping the secret of sexual abuse being the ultimate virtue, disclosing the sexual abuse being the ultimate sin, leading towards the eventual disintegration of the family unit. ⁴⁸

9.4 DELAYED, CONFLICTED AND UNCONVINCING DISCLOSURE

Child sexual abuse within the domestic situation is rarely if ever disclosed to the authorities. Where disclosure does take place this may be as a result of either: overwhelming family conflict; discovery of the abuse by a third party; or outreach community education programmes.⁴⁹ Where disclosure does take place it is often only after years of continuing sexual abuse. The problem with this is that when such is reported, unenlightened officials in charge may have difficulty in understanding how a child could endure ongoing sexual abuse. Consequently, they deny the reality of the allegation.⁵⁰

9.5 RETRACTION

Often where impulsive disclosure about sexual abuse has taken place, such may be followed by reversal of the allegation. Summit writes that reasons for this are numerous. The child may feel guilt and a martyred obligation to maintain the dysfunctional

⁴⁸Summit op cit 184-186.

⁴⁹Summit op cit 186.

⁵⁰Summit op cit 186.

family unit. The child may fear the reality of the threats which accompanied the sexual abuse. The child may begin to feel alienated from the family. The child may be separated from the family, removed to a place of safety and repeatedly questioned about the sordid details of the abuse. The message may be communicated to the child that she bears the sole responsibility for preserving or destroying the family, and that maintaining the allegation of sexual abuse would constitute a bad choice towards the maintenance of the family, while, retracting the allegation would constitute a good choice for the sake of the family.⁵¹

Summit writes that '(u)nless there is special support for the child and immediate intervention to force responsibility on the father, the girl will follow the "normal" course and retract her complaint.'⁵² It is obvious from this, that retractions of sexual abuse allegations should not be allowed to go unchallenged. False allegations of sexual abuse is a rare occurrence. 'Very few children, no more than two or three per thousand,⁵³ have ever been found to exaggerate or to invent claims of sexual molestation.' Furthermore, as discussed in Chapter 8 of this thesis, expert interviewing skills can facilitate the differentiation between actual abuse and a false allegation of abuse.

The operation of the sexual abuse accommodation syndrome tends to reinforce conservative professional and layman attitude concerning the lack of veracity of sexual abuse among children. On the other hand, understanding the dynamics inherent in this syndrome, that is the existence of the five categories; the effect they have on the child; the manner in which they promote adult scepticism; and upon what basis such scepticism can be overcome; has a major role to play in facilitating the multi-disciplinary approach to the protection of the child.

⁵¹Summit op cit 188-190.

⁵²Summit op cit 188.

⁵³Summit op cit 190.

CHAPTER 3

A STATISTICAL OVERVIEW OF CHILD PHYSICAL AND SEXUAL ABUSE - CAUSE FOR CONCERN?

1. INTRODUCTION

In a previous chapter of this thesis it was noted that child abuse is not a modern phenomenon, but, one deeply embedded in the social fibres of civilization.¹ The advent of modern technology in the form of the invention of the x-ray machine and other medical devices have contributed much to the discovery of physical manifestations of trauma in a child. By the same token, the creation of the printing press, the radio and television has effected the means of communication of atrocities which make news. Daily, newspaper headlines speak of the atrocities perpetrated against children by their parents or other child caretakers.

While little is known of the exact incidence of child physical and sexual abuse in society, what is however known is that the statistics increase annually. In America alone, close to one million children are estimated as being physically abused and neglected, and there are between 100 000 to 500 000 cases of severe to mild forms of sexual abuse taking place annually.² The effect of identification of abuse, is usually the accompanied involvement of the legal system. Evidence abounds that when children participate in this system, forms of secondary victimization producing long-term psychological damage takes place.

Moves are afoot to reform those aspects of the legal system which contribute to the further abuse of the abused child. It is hoped that the following statistical examination will highlight the

¹See Chapter 1.

²Myers, E.B. 'The Legal Response to Child Abuse: In the Best Interests of Children?' (1985) 24 *Journal of Family Law* 169-170.

urgency for such reform.

2. THE INCIDENCE OF CHILD ABUSE IN SOUTH AFRICA

No statistics are available for child abuse in the Indian, Black and Coloured communities. Statistics provided by the Department of Health Services and Welfare - House of Assembly, however, reveal the following statistics for the White population:

1987	6680 cases were reported of which 659 of them are cases of suspected abuse.
1988	7355 cases were reported of which 825 of them are cases of suspected abuse.
1989	6957 cases were reported of which 841 of them are cases of suspected abuse.
1990	7108 cases were reported of which 1040 of them are cases of suspected abuse.
1991	7678 cases were reported of which 1215 of them are cases of suspected abuse.

For reasons mentioned below, it should be borne in mind, that this figures are not a accurate reflection of the incidence of abuse among the White population, let alone the South African population. They are merely a reflection of the tip of the iceberg, and a gross under-reflection of what is probably taking place in South Africa.

3. CRIMINAL CONVICTION STATISTICS IN SOUTH AFRICA

A secondary method which could be used to facilitate the assessment of child abuse in South Africa is a review of official statistics relating to convictions for child abuse. The major defect in relying upon this method is however that it relies primarily upon the reporting of instances of child abuse to the authorities, prior to the involvement of the legal system.

Given the inherent lack of reporting of abuse, even by those

mandated to report, this in itself creates a number of problems.³ Some reasons for the lack of reporting include: limited policing, due to inadequate resources; the poor image of the police force especially among the black communities, in respect of safeguarding the interests of the individual; the widespread lack of education concerning children's rights and the right to say 'No' to sexual abuse; and the reluctance to expose a child to the possibility of secondary victimization at the hands of the legal system.⁴

Notwithstanding the present lack of reporting, statistics provided by the Child Protection Unit of the South African Police reveal the following conviction statistics:

CONVICTION	1988	1989	1990	1991
Common Assault	1354	1392	1423	1808
Assault (GBH)	907	859	1297	1252
Indecent Assault	1042	1690	1553	1839
Rape	1707	2133	2623	1915
Sodomy	361	417	475	379
Incest	169	354	251	257

A comparison of these figures beginning with the period 1988 to 1991 reveal an increase of 34% for convictions of common assault; 38% for assault with intent to do grievous bodily harm; 76% for indecent assault; 12% for rape; 5% for sodomy and 53% for incest.

Looking further abroad, and taking into consideration the estimated incidence of child physical and sexual abuse in the United States of America and the United Kingdom, one is surprised to find the incidence of physical abuse and neglect in America to be close to one million children per annum, with the estimates

³See Chapter 7.

⁴See Chapter 7.

of sexual abuse ranging from 100 000 to 500 000 cases per annum.⁵

Figures for England and Wales for 1987, reveal that an estimated 9 000 children between the ages of 0-16 were physically abused; 7 200 were sexually abused, and 26 000 who could have been physically or sexually abused.⁶

4. COMMENTARY

This investigation of recorded statistical data points to the fact that the quantitative information relating to the incidence of child physical and sexual abuse is not a true reflection of actual occurrences of abuse, but represents only a small proportion of what is in fact taking place. Several reasons can be advanced which may account for the lack of adequate information of abuse in society:

1. An absence of a universal definition of child abuse cutting across all social, cultural and geographical boundaries.
2. Failure to recognise and identify the origin of a child's injury.
3. Failure of doctors, dentists, nurses and social workers to act in accordance with the reporting directives of s 42(1) of the Child Care Act.
4. Failure to detect repeated or chronic injuries as a result of parents utilizing different health care facilities and thereby hindering physicians from recognising the injury as being one caused by abuse.
5. The possibility that an abusive parent or caretaker will

⁵Myers op cit 169-170.

⁶Spencer, J.R. & Flin, R. *The Evidence of Children - The Law and the Psychology* (1990) 8-10.

delay in seeking medical care for the child, thereby allowing the natural healing processes of the body to take place, and consequently hindering the medical profession from determining with any certainty the causes and origin of the injury. This problem is exacerbated in child sexual abuse cases because in the majority of these cases, the sexual abuser is someone known to, and living within the same household as the child.⁷

Essentially, the closer the relationship between the abuser and the victim, the less likely the abuse will come to the attention of the authorities.

In instances where the abuse takes place among the family members within a single domestic situation, the situation usually arises that the 'non-victim' members of the family play a collusive role in the incestuous activity.⁸ By ensuring the maintenance of a shroud of secrecy over the incestuous activities, the non-victim members of the family prevent the possibility of detection of the activities. The problem inherent in this is that while on the surface, the family present a portrait of domestic perfection, below the surface, the truth lays itself bare.

Other factors affecting attempts to estimate the incidence of sexual abuse include:

1. The possible lack of definite clinical evidence of sexual abuse. Child sexual abuse covers a wide spectrum of activities ranging from exhibitionism to actual penetration of the vagina or anus of the child.⁹ It therefore follows that in certain cases of sexual abuse, there may be no

⁷La Fontaine, J. *Child Sexual Abuse* (1990) 109-125.

⁸de Young, M. *The Sexual Victimization of Children* (1982) 22, 29, 66-68.

⁹Levett, A. 'Contradictions and Confusions in Child Sexual Abuse' (1991) 3 *SACJ* 11-12.

manifest indications of the abuse. A problem then arises that in the absence of any evidence revealing either a perforated hymen, anal fissures or scars, rectal bleeding or the presence of a sexually transmitted disease, the veracity of the child's allegation of sexual abuse may be discounted and therefore not reflected in the statistical estimates of child sexual abuse.

2. The absence of eye witnesses to the events in question. In the large majority of cases, the sexual abuse of the child takes place in the privacy of a home or in places where the activity will not come to the attention of others.¹⁰ Lack of eye witness testimony to substantiate an allegation, often results in the veracity of the child's allegation being questioned. Such doubt may hamper attempts at statistical recording.
3. Techniques used by perpetrators to facilitate compliance with the abuse. These techniques include among others: the use of threats of force; the use of promises or gifts; the re-interpretation of societal standards of morality to sanction sex with a child; the shifting of feelings of guilt, blame and moral blameworthiness for the sexual involvement onto the child's shoulders.¹¹ Reliance upon these techniques frequently emanates from the perpetrator's fear of detection and knowledge of the resultant personal, legal, social and economic consequences likely to flow from such disclosure.¹² The fear of disclosure is not only, the domain of the perpetrator, but, may, as in the case of incest where collusion is evident, be experienced by all members of the household. '..(A)s part of the family, they are directly impacted by publicity, conviction, divorce,

¹⁰Hammond, J.C. & Hammond, E.J. 'Justice and the Child Witness' (1987) 11 *SACJ*

¹¹La Fontaine op cit 77-80.

¹²Myers op cit 243-245.

loss of financial support, and the social isolation that may accompany disclosure...'¹³

The impact of disclosure of the sexual abuse usually '..triggers a major disruption in the delicate family balance that has been built around the incestuous activity. The family is suddenly thrown into a crisis; the father is confronted with the possibility of legal action, loss of job, and loss of his community standing; whilst the mother risks losing her marriage and her livelihood...'¹⁴

Finally it should be noted that the knowledge of the consequences of disclosure, may as in the case of the older victim, play an important role in the victim's willingness to allow the matter to come to official attention, in addition to becoming a reason for the subsequent retraction of the allegation - an inherent feature of the 'Child Sexual Abuse Accomodation Syndrome'.¹⁵

5. CONCLUSION

Child physical and sexual abuse is essentially a problem of significant but unknown proportions. Despite attempts to obtain accurate figures for the incidence of child abuse in South Africa, these are not available.

The current estimated incidence of abuse in our society is however a cause for concern. This in turn, points to the urgency for reform measures of those problematic aspects, associated with the legal response to the phenomenon.

¹³Myers op cit 245.

¹⁴Myers op cit 351.

¹⁵Summit, R. 'The Child Sexual Abuse Accomodation Syndrome' (1983) 7 *Child Abuse and Neglect* 177-191; de Young op cit 38 writes that the pervasive fear of the eventual breakdown of the family unit and the subsequent separation of family members, is a fear which permeates the entire incestuous family unit. She believes that often abusers exploit this fear in order to ensure that the incest remains a secret.

CHAPTER 4

A CRITICAL ANALYSIS OF THE CHILD CARE ACT

1. INTRODUCTION

Thus far, the central focus of this thesis has been upon sociological, psychological, historical, statistical and medical aspects of child physical and sexual abuse. The justification for this, as has been provided in the preceeding chapters of this thesis, is essentially that child abuse is a multidisciplinary, multifactorial issue; and in order to provide an appropriate, workable solution to the occurrence of this heinous phenomenon, the response must by necessity be founded upon a recognition of its multi-disciplinary base.

Following upon this, the central focus of this chapter and the ensuing three chapters of Part II, is to provide the reader with an overview of the legal response to child physical and sexual abuse.

This chapter focuses predominantly on the Child Care Act 74 of 1983; Chapter 5 reviews s50 of the Child Care Act and the issue of the lack of legal definition of child physical and sexual abuse; Chapter 6 examines the matter of the legal sanctioning of corporal punishment; and Chapter 7 provides a comparative analysis of s42 of the Child Care Act.

2.1 A HISTORICAL OVERVIEW OF LEGISLATION PERTAINING TO CHILD PROTECTION - AMERICA AND ELSEWHERE

In Chapter 1 it was documented that the earliest enactment of legislation concerning the protection of the child, came about as a result of the Mary-Allen case in the 1870's. Mary-Allen's case resulted not only in the founding of the NYSPCC ² in 1874,

¹Act 74 of 1983.

²New York Society for The Prevention of Cruelty to Children.

an organisation instrumental in passing protective laws against child abuse, but also set out to revolutionize legal thinking concerning the rights and protection of children in relation to abuse.³

The first successful attempt at codifying the rights of the child took place after the First World War, as a result of change in societal ethos. Documenting the development, Freeman writes:

'One of the earliest significant documents is the declaration adopted by the Fifth Assembly of the League of Nations in 1924. It reflected a concern with the rights of children afflicted by the devastation of the "Great War" and its aftermath. The declaration emphasized children's material needs. It proclaimed, for example, that children "must have" means requisite for the hungry, nursing for the sick, help for the handicapped, and shelter and succour for the orphan and waif.'⁴

The collapse of the League of Nations in the 1930's did not destroy attempts to codify the rights of the child. 35 years after the first declaration, a second declaration under the auspices of the United Nations, was put forward. In the late 1980's this declaration was transformed into an International Convention on the Rights of the Child.

2.1.1 INTERNATIONAL CONVENTION ON THE RIGHTS OF THE CHILD

The present Convention consists of 45 articles. The aim of the Convention is to safeguard the rights of children by means of codified international standards and procedures. The Convention is based upon three principles: (1) children need special safeguards beyond those provided to adults; (2) the best environment for a child's survival and development is within a protective and nurturing family setting; and (3) governments should be committed to acting in the best interests of children.

The articles within the Convention range from protection of the

³See Chapter 1.

⁴Freeman, M.D.A. *The Rights and Wrongs of Children* (1983) 19.

survival rights of children; to the rights to safe and proper development through formal education; to the right to participate in the social, cultural, religious and political life of a particular culture.

While difficulties may exist in ensuring international adherence to the articles contained in the Convention - the articles cannot be enforced in the same way as domestic laws are enforced by domestic courts - it is accepted that the Convention has a binding nature on all ratifying nations. Governments who become signatories to the Convention are required to comply with the provisions of the Convention, reflecting them in their own laws and regulations. The commendable feature of the Convention is not only that it reflects international concern for the protection of the rights of the child, but that it provides guidelines to both signatory and non-signatory states for the realisation of such rights.

Pertinent articles from the Convention on the Rights of the Child include:

Article 1: '...a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.'

Article 2(1): 'State parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'

Article 3(1): 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.'

Article 12(1): 'State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

Article 12(2): 'For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings

affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

Article 19(1): 'State Parties shall take appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.'

Article 32(1): 'State parties recognize the right of the child to be protected from economic exploitation..' Article 32(2): 'State parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article...State parties shall in particular:

- a) Provide for minimum age or minimum ages for admission to employment.
- b) Provide for appropriate regulation of the hours and conditions of employment.
- c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 34: 'State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- b) The exploitative use of children in prostitution or other unlawful sexual practices;
- c) The exploitative use of children in pornographic performances and materials.'

South Africa is currently, in the process of becoming a signatory state to the Convention. Upon ratification of the Convention, the issue of the extent to which our existing national laws reflect the international standards will have to be addressed. In the analysis of the Child Care Act, examination will be made of the current national standard and procedure, in light of internationally accepted standards.

2.2 A HISTORICAL OVERVIEW OF LEGISLATION PERTAINING TO CHILD PROTECTION - SOUTH AFRICA

In South Africa, the earliest legislation dealing with the child was enacted by the Cape Parliament in 1856 under the Minor's Inheritance Act and the Meesters en Diensboden Wet. Though these Acts appeared 18 years before the Mary-Allen case, they dealt respectively with the issue of protection of the inheritance rights of minors, and the care of the neglected child, but not with the issue of child abuse protection.

Legislation dealing with this was first enacted in 1895 under the Deserted Wives and Child Protection Act.⁵ Thereafter followed the enactment of the Destitute Children's Relief Act 24 of 1895 (Cape), the Children's Protection Act 38 of 1901 (Natal), the Wet ter Bescherming van het Leven van Jonge Kinderen 4 van 1907 (Cape), Children's Protection Act 25 of 1913, the Children's Act 31 of 1937, the Children's Act 33 of 1960 and the Child Care Act 74 of 1983.

As noted by the Minister of Health and Welfare during his introductory speech to parliament on the proposed Child Care Act: 'Legislation involving the protection and care of children in South Africa has had a long history (!)'⁶

The introduction of the Child Care Act on the Statute Book has not been without criticism and controversy. The Act has been slated from all corners for its apparent shift in emphasis from the 'child in need of care' to the issue of competency of the custodian.⁷ This is not the only area for criticism of the Act. In conjunction with the above issue, the following shortcomings are apparent:

1. The glaring omission of legal representation for the

⁵Act 7 of 1895 (Cape Parliament).

⁶House of Assembly Debates (Hansard) 9 May 1983 6559.

⁷See Barlow, G.E. 'Child Care Bill - Best Interests of Children?' (1982) *De Rebus* 339; Zaal, N. 'Child Removal Procedures Under the Child Care Act: Some New Dangers to Contend With' (1988) 105 *SALJ* 224.

child.

2. The lack of guidelines as to what actions constitute child 'ill-treatment' as utilised in ss 42(1) and 50(1) of the Act.⁸
3. The narrow category of mandated reporters under s42(1).⁹
4. The failure to provide for an appeal against all decisions of the children's court.

It is a universal ideal that in all matters pertaining to the welfare and safety of the child, the best interests of the child shall be the paramount concern.¹⁰ One can only question how the present Act with all its deficiencies and shortcomings can best reflect the interests of the child. Furthermore, as noted above at 2.1, the likely ratification of the United Nation's Convention on the Rights of the Child by the South African government, necessitates a critical analysis of the Act, in the light of internationally accepted standards of conduct.

3. A CRITICAL ANALYSIS OF THE CHILD CARE ACT

3.1 NAME OF THE ACT

In introducing the proposed Act to parliament in 1983, the Minister of Health and Welfare stated:

'The name of the Bill is the "Child Care Bill". In this way recognition is granted to the general principle that the family is the normal social and biological structure within which the child must grow and develop. The legislation does not, therefore, focus solely on the child, or solely on the child's parent, but on both.'¹¹

⁸See Chapter 5.

⁹See Chapter 7.

¹⁰Olmesdahl, M.C.J. 'Discretion, Social Reality and the Best Interests of the Child' Inaugural Lecture, delivered at the University of Natal, Durban, 15 October 1986. '(t)he best interest of the child standard is so frequently used that the expression has become a cliché.'

¹¹House of Assembly Debates (Hansard) 9 May 1983 6560.

It is argued that regardless of the name given to the Act, the underlying philosophy of any legislation dealing with the child, should always be directed towards ensuring observance of the best interests of the child.

The discarding in the Act, of the concept 'child in need of care'¹² in favour of an approach focusing upon parental fault, creates a shift in perspective - albeit subtle - from the child to the parent. Consequently, in spite of any justification which may be given, the Child Care Act falls short in respect of upholding the 'best interests of the child' standard. This downfall of the Act is particularly apparent in examination of s 14(4)(b), and the issue of child physical and sexual abuse. The requirement that the court should first establish parental fault before it may take steps to provide protection for the child, reveals nothing less than legislative shortsightedness concerning the dynamics of abuse.¹³

From the outset the suspicion needs to be raised whether protection of the abused child is a primary interest of the Act, or whether the disguised objective of the Act, is the development of a theory of rights for parents. A characteristic of childhood is that its occupants are voiceless, the Child Care Act should be the mouthpiece of children's rights, its aim should be the empowerment of the child and the protection of the child's integrity. While it is understood that the family is the normal social and biological structure within which the child must grow and develop, and that an abused child will possibly be more effectively helped if the focus is on the entire family, it must

¹²See s 1 of the Children's Act 33 of 1960.

¹³The age of the child, the relationship between the child and the abuser, the nature of the abuse, the absence of physical manifestations of abuse, and the dynamics of family interaction are all factors which may militate against a finding of parental guilt. In the absence of such finding the court is bound to return the child to the home. The consequences of this are too horrendous to even contemplate.

not be forgotten that the primary focus of the Act should be on the child. It is submitted that the shift in focus from the child to parental fault constitutes in the long run, an injustice towards all children.

3.2 DEFINITION OF A CHILD

Section 1 of the Child Care Act provides that a child is a person below 18 years of age.¹⁴ This position differs radically from the position under the Children's Act of 1960, in that under this Act, a child could in certain circumstances include persons between the ages of 18 to 21 years.¹⁵ Further examination of pertinent legislation concerning various aspects relating to the protection of children reveals a patchwork of inconsistent and anomalous age levels. For example, ss 14(1)(a) and 14(3)(a) of the Sexual Offences Act 23 of 1957 prohibits the unlawful carnal intercourse with a girl or boy below the age of 16 years. Sections 14(1)(b) and 14(3)(b) of the same Act prohibits any male person from committing or attempting to commit an immoral or indecent act with a boy under the age of 19 years, and any female person from committing or attempting to commit an immoral or indecent act with any girl under the age of 19 years. Finally, in terms of ss 12 and 13 of the Act, the crime of abduction can be committed against unmarried persons below 21 years of age.

3.3 CHILDREN'S COURT

Children's Courts were first established under the Children's Act 31 of 1937. The courts are creatures of statute and consequently any question concerning the courts can be answered by reference to the Act.¹⁶ As noted by Hathorn JP in *Raison v Commissioner of Child Welfare of Durban*¹⁷ the children's court is on the same footing as an ordinary civil court save for the fact that the

¹⁴See s1.

¹⁵Section 1.

¹⁶*Napolitano v De Wet NO & others* 1964 (4) SA 337 (T) at 342A.

¹⁷1948 (4) SA 218 (N) at 221.

proceedings take place in private.

The establishment of children's courts are dealt with in Section 5 of the Child Care Act. The cardinal feature of the section is the linking of magistrate's courts with children's courts. In effect this means that in the event of there being no children's court established for a specific area, the magistrate's court presiding over that area, performs the functions of the children's court.¹⁸ In essence therefore, irrespective of the place of residence, all children are afforded the special protection offered by the Children's Court.

3.4 COMMISSIONER OF CHILD WELFARE

Section 6 of the Child Care Act provides that every magistrate shall be a Commissioner of Child Welfare and every additional magistrate and assistant-magistrate shall be an assistant Commissioner of Child Welfare for the district of which he is a magistrate, additional magistrate or assistant magistrate.

Concerning the appointment of a Commissioner of Child Welfare, Swanepoel and Wessels write:

'Voordat 'n beampte in diens van die Departement van Justisie as 'n landdros, addisionele landdros of assistent-landdros aangestel kan word, moes hy eers sekere minimum regs kwalifikasies, soos bepaal in a 10 van die Wet op Landdroshowe 32 van 1944 verwerf het. Slegs die beampte in bevel van 'n distrikskantoor, gewoonlik ook genoem die kantoorhoof, word aangestel as die landdros van 'n betrokke distrik. Dit is gewoonlik 'n senior en ervare beampte van die Departement van Justisie. Hierdie beampte is dan ook die kommissaris van kindersorg vir die distrik.'¹⁹

¹⁸*Napolitano v De Wet NO & others* (supra) at 342E.

¹⁹Swanepoel, H.M. & Wessels, P.J. *'n Praktiese Benadering tot die Wet op Kindersorg* (1992) 20. The Chief-Magistrate of The Pietermaritzburg and surrounding Magisterial Districts, confirms this process of appointment for the Pietermaritzburg magisterial district. Stressing, that the exercise of Solomonic judgement in respect of a child, requires specialised knowledge which only comes from years of experience in dealing with people in the legal system.

A Commissioner of Child Welfare exercises wide powers. Section 6(2) provides that he shall perform all the functions assigned to him by the Act or by any other law. Review of the Act reveals that some of his functions include:

1. Presiding over the children's court; ²⁰
2. Authorizing the publication of information pertaining to a children's court issue; ²¹
3. Authorizing the removal of a child to a place of safety; ²²
4. Requesting at any time during a children's court inquiry, that the social worker dealing with the case furnish reports concerning pertinent aspects of the family; ²³
5. Determining whether a child's parent or guardian is unable or unfit to have the custody of the child in accordance with s14(4)(b)(i)-(x); ²⁴
6. Placing the child in an appropriate place subsequent to a children's court inquiry; ²⁵
7. Deciding on the adoption issues of a particular case; ²⁶
8. Deciding on custody issues; ²⁷
9. Deciding the amount and manner of payment of contribution orders; ²⁸
10. Determining the age of a child appearing before the children's

²⁰Section 7(1).

²¹Section 8(3).

²²Section 11(2).

²³Section 14(2).

²⁴Section 14(4).

²⁵Section 15.

²⁶Section 17.

²⁷Sections 36(2)(a) and 38.

²⁸Sections 43 and 46.

court.²⁹

11. Appointing a competent officer in the Public Service to act as a children's court assistant until such time that one is appointed under s7(2) of the Act, or the appointed children's court assistant is able and fit to resume office.³⁰

In respect of the exercise of power by assistant commissioners of child welfare, s6(3) holds that the assistant commissioner shall perform all of the functions of a commissioner as he is not generally or in any particular case prohibited from performing either by the Minister or by the magistrate of the district of which he is additional or assistant magistrate. Section 6(4) further provides that every additional magistrate or assistant magistrate holding office as a commissioner or assistant commissioner of child welfare, shall in his capacity as commissioner or assistant commissioner be subject to the administrative control of the magistrate of the district of which he is an additional or assistant magistrate.

The duty of a commissioner of child welfare is to execute his tasks conscientiously and precisely. Faulty handling of a case may provide deleterious results for an unfortunate child resulting in (a) the setting aside of the decision of the court; and (b) delay in providing the necessary placement of the child. Subjecting the additional magistrate acting as commissioner or assistant commissioner of child welfare to the control of the district magistrate provides a form of insurance against the possibility of such task being carried out without the necessary precision and conscientiousness required.³¹

3.5 CHILDREN'S COURT ASSISTANT

Section 7(2) makes provision for the appointment of children's court assistant(s) to facilitate the operation of children's

²⁹Section 54(1).

³⁰Section 7(3).

³¹Swanepoel & Wessels op cit 20-21.

court proceedings. Regulation 2 handles the functions of the children's court assistant which includes:

- (1) attending any sitting of the children's court of which he is an assistant;
- (2) examining or cross-examining the child concerned, a parent or adoptive parent of the child, a respondent or any witness;
- (3) giving evidence and being examined or cross-examined by a party to the proceedings; and
- (4) addressing the court.

The present function of the children's court assistant under the Child Care Act differs materially from the function of the children's court assistant under the Children's Act.³² While previously, the office of children's court assistant could be likened to that of a public prosecutor, the present situation of the assistant being examined and cross-examined by the parties to the proceedings renders this position anomalous to that of a prosecutor.

Addressing envisaged problems inherent in the functioning of the assistant under the Child Care Act, Swanepoel and Wessels write:

'Sekere vrae ontstaan hieroor, byvoorbeeld wie tree op as assistent van die kindert Hof terwyl hierdie beamp te getuig, of gaan die verrigtinge dan net voort sonder enige assistent? Moet die assistent van die kindert Hof nie 'n onpartydige rol in die verrigtinge vertolk nie? Is dit nie 'n onreelmatigheid as 'n assistent ook getuie in die selfde ondersoek is nie? In strafhowe is dusdanige optrede 'n onreelmatigheid.'³³

Further powers of the children's court assistant are set down in reg 2(2) and (3). Reg 2(2) provides that where the court appoints a social worker to act as a children's court assistant, all reports by social workers intended for that court must be

³²Act No 33 of 1960.

³³Op cit 21.

canalised through that assistant. Reg 2(3) empowers the children's court assistant to request further information, reports or documents as deemed necessary for the proceedings of the children's court. Under s12(2)(b), a policeman, social worker, or authorised officer, who has removed a child without a warrant to a place of safety must inform the children's court assistant of the reasons for such removal in the form of a copy of Form 4.³⁴ On receipt of the authority, the children's court assistant must submit the form to the commissioner for review.³⁵ The children's court assistant may also, where he is of the opinion that a child has no parent or guardian, or has a parent or guardian who cannot be traced, or has a parent or guardian or is in the custody of a person unable or unfit in terms of s14(4) to have the custody of the child, order that a policeman, social worker, authorised officer, parent, guardian or any other person having the custody of the child bring that child before the children's court.³⁶

3.6 PROCEEDINGS IN THE CHILDREN'S COURT

3.6.1 General

As noted at 3.2, children's courts are governed in accordance with the statutory procedural requirements applicable to magistrate courts. The proceedings are however more flexible and informal and provide a more supportive atmosphere for the participation of all involved parties. Midgely writes that the informality and flexibility of proceedings engender opportunity for frank discussion and the expression of opinions and feelings and assists the court in its diagnostic function.³⁷

Section 8(1) of the Act provides:

³⁴Regulation 9(2)(b).

³⁵Regulation 9(2)(c).

³⁶Section 13(2).

³⁷Midgely, J. *Children on Trial* (1975) 132.

'A children's court shall sit in a room other than that in which any other court ordinarily sits, unless no such other room is available and suitable.'

In practice, the inquiry is conducted in the private chambers of the commissioner of child welfare. The effect of this is that the inquiry is rendered less formal than that intrinsic to ordinary criminal or civil court proceedings, with the corresponding potential for traumatization of the child as documented in Chapter 9, being sizeably reduced.

The Act further provides that during the course of the children's court hearing, no persons other than those whose presence is necessary in connection with the proceedings of the court, shall be permitted entrance to the hearing.³⁸

Publication of information in the Children's Court hearing, revealing the identification of any child involved in those proceedings, is prohibited.³⁹ The Minister or the commissioner presiding at a hearing may however, authorise the publication of such information which in his opinion is 'just and equitable and in the interest of any particular person'.⁴⁰ Justification for the prohibition of information concerning any aspect pertaining to a children's court inquiry, rests upon the need to protect the child concerned from future discriminatory attitudes or

³⁸Section 8(2). Regulation 4(2) provides that a commissioner may permit any person, who in his opinion has substantial interest in the proceedings, to join the proceedings. Such person has the same rights and duties of the parties referred to in regulation 8(1) - i.e., they have the same rights and powers as a party to a civil action in a magistrate's court in respect of the examination of witnesses, the production of evidence, and the addressing of the court.

³⁹Section 8(3).

⁴⁰Section 8(3).

practices.⁴¹ Any person who publishes information in contravention of s8(3) or in conflict with the scope of permission granted under this section, is guilty of an offence.⁴² Section 58 provides that any person convicted of an offence under a provision of the Act for which no punishment has been specifically provided, shall be liable to a fine not exceeding R4 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

3.6.2 Removal of a Child to a Place of Safety

(a) Section 11(2)

Section 11(2) of the Child Care Act provides that where it appears to a commissioner of child welfare on information on oath that there are reasonable grounds for believing that it would be in the interests of the safety and welfare of a child within his area of jurisdiction, to be placed in a place of safety, the commissioner of child welfare may issue a warrant authorising the removal of the child to a place of safety, to be kept there, until such time that the child can be brought before a Children's Court.⁴³ This section is widely drawn, enabling any concerned party, to bring their concern for the safety or welfare of the child to the attention of the Children's Court. Provided there are reasonable grounds for believing that it is in the interests of the safety and welfare of the child that an order for his removal is effected, the commissioner of child welfare is empowered by the section, to execute the order without the prior involvement of a social worker.

⁴¹Swanepoel & Wessels op cit 27. The authors note that the only instance where authorisation for publication would probably be given, is in respect of cases involving unidentified abandoned babies.

⁴²Section 8(9).

⁴³Section 11(2). Section 1 of the Child Care Act defines a place of safety as 'any place established under section 28 and includes any place suitable for the reception of a child, into which the owner, occupier or person in charge thereof is willing to receive a child.'

The obvious intention of the legislature in this section is the encouragement of public notification whenever there is concern for the safety and welfare of a child; and the provision of efficient response, in the absence of prior recourse to a social worker's investigatory report. Questions must however be raised as to the effectiveness of the section given that the Act does not provide immunity from legal proceedings for erroneous reporting by concerned citizens falling outside the boundaries of s 42(1) of the Child Care Act.⁴⁴

Regulation 9(1) stipulates that the warrant for the removal of the child must be the form of a Form 3. In order to circumvent the possible draconian effects of the warrant upon the family unit, the name of the child to be removed, should whenever possible, be inserted on the warrant. Section 11(4) does however make provision for cases where the name of the child is not known to the applicant. In such cases, the section provides that it is not necessary to state the name of the child whose removal is thereby ordered. Section 11(2) holds that the removal of the child may only be effected by a policeman, social worker, or authorised person. In accordance with the directives of s 11(3), the person authorised may enter any house or premises mentioned in the warrant, and apply as much force as necessary, to effect the removal of the child.

Finally, despite the wide ambit of s 11(2), the primary disadvantage intrinsic to the section is that the removal of the child may only be effected by the commissioner possessing jurisdiction over the child. If prior to the authorised removal of the child, such child is transferred to another magisterial district, the process of giving information on oath to a commissioner with jurisdiction, must be repeated.

(b) Section 12

An interesting innovation to the Child Care Act is the inclusion

⁴⁴See Chapter 7 for a criticism of this.

of s 12 into the Act. This section provides that a policeman, social worker, or authorised officer may on their own initiative remove a child from any place to a place of safety, without first having obtained a warrant authorising such removal.⁴⁵

Limitations upon the exercise of this power relate to the fact that: (a) the policeman, social worker or authorise officer effecting the removal must have reason to believe that the child is a child referred to in s14(4); (b) the delay in obtaining a warrant must be prejudicial to the safety and welfare of that child; and (c) the reasons for the removal of the child must be set out in a Form 4 for subsequent examination in the children's court inquiry.

In respect of (c), the authorised person effecting the removal of the child is required to provide reasons for the removal of the child. Regulation 9(2)(c)-(d) provides that such will be used as the basis upon which the commissioner exercises his discretion concerning the validity of the removal.⁴⁶ Where the commissioner confirms the removal of the child, evidence presented by the person effecting the removal is also confined to the reasons as provided in Form 4.⁴⁷

Regulation 5(1)-(2) provides that the submission of a written report compiled and signed by a social worker (or any other

⁴⁵Zaal, N. 'Child Removal Procedures Under The Child Care Act: Some New Dangers to Contend With' (1988) 105 SALJ 233 writes: 'the power is thus clearly an emergency one to cover situations where..(there is) a need to make a prompt decision concerning immediate removal of a child apparently in imminent danger of further harm.'

⁴⁶Regulation 9(2)(c)-(d).

⁴⁷Swanepoel & Wessels op cit 35 write: 'Die getuienis wat die maatskaaplike werker, polisiebeampte of gemagtigde beampte tydens 'n ondersoek lewer, mag ook nie verskil van die redes wat daar op vorm 4 aangeteken is toe die kind verwyder is nie, met ander woorde die ouer moet reeds by die verwydering ingelig word oor die redes vir so 'n drastiese stap.'

person who is capable of forming an authoritative opinion) on the child or the child's circumstances, or the parents or prospective parents, or the person having custody of the child, shall be *prima facie* proof of the facts stated in the report. The person affected by the contents of the report must have such contents disclosed to him, and he must be given an opportunity to cross-examine any person concerned in regard to any matter arising from the report and to refute any matter arising therein.

A social worker operating under these circumstances enjoys the following legal protection. Section 9(3) provides that 'the contents of the statement or a report of a social worker which has been lodged with a children's court, shall not be disclosed for the purposes of any civil action except by order of any court to a court where such disclosure would be in the interests of any child mentioned in the report.' Zaal contends that s 9(3) is not 'an immunity provision *per se*. It merely blocks one source of disclosure of potentially defamatory material (after lodging with the court has occurred) without barring use of the same material from other sources.'⁴⁸ The recent amendment to the Child Care Act however, provides immunity for the protection of social workers from irate or vindictive parents, guardians, or custodians.⁴⁹ Section 42(6) of the Act provides that 'no legal proceedings shall lie against any dentist, medical practitioner, nurse or social worker in respect of any notification given in good faith in accordance with this section.'⁵⁰

Interpretation of the wording of s 12(2): 'as soon thereafter as may be' is problematic. No indication is given as to the exact time period within which the child must be brought before the children's court. Commenting on this situation, Swanepoel and Wessels write:

⁴⁸Zaal op cit 235.

⁴⁹Act No. 86 of 1991.

⁵⁰See Chapter 7.

'Daar is verskeie artikels van die Wet op Kindersorg 74 van 1983 verwysings na die Strafproseswet 51 van 1977 wat *mutatis mutandis* op die Wet op Kindersorg van 1983 van toepassing is. Artikel 50 van die Strafproseswet 1977 bepaal onder andere dat 'n persoon wat met of sonder 'n lasbrief gearresteer is, binne 48 uur voor 'n laerhof gebring moet word, met enkele uitsonderings. In die voorganger van die huidige a 50, naamlik a 27 van Strafproseswet 56 van 1955, is daar bepaal dat so 'n persoon so gou moontlik voor 'n regterlike amptenaar gebring moes word. Waarom daar nie 'n soortgelyke bepaling in die Wet op Kindersorg 1983 voorkom nie, is onduidelik. As die Strafproseswet 1977 as maatstaf geneem word, kan geargumenteer word dat 'n kind binne 48 uur na bekragting van die verwydering voor 'n kinderhof gebring moet word.'⁵¹

In respect of the issue of removal of the child to a place of safety pending the court inquiry, it is submitted that such should only take place in instances where there is fear for the violation of the physical or sexual integrity of the child. Literature abounds with documentations of the trauma which the young child faces on removal from its parents,⁵² accordingly, children not at risk from physical or sexual abuse, should not be the victims of over-zealous state interference. This course of action should not only apply to the issue of removal of the child pending the court hearing, but also to determinations made under s 15 of the Act. As noted by Dickens, the principle of minimal state intervention is to be preferred as such 'preserves maximum integrity of the domestic environment' and emphasizes the parental responsibility in relation to the protection of the child.⁵³

Affirming this position, authors, Goldstein, Freud, and Solnit argue for restrictions on state intervention in the domestic sphere. They limit instances of justifiable interference to: (1) the death or disappearance of parents, when coupled with their

⁵¹Swanepoel & Wessels op cit 34.

⁵²Olmsdahl op cit 23.

⁵³Dickens, B.M. 'Legal response to Child Abuse' (1978) 12 *Family Law Quarterly* 24.

failure to make provision for the child's custody and care; (2) conviction, or acquittal by reasons of insanity, for a sexual offence against one's child; (3) serious bodily injury inflicted by the parents upon their child, and an attempt to inflict further injury or the repeated failure of parents to prevent their child suffering such injury; and (4) refusal by parents to authorise medical care when (i) medical experts agree that treatment is non-experimental and appropriate for the child, (ii) denial of that treatment would result in death and (iii) the anticipated result of treatment is what society would want for every child - a chance for normal healthy growth and for a life worth living.⁵⁴

3.6.3 Removal of Child to a Place of Safety on Order of Court

An exemplary provision in the Child Care Act, and one reflecting acknowledgement of the interests of the child is that contained in s 11(1).

Section 11(1) of the Child Care Act provides that if it appears to any court in the course of any proceedings, that any child before it, has no parent or guardian, or that it is in the interest of the safety and welfare of any child that he be taken to a place of safety, the court may order that the child be taken to a place of safety and be brought as soon as possible thereafter before a children's court.⁵⁵

The same provision is present in the Criminal Procedure Act 51 of 1977. Section 254 of the Act provides that at the trial of any person below the age of 18 years, the magistrate may, if it appears to him that the child may be a child as referred to in s 11 of the Child Care Act, order that the trial be stopped and

⁵⁴Goldstein, J. Freud, A. Solnit, C. *Before the Best Interests of the Child* (1979) 17.

⁵⁵*S v Jodwana* 1968 (4) SA 367 (EC) at 368F-G per Kannemeyer J; *S v Shange* 1972 (2) SA 555 (N) at 556E per Milne J; *S v Mdukasi* 1972 (4) SA 256 (NC) at 257 per Van den Heever J.

that the accused be brought before a children's court.

Reviewing the section , Anne Skelton writes:

'The magistrate may act on his or her own observations, or in response to allegations raised by any other person such as the prosecutor, a defence lawyer or a social worker.

It does not matter what the charge was, the test is only whether it appears that the child is a child referred to in section 11 of the Child Care Act, and the seriousness of the crime should not therefore be a factor.

The trial can be stopped at any stage, and if the trial has already been completed, the magistrate can still make an order that the accused be brought before the children's court, and the verdict of the court is of no force.

Once the order has been made the criminal charges fall away. The children's court proceedings take the form of an inquiry, it is not a trial, and there is no conviction or sentence at the end of it. The child will not get a criminal record.' (my italics)⁵⁶

The advantage of the section really centers around the fact that once the court recognises that the child before it is a child as referred to s 14(4)(b) of the Child Care Act, the criminal proceedings terminate in favour of a children's court inquiry and criminal charges against the child are dropped. If the child is already convicted, the conviction is nullified and not recorded by the police. Essentially s11 not only protects certain categories of children from the stigmatization associated with

⁵⁶Skelton, A. *Children in Trouble with the Law* (1993) 13-14. Midgely op cit 133 writes: '..the law governing transfer from the juvenile to the children's court is permissive and not obligatory. The Criminal Procedure Act clearly states that the magistrate "may" stop the trial and order that the child be referred to the children's court. The juvenile court magistrate is not asked to rule that the child is in need of care but simply transfers the case to the children's court, where a full inquiry will be held. Many magistrates feel that it is more desirable to deal with the young offender, whether grounds for an enquiry exists or not, through juvenile court proceedings. They are especially reluctant to transfer a child if he has several previous convictions and generally few older children are referred to the children's court.'

criminal charges, but also from the potentially disastrous situation of prison life.

3.6.4 Bringing a Child Before the Children's Court

Any child who has been removed to a place of safety on order of court or on sworn information or by a social worker, policeman, or authorised officer acting in accordance with the provisions of s 12(1), must be brought before the children's court of the district in which the child resides.⁵⁷

In the case of *Philips v Commissioner of Child Welfare, Belville*⁵⁸ it was held:

'In the absence of any special context, the word "resides" denotes "the place where an individual eats, drinks and sleeps...'

The children's court shall thereafter, hold an inquiry in the prescribed manner in order to determine whether the child is a child as referred to in s 14(4) of the Act.⁵⁹

Notice of the pending inquiry and request for attendance thereat must be given in the prescribed manner to the parents, guardians, or persons having custody of the child.⁶⁰ Failure to attend the inquiry in the absence of permission by the commissioner or

⁵⁷Section 13(1).

⁵⁸1956 (2) SA 330 (C) at 334 per Ogilvie Thompson J.

⁵⁹Section 13(3).

⁶⁰Section 13(5)(a). In the case of *J and another v Commissioner of Child Welfare, Durban* 1979 (1) SA 219 (N) it was held per Howard J that s 34 of Act No 33 of 1960 (corresponding to s 13(5)(a) of Act No 74 of 1983) was peremptory. He held that the object of giving notice was to afford the parents a proper opportunity for taking such steps as they needed to protect their position, including the seeking of legal advice, arranging for legal representation and the procuring of witnesses and evidence, and that failure to give such notice constituted a gross irregularity which vitiated the proceedings and orders made in respect of the two children.

reasonable excuse, requires that the party be dealt with *mutatis mutandis* as provided in s 74(6)-(7) of the Criminal Procedure ACT 51 of 1977.⁶¹

Where it appears to the court that a child who is the subject of the children's court inquiry should by reason of his infancy, ill-health or other sufficient cause not be brought before the court, the inquiry may be held in the absence of that child.⁶²

3.6.5 The Children's Court Inquiry

The aim of a children's court inquiry is to ascertain whether:

- (a) the child has no parent or guardian; or
- (aA) the child has a parent or guardian who cannot be traced; or
- (b) the child has a parent or guardian or is in the custody of a person who is unable or unfit to have the custody of the child in that he-
 - (i) is mentally ill to such a degree that he is unable to provide for the physical, mental or social well-being of the child;
 - (ii) has assaulted or ill-treated the child or allowed him to be assaulted or ill-treated;
 - (iii) has caused or conduced to the seduction, abduction, or prostitution of the child or the commission by the child of immoral acts;
 - (iv) displays habits and behaviour which may seriously injure the physical, mental or social well-being of the child;
 - (v) fails to maintain the child adequately;
 - (vi) maintains the child in contravention of section 10;
 - (vii) neglects the child or allows him to be neglected;
 - (viii) cannot control the child properly so as to ensure proper behaviour such as regular school attendance;
 - (ix) has abandoned the child; or

⁶¹Section 13(5)(b).

⁶²Section 13(4).

(x) has no visible means of support.⁶³

A children's court may at any stage of the inquiry order a medical officer to examine the child and to provide a report thereafter.⁶⁴ The court may further during the inquiry request that a social worker furnish a report on any matter concerning the child, his parents, guardian, or the person having the custody of the child.⁶⁵ It is important to note that the use of the word 'may' in s 14(2): 'the commissioner presiding over a children's court holding such inquiry may at any time...request any social worker to furnish a report on any matter...' denotes the exercise of a discretion.⁶⁶ The absence of a statutory duty mandating the furnishing of social-worker reports on pertinent facts concerning the child or his family, constitutes an injustice to the child and the family, and gives rise to the question of whether the commissioner, in the absence thereof, would be suitably informed to make a decision 'in the best interests of the child'.

Section 14 (3) of the Act provides that where required a children's court hearing may be postponed for periods not exceeding 14 days at a time.

3.6.6 Powers of Children's Court After Inquiry

Where a court is satisfied that the child involved in the children's court inquiry is a child as referred to in s 14(4), the following options are open to the court:⁶⁷

⁶³Section 14(4)(a)-(b). See section 4.3.2.

⁶⁴Section 14(1). Regulation 13(a)(iii) provides that as a condition for custody, parents must be prepared to submit themselves to the medical, psychiatric or psychological examination or treatment as requested by the social worker.

⁶⁵Section 13(2).

⁶⁶*House of Assembly Debates (Hansard)* of 30 May 1983 8174.

⁶⁷See s 15(1)(b)-(d).

(i) The court may order that the child be returned to or remain in the custody of his parents or, if the parents live apart or are divorced, the parent designated by the court or of his guardian or of the person in whose custody he was immediately before the commencement of the proceedings. This step is to be taken under the supervision of a social worker and on condition that the child or his parent or guardian complies with such of the prescribed requirements as the court may determine; or

(ii) the court may order that the child be placed in the custody of a suitable foster parent designated by the court and under the supervision of a social worker;⁶⁸ or

(iii) the court may order that the child be sent to a children's home designated by the Director-General;⁶⁹ or

(iv) the court may order that the child be sent to a school of industries.⁷⁰

Subsection (3) of s 15 provides that any order made under subsections 1(b), (c) or (d) may also order that the child be kept in a place of safety until such time as effect can be given to the order which the court has made.

The options available to the court under s 15 must however be

⁶⁸Section 1 of the Child Care Act defines a foster parent as 'any person, except a parent or guardian in whose custody a child has been placed in terms of Chapter 3 of this Act or section 209 of the Criminal Procedure Act 51 of 1977.'

⁶⁹Section 1 of the Child Care Act defines a children's home as 'any residence or home maintained for the reception, care and bringing-up of more than six children apart from their parents, but does not include any school of industries or reform school.'

⁷⁰Section 1 of the Child Care Act defines a school of industries as 'a school maintained for the reception, care, education and training of children sent or transferred thereto under this Act.'

exercised against the backdrop of the 'best interests of the child'.⁷¹ Despite the fact that what is best for a specific child cannot be determined with any degree of certainty,⁷² utilisation of the concept during the inquiry, facilitates the decision-making process of the courts, enabling it to focus upon the range of alternatives available to the child, and to make a decision which would - in the opinion of the community, the court and the child - reflect the best interests of the child.⁷³

3.6.7 Duration of Orders under section 15

For the purposes of s 16(1), the duration of any order made under section 15 shall lapse after the expiration of a period of two years after the date on which the order was made or after the expiration of such shorter period as the children's court may have determined at the time of making that order.

⁷¹Olmsdahl op cit 11-12 writes: 'It is important to emphasize that the welfare principle of 'the child's best interest' should only arise after a finding that the child is a child in need of care and should be supported by specific findings of fact. It entails a clear distinction between the initial inquiry and the subsequent placement inquiry.'

⁷²Heaton, J. 'Some General Remarks on the Concept "Best Interests of the Child" ' (1990) 53 *THRHR* 95-96. The author writes that '(f)or a determinate answer to the question of what would be in the child's best interests, (a) all the options must be known, (b) all the possible outcomes of each option must be known, (c) the probabilities of each outcome occurring must be known and (d) the value attached to each outcome must be known.' Confronting the difficulties intrinsic to such inquiry, he writes that in respect of (a) not all the options will be available to the court when arriving at a decision, that in respect of (b) and (c) even if all the options were known and available to the court, difficulties would exist concerning knowing what the outcome of each option would be and of the probability of each occurring, and that finally in respect of (d) it would be impossible to attach a value to each option. He concludes at 96: 'It is therefore clear that the best interests of the child cannot be determined with absolute certainty but rather rests largely on speculation. What is deemed to be in the child's best interests would depend on the prevailing theories and points of view of the particular community of which the child forms part.'

⁷³Heaton op cit 98-99.

On the practicalities involved in extending an order, Swanepoel and Wessels write that three months prior to the termination of the order a social worker's report containing an outline of the general and social circumstances of the child and his parents must be sent to the Director-General for his consideration.⁷⁴

Determination of the time period of any order is dependent upon the exercise of the discretion of the commissioner of child welfare. Swanepoel and Wessels note that the time period for orders of the children's court vary from six months to two years. Justifying this they write that '(d)it sou geen doel dien om 'n bevel vir 'n korter tydperk as ses maande van krag te laat wees nie. Geen rekonstruksiedienste van deurslaggewende aard kan in so 'n kort tyd gelewer en geevalueer word nie. 'n Periode van twee jaar is gewoonlik geskik vir sodanige dienste.'⁷⁵

Subsection (2) provides that subject to the provisions of subsection (3), the validity of an order in (1) may at any time be extended by the Minister for a further period not exceeding two years. While strictly speaking, an order may not be extended to a date after the date on which the child attains the age of 18 years, a child may remain in the custody of a foster parent or institution after such date in order to complete its education or training obligations⁷⁶

⁷⁴Op cit 50. See also reg 15.

⁷⁵Op cit 50. Babies are however an exception. The general trend noted by Swanepoel and Wessels is to make an order for as short a period as possible so as to avoid the possibility of the child not being able to form an attachment with its natural parents. All of this is however subject to the natural parent's willingness to rehabilitate themselves.

⁷⁶See s 33(3). Section 16(3) provides that the Minister may order that any former pupil of or pupil in an school of industries whose period of retention has expired or is about to expire, return to or remain in that school of industries for any further period which he may fix, and that he may from time to time extend that period, provided that no such order or extension shall extend the period of retention beyond the end of the year in which that pupil

3.6.7 Determination of the Age of a Child

As we have already seen the Child Care Act defines a child as a person below the age of 18 years. Knowledge of the age of a child involved in a children's court inquiry is especially important whenever the court is called upon to make a placement order in respect of an adolescent child.

Section 54 holds:

'Whenever in any proceedings in terms of this Act the age of any person is a relevant fact of which no or insufficient evidence is available, the officer presiding at those proceedings may estimate the age of that person by his appearance or from any information which is available, and the age so estimated shall for the purposes of this Act be deemed to be the true age of that person.'

Where the Minister is satisfied that the estimated age of the person is not his true age, the Minister may determine that any age other than the estimated age was the true age of the person on the date that the estimate was made, and thereupon the person concerned shall be dealt with as if the age so determined were the true age.⁷⁷

In the criminal case of *S v Mncwabe*⁷⁸ it was held that a magistrate should not estimate a child's age without first calling for and hearing the best evidence available. While in the same vein, it was held per Corbett JA in *S v Van Rooi en andere*⁷⁹ that where all else fails, tests using x-ray plates could be used to ascertain the age of the child.

3.7 APPEAL OR REVIEW

No provision is made in the Child Care Act for an appeal against

attains the age of 21 years.

⁷⁷Section 54(2).

⁷⁸1966 (4) SA 27 (A) at 29C per Fannin J.

⁷⁹1976 (2) SA 580 (A) at 583H.

the decision of the commissioner of child welfare. Decisions may only be taken on review. The test being the failure of the court to apply its mind to the issue before it, bias and grave irregularity in the proceedings.⁸⁰

In the case of *Young v Swanepoel and Others*⁸¹ it was held per Conradie J:

'The Legislature has not seen fit to provide for an appeal against the judgement of the commissioner. This strikes me as being a sensible and workmanlike provision. No order of the children's court is final. The interests of the child are always uppermost. If the children's court comes to a wrong conclusion, either because the presiding officer erred or because insufficient or incorrect information is placed before him, and the child is placed in the care of someone who is incapable of looking after him, there is adequate machinery to ensure that social welfare officers and indeed other interested parties can bring this to the attention of the authorities so that a further children's court inquiry can be opened. There is no limit to the number of children's court inquiries which may be held as circumstances change and develop.'

In the case of *Ex parte Commissioner for Child Welfare: In re Adoption Volczer*⁸² followed by *Ex Parte Kommissaris van Kindersorg: In re Van Wyk*⁸³ the court held that where a court

⁸⁰*Young v Swanepoel* 1990 (2) SA 54 (C) at 57C per Conradie J. In the case of *J and another v Commissioner of Child Welfare, Durban* 1979 (1) SA 219 (N) at 221H it was held per Howard J that s 34 of Act 33 of 1960 was peremptory, and that accordingly, failure to give the applicants proper notice of a children's court enquiry constituted a gross irregularity which vitiated the proceedings. Similarly, in the case of *Snyder en andere v Steenkamp en andere* 1974 (4) SA 82 (N) it was held per Hoexter J that failure to give written notice of the enquiry into whether a child was a child in need of care under s 30 of the Children's Act 33 of 1960 constituted a material irregularity. See also: *Napolitano v De Wet NO & others* (supra) at 344A; *Napolitano v Commissioner of Child Welfare, Johannesburg* 1965 (1) SA 742 (A) at 745F.

⁸¹Supra at 57C.

⁸²1960 (2) SA 312 (O) per Eksteen J.

⁸³1964 (4) SA 601 (GW) at 602H per De Vos Hugo J.

exercises its jurisdiction to review an order made by the commissioner, notice of such review must be given to all interested parties.

An order of a commissioner of child welfare placing a child in an industrial school in accordance with the provisions of the Act, does not constitute a sentence in a criminal case, and is accordingly not subject to automatic review by the Supreme Court.⁸⁴

3.8 THE ILL-TREATMENT OF CHILDREN

Section 50(1) of the Act provides that 'any parent or guardian of a child or any person having custody of a child who-

(a) ill-treats that child or allows it to be ill-treated;
or

(b) abandons that child,

or any other person who ill-treats a child, shall be guilty of an offence.'

No definition is provided in the Act as to what conduct constitutes ill-treatment. While the issue of definition is discussed elsewhere in this thesis,⁸⁵ it suffices for this Chapter to point out the following:

In the case of *S v Lamprecht*⁸⁶ it was held that the term ill-treatment as utilised in s 18(1) of the Children's Act ⁸⁷ covered conduct amounting to assault at common law. In *S v Erasmus* ⁸⁸ it was held that leaving a warmly-clad six-month-old child in a locked in a motor car with no open windows for a long period of

⁸⁴*S v Fourie* 1962 (2) SA 678 (O) at 679 per De Villiers J.

⁸⁵See Chapters 5 and 6.

⁸⁶1977 (1) SA 246 (E) per Addelson J.

⁸⁷Act 33 of 1960.

⁸⁸1973 (4) SA 481 (T) per Coleman J.

time constituted 'ill-treatment' and in the case of *S v Maree*⁸⁹ it was held per Rose-Innes J that the term covered instances ranging from failure to obtain medical aid for an injured child; to starving a child of food; to exposing it to excessive cold or heat by not clothing it adequately; to depriving it of the shelter of a home.⁹⁰

The onus of proving guilt in accordance with s 50(1) rests upon the State. Where a person is charged under this section an alternate charge such as assault, assault with intent to do grievous bodily harm, indecent assault, sodomy or rape, should be added to the charge sheet. Section 50(3) provides that any person convicted of any offence under this section shall be liable to a fine not exceeding R20 000 or to imprisonment not exceeding five years or to both such fine and such imprisonment. As with the penalty provision governing the application of s 42, numerous questions regarding the efficacy of penalty provisions in child protection legislation must be raised.⁹¹ For example, will the penalty provision achieve what it has set out to do and if so, what method can be utilised to reveal its efficacy? What are the advantages/disadvantages of the provision? Has the provision the potential of curbing the incidence of child abuse in society, or will it serve merely to stigmatize the offending parent, cause him to lose his job, label him a pariah and act contrary to the needs and interests of the child in the long run?

In respect of the disadvantages of the provision, Barlow writes that the provision will only serve to isolate the offending parent as a criminal instead of as a parent in need of care. 'A parent thus convicted will probably not respond well to rehabilitation which requires sympathetic handling of the family problem and this may result in failure to achieve the ultimate

⁸⁹1990 (3) SA 365 (C).

⁹⁰At 370D.

⁹¹See Chapter 7 for a criticism of s 42(5).

goal of reuniting the family.'⁹²

By the same token however, penalising such conduct only with the threat of rehabilitation, will not always be effective. '...therapy is not something which can be prescribed and dished up like cough mixture or a surgical procedure, but a process which demands a high degree of commitment, trust, a willingness for painful self-disclosure and a need to change.'⁹³ In the absence of a sincere desire for change, the therapeutic process will yield no fruits. Furthermore the rate of recidivism in respect of child sexual offenders remains at a startlingly high 90%.⁹⁴

At present there is no quick-fix method in respect of treating the abuser. Theories abound, but the determination of such is beyond the scope of this thesis.

4. A CRITICAL ANALYSIS OF THE CHILD CARE ACT IN LIGHT OF INTERNATIONALLY ACCEPTED STANDARDS OF CONDUCT AS EMBODIED IN THE UNITED NATION'S CONVENTION ON THE RIGHTS OF THE CHILD

4.1 DEFINITION OF A CHILD

4.1.1 United Nation's Convention

Article 1 of the United Nation's Convention reads:

'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.'

4.1.2 Child Care Act

⁹²Barlow op cit 350.

⁹³Levett op cit 19.

⁹⁴Marais, C. *Children of Sorrow - Child Sex Abuse in South Africa* (1990) 36.

The provision of the Convention is satisfied under s1 of the Child Care Act.

4.2 THE ISSUE OF EQUALITY BEFORE THE LAW AND THE FUNCTIONING OF THE CHILDREN'S COURT

4.2.1 United Nation's Convention

Articles 2(1) and 2(2) of the Convention read:

(1) 'State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, *irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth or other status.*' (my italics)

(2) 'State Parties shall take appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the *status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*' (my italics)

4.2.2 Child Care Act

Under the existing legislation, the children's court operates in respect of children of all races. This position differs markedly from the position under the Children's Act. Section 5 of the latter Act provided for the establishment of separate children's courts to deal with issues affecting Black children. Unfortunately, in conjunction with many other problems, this situation created discrepancies in approach to the protective mechanisms afforded by the Children's Act. In 1984, in attempt to remedy the apparent inequalities, section 5 of the Act was amended. Theoretically, the present situation is now in line with accepted international standards.

One area where discriminative practice is however apparent is in respect of s12 of the Act. As analysis of the section has been dealt with under section 3.4.2 (ii) of this chapter, it suffices to state that:

(a) Section 12(1) provides that any policeman, social worker or authorized officer may remove a child from any place to a place of safety without a warrant if that policeman, social worker or authorised officer has reason to believe that the child is a child referred to in s14(4) and that the delay in obtaining a warrant will be prejudicial to the safety of the child;

(b) South African case law provides that the term 'reason to believe' refers to a belief structure capable of objective analysis; and

(c) The present excess of Black children roaming the streets at night should provide sufficient 'reasons to believe' in the minds of policemen, social workers and authorised officers, that these children fall into the category of children referred to in s14(4) of the Act, more specifically s14(4)(b)(ix).

There are a number of factors involved in the issue of effectively removing these children from the streets, which serve merely to paralyse welfare attempts to help these children: i.e., (1) allegations of physical and sexual molestation by the older children at the shelters; (2) glue-sniffing dependency; and (3) exploitation by adults as drug peddlars, pimps etc. However, the absence of visible state intervention and 'effective' removal of these children to places of safety where they can be given opportunities for growth and education, still evinces clear discriminative practice against Black children. One wonders what would happen if a White child below the age of 8 was found wandering around the streets at night, begging for money or food!

4.3 THE BEST INTERESTS OF THE CHILD

4.3.1 United Nation's Convention

Article 3(1) of the Convention reads:

(1) 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.'

4.3.2 The Child Care Act

It is a well accepted principle of our law that in all matters affecting the welfare and safety of the child, the principle of 'the best interests of the child' prevails.⁹⁵ The recent enactment of the Child Care Act and the dropping of the term 'child in need of care' in favour of the parent being unable or unfit to have the custody of the child, has not been without criticism concerning whether such will in fact protect the best interests of the child.

In introducing the Child Care Bill to the House of Assembly at the second reading stage, the Minister of Health and Welfare justified the inclusion of s 14 into the Act saying:

'..the time has come for us to tell an incompetent parent, without beating about the bush, that his child is in need of care because he is an incompetent parent, and that action should be taken against these unfit parents for the sake of the child.*

While this assertion is laudable, questions need to be raised concerning whether this is in fact in the best interests of the child.

Zaal notes that while some may argue that the new focus of the Act serves to: (1) provide a more appropriate expression of society's distaste of child physical or sexual abuse and neglect; and (2) provide a fairer balance of interests between protection of the rights of children and those of parents, there are a number of factors which should be taken into consideration:

⁹⁵*Rowan v Faifer* 1953 (2) SA 705 (O); *Byliefeldt v Redpath* 1982 (1) SA 702 (A); *Short v Naisby* 1955 (3) SA 572 (D); *Van Deijl v Van Deijl* 1966 (4) SA 260 (R); but note *Petersen en 'n ander v Kruger en 'n ander* 1975 (4) SA 171 (C) where it was held per Van Winsen JP that while determination of the best interests of the child remained the court's primary concern, the rights of the parents could not be left out of account.

⁹⁶*House of Assembly Debates (Hansard)* 9 May 1983 6561.

- (1) Formal declarations of parental guilt may serve only to engender parental bitterness towards the child, the social worker and society in general; such bitterness may be directed towards other children remaining within the domestic environment;
- (2) furthermore, the declaration may destroy co-operation between the social worker and the parents; it is unlikely that a parent who has been stigmatized under the new Act would want to have any dealings with the person precipitating the inquiry in the first place;
- (3) the declaration may exacerbate feelings of hostility towards the child;
- (4) the condemnation may be an artificial and unfair depiction of the underlying cause leading to the child's removal; and
- (5) in the absence of clear evidence pointing to parental fault, a child cannot be justifiably removed from the home.

The greatest disadvantage of s 14 in the light of the 'best interests of the child' standard, is found in cases dealing with suspected child physical and sexual abuse. Subsection (4)(b)(ii) provides that the children's court must prove that the parent, guardian or custodian of the child has assaulted or ill-treated the child, before such child can be removed from the home environment. Proof in such cases may be extremely difficult to obtain by virtue of: (1) the age of the victim; (2) the possible lack of physical manifestations of sexual abuse; and (3) the fact that sexual abuse often takes place in the privacy of the home without eyewitnesses present.

Absence of court satisfaction beyond a reasonable doubt that the parent or guardian or custodian of the child, is responsible for the abuse, would result in the child remaining at the mercy of the perpetrator.

In short, it is argued that while the advantage of s 14(4) may be that it ensures a balance of interests between the parent and child, the section falls dismally short of the standard required for child legislation, and thereby taints a major portion of the

Act.

Conclusion

In the light of the present changes to the Act, one needs to seriously consider the extent to which our law is concerned with the protection of the best interests of the child. The shift in emphasis from the 'child in need of care' to the issue of 'parental defect or flaw' is an obvious indication of the current move away from purely child-centered approaches to parental- and family centered approaches to the problem. While this situation may be in line with contemporary developments elsewhere in the world, i.e., the English Children Act 1989 - it is clearly not the best approach to providing comprehensive protection to the welfare needs of the child.

4.4 LEGAL REPRESENTATION FOR THE CHILD

4.4.1 United Nation's Convention

See articles 9(1)-(2) and 12(1)-(2):

9(1) 'State Parties shall ensure that a child shall not be separated from his parents against their will, except where competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or where the parents are living separately and a decision must be made as to the child's place of residence.'

9(2) 'In any proceedings pursuant to paragraph 1 of the present article, *all interested parties shall be given an opportunity to participate in the proceedings and make their views known.*' (my italics)

12(1) 'State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

12(2) 'For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of

national law.

4.4.2 The Child Care Act

A major flaw in the Child Care Act is the absence of a provision for compulsory legal representation on behalf of the child involved in a children's court hearing. While it may be contended that the social worker involved in the case, provides the necessary representation for the best interests of the child, practically this is not always the case.

The social worker's lack of legal knowledge concerning evidence and procedure renders them less than capable of arguing effectively on behalf of a child, against the legal representative of the parent(s) or guardian(s). Furthermore, the social worker dealing with the family may not wish to alienate the parents more than may have already occurred, as this could have a detrimental affect on subsequent relations between the parties, and accordingly, she may take a less adversarial approach to the parents in the hearing, than would be required for protecting the best interests of the child.

Moreover, the commissioner presiding at the hearing may not have any training outside his field on the developmental and other needs of a child, and accordingly make a decision swayed by factors extraneous to the issue of the best interests of the child - i.e., the persuasive argument put forward by the legal representative of the parent(s) or guardian(s).

While, doubt still exists as to the role the child's legal representative would assume, i.e., will the representative act for the child or in the child's best interests? Who will brief the representative? The child? And if so, will only certain children deemed to have the mental and emotional capacity for logical thought be permitted to do so, or will this right extend to all children? Or, will the social worker brief the representative? In which case, isn't the involvement of either the social worker or the legal representative in this field superfluous? Notwithstanding these and other questions, it is

submitted that, theoretically, the presence of an independent legal representative for the child, who is knowledgeable about matters concerning children and their developmental needs, would remedy inherent inadequacies within the system, (i.e., eliminate potential bias against the child) as well as facilitate the process of decision-making on the best interests of the child.

The lack of provision for independent representation for a child involved in a children's court hearing, violates the central provisions of the United Nation's Convention. This shortcoming in the Act will have to be remedied prior to ratification of the Convention.

CHAPTER 5

TOWARDS A LEGAL DEFINITION OF CHILD ABUSE

1. INTRODUCTION

A significant obstacle confronting the study of child physical and sexual abuse from either a medical, psychological, social or legal perspective is the conspicuous absence of clarity and precision as to the parameters within which this phenomenon falls.

The aim of this chapter will be threefold. Firstly, it will provide an overview of the current status of professional definitions of child abuse. Secondly, it will examine the present position of the law with regard to the issue of definition of child abuse. Thirdly, it will highlight the problems inherent in enacting a specific definition for the term 'ill-treatment', as utilised in the Child Care Act No 74 of 1983.

2. THE CURRENT STATUS OF PROFESSIONAL DEFINITIONS OF ABUSE

Section 50(1)¹ of the Child Care Act reads -

Any parent or guardian or any person having the custody of a child who
(a) ill-treats that child or allows it to be ill-treated,
(b) abandons that child,
or any other person who ill-treats a child, shall be guilty an offence.

While the act expressly criminalises the ill-treatment, neglect, and abandonment of the child ², penalising such conduct with the

¹Section 50(1) amended by subsec 18(a) of Act 86 of 1991.

²Sect 50(2) of the Child Care Act reads :
'Any person legally liable to maintain a child, who while able to do so fails to provide that child with adequate food, clothing, lodging, and medical aid, shall be guilty

threat of a fine not exceeding R20 000 or to imprisonment for a period not exceeding 5 years, or to both such fine and such imprisonment³, no definition as to what acts constitute child 'ill-treatment' is provided for in the Act.

The lack of definition in this Act, has prompted widespread criticism.⁴ Numerous attempts have been made to address this perceived inadequacy. Lamentably, solutions offered, have often reflected the exclusive point of view of a particular discipline, to the detriment of other professional perspectives. The differences in perspective on the nature of child abuse, compounded by the differences in approach to remedying the problem, creates numerous problems for the legal search for an all-encompassing definition.

An example of the wide differences of perspective on the important criteria for abuse, is exposed in a comparison between the medical, psychological and legal perspective of child abuse. Medical perspectives of abuse focus primarily upon the presenting symptoms of abuse - as exemplified in the early writings of Dr. Kempe and associates. Psychological orientations on the other hand, focus predominately upon the maladaptive personality characteristics of the perpetrator. While, existent legal perspective emphasizes the intention of the perpetrator and the necessity for distinction between non-accidental and accidental traumatology.

Supplementary to the above, is the fact that professional orientations may be further distinguished from one another, on the grounds of placement of emphasis for determination of abuse. For example, some professional bodies may view the behaviour of

of an offence.'

³Section 50(3).

⁴Levett op cit 11 - 13; Fahn, M.S. 'Allegations of Child Sexual Abuse in Custody Disputes : Getting to the Truth of the Matter' (1991) 25 Fam L.Q. 193 -216.

the adult caretaker as the significant consideration for abuse, while another body, may place the emphasis upon the ultimate consequences of such behaviour for the child victim.

The medical profession places emphasis upon the latter. This perspective is exemplified in the writings of Arnom Bentovim. Note the area of accent in his definition of child physical abuse:

'A child with a characteristic pattern of injuries, the explanation of which is not consistent with the pattern, or where there is definite information through acknowledgement or reasonable suspicion that the injury was inflicted or knowingly not prevented by a person having custody, charge or care of the child.'⁵

Other professions such as the psychological and social sciences, define child abuse in terms of the behaviour of the parent\caretaker. Psychologists, for example, define abuse as the intentional non-accidental use of physical force and/or the intentional, non-accidental acts of omission on the part of a caretaker which results in injury to the child.⁶ Definitions from the field of Social Work on the other hand, define it as '..'n klieriese toestand as gevolg van ernstige liggaamlike beserings (soos frakture, hematome en kneusings) wat ontstaan het uit growwe mishandeling van n jong kind deur byvoorbeeld 'n ouer.'⁷

The differences in professional perspectives of abuse essentially creates the unfortunate situation of lack of consensus concerning a workable, solitary, universally accepted definition of child physical and sexual abuse. From the outset it is important to

⁵Bentovim op cit 3954.

⁶Gil, D.G. 'Violence against Children' in *Child Abuse and Violence* ed Gil, D.G. (1979) 173-198

⁷Munnik, E. E. 'Kinderfoltering : n Aktuele Probleem' (1987) 11 SACC 242-249.

note that the absence of clarity regarding the above, is not only as a result of diverse inter-professional perspective, but as a result of: (1) intra-professional disparities of thought; and (2) the present inchoate state of knowledge on the dynamics, aetiology and symptoms of abuse.

Concerning point one, reference to medical definitions of abuse reveal Kempe as defining abuse according to the narrow criteria of the 'infliction of serious physical harm upon the child'⁸, while others, such as Newberger⁹ and Gil¹⁰ define it according to a broader spectrum of criteria. For them, any act violating a child's developmental needs and inherent potential is capable of being classified as an abusive act.

In essence, this very range of definitions available, compounded by both the vacillation between a narrower and broader definition of abuse, and the present state of academic knowledge, demonstrates the particular difficulties facing any legal system wishing to enact a satisfactory definition of abuse.

In essence, so long as inter and intra-professional conflicts over primary issues of abuse are the order of the day, absence of a legal definition of abuse capable of transcending professional, social and cultural boundaries, remains an actuality.

3. THE PRESENT POSITION OF THE LAW CONCERNING A DEFINITION OF CHILD ABUSE AND THE PROBLEMS INHERENT IN PROVIDING A SPECIFIC DEFINITION FOR THE TERM 'ILL-

⁸Kempe, C.H. Silverman, F.N. Steele, B.F. Droegmuller, W. Silver, H.K. 'The Battered Child Syndrome' (1962) 181 *Journal of the American Medical Association* 105.

⁹Newberger, E. 'The Myth of the Battered Child Syndrome' (1973) 40 *Current Medical Dialog* 327-330.

¹⁰Gil op cit at n6.

TREATMENT' AS UTILISED IN THE CHILD CARE ACT.

As noted earlier, the Child Care Act, while criminalising the ill-treatment of children, fails to provide guidelines as to what constitutes an act of child physical and sexual abuse. (a term which according to social scientists, could comprise of acts ranging from violent child rape to adult exhibitionism.¹¹)

While scope for criticism of this state of affairs certainly does exist, it is submitted that the present deficiency in the Child Care Act, is not a handicap operating against the legal system per se.

During the course of this section, it will be shown that this situation may in fact be beneficial to society in that, with (a) the current embryonic state of knowledge on the aetiology, symptoms and dynamics of abuse; (b) the existing lack of a definition of abuse; and (c) the utilisation of the catchall phrase 'ill-treatment'; the lack of a specific definition of the term, within the Act, permits a greater exercise of judicial discretion on behalf of the child. The elimination of the nebulous concept of 'ill-treatment' in favour of a more specific legal definition, would not serve the ends of justice, as such action, would tie the judge's hands in individual situations where judicial action was most needed. (i.e., where the child lies along, but not within, the margins of abuse as determined by the restrictive definition of abuse).¹²

¹¹Levett op cit 11-12.

¹²It is important to note that while the present lack of a specific definition of abuse, in the Child Care Act, has undoubtedly placed a considerable burden upon the judiciary, this state of affairs has, by and large, proved to have been advantageous for the child seeking the protection of the legal system. A review of the case law, reveals the judicially created parameters of child abuse to be both flexible and wide. Two cases in point are: *S v Lamprecht* 1977 (1) SA 246 (EDC) and *S v Maree* 1990 (3) SA 365 (CPD).

In the case of *S v Lamprecht*, the court dealt with the determination of whether conduct, taking the form of beating an infant, aged two, upon the buttocks, thighs and

head and causing a depressed fracture of the skull, amounted to ill-treatment within the meaning of section 18(1) of Act 33 of 1960. The court rejected counsel for the appellant's argument that if proved, the appellant's conduct amounted only to assault at common law.

Addleson J held at ...:

'With due respect to the views quoted above, I am not persuaded that 'to treat badly; to ill-use, maltreat' should not be given their plain meaning. According to the Shorter Oxford English Dictionary, 'ill-treats' means, 'to treat badly, to ill-use, to maltreat' and the Afrikaans meaning, according to H.A.T. is even more illuminating - mishandel means 'sleg behandel; liggaamlik or geestelik kwaad aandoen' (the Afrikaans is the official text of the Act) Both these definitions plainly include an assault of the nature of the acts alleged against the appellant. It may be preferable to charge an assault as an assault but, in the absence of contrary authority which is binding on me, I am not prepared to hold that the word 'ill-treats', as it is used in section 18(1) of this Act, excludes conduct which amounts to assault at common law. In my view therefore, the conduct of the appellant, if proved, constituted 'ill-treatment' within the meaning of s18(1)' Similarly, in the case of *S v Maree*, Rose-Innes J held that the meaning of the term 'ill-treats', as utilised in section 50(1) (a) of the Child Care Act 74 of 1983 was conduct, 'calculated to cause unnecessary suffering or injury to health'. (at 369G)

He held:

'The word 'ill-treats' is not defined in the Act. The ordinary meaning of the word, according to the recognised dictionaries, is 'to treat badly, to ill-use, maltreat', and 'mishandel' means 'sleg behandel, liggaamlik of geestelik kwaad aandoen'. *S v Lamprecht* 1977(1) SA 246 (E) at 248F. The passage in Clark-Hall and Morrison *The Law Relating to Children and Young Persons*, cited in *S v Lamprecht* (supra at 247-248) which defines the term 'ill-treats', in the context of ill-treatment of children, as covering misconduct calculated to cause unnecessary suffering to injury or health, is in my view also apposite...There can in our opinion be no doubt that neglect to obtain medical aid for an injured and ill child in need of medical attention constitutes ill-treatment in the sense of treating the child badly and causing it unnecessary suffering and injury to its health'.(at

The learned judge continued further at 370D :

'The ordinary meaning of 'ill-treats', as already discussed in this judgement, clearly covers causing unnecessary suffering or injury to bodily health by, for example, starving a child of food, exposing it to excessive cold or heat by not clothing it adequately, depriving it of the shelter of a home, and depriving it of medical attention and treatment when it is seriously injured or ill'.

A further advantage accruing from the current situation, is that the utilisation of the 'umbrella' term 'ill-treats/ill-treatment' as utilised within the Act, circumvents the possibility of the exercise of white ethnocentrism, in favour of a more heterogenous approach to the question of abuse.

It is obvious from the above cited advantages, that a narrowing of the term 'ill-treats' to specific, documented instances of abuse, would lead to the unnecessary fettering of the exercise of judicial discretion, and, the consequent narrowing of circumstances permitting for legal intervention. Essentially, the broader the definition of abuse, the greater the permitted scope of legal intervention, the greater the ease of identification of abuse situations.¹³

Academic criticism against the utilisation of a broad definition in a legislative act, usually follows the line of argument that the inclusion of the broad definition is nothing more than superfluous description; and that as a result of the above, such creates the possibility of greater ease of misidentification.¹⁴

As counterargument to the above, the following should be taken into consideration: (1) the uppermost concern of the court is always the protection of the child; and (2) instances of misidentification and/or mislabelling of abuse, can, in the case where the child has been removed from the home be rectified through the operation of review of the Children's Court decision.¹⁵

Conradie J, in *Young v Swanepoel and others*¹⁶:

No order of the Children's Court is final. The interests of the child are always uppermost. If the Children's Court comes to a wrong

¹³Dickens op cit 4.

¹⁴Dickens op cit 9.

¹⁵See s15 of the Child Care Act 74 of 1983.

¹⁶1990 (2) SA 54 (C).

conclusion, either because the presiding officer errs or because insufficient or incorrect information is placed before him...there is adequate machinery to ensure that social welfare officers and indeed other interested parties can bring this to the attention of the authorities so that a further children's court enquiry can be opened. There is no limit to the number of children's court inquiries which may be held as circumstances change and develop.

4. CONCLUSION

Knowledge of the presenting physical and psychological symptoms of child abuse is still in an embryonic stage of development. Consequently, any attempt to provide a high degree of normative definition in order to (1) satisfy society's need for certainty and predictability with regard to proscribed conduct; and (2) cover all instances of abusive behaviour requiring legal protection, is bound to fail. Unfortunately, the current utilisation of a broad definition of abuse presents for some, a number of disadvantages.

Proposal for reform:

In order to tie up the loose ends apparent from a lack of a definition, the following proposal is put forward:

(1) The law retains its present utilisation of the broad term child 'ill-treatment'; but allows for, (2) guidelines, as to what acts may constitute acts of ill-treatment of children, to be included into the existent legal framework.

It is submitted that the advantage of such proposal is that the continued utilisation of the broad term 'ill-treats/ill-treatment' within the Act would serve to: (1) include and cover an endless variety of incidents; and (2) permit sufficient flexibility to apply to a range of cultural contexts of abuse. While the inclusion of more specific guidelines would (1) compensate for the potential vagueness of the term ill-treatment; (2) provide clarification where necessary; and (3) facilitate the process of identification of endangered children.

The incorporation of guidelines into the legal framework would not be a requisite for all enactments dealing with child abuse, but would be a requisite where such inclusion would facilitate the process of identification. For example, the inclusion of guidelines into s 42 of the Child Care Act¹⁷, would facilitate the discovery of abuse by:

- (1) rendering invaluable guidelines to professionals mandated to report suspicions of abuse, not as a result of their knowledge of the presenting symptoms of abuse, but rather, as a result of their opportunity for contact with children, i.e., child care workers, school nurses, social workers; and
- (2) act as a warning beacon for members of the medical profession, whenever cases accompanied by the presenting symptoms listed here below, come to their attention.

Section 42 of the Child Care Act could, if the proposed recommendation was enacted, read as follows:

42(1) Every Dentist, Medical Practitioner, Nurse or Social Worker who examines, attends or deals with a child in circumstances giving rise to the suspicion that the child has been ill-treated, or suffers from any injury, single or multiple, the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease, shall immediately notify the Director-General or any officer designated by him for the purposes of this section, of those circumstances.

42(2) For the purposes of this section the term **ill-treatment** shall include, but not necessarily be confined to :

(a) Any multiple injury, or injury to the head, face, body and legs, taking place over a prolonged period of time,

¹⁷Act 74 of 1983.

the explanation of which is not consistent with the pattern manifested.¹⁸

(b) Any bruising in sites not characteristic of accidental childhood injuries. Sites pathognomic of abuse, being genital, inner thigh, buttocks, cheeks, ear lobes, upper lip, labial frenulum, and abdominal wall bruises.¹⁹

(c) Any manifestation of traumatic alopecia or hair loss

¹⁸Bentovim op cit 3954; Schmidt, B.D. 'The Child with Non Accidental Trauma' in *The Battered Child* 3ed. eds Kempe & Helfer (198)) 128-130. Schmidt writes that while diagnosis and final assessment of the plausability of the history offered is always a medical judgement, the following histories are diagnostic or extremely suggestive of non-accidental trauma, (...and as such, may if studied, facilitate the identification of possible cases of abuse..):

1. Partial confessions by a parent.
2. Unexplained injury in children.
3. Implausible history offered.
4. Alleged self-inflicted injury.
5. alleged sibling-inflicted injury.
6. Delay in seeking medical treatment.
7. Absence of presence and explanation of adult who was present at the time of the alleged 'accident'.

¹⁹Bentovim op cit 3954; Schmidt op cit 130-134. Schmidt writes that 'inflicted bruises occur at typical sites or fit recognisable patterns(e.g. hand marks, human bite marks, strap marks, or bizarre shapes) Inflicted bruises are so common at certain sites that finding them there is pathognomic....Accidental bruises usually occur on the skin overlying bony prominences (chin, elbow, forehead, spinous processes, greater trochanter, etc) Nondescript bruises becomes suspect as abuse when they occur on the softer part of the body...Most falls only produce bruises on a single surface. Bruises on multiple body planes are usually inflicted, unless there is a history of tumbling accidents. True tumbling accidents also give bruises and abrasions over bony prominences. "Falling Downstairs" is often offered as a last minute explanation for unexplained bruises in a child. The child who does tumble down the stairs ends up with very few bruises. Therefore, the number of bruises and the location of the bruises speaks of an inflicted injury.'

with petichiae evident at the root ends.²⁰

(d) Any distinctive bruise containing individual teeth marks, and where the point to point mark between the canine tooth marks measure a distance greater than 3 cm.²¹

(e) Any manifestation of swelling and tenderness and bruising of both eyelids of a young child.²²

(f) Any indication of a compression injury or fracture in a young child. Typical compression injuries being fractured ribs, a ruptured spleen, bladder, kidneys, or liver, and

²⁰ Schmidt op cit 139:

'Some children are pulled or yanked by the hair. Sometimes the hair spirals at the broken ends, probably secondary to stretching at this site prior to breakage. If the hair-pulling event is recent, the scalp may be tender and a few petechiae may be found at the hair-roots.'

Alopecia: a medical term for baldness;

Brown, J.A.C. *Pears Medical Encyclopaedia* (1988) 596 defines petechiae as follows: 'small spots in the skin due to tiny haemorrhages which form a red or brown rash, turning blue or yellow later. The causes range from acute infections to fragility of the capillaries.'

²¹Schmidt op cit 134-136:

'In serious injuries with several suspects, the exact perpetrator can be determined by having a dentist make wax impressions of each suspect's teeth and comparing them to a photograph of the bite marks.'

²²Schmidt op cit 138 writes:

'Children who have been hit about the eyes with an open or closed hand present massive swelling and bruising of both eyelids. Most black eyes caused by accidents only involve one side. The question that is frequently raised is whether or not a child can acquire two black eyes from a single accident, or more precisely, from striking a single object. The answer is yes. Bilateral black eye can occur from blood seeping down from a large bruise on the forehead or from a basilar skull fracture. Blood moves with gravity. However, these children have minimal lid swelling and no lid tenderness. In addition, the onset of the black eye is delayed one or two days from the time of the injury. Therefore, these situations should not be confused with the child who has been beaten about the head and eyes.'

acute pancreatitis.²³

(g) The fabrication of clinical histories and illness on a child by a parent or child caretaker through the administration of drugs, the misreading of thermometers, the false description of illness in the child or any other conduct inducing fictitious illness in the child and causing unnecessary and intrusive medicalisation to be administered to the child.²⁴

²³Schmidt op cit 139. While determination of this category belongs to the sole province of the medical profession, it is interesting to note that:

'Unlike the contents of the chest, the abdominal organs are not protected..(M)ost of the injuries (to this area) are usually caused by a punch or kick that compresses the organs against the anterior spinal column. The most common finding is a ruptured liver or spleen. These children present blood loss and shock. Second, blows to the abdomen can cause tears or rents in the small or large intestine. These children often present advanced peritonitis because of delay in seeking medical care. An upright film of the abdomen will show free air under the diaphragm. Third, the most unique abdominal injury is an intramural hematoma of the duodenum or proximal jejunum..Fourth, arteries or veins can be torn and these patient presents in shock. Fifth, trauma is the most common cause of acute pancreatitis in children..Sixth, kidney injuries usually result from blows to the back and present gross hematuria. The bladder may be ruptured by a blow to the lower abdomen...In all of these conditions, trauma to the abdomen is usually denied. Bruise of the abdominal wall (when present) help to establish the correct diagnosis. Unfortunately, there are no visible bruises or marks on the abdominal wall in over half of these cases. The abdominal wall is usually relaxed at the time of the injury, and the energy from the blow is mainly absorbed by the internal organs.'

²⁴Bentovim op cit 3954; Craig, L. Biley, F. "Munchausen by Proxy: Fact not Fiction" (1991) 4 *Nursing* 11-13. See also the discussion in Chapter 1.

Craig and Biley list possible indications which should lead to a high index of suspicion of Munchausen Syndrome by Proxy:

- * Persistent or recurrent illness with no found cause.
- * Inconsistencies between medical history and clinical findings.
- * Signs and symptoms which do not occur when mother is not
(continued...)

(h) Any involvement of dependant, developmentally immature children and young people in sexual activities which they cannot fully comprehend, to which they cannot give informed consent, and which violate the social taboos of the culture and are against the law.²⁵

From the outset, it should be noted that this list does not purport to be exhaustive. The above is merely an example illustrating how the legal system could transcend the present deficiencies inherent in inter-professional knowledge of abuse; provide clarification of the complex and enigmatic aspects of abuse; and yet, still permit the term 'ill-treatment', to be applicable to a wide range of activities, in a multiplicity of social and cultural contexts.

A final matter which has bearing on attempts to provide a legal definition of abuse, relates to the issue of the corporal punishment of children by parents, educational institutions, and the legal system. This issue will be dealt with in Chapter 6 of this thesis.

²⁴(...continued)
with her child.

- * Unusual signs and symptoms that do not make sense.
- * A differential diagnosis of symptoms less common than Munchausen Syndrome by Proxy.
- * Persistent failure to respond to medical treatment.
- * A parent less concerned than the medical staff.
- * Repeated hospitalisations without definitive diagnosis.
- * A parent constantly at the child's bedside, involved in care of other patients, may become attached to staff.
- * A parent who welcomes medical tests on child even when they are painful.

²⁵Bentovim op cit 3954; Levett op cit 11-12. Levett writes: 'Today the term child sexual abuse covers a range of behaviours: rape, or intercourse, fondling, masturbation, oral-genital contact, simulated intercourse with attempted penetration or without penetration, sodomy, exposure to adult exhibitionism and several other possibilities.' It is submitted that the inclusion of Clause (h), would cover this wide range of behaviours.

CHAPTER 6

DISCIPLINARY CHASTISEMENT AND CHILD PHYSICAL ABUSE

1. INTRODUCTION

Any work dealing with the issue of child abuse would be incomplete without reference being made to the problem of the legal sanction of disciplinary chastisement by parents and those acting in loco parentis. The aim of this Chapter will be to set out the law as it applies to the disciplinary chastisement of children.

2. PARENTAL CHASTISEMENT OF CHILDREN

The South African legal system recognises the right of the parents and those standing in loco parentis to use reasonable and moderate force to procure the child's obedience to legitimate directions and requests.

In *R v Jancke & Jancke*¹ Mason J said:

'The general rule adopted both by the Roman, the Roman-Dutch law and the English law is that a parent may inflict moderate and reasonable chastisement on a child for misconduct provided that this is not done in a manner offensive to good morals or for other objects than correction and administration...The presumption is that such punishment has not been dictated by improper motives and the court will not lightly interfere with the discretion of parents or those empowered with a similar authority...The character of the offence, the amount of punishment inflicted, the bodily and mental condition of the child, the nature of the instrument used and the objects, purposes and motives of the person inflicting chastisement are all matters which have to be considered. A highly nervous or sensitive child may, for instance, be seriously affected by a whipping which would be harmless in the case of a more robust constitution. And where the object of the whipping is not really for the purposes of correction or by way of admonition or instruction or the proper vindication of authority (see Voet 47.10.2)

¹1913 TPD 382 at 385-386.

those guilty of such conduct may be held liable to the law.'

The acceptance of the parental right to physically chastise a child is deeply rooted in the fibre of societal life.² It is only recently, that restraint upon the exercise of this right has become a reality.³ Yet, notwithstanding the existence of legislation curbing the unrestrained application of physical violence upon the person of the child, incidents of 'physical chastisement gone wrong' still come to the attention of hospital and legal authorities.⁴ This has prompted many to advocate the elimination of the parental right of chastisement in favour of a more liberal approach to child-rearing. Freeman cites Zigler as writing that '(O)ne of the single most important determinants of child abuse is the willingness of adults to inflict corporal punishment upon children in the name of discipline. Well over half of all instances of child abuse appear to have developed out of disciplinary action taken by the parent. All too often an adult begins disciplining a child with mild forms of punishment and ends up unintentionally harming the child.'⁵ It has been noted that in countries where the physical chastisement of children has been de-legalized, the incidence of child abuse has dropped noticeably.⁶ Sweden, is perhaps the best example of this, followed by Finland, Denmark, Norway and Austria.⁷

²See Chapter 1.

³See for example s 50(1) of the Child Care Act 74 of 1983.

⁴Legal limits have been placed upon the exercise of the parental authority viz the Child Care Act. Section 50(1) of the Act provides that any parent or guardian of a child or any person having custody of a child who ill-treats that child or allows it to be ill-treated (or who abandons that child) will be guilty of an offence. In conjunction with the above, calls have been made for a stricter approach to the scope of the defence of disciplinary chastisement. See Milton & Burchell op cit 163.

⁵Freeman, M.D.A. *Current Legal Problems* (1990) 112-113.

⁶Freeman op cit 89.

⁷Freeman op cit.

In determining the reasonableness of the punishment the following factors should be considered. The list is not exhaustive.⁸

1. The nature of the offence.
2. The condition of the child, physically and mentally.
3. The motive of the person administering the punishment.
4. The severity of the punishment, i.e., degree of force applied.
5. The object used to administer punishment.
6. The age and sex of the child.
7. The build of the child.

Unfortunately, difficulties exist in attempting to provide for the total abrogation of the parental right to chastise his child, i.e., the problem of enforcement, and the social condonation of punishment, etc. Something must however be done to remedy the incongruous situation which arises from the law's sanction of corporal punishment. The veil of hypocrisy which on one hand criminalises all forms of assault, and on another sanctions the corporal punishment of children, must be removed.

The proposals put forward by the Scottish Law Commission in the *Report on family Law*⁹ are in this respect, worthy of consideration. The Commission proposes that while a parent should not be allowed to 'cane, belt, whip or flog a child or hit the child with a shoe, slipper, other objects which we know parents use as instruments of punishment' the ordinary safe parental smack with an open hand should be permitted. The Commission further proposes that conduct injuring the child which possesses an attached risk of injury, or which causes prolonged pain or discomfort should be outlawed.¹⁰

The proposals of the Scottish Law Commission should be of special significance to the South African legal system, by virtue of the

⁸Friedman J in *Du Preez v Conradie* 1990 (4) SA 46 (BGD) at 51J-52A.

⁹*Report on Family Law* (Scot Law Com No 135 1992) 19-33.

¹⁰At 30-33.

recent governmental endorsement of the Conference of the Rights of the Child, held in Cape Town, 1992, and the subsequent implicit endorsement of the United Nations Convention on the Rights of the Child.

Article 19 of the Convention requires that all signatory States take:

'..appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation while in the care of parents, legal guardians, or any other person who has the care of the child.'

Legislative enactment of the proposals would bring South Africa in line with the position advocated by the United Nations.

3. THIRD PARTY CHASTISEMENT OF CHILDREN

In respect of chastisement of children by third parties, it is settled law that the right of chastisement is not limited to parents but may, in certain cases, be extended to those acting in a loco parentis capacity.¹¹

3.1 THE RIGHT OF CHASTISEMENT BY FOSTER, ADOPTIVE AND NON-CUSTODIAN PARENTS

In *Du Preez v Conradie and another*,¹² a stepfather married to the divorced mother of children to whom custody of the children had been awarded, was held by the court to exercise the same rights as the parent (the custodian mother) if requested to do so by such parent, subject to the same limitations, or if he is in loco parentis during the temporary absence of the parent, again subject to the same limitation.

¹¹*Du Preez v Conradie* supra n 8; *Germani v Herf* 1975 (4) SA 887 (A).

¹²Supra n 8.

Per Friedman J:

'If the second respondent..(the custodian mother)..enlists the assistance of the first respondent..(the stepfather)..for these purposes, it is his duty to support and assist her. He may not, however, exceed the limit of his rights, nor mete out a greater degree or nature of punishment than the circumstances require. On no account is he however, to exceed the bounds of reasonableness and moderation in chastising the children, by way of administering corporal punishment.'¹³

Similarly, in the case of *Germani v Herf and another*¹⁴ it was held that a custodian is entitled to use reasonable force to compel an unwilling or recalcitrant child to submit to the non-custodian parent's right of access. Furthermore, the custodian parent can also ask the non-custodian parent to use reasonable force to compel an unwilling child to submit to the non-custodian parent's rights of access. The court held that while the child is temporarily under the control of the non-custodian parent pursuant to a right of access, the parental authority revives, and the non-custodian parent in these circumstances can use reasonable force to correct or discipline the child should it be necessary.

As is the case with parents, the chastisement must be moderate and reasonable, and is subject to the same limitations as mentioned hereabove.

Finally, in the case of *Du Preez v Conradie*¹⁵ it was held that the parent can only delegate such rights as he or she has, and nothing more. Consequently the person to whom the right of chastisement is delegated has not a greater or more extensive right than that which the parent has.

¹³Supra n 8 at 53F-G.

¹⁴Supra n 11.

¹⁵Supra n 8 at 53B.

3.2 CORPORAL PUNISHMENT IN SCHOOLS

A teacher or housemaster or principal of a school has the right to inflict moderate and reasonable corporal punishment on pupils.¹⁶

In order that the disciplinary chastisement may be viewed as lawful, it must be authorised, either by regulation or contract in the case of the private school, and it must be properly exercised.¹⁷

It is interesting to note that in respect of regulations governing schools under the House of Delegates, reg 11(2) holds that:¹⁸

'Corporal punishment shall not be applied as a disciplinary measure at any school.'

In respect of public schools governed under the House of Assembly, the following regulations should be noted:¹⁹

- 4.(1) Corporal punishment shall be administered to pupils only-
- (a) on account of neglect of duty or disobedience, recalcitrance, wilful damage to property, theft, dishonesty, lying, assault, bullying, indecency, truancy or any other misconduct of a serious nature;
 - (b) after the guilt of the pupil had been proved to the satisfaction of the principal in a full enquiry during which the pupil shall be afforded the opportunity to state his case;
 - (c) by the principal or by a person authorised thereto by him in writing, or by another teacher in the presence of the principal or the said authorised person;

¹⁶R v Roux 1939 OPD 59 at 61; R v Le Maitre and Avenant 1947 (4) SA 616 (C); *Hiltonian Society v Crofton* 1952 (3) SA 130 (A); R v Scheepers 1915 AD 337.

¹⁷See: Burchell, J. & Milton, J. *Principles of Criminal Law* (1991) 164-166.

¹⁸The regulations are made under the Indians Education Act 61 of 1965. Proc R2753 GG 12864 of 30 November 1990 (Reg Gaz 4598).

¹⁹Proc R704 GG 12381 of 30 March 1990 (Reg Gaz 4475).

- (d) in the office of the principal or a place indicated by him, or, in the absence of the principal, in the office of the teacher in control of the school or a place indicated by him;
- (e) on the buttocks covered with normal attire, with a cane or smooth switch and to a maximum of five strokes; and
- (f) with consideration of the age and physical condition of the pupil.

(2) Corporal punishment shall not be administered-

- (a) to pupils in pre-primary schools, pupils in levels 1-3 or female pupils;
- (b) to handicapped pupils without the permission of a medical officer; or
- (c) in the presence of other pupils

(3) In every case where corporal punishment was administered, the principal shall record in a punishment register the name and age of the pupil concerned, the reason for the punishment, the number of strokes inflicted, the date upon which and the name of the person by whom the punishment was administered, and this register shall at all times be available for inspection by the superintendent of education.

The ordinances or statutory regulations governing the exercise of the teacher's authority supersede the operation of the common law.²⁰ In the case of *S v Meeuwis*, the court held that a primary school teacher who caned a young boy for failure to do a sum correctly, had acted in contravention of the regulations promulgated by the *Administrator's Notice* 99 of 1915, and was accordingly, guilty of an assault.

Per Hiemstra J:

'..justification of assault which lies in the teacher-pupil relationship has been circumscribed by legislation. It does not matter whether this is contained in an Ordinance or in regulations contained in an *Administrator's Notice* promulgated in terms of an Ordinance. The relationship of teacher and pupil is in law governed by these regulations. When the charge is common assault and the defence of justification is raised on the ground of a teacher-pupil relationship, then it is only the circumscribed justification which can be taken into account. The evidence led by the State proved a course of conduct which went beyond the regulations, and the accused should not have been

²⁰*S v Meeuwis* 1970 (4) SA 532 (T); *R v Roux* 1932 OPD 59; Olmesdahl, M.C.J. 'Corporal Punishment in Schools' (1984) 101 SALJ 539.

discharged.²¹

Where a teacher accordingly, inflicts punishment upon a child which falls outside the four corners of the relevant statutory position, the defence of justification is negated, and the teacher is guilty of assault.²² In the case where the authorization for chastisement is governed by contract, as in a private school, the ordinances governing the government or state-aided schools, act as guidelines.²³

In conjunction with the above-mentioned regulations, the teachers right to chastise is subject to the same limitations as the parent.

Ignorance of the statutory regulations governing the corporal punishment of pupils would render the offending teacher culpable. The applicable case in this respect is *S v Du Toit*²⁴ wherein it was held that a person who engages in a particular sphere of activity is expected to acquaint himself with the appropriate regulations governing that realm of activity.²⁵ Consequently, both wilful and negligent transgression of the limits of disciplinary chastisement would expose the guilty perpetrator to the possibility of civil and criminal liability.²⁶

²¹Supra at 534C-E.

²²*S v Meeuwis* supra n20.

²³*Van der Berg v Scholtz* 1938 TPD 129; *Olmsdahl op cit* 539.

²⁴1981 (2) SA 33 (C).

²⁵*Olmsdahl op cit* 552 cautions that: '(i)t is unthinkable for any teacher not to be aware of the regulations applicable in his chosen career, especially those relating to the extent of his powers of discipline. Ignorance would be bliss, but culpable.'

²⁶See generally: Spiro, E. *Law of Parent and Child* (1985) 89-90, 169, 240.

In the case of *S v Lekgathe*²⁷ the complainant, a young boy of eleven, had been involved in a brawl with a girl, who subsequently reported the matter to the accused. Thereupon the accused administered more than twenty strokes with a cane, to the complainant's bare back and buttocks. The complainant was also hit with a bucket over the left eye. The court per Steenkamp J, held that the assault in this case was so brutal and humiliating that the only reasonable inference which could be drawn was that he had the intent to assault and inflict serious bodily harm on the child.²⁸ The accused was accordingly ordered to pay R300 as compensation for pain and suffering.²⁹

Where a charge of assault or assault with intent to do grievous bodily harm is brought against a teacher, that teacher bears the onus of adducing evidence that the conduct falls within the bounds of lawful authority.

While traditionally, corporal punishment inflicted at schools received widespread condonation, moves are afoot, to effect the total prohibition against the use of the birch in the classroom.³⁰ Of great significance to South Africa, is the fact that (1) corporal punishment is banned in schools governed by the House of Delegates and (2) the fact that the Government has just recently endorsed the Conference of the Rights of the Child, held in Cape Town, 1992. At this Conference, the United Nations Convention on The Rights of the Child was accepted and signed. Important clauses within this document usurp the right to inflict corporal punishment upon a child. It is possibly just a matter of time, before corporal punishment in schools is abolished.

²⁷1982 (3) SA 104 (BSC).

²⁸At 110C.

²⁹At 113A.

³⁰See generally, the comment of Dumbutshena CJ in *S v A Juvenile* 1990 (4) SA 151 (ZSC); *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC); *R v Theron* 1936 OPD 166 at 172; *Fair Lady* October, 1993.

4. THE WHIPPING OF JUVENILE OFFENDERS

Research on corporal punishment reveals that more than 40 000 people are whipped each year in South Africa, and that the majority of them are juveniles.³¹ Numerous calls have been made for reform of the law concerning whipping imposed as a sentence by the courts.³² Despite these calls however, no progress has been made. The judicial sanctioning of whipping remains a modern day reality in South Africa.

The institutional whipping of juveniles, is dealt with under section 294(1) (a)-(b) of the Criminal Procedure Act 51 of 1977 which holds:

(a) If a male person under the age of twenty-one years is convicted of any offence, whether such conviction is a first or a subsequent conviction, the court convicting him may, in lieu of any other punishment, sentence him to receive in private a moderate correction of a whipping not exceeding seven strokes, which shall be administered by such person and in such place and with such instrument as the court may determine.

(b) Notwithstanding the provisions of paragraph (a) a male person of or over the age of 17 years but under the age of 21 years may be sentenced to a whipping in terms of that paragraph in addition to any other sentence excluding imprisonment, with or without the option of a fine, unless the whole of that imprisonment is suspended.

It is important to note that in the cases of *S v W*³³ and *S v Sithole*; *S v Jiba*³⁴ it was held that the relevant date for determination of the age of the juvenile, is the date of the

³¹Sloth-Nielsen, J. 'Corporal Punishment: Acceptable state violence?' in *Towards Justice? Crime and State Control in South Africa* eds Hansson, D. & Van Zyl Smit, D. (1990) 195.

³²For a review of criticism directed against the present system of juvenile justice see: Skelton, A. *Children in Trouble with the Law - A Practical Guide* (1993).

³³1990(1) SACR 262 (NC).

³⁴1990(1) SACR 626 (N).

commission of the crime, and not the date of conviction of sentence.

Section 294(2) of the Act confines the site of imposition of the whipping to the buttocks covered with normal attire. In accordance with the provision of subsection 294(3) a parent or guardian of the person concerned may be present at the whipping, which in accordance with the provision may only be inflicted after certification by a district surgeon, that the juvenile is in a fit state of health to undergo the whipping.³⁵

Where such certification can not be issued by reason of ill-health of the juvenile, the court may amend the sentence accordingly.³⁶ Females, and juveniles suffering from psychoneurotic or psychopathic disorders, are exempt from the imposition of a sentence of whipping.³⁷

Despite the provisions governing the imposition of whipping, judicially sanctioned corporal punishment remains quintessentially, a brutal and degrading form of punishment. In the Zimbabwean case of *S v Ncube*,³⁸ Mr Justice Gubbay describes the inhumanity of the procedure as follows:

'Once the prisoner is certified fit to receive the whipping, he is stripped naked. He is blindfolded with a hood and placed face down on a bench in a prone position. His hands and legs are strapped to the bench, which is then raised to an angle of 45 degrees. The calico square is tied over his buttocks and the kidney protector secured above his buttocks at waist level. The prisoner's body is then strapped to

³⁵Section 294(4).

³⁶Section 294(5).

³⁷Section 295(1)-(2). It is submitted that this section offers very little protection to children suffering from such disorders. In practice, a District-Surgeon merely performs a cursory physical examination prior to the whipping, and does not usually concern himself with the mental state of the child.

³⁸*S v Ncube* 1988 (2) SA 702 (ZSC).

the bench. The cane is immersed in water to prevent splitting. The strokes are administered to one side across the whole buttocks. It is within the power of the officer administering the strokes to determine their strength, timing and, to some extent, their placement upon the buttocks. A second stroke upon the same part as an earlier stroke undoubtedly causes greater pain than were it to be placed elsewhere.³⁹

The South African judiciary have not been silent in their condemnation of corporal punishment. Judicial criticism is evident in the following cases:

In *S v Myute and Others; S v Baby*⁴⁰ De Wet CJ stated: '(t)hat the imposition of strokes is a very severe and humiliating form of punishment'

In *S v Machwili*⁴¹ Didcott J held: 'When an adult is flogged on the other hand, especially when he is flogged not in lieu of but in addition to being goal, nothing is achieved but revenge. Such is gained at a cost, what is more. Society's standards suffer. It stoops to the level of the criminal whom it punishes. It behaves with the same sort of barbarism as that which it condemned in him.'

In respect of corporal punishment of juveniles, the court in *S v A Juvenile*⁴² held that the imposition of a sentence of whipping upon a juvenile constituted inhuman and degrading punishment which violated the relevant provisions of the Zimbabwean Constitution.

Similarly, in the case of *Ex Parte Attorney-General Namibia: In Re Corporal Punishment By Organs of State*,⁴³ Mahomed AJA held

³⁹At 714A-C.

⁴⁰1985 (2) SA 61 (C) at 68H-I.

⁴¹1986 (1) SA 156 (N).

⁴²Supra at 30.

⁴³Supra n 30.

that the infliction of all corporal punishment (in consequence of an order from a judicial or quasi-judicial authority) both in respect of adults as well as juveniles, constitutes degrading and inhuman punishment within the meaning of art 8(2)(b) of the Namibian Constitution.⁴⁴ 'Such punishment remains an invasion on human dignity; an unacceptable practice of inflicting deliberate pain and suffering "degrading to both the punished and the punisher alike". Even in the case of juveniles it remains wide open to abuse and arbitrariness; it is heavily loaded with retribution with scant appeal to the sensitivity and rational responses of the juvenile. It is inconsistent with the basic temper and the letter of the Namibian Constitution.'⁴⁵

In South Africa moves are afoot to educate the courts to place greater reliance on diversionary tactics as opposed to institutionalised whippings. Anne Skelton describes such tactics as: 'a way of dealing with offenders in an alternative method rather than allowing them to go through the normal criminal process.'⁴⁶ These methods include concentrating on restorative notions of justice, such as reconciliation, problem solving and taking responsibility.⁴⁷

Where diversionary tactics are not available, possible sentences include the postponement of passing sentence in terms of s 297 of the Criminal Procedure Act ⁴⁸; placement under the supervision of a probation officer, s 290(1)(a) of the Act; reform school as contained under s 290(1)(d) of the Act; correctional supervision, s 276A of the Act, or imprisonment.

5. CONCLUSION

⁴⁴At 93D.

⁴⁵At 92F

⁴⁶Skelton op cit 24.

⁴⁷Skelton op cit.

⁴⁸Act 51 of 1977.

The traditional condonation of physical punishment, as a means of controlling the wilful nature of the child, is slowly being abrogated in favour of a more liberal approach to child-rearing.

No matter what form it takes, the corporal punishment of children is in its essence, physically, pedagogically, and psychologically undesirable. Violence begets violence as it tends to generate rage, resentment, hostility and aggression within the child, and teaches the child that violence and humiliation are legitimate ways of altering another person's behaviour.

While it is acknowledged that the education of the child within the home, the school, and the societal setting, cannot take place against a disorderly or disruptive backdrop, alternatives, such as the use of systematic rewarding for good behaviour, behaviour modification therapy, and diversion programmes in the case of the juvenile offender, have the potential of achieving the goal of non-disruptive education of children in society.

Krause J in *R v Theron* said ⁴⁹:

'Methods of violence and force may create fear and hatred but hardly ever respect or affection. The old saying "spare the rod and spoil the child" has long been abandoned by educationalists. Our increased knowledge of the operations of the mind has revealed the incontestable fact that in the building of character the rod should be sparingly, if ever used.'

While physical chastisement of children may have played an important role in child-rearing practices of the past, the present abuse of the rod, necessitates the de-legalization of corporal punishment. It is imperative that yesterday's orthodoxy becomes today's heresy.

⁴⁹1936 OPD 166 at 172.

CHAPTER 7

CHILD ABUSE REPORTING LAWS

1. INTRODUCTION

The introduction of s 42 into the Child Care Act 74 of 1983 and s 4 of the Prevention of Family Violence Act 133 of 1993 heralds a legislative attempt to create a mechanism for the protection of the child at risk from abuse or neglect. While the Act does not expressly define the purpose of the mandatory reporting sections, the primary objective of ss 4 and 42 is believed to be the facilitation of the early discovery of instances of abuse.¹

Since the enactment of the Child Care Act, the number of reports of abuse and neglect coming to the attention of Social Welfare Organisations have increased dramatically.² Comparative statistics reveal an 84% increase in the number of cases coming to the attention of the Department of Health Services and Welfare (House of Administration) for the period 1987 - 1991. Lamentably, however, studies conducted elsewhere in the world have revealed that the under-reporting of child abuse and neglect remains a serious problem. A study conducted by the U.S. Department of Health and Human Services revealed that close on 68% of children whose condition satisfies the definition of abuse, are not reported as having been abused.³ There is a strong possibility that the position in South Africa is akin to that in America.

¹Bedil, S., 'Suffer Little Children - The Duty to Report Child Abuse (1989-1990) 19 *Business Man's Law* 19 - 39.

²See Chapter 3.

³Merriwether, M. 'Child Abuse Reporting Laws - Time for a Change' (1986-1987) 20 *Family LQ* 141.

Given this possibility of wide scale non-reporting, it is imperative that a critical investigation into ss 4 and 42 be undertaken, and that guide-lines for the accommodation of the central objectives of the mandatory reporting laws, with the enacted provisions of the sections be provided where possible.

The aim of this inquiry will therefore be :

1. To review the evolution of child abuse reporting legislation;
2. To evaluate the current status of ss 4 and 42 of the Acts and to highlight possible flaws inherent in the sections;
3. To discuss possible means of reconciling the effect of ss 4 and 42 with the laudatory objectives of Mandatory Child Abuse and Neglect Reporting Laws.

2. THE EVOLUTION OF REPORTING LEGISLATION

(a) THE POSITION IN AMERICA

The inception of the first Mandatory Child Abuse Reporting Law took place in America in the early 1960's. Growing public awareness of the devastating dimensions of child battery in society led to renewed pressure being placed upon the Government to provide greater legal protection to the child at risk from abuse. In response, the Children's Bureau of the Department of Health, Education and Welfare promulgated a model Child Abuse Reporting Statute (1963). The primary objective of the model statute being the provision of guidelines for States wishing to respond to the widespread occurrence of abuse in society. By 1967 a nation wide enactment of mandatory reporting laws had taken place.⁴

Early reporting legislation was, however, characterised by a narrow

⁴Frischmeyer, L.E. & Ballard, D.D. 'Iowa Professionals and the Child Abuse Reporting Statute - a Case of Success' (1980) 65 *Iowa Law Review* 1286-1288; Sussman, A. 'Reporting Child Abuse : A Review of the Literature' (1974) 8 *Family LQ* 245-247.

class of designated reporters ⁵ and a definition limited to the incident of non-accidental physical injury.⁶ Supplying a rationale for the singling out of physicians as the sole group of professionals required to report, the Children's Bureau stated :

'Children who have suffered physical abuse at the hands of parents or other persons responsible for their care and protection are most frequently brought or come to the attention of physicians, either in private practice or at hospitals, for care and treatment. Physicians, because of the nature of the injuries and the case histories of these children, are in an optimum position to form reasonable, preliminary judgements as to how the injuries occurred. ⁷

The advent of the Children's Rights Movement; the advancement of medical understanding on the aetiology, development and consequences of abuse; the enactment of the Child Abuse Prevention and Treatment Act (1974), and the impetus provided by the Act to ensure State compliance with the provisions of the Act, led to major reform of the child protection system.⁸

Amendments to the Statutes including :

1. An expansion of the definition of child abuse to include instances of neglect, psychological and sexual abuse.⁹
2. A widening of the base of persons compelled to report

⁵Meriwether op cit 142.

⁶ibid

⁷Mitchell, M.H. 'Must Clergy Tell? Child Abuse Reporting Requirements versus the Clergy Privilege and Free Exercise of Religion.' (1987) 71 *Minnesota Law Review* 725 at fn 14.

⁸Meriwether op cit 142.

⁹Frischmeyer op cit 1287-1288.

suspicious of abuse to the authorities.¹⁰

3. The addition of sections permitting permissive reporting by lay persons, the application of sanctions for failure to report, and the establishment of a central register to record all cases of abuse reported.¹¹

(b) THE POSITION IN SOUTH AFRICA

The inception of the first mandatory reporting law into the South African legal system took place in 1987, as a result of the enactment of the Child Care Act 74 of 1983. Prior to the enactment of the Act, medical practitioners, dentists and nurses had in terms of the law merely a moral duty to take affirmative action and report suspicions of abuse to the authorities. Failure to report the suspicion of the ill-treatment of a child, whilst constituting morally reprehensible conduct, did not create criminal or civil liability for these professionals.

The reason for this state of affairs stems from the fact that the South African legal system does not recognise, in the absence of a statutory exception, a general duty on one person to help another person who is in danger, even where such help may be readily and safely given.¹²

Citing the position of the law in this respect, Rumpff CJ held in *Minister van Polisie v Ewels*¹³ :

¹⁰ibid.

¹¹Meriwether op cit 142-143.

¹²Burchell, E.M. & Hunt, P.M.A. *South African Criminal Law and Procedure General Principles of Criminal Law* (2 ed) eds. Burchell, E.M., Milton, J.R.L. & Burchell, J.M. (1983) 112-114.

¹³1975 (3) SA 590 (A) at 596H.

'..As uitgangpunt word aanvaar dat daar in die algemeen geen regsplig op 'n persoon rus om te verhinder dat iemand anders skade ly nie, al sou so 'n persoon maklik kon verhinder dat die skade gely word en al sou van so 'n persoon verwag kon word, op suiwer morele gronde, dat hy daadwerklik optree om die skade te verhinder..

Whilst Van den Heever, in *Aquilian Damages*¹⁴ writes: '(In essence).. our legal system accepts a healthy individualism as the key note of human conduct..If every individual were liable for failure to protect others against loss, each would be compelled, in order to avoid liability, to run around and busy himself with the affairs of his neighbours, to the neglect of his own, which would lead to chaos..' ¹⁵

The effect of the inclusion of s 42 in the Act was essentially to transform, by way of statutory intervention, the moral duty to report suspicions of abuse into a legal duty to take affirmative action. But while s 42 heralded an innovative attempt to provide greater protection for children at risk from abuse, the essence of the section provided an inadequate response to the complexities of the child abuse phenomenon. In 1991, in response to public pressure, the mandatory reporting provisions of the Act were expanded dramatically to include social work professions on the list of mandated reporters. Further amendments to the provisions included the expansion of the reportable conditions of abuse from 'undernourishment' to 'nutritional deficiency disease', and the modification of the penalty provision of the Act from the threat of imposition of a fine of R1 000 to the threat of imposition of a fine of R4 000 for failure to report suspicions of abuse.¹⁶ And finally, the most recent amendment to mandatory reporting laws has

¹⁴(1944) at 37-38.

¹⁵Boberg, P Q R, *The Law of Delict* (1989) 211.

¹⁶Act 86 of 1991.

come by way of enactment of the Prevention of Family Violence Act.¹⁷ Section 4 of the Act provides that:

'Any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from any injury the probable cause of which was deliberate, shall immediately report such circumstances-

- (a) to a police official; or
- (b) to a commissioner of child welfare or a social worker referred to in section 1 of the Child Care Act 74 of 1983.'

3. REVIEW OF SECTION 42 OF THE CHILD CARE ACT 74 OF 1983 AND SECTION 4 OF THE PREVENTION OF FAMILY VIOLENCE ACT 133 OF 1993

3.1 MANDATORY REPORTERS

The basic element of all reporting laws is the existence of a list of persons required to report suspicions of abuse in accordance with the provisions of the law. Section 42(1) of the Child Care Act 74 of 1983 which provides :

"Every Dentist, Medical Practitioner, Nurse or Social Worker who examines, attends, or deals with any child in circumstances giving rise to the suspicion that the child has been ill treated, or suffers from any injury, single or multiple, the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease, shall immediately notify the Director-General, or any officer designated by him for the purposes of this Section, of those circumstances."¹⁸

reveals the designated class of persons, upon whom the statutory

¹⁷Act 133 of 1993.

¹⁸Section 42 substituted by Section 15 of Act 86 of 1991.

duty to report instances of abuse rests, to be persons possessing either, specialist skills or expertise in regard to the identification of child abuse, or, persons possessing special opportunity for contact with possible child abuse cases.

- Section 4 of the Prevention of Family Violence Act on the other hand, provides that **any person** who examines, treats, attends to, advises, instructs or cares for any child in circumstances giving rise to the reasonable suspicion that the child has been ill-treated must immediately report those circumstances to the designated authorities.

The list of person included in this section to report suspicions of abuse is wide and ranges from teachers, day care mothers, school counsellors, psychologists, baby sitters, relatives, pharmacists, members of the legal profession dealing with or advising a child to concerned neighbours.

In respect of mandatory reporting laws under the Child Care Act, the enactment of s 42(1) abrogates the physician-patient, social worker-client privilege of confidentiality of communication. Accordingly, medical practitioners and social workers are now precluded from raising the defence of confidentiality of communication, as a counter-argument to liability under ss 42(5) and 58 of the Act. Failure to act in accordance with the provisions of this section would theoretically expose both the medical practitioner and the social worker to the risk of criminal liability for failure to act in accordance with a statutory duty¹⁹ and civil liability for failure to take reasonable precautions to prevent further harm being inflicted upon an abuse child-patient.²⁰ Section 4 of the Prevention of Family Violence Act which includes

¹⁹Section 42(5)

²⁰Boberg op cit 210.

among its list of mandated reporters any person who **advises** a child can be read to have abrogated the psychologist-client and legal professional-client privilege of confidentiality of information in respect of child clients but not in respect of third party client divulging secrets of child abuse. Although in the latter instance, the attorney or psychologist may make an anonymous call to the nearest Social Welfare department or Child Protection Unit, in order to express his concern for the safety of the child.²¹

Although no civil case prosecuting reporters for failure to report have as yet, been recorded in South Africa, in the American case of *Landeros v Flood* ²² the Supreme Court of California held that a cause of action existed in favour of a battered child against a medical practitioner for negligently failing to diagnose child abuse and to comply with the applicable reporting legislation.

While some critics may contest the imposition of liability upon the premise of violation of the principle of physician-patient privilege, it must be borne in mind that '...child abuse is not a private or domestic peccadillo or perversion protected by principles of confidentiality but a grave matter calling for public scrutiny and intervention by agencies of the state..²³

Mandated professionals operating within the confines of privileged information have an obligation, first and foremost, to protect and to uphold the values of society. Children are society's greatest asset and, as such, there can be no justification for silence and the protection of the assumed interests of the family at the cost of the child's physical and mental health.

²¹For the procedure which would be followed subsequent to such a notification, see Chapter 4.

²²17 Cal 3d, 399,97,ALR3d, 324

²³Dickens, B.M. 'Legal Responses to Child Abuse' (1978) 12 *Family LQ* 15.

It should however be noted that notwithstanding the possibility of criminal and civil liability for failure to report suspicions of abuse to the authorities, under-reporting of child abuse remains staggeringly rife.²⁴ Reasons often advanced for the failure to report suspicions of abuse include:²⁵

- (a) A general unfamiliarity with the provisions of the reporting legislation;²⁶
- (b) A general reluctance to become involved in legal proceedings;²⁷
- (c) A reluctance to expose the child to the possibility of secondary victimization in the court-room.
- (d) A reluctance to believe parents would ever intentionally injure their offspring;
- (e) Difficulties experienced in attempting to identify possible cases of child physical and sexual abuse;²⁸
- (f) Fear that knowledge of section 42 would deter parents from seeking medical treatment for their injured children.²⁹

²⁴Meriwether op cit 141.

²⁵See also the Conclusion at the end of this Chapter for a review of the most common reasons for failure to report abuse to the authorities as cited by medical practitioners operating at Edendale hospital in Pietermaritzburg.

²⁶Meriwether op cit 141-142.

²⁷Frischmeyer op cit 1308.

²⁸Frischmeyer op cit 1310-1313.

²⁹Dickens op cit 15-16 writes: 'The objection that compulsory reporting will deter guardians from presenting their injured children for medical attention and other help is more intuitive than empirical. The claim that compulsory reporting law would be counter productive has never been proven by statistics in a field much given to statistical

- (g) Reluctance to expose children to the whim of an overworked, understaffed Social Welfare Organisation which, by virtue of lack of adequate financial resources, would not be able to provide the child with better life conditions than those he faces within his abusive domestic situation.

Yet, despite the valid fears inherent in reporting suspicions of abuse to the Authorities, it is submitted that the overall objective of the reporting sections remains nonetheless a worthwhile pursuit. Acting in accordance with the directions of the sections would not necessarily entail the activation of the Criminal Justice System, nor would it necessarily entail the permanent removal of the child from its domestic environment.³⁰

Ideally activation of the sections would assist the authorities in

research and anecdotal evidence tends to the contrary, although by definition non-presenting abusive guardians may not furnish materials for statistics or anecdote. Positive abuse of children tends to be triggered by crises, and when these have passed, parents show concern for treatment. The eminent authority Monrad G Paulsen has observed that "the number of parents who are willing to risk the life of their child by not seeking medical help is likely to be small. Many of those who inflict deliberate injury in moments of tension, high passion or psychological imbalance, will respond to a child's obvious needs in later, calmer times " ' .

³⁰See in connection herewith Chapter 4. The central belief of Social Welfare Organisations appear to be that it is rarely necessary to remove a child from its home while investigations are being conducted. Although, in cases where it is believed that the child may be in physical danger if it remains at home, the necessary steps to remove the child from the home will be taken. According to Section 15 of the Act, permanent removal of a child from the home environment may only take place where the Commission of Child Welfare is satisfied that the child concerned has no parent or guardian, or has a parent or guardian who cannot be traced, or is in the custody of a person unable, or unfit to have the custody of the child as determined by s 14(4) (b).

the detection of the early symptoms of child abuse and facilitate the making of necessary rehabilitative services available to a family in need - a critical first step in treating family violence.³¹

As compliance with the Acts would ultimately assist with the reduction of instances of abuse in society, it is accordingly submitted that the list of persons required to report suspicions of abuse should be broadened to include - commercial film and photographic print processors.

3.2 REPORTABLE CONDITIONS

The concept 'child abuse and neglect' is not specifically defined in the Child Care Act. Contrary to the position in a number of states in America, where the categories of reportable abuse and neglect are specifically defined³² s 42(1) merely requires the reporting of suspicions of ill-treatment, deliberate injury or

³¹Frischmeyer op cit 1343.

³²While the Child Abuse Prevention and Treatment Act (1974) defines child abuse as 'physical or mental injury, sexual abuse or exploitation, negligent treatment or maltreatment of a child', the Colorado definition of abuse or neglect is more specific - 'any case in which a child exhibits evidence of skin bruising, bleeding, malnutrition, ill-treatment, deliberate injury, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death, or circumstances indicate that such condition or death may not be the product of an accidental occurrence. Any case in which a child is subject to sexual assault or molestation, sexual exploitation, or prostitution. Any case in which a child is a child in need of services because the child's parents, legal guardians, or custodians fail to take the same actions to provide adequate food, clothing, shelter, medical care, or supervision that a prudent parent would take.

nutritional deficiency disease³³ Section 4 of the Prevention of Family Violence Act requires on the other hand, reporting of reasonable suspicions of ill-treatment or deliberate injury.

While the wording of these sections may at first blush appear rather vague and likely to promote uncertainty amongst mandated reporters as to whether a particular case falls within the parameters of reportable conditions, it must be borne in mind that as the primary purpose of reporting legislation is merely the triggering of reports of suspicions of abuse to the authorities so as to facilitate the early identification of possible cases of abuse, the inclusion of a specific definition is not fundamental to the operation of the section.

However, the inclusion of a more specific highly technical definition within the existing framework, as noted in Chapter 5, would provide invaluable guidelines for the reporters chosen to report, not because of their knowledge on abuse, but because of their contact with children i.e., social workers, as well as be warning beacons for members of the medical profession as to which acts are considered by the 'experts' to constitute probable child abuse.

3.3 DEGREE OF CERTAINTY

³³Criticism directed against the inclusion of the term 'nutritional deficiency disease' in the Act, is often grounded upon the fact that not all cases of nutritional deficiency disease are evidence of deliberate parental neglect. For example, certain categories of Nutritional Deficiency Diseases, such as Kwashikor, Pellagra, Scurvy, Berie-Berie, Folic Acid Deficiency, and Anemia, may be caused more as a result of poverty and parental ignorance, than as a result of deliberate parental neglect. See also the conclusion to this Chapter for a review of medical practitioners' opinions concerning this category of reportable condition.

For the purposes of s 42(1) of the Child Care Act and s 4 of the Prevention of Family Violence Act, it is sufficient that the person falling within the confines of the statutory duty, possess a mere suspicion of the ill-treatment, deliberate injury, (or neglect of the child as in the case of s 42(1)). Actual knowledge of abuse, is not the prerequisite to the making of the report.

As indicated earlier, Section 42(1) which reads - "Every dentist, Medical Practitioner, Nurse or Social Worker who examines, attends, or deals with any child in circumstances giving rise to the suspicion that the child has been ill treated" reveals that actual knowledge of abuse is not the prerequisite to the making of the report. Reporting is required by statute even where the reporter only suspects abuse has occurred by lacks definite and conclusive evidence to confirm the suspicion. A statutory limitation guarding against the possibility of unrestrained reporting is contained in the fact that the report of the suspicion of abuse must be grounded upon circumstances which in the normal course of events would give rise to the suspicion of abuse.

Section 4 also provides that the suspicion must be reasonable.

The test for the reasonableness of the notification is essentially an objective test - i.e. the test of the reasonable man. In that the law imposes liability upon the basis of an objective standard, for the purposes of criminal and civil liability to ensue, it would suffice if it could be shown that the reasonable reporter would have reported his suspicions of abuse or ill -treatment to the authorities. It must, however, be borne in mind that '...the objectivity of the reasonable man test does not prevent the law from demanding a higher than average degree of care from those possessed of special knowledge, skill or experience ..'³⁴ and that accordingly, while the test of reasonableness is essentially an

³⁴Boberg, op cit, 280.

objective test, the law will take into consideration the subjective element of the qualifications and level of expertise of the reporter.³⁵ This is especially relevant in respect of assessing the reasonableness of a mandated professional's report or omission to report.

3.4 IMMUNITY FROM LIABILITY

An indispensable feature of most child abuse reporting laws is the inclusion of a clause providing for immunity from civil and criminal prosecution for those acting in pursuance of the reporting law provisions.³⁶ The function of an immunity provision is essentially to enhance the effectiveness of the reporting law by eliminating the threat and fear of possible legal prosecution for those acting in accordance with their legal obligation.³⁷

Whilst numerous states in America provide immunity from civil and criminal liability to all persons reporting their suspicions of abuse to the authorities³⁸ South African reporting laws place a limitation on the scope of the immunity provision, confining it to dentists, medical practitioners, nurses and social workers.³⁹

An analysis of Section 42(6) reveals that, in addition to the

³⁵Van Wyk v Lewis (1924) AD 438 AT 444

³⁶Mitchell op cit 732.

³⁷Sussman op cit 239.

³⁸Where a State imposes a duty upon every citizen to report a suspicion of abuse, the test for immunity from criminal and civil prosecution is whether the report was made in good faith.

³⁹No provision is made in the Prevention of Family Violence Act No.133 of 1983 for immunity from criminal or civil prosecution for those acting in accordance with the section.

satisfaction of the good faith requirement, the suspicion upon which the report is founded must be reasonable and capable of objective analysis.⁴⁰

Lamentably, no immunity from prosecution is offered to concerned persons who report their suspicion of abuse to the authorities in accordance with the directives of s 4. Essentially the position of the law would be that such persons making a report in good faith which is subsequently found to be groundless, could find themselves to be either criminally liable for malicious prosecution, or civilly liable for defamation of character. Conferring immunity from prosecution upon these persons would definitely make the section more effective. Given the possibility that this type of reporting, though very necessary, could prompt the making of malicious, unsubstantiated reportings, it is submitted that the test for liability should be the same as that for the mandated reporter under s 42 of the Child Care Act, i.e. whether the report was made in good faith and based upon a reasonable suspicion of abuse or neglect.

3.5 PENALTY FOR FAILURE TO REPORT

The essence of all mandatory laws is that they create a duty upon a designated class of persons to report their suspicions of abuse or neglect to a particular welfare organisation or body. Failure to comply with the provisions of the mandatory law warrants liability. In South Africa the penalty provision of the duty is contained in s 42(5) and s 58 of the Child Care Act and s 6 of the Prevention of Family Violence Act.

The two sections applicable to the Child Care Act, when read together, reveal that failure to report is punishable with a fine

⁴⁰Bedil, L & Lind, C, 'Compulsory Child Abuse Reporting - Effective Protection?' (1989) 5 SAJHR 82-88.

not exceeding R4 000, or imprisonment for a period not exceeding one year, or to both such fine and such imprisonment. Under the Prevention of Family Violence Act, failure to comply with the provisions of s 4 would result in a fine or a period of imprisonment for three months or both a fine and imprisonment.

While there have been a number of arguments raised against the threatened imposition of sanctions for those mandated professionals such as medical practitioners, dentists, and nurses who do not comply with the directives of the mandatory reporting laws ⁴¹ the trend appears to be towards accepting the inclusion of penalty sanctions in child abuse reporting laws. As noted by Sussman, the concept mandatory reporting laws has little value if the law provides for no means to enforce its directives ⁴². In respect of medical practitioners it is submitted that the presence of penalty clause in reporting laws facilitated the reporting of suspicions of abuse, even in the face of parental disfavour, as such clauses remove the psychological barriers to reporting on a patient. Furthermore, the clauses possess the potential for intimidating reporters to act in accordance with their mandate so as to avoid the stigma attached to a legal penalty.⁴³

Given the necessity for penalty clauses, it is nonetheless conceded that the penalty clause should merely contain the threat of the imposition of a fine, and not the additional threat of

⁴¹Sussman op cit 295 writes that '...the identification of an abused child is obviously not as simple as the recognition of a gunshot wound. To provide a penalty for the failure to report a case of child abuse when its identification requires the exercise of a considerable amount of judgement and discretion is unduly harsh..'

⁴²ibid.

⁴³Sussman op cit 296.

incarceration.⁴⁴

Despite the provision of a penalty clause in s 42, there has to date never been a reported South African case of criminal action instituted against a mandatory reporter for failure to report abuse or neglect to the authorities. As such, the issue of the ethics involved in imposing a specific penalty does therefore not arise. Rather, the question 'why does this state of affairs exist, when it is well known that mandated reporters violate their statutory obligation with impunity?' One possible reason for the failure to prosecute mandated professionals under s 42 of the Act may be the lack of an established means of enforcement to ensure strict compliance with the directives of the law. Lack of an effective means of enforcement essentially places an individual responsibility upon the reporter to act in accordance with the dictates of his moral conscience. So long as there is no adequate means of enforcement, the under-reporting of child abuse will remain seriously rife. On the other hand, the establishment of a legal body to actively ensure strict compliance with the provisions of the section would contribute to the overall efficacy of the section.

3.6 PROCEDURE TO BE FOLLOWED

No specific manner of notification is required by Section 42(1). Generally, notification of abuse takes place in a number of ways, ranging from reporting suspicions verbally by way of the telephone, to notification by way of post.⁴⁵

⁴⁴Merriwether op cit 163, writes that imposing a jail sentence is overly harsh, given the possibility that the actual abuser may never even be prosecuted for his or her heinous conduct towards the child.

⁴⁵See Swanepoel, H. M. & Wessels, P. J. 'n *Prakiese Benadering Tot die Wet op Kindersorg* (1992) 77.

In the House of Administration, all reports made to the Department of Health and Welfare are placed on a computerised Central Register. The aim of the Register, established in 1989, being to ensure that a trace is kept of suspected child abuse cases and suspected child abusers. All information which is placed on to the register is confidential. Access to the information being limited to social workers. Removal of a child's name from the register takes place only after it is found that the suspicion of abuse was unfounded, or upon the eighteenth birthday of the child in question.

While the central aim of the Register is praiseworthy, research has revealed that the paperwork involved with registering suspicions of abuse with the central authority compounded by the time factor, results in a great number of cases not being recorded in the Central Register. This is particularly true in respect of social workers operating within private organisations. The existence of internal registers within the private organisation, compounded by the paperwork involved on registering reports on these registers, often deters the social worker from notifying the Central Register. A possible solution to this is either to reduce the paperwork required by the central authorities, or to eliminate the need for internal registers by updating the central register model and ensuring that social workers have easy access to all information contained within the Register.

Once notification of abuse has been made in accordance with the directives of section 42 (1), the Director-General or the officer designated by him, may issue a warrant for the removal of the child concerned to a place of safety or hospital.⁴⁶ The Director-General, or the designated officer, may then in accordance with the provisions of Section 42(3) decide upon the course of action to be followed. Possible courses of action available to the Director-

⁴⁶Section 42(2).

General include the decision to either provide rehabilitative interaction with the family and thereby maintain the family unit, or to bring the matter before the Children's Court ⁴⁷ and have the parent or guardian of the child declared unfit to have custody of the child ⁴⁸.

3.7 CONCLUSION

The inclusion of both ss 42 in the Child Care Act and 4 in the Prevention Of Family Violence Act, reveals a laudatory attempt by the South African Legislature to address the complex phenomenon of child abuse in society.

While the early South African reporting law proved to be an inadequate response to child abuse, the 1991 and 1993 enactments have served to bring South African reporting legislation closer in line with developments world-wide.

During the course of 1993, a survey was conducted among 42 medical practitioners practising at Edendale hospital, on the outskirts of Pietermaritzburg. The aim of the survey was to assess the level of the medical practitioners' knowledge on their mandatory duty in respect of child abuse. The subjects were questioned on a number of issues. Of relevance to this thesis were those relating to the level of certainty required for reporting, the manner of notification required, the agency to whom they should report, their knowledge of the legal consequences for failure to report, knowledge of the immunity provisions, as well as their general willingness to report abuse to the authorities. The following interesting but disturbing results from the questionnaire, which is annexed at the end of this Chapter, are noted:

⁴⁷Section 43.

⁴⁸Sections 14(4)(b) and 15(1)(a)-(d).

1 Only 65% of medical practitioners were 'very willing' to report suspicions of abuse. One doctor was actually unwilling to report any form of child abuse to the authorities.

Reasons cited for the reluctance to report the above were, in order of priority:

- a. Fear of additional injury to the child upon reporting.
- b. Reluctance to expose the child to an overworked, understaffed social welfare agency.
- c. Reluctance to expose the child to legal proceedings.
- d. Reluctance to become involved with legal proceedings.
- e. Fear that reporting would deter parents from seeking further medical help for an abused child.
- f. Fear of being wrong.
- g. Fear of reprisals for making the report.

2 As far as reporting of 'Nutritional Deficiency Disorders' is concerned, only 33% of medical practitioners were 'very willing' to report, 20% were 'unwilling'. The reason most frequently cited for this general reluctance, originated from the belief that the disorder is reflective of the poor socio-economic circumstances of the parents, and not abuse or neglect.

3 Concerning the level of certainty required prior to reporting, only 60% of medical practitioners were aware that full evidence was **not** required prior to the making of a report.

4 45% of medical practitioners were unaware that failure to report could render them criminally and civilly liable, and 30% did not know that they could not be held civilly liable if

after reporting the abuse, investigations revealed no evidence thereof.

5 In respect of the agency to whom reports should be made and the manner of notification required. Only 45% of medical practitioners knew that reports of abuse, should wherever possible, first be made to a social welfare department, and a staggering 85% did not know that all that was needed was a phone call!

It is obvious from this questionnaire that the majority of medical practitioners questioned were unaware of their legal obligations and the manner to effect these obligations. One shudders to think what the findings of a nation wide survey would have revealed! While it is trite to assert everyone is presumed to know the law, this assertion falls flat, when one deals with an issue relating to the protection of vulnerable children. Someone has to take responsibility for educating medical practitioners concerning their legal obligation to children. The lack of adequate enforcement measures for s 42 compounded by an apparent lack of instruction on the legal aspects of abuse facilitates the growth of ignorance amongst doctors. This situation is lamentable, given that the doctor is often the first person coming in contact with an injured child.

In order to increase the efficacy of s 42 and thereby harness the full potential inherent in child abuse reporting legislation, it is submitted that serious consideration should be given to the establishment of a more viable means of ensuring compliance with the provisions of the section. The present position of professionals violating their legal obligation with impunity is denounceable! A call is therefore made to all professional bodies dealing with child abuse to provide specialised training on the

causes and indicia of child abuse, to provide educational seminars for dispensing information on current reporting legislation, and to provide greater possibilities for intra-professional communication on the complex phenomenon of child abuse.

CHAPTER 8

THE CHILD WITNESS : INGENUOUS OR INGENIOUS? A REVIEW OF THE PSYCHOLOGICAL EVIDENCE ¹

1. INTRODUCTION

Intrinsically, the child has been deemed a witness, incapable of providing testimony free from the taint of adult suggestibility and childhood fantasy. The recent upsurge in interest in child developmental and cognitive psychology has however, led to a major re-appraisal of the child's psychological and intellectual strengths. The effect of this has been to challenge the conventional notions regarding the ability of the child witness.²

Current research has revealed that the perceived distinction between child and adult cognitive ability have been seriously exaggerated. The aim of this Chapter will be to examine prevailing objections to child testimony in the light of current psychological research and to provide a frame work upon which subsequent work dealing with the maximisation of the testimony

¹ Title taken from:

Spencer, J.R. & Flin, R. *The Evidence of Children - The Law and The Psychology* (1990) 236

²Spencer and Flin op cit 236-238. The authors write at 238: 'During the past 20 years, the enormous upsurge of interest in cognitive psychology and in child development..has permitted a reappraisal of the child's intellectual strengths. This is not to say that children are simply miniature adults: but we can say that their cognitive skills, particularly those relevant to giving evidence (e.g., perceiving and remembering people, places and events) may have been undervalued. Recent forensic research has also highlighted the ubiquitous imperfections of adult testimony, showing that mature witnesses' memories can be fragile and susceptible to the distorting influences of suggestion and misinformation. (Loftus 1979; Loftus et al. 1989). In sum, the presumed gulf between the eyewitness abilities of children and adults has been seriously exaggerated.'

of the child, can be based.

Given, the magnitude of the field, this review is perforce selective. The issues discussed hereunder emanating solely from the criticisms cited by Heydon:

'Firstly, children's powers of observation and memory are less reliable than that of an adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. Most dangerously, a policeman taking a statement from a child may without ill will use leading questions so that the child tends to confuse what actually happened with the answer suggested implicitly by the question. A fifth danger is that children often have little notion of the duty to speak the truth, and they may fail to realise how important their evidence is in a case and how important it is for it to be accurate. Finally, children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations.'³

From the outset it should be noted that Heydon's views are commonly held by a number of South African 'authorities'. For example: The South African Law Commission ⁴, Hoffmann and Zeffertt⁵ and Schreiner JA ⁶.

³Heydon, J. Evidence. Cases and Materials 2 ed (1984) see also Spencer & Flin op cit 236.

⁴See the Law Commission's Report on the *Protection of Child Witnesses* (1991)

⁵Hoffmann, , L.H. & Zeffertt, D.T. *The South African Law of Evidence* 4ed (1989) 581.

⁶R v Manda 1951 (3) SA 158 (A).

2. THE MIND SET OF THE CHILD

The contemporary salience of both the child as victim of crime and the child as witness in a court case, has prompted an increase in psychological research being conducted on the eyewitness capabilities and fallibilities of children.⁷ Of primary interest to psychologists has been the issue of whether children have the ability to accurately perceive, remember, and report a witnessed event. Numerous researchers have noted that in order for a child to be deemed a good and reliable witness, that child must have the mental ability to observe and register the event accurately, with sufficient memory to retain an independent recollection of that event in the absence of any postevent influence.⁸

Lefton, in Psychology defines memory as '...the ability to recall or remember information, events, or skills learnt in the past..⁹ Studies have shown that when information enters the memory-processing system it moves from the sensory register, the location wherein initial coding and brief storage of stimuli takes place¹⁰; into the short term memory, the memory process which temporarily stores information for immediate or short term use¹¹; and thereafter into long-term memory.

Through the application of certain experimental techniques, the differences between the respective abilities of adults and children ability to encode, store and retrieve information

⁷Spencer & Flin op cit 237-238 .

⁸Oates, R.K. 'Children As Witnesses' (1990) 64 *The Australian LJ* 130; See also Diemont JA in *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028A-C

⁹Lefton, L.A. *Psychology* 2 ed (1982) 106.

¹⁰Lefton op cit 111 notes that the duration of the visual sensory register is 1/4 second.

¹¹The duration of short term memory is about 30 seconds and has a limited capacity for 5 to 9 items. See Lefton op cit 111 for more information.

witnessed, can therefore be assessed. Research reveals that while differences in memory capabilities between an adult and a child do exist, the memory ability of a child can in certain instances, surpass that of an adult.¹²

In support of the above, Spencer and Flin write:

children's memories can be very powerful...age differences in memory performance can be easily reversed. For example, if children have superior knowledge of the subject-matter (e.g., chess or prehistoric monsters) they can remember more information than adults in a standard memory test (Chi and Ceci 1986). The same would be true of an eyewitness situation where, for example, a child who has a detailed knowledge of cars is likely to give a better vehicle description than the average adult.¹³

¹²Turtle, J.W. & Wells, G.L. 'Setting The Stage for Psychological Research On THE Child Eyewitness' in *Children's Eyewitness Memory* Ceci, S.J. Toglia, M.P. & Ross, D.F. eds, (1987) 241; Spencer & Flin op cit p239.

¹³Spencer & Flin op cit 239. See also Van Dokkum, N. 'The Preparation of the Child Complainant' unpublished paper delivered at the Durban Child Welfare AGM, December, 1993, where the author writes:

'...children have better episodic memories (a memory for events) than semantic memories (a memory of general knowledge) since the latter is a distillation of the former, and improves over time. When a child is asked a specific question, such as "What did you have for lunch at school today?", the accuracy and completeness of the answer will usually be equivalent to that of an adult. This means that children should make good witnesses, since their recall of events will be uncontaminated by what is termed "common sense". Again, this could conceivably make them better witnesses than adults, who often tend to logically organise their memories, and subsequently colour their recollection according to personal logic.

For example, an adult and a child both witness a person attempting to shoplift unobtrusively. The adult may not even notice the shoplifter because there is no reason to focus on him. The child is more likely to notice, although he or she may not realize the significance of what they see. Children are more likely to observe details of the criminal's appearance while adults concentrate on the behaviour of the offender. This developmental difference may actually lead to more accurate testimony from the child. If the child remembers several details without inferring either valid or invalid relationships, a "true" story should emerge. In contrast, adults may make inferences based on their previous knowledge of what usually happens in a particular kind of situation, and in their testimony they may unintentionally fill in gaps. Therefore the child will remember details of the offenders clothes, physical characteristics and idiosyncracies; exactly the sort of detail a prosecutor dreams about. The adult on the other hand, will have a memory based on deduction, opinion and inference. However, the chances are high that the investigating officer will take a statement from the adult but will scarcely acknowledge the child.'

Turtle notes that the significance of this is that while this does not in itself 'allow precise predictions about the situations giving rise to equal or superior performance, children's testimony regarding familiar environments (e.g., the child's own neighbourhood, bedroom, or playground) need not be considered untrustworthy on the basis of age per se.'¹⁴

Memory Assessment in Court

Essentially when children take the stand, their memory is tested in one of three ways: either through recognition, reconstruction, or recall of information stored in the brain.¹⁵ Perry and Wrightsman write that of the three '..recall is the most complex form of retention test..(in that)..(i)t requires that previously observed events be retrieved from storage with few or no prompts. It is also the form of retrieval often required of witnesses.'¹⁶ Given that recall-ability is also age-related¹⁷, the effect of the above, is the often inescapable difficulty, witnesses, especially child witnesses, will face when confronted by the full onslaught of the legal system.

It is important to note that current research investigations on free-recall ability (i.e., describe everything you saw) has however revealed, that while young children may have great difficulty in retrieving information from long term memory in free-recall testings, the age-differences evident in such testings, relate more to the completeness of the account rendered, than to the accuracy of that account.¹⁸ In support of the above, Perry and Wrightsman write '(i)t would be erroneous to assume that younger children necessarily have poorer recall

¹⁴Turtle & Wells op cit 241.

¹⁵For a detailed discussion on memory and information retrieval techniques see Perry, N.W. & Wrightsman, L.S. *The Child Witness - Legal Issues and Dilemmas* (1991) 106-117.

¹⁶Perry & Wrightsman op cit 111.

¹⁷Perry & Wrightsman op cit 111.

¹⁸Oates op cit 130.

than do older children or adults. In some cases, younger children can provide more accurate information. The important point is that because of their limited ability to use memory strategies, children often know more than they can freely recall.¹⁹

Confronting the issue of the limited recall-ability of children in general, Zaragoza contends that retrieval deficits in children exist by virtue of an inability to deal with memory in a strategic fashion, that is by means of rehearsal and the generation of images in an organised manner.²⁰ Oates, however, contends that young children's fallibilities in respect of free-recall tasks, exists by virtue of absence of schema on which to link memory and the consequent inability to record, in memory, as much detail of a stimulus as an older subject would.²¹ Perry and Wrightsman on the other hand write: '(T)heir incompetence at recall may be due to a number of factors that affect memory. Pre-schoolers appear to be ignorant of strategies (such as rehearsal or clustering) that help register information in memory. They may be limited by their inappropriate research tendencies (such as their propensity to recall the last object shown). Finally, their limited verbal ability may limit their production of available information.'²²

Whatever the reason however, of importance to the legal system, is the fact that research has shown that irrespective of age, all witnesses tend to recall central details and familiar events better than they would peripheral details.²³ Caution must however be exercised when questioning a child about the central issues

¹⁹Perry & Wrightsman op cit 113-114.

²⁰Zaragoza, M.S. 'Memory, Suggestibility, and Eyewitness Testimony in Children and Adults' in *Children's Eyewitness Memory* (1987) 65.

²¹Oates op cit 130.

²²Perry & Wrightsman op cit 113.

²³Spencer & Flin op cit 241.

of time, distance and speed.²⁴

Cashmore writes that '..(W)hile adults can usually distinguish between events which happened months ago and those which happened a year ago, children under ten or so tend to see the past '(beyond the very recent past) as a rather amorphous whole.'²⁵

She submits that it is accordingly, '..necessary to provide concrete anchor points using time or events that are relevant to the child. Questions for example might ask whether the event at issue occurred before or after their last birthday, or during the school holidays, or when they were in a certain class at school. It is quite inappropriate, for example, to ask a child to "take your mind back to 14 August 1987." '²⁶

Stress and Memory Performance

It is trite that abusive incidents, especially abusive incidents taking place over a period of time, usually generate high levels of stress for the victim.

Given the essential nature of child sexual abuse, i.e., that it could, as in the case of incest, take place over a number of years beginning from a time when the child is pre-pubescent right into adulthood, or, as in the case of rape, involve a single violent episode generating intense levels of stress, the issue of stress and memory performance assumes great importance for the legal system.

A literature survey however, indicates that in respect of this crucial issue, little scientific knowledge exists. Problems intrinsic to the study of the phenomenon arise essentially from the ethical constraints which have been placed on laboratory

²⁴Spencer & Flin op cit 241.

²⁵Cashmore, J. 'Problems and Solutions in Lawyer-Child Communication' (1991) 15 *Criminal LJ* 196.

²⁶Cashmore op cit 196-197.

studies attempting to study the phenomenon.²⁷ To overcome this problem, a number of researchers have attempted to test the issue of stress and memory performance, in naturally-occurring stressful circumstances.²⁸ These studies have unfortunately, not yielded results, consistent enough, for the making of an empirical conclusion.²⁹

Delay and Memory Performance

In a study conducted by researchers Flin, Boon, Knox and Bull, on the effect of a five-month delay on children's and adults' eyewitness memory, it was found that '...while all three age groups, six-year-olds, nine-year-olds and adults, showed a reduction in recall accuracy over this period, there was a significantly greater reduction in performance for the children, particularly the younger group.'³⁰

Expediting the processing of all criminal cases involving child witnesses is one way in which this problem could be circumvented.

Ancillary Considerations

There are a number of ancillary considerations which are to be borne in mind in respect of the issue of the memory ability of the child.

These are: stress associations relating to the courtroom appearance; inability, by virtue of immaturity, to use memory strategies to facilitate memory retrieval; and the effect of the threats, used by the assailant during the abusive episode to

²⁷Spencer & Flin op cit 246.

²⁸Examples include: visits to the dentist (Peters 1987), and to the doctor for blood testings (Goodman et al 1987).

²⁹Spencer & Flin op cit 246; Perry & wrightsmen op cit 193-195.

³⁰Flin, R. Boon, J. Knox, A. & Bull, R. 'The Effect of a Five-Month Delay on Children's and Adults' Eyewitness Memory' (1992) 83 *British Journal of Psychology* 334.

prevent against the possibility of subsequent disclosure.³¹

Circumvention of these ancillary influences may be achieved by any, or all, of the following:

1. The interview taking place as soon as is reasonably possible.
2. The interview taking place in a relaxed and informal setting, possibly in the presence of a familiar adult, but not in the presence of the accused offender.³²
3. The utilisation of external cues such as anatomically

³¹See generally, Perry & Wrightsman op cit 120-122.

³² The recent enactment of section 170A of the Criminal Law Amendment Act 135 of 1991 satisfies this requirement for a large number of regional and supreme courts, situated throughout South Africa. The section reads:

'(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may subject to subsection (4) appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.

(2)(a) No examination, cross-examination or re-examination of any witness in respect of whom the court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his evidence at any place-

(a) which is informally arranged to set that witness at ease.

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, the intermediary as well as that witness during his testimony.'

See Chapter 10 for a detailed discussion on s170.

correct dolls, cards or drawings to act as memory prompts for the child.³³

4. The utilisation of narrative interviews where the child in question is asked to describe everything he or she saw in a structured manner taking into consideration the sequence of events. (i.e., the day the child met the accused, the activities they engaged in prior to the assault, the nature of the assault itself, the activities they engaged in subsequent to the assault, the nature of the activities which took place after they parted etc).

3. DISTINGUISHING FACT FROM FANTASY

Legal concern regarding the proclivity of children to confuse fantasized events with actual experiences is believed to have originated with the infamous Salem trials of the Sixteenth and Seventeenth centuries ³⁴. Further concern regarding their ability to differentiate between fact and fantasy was influenced by the writings of Sigmund Freud who asserted that children were

³³See Chapter 10 for a discussion on the reliability of anatomically correct dolls.

³⁴Spencer & Flin op cit 257.

Based upon testimony provided by children ranging in ages from five to twelve years, the trials held in Salem, Massachusetts, resulted in 21 people being accused, tried and found guilty of practicing witchcraft and sorcery. The punishment in all but one of the cases resulting in death by hanging. In all the cases the accused denied the almost incredulous testimonies provided by the children - testimonies ranging from the accused adults transforming themselves into black cats and dark coloured rabbits, to flying on broomsticks, and materializing before the children as spirits alongside apparitions of the dead. These highly improbable observations of the children are theorised as having been caused in part, from imagination concerning the folklore of Salem (which folklore included the beliefs that the devil visited witches by assuming the form of dark-coloured animals such as black and brown dogs, black cats and black rabbits) and, in part, from the ingestion of a poisonous fungi causing hallucinations.

incapable of rendering accurate or reliable testimony.³⁵

Contemporary cognitive research has however served to refute certain ingrained assumptions concerning the unreliability of the child-witness and more specifically children's inability to differentiate between fact and fantasy by asserting that:

1. The phenomenon of integrating memories of imagined events with memories of reality is not restricted to children, but is also committed by older children and adults.
2. While childhood imagination, fantasy and make-believe play a very important and integral role in the development and maturation of children, such occurrences do not detract from the totality of the evidence provided by children.³⁶

FACTUAL MEMORY VERSUS IMAGINED EXPERIENCE

Some researchers have argued that this issue is not as problematic as may first be assumed. Contemporary psycho-legal research has recently developed a technique for distinguishing testimonies of fact, from those based upon fantasy. Current research demonstrates that memory derives from two sources; (1) externally derived memory and (2) internally derived memory. Memories of externally derived experiences (factual experiences)

³⁵Lindsay, D.S. & Johnson, M.K. 'Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources' in *Children's Eyewitness Memory* op cit (1987) 95-96.

Freud, in the latter half of the nineteenth century asserted that young children had a proclivity to confuse fantasized events with actual experiences, and that as a consequence thereof, young children were incapable of rendering reliable or accurate testimony. Freud alleged that the untrustworthiness of the assertions of children was as a result of the predominance of their imagination. The basis for this assertion, is believed to have been founded upon Freud's mistaken interpretation of accounts of traumatic child sexual abuse experiences as being memories of childhood fantasies rather than memories of genuine childhood encounters.

³⁶Spencer & Flin op cit 258. For a general discussion on the above see Lindsay & Johnson op cit 103-116.

are regarded as comprising of more contextual, sensory and detailed information, than memory of internal or imagined experiences. Internally generated memory, in contrast, is found to include greater application of cognitive operations in order to create the memory. Essentially then, the manifest difference between experienced events and a witness's internally generated events, is that the former exhibits greater sensory, spatial, and temporal information.³⁷ Van Dokkum writes that these differences can be used to identify the origin of memories.³⁸

However, while this technique could provide an intriguing test for the legal professional requiring knowledge of the veracity of a statement, lack of extensive testing of the technique within strict methodological controls, has resulted in the technique not meeting the Frye standard of approval (i.e., general acceptance by the social sciences community), and hence, not being recognised by the majority of legal systems.³⁹ An exception to this situation is however found in Germany.

Briefly, the German legal system is inquisitorial in nature. This means that the basic aim of the judicial system is that of 'fact-finding' with the principal consideration of the prosecution being the clarification of issues under investigation. In respect

³⁷Dunning, D. 'Research on Children's Eyewitness Testimony: Perspectives on its Past and Future' in *Perspectives on Children's Testimony* Ceci, S.J. Ross, D.F. & Toglia, M.P. eds. (1987) 242-243.

³⁸Van Dokkum op cit 1.

³⁹In the case of *Frye v United States* 293 F 1013 (DC Cir 1923) at 1014, the United States Court of Appeal for the District Columbia Circuit held: 'Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognised and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*' (italics inserted)

of child sexual abuse cases, the court is obligated to call an expert witness for the assessment of the credibility of the child's testimony, where such constitutes the only, or main evidence not corroborated by any other evidence. The major diagnostic tool accepted for this evaluation, is that of Statement Analysis, a method akin to the one documented above. The use of this method is essentially based upon the assumption that '..a (child) witness will usually not be able to fabricate an invented story containing the same quality of content as a report on a self-experienced real event would include.'⁴⁰

Briefly, this technique requires that the expert assesses the general level of the witness's cognitive, social, and emotional development; the nature of the statement - i.e., to whom was it made, when was it made, what was said; the social relationship between the witness and the accused; and the witness's verbal competence. This material is then compared with samples from the witness's imagination. The results obtained from the comparison are then applied to the witness's testimony, and assessment is made as to probable veracity of that testimony.⁴¹

Expectedly, there exists meagre experimental data supporting the validity of the statement analysis approach. Reports out of Germany on its validity are controversial.⁴² Further research is accordingly required, prior to uniform acceptance of this approach, as an important tool for the evaluation of statement credibility.

Childhood Fantasy and Sexual Abuse

In respect of the matter of fantasy and allegations of sexual

⁴⁰Kohnken, G. & Steller, M. 'The Evaluation of the Credibility of Child Witness Statements in the German Procedural System' in *The Child Witness - Do The Courts Abuse Children?* Davies, G. & Drinkwater, J. eds. (1988) 38.

⁴¹See Kohnken & Steller 37-44 for a detailed examination of Statement Validity Analysis.

⁴²Kohnken & Steller op cit 42-43.

abuse, it has been asserted that young children lacking in sexual knowledge are incapable of lying or fantasizing about sexual acts, especially in the explicit detail with which they are frequently alleged to have been experienced. Numerous researchers have commented that given the cognitive and imaginative capacities of children, detailed descriptions of sexual involvements, in the absence of other factors, should be seen as stemming from the reality of past abuse rather than from the child's imagination.⁴³

In respect of the argument that an allegation may have stemmed as a result of exposure to such things as, pornographic material or observation of adult acts of sexual intercourse, and not as a result of actual involvement itself, some researchers argue that a qualitative difference between information acquired from actual participation and that acquired from vicarious knowledge is apparent wherever such information is examined by an expert-interviewer.⁴⁴

4. EGOCENTRICITY

There is a need to examine the common belief that a child is extremely egocentric and that therefore details seemingly unrelated to their own world will be quickly forgotten by them.

Lefton defines egocentrism as '..an individual's failure to perceive a situation or event in more than one way; in infancy, it is the attitude that directs all concerns and behaviours to personal interests and needs'.⁴⁵ In the individual, egocentrism may assume the guise of either moral deficits, and/or, cognitive deficits. Moral egocentrism comprises the absence of concern

⁴³Spencer & Flin op cit 259 263; Vizard, E. 'Interviewing Young, Sexually Abused Children-assessment techniques' (1987) *Fam LJ* 24.

⁴⁴Spencer & Flin op cit

⁴⁵Lefton op cit 259.

regarding the impact of the individual's actions upon others, whilst cognitive egocentrism comprises the lack of appreciation for other perspectives and attitudes, compounded by the operation of selective memory limited to information having personal significance.⁴⁶

While psychological research has revealed egocentrism to permeate all developmental stages of man, displays of egocentric behaviour and thought patterns have been characteristically isolated as being predisposed to childhood intellectual development. According to Piaget, the father of the study of the development of intelligence in children, the onset of the egocentric mode of thought occurs at birth and remains operative until about the ages of seven or eight, or until such time that the child reaches the concrete operational stage of intellectual development.⁴⁷

While childhood egocentrism is not positively correlated with the distortion or misrepresentation of important facts, the major problem inherent in childhood egocentrism becomes evident whenever a young child attends court as a witness and is required to provide important information to fill in the missing links.

⁴⁶Spencer & Flin op cit 251-252.

⁴⁷ Piagetian theory on human intellectual development divides the course of intelligence maturation into four stages, with each stage requiring successful completion prior to the commencement of the next stage.

Briefly the four stages of development are :

(1) The sensory motor stage (0-2 years) - A period during which the child begins to interact with the environment and during which the rudiments of intelligence are established.

(2) The preoperational stage (2-7 years) - A period during which symbolic thought is developed.

(3) The concrete-operational stage (7-11 years) - A period during which the child develops thought processes enabling him or her to understand constant factors in the environment, rules, and higher order symbolism.

(4) The formal-operational stage (12 years and onwards) - A period during which the child masters hypothetical thought processes and deductive logic.

For more information concerning this see Lefton op cit 255-293.

Classical Studies on Child Egocentrism

Classic studies on childhood egocentrism and the legal system, reveal that cognitive egocentrism may have detrimental effects on the child's testimony. In a study conducted by Warren-Leubecker on 74 children ranging in ages from five until fourteen, it was found that very young children suffered from cognitive egocentrism and were unable to appreciate other people's levels of understanding concerning a particular issue.⁴⁸

Participants in the Warren-Leubecker study were asked to analyse a legal story and to answer a number of questions relating thereto. Interpretation of the findings revealed cognitive egocentrism to have been apparent in the answers of the majority of children, and evidenced by the belief that all that was required for the establishment of the story's principal character, was the communication of a simple statement of innocence, and that since such statement was the truth, it should automatically have been believed by the adult characters in the story.⁴⁹

Based on the findings, Warren-Leubecker argues that children are egocentric in the sense that, if they know something then they expect that adults - particularly adults in authoritative positions - should know it too. Hence, questions concerning events and information which children believe adults have knowledge of, are believed to account for the tendency of children to provide only sketchy free-recall of events questioned. Essentially, an inability to appreciate the listener's perspective or understanding of a particular issue,

⁴⁸Warren-Leubecker, A. Tate, C.S. Hinton, I.D. Ozbek, I.N. 'What Do Children Know about the Legal System and When do they know it? First Steps Down a Less Travelled Path in Child Witness Research' in *Perspectives of Children's Testimony* eds Ceci, S.J., Ross, D.F. Toglia, M.P. (1989) 171-175.

⁴⁹Warren-Leubecker op cit 174.

would necessarily translate into an inability of the child, to take the listener's perspective, which would in turn lead to deficits in the forming or modifying of messages.⁵⁰

While the propensity for egocentric thought processes and behavioural manifestations in children requires an awareness and understanding of the intellectual stages of a particular child being questioned, researchers, Yuille and King, have made the observation that the '...real danger of egocentrism may be the egocentricity of the adult who is unable to appreciate fully, the child's perspective in an interview...'⁵¹ Other displays of adult egocentrism may be evident through the adults overestimation of the child's linguistic fluency.⁵² Explaining the above, King and Yuille write that '...(T)here is a considerable difference between the child as speaker and the child as listener. The child's performance in monologue can cause us to overestimate his or her linguistic competence. As a listener in a child-adult conversation the child is not in control and must use all the cues available, verbal and nonverbal, to aid in understanding the message. Children are enormously adept at drawing upon all available information in such situations, and the results are usually an intelligible interchange. At times, however, this contextual sensitivity can result in confusions and misinterpretations...'⁵³ It is submitted that such phenomenon could however, be circumvented through the utilisation of age-appropriate interviewing techniques, speaking slowly, asking simple questions, avoiding complex sentences which place two distinct ideas alongside one another.

5. SUGGESTIBILITY

⁵⁰Warren-leubecker op cit 174.

⁵¹Spencer & Flin op cit 252.

⁵²King, M.A. & Yuille, J.C. 'Suggestibility and the Child Witness' in *Children's Eyewitness Ability* eds Ceci, S.J. Toglia, M.P. Ross, D.F. (1987) 29.

⁵³King & Yuille op cit 29.

A long-standing legal concern regarding the child witness, relates to the belief that children are prone to invention and not capable of accurate recall of information uncontaminated by suggestion. Indeed, many legal experts and psychologists have regarded susceptibility to suggestive and/or misleading questioning as being a particularly grave but unavoidable feature of childhood.⁵⁴

Contemporary psychological research has however challenged ingrained assumptions on the suggestibility of the child witness, arguing that : (1) age per se is not a particularly useful predictor of suggestibility ⁵⁵; (2) adults are also highly susceptible to suggestive questioning ⁵⁶; (3) the likelihood that a given witness will be susceptible to suggestive questioning is a function of the witness' personality characteristics combined with the stress inherent in the interviewing situation ⁵⁷; and (4) children, even very young ones, can give valuable testimony when properly prepared and interviewed ⁵⁸.

Explanations concerning child-suggestibility, cite the operation of either (a) the Social Dominance/Social Conformity Phenomenon or (b) the apparent cognitive malleability of the child, as reasons for the assumption that a child is more prone to suggestive questioning than an adult.⁵⁹

⁵⁴Spencer & Flin op cit 253. King & Yuille op cit 24-25.

⁵⁵Spencer & Flin 257.

⁵⁶Spencer & Flin op cit 253.

⁵⁷Spencer & Flin op cit 256.

⁵⁸Berliner, L. & Barbieri, M.K. 'The Testimony of the Child Victim of Sexual Assault' (1984) 40 *Journal of Social Issues* 129.

⁵⁹Davies and Flin op cit 26 write that if distinction between the two possible reasons noted, were possible, such would have important implications for the legal system '...because if suggestion is predominantly of a social kind, then it implies the possibility of reversal at a later time with a more sympathetic and sensitive interviewer'.

In respect of the latter, a study was conducted by King and Yuille ⁶⁰ concerning the manipulation of central and salient aspects of an event wherein it was established that although young children were susceptible to suggestive questioning, such suggestibility was confined solely to peripheral as opposed to central detail.⁶¹ The researchers write '(t)hese results demonstrate that younger children are capable of resisting suggestions about matters that are salient and memorable..this resistance decreases for less salient aspects of the event'.⁶²

These findings have particular importance in respect of the examination of the testimony of child sexual abuse victims and witnesses. In a study conducted by Goodman it was found that young children were extremely unlikely to make false reports of abuse in response to suggestive and misleading questioning concerning the allegation of abuse.⁶³ Expanding upon this, in one set of experiments Goodman attempted to assess a child's suggestibility to a potentially stressful and personally significant situation, and concluded that regardless of age, questions concerning central factors were answered more accurately than questions concerning peripheral factors. In addition to the above, she stated that in respect of questions concerning areas of interest to child sexual abuse cases, children ranging in ages from three to six scored above 90% accuracy, to questions such as "Did the person kiss you ?" "Did the person hit you ?" "Did the person touch you anywhere other than your arm/thigh ?"⁶⁴

⁶⁰King & Yuille op cit 26-27.

⁶¹ King & Yuille op cit 25-28. See also: Glaser op cit 488; Spencer & Flin op cit 253-255.

⁶²King & Yuille op cit 27.

⁶³Spencer & Flin op cit 254-255.

⁶⁴Goodman, G. Aman, C. Hirschman, J. 'Child Sexual and Physical Abuse: Children's Testimony' in *Children's Eyewitness Memory* eds Ceci, S.J. Toglia, M.P. Ross, D.F.(1987) 15-17. See also: Davies, G. & Flin, R. 'The Accuracy and Suggestibility of Child

An important point to note in respect of the above is that while it has been asserted that children are less prone to suggestive questioning when the question concerns principal as opposed to peripheral detail, 'central and peripheral detail should be defined in terms of the child's and not the adult's perception of the events.'⁶⁵ In a study conducted by King and Yuille, it was observed that often what may appear to an adult to be a central factor, may not be so for a child and vice versa. In this study, children ranging from eight to fourteen years were exposed to a staged bicycle theft. Thereafter the children were subject to an interview of what they had witnessed, each interview included two misleading questions. One of the questions supplied misleading information concerning the thief's hat (he had not been wearing one at the time of the theft) and the other question concerned the thief's shoes. The researchers had assumed that as the absence of a hat would have been a salient characteristic, children would not be susceptible to suggestion concerning its presence and that, as footwear was a less salient characteristic than headwear, misleading information concerning it would have great influence upon the response of the children. The results of the questioning however revealed that whereas to the adult interviewers, the thief's headwear was of central importance and therefore the only factor to be resistant to suggestion, the majority of children in the study had found both the thief's headwear and his footwear to be of central importance and hence, were resistant to suggestive misleading information in both these cases.⁶⁶

In respect of the operation of the Social Dominance Phenomenon, research data suggests that young children may be susceptible to suggestive questioning as a result of the child acknowledging the superior status of the adult, and submissively complying with any

Witnesses' in *The Child Witness - Do the Courts Abuse Children?* eds Davies, G. & Drinkwater, J. (1988) 25-26.

⁶⁵Spencer & Flin op cit 254.

⁶⁶King & Yuille op cit 26-27.

suggestions which the interviewer makes during the course of the questioning.⁶⁷

Davies and Flin write that knowledge concerning which of the two primary factors it is, that causes a child to yield to suggestive questioning, can have important implications for the legal system given that '..if suggestion is predominantly of a social kind, then it implies the possibility of reversal at a later time with a more sympathetic and sensitive interviewer'.⁶⁸ At the present point in time, little is known as to the antecedent for suggestibility. Whatever this is, the legal system would have to accommodate it. While contemporary research is still in the process of pinpointing the exact antecedent for suggestibility, other factors believed to play a role in the precipitation of suggestibility should be reviewed with possible attempts to minimise their risks formulated.

Spencer and Flin, propose the following as assuming a precipitative character: (1) the child's unfamiliarity with the social rules of a formal interview and consequent attempts to make sense of the whole situation by being sensitive to all possible cues given by the adult interviewer; (2) the child's aim to terminate the interview as quickly as possible; (3) the belief that it is better to hazard a guess than to appear ignorant; and (4) the belief that an adult's request for a confirmation of an answer already provided is indicative that the first response was incorrect.⁶⁹

Solutions aimed at minimising the overall risk of suggestibility in these situations could include:

- (1) The interviewer explicitly communicating to the child, the interviewer's lack of knowledge concerning the events to

⁶⁷Spencer & Flin op cit 255. King & Yuille op cit 27-28.

⁶⁸Davies & Flin op cit 26.

⁶⁹Spencer & Flin op cit 255.

which the child is to be interviewed.

- (2) The interviewer supplying the child, at the commencement of the interview, with understandable, unambiguous and comprehensive instructions as to the course the inquiry will follow, the nature of the questions which will be asked, and that which will be expected of the child.
- (3) The interviewer giving the child explicit instructions to say 'I don't know' if uncertain as to the answer of the question.
- (4) Avoiding repetitive questions to the child.
- (5) Avoiding the use of leading questions.
- (6) Interviewing the child on familiar territory.
- (7) Communicating to the child, that the interviewer is only concerned with what the child remembers and that forgetfulness of a detail or gaps in his memory are expected.⁷⁰

6. FALSE ALLEGATIONS

Little is known about the actual prevalence of sexual activities between adults and children in the community. A review of the number of cases reported to both the Child Protection Unit of the South African Police and the numerous welfare agencies throughout South Africa reveal the estimated incidence of sexual abuse of children to be extremely high.⁷¹ Despite the high incidence of reported occurrences, a view endemic among both legal writes and society at large is that not only are children unreliable and

⁷⁰Spencer & Flin op cit 256. In respect of point 6 it is submitted that as research has time and time again revealed that the less intimidating the conditions the child is exposed to during the course of the interview, the more resistant the child would be to suggestive questioning, resistance to suggestive questioning could be facilitated not only by removal of the child to familiar territory but also through the permitting of the child to sit on the lap of familiar adult not directly involved in the case, during the course of the examination, or in the case where, special 'children's court rooms' are available, permitting the familiar adult, to sit in on the examination.

⁷¹See Chapter 3.

incompetent witnesses, but the veracity of their allegations of sexual abuse needs to be carefully scrutinized.⁷²

Several studies have been conducted, challenging ingrained assumptions concerning the propensity for false allegations of sexual abuse.⁷³ In one such study conducted by Jones in 1985, it was found that of the 576 sexual abuse cases reviewed, only 7.81% of the cases were proven to be fictitious and that of these fictitious allegations only 1.56% were falsely generated by children⁷⁴, and 6.25% of those fictitious allegations were made by adults.

Murray and Gough in *Intervening in Child Sexual Abuse* cite Myers as suggesting that false allegations made by adults of sexual abuse, are more likely to occur in divorce and child custody proceedings than in any other context.⁷⁵ Discussing the dynamics behind the occurrence, Murray and Gough write:

'..(O)n the one hand, the emotionally charged atmosphere of a divorce or custody proceeding may cause one parent to misinterpret the child's account of a stay with the other parent, leading to an unfounded accusation. This emotional setting may also encourage parents to make false accusations in order to gain or retain custody rights, to prevent the other spouse from exercising visitation rights or simply to be malicious..'

The authors observe that the emotional strain of divorce proceedings may produce a potent breeding ground for child

⁷²Numerous critics have asserted that this widespread distrust of children's ability to be truthful has in the past been founded upon the legal assumption that allegations by women of sexual assault were false, and that complaints of sexual offences by children were correspondingly false as well.

⁷³Spencer & Flin op cit 267; Murray, K. & Gough, D.A. *Intervening in Child Sexual Abuse* (1991) 5.

⁷⁴King & Yuille op cit 24.

⁷⁵Murray & Gough op cit 5.

molestation by parents, and accordingly, as marital trust evaporates, spouses may notice abuse, where previously this may have gone unnoticed. Similarly, the breakdown in marital trust may enable a parent to confront the sexual abuse known to have occurred during the marriage itself.⁷⁶

Although the percentage of false allegations made by children in comparison with the percentage of false allegations made by adults is sizeably lower, legal opinion appears towards believing that children's allegations should be regarded with suspicion due to their tendency to make false statements concerning abuse.⁷⁷ In a study, conducted in America, by Leippe, to assess the extent of scepticism of both prosecutors and defence attorneys in respect of child allegations of sexual assault, data revealed that both prosecutors and defence attorneys believed complete fabrications of sexual assault to occur at rates of one in every six cases of abuse reported, for the age groups five to nine years.⁷⁸ While no such study has been conducted in South Africa, it is submitted that a high probability exists that the position is akin to that in America.

Overall, false allegations of sexual abuse made by children are an extremely rare occurrence and should be distinguished from

⁷⁶The authors note that it is not unusual for a child to disclose abuse for the first time during the breakup of the family - this results from the inability of the abusing parent to pressure the child to remain silent during period of separation.

⁷⁷Schreiner JA in R v Manda 1951 (3) SA 158 (A) at 163C: '(T)he dangers inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps to suspicion'.

⁷⁸Leippe, M.R. Brigham, J.C. Cousins, C. Romanczk, A. 'The Opinions and Practices of Criminal Attorneys Regarding Child Eyewitnesses: A Survey' in *Perspectives of Children's Memory* eds Ceci, S.J. Toglia, M.P. Ross, D.F. (1989) 111-112.

cases where (a) the child-victim makes a valid complaint of sexual assault but identifies the wrong person as the perpetrator; and (b) where the child fabricates a complaint as a result of adult coaching.⁷⁹ Researcher Warren-Leubecker has revealed that while manipulative adults may coach children into making false statements, such coaching is not easy and would become very apparent during the cross-examination of the child.⁸⁰ Documenting the distinctive characteristics of false allegations, Danya Glaser writes that ‘..(F)alse allegations...are usually made in a rehearsed manner and often using language which is beyond that expected of the child..’⁸¹

False Retractions versus False Allegations

Research has found that children are more inclined to make false denials and false retractions, than false allegations of abuse. The sexually abused child’s proclivity for false denials of abuse is an inherent aspect of the Child Sexual Abuse Accomodation Syndrome, as noted in Chapter 2. Discussing the phenomenon Summit writes:

‘..Whatever a child says about sexual abuse, she is likely to reverse it. Beneath the anger of impulsive disclosure remains the ambivalence of guilt and the martyred obligation to preserve the family. In the chaotic aftermath of disclosure, the child discovers that the bedrock fears and threats underlying the secrecy are true. Her father abandons her and calls her a liar. Her mother does not believe her or decompensates into hysteria and rage. The family is fragmented, and all the children are placed in custody. The father is threatened with disgrace and imprisonment. The girl is blamed for causing the whole mess, and everyone seems to treat her like a freak. She is interrogated about all the tawdry details and encouraged to incriminate her father, yet the father remains unchallenged, remaining at home in the security

⁷⁹Spencer & Flin op cit 265.

⁸⁰ Spencer & Flin op cit 273. The authors note at 270 that the transparency of a child’s fabrications has led to the deeply entrenched legal assumption that children tend to lie more more frequently than adults and older children.

⁸¹Glaser op cit 488.

of the family. She is held in custody with no apparent hope of returning home if the dependency petition is sustained.

The message from the mother is very clear, often explicit. 'Why do you insist on telling those awful stories about your father? If you send him to prison, we won't be a family anymore. We'll end up on welfare with no place to stay. Is that what you want to do to us?' Once again, the child bears the responsibility of either preserving or destroying the family. The role reversal continues with the 'bad' choice being to tell the truth and the 'good' choice being to capitulate and restore a lie for the sake of the family.

Unless there is special support for the child and immediate intervention to force responsibility on the father, the girl will follow the 'normal' course and retract her complaint. The girl 'admits' she made up the story. 'I was awful mad at my dad for punishing me. He hit me and said I could never see my boyfriend again. I've been bad for years and nothing seems to keep me from getting into trouble. Dad has plenty of reason to be mad at me. But I got real mad and just had to find some way of getting out of that place. So I made up this story about him fooling around with me and everything. I didn't mean to get everyone in so much trouble'.⁸²

A major problem concerning the occurrence of false retractions of sexual abuse, is the fact that if such is allowed to go undetected, the situation may become one which is potentially very dangerous for the child.⁸³ Determination of the veracity of an allegation should be given the highest priority, not only in cases where the child is insistent that the allegation is true, but also in cases where a child, after lodging a complaint, becomes insistent that it did not occur. This determination falls largely into the social work province, but could have a bearing on the legal system in instances where the retraction takes place subsequent to the commencement of the legal proceedings.

7. INTERVIEWING TECHNIQUES AND THE MAXIMIZATION OF THE CHILD'S TESTIMONY

The final issue to be reviewed hereunder, relates to the maximization of the child's testimony, through the utilisation

⁸²Summit op cit 188.

⁸³Spencer & Flin op cit 269.

of specific and age-appropriate interviewing techniques. Notwithstanding, the suggestions contained above, the following proposals are worthy of sensitive consideration.

Firstly, it must be borne in mind that the competence of the child to interact with the legal system, is essentially a function of the competence of those dealing with them, within that system.⁸⁴

Secondly, it must be borne in mind that the comprehension of questions forms, is dependent upon the age-level of the child. According to the research of Bloom and Lahey, it was found that between the ages of two to three, a child comprehends questions of the 'yes-no' and 'where, what, and what do..' nature. Between the ages of three to four, a child comprehends, in addition to the above, questions of a 'who, whose, why, how many, and how' nature. And, between the ages of four to six, a child comprehends 'how much, how long (duration), how far, how often, how long (time)' questions.⁸⁵

Thirdly, those examining the child's testimony must be aware that a young child does not have the communicative ability to monitor everything that it says in relation to consistency and completeness of response. This may be in part due to (a) children's general inability to provide an orderly sequence of events, (b) their tendency to commit time-framework errors and (c) over-extension and under-extension of words.

Circumvention of problem (a) is easily effected, through explaining to the child that the answer given is inadequate, and that more information is required, and through assessment of whether there is in fact, concordance between the interviewer and

⁸⁴Cashmore op cit 193.

⁸⁵Perry & Wrightsman op cit 125.

the child concerning conceptualizations of the terms used.⁸⁶ In respect of (b) it is submitted that young children possess a manifest inability to distinguish between events which happened at different times. As noted above, young children do not respond well to conceptualizations of time, as would an adult. A child's relation to time is sensitive to specific important events such as christmas, easter, birthdays, school holidays, day/night and possibly even favourite TV programmes.

In respect of (c) Perry and Wrightsman give an example of over-extension of words in the child's vocabulary, as occurring in cases where a single word is used to cover a list of objects possessing a common factor with the word, i.e. where the term 'doggie' is used to cover all species of four-legged animals covered with fur.⁸⁷ The courts must accordingly, be very careful to decipher the specific meanings of words used by a young child witness. By way of example, the word 'stick' in the sentence '..and then he touched me with a stick' may refer to both a a wooden object and a penis! Careful questioning by the courts as to the similarities and differences between words used to describe perceptions may be necessary in order to minimise adult confusion.⁸⁸ Under-extension of the meaning of a word would be apparent in the case where the child who was sexually abuse through oral-sexual contact answered a question concerning sexual abuse in the negative, believing that sexual abuse referred only

⁸⁶Cashmore op cit 196 writes: Children's usage of certain terms commonly used in court-based situations such as 'remember' and 'forget', and 'know' and 'guess' may also be different from adult usage. Adults use 'remember' and 'forget' to indicate current ability to know something in terms of previous knowledge; you cannot be said to have forgotten something if you did not previously know it. this is not the case for younger children, however, because they base their judgement on current on current performance, independent of previous knowledge, 'I forget', may therefore mean that they do not know, not that they knew before and now do not.

⁸⁷Perry & Wrightsman op cit 126.

⁸⁸ibid.

to penetration of the vagina by the penis.

Finally, leading questions, negative and double negative statements, multi-faceted questions, questions possessing a degree of circularity, and repetitive questioning around a specific area, are all forms of questioning which could lead to the general confusion of the child and the detracting from the child's credibility in the eye's of the court.

7. CONCLUSION

Current psychological research challenges the conventional notions concerning the ability of the child in the court room, revealing them to be without justification in the greater majority of cases. While caution should still be applied in the application of these findings - i.e., research in this area is still in the early stage and hence extrapolation of empirical data should be avoided at all costs - it is imperative, in the light of the burgeoning increase in the number of children being called upon by the State to participate in the legal process, that the legal system begin to realign its beliefs on the ability of the child witness, with contemporary psychological postulations.

CHAPTER 9
SECONDARY VICTIMIZATION OF THE CHILD
WITNESS-
THE IMPLICATIONS OF STRESS ON THE CHILD'S
TESTIMONY

1. INTRODUCTION

Growing societal awareness of the magnitude of child sexual abuse has been accompanied by a concomitant increase in concern, regarding the emotional effects of criminal court involvement for child sexual abuse victims.

Legal and psychological literature abounds with opinion concerning the stressful effect of participation in the legal system for the child witness.¹ Extracts from legal literature reveal the following belief structures:

Myers in the Journal of Family Law:

'Involvement in the legal system is hard on children. The trauma of abuse may be compounded by the trauma of the Criminal Justice System'.²

Avery in the Criminal Justice Journal:

'Often many child abuse cases are not reported because of the treatment the child victim receives within the judicial process. Mental health professionals have found that legal proceedings can have a profoundly disturbing effect on the mental and emotional health of the child victim. Stigma, embarrassment and trauma to the child, sometimes with lifelong ramifications, are increased by involvement in the current judicial system. The effect can serve to perpetuate a problem which is

¹Berliner & Barbieri op cit 125-137; Davies, G. & Drinkwater, J. *The Child Witness - Do The Courts Abuse Children?* Issues in Criminological and Legal Psychology No (1988) 13 6-70; Dent, H. & Flin, R. *Children as Witnesses* (1992); Spencer & Flin op cit 282-305.

²Myers op cit 182

often already self-perpetuating, especially in incest cases'.³

Lord Mackay in *The Evidence of Children - The Law and The Psychology*:

'Today there is growing recognition by all those involved that, where a child has suffered or is a witness to a serious, violent or sexual attack, to appear in court seeing the perpetrator again, and facing cross-examination can cause anguish, may often be terrifying, and can sometimes have traumatic effects. Unnecessary stress in such a situation cannot be in the interests of the unfortunate children involved and it certainly does nothing to further the interests of justice'.⁴

And finally, Jacqueline Parker in the *New England Law Review*:

'It is perhaps one of the most tragic ironies of modern court procedure that renders the court both the child protector of last resort and one of the most serious perpetrators of child abuse. The child witness often faces victimization in the courtroom. Criminal procedures that operate solely to vindicate a societal interest often fail to take into account the psychological damage that can be done to a young child in the role of a witness'.⁵

The recent salutary enactment of s 170A of the Criminal Law Amendment Act 135 of 1991, is but one of a number of measures which have been adopted by the South African legal system to ameliorate the position of the child witness within the adversarial legal system. While a more comprehensive assessment of s 170A will take place in Chapter 10, it suffices for this chapter to provide a rough outline of the enactment.

Section 170A provides for the utilisation of intermediaries in

³Avery, C. 'The Child Abuse Witness: Potential For Secondary Victimization' (1983) 1 *Criminal Justice Journal* 3-4.

⁴Spencer & Flin op cit 285.

⁵Parker, J. 'The Rights of the Child Witness: Is the Court a Protector or Perpetrator' (1982) 17 *New England Law Review* 643.

criminal cases involving children below the age of eighteen, where in the opinion of the court, such proceedings would expose the child to undue mental stress and suffering.⁶ Subsection 3(a)-(c) further permits the evidence tendered by the child witness, in respect of whom an intermediary has been appointed, to be given in a place, informally arranged, so as to place the witness at ease, outside the sight and hearing of any person who may set the witness ill at ease, and via the use of screens or a live video-link, or any other electronic device(s).

Notwithstanding the obvious advantages of the section - i.e., the minimisation of trauma for the child witness; the maximisation of their ability to provide more detailed and accurate testimony; and the more equitable balancing of interests of the parties to the proceedings - there are still a number of problems concerning the secondary victimisation of the child by the legal system, which the section is clearly incapable of remedying.

These problems include: (1) the fact that the child will possibly still have to wait for an extended period of time before being able to give evidence to the court; (2) the fact that the child will still be required to relive the traumatic experience of the abuse through repeated narration of events; and (3) the fact that the child will be expected to provide a comprehensive account of the events to a stranger.

In the light of evidence supporting the contention that:

1. Participation in the legal system may be a distressing and confusing experience for a child;⁷
2. Reliving the traumatic experience of sexual abuse through recall and narration may prove to be as traumatic as the actual experience itself;⁸ and

⁶Section 170A (1)-(2)(a).

⁷Berliner & Barbieri op cit 125-137.

⁸Berliner & Barbieri op cit 125-137.

3. Increased anxiety and apprehension may lead to a decline in memory ability and performance.⁹

Further amendments to the law in respect of easing the stressful burden placed upon the child by the legal system must be given sensitive consideration.

'If our society believes that sexual molestation is a serious crime then it seems logical that special techniques which not only encourage the co-operation of child witnesses but at the same time acknowledges the inherent limitations of a child's performance.'¹⁰

2. THE CAUSES OF STRESS FOR THE CHILD WITNESS

Any attempt to eradicate the problems inherent within the system in respect of the child witness, must of necessity, be based upon accurate and systematic research into the causes and effects of stress upon the child witness prior to, during and subsequent to the court appearance.¹¹ While it is evident from the above that the appropriateness of legal involvement in the issue of child sexual abuse, is for a number of reasons, a matter of intense concern. Psychological research has to date, tended to focus more upon the competence and credibility of the child witness than on the effects of stress upon the child witness.¹²

Where research has been conducted, the following factors have been isolated as causing undue mental and emotional strain upon

⁹Perry & Wrightsman op cit 193-195.

¹⁰Berliner & Stevens cited in Gwynn, P. 'Investigating Child Abuse: The Bexley Project' in *The Child Witness - Do the Courts Abuse Children?* 65.

¹¹Spencer & Flin op cit 286.

¹²Flin, R.H. Stevenson, Y. & Davies, G.M. 'Children's Knowledge of Court Proceedings' (1989) 80 *British Journal of Psychology* 285-286.

the child: ¹³

1. Repeated interviewing of the abuse.
2. Removal of the child from the home.
3. Delay between reporting the abuse and the trial itself.
4. Postponements and adjournments of the case.
5. Lack of knowledge of the judicial process.
6. Lack of knowledge of legal linguistics.
7. Unfamiliarity with the court room surroundings.
8. Fear of facing the accused in the court room.
9. Fear of the accused seeking retribution as a result of the trial.
10. Fear of being alone in the court room without familiar support.
11. Fear of cross-examination and not being able to understand or answer the questions.
12. Fear of being found guilty for 'participation' in the offence and being sent to jail.
13. Lack of understanding of the trial proceedings, and the role expected of the witness.

When examining these factors with the recently enacted s 170A, it becomes apparent, that while the section eradicates the presence of a number of these factors, it does not eradicate all of them.

- (1) The child witness is still obligated to come to court.
- (2) There will still be lack of understanding of the role expected of the child.
- (3) The child will still be placed in an unfamiliar environment.
- (4) And the child will still be exposed to a form of repeated interviewing of the horrific or embarrassing aspects of the

¹³ See Generally:
Spencer & Flin op cit 287-297; Berliner & Barbieri op cit 125-137; Parker op cit 643-717.

crime.

Knowledge of the effect which these factors may have upon the evidence tendered by the child, and possible means of remedying the effect of these factors, is of the utmost importance. However, consideration must also be given to the fact that the impact which these factors may have upon the emotional well-being of the child, will, by and large, be determinable, by the number of mediating or intervening variables surrounding each individual case.¹⁴

The greater the interplay of 'positive' mediating variables, the less likely the child witness will be to suffer severe long term psychological strain. Correspondingly, the greater the interplay of 'negative' mediating variables, the greater the likelihood that the child will suffer long term emotional damage.

3. MEDIATING VARIABLES AND THEIR OVERALL EFFECT UPON THE CHILD WITNESS

The following have been isolated by social scientists as acting as intervening variables:¹⁵

1. The nature and type of offence.
2. The relationship between the accused and the victim.
3. The reaction of the parents to disclosure of the offence.
4. The manner in which the initial investigation is conducted.
5. The manner in which the trial is conducted.
6. The degree of support given to the child witness.
7. The outcome of the trial.

1. The type of offence.

As noted by Hartman and Burgess; the nature, duration and

¹⁴Spencer & Flin op cit 298 explain that in any analysis of the impact of stress on human performance the precise relationship between the cause of the stress and the effect of that stress will be difficult to chart, due to the influence of mediating variables.

¹⁵Spencer & Flin op cit 298.

frequency of the offence, plays a crucial role in determining the extent and severity of psychological damage suffered by the child.¹⁶ An instance of violent rape is more likely to have a damaging effect upon the psychological well-being of the child than an instance of indecent exposure. By the same token, the perpetration of a sexual act upon a child by a person known to and respected by the child is more likely to have a detrimental impact, than the same act perpetrated by a stranger.¹⁷

2. The relationship between the accused and the victim.

Numerous research studies have revealed that the likelihood of traumatization increases where the sexual abuse takes place within the domestic setting and is perpetrated by someone known to and trusted by the child. In such cases, children suffer severe psychological damage by virtue of: (1) Guilt at committing the ultimate act of disloyalty to the family unit; (2) Possibility of other family members disbelieving the accusations of sexual abuse, and believing the duty of loyalty to extend even to errant family members; and (3) Fear of retaliation and punishment by the accused parent.¹⁸

Illustrating the effect sexual assault perpetrated within the four walls of the home, can have upon a child, Bohmer and Blumberg write:

'We had a ten-year old girl in the emergency room not long ago who had been viciously raped by her stepfather, but she kept denying she had been abused, even though she was so terrified of going back home that she asked to spend the night at the hospital.'¹⁹

In essence, the child who makes the complaint of sexual abuse is

¹⁶Hartman & Burgess op cit 105-107.

¹⁷Hartman & Burgess op cit 105-107.

¹⁸Berliner & Barbieri op cit 128.

¹⁹ibid.

likely to experience remorse over having accused a family member of the crime, and fear the possibility of antagonism and rejection by others in the family.²⁰

3. The reaction of the parents to disclosure of the offence.

As noted previously, disclosure of an offence perpetrated by a family member is likely to have negative consequences for all family members - giving rise to the possibility of family disbelief and suspicion of the child. Where the accused is however, a stranger, the allegations of the child increase in likelihood of adult believability.²¹

4. The manner in which the initial investigation is conducted.

The more sensitively the interview is conducted, with regard being had to the emotional needs and fears of the child, the greater the likelihood of the child adopting a positive approach to the impending trial.²²

5. The manner in which the trial is conducted.

A trial characterised by (1) harsh, insensitive and unrelentless cross-examination of the child; (2) the presence of the accused in the court room; (3) the lack of familiar support being given to the child during testimony; and (4) repeated requests for recall of embarrassing aspects of the sexual offence; may result in greater likelihood of long-term psychological damage for the child witness.²³

6. The degree of support given to the child witness.

The presence of a familiar adult - non-offending spouse in a case of family sexual abuse - during the court examination of the child, may, by virtue of the support capable of being provided

²⁰Berliner & Barbieri op cit 128; Summit op cit 188.

²¹Berliner & Barbieri op cit 128.

²²ibid.

²³See generally: Berliner & Barbieri op cit 125-137; Avery op cit 3-4; Parker op cit 643.

by such person, prove to be both beneficial for the child, and in the greater interests of justice.

Given the nature of the crime and the requirements of the legal system i.e., that evidence of the crime be tendered before the courts, an absence of support at the time of testimony - even if such testimony is given outside the presence of the accused - may prove to be essentially disastrous for the psychological welfare of the child. In order to ensure that the interests of justice are served, a proposal calling for the compulsory presence of a supportive person known to and trusted by the child, should accordingly, be given sensitive consideration.

It is submitted that fear that the presence of such person may affect or taint the evidence tendered by the child could be allayed by:

(1) having a television camera focused solely upon the support- adult, thereby ensuring close scrutiny of the actions of such person, in the case where the child gives testimony via live video link; or

(2) In the case where screens are utilised, having the actions of the support-adult carefully monitored throughout the proceedings by the presiding judicial officer, the defence attorney and the prosecutor.

7. The outcome of the trial.

A verdict of not-guilty can have a profoundly detrimental effect upon a child victim/witness as such may, in the absence of careful explanation to the child, generate the belief that the court did not believe the veracity of the child's testimony. By the same token, a verdict of guilty, may have a negative effect upon the child whose main aim for bringing the abuse to light, was to have the abuse stopped, not the accused incarcerated.²⁴

²⁴Berliner & Barbieri op cit 128.

It is submitted that careful preparation and thorough age-appropriate explanation of the judicial process to such child, would serve to eradicate the negative impact of the variable, and alleviate some of the confusion experienced by the child in relation to the sentencing procedure of the legal system.

4. THE PSYCHOLOGICAL EFFECTS OF STRESS UPON THE CHILD WITNESS

Researchers measuring the effects of stress upon the child witness have noted the importance of differentiating the effect of stress caused by (1) witnessing or being a victim of an offence; and (2) involvement in the judicial process.²⁵ This issue will accordingly be viewed from each perspective.

(1) The Psychological Effects of Being a Victim of a Sexual Offence ²⁶

The following have been isolated as being among others, the possible psychological effects of ongoing sexual abuse upon a child :

1. Withdrawal.
2. Anxiety.
3. Enuresis.
4. Guilt.
5. Delinquency.
6. Anti-social behaviour.
7. Self-hate and self-condemnation.
8. Frigidity.
9. Promiscuity.
10. Prostitution.

It is important to bear in mind that in case of sexual abuse

²⁵Spencer & Flin op cit 298.

²⁶Hasewinkel op cit 32-42; Parker op cit 649-650.

taking place in the home, much of what is eventually categorized as adolescent or adult psychopathology, is essentially grounded on the 'natural reactions of a healthy child to a profoundly unnatural and unhealthy parental environment.'²⁷

Documented psychological effects of sexual abuse excluding actual penetration include among others:

1. Mood changes.
2. Enuresis.
3. Reversion to infantile states.
4. Changes to inter-personal relationships.
5. Nightmares.
6. Obsessive-Compulsive behaviour.
7. School problems.

As noted above, the nature, duration and frequency of the offence plays a crucial role in determining the extent and severity of the psychological damage suffered by the child.²⁸

(2) Documented Psychological Effects of Stress Upon the Child Witness.

(a) Pre-Trial Period

Researchers have revealed that the anxiety and apprehension the child witness may experience as a result of fear of the approaching trial may give rise to the following behavioural problems: sleep disturbances; appetite disturbances; mood changes and disruption of concentration.²⁹

The issue of children's stress during the pre-trial period is significant in that emotional fitness of the child witness is

²⁷Summit op cit 184.

²⁸Hartman & Burgess op cit 105-107 .

²⁹Spencer & Flin op cit 299-230.

often the determining point for prosecution of the case.³⁰ Documented concerns for the emotional health of the child prior to and during the trial, may also be the determining point for parents concerning whether they would ever want, or allow, their child to participate in a trial.

Citing Katz, 'Incestuous Families' Myers writes: ³¹

'The criminal justice system is so difficult for some children that their parents refused to let them participate. In a recent California case, sexual abuse charges were dismissed against the operator of a day care center because of parental non-cooperation...The newspaper coverage is interesting for the insight it offers into the difficulty of prosecuting such cases:

Child molesting charges against a Marin County day-care centre operator will be dropped Monday, a prosecutor said yesterday.

The decision to dismiss the case...came after the mothers of two alleged victims said they would not allow their children to testify.

Both mothers expressed concern over the stress a trial would put on their children—one a 5-year-old boy and the other an 8-year-old girl.

"I cannot allow my son to testify again, because to continue to expose him to the pressure this case presents would be at the expense of my child's well-being" one mother said.

The Sunday Times reported a mother who had observed her ten-year-old daughter giving evidence, as saying that if any of her own children were interfered with again, she would not lay charges. 'I would never put one of my children through that again.'³²

(b) Trial Period

While some researchers have noted that it is almost impossible to measure the actual degree of stress experienced by witnesses while they are giving evidence in court, unless they display

³⁰Spencer & Flin op cit 300.

³¹Myers op cit 182 n109.

³²Sunday Tribune December 15, 1991,

unambiguous physical reactions such as crying, fainting, or shaking,³³ studies conducted by Flin - Scotland - and Goodman - USA - have attempted to measure the degree of stress experienced by child witnesses during the trial itself.

The findings of both researchers reveal that the experience of giving evidence in court is generally distressing for children. In her preliminary findings, Goodman reveals that distress may be manifested through either faltering speech, the inability to answer the prosecutor's questions, or the providing of incomplete testimony.³⁴

Spencer and Flin note on the other hand that the general effect of giving evidence, varies from case to case, and is ultimately dependant upon the interplay of such factors as:

- (1) the nature of the offence;
- (2) the conduct of the investigation;
- (3) the conduct of the trial;
- (4) the presence of support provided prior to and during the trial;
- (5) the witness' personality; and
- (6) the final verdict of the case.³⁵

5. CONCLUSION

Expert opinion asserts that participation in the legal system results in the re-victimization of the child. While there is little published research in South Africa on the sources of stress for the child witness, research conducted elsewhere,

³³Spencer & Flin op cit 301.

³⁴Spencer & Flin op cit 302; Goodman, G.S. Jones, D.P.H. Pyle, E.A. Prado-Estrada, L. Port, L.K. England, P. Mason, R. & Rudy, L. "The Emotional Effects Of Criminal Court Testimony On Child Sexual Assault Victims: A preliminary Report" in *The Child Witness Do The Courts Abuse Children?* (Davies, G. & Drinkwater, J. eds) Issues Of Crimonological And Legal Psychology, Number 13 46-54.

³⁵Spencer & Flin op cit 302.

reveals factors such as facing the accused, the fear of retribution, having to give evidence in front of unfamiliar adults, and long delays between the commission of the offence and the trial, as being important sources of stress for the child witness.

In light of the fact that (1) child sexual abuse prosecutions rely heavily upon the testimony of the victim, and (2) evidence reveals that stress and intimidation can decrease an individual's willingness and ability to retrieve information from memory, it is in the interest of justice that the issue of stress in the courtroom be confronted.

CHAPTER 10

A CRITICAL ANALYSIS OF THE LAWS OF EVIDENCE PERTAINING TO THE CHILD WITNESS

The aim of this Chapter will be to examine certain aspects of the law of evidence and procedure in respect of child witnesses. Where possible, recourse will be had to the position in the American and English legal systems as a comparative study.

1. THE PRESUMPTION OF INNOCENCE, THE BURDEN OF PROOF AND THE STANDARD OF PROOF IN CRIMINAL MATTERS

The general rule of policy operative within the South African legal system is that in all criminal cases, except where otherwise provided by statute, the accused is presumed innocent until the State has satisfied the court - beyond a reasonable doubt - that the accused is guilty.¹

Schmidt describes this rule as:

' 'n reel wat voorspruit uit 'n begeerte om die beskuldige te beskerm weens die erns van die strafsanksie en die feit dat hy hom teen die sterk arm van die staat verset.'²

While the time-hallowed phrase 'proof beyond reasonable doubt' is incapable of precise definition,³ in the case of

¹Hoffman, L.H. & Zeffert, D.T. *The South African Law of Evidence* 4 ed (1989) 513-515; Schmidt, C.W.H. *Bewysreg* 3 ed (1972) 50-52; *R v Britz* 1949 (3) SA 293 (A).

²Schmidt op cit 50.

³Hoffmann & Zeffertt op cit 525 write: 'The degree of proof required by the criminal standard is probably easier to understand than to explain. The difficulty is that, as Wigmore has put it, "no one has yet invented or discovered a mode of measurement for the intensity of human belief", and there is therefore no way of giving an accurate description of a particular point on the scale of

S v Glegg ⁴, it was held per Rumpff CJ that the phrase pointed to a doubt which existed because of possibilities and probabilities which could be regarded as reasonable on the ground of generally accepted human knowledge and experience.

In the case of *R v Difford* ⁵ it was held per Greenberg J that

'no onus rests upon the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.'

In a nutshell, reasonable doubt may be created as a result of⁶:

1. Defective evidence tendered by the State;
2. State witnesses contradicting one another;
3. A State witness rendering an incomplete testimony;
4. State witness making a concession which points to the veracity of the accused's version; or
5. The cogency of the accused's version being such as to be reasonably true.

2. THE ADVERSARIAL SYSTEM

There are two models governing trial procedure in the civilised world: the adversarial model and the inquisitorial model.

The former model is posited on the theory that justice is best served if the advocate of an issue in dispute, differs from the

probability. To a large extent no explanation is necessary, because for judges and magistrates the standard of proof is a matter of experience and intuition rather than analysis.'

⁴1973 (1) SA 34 (A) at 38A-39E.

⁵1937 AD 370 at 373.

⁶South African Law Commission Project 71 *The Protection of Child Witnesses* (1991) 6.

decision-maker in the issue. This model, which predominates in most English speaking countries including South Africa, perceives the role of the judge as referee in a contest, and the lawyer as the active player. Each side must according to this model present his argument before the court, attack the argument of the opponent via cross-examination and allow the decision-making process to be conducted by the court.⁷ The essence of the inquisitorial system, on the other hand, is that the presiding judicial officer takes a more active role in the trial procedure than is the situation in the adversarial model. McEwan writes that 'the position of the parties is weaker in this model; they cannot limit the tribunal's field of inquiry through pleadings or by consent. The court itself will pursue facts, and avail itself of any sources, including the interrogation of the defendant. The increased importance of the judicial role correspondingly diminishes the power and function of the advocate.'⁸

The distinctive and universal features of the adversarial model are:⁹

1. The trial is conducted in a court of law, wherein the evidence is presented orally and in a continuous manner.
2. Evidence tendered is wherever possible subjected to cross-examination.
3. Evidence is tendered in the presence of the parties to the proceedings.
4. The trial takes place in open court and members of the public and press have access thereto.

In South Africa, save for the exception created by s 170A of the

⁷McEwan, J. *Evidence and the Adversarial Process - the Modern law* (1992) 4.

⁸McEwan op cit 6.

⁹Spencer & Flin op cit 66-67.

Criminal Law Amendment Act ¹⁰ and ss 153(3) and 153(3a) of the Criminal Procedure Act, a trial is conducted in a court of law, in the presence of the accused,¹¹ who is permitted to cross-examine the evidence of any witness called by the opposition.¹² The major criticism directed against the adversarial model in South Africa concerns the brutal often humiliating cross-examination which child complainants in sexual offences are forced to undergo. Many have argued that this feature of the adversarial model promotes long-term psychological damage of the child.¹³

Some legal academics would however not agree with the criticism directed against cross-examination. Wigmore writes that

'Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the medieval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moments doubt upon this point in the mind of a lawyer of experience....If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.'¹⁴

In South Africa, cross-examination is governed by s 166 of the Criminal Procedure Act. The section provides:

'(1) An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at

¹⁰Act No. 135 of 1992.

¹¹Section 158 of the Criminal Procedure Act 51 of 1977.

¹²Section 166 of the Criminal Procedure Act 51 of 1977.

¹³op cit at 21.

¹⁴Wigmore cited in Spencer & Flin op cit 222.

criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the accused.'

(2) The prosecutor and the accused may, with leave of the court, examine or cross-examine any witness called by the court at criminal proceedings.'

As noted by Hoffmann and Zeffert the general rule applicable to cross-examination is that any witness who has been sworn and has given examination-in-chief is liable to be cross-examined by the opposing party.¹⁵ Failure to allow cross-examination where such is required by the other party is an irregularity and could result in the ruling of the court being set aside. A case in point is that of *R v Ndawo*¹⁶. In this case, the presiding judicial officer permitted a young witness to get down from the witness box prior to his being cross-examined. This irregularity resulted in the subsequent conviction of the accused being set aside. Leading questions, while prohibited during examination-in-chief, may be asked during the cross-examination stage. The reason for permitting leading questions in the latter stage of proceedings and not in the former is answered by reference to the case of *S v Rall*¹⁷ wherein it was stated per Trollip AJA that the rule against leading questions exists by virtue of:

'the risk that the witness may perhaps think that such questions are an invitation, suggestion, or even instruction to him to answer them, not unbiasedly or truthfully, but in a way that favours the party calling him.'

This problem is particularly apparent with child witnesses. Knowledge of a child's openness to suggestion, not by virtue of a propensity for lying, but by virtue of numerous other factors which were discussed in Chapter 8, should abrogate the exception to the general rule of permitting leading questions, in respect

¹⁵Hoffmann & Zeffertt op cit 456.

¹⁶1961 (1) SA 16 (N).

¹⁷1982 (1) SA 828 (A).

of child witnesses.

2. COMPETENCE, CORROBORATION AND THE CAUTIONARY RULES

2.1 COMPETENCE

Section 192 of the Criminal Procedure Act ¹⁸ holds that every person not expressly excluded by the Act from giving evidence shall, subject to the provisions of s 206, be competent and compellable to give evidence in criminal proceedings. Section 206 of the Act provides that the law as to competency, compellability and privilege of witnesses which was in force in respect of criminal proceedings on the thirtieth day of May 1961, shall apply in any case not expressly provided for by the Act or any other law. The law as applied on this day, was the law of England. Accordingly, section 192 must be read against the backdrop of the English law as operative on this day.¹⁹

While a witness is generally presumed to be competent, the question of competency of a particular witness may be raised at any stage of the proceedings until the appeal stage.²⁰ Section 193 of the Criminal Procedure Act provides that the determination of the competence of the witness is the function of the presiding judicial officer. Such determination involves the assessment of whether the witness understands the nature of the oath to be taken.²¹ Where the trial is conducted in the presence of assessors, the issue of competency must be tried in their presence.²² Hoffmann and Zeffertt write that this is particularly

¹⁸Act No. 51 of 1977.

¹⁹See: Hoffmann & Zeffertt op cit 371-372.

²⁰Hoffmann & Zeffertt op cit 372.

²¹ibid.

²²ibid.

advisable where the issue involves the mental capacity of the proposed witness, since the evidence obtained will assist the assessors to estimate the witness's credibility.²³ Care must however be taken during the inquiry, to avoid issues dealing with the merits of the case, where this cannot be achieved, the assessors, if present, must be asked to leave the court room.²⁴

The burden of establishing competency rests upon the party calling a particular witness. Where questions concerning the competency of a state witness are raised, the prosecution bears the onus of proving beyond reasonable doubt the competency of the witness. In respect of defence witnesses, the defence need only prove their competence on a balance of probability.²⁵

2.1.1 Husbands and Wives

Under the common law, the spouse of an accused was both an incompetent and non-compellable witness of the prosecution.²⁶ Under s 195 of the Criminal Procedure Act, the spouse of an accused is now a competent but non-compellable witness of the prosecution. Save only in exceptional circumstances as set out in s 195 (1)(a)-(i) is a spouse both competent and compellable.

In respect of this thesis, the following are important provisions:

(a) where the one spouse is charged with any offence committed against the person of either of them or of a child of either of them;²⁷ or

²³Hoffmann & Zeffertt op cit 327.

²⁴Hoffmann & Zeffertt op cit 372-373. In *R v Kgaladi* 1943 AD 255

²⁵Hoffmann & Zeffertt op cit 373. Howard, M.N. Crane, P. Hochberg, D.A. *Phipson On Evidence* 14 ed (1990) 4-23. *R v Yacoob* (1981) 72 Cr.App.R. 313.

²⁶Hoffmann & Zeffertt op cit 386-387.

²⁷Section 195(1)(a).

(b) where the spouse is charged with any offence under Chapter 8 of the Child Care Act 74 of 1983, committed in respect of any child of either of them;²⁸ or

(c) where a spouse is charged with incest.²⁹

2.1.2 Children

In accordance with the provision of s 192, a child is a competent witness provided he or she does not fall within any other category of disqualification. While no age-limit is imposed below which a child may be deemed incompetent,³⁰ the test for competency is whether the child understands the nature of truth and falsehood.³¹ Where the child does not understand the import of the oath as contained in s 162 (1), s 164 of the same Act holds that the evidence may be made in the absence of an oath or affirmation.

'Any person who, from ignorance arising from youth, defective education, or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth the whole truth and nothing but the truth.'³²

²⁸Section 195(1)(b).

²⁹Section 195(1)(e).

³⁰See generally: *R v Manda* 1951 (3) SA 158 (A); *R v Erasmus* 1941 OPD 270; *R v UMhlahlo and Nokusa* (1904) 25 NLR 264. The court held in this case that while the evidence of a child under 7 years of age was admissible, if in the opinion of the judge the child had sufficient understanding of the duty he was to perform, the evidence of the child of three or four years of age was unacceptable on the ground that when she gave her evidence she appeared somewhat ill-informed.

³¹*S v Saul* 1973 (1) SA 344 (C). *R v Umhlahlo and Nokusa* supra; *R v Erasmus* op cit.

³² In the case of *R v Manda* 1951 (3) SA 158 (A) it was held per Schreiner JA: 'A child may not understand the nature or recognise the obligation of an oath or affirmation and yet

The test for competency, whether the evidence is made sworn or unsworn, remains that of comprehension of the concept 'truth'. As noted by Hoffmann and Zeffertt, 'If a child does not have the intelligence to distinguish between what is true and false, and to recognise the danger and wickedness of lying, he cannot be admonished to tell the truth - he is an incompetent witness.'³³

As with the position in England, no specific guidelines indicating the manner in which determination of the child's ability to understand the difference between a truth and a lie should be conducted, is provided by the legislature. Such inquiry rests entirely upon the discretion of the judicial officer in charge.³⁴ This is problematic in that questioning of the above needs to be age-specific with questions being framed in such a way that children with limited language skills are able to appreciate the questions put to them and in answering them, allow the judicial officer to acquire an accurate perception of their understanding.

Parkinson cautions:

'The manner in which a competency test is administered may thus affect the way in which a child's ability to distinguish between a truth and a lie is perceived...if a child responds in the affirmative to the question, "do you understand the difference between a truth and a lie?", it does not necessarily mean that the child does understand it. A child need only answer "yes" and the court will be little the wiser. On the other hand, if the child is asked, "what is the truth?" or "what is a lie?" a competent child witness may still not be able to give a satisfactory answer.'³⁵

may appear to the court to be more than ordinarily intelligent, observant and honest.'

³³Hoffmann & Zeffertt op cit 376.

³⁴Section 193 of the Criminal Procedure Act 51 of 1977.

³⁵Parkinson, P. 'The Future of Competency Testing for Child Witnesses' (1991) 15 Criminal LJ 189-190.

Such a question asks for a definition. A young child's ability to distinguish between the truth and a lie may be much greater than his or her ability to define that distinction.¹⁶

Parkinson also notes that caution should be exercised in the way questions assessing competency are put to the child. He provides an illustrative example of how such questions should not be put to the child:

'Children may also be confused by the manner in which questions relating to competency are asked. A question put to a six-year-old child by one English judge is illustrative:

"Would you tell the truth if I asked you to tell the truth? Would you do your best? Even though it may be a bit difficult. If I asked you a question which was difficult and you did not know the answer would you say so? Would you say "I don't know"?"

To this question the child responded, "Yes. No". This is hardly surprising. The child was asked four questions. Had they been asked individually, no doubt she would have responded affirmatively to each.¹⁷

The above emphasizes the need for guidelines, developed by the specialists in the field of child language acquisition, in order to circumvent the unnecessary problems which may arise from faulty questioning. These guidelines should then be handed down to judges and magistrates exposed to child witnesses. In the alternative, judges and magistrates should be given opportunities to attend seminars and conferences on this issue. For further information on the development of language in children and appropriate interviewing techniques for the maximization of children's testimony, see Chapter 8.

Where straightforward questions on truth and lies are used, answers to these questions which reveal fear of imprisonment, fear of punishment by God, fear of going to the hell-fire and fear of parental punishment for not accurately or honestly

¹⁶Parkinson op cit 189-190.

¹⁷Parkinson op cit 190.

revealing information known to or witnessed by the child, have all been regarded as sufficient indicators of the child's ability to distinguish between truth and lies and appreciate the consequences emanating from the telling of lies.³⁸

2. CORROBORATION AND THE CAUTIONARY RULES

Save for the exception contained under s 209 of the Criminal Procedure Act, there exists no statutory requirement in our law that evidence tendered must be corroborated for conviction to follow. Notwithstanding the above, a general rule of practice when dealing with the uncorroborated evidence of accomplices, single witnesses, young children, complainants in sexual offences and police traps and informers, is that such evidence must be viewed with caution.³⁹

³⁸Spencer & Flin op cit 46-46 provide two case illustrations of answers accepted as revealing ability to distinguish between truth and falsehood.

(A)

Judge: Suppose you should tell a lie, do you know who is the father of all liars?

13-year-old boy: Yes

Judge: Who is it?

Boy: The Devil

Judge: If you should tell a lie, do you know what will become of you?

Boy: Yes

Judge: What if you should swear to a lie? If you should call God to witness to a lie, what would become of you then?

Boy: I should go to hell-fire.

(p46)

(B)

Judge: And if you do always tell the truth, where will you go when you die?

Little girl: Up to heaven sir

Judge: And what will become of you if you tell lies?

Little girl: I shall go down to the naughty place, sir

Judge: Are you quite sure of that?

Little girl: Yes, sir

Judge: Let her be sworn, it is quite clear she knows more than I do.

(p48)

³⁹Hoffmann & Zeffertt op cit 565-567.

This rule which has given rise to the application of the cautionary rule, was first devised for application in the English courts and consisted in the judge warning the jury to exercise circumspection when dealing with the testimony of specific categories of witnesses. The rule has been uniquely adapted to fit in with the South African trial procedure. In South Africa, the judge or magistrate dealing with the uncorroborated testimony of certain categories of witnesses must exercise the same amount of caution in coming to a decision as he would have warned the jury before him to do. On handing down his judgement, the judge or magistrate must give reasons for his verdict of guilty or not guilty. The amount of caution given to uncorroborated evidence will be reflected in the record of the case.⁴⁰

The rules for the application of the cautionary rules are not inflexible. Trustworthiness of a witness's account may accrue from other sources pointing to the truth of a matter. '...if a court is satisfied upon rational grounds that a witness is reliable, it is not obliged to reject his evidence because those grounds have not been mentioned in any decided case.'⁴¹ Holmes J in *S v Artmann*:⁴²

'While there is always a need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense.'

In light of the nature of child sexual abuse, i.e., that the offence is of a sexual nature, that the offence is perpetrated upon children, and that generally, there are no outside witnesses to the events in question, the following categories of witnesses in respect of whom the cautionary rules will be applied will be

⁴⁰See generally Hoffmann & Zeffertt op cit 567.

⁴¹Hoffmann & Zeffertt op cit 572.

⁴²1968 (3) SA 339 (A) at 341B.

examined:

1. Single Witnesses
2. Complainants in Sexual Offences
3. Children

(i) Single Witnesses

Section 208 of the Criminal Procedure Act provides that:

'An accused may be convicted of any offence on the single evidence of any competent witness.'

On the origin of the cautionary rule in respect of the single witness, it was held per De Villiers JP in *R v Mokoena*⁴³ that:

'...the uncorroborated evidendence of a single competent and credible witness is no doubt declared to be sufficient for sec. 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the singlewitness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc, etc.'

While this case provides a useful enumeration of factors which should be considered when assessing the cogency of the prosecution's evidence, these factors should be read in the light of *S v Saul and others*:⁴⁴

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness...The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defeats or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the evidence must succeed if any criticism, however slender, of the

⁴³1932 OPD 79 at 80.

⁴⁴1981 (3) SA 172 (A) at 180E-G.

witness's evidence were well founded" (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

(ii) Complainants in Sexual Offences

A general rule of policy operative in cases involving allegations of sexual abuse, is that the evidence of the complainant must be viewed with circumspection. The general belief in respect hereto is that '(C)harges of immorality are easy for woman to formulate but difficult for man to refute'⁴⁵, 'a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all'⁴⁶, and 'it is also recognised that, even with adults, one may encounter cases of unfounded allegations of sexual assault which owe their origin to flights of fancy.'⁴⁷ The application of the cautionary rules in respect of complaints of sexual offences, is not limited to females, complaints made by males are also subject to the application of the rules.⁴⁸

The cautionary rules in respect of allegations of sexual offences, have recently undergone severe criticism. In the case of *S v D and another*⁴⁹ the Namibian High Court held that given that the overwhelming number of cases of sexual assault are perpetrated against females, the effect of the cautionary rules is to discriminate against women complainants:

'...in the overwhelming majority of cases the complainants are female. Given the social fabric of society in Namibia, this state of affairs is hardly likely to change. In this Court, for example, there were 31

⁴⁵*R v M* 1947 (4) SA 489 (N) at 493

⁴⁶*R v Rautenbach* 1949 (1) SA 135 (A) at 143 per Schreiner JA.

⁴⁷*R v J* 1966 (1) SA 88 (SR) at 92A-C.

⁴⁸See in this respect: *R v O* 1964 (4) SA 245 (SR); *S v C* 1965 (3) SA 105 (N).

⁴⁹1992 (1) SA 513 (Nm)

cases involving sexual assault during 1990 with not a single one involving a male complainant. In my view one can safely assume that in at least 95% of cases of this nature the complainants are female. Taking this factual situation into consideration, I am of the view that the so-called cautionary rule has no other purpose than to discriminate against women complainants. This rule thus probably also is contrary to art 10 of the Namibian Constitution which provides for the equality of all persons before the law regardless of sex.⁵⁰

The learned judge continued at 146G:

'To sum up , in my view, the cautionary rule evolved in cases of rape has no rational basis for its existence and should therefore not form part of our law and is probably contrary to the provisions of the Namibian Constitution.'

The judge however noted that:

'..this does not mean that the nature and circumstances of the alleged offence need not be considered carefully. Where the complainant is a single witness the cautionary rule relating to single witnesses will obviously apply. Where any motive for a false charge is suggested by the accused or appears from the evidence this must carefully be considered. In the end, however, only one test applies, namely, was the accused's guilt proved beyond reasonable doubt, and this test must be the same whether the crime is theft or rape.'⁵¹

(iii) Children

As noted above, there is no statutory requirement in our law that the evidence of a child must be corroborated prior to its acceptance in a court of law.⁵² However, a rule of judicial practice is that the uncorroborated evidence of a child should be viewed with circumspection. Schreiner JA in *R v Manda*:⁵³

'..the dangers inherent in reliance upon the uncorroborated evidence of a

⁵⁰per Frank J at 146.

⁵¹146H.

⁵²*R v Manda* 1951 (3) SA 158 (A) at 163C per Schreiner J.

⁵³1951 (3) SA 158 (A).

young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps to suspicion.' ⁵⁴

And in the case of *Woji v Santam Insurance Co Ltd* ⁵⁵ it was held per Diemont JA that '..the danger of believing a child where evidence stands alone must not be underrated.'⁵⁶

Reasons frequently adduced for application of these rules rests upon judicial assumptions of children's imaginativeness and suggestibility. In the case of *Woji v Santam Insurance* the court held at a trial involving a child witness, that the primary consideration of the trier of the fact is 'whether the young witness' evidence is trustworthy'.⁵⁷ Diemont JA said that:

'Trustworthiness...depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will again depend on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers"...There are other factors which the court will take into account when assessing the child's trustworthiness in the witness-box. Does he appear to be honest - is there a consciousness of the duty to speak the truth?.' ⁵⁸

While, application of these rules are stringent - failure to apply them may result in the conviction of the court *a quo* being set aside - it was held in the case of *S v Artmann* 1968 (3) SA 339 (A) that overall 'the exercise of caution must not be allowed to displace the exercise of common sense' ⁵⁹. In other words,

⁵⁴At 163C

⁵⁵1981 (1) SA 1020 (A).

⁵⁶At 1028E.

⁵⁷At 1028A.

⁵⁸At 1028A-C.

⁵⁹At 341B.

where the case involving the child, is of such a nature as to exclude the risk of suggestibility, fabrication, or the exercise of the imagination; there may be sufficient evidence pointing to the child's trustworthiness as to exclude the need for corroboration of the evidence.

3. THE POSITION OF COMPETENCY TESTING AND CORROBORATION REQUIREMENTS ELSEWHERE IN THE WORLD

In the United Kingdom, the position of the law with regard to the issues of competence and corroboration of evidence is that while theoretically, children are deemed competent to provide sworn and unsworn testimony in criminal and civil proceedings, in practice, only children above a specific age group may tender evidence in a court of law.⁶¹

Since the case of *R v Wallwork*⁶¹ the English courts have accepted the imposition of an arbitrary age-limit below which children may not give evidence. This age-limit has not been established with any authority. In *R v Hayes*⁶² the court imposed a dividing line between eight and ten years. However, in *R v Khan*⁶³ the Court of Appeal suggested that a criminal court should be wary of the evidence of any child under 14. In *R v Wallwork*⁶⁴ Lord Goddard CJ commenting upon the calling of a five year old as a witness in the trial in the following way:

'The court deprecates the calling of a child of this age as a witness. Although the learned judge had the court cleared as far as it can be cleared, it seems to us to be unfortunate that she was called and, with all respect to the learned judge, I am surprised that he allowed her to be called. The jury could not attach any value to the evidence of a child of five: it is

⁶⁰Spencer & Flin op cit 50-51; Lyon, C. & De Cruz, P. *Child Abuse* (1990) 62-63.

⁶¹(1958) 42 Cr.App.R. 153.

⁶²[1977] 2 ALL ER 286.

⁶³(1981) Crim. LR 330.

⁶⁴Supra n37.

ridiculous to suppose that they could. There must be corroborative evidence if a child of tender years and too young to understand the nature of an oath is called, but in any circumstances to call a little child of the age of five seems to us to be most undesirable, and I hope it will not occur again.'

The effect of this ruling, has been essentially, to create a restriction against the acceptance of evidence of children younger than six - in practice, the ruling led to the rejection of testimony of children younger than eight.⁶⁵ In the recent case of *R v B*⁶⁶ the English court criticised the imposition of a rigid age restriction asserting that determination of the competency of the child varies from case to case in accordance with the directives of section 38 of the Children and Young Persons Act.⁶⁷

In respect of the issue of corroboration of evidence, the general rule of English Law is that the courts may act upon the uncorroborated evidence of one witness. Section 34(2) of the Criminal Justice Act 1988, holds that a jury may convict the accused on the unsworn evidence of a child which has not been corroborated. This is a marked improvement in the area of corroboration as previously, the position of the law under s 38 of CYPA 1933, had been that the unsworn evidence of a child had to be corroborated by the presence of independent evidence tending to implicate the accused.

Commenting upon the position of English law in respect of the issue of corroboration, Tapper writes that in the past, legal fear of the danger of conviction upon the uncorroborated evidence of a witness seemed so great as to have generated rules of practice requiring warning of such danger in formal terms, and the elaborate dissection of evidence so as to instruct the jury

⁶⁵Spencer & Flin op cit 51.

⁶⁶(1990) Times, 1 March, 1990.

⁶⁷ The court did however point out that a child of five was rarely, if ever, competent to satisfy the competency test as required by English Law.

whether it was, or was not, capable of amounting to corroboration.⁶⁸ Current amendments to the English law, in particular, section 34(2) of the Criminal Justice Act 1988, have however, eliminated the need for judicial cautioning in a number of cases.

Section 34(2) of the Criminal Justice Act 1988 reads:

'Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated in relation to cases where such a warning is required by reason only that the evidence is the evidence of a child.

Spencer writes that the present rule of practice, is that judges still however retain the power to warn the jury of the danger of convicting on the child's evidence where such conviction is thought to be dangerous. Judicial warnings are however, still mandatory in respect of child witnesses of sexual offence cases.⁶⁹

The practice of judicial cautioning has been severely criticised by English academics upon the base that:

'A mandatory duty to warn of the danger of convicting on the evidence of a particular type of witness necessarily involves suggesting to the jury that a witness of a particular type ought to be disbelieved, which is not only insulting to that type of witness, but undermines their evidence quite needlessly in a strong case where there is plenty of other evidence to back it up; and a duty to warn the jury that it is dangerous to convict seems insufficient protection for the defendant in a case where the judge believes

⁶⁸Tapper, C *Cross on Evidence* 7th ed (1990) 229.

⁶⁹Spencer, J.R. 'The English Legal System' in *Intervening in Child Sexual Abuse* eds Murray, K. & Gough, D.A. (1991) 89.

from his experience that a conviction would indeed be dangerous.' ⁷⁰

In respect of the law operative in Scotland the situation is that all persons who are: (1) capable of making themselves intelligible to the tribunal; and (2) reveal an understanding of the duty to tell the truth, are deemed competent as witnesses.⁷¹ Scottish law does not place a prohibition in principle, against the tendering of evidence by a young child in a court of law. In respect of the issue of corroboration of evidence, Scottish law requires that all evidence tendered in criminal cases must be corroborated.⁷² Scottish law does not however require the total evidence tendered in the criminal trial, to be corroborated - corroborative evidence need only be supplied in respect of (a) that the offence took place, and (b) that the accused committed the offence.⁷³ Scottish law further permits conviction upon the evidence of one child which has been corroborated by another child ⁷⁴ Note, this is in contradistinction to the present more lenient position assumed by English law which permits the uncorroborated evidence of a child to secure the conviction of an accused.

One major disadvantage emanating from the corroboration requirement as established under Scottish law is that such requirement makes no allowances for the fact that in sexual offence cases involving children, there are seldom other witness

⁷⁰Spencer & Flin op cit 190.

⁷¹See: *Rees v Lowe* [1989] SCCR 664

⁷² The corroboration requirement in civil cases was abolished under The Civil Evidence (Scotland Act) 1988.

⁷³See generally: Spencer & Flin op cit 167-171.

⁷⁴Spencer & Flin op cit 169. In South Africa there is no rule which provides that a witness in respect of whom a cautionary approach must be assumed, cannot corroborate the evidence of another witness falling into the same class. In other words, one child witness may corroborate the evidence of another child.

present to provide the requisite corroborative evidence.⁷⁵

While provisions concerning the competence of children in the United States vary from one jurisdiction to another, the variations of the provisions, generally fall into one of the following categories:⁷⁶

- 1) States presuming incompetence below a specified age.⁷⁷
- (2) States requiring the understanding of an oath.⁷⁸
- (3) States Following the Federal Rules Of Evidence.⁷⁹

⁷⁵In other words, so long as the victim requires a witness, incest - or any other form of child sexual abuse - remains legal!

⁷⁶Perry & Wrightsman op cit 41-49. The authors point out that the above-mentioned groupings are not mutually exclusive - some states have statutes reflecting more than one grouping (i.e., presuming incompetence below a specified age except in sex offences cases where all children would be presumed competent to give testimony, etc).

⁷⁷ Perry & Wrightsman op cit 41 write: 'Some states hold that children below a certain age (usually 10, 12 or 14) are presumptively incompetent unless the trial judge determines via questioning that they possess the capacity to testify.' Examples of such states are Idaho, Maine and New York.

⁷⁸Perry & Wrightsman op cit 43 write 'several states employ the oath as a means of ensuring that the witness understands the obligation of testifying truthfully prior to being given permission to testify. 'The purpose of the testimonial oath is two-fold: "to alert the witness to the moral duty to testify truthfully and to deter false testimony by establishing a legal basis for perjury prosecution".' Examples of states adopting this approach are Georgia and Texas.

⁷⁹Perry & Wrightsman op cit 45 write that an increasing number of jurisdictions throughout the USA have adopted some version of Federal 601 into their statute books. Federal Rule 601 reads: 'Every person is competent to be a witness except as otherwise provided in these rules.' The authors note '(a)lthough Rule 601 (even when amended) clearly paves the way for more children to testify, other safeguards are built into the system that prevent improper inclusion of child witnesses. For example, Rule 603 of the

(4) States providing that all children are competent witnesses in sex offence cases.

Finally, in respect of the issue of the competency of the child victim of an alleged sexual offence, the American Bar Association's National Legal Resource Center For Child Advocacy and Protection has provided a recommendation that all such witnesses be considered competent and accordingly permitted to testify without prior qualification in any judicial proceeding.⁸⁰

4. CONCLUSION

The issue of competency, corroboration and the application of judicial cautioning in child sexual offence cases, has been shown to vary from country to country. While some countries have abolished certain aspects of these rules, most still seem to have in existence rules of practice which essentially serve to sacrifice the rights of the child victim, in favour of protection of the rights of the accused defendant. Where competency testing

Federal Rules of Evidence states: "(b)efore testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation". In order to make a meaningful declaration, of course, the child must be able to distinguish truth from falsity and to appreciate the duty to tell the truth..If the court determines that the child lacks either or both of these capabilities, Rule 603 could be invoked to exclude the witness's testimony. Similarly, Rule 403 might be used to exclude testimony of a child witness if she is found to be so marginally competent that the probative value of her testimony would be 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay (or) waste of time' (Fed.R.Evid. 403). And, if a prospective child's testimony proves unnecessary or merely cumulative, the court could exclude it under Rule 611, which governs the court's broad authority to control the presentation of evidence...Rule 601 (and statutes of similar phrasing) provide wide latitude for children to be deemed competent to testify, but the presiding judge must still be the one to decide the probative value of the testimony.'

⁸⁰Perry & Wrightsman op cit 48-49 write that since the publication of these recommendations, all American states have enacted statutes reflecting these suggestions.

of a child is still a prerequisite to the holding of a trial, critics have argued that perceived inherent childhood problems of memory incapacity and inclination towards suggestibility, should go to the issue of weight of evidence and not admissibility of such evidence.⁸¹ Parkinson questions the need for competency tests in those countries where it is still administered, writing:

'The question remains whether we need a competency test. It may be that it is designed to address a problem which is more imaginary than real.'⁸²

The same may be said for application of the cautionary rules in respect of children. As revealed in Chapter 8, there is ample evidence refuting archaic assumptions about children's ability as witnesses.

A call is therefore made for the abolition of the cautionary rules in respect of complainants in sexual offences and children. In respect of the former, it is submitted that given that in the greater number of cases involving sexual offences, the complainant is usually a woman, the application of the rules, evinces clear evidence of discriminatory practice.

⁸¹Parkinson op cit 192.

⁸²He continues: ' A child who is old enough to give a rational account of his or her experiences sufficient to be of use in court proceedings will have a sufficient concept also of the importance of telling the truth. Whether he or she will tell the truth is another matter. Extensive research has been conducted by child psychologists on children's memory, their reliability as eyewitnesses, their tendency to fantasise, and their vulnerability to suggestion. The basic tenor of this research evidence is that children of six years or older are as reliable as adults in answer to objective questions, although the younger the child, the less information he or she may impart. In some situations, children will be more reliable than adults. Children under six are not always so reliable. There is a particular need for caution with children under eight in terms of their accuracy in the eyewitness identification of strangers. In general, the research evidence is very supportive of young children's capabilities as witnesses.'

While in respect of the latter, the present singling out of children as a category for suspicion and circumspection, is a clear message that the judiciary does not hold any faith in current psychological research which refutes the age-old myths about children's abilities.

In respect of cases dealing with child sexual abuse allegations, it is submitted that the cautionary rule should still be applied, but on the ground of the evidence coming from a single witness⁸³ and not on the grounds that the evidence is tendered by a child and of a sexual nature.

4. RELEVANCY, OPINION EVIDENCE AND EXPERT EVIDENCE

SOUTH AFRICA

Section 210 of the Criminal Procedure Act holds that:

'No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.'

Various definitions of relevant facts have been put forward. In the case of *R v Mpanza*⁸⁴ it was held that facts 'are relevant if from their existence inferences may properly be drawn as to the existence of the fact in issue'. In *R v Katz*⁸⁵, Watermeyer CJ approved of Stephen's definition of relevancy.

'The word relevant means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.'

⁸³Only if the abuse took place in the absence of eyewitness presence however.

⁸⁴1915 AD 348 at 352.

⁸⁵1946 AD 71 at 78.

And in *R v Matthews and others*⁸⁶ Schreiner JA held that relevance is 'based upon a blend of logic and experience lying outside the law.'

In *Commentary on the Criminal Procedure Act*⁸⁷ the authors note that '(i)f evidence does not logically show or indicate the facts sought to be proved, it is inadmissible. It takes matters no further and is said to be *logically* irrelevant. A finding that evidence is logically relevant, on the other hand, does not end the inquiry. It must still be asked whether the evidence is *sufficiently* relevant to be received.'

The authors point to Federal Rule 403 as indicative of the type of practice usually followed in South Africa.⁸⁸

'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.'

In this respect it was held *per Watermeyer CJ* in *R v Katz*⁸⁹ that relevant facts which are normally excluded from evidence are facts which are 'of little probative value and likely to cause prejudice'. Similarly in the case of *Delew v Town Council of Springs*⁹⁰ it was held that evidence tending to waste time or burden the enquiry with collateral matters would be rejected on the grounds of policy and fairness.

This leads us to the issue of opinion evidence in the law. There are two approaches which govern understanding of the opinion rule

⁸⁶1960 (1) SA 752 (A) at 758.

⁸⁷Du Toit, E. De Jager, F.J. Paizes, A. Skeen, A. Van der Merwe, S. eds. 3rd ed (1993) 24-12.

⁸⁸op cit 24-12.

⁸⁹Supra n 61.

⁹⁰1945 TPD 128 at 130.

in the South African legal system.⁹¹ The first is, a traditional approach which holds that '(t)he general rule is that the opinion or belief of a witness is irrelevant because it is the function of a court to draw inferences and form its opinion from facts; the witnesses give evidence as to the facts, the court forms its opinion from those facts.'⁹² This rule acknowledges a closed list of exceptions, ranging from: expert testimony to testimony on identification; estimates of age; value and degree of intoxication.⁹³

A major problem associated with the traditional approach is the absence of a 'satisfactory distinction between "facts" and inferences.' Hoffmann and Zeffertt write that '(a) witness who says "I saw the accused shoot the deceased" may appear to be making a plain statement of fact, but he is really drawing an inference from his observation of actions such as the pointing of a gun by the accused and his pulling of the trigger, the sound of the shot, and the subsequent injury to the deceased.'⁹⁴

A second approach to opinion rule is that as enunciated in *R v Vilbro*⁹⁵ where the views of Wigmore concerning opinion evidence, were cited with approval. The opinion rule 'simply endeavours to save time and avoid confusing testimony by telling the witness: "The tribunal is on this subject in possession of the same materials as yourself; thus, as you can add nothing to our materials for judgement, your further testimony is unnecessary, and merely encumbers the proceedings. It is this living principle which is (or ought to be) applied in each instance; nothing more definite than this is the test involved by the principle.'⁹⁶ In

⁹¹See generally Hoffmann & Zeffertt op cit 83-88.

⁹²Hoffmann & Zeffertt op cit 83.

⁹³Hoffmann & Zeffertt op cit 84.

⁹⁴Hoffmann & Zeffertt op cit.

⁹⁵1957 (3) SA 223 (A).

⁹⁶At 228E.

other words, according to this approach, all supererogatory evidence is rejected.

In respect of expert evidence, the general rule is that 'the opinion of expert witnesses is admissible whenever by reason of their special knowledge or skill they are better qualified to draw inferences than the judicial officer.'⁹⁷

According to the traditional approach, the admissibility of expert testimony is an exception to the rule governing opinion evidence. In accordance with the *Vilbro* approach, expert testimony is admissible whenever it is not supererogatory. That is, a witness may not tender an opinion on a matter before the court, unless the matter is one outside the knowledge and experience of the court, and where the competency to form an opinion can only be acquired by special study or experience.⁹⁸

In *Ruto Flour Mills Ltd v Addelson*⁹⁹ the court held per Boshoff J that:

'An expert's opinion is received because and whenever his skill is greater than the Court's'

A witness need not necessarily be an expert in the strict sense, for his opinion to be accepted by the court. Opinion tendered by both expert and non-expert alike could be held admissible, depending upon the nature of the case.¹⁰⁰

In the case of *S n Nangutauala*¹⁰¹ Hoexter J referred to the writings of Schmidt in *Bewysreg* :

⁹⁷Hoffmann & Zeffertt op cit 97.

⁹⁸*Cooper (SA) (Pty) Ltd v Deutsche Gesellschaft Fur Schadlingsbekampfung Mbn* 1976 (3) SA 352 (A).

⁹⁹1958 (4) SA 235 (T) at 237B.

¹⁰⁰Hoffmann & Zeffertt op cit 98-99.

¹⁰¹1974 (2) SA 165 (SWA).

'Daar word nie vereis dat die getuie die hoogste kwalifikasies op sy gebied moet besit, of dat hy noodwendig teoretiese opleiding moet ontvang het. Die benadering is realisties. Die getuie se kwalifikasies moet gemeet word aan die getuie wat hy lewer, om te bepaal of die getuie van betekenis in die saak, dit sal se relevant sal wees.'

Expert witness testimony may be based upon either:

1. Inferences from facts within the expert's own personal experience; or
2. Opinion on the basis of facts proved by others.¹⁰²

The expert tendering his opinion must communicate to the court the premises upon which he bases his opinion in order that 'if one or more of these is finally rejected, the opinion too must be discarded.'¹⁰³ Where an expert bases his opinion on the testimony of others, the facts of which are still to be proved, the expert must give his opinion in the form of a hypothesis in which the assumed facts are laid out. It is also essential that the expert provide the court with reasons for his opinions. The basis for this principle, is that this allows the court to exercise its discretion in respect of accepting or rejecting the expert's testimony.¹⁰⁴

The procedure to be followed in respect of calling an expert is laid out in the Magistrate's Court Rules No 24(9) and the Supreme Court Rules 36(9). The rules provide that:

'No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received, unless he shall-

- (a) not less than 15 days before the hearing, have delivered notice of his intention to do so; and
- (b) not less than 10 days before the hearing have delivered a summary of such opinions of such expert and his reasons therefore.'

¹⁰²Hoffmann & Zeffertt op cit 101.

¹⁰³Hoffmann & Zeffertt op cit 102.

¹⁰⁴Hoffmann & Zeffertt op cit.

The above discussion is meant to provide a framework for analysis of the issue of admissibility of expert opinion in respect of the credibility of the child witness. This is dealt with comprehensively in the conclusion of this section.

UNITED KINGDOM

The general rule in the United Kingdom is that the courts will not receive evidence from any person upon a matter upon which the judge and jury have to decide. An exception to this rule is that the opinion of an expert witness is admissible in evidence, whenever the subject is one on which the ability to make a decision is founded upon skill, study or experience, which is beyond the capability of the judge or jury.¹⁰⁵

In the case of *Director of Public Prosecutions v Jordan*¹⁰⁶ Lord Wilberforce cited *R v Turner*¹⁰⁷ with approval.

'An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgement more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves, but there is a danger that they may think it does.

The expert may give an opinion on matters which are either admitted or proved by himself, or other witnesses in his hearing, on matters of common knowledge as well as upon a hypothesis based thereon.¹⁰⁸

¹⁰⁵See generally *Phipson On Evidence* 32-07; *Cross On Evidence* 488-503.

¹⁰⁶[1977] AC 699 at 718.

¹⁰⁷[1975] QB 834 at 841.

¹⁰⁸*Phipson On Evidence* 34-14.

The determination of the competency of the expert falls within the province of the presiding judicial officer. In the case of *Davie v Edinburgh Magistrate*¹⁰⁹ it was held per Lord President Cooper that:

'The duty of experts is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence.'

While wide latitude is offered to the expert, the application of the ultimate issue rule which stipulates that an expert witness may not express his opinions upon any issue whether of law or fact which the law is called upon to determine, ensures that the expert does not usurp the function of the trier of the fact.¹¹⁰

As noted by Spencer and Flin, the effect of this rule in child sexual abuse prosecutions, is essentially that an expert witness may not tender opinion in the area of whether sexual abuse occurred. The expert may however present evidence which with common-sense would lead the court to formulate the opinion of abuse.¹¹¹

'If the jigsaw is capable of being assembled by the court, the expert must leave the magistrates, judges or jury to do it: he can hand them the pieces but he may not put the pieces together for them, even if he could do it quicker and more accurately than they could.'¹¹²

While the ultimate issue rule is definitely on its way out, Spencer and Flin argue that notwithstanding its possible

¹⁰⁹[1953] SC 34 at 40.

¹¹⁰*Joseph Cromfield and sons Ltd v Techno-Chemical Laboratories Ltd* (1913) 29 TLR 378 at 379; *Cross On Evidence* 499-500.

¹¹¹Spencer & Flin op cit 210.

¹¹²Spencer & Flin op cit 211.

abolishment, evidence may still fall foul of other exclusionary rules., i.e., the rule that expert opinion is not admissible where the court is competent to decide without it, and the rule that a judge must reject evidence which is unduly prejudicial.¹¹³

AMERICA

The rules applicable to expert testimony in America are governed by Federal Rules 702 and 703.

'Rule 702. Testimony by experts

If scientific, technical or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience training or education may testify thereto in the form of an opinion or otherwise.'

'Rule 703. Bases of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject the facts or data need not be admissible in evidence.'

The analysis of expert opinion in America requires (1) examination of the admissibility of the evidence - whether the testimony will aid the trier of the fact in evaluating and understanding the issue; and (2) determination of whether the probative value of the evidence will outweigh the prejudicial

¹¹³Op cit 212. Briefly, the general rule applicable in South Africa is that where the court cannot formulate a decision on an ultimate issue, in the absence of a person qualified to render an opinion, it must rely on expert opinion. This is contained in the dictum of Wessels JA in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft fur Schadelingsbekampfung MbK* 1976 (3) SA 352 (A) at 370F-H: 'There are, however, cases where the court is by reason of a lack of special knowledge and skill, not sufficiently informed to enable it to undertake the task of drawing properly reasoned inferences from the facts established by the evidence, in such cases, subject to the observations in the *Gentiruco* case (1972 (1) SA 589 (A))..the evidence of expert witnesses may be received because, by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact.'

impact.

In accordance with Federal Rule 703, the opinion rendered by the expert must be reliable. Reliability referring to an opinion generally relied upon by experts in a particular field.

An exception to Rule 703 provides that evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issue, misleading the jury, undue delay, waste of time, or needless presentation of cumulative facts.¹¹⁴

As in South Africa, the determination of the balance between the probative value of the evidence against its prejudicial impact, falls within the province of the trial judge. In the case of *US v Wright*¹¹⁵ the court held that this determination may not be disturbed on appeal save for instances of grave abuse of the discretion.

In respect of expert evidence concerning child abuse, numerous American courts have in the past accepted admissibility of medical testimony concerning the 'Battered Child Syndrome'. This is by virtue of the fact that the syndrome is based upon signs and symptoms verifiable by physical examination, x-ray and other objective medical techniques.¹¹⁶

In the case of *People v Jackson*¹¹⁷ it was held that the trial court had not erred in allowing a doctor's testimony that a child had suffered from this syndrome. The appeal court held that while

¹¹⁴Federal Rule 403.

¹¹⁵1973, 489 Fd 1181

¹¹⁶See: Myers, J.E.B. 'Expert testimony in Child Sexual Abuse Litigation - The American Experience' in *Intervening in Child Sexual Abuse*, eds Murray, K. & Gough, D.A. (1991) 108-109.

¹¹⁷18 Cal App 3d 504, 95 Cal Rptr 919.

the admissibility of such evidence lay within the discretion of the trial court, the diagnosis of the syndrome was an accepted medical diagnosis and that lack of scientific certainty did not deprive the medical opinion of its evidentiary value.

In *People v Ewing*¹¹⁸ the court affirmed that the diagnosis of the syndrome was admissible as evidence in child abuse prosecutions, that the syndrome denoted repeated, sometimes serious injuries inflicted over a period of time, and that it was of such nature, severity and number as to preclude an inference of accident.

In respect of expert testimony of the sexually abused child syndrome, the courts have frequently in the past rules on its admissibility in order to counterattack defence attacks on:¹¹⁹

1. the child victim's delay in reporting the abuse;
2. frequent alterations of the testimony concerning abuse;
3. recantations of allegations of abuse;
4. the child's ambivalence to testify in court.

In, *Matter of Cheryl H*¹²⁰ the court held that:

'Expert opinion testimony about whether a child has been sexually abused is similar to the battered child syndrome testimony already approved by Californian courts...Child beating and sexual molestation of a child differ primarily in location and cause..If expert opinion testimony is admissible to establish that the facial and bodily injuries exhibited by the child are the result of an ongoing pattern of child beating then that same sort of testimony should be available to assist a trier of fact who is attempting to determine whether certain vaginal injuries were caused by sexual abuse rather than some innocent accident,

Here of course, it is not medical testimony about the physical characteristics of the injury which support the diagnosis. rather it is psychiatric testimony about the victim's post injury behaviour which leads to the conclusion that she was sexually abused. But that behaviour appears to be unique to children

¹¹⁸(1977, 3d Dist) 72 Cal App 3d 714, 140 Cal Rptr 299.

¹¹⁹Myers op cit 110.

¹²⁰1953 Cal App 3d 1098, 200 Cal Rptr 789.

subjected to child abuse and as a valid indicia of such abuse as the physical characteristics used to identify the battered child syndrome" '.

While in the above mentioned case, the courts revealed their willingness to rely on expert testimony concerning symptoms characteristic of victims of child sexual abuse, the courts have however rejected expert testimony concerning the credibility of the child witness.¹²¹ Reasons cited for the lack of admissibility of such testimony range from the inability of experts to provide statistical data on the likelihood that children tell the truth to the possibility that such evidence will produce a trial within a trial between the experts on a collateral issue.¹²²

CONCLUSION

It is apparent from the foregoing that the value of expert testimony on issues which are beyond the general comprehension of the courts, is recognised by all major legal systems. One issue which has confronted the courts in the past, relates to the admissibility of expert opinion on the credibility of the sexually abused child witness. Time and time again, legal systems worldwide have pointed out that the admissibility of such an opinion goes against the central tenet of expert evidence, i.e., that the function of the expert is to assist the court, not usurp the functioning of the trier of the fact.

In 1989, one of the key issues which the South African Law Commission was called upon to review related to the admissibility of expert testimony on the credibility of the child witness. In coming to a decision the Commission referred to the comments of the Natal Law Society:

'The Commission properly cautions against innovations in this respect. Permitting an expert witness to give an opinion on the

¹²¹Myers op cit 115.

¹²²ibid

child's credibility is not permissible, on the grounds that it usurps the functions of the court. Courts assess credibility on actual evidence and specific behaviour, not from the generalised behavioural patterns or abused child syndrome.'

A major problem inherent in the use of experts in an adversarial context relates to the possibility that such could give rise to the situations of 'trial by experts'. Such would in the long run be detrimental to the child as it could result in extended trials.

Proposals for circumventing the problems facing the judge or magistrate confronted by a child sexual abuse trial are:

1. Establishing specialised units of prosecutors and presiding officers who have the expertise and experience in child abuse cases.
2. Appointing a 'neutral' expert to sit with the judge as assessor and provide assistance to the court concerning the developmental and psychological needs of the child. The aim of such expert would be not to offer testimony on the substance of the allegations but to remain strictly non-partisan and assist the court in relation to any issue pertaining to child sexual abuse which is beyond the general level of knowledge of the court.

5. PREVIOUS CONSISTENT STATEMENTS

The law applicable to previous consistent statements is relevant to issues dealing with the sexual abuse of children, and is accordingly discussed hereunder.

The general rule applicable to previous consistent statements is that 'a witness cannot be corroborated by proof of prior similar statements.'¹²³ This rule falls under the provisions of s 210 of the Criminal Procedure Act as discussed hereabove, which

¹²³R v Rose 1937 AD 467 at 473 per De Wet JA. See also, S v Mkhohle 1990 SACR 95 (A).

provides:

'No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.'

There are however a number of exceptions to the rule against inadmissibility of a previous consistent statement. Generally these exceptions relate to instances where:

- (i) the previous statement is from a complainant in a sexual case;
- (ii) such can be used as a means of rebutting a 'recent' fabrication; and
- (iii) such can be used as evidence of prior identification.

Of particular importance to the child sexual abuse victim, is the exception relating to complainants in sexual cases.¹²⁴ Generally, the position of the law is that evidence, that the complainant in a sexual case made a complaint soon after the alleged offence, is admissible evidence to show 1. consistency of the witness' evidence and 2. absence of consent.¹²⁵ The admissibility requirements for previous consistent statements under this section are:

1. The complaint must have been made at the first possible opportunity.

In the case of *R v Gannon*¹²⁶ the court acknowledge that determination of the time factor was a function of the exercise of the presiding judicial officer and would be

¹²⁴This rule is applicable to prosecutions involving rape, indecent assault and similar offences. Hoffmann & Zeffertt op cit 119.

¹²⁵Hoffmann & Zeffertt op cit 118. See also *R v M* 1959 (1) SA 352 (A) which is discussed here above.

¹²⁶1906 TS 114.

affected by such factors as the age of the complainant, awareness of the physical and moral character of the act, the availability of a person in whom the complainant could confide, and the possibility of threats for silence.

2. The complaint must have been of a voluntary nature.

A complaint elicited by threats is not admissible. In the case of *S v T*¹²⁷ a mother's threat to beat her child unless she told her who had sexually assaulted her was not accepted by the court as a previous consistent statement, as such had been elicited by threats.

3. The complainant must testify at trial.

Failure of the complainant to give evidence at a trial would render the previous complaint of sexual abuse, inadmissible evidence. 'from all the authorities it is, therefore, clear that, when the evidence of the complainant is not before the Court, neither the particulars of a complaint made by her, in the absence of the accused, nor the bare fact that a complaint was made, can be given in evidence.'¹²⁸

The inclusion of the above exception to the rule against self-corroboration, is laudable, given that in the majority of cases of sexual assault, whether perpetrated on child or adult, the act takes place outside the presence of eyewitnesses. In respect of instances of child sexual abuse, the effect of the exception is essentially to lighten the heavy burden carried by the child complainant on participation in the legal process.

6. SPECIAL COURTROOMS, CLOSE-CIRCUIT TELEVISION LINKS

¹²⁷1963 (1) SA 484 (A).

¹²⁸Centlivres JA in *R v Kagladi* 1943 AD 255 at 261.

AND EVIDENCE VIA INTERMEDIARIES

SOUTH AFRICA

In 1990 an 'unusual' application was made to the Regional Court in Pietermaritzburg to allow a seven-year-old victim of an alleged kidnapping to give evidence in a room other than the courtroom via a closed circuit television.¹²⁹ The child was to be questioned by a state prosecutor who being fitted with earphones and could relay to the child the questions of the court, prosecution and defence. The former were all to be seated in an adjoining room from which they would watch the proceedings on a television screen. The oath was to be administered by the intermediary, who as an 'interpreter' was empowered by s 165 of the Criminal procedure Act to administer the oath to the child.

Unfortunately, the application was refused on the ground that criminal proceedings must take place in the presence of the accused.¹³⁰ The presiding judicial officer also noted that in accordance with precedent set down in the case of *S v Motlatla*¹³¹ it was imperative that there should be a confrontation between the accused and the complainant.

The issue of allowing a child witness to give evidence outside the presence of the accused was again broached in the *Report on the protection of child witnesses*.¹³² Many proposals in connection herewith were put forward by the Commission, and these proposals have formed the basis for the newly enacted s 170 A of the Criminal Law Amendment Act.

Section 170A makes provision for the accommodation of those

¹²⁹See: Schwikkard, P.J. 'The Child Witness: Assessment of a Practical Proposal' (1991) 4 SACJ 44-49.

¹³⁰Section 158 of the Criminal Procedure Act 51 of 1977.

¹³¹1975 (1) SA 814 (T) at 815E-F.

¹³²Project 71 of 1991 32; 45.

aspects which have an inhibiting influence on the tendering of evidence by the child witness, while, not dispensing with 'time-honoured rules for procedure and evidence.'¹³³

In introducing the Act to parliament, the Deputy Minister of Justice is recorded as saying:

'It happens from time to time that those who have a vested interest in the truth not being revealed in court try to prevent the truth from coming to the fore by all kinds of means...(this is apparent)...Particularly in cases where the witness is still under age and especially susceptible to intimidation and threats, it is often found that a child witness may actually, apart from anguish personally suffered, jeopardise the State's case when giving evidence in an environment and atmosphere which he or she perceives as being threatening. These child witnesses are very often the only witnesses of an alleged crime, especially crimes involving sexual abuse.'

EXAMINATION OF THE PROVISIONS OF THE SECTION

Section 170A(1) makes provision for the a witness below the age of eighteen years, to give testimony by way of an intermediary, whenever it appears to the court that to testify at such proceedings would cause undue mental stress and suffering for the witness. Section 170A(3) provides that the court may direct that the witness in respect of whom an intermediary has been appointed, shall give his evidence at any place which is informally arranged, away from the presence of any person whose presence may upset the witness (normally the accused), and via the use of a live video link.

Section 170A raises a number of interesting considerations. Namely, the section permits significant changes in the submission of evidence by witnesses under the age of 18 years. The criterion to be satisfied is that the court is of the opinion that to expose the witness to normal criminal proceedings would result in '*undue mental stress or suffering*' for the witness. No guidelines as to what constitutes undue mental stress and suffering are provided. Therefore, the question arises, 'Upon

¹³³*Hansard (House of Assembly Debates)* 19 June 1991, 13523.

what premise would the court base a finding of 'undue mental stress and suffering'? and following on this, 'When would such determination take place? Before the start of proceedings? Or, only after the proceedings have commenced and the court has had ample opportunity to examine the witness's performance in court?' By which time, it is submitted, the witness will possibly be sufficiently stressed for long term psychological damage to ensue.

Another issue concerns that of the age limit imposed for this novel form of protection. According to the provision of the section, only witnesses under 18 years of age, may testify in such a manner. It is obvious that the legislature has taken the age-limit imposed by the Child Care Act ¹³⁴ as the criterion for protection. But, as was noted in Chapter 4, pertinent legislation concerning aspects relating to the protection of the child reveal a patchwork of inconsistent and anomalous age levels. A child of 19 years who is still dependent on the family and who is the victim of continual rape within the family, will suffer just as much, and be as afraid of testifying against the father, as a seventeen-year-old victim would. A child of nineteen is no less susceptible to the threat of traumatization or intimidation than a child of seventeen. The only difference between the two age groups is that, one is given psychological support, in the form of being allowed to testify in another room away from the accused, while, the other is expected to face the full onslaught of the adversarial system, in conjunction with heightened levels of stress and embarrassment characteristic of the 'Child Sexual Abuse Accomodation Syndrome'.

It should be noted that s 227 of the Criminal Procedure Act provides some form of protection to the sexually abused victim, irrespective of age, in that it provides that 'evidence of the complainant's sexual history will...be inadmissible and cross-examination of the complainant will be impermissible if the court

¹³⁴Act No. 74 Of 1983. Section 1.

is of the view that the probabtive value of the evidence so elicited is substantially outweighed by its disadvantageous or prejudicial qualities.¹³⁵ This however still does not allow for the older victim to be examined in a place removed from the presence of the accused,

While, it is acknowledged, that at this point in time, effort must be directed against opening the floodgates, and allowing anyone, irrespective of age, who screams rape, to be afforded the specialised protection now offered by the courts, it is submitted, that sensitive consideration should be given to allowing persons below 21 years of age who allege sexual abuse by the father figure in the family, to be given the opportunity to give evidence of the abuse via a video link. If eyebrows are raised at this suggestion, it must be borne in mind, that the section places the discretion for use of such facility, at the feet of the court. The floodgates will not be opened.

The use of a video link between the court and the witness is a laudatory means of counteracting the negative factors associated with the courtroom. Traditionally a courtroom presents a harsh, bleak appearance to the outside world. Its atmosphere is accusatory. Research reveals that this has a detrimental effect on witnesses. For the innocent child victim of the sexual offence, the very appearance of the courtroom may be enough to frighten them into a silence. Placing the child, in a 'child-friendly' environment will do much to combat one of the first intimidatory aspects of legal involvement.¹³⁶

The decision to allow the child to give evidence in a place other

¹³⁵Du Toit, E. De Jager, F.J. Paizes, A. Skeen, Q. Van der Merwe, S. *Commentary on the Criminal Procedure Act* (1993)24-100B.

¹³⁶It is submitted that the second intimidatory factor, is the presence of the accused in the courtroom. The third, the cross-examination of the child by the defence attorney or the accused himself. Fortunately, s 170A deals with both of these aspects.

than the courtroom is the function of the presiding judicial officer.¹³⁷ As noted, the criterion is 'undue mental stress and suffering'. The general nature and import of the criterion must be satisfied before the presiding judicial officer can exercise his discretion in favour of the child. It is interesting to note that the Law Commission recommended that the criterion to be satisfied should be that of 'substantial mental anxiety or harm'.¹³⁸ It is submitted that the present criterion has a greater potential of protecting the interests of a larger category of children, as it is less stringent than the one proposed by the Law Commission. Essentially, the determination of whether a child witness would suffer 'substantial mental anxiety or harm' would result in time delays as the court would have to bring in an expert to ascertain the mental state of the child and thereafter, hypothesize about the impact of court involvement.

It is interesting to note that the provisions of the section are not confined to the protection of child victims of sexual abuse but extend to the protection of any child witness who satisfies the criterion laid down.

(ii) Evidence through intermediaries

'Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, *subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.*'

Subsection (4) (a) provides that the Minister may by notice in the

¹³⁷Sections 170A(1) and 170A(3).

¹³⁸See the proposed Bill as annexed to the *Report on the Protection of child witnesses.*

Government Gazette determine the category or class of persons who are competent to be appointed as intermediaries. Under regulation 1374¹³⁹, the class of persons designated to act as intermediaries are:

(a) Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Service Professions Act,¹⁴⁰ and against whose names the speciality **paediatrics** is also registered.

(b) Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Service Professions Act¹⁴¹ and against whose names the speciality **psychiatry** is also registered.

(c) Family counsellors who are appointed as such under s 3 of the Mediation in Certain Divorce Matters Act¹⁴², and who are or were registered as social workers under the Social work Act¹⁴³, or teachers in qualification categories C to G as determined by the Department of National Education, or clinical, educational, counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act¹⁴⁴

(d) Child care workers who have successfully completed a two year course in child and youth care approved by the National Association of Child Care Workers and who have four years' experience in child care.

(e) Social Workers who are registered as such under s 17 of the

¹³⁹R1374 GG 15024 of 30 July 1993.

¹⁴⁰Act No. 56 of 1974.

¹⁴¹Op cit n 110.

¹⁴²Act No. 24 of 1987.

¹⁴³Act No. 110 of 1978.

¹⁴⁴Op cit n 110.

Social Work Act¹⁴⁵ and with two years experience in the field.

(f) Teachers qualified in categories C to G, with four years' experience in teaching and who have not at any stage, for whatever reason, been suspended or dismissed from service in teaching.

(g) Psychologists registered as clinical, educational, or counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act.¹⁴⁶

A major criticism directed at the designated category of potential intermediaries is the absence of a category permitting legal professionals to act as intermediaries. This is an obvious shortsighted omission on the part of the Minister of Justice. Subsection (2) provides that no examination, cross-examination, or re-examination of any witness in respect of whom the court has appointed an intermediary shall take place in any manner other than via the intermediary.¹⁴⁷ And, the intermediary may during the questioning convey the general purport of the question to the witness.¹⁴⁸ Firstly, with all due respect to the ability of the designated category of intermediaries, the use of 'legal' intermediaries will provide far greater insurance against (1) time delays caused by defence objections to the intermediary's 'translation' of a question and (2) against potential appeals and reviews of a case which in the long run will only be detrimental to the child. Secondly, including a category for legal professionals to act as intermediaries, will circumvent the problems which could arise in a rural area where an intermediary is required, but the closest one is miles away, and getting her to come out to the court will result in time delays and a waste

¹⁴⁵Op cit n 113.

¹⁴⁶Op cit n 110.

¹⁴⁷Subsection (2)(a).

¹⁴⁸Subsection (2)(b).

of funds (hotel expenses, travelling expenses, professional costs). Were a category of legal intermediary included in the regulation, each rural court could ensure that where its staff consists of more than one prosecutor, one should be trained and designated to operate as an intermediary in cases where one is required. Thirdly, using trained legal intermediaries will save the state a lot of money. And this money which is saved could then be used for training and education of judges, magistrates, and prosecutors on issues relevant to the legal response to child physical and sexual abuse.

Briefly, in respect of the manner of operation of the section. The envisaged operation is that the intermediary acts as the conduit for the questioning of the child by the court. The prosecution, defence and court put the question which they'd like the child to answer, to the intermediary who then relays the question to the child in a tactful manner.

ENGLAND

In England, section 32 of the Criminal Justice Act 1988¹⁴⁹, provides for the reception of evidence from a child under 14 via close circuit video link, where the child is a witness in a sexual offence, a violent crime, or in an act involving cruelty to children.¹⁵⁰

Criticism has been directed at the limitation of the 'live video link' to trials of a sexual or violent nature. Spencer writes:

'What sensible reason could there be possibly be for restricting the live link to trials for certain defined offences? Surely it should be available in any case, sex, violence or otherwise, where a young child may be able to give useful evidence but may be afraid to do so in open court; a trial of an estranged parent for attempting to burn down the family home, for example, or

¹⁴⁹Came into force 5 January 1989.

¹⁵⁰Section 32(2).

of a Fagin-esque adult who has organised a group of children to steal.¹⁵¹

Another area of criticism is the fact that the provision is not available in magistrates' courts. 'Even the most serious child sexual abuse cases start off with 'committal proceedings', which are a preliminary hearing in the magistrates' courts, where the magistrates examine the prosecution evidence and decide whether the case is worth sending to the Crown Court for trial.'¹⁵² And finally, the proposal does not allow for the use of an intermediary other than the lawyer in the case, to act as the conduit whereby the questions are relayed to the child.¹⁵³

In respect of the use of a screen to shield the child witness from the threatening presence of the accused, it was held in the case of *R v X; R v Y; R v Z*¹⁵⁴ that the screen did not provide an unfair advantage to the child victim. The court ruled *per* Lord Chief Justice, Lord Lane, that the necessity of trying to ensure that the child would be able to give evidence, outweighed any possible prejudice to the defendant's basic rights, as a result of the erection of the screen.¹⁵⁵

AMERICA

In America, numerous States have attempted to respond to the needs of the child witness to present their version of the events in question without 'face to face' confrontation' as embodied in the Sixth Amendment of the United States Constitution. The confrontation clause of the Sixth Amendment provides that '(i)n all criminal prosecutions the accused shall enjoy the right ..

¹⁵¹Spencer, J.R. 'The English Legal System' in *Intervening in Child Sexual Abuse*, eds Murray, K. & Gough, D.A. (1991) 87.

¹⁵²Spencer *op cit* 88.

¹⁵³Spencer *op cit* 88.

¹⁵⁴(1989) *The Times* November 3.

¹⁵⁵Cited in Lyon, C. & De Cruz, P. *Child Abuse* (1990) 70.

to be confronted with the witnesses against him.'¹⁵⁶ In the case of *Mattox v United States* ¹⁵⁷ the court declared that the primary object of the clause was to allow the criminal defendant 'a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge him by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief'.

The use of live video links in child sexual abuse prosecutions, has been attacked in numerous cases as a violation of the accused's right to confrontation of the accuser. Two cases in particular, spring to mind in connection herewith: *Coy v Iowa* ¹⁵⁸ and *Maryland v Craig* ¹⁵⁹.

In the case of *Coy v Iowa*, two thirteen-year-old girls were sexually molested by a man wearing a stocking over his head, while they slept in a tent erected in their backyard. The backyard was located next to the home of the defendant. In their statement, the girls said that the man shone a torch into their eyes and warned them not to look at him. Accordingly, neither girl was able to describe the assailant's face. One girl however, revealed that after performing various sexual acts on the girl, the assailant urinated in a yellow cup belonging to the girl. The police found the cup and a flashlight in the home of the

¹⁵⁶Nuce, G.R. 'Child Sexual Abuse: A New Decade for the Protection of our Children?' (1990) 39 *Emory Law Journal* 586.

¹⁵⁷156 U.S. 237 (1895) cited in O'Brien, J.S. 'Television Trials and Fundamental Fairness: The Constitutionality of Louisiana's Child Shield Law' (1986) 61 *Tulane Law Review* 154-155.

¹⁵⁸108 S.Ct. 1798, 487 U.S. 1012 (1988).

¹⁵⁹110 S.Ct. 5157, 111 L.Ed.2d 666 (1990).

defendant.¹⁶⁰

At the trial of the defendant, a screen was placed between the defendant and the girls during the tendering of their testimony. The defendant, argued that the screen violated the face to face confrontation principle as embodied in the U.S. constitution. This argument was confirmed by the Supreme Court.

In his argument, Justice Scalia pointed out that while adherence to the face to face confrontation principle could upset the truthful rape victim and the abused child, 'constitutional protections have costs.'¹⁶¹ The judge noted however, that the principle was not absolute but would in appropriate cases give way to other competing interests.¹⁶² 'I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses.'¹⁶³

In the case of *Maryland v Craig*¹⁶⁴ a child-care worker was charged with the sexual abuse of a number of children in her care. Four children were permitted to give evidence against her by means of closed-circuit television. she was convicted of the abuse. The Maryland appeal court overturned the ruling of the trial judge on the ground that he should have first questioned the witnesses as to their ability to testify. In the United States Supreme Court this decision was again overturned. The court ruled that the use of a closed-circuit television link did not violate the rights of the accused.¹⁶⁵

Judge Scalia held:

¹⁶⁰Nuce op cit 596-597.

¹⁶¹Supra 2802.

¹⁶²Supra 2803-2804.

¹⁶³Supra 2804.

¹⁶⁴Supra n 110.

¹⁶⁵Perry & Wrightsman op cit 146-147.

'The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against them at trial...Although the face-to-face confrontation forms the core of the Clause's value, it is not an indispensable element of the Confrontation right..Accordingly, the Clause must be interpreted in a manner sensitive to its purpose and the necessities of trial and the adversary process. Nonetheless, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured.'¹⁶⁶

In other words, this case provides that the rights of the defendant to face-to-face confrontation will be upheld, unless there is sufficient indication of trauma to the child and/or inability to communicate without the protection of a CC-TV link, in which case, the rights of the defendant pale in comparison to those of the child.¹⁶⁷

CONCLUSION

The attempts which are evidently being made worldwide, to improve criminal proceedings in respect of the child witness, are to be warmly appaluded. These amendments do not constitute radical attempts at modernising the law, but are essentially, the barest minimum which is required if any legal system is to be considered fair and effective.

Review of the amendments to the American and English legal systems in respect of the admissibility of testimony via live video links reveals South Africa to be an obvious leader in this field. For example, whereas, no mention is made at present in the English or American systems for the use of intermediaries trained in or knowledgeable about child developmental psychology or language skills in children, the use of such intermediaries as conduits in the examination process of the child is a starting point of the amendment. Secondly, in the South African legal

¹⁶⁶Supra 673.

¹⁶⁷Perry & Wrightsman op cit 218.

system, s 170A is applicable whenever the court is of the opinion that a child witness would be exposed to 'undue mental stress or suffering'. In England, s 14 of the Criminal Justice Act is limited to children under 14 who are witnesses to a sexual or violent offence. And in America, stringent conditions are imposed by the various States before recourse can be had to the procedure, i.e., the prosecutor must show that the child would suffer more than *de minimis* trauma from testifying in the presence of the accused.¹⁶⁸

A final issue which must be reviewed prior to examination of the admissibility of a video taped interview of abuse relates to the use of specialised interrogators under the Israeli legal system.

In a nutshell, the youth interrogator who is generally, a professional involved with child care such as a psychologists, educational officer, social worker, or youth probation officer, is empowered by the law, to decide whether and under what circumstances the interrogation of the child witness of a sexual offence should be permitted.¹⁶⁹ The usual procedure followed by the youth interrogator confronted with an allegation of sexual abuse is to interrogate the child concerned.¹⁷⁰ Evidence of the abuse is noted.¹⁷¹ This evidence is admissible in court.¹⁷² The youth interrogator makes a decision regarding whether the child should appear as a witness in court. Where the youth interrogator initially permits the child's involvement in the system, he may subsequently, remove that permission if it appears to him that the child's participation will result in psychological harm to

¹⁶⁸Perry & Wrightsman op cit 218-219.

¹⁶⁹Harnon, E. 'Examination of Children in Sexual offences - The Israeli Law and Practice' (1988) *Criminal LR* 264.

¹⁷⁰ibid.

¹⁷¹ibid.

¹⁷²ibid.

the child.¹⁷³

In respect of the issue of the credibility of the child, the general rule is that the court decides on the credibility of the child but can be assisted by the impressions of the youth interrogator.¹⁷⁴ The law holds that the accused in such proceedings cannot be convicted solely on the evidence submitted through the youth interrogator.¹⁷⁵ Such evidence must be corroborated for conviction to ensue. Where, a child tenders evidence in person, and such evidence is in conflict with that tendered by the youth interrogator, the position of the law is that the evidence of the latter must take precedence.¹⁷⁶ The reason for this is that the courts recognise that earlier allegations of sexual abuse will be less likely to be influenced by controversy or intimidation.

While, the Israeli Procedure is laudable in that its aim is to discover the truth without harming the well-being of the child and still safeguarding the rights of the accused, it is submitted that the procedures operative in the American, English and South African legal systems, offer a more innovative and responsive approach to the problem of child sexual abuse prosecutions. While the procedures in the latter countries do not offer as personalised an involvement of the legal officials in individual cases of abuse; they do however offer a more 'justice-orientated' approach to the entire issue of child abuse, through their attempts to balance the rights of the accused with those of the victim. The Israeli procedure can be likened to that of a swinging pendulum, one moment it swings to the side of the victim, providing him with his own personalised protector and the next moment, it swings to the side of the accused, demanding

¹⁷³ibid.

¹⁷⁴Harnon op cit 267-268.

¹⁷⁵Harnon op cit 264-265.

¹⁷⁶ibid

stringent acknowledgement of the need for corroboration prior to conviction. Child sexual abuse is not a clear-cut issue which can be packaged into little boxes. It is a messy issue, one where there are rarely witnesses to the events in question. Legal systems need to respond to this truism. Novel approaches permitting the use of video recordings, cc-tv links and the abolition of rules of competence will in the long run, better serve the process of justice, than the mere appointment of specialised interrogators or child advocates in the absence of these amendments.

7. VIDEO RECORDING AND THE INITIAL STATEMENT AS ADMISSIBLE EVIDENCE

SOUTH AFRICA

Another possible means of alleviating a child witness's anxiety without threatening the rights of the accused, relates to the admission of a pre-recorded video-tape of the child's initial allegation of sexual abuse. It is submitted that the video-tape, which would form the major portion of the State's case against the accused, would facilitate the process of justice, by preserving on tape, the child's account of the abuse while this is still 'fresh' in the child's memory.¹⁷⁷

The issue of video-recording of the initial statement of the child as admissible evidence was reviewed by the Law Commission in its *Report on the protection of child witnesses*¹⁷⁸. In its working paper, the Commission noted that while the video recording would have practical advantages for both the police and the prosecutor involved with the case, the recording in the hand of the prosecutor would be inadmissible evidence as it constituted:¹⁷⁹

1. self-corroboration;

¹⁷⁷In Chapter 8 it was revealed that a child's memory is extremely sensitive to the passage of time.

¹⁷⁸Project 71 (1991) 37, 62.

¹⁷⁹At 62.

2. a previous consistent statement;
3. a violation of the principle of viva voce testimony.

Various legal societies commented on this. Justice College deemed the proposition that video recording were of no use according to the current law as 'untentable' ¹⁸⁰ On the contrary, they pointed out that recordings could be admissible evidence; that they were useful as evidential material and not necessarily a form of corroboration; that they could be used as an exception to the rule against previous consistent statements -i.e., especially where allegations of a fabrication were made; that they could bridge the cautionary rule in respect of child witnesses; and finally, that not all evidential material was subject to the requirement of viva voce testimony. The Natal Law Society on the other hand, presented the Commission with both the advantages and disadvantages of video recordings, while the Bar Council of the Cape flatly rejected the proposal for the admissibility of pre-recorded initial interviews, writing:

'It cuts across the fabric of our law, to the extent that the accused is not permitted to confront his accusers. It does make it easier for the child complainant who has been indoctrinated, or who is fabricating, to give false testimony without having to look at the accused face to face.'¹⁸¹

Accordingly, the Commission took the view that: (1) as such recordings were already admissible evidence in law, further statutory amendments to the law were unnecessary, and (2) that their use, though advantageous for all involved, should be confined to the police.¹⁸²

While the issue of admissibility of video-taped recordings will be dealt with more comprehensively under the conclusion to this section, it suffices for now to point out that while the use of

¹⁸⁰At 63.

¹⁸¹At 64.

¹⁸²Page 64.

video-taped recordings as admissible evidence is not the panacea for the problems facing the child witness, the advantages accruing from the recordings warrant similar statutory modifications to the law, as has been done in countries such as the United Kingdom and America.

UNITED KINGDOM

In the United Kingdom, s 54 of the Criminal Justice Act provides for the acceptance of a video recording of the initial interview with a child victim of a sexual or violent offence. The enactment of this section, comes as a response to the Pigot Committee report, published in December 1989.¹⁸³

The recommendations of the Committee were as follows:¹⁸⁴

1. Whenever possible a contemporaneous account of the sexual abuse must be obtained, i.e., within a few days of the initial complaint. The Committee recognised that a contemporaneous account is frequently more accurate and detailed than one given during the trial proceedings.
2. The purpose of the video recorded interview must be recognised by all involved as being distinct from that of a therapeutic interview.
3. A Code of Practice must be drawn up, to provide guidelines ensuring that the interviews are suitable for use in criminal proceedings.
4. The admissibility of video-recorded interviews should be restricted to victims below 14 years in the case of violent offences and below 17 years in the case of sexual offences.
5. The admissibility of the videotaped interview should be decided by a trial judge at a preliminary hearing.
6. A judge who decides to exclude all or part of the recorded

¹⁸³Report of the Advisory Group on Video Evidence (Home Office 1989).

¹⁸⁴Recommendations cited in McEwan, J. 'In the Box or on the Box? The Pigot Report and Child Witnesses' (1990) *Criminal LR* 363-370.

interview should be obliged to provide written reasons for doing so.

7. The purpose of the video-recorded interview should be to replace examination-in-chief.

8. The child witness should not be cross-examined personally by the defendant.

9. The video-recorded interview should be placed in the custody of the police.

AMERICA

In respect of America, the earliest video recording of interviews with the abused children began in the early 1970's.¹⁸⁵ These recordings were used primarily by the police and social workers. In 1977, Montana became the first State to enact laws on the admissibility of videotaped interviews.¹⁸⁶ And, in 1982, the American Bar Council declared its willingness to accept videotapes being used, in legal proceedings involving children.¹⁸⁷

Today, the position in America is that the majority of States have laws which make videotaped testimony admissible evidence.¹⁸⁸ There appears to be two distinct approaches to admissible videotaped evidence. The first, as contained within the the Texas¹⁸⁹, Hawaii¹⁹⁰, and Kansas¹⁹¹ Statutory Books provide for the admissibility of videotapes as supplements to a child's live evidence.

¹⁸⁵Spencer & Flin op cit 141.

¹⁸⁶Spencer & Flin op cit.

¹⁸⁷Spencer & Flin op cit.

¹⁸⁸Spencer & flin op cit 142.

¹⁸⁹Tex, Code Crim. Proc. Ann. art. 38.071 s 5(a) (1992).

¹⁹⁰Hawaii R. Evid. 616.

¹⁹¹Kan. Stat. Ann. s 22-3433(a)(2) (1988).

The disadvantage of such an approach is that '(a)s the child must still be available to give live evidence at trial, and undergo an adversarial cross-examination, this does little to alleviate the problem of stress, but it is of benefit to prosecutors as it is an insurance policy against the child whose testimony at trial is hesitant and incomplete.'¹⁹²

The second, as exemplified in the Nebraska¹⁹³ and Florida¹⁹⁴ Statutes provides for a form of video deposition. This approach provides an alternative to live testimony. The initial examination of the child's evidence which is often given in the presence of the parties involved in the proceedings is video taped, and shown at the trial in lieu of an appearance by the child. In the case of *State v Thomas*¹⁹⁵ the court noted that the primary advantage of the video deposition, was that it minimized the emotional strain of participating in criminal proceedings.

CONCLUSION

In South Africa, the position of the law is that the use of video tapes as a means of serving the process of justice has been viewed in a favourable light. In the case of *S v Baleka and others*¹⁹⁶, it was held per Van Dijkhorst J that:

'Having sat through two weeks of video viewing, I am convinced that the video can be a very helpful tool to arrive at the truth. It does not suffer from fading memory as do witnesses. The camera may be selective, but so is the witness's recollection, even more so. The best word artist cannot draw his verbal picture as accurately and as clearly as does the cold eye of the camera. Not to mention the faltering witness who has difficulty in expressing himself. The tape records and retains for the benefit of the court not only the words but the imitation and emphasis of the speaker and the reaction of

¹⁹²Spencer & Flin op cit 142.

¹⁹³Neb. Rev. Stat. s29-1926(1) (1989).

¹⁹⁴Fla. Stat. Ann. s 92.53(1) (1992).

¹⁹⁵425 N.W. 2d 641, 646 (Wis 1988).

¹⁹⁶1986 (4) SA 194 (T).

the audience. A tape sound and video recording can often be more reliable than the recollection of a witness. The mere fact that there are interruptions in the video and sound recording does not call for the exclusion of the whole video or tape as evidence. Nor would the fact that parts of the visual recording are out of focus or the sound inaudible. Whether and to what extent an incomplete and imperfect video would help the Court in its search for the truth is a matter to be decided in relation to the facts of each case. There can be no hard and fast rule.¹⁹⁷

In conjunction with the favourable light in which video tapes are viewed, there are numerous advantages relating to their use in child sexual abuse cases.¹⁹⁸

Firstly, the video tapes would result in a reduction in the number of pre-trial interviews and the accompanied lessening of the risk of secondary victimization. Graham Davies notes that extensive questioning by the different agencies involved in the case may have the potentially disastrous effect of accelerating the process of memory contamination.¹⁹⁹

Secondly, the video taped interview provides a means of revealing to the court, the facial expressions and emotions of the child which often signal the veracity of the child's account. In addition to demonstrating the child's emotion at the time of disclosure, Spencer and Flin note that another advantage falling under this category is that the video tape reveals the original words used by the child. During repeated questioning, the child may be influenced by adult words for sexual acts, and as noted by the authors this may lead to the false impression that the child has been coached.²⁰⁰

¹⁹⁷At 194I-195B.

¹⁹⁸See: Perry & Wrightsman op cit 164. Spencer & Flin op cit 161-164.

¹⁹⁹Davies, G. "Use of Video in Child Abuse Trials' (1988) *The Psychologist* 21.

²⁰⁰Spencer & Flin op cit 161.

'When an eight-year-old says, "And then he ejaculated over me", defence counsel will immediately ask, "Did your mummy teach you that word?, to which the answer will probably be yes - with the resulting suspicion that the child's knowledge of such things also comes from what her mother told her rather than from witnessing the indecent act. If when she first described the incident her words were, "And then he kind of flicked white wee from his willy", a videotape would often reveal that she originally used words appropriate to her age and understanding.²⁰¹

Thirdly, a video-taped interview may prompt an acknowledgment of the abuse by the accused, thereby eliminating the need for the child to appear in court.

Fourthly, the tape may increase the accuracy of the child's testimony. Perry and Wrightsman²⁰² refer to the judgement in *State v Sheppard*²⁰³ where the court relied upon the testimony of a forensic psychiatrist who noted that:

'[For the child who testifies] there is guilt and satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.'²⁰⁴

And finally, the tape may, in the case where the child is too afraid to personally disclose the nature of the abuse to a parent, act on behalf of the child.

Given the numerous advantages accruing from video taped interviews of the sexual abuse, the favourable light in which video taped testimony has been viewed in this country, and current developments taking place elsewhere in the world, it is submitted that the Legislature should give serious thought to

²⁰¹Spencer & Flin op cit 162.

²⁰²Op cit n 149.

²⁰³197 N.J Super 411,484 A.2d 1330 (1984).

²⁰⁴Perry & Wrightsman op cit 165.

possible statutory modifications of the law which permit the use of a video taped interview with a child victim of sexual abuse as examination-in-chief. The presence of the child will still however be required at the cross-examination stage of proceedings otherwise, the video-taped interview would in the eyes of the law constitute hearsay evidence. The recently enacted s 54 of the Criminal Justice Act could act as a guideline for the legislature.

In order for the section to be viable, it is submitted that the following should in one way or the other be accounted for: (1) Guidelines concerning the place of interview. The interview should be conducted in a 'child-friendly' environment which will put the child at ease; (2) Guidelines concerning the set-up of the interviewing room. That is, where the video cameras should be set up, how many video cameras should be used, who can or should operate the cameras - the mother, a friend, a neutral operator? the place from where the video operator should operate the cameras - i.e., behind a special one-way mirror, in the presence of the child etc. The primary advantage of the inclusion of guidelines of this nature, is that they would act as a defence against possible defence objections, which could run along the line that the operator was biased and prompted the child, or that the camera failed to show the reactions of the interviewer to the child's allegation and therefore questions exist whether she didn't perhaps prompt the child, etc. (3) Guidelines as to who should conduct the interview with the child. Given the weight which would be attached to the video taped interview by the court, it is imperative that the interviewer be skilled in the art of interviewing children for legal purposes. (4) Guidelines as to interviewing techniques to be used during the interview, and possible questions to be asked. (5) The weight to be attached to the interview. That is, (a) is the interview shown to the court merely for the purposes of credibility? (b) is it to be used in conjunction with the child's testimony tendered for the prosecution? or, (c) is it to be used by the prosecution in place of the child's testimony and then, if so, under what conditions

should the video replace the child's physical presence in the court? and finally, (6) Guidelines as to which agency or person should retain custody of the video tape prior to and subsequent to its showing in court.

8. ANATOMICALLY CORRECT DOLLS

A current controversial area in the law of evidence concerns the use of anatomically correct dolls as a 'scientific technique' for the assessment of child sexual abuse.²⁰⁵

Anatomically correct dolls come in families of four. A female and male adult doll, and a female and male child doll. The dolls, which have oral and anal openings and genitalia in proportion to the rest of the body and in the correct location, are capable of representing the child and siblings, the mother, father, grandfather, grandmother, uncle, aunt or child caretaker.²⁰⁶

While the use of the dolls are meant to facilitate the process of giving evidence, enabling an inhibited child to overcome his fear or reticence to speak about the abuse,²⁰⁷ the use of the dolls in the courtroom has the potential for creating a potential legal battlefield. This is by virtue of: (1) the lack of scientific knowledge concerning the reliability of the dolls;²⁰⁸ and (2) the absence of standardized interviewing techniques with the dolls.²⁰⁹

²⁰⁵See generally: Songca, R. 'The Reliability of Anatomically Correct Dolls In Child Sexual Abuse Cases' (1993) 6 SACJ 83; Levy, R. J. 'Using Scientific Testimony to prove Child sexual Abuse' (1989-1990) 23 *Family Law Quarterly* 397-408.

²⁰⁶Levy op cit 397.

²⁰⁷levy op cit 398.

²⁰⁸White, S. Strom, G.A. Santilli, G. Halpin, B.M. 'Interviewing Young Sexual Abuse Victims with Anatomically Correct Dolls' (1986) 10 519; Levy op cit 400-402.

²⁰⁹Levy op cit 398-399.

Anatomically correct dolls were created in 1976, and manufactured for general use in 1980.²¹⁰ Little systematic knowledge on the dolls exists. Of crucial importance is the fact that no baseline data measuring sexually abused and non-abused children's play with the dolls has been obtained.²¹¹ The need to establish a baseline on the behaviour of non-abused children with the dolls cannot be over-emphasized. Before evidence of a child's play with the dolls can be admissible in a court of law, the use of the dolls must be shown to have acquired general acceptance in the professional community.²¹² At present no such acceptance exists. Difficulties in obtaining information on the differences between abused and non-abused children's play with the dolls include: (1) the difficulty of defining the subject groups. White and Santilli write: 'One truly never knows that a child has not been sexually abused although it is occasionally known through medical evidence that a child has been abused. The vast area between the two ends of this continuum..is very difficult to define'²¹³; (2) the possibility that a sexually abused child may hide the abuse experience, as a result of fear or threats of harm, thereby confounding research findings²¹⁴; and (3) the lack of empirical knowledge on the various factors of abuse and the impact which these factors will have upon the child's response to the dolls.²¹⁵

A further problem pertains to the lack of standardized

²¹⁰Levy op cit 400.

²¹¹Vizard, E. 'Interviewing Young Sexually Abused Children - Assessment Technique' *Family Law* 31.

²¹²This is in accordance with the *Frye* test as noted in chapter 6. at fn.37.

²¹³White & Santilli op cit 527.

²¹⁴White & Santilli op cit 527.

²¹⁵Supra.

interviewing techniques for use with the dolls.²¹⁶ Levy contends that standardization of practice is unlikely, given, that there is an absence of standardized professional belief concerning the use of the dolls.

In some quarters, this problem is further compounded by the lack of trained interviewers.²¹⁷ Vizard expresses concern over this, writing:

'Interpretation of the data collected at the end of the interview and the assessment process...is a complex process requiring a great deal of training and consideration of all the issues. It is a little worrying therefore, to hear that sets of these dolls are being sold, up and down the country, to agencies where the level of training in child abuse, let alone in child sexual abuse is of a low order.'²¹⁸

Given the above-mentioned problems, the dolls should not at present be considered as diagnostic tools for abuse but rather their function should be to facilitate the process of tendering evidence about the sexual abuse. The latter would permit the shy or reticent child to point to certain anatomical areas without having to verbalise or provide an anatomically-correct term for the body part. Terms such as vagina, anus, penis and scrotum does not come naturally to all children. Childlike references to these areas may cause both embarrassment for the child and confusion for the court, resulting in frequent interruptions of the child's testimony to clarify regions. The logical effect of this will be the inhibition of the child's testimony.

In respect of interviewing techniques, it is submitted that the interviewer should at all times maintain a neutral attitude, avoiding the tendency to prompt, reinforce, or use leading

²¹⁶Levy op cit 398.

²¹⁷Supra.

²¹⁸Vizard op cit 31.

questions with the child.²¹⁹ Furthermore, examiners should be made aware that sexualised play or investigation with the dolls is not necessarily indicative of sexual abuse.²²⁰ Anatomically correct dolls are merely 'an adjunct to the diagnostic process they are not imbued with magical powers'.²²¹ Examiners should accordingly, refrain from preconceptions that sexual abuse has taken place whenever the child engages in sexual play with the dolls, as such may lead them to unconsciously put pressure upon the child to elicit an accusation of abuse.

Anatomically correct dolls possess great potential.²²² They play an important role in enabling the legal system to grapple with the problem of a reticent child witness. More empirical research on the dolls is however required. In the mean time, restraint must be exercised until the reliability of the dolls as a diagnostic tool for sexual abuse has been firmly established.

9. THE IDENTIFICATION OF 'SPECIALIST' CHILD ABUSE PROSECUTORS TO DEAL WITH ALL CASES OF CHILD ABUSE

Numerous calls have recently been made for the training of

²¹⁹Douglas, G. & Willmore, C. 'Diagnostic Interviews as Evidence in Cases of Child Sexual Abuse' (1987) 17 *Family Law* 153.

²²⁰See above where it is revealed that at present no baseline data on the behaviour of non-abused children in play with the dolls has been established. In the absence of such findings, researchers should still be cautious to infer sexual abuse where sexualised play is evident. Vizard op cit 31 however contends that 'explicit demonstrations of sexual behaviour in the interview with the child are highly significant and associated with an experience of abuse.'

²²¹Vizard op cit 31.

²²²In the unreported case of *S v Thomas* case number RC 696/92, Pietermaritzburg, a mentally handicapped girl with a pronounced speech disability resulting in ability to only make sounds was able to show the court how she was raped by means of manipulation of anatomically correct dolls. The advantages of the dolls were clearly evident in this case, i.e., portrayal of sexual abuse without prior recourse to language.

specialist prosecutors to deal with rape trials.²²³ In 1993, under the auspices of the Cape Attorney-General, specialist rape prosecutors have been employed to operate in the specialised Sexual Offences Court in Wynberg . It is submitted that the establishment of such an office is a salutary measure operating on behalf of the rape victim and a possible means of ensuring improved treatment of the victim prior to, and during the trial ordeal.

In the light of the dynamics of child physical and sexual abuse, and the 'sexual abuse accomodation syndrome' as discussed in Chapter 2, the establishment of specialist child physical and sexual abuse prosecutors, and the training of regional magistrates and judges in (1) the identification of such dynamics; and (2) possible forms of secondary victimization of the child witness by the legal system, would similarly advance the ends of justice.

²²³Describing the plight of the rape victim in the criminal courtroom, Anne Skelton in 'Preparation for Trial - Problems in Procedure', unpublished paper given at the Rape Education Action Project Conference, Pietermaritzburg, July 1993, writes: 'In all too many cases, the rape survivor is left to sit for hours in a bleak corridor outside the courtroom waiting for her case, often appallingly intimidated by the accused who, if he is on bail, may be standing nearby. When her name is called, and she stands before the court, it may be the first time she has seen the prosecutor and the presiding officer. The only person in the courtroom familiar to her might, ironically, be the man who raped her. There is little consistency in the staffing of the courts, and if a rape case is postponed, it is quite likely that the prosecutor will be a different person on the next occasion. The majority of prosecutors are men, and this does seem to make it worse - but certainly there is no guarantee that a woman prosecutor will automatically be better. She may have a more instinctive empathy and rapport with the survivor, but she may not. And the language and cultural divides will still exist. Clearly the answer is for prosecutors to be specifically trained to deal with the specific needs of rape cases. It is likely that some prosecutors will have more interest in, or show more aptitude for this type of work - and they should be selected for the training. Once trained they, and only they, should have responsibility for dealing with these cases.'

10. PREPARATION OF THE CHILD WITNESS

The secondary victimization suffered by the child in the courtroom often stunts the course of justice by preventing the system from successfully prosecuting potential offenders. Facing the accused in the courtroom, being exposed to repeated examination of the abusive event, and being interviewed by a stranger are all factors which could minimise the ability of the child in the courtroom.

Reducing the trauma suffered by the child can however be facilitated through the implementation of child witness preparation programmes. Guidelines in this respect are the child witness programmes operative in certain areas of Northern America.

London Child Witness Project - Ontario, Canada²²⁴

A project initiated with the specific aim of reducing the traumatization of the child within the courtroom. The focus of the program being essentially on the demystification of the courtroom process.

The project extends over a period of three to eight sessions. the project assumes a two-pronged line of attack:

1. Education in the operation of the legal system;
2. Stress reduction education.

The focus of the former being:

1. assessing the child's knowledge of court and court proceedings through the completion of a 'knowledge of court questionnaire'.
2. assessment of the child's level of cognitive functioning.
3. assessment of the child's understanding of words and concepts utilised in the legal system.
4. lessons on general courtroom etiquette and protocol, giving

²²⁴Dezwirek-Sas, L. 'Empowering Child Witnesses for Sexual Abuse Prosecutions' in *Children as Witnesses* op cit 181-191.

testimony in court, and the ability to withstand defence tactics.

5. the utilisation of a wooden courtroom model and soft dolls to represent courtroom personnel, the child, the family and the accused.
6. the utilisation of educational literature: *So You Have To Go To Court* Harvey and Watson-Russel (1988) *What's My Job in Court?* Gaitskell (1989)
7. role playing
8. lessons on voice projection and assertive answering
9. homework assignments on the importance of telling the truth
10. familiarisation of the courtroom in which the trial would be conducted.

The stress reduction component of this project focuses on deep-breathing exercises, deep muscle relaxation exercises, cognitive restructuring exercises; emotional support and finally systematic desensitization techniques.

Overall, the benefits found accruing from participation in the program include:

1. mitigation of the stressful effects associated with courtroom participation;
2. acknowledgement of the psychological levels of fear experienced by the child;
3. an increase in knowledge of courtroom proceedings;
4. the empowerment of the child witness.

National Children's Advocacy Centre Project - Alabama, USA²²⁵

The project extends over a period of four to six sessions and attempts to reduce the anxiety commonly associated with a court appearance by addressing the specific fears of the individual child.

²²⁵Sisterman Keeney, S. Amacher, E. & Kastanakis, J.A. 'The Court Prep Group: A Vital Part of the Court Process' in *Children as Witnesses* op cit 201-209.

An outline of the group sessions program:

Session 1: held in a neutral setting includes activities like artwork, discussions on attending court, assembling a puzzle depicting the court personnel, listing people encountered in the system.

Session 2: held in a neutral setting includes activities like artwork, giving concrete information about court, role-playing.

Session 3: held in the courtroom includes activities like a tour of the court, and participating in exercises believed to increase the child's familiarity with the court process.

Sessions 4-5: held in court and includes mock court role play, witness behaviour, and videos on the court process.

Session 6: held in a neutral setting, includes a focus on individual cases, review of group experience, and a graduation ceremony.

11. CONCLUSION

Throughout this Chapter attempts have been made where possible to provide the reader with a comprehensive overview of those aspects of the Law of Evidence which impinge upon the child witness. Review was made of the position of the law in respect of the child witness in the American and English legal system. Criticism and proposals for reform of the system were offered throughout the Chapter where it was thought that such should take place. And credit was given where warranted.

While the position of the sexually abused child is distinctively better in the present times than was the case prior to

'awakening' to the problems faced by the child witness, the reform measures which are at present in place are the barest minimum of what is required if the legal system desires the label of 'civilised'. More reform is needed. The Legislature cannot afford to sit back on the laurels accruing from enactment of s 170A of the Criminal Procedure Act. The issue of statutory modification to the law in respect of mandating the video recording of a child's initial interview, after a sexual abuse allegation must be addressed. The application of cautionary rules in respect of children should be reevaluated. Lawyers should be included on the list of intermediaries.

More change must come. And quickly at that. As noted by Spencer:

'For myself I fail to see how any rule of tradition can sensibly be dignified with the title of a basic principle of British criminal justice unless it furthers one of the following three objects: the conviction of the guilty; the acquittal of the innocent; and the conduct of the trial in a humane fashion which inflicts no greater pain and indignity on the participants than the seriousness of the case makes necessary. Any so-called basic principle which does not further one of these objects is bogus, a dispensible supernumerary at best, and more likely a malevolent imposter, seeking to turn the serious business of criminal justice into a cynical game, amusing and enriching for lawyers, but detrimental to the general public for whose help and protection criminal justice supposedly exists.'²²⁶

²²⁶Spencer, J. 'Child Witnesses: A Case for Legal Reform' *the Child Witness - Do the Courts Abuse Children?* op cit 17.

CONCLUSION

The issue of child abuse generally, and the abuse of the child witness by the legal system more specifically, is one of the gravest issues of our modern time. Since time immemorial, children have been the victims of forces over which they have had no control, and the development of man across the ages has done nothing more than to perpetuate the vicious cycle of abused and abuser, into new more sophisticated forms of victimization.

Whilst the reality of child physical and sexual abuse is so deeply ingrained into the psyche of man, as to render hopeless any attempt at eradicating this phenomenon, the facilitation of the legal response to child abuse, will play a major role in curbing the long term psychological harm suffered by the child participant in the legal process.

Two important issues are highlighted throughout this thesis in respect of facilitating the legal response to child abuse. The first relates to the need to acknowledge the multi-dimensional nature of child abuse, and the consequent urgency for the establishment of a multi-disciplinary organisation, which comprises of the medical, psychological, social and legal professions. The second issue relates to the need to re-align the law with current psychological research on the child witness.

In respect of the former, it is submitted that the creation of a multi-disciplinary forum would facilitate greater insight into the dynamics inherent in child abuse; provide group support for treatment of difficult cases; enhance the commitment and morale between inter-departmental organisations; enable the legal system to provide more than just a cosmetic response to the problem of abuse; provide education for other professional bodies on their

legal obligations relating to child abuse, and on the general rules of evidence and procedure operative within the courtroom in respect of the child witness.

In respect of the latter, it is submitted that current research conducted in the field of child cognitive and developmental psychology, reveals that legal assumptions concerning the ability of the child witness are out of line with contemporary findings. Research reveals that:

1. While differences in memory capabilities between an adult and a child do exist, the memory ability of a child can in certain instances, surpass that of an adult, i.e., where children have superior knowledge of the subject matter.

2. Children possess better episodic memories than semantic memories which consequently could make them better witnesses than adults, given that their recall of events would be uncontaminated by 'common sense' or personal logic.

3. Techniques for distinguishing testimonies of fact from those based upon fantasy have been established.

4. False allegations of sexual abuse when made by the child itself is a rare occurrence.

5. With regard to suggestibility, (i) age per se is not a particularly useful predictor of suggestibility; (ii) adults are also highly susceptible to suggestive questioning; (iii) the likelihood that a given witness will be susceptible to suggestive questioning is a function of the witness' personality characteristics combined with the stress inherent in the interviewing situation; and (iv) children, even very young ones, can give valuable testimony when properly prepared and interviewed.

6. Participation in the legal system is traumatic for children which is exacerbated when the child is confronted by ignorant legal personnel, most notably the presiding judicial officer and the prosecutor of the case.

Based upon these findings, the following amendments to the law are considered worthy of urgent consideration:

1. The establishment of the office of specialised child abuse prosecutor, in order to (i) circumvent the discontinuity often manifested through repeated adjournments and postponements of trials (ii) ensure that only those persons possessing empathy and the necessary knowledge of the dynamics of abuse deal with these cases.
2. The training of regional magistrates and judges in the dynamics of child abuse.
3. The training of 'specialised' intermediaries who have knowledge of (i) The law of evidence and procedure (ii) The dynamics of abuse (iii) The development of language in children (iv) Common errors in children's comprehension of language (v) Interviewing techniques.
4. The establishment of child witness preparation programmes to circumvent possible secondary traumatization by the legal process.
5. The admissibility of videotapes of the child's initial interview, made as soon as reasonably possible, after the child's allegation of sexual abuse.
6. The utilisation of a neutral expert where necessary, to sit with the presiding judicial officer as an assessor, and thereby provide assistance to the court on the developmental and psychological needs of the child.
7. Expediting the criminal trial, in light of the fact that justice delayed, would in the case of the child witness, result in justice denied!

In respect of amendments to the Child Care Act 74 of 1983 and the Prevention of Family Violence Act 133 of 1993, the following proposals are made:

1. Dispensing information on reporting legislation to those mandated to report ill-treatment in accordance with s 42 of the Child Care Act. Such information should ideally be concise and contain point-form references to:
 - (i) The legal obligation to report.
 - (ii) Immunity from criminal and civil liability.
 - (iii) Manner of notification.
 - (iv) Agency to whom notification should be made.
 - (v) Penalty for failure to report.
2. Providing immunity from liability for all persons acting in accordance with s 4 of the Prevention of Family Violence Act.
3. The de-legalization of corporal punishment in the educational and institutional setting. The provision of legislative enactment providing stricter boundaries for the lawful corporal punishment of children by parents.
5. Amendments to the Child Care Act in order to bring it in line with international standards as set out in the United Nation's Convention on the Rights of the Child. The most imperative of these being:
 - (i) Reviewing the present concept of 'parental fault' as utilised in s 14.
 - (ii) Providing independent legal representation for the child.

'It must be borne in mind that the competence of the child to interact with the legal system, is essentially a function of the

competence of those dealing with them, within that system.¹ While it may be asserted that the present laws are an embodiment of legal experience gained across generations, the application of these laws in respect of child abuse victims, renders the legal system a perpetrator of child abuse in its gravest form.

Clinging to archaic, prejudicial rules of evidence and procedure when viewed from the perspective of the child witness, simply because these rules have been in existence for a long time, reveals a shortsightedness and an arrogance within the legal profession, for which there can be no justification.

¹Cashmore op cit 193.

APPENDIX

MEDICAL PRACTITIONER'S QUESTIONNAIRE

1. **Type of Practice**
Hospital.....
Private Practice.....
2. **In what area of Practice are you currently employed ?**
Paediatrics Internal Medicine
Surgery Orthopedics
Ob/Gyn Psychiatry
Family Practice....
Other
3. **Number of years in Practice**
4. **Indicate your best and second best sources of information about the laws regarding child abuse**
Your formal education ()
Other Physicians ()
Professional Journals ()
Lay Press ()
Training Seminars ()
Other (please specify).....
5. **If you suspected a child to have been physically or sexually abused, how willing would you be to report your suspicions of the above ?**
Very willing ()
Willing ()
Unwilling ()
6. **Which factors would influence your decision not to report your suspicions of abuse to the Authorities ?**
 - * Fear of reprisals for having made a report of abuse?
 - * Fear that your report would inhibit your ability to provide rehabilitative services to the abused child?
 - * Fear of additional injury being perpetrated upon the child post notification of suspicions of abuse to the Authorities?
 - * A general reluctance to become involved in legal proceedings?
 - * A reluctance to expose children to the possibility of secondary victimisation in the courtroom?
 - * Fear that reporting the suspicion of abuse would deter parents from seeking future medical treatment for their injured child?
 - * Reluctance to expose children to the whim of an overworked, understaffed, Social Welfare Organisation, which by virtue of lack of financial resources would not be able to provide the child with better life conditions than those he faces within his domestic situation?
 - * Other (Please Specify)

7. If you suspected a child to be suffering from a Nutritional Deficiency Disorder, how willing would you be to report your suspicions to the Authorities ?
 Very Willing ()
 Willing ()
 Unwilling ()
8. What factor(s) would affect your decision not to report your suspicion to the Authorities ?

9. How strongly must you believe that physical or sexual abuse or neglect occurred, before you would be willing to report it as a case of abuse ?
 Probably is not abuse, but question exists in own mind
 Sure it is abuse, but without full evidence to confirm
 Full evidence to confirm abuse
10. Would failure to report abuse expose you to :
 Criminal Liability YES/NO
 Civil Liability for subsequent injury to the child YES/NO
11. Can you be held civilly liable for reporting a suspected case of abuse, if subsequent investigations reveal no evidence of abuse ? YES/NO
12. May you be called upon to testify in a court of law as to communications with a parent which revealed evidence of abuse YES/NO
13. To which agency should reports of suspicions of child abuse or neglect be made?.....
14. In what manner should such notification be made ?
15. Please indicate your Agreement or Disagreement with the following statements by marking the appropriate response:

(i) Section 42(1) of the Child Care Act which reads :
 'Every dentist, medical practitioner, nurse or social worker who examines, attends or deals with any child in circumstances giving rise to the suspicion that that child has been ill-treated, or suffers from any injury, single or multiple, the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease, shall immediately notify the Director-General or any officer designated by him for the purposes of this section of those circumstances.'

facilitates the identification of children at risk from abuse.
 AGREE/DISAGREE

(ii) The list of mandated reporters as enumerated under sect42(1) should be amended to include :

Psychologists	AGREE\DISAGREE
Educational Personnel	AGREE\DISAGREE
Attorneys	AGREE\DISAGREE
Commercial Film and Photographic Print Processors	AGREE\DISAGREE
Members of the Clergy	AGREE\DISAGREE

(iii) The statement "Medical practitioners have a duty first and foremost to uphold and protect the values of society" provides

adequate justification for the violation of the Physician/Patient Principle of confidentiality of communication in child abuse cases.

AGREE\DISAGREE

(iv) The wording of sect42(1) of the Child Care Act which requires the reporting of suspicions of ill-treatment, deliberate injury, or nutritional deficiency disease, is rather vague and likely to promote uncertainty amongst mandated reporters as to whether a particular case falls within the parameters of a reportable condition.

AGREE\DISAGREE

(v) The presence of Penalty Clauses in the reporting provision, i.e. Section 42(5) and 58, which read respectively :

'Any dentist, medical practitioner, nurse or social worker who contravenes any provision of this section shall be guilty of an offence.'

'Any person who is convicted of an offence under any provision of this Act for which no punishment is specifically provided shall be liable to a fine not exceeding R4 000, or to imprisonment not exceeding one year, or to both such fine and such imprisonment.'

facilitates the reporting of suspicions of abuse by mandated professionals.

AGREE\DISAGREE

(vi) The Penalty Provision re: Mandatory Reporting Laws should be amended to exclude the threat of incarceration for failure to comply with the statutory duty.

AGREE\DISAGREE

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