

THE DOCTOR AND THE CHILD- PATIENT:

MEDICO-LEGAL ASPECTS



CENTRE FOR CHILD LAW

INTRODUCTION

- Children as vulnerable members of our society
- Legal mechanisms /framework necessary to address issues
- Movement from seeing children only as objects owned by parents to individual rights bearers with evolving autonomy
- They are not umbilically linked to their parents destined to sink or swim with them
- Neither are they miniature adults



CENTRE FOR CHILD LAW

THE LEGAL FRAMEWORK

- Understanding the framework to consider:
- The Constitution: section 28 – basic starting point
- Sections 10, 12, 14,
- The common law
- Children's Act 38 of 2005
- Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
- Criminal Procedure act 51 of 1977
- National Health Act 61 of 2003
- Prevention of Family Violence Act 133 of 1993
- Choice of Termination of Pregnancy act 92 of 1996
- Domestic Violence Act 116 of 1998



CENTRE FOR CHILD LAW

A 14-year old girl (Ms X) visits your consulting rooms requesting a prescription for contraceptive medication. She is sexually active, but refuses to inform her parents about it under any circumstances.



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- *How would you advise her?*
- *May you inform her parents?*
- *May she give permission for such a prescription?*
- *How (and who) will you charge for the consultation and/or prescription?*



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Six months later Ms X is pregnant. You find that she has been pregnant for about seven weeks. She asks you to terminate the pregnancy, and again refuses to inform or consult her parents.



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- *Does she need her parents' consent for an abortion?*
- *What would your advice be to her?*
- *May you perform an abortion yourself?*
- *Have the children committed a crime?*
- *Will you do anything in this regard?*



CENTRE FOR CHILD LAW

Ms X changed her mind. She consulted her parents and together they decided not to go through with the abortion. You refer her to a gynaecologist. The pregnancy progresses well, but during the last three weeks before the expected birth of the baby, pregnancy related complications develop and the gynaecologist recommends a caesarean section.



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- *May Ms X give permission for a caesarean section to be performed?*
- *If an emergency caesarean section must be performed and the parents of Ms X cannot be found, who may give permission?*



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The baby of Ms X is born,
complications set in and the
baby needs medical care.

- *Who is responsible for authorising medical care for the baby?*



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The parents of Ms X are Jehova's Witnesses. Ms X develops massive post-partum bleeding and urgently needs a blood transfusion to prevent her from dying. Her parents refuse the blood transfusion, and Ms X herself is unconscious.



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• *According to the law, what should her doctor do now?*

• *The parents are financially very secure, but do not have a medical aid. However, they refuse to pay for the medical treatment (transfusion) of the child. What is the legal situation in this regard?*



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- During consultation with the doctor, Ms X reveals that since the age of 9 years, her uncle, Z, has on a regular basis sexually molested her by placing his penis into her mouth. This has happened again on 22 December 2011. Z has also forced Ms X to watch pornographic dvds. What should the doctor do with this information?
- Ms X also informs the doctor that since the age of 12.5 years, she allowed her then boyfriend, B, (the neighbour's son) who was 14 years old at that stage, to french kiss her and sexually fondle her. There was, however, no penetration. What should the doctor do with this information?



CENTRE FOR CHILD LAW

The Bill of Rights / *Die Handves van Menseregte*

Section 28 (*Artikel 28*) protects the rights of children and shows that every child has the right to:

- parental care, family care or appropriate alternative care; (28(1)(b))
- basic nutrition, shelter, basic health care services and social services; (28(1)(c))
- To be protected from maltreatment neglect, abuse or degradation; (28(1)(d))
- Section 28(2): The child's best interests are of paramount importance in every matter concerning the child.

In addition to the rights in s 28 children have all the rights in The Bill of Rights.



CENTRE FOR CHILD LAW

The Children's Act 38 of 2005

(1) The general principles set out in this section guide-

- (a) the implementation of all legislation applicable to children, including this Act; and
- (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.



CENTRE FOR CHILD LAW

Best interests of the child – section 7

- (g) *the child's—*
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) *the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;*
- (i) *any disability that a child may have;*
- (j) *any chronic illness from which a child may suffer;*



CENTRE FOR CHILD LAW

Section 10 – Child Participation

- Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration



CENTRE FOR CHILD LAW

S11 – Children with disability or chronic illness

- S11(1) apply to children with disabilities and S11(2) to children suffering from a chronic illness:
 - Parental care, family care or special care
 - Conditions that ensure dignity, promote self-reliance and facilitate active participation in the community
 - Providing the child and care-giver with support services
- S11(3) May not be treated in a way detrimental to their health, well-being and dignity



CENTRE FOR CHILD LAW

Section 12 – Social, Cultural and religious practices

- General principle is that no practice is allowed which is detrimental to the child's well-being, in particular:
- Female genital mutilation or circumcision of girl children.
- Forced marriage
- Virginity testing and male circumcision as a cultural practice on any child under the age of 16
- Any one who contravenes these sanctions is liable to a prison sentence of 10 years and/or a fine.



CENTRE FOR CHILD LAW

- Virginity testing may only be performed on children 16 and older under strict conditions
 - Child must consent
 - After proper counselling
 - Testing individually and in private
 - Sterile examination
 - Only a women may test a girl child and *vice versa*
 - Results may not be disclosed without consent of the child
 - The child's body may not be marked in any way



CENTRE FOR CHILD LAW

- Male circumcision of a male child under 16 is prohibited unless there are medical or religious reasons and under strict conditions:
 - Must be performed by a medical practitioner or by a person with particular knowledge of the social, cultural or religious practice who has proper training to perform circumcisions
 - Sterile conditions re gloves and instruments
 - Consent to the circumcision from the boy child
 - Assisted by a parent or guardian
 - Proper counselling
 - The boy's age must be verified



CENTRE FOR CHILD LAW

S 13 – Information on health care

- S13(1)
 - (a) access to information on health promotion, prevention, treatment, sexuality and reproduction;
 - (b) access to information regarding their own health status;
 - (c) access to information regarding causes and treatment of his or her health status;
 - (d) confidentiality regarding own health status or health status of parent except when not in the child's best interests
- S13 (2) Information must be accessible to children



CENTRE FOR CHILD LAW

Section 17 – Age of Majority

- A child becomes a major upon reaching the age of 18
- In line with the Constitution and international law
- To attain uniformity in legislation – various act referring to a child as a person below the age of 18 with others referring to “minor”



CENTRE FOR CHILD LAW

Consent to health services – section 129

- What does consent mean:
 - Must a person capable of giving consent, legal capacity to give consent
 - Informed consent
 - Clear, unequivocal and comprehensive consent
 - Consent must be given freely



CENTRE FOR CHILD LAW

- A child may consent to his or her own **medical treatment** or to the medical treatment of his or her child if:
 - The child is over the age of 12 years; **and**
 - The child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.
- A child may consent to the performance of a **surgical operation** if:
 - the child is over the age of 12 years; **and**
 - The child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment; **and**
 - The child is duly assisted by his or her parent or guardian



CENTRE FOR CHILD LAW

- Treatment: non-invasive and includes psychological treatment
- Surgery: invasive surgical intervention
- **Choice on Termination of Pregnancy Act remains unaffected by the Children's Act**
- For purposes of surgery From 34 must be signed by the medical practitioner, the child consenting to his or her own surgery and the parent or guardian
- When a child has to give consent to a surgical operation on his or her child, the child parent must be assisted by the parent or guardian in this case Form 35 is filled out.



CENTRE FOR CHILD LAW

Consent by parent or guardian

- Parent, guardian **or care-giver** may consent to medical treatment of child under 12 or child without sufficient maturity
- Only parent or guardian may consent to surgical operations of child under 12, and must assist child over the age of 12
- Who is a guardian?
 - Biological mothers
 - Married biological fathers
 - Unmarried biological fathers who qualify i.t.o. Section 21
- Consent by care-givers in emergencies section 32
- Foster parents or persons who have the right to make medical decisions in terms of a court order



CENTRE FOR CHILD LAW

Alternative avenues for consent

- Superintendent of the Hospital – 129(6)
 - Necessary to preserve the life of the child or to save child from serious or lasting physical injury or disability; or
 - The need for treatment is so urgent that it cannot be deferred for purposes of obtaining consent.
- Minister of Social Development if the parent:
 - Unreasonably refuses consent or to assist; or
 - Is incapable of giving consent or assistance; or
 - Cannot be traced, unknown whereabouts; or
 - Is deceased.
- Minister may consent if the child unreasonably withholds or refuses consent



CENTRE FOR CHILD LAW

- The High Court or the Children's Court may consent to medical treatment or surgery
- No parent, guardian or care-giver may refuse to assist a child or withhold consent based on only religious beliefs unless they can show that there is a medically accepted alternative
- What is 'unreasonable'?
 - It's a legal joke 'it depends' just like capacity of the child to consent
 - Depends on the facts of each case, each child must be assessed individually
- A child's right to consent includes the right to refuse treatment or surgery



CENTRE FOR CHILD LAW

HIV testing of children – section 130

- Testing must be in the best interests of the child
- Consent by child or by parent/guardian
- *'Access to a continuum of care and promote a child's physical and emotional welfare'*
- If the child is older than 12 then the child can consent with or without his parents assistance
 - No requirement in respect of maturity.
- If the child is under 12 and sufficiently mature then the child can consent himself or herself
- Otherwise the parent/guardian can consent



CENTRE FOR CHILD LAW

- **When is a child mature enough to consent:**
 - If they can demonstrate that they understand information on HIV testing and can act in accordance with that appreciation.
- **Factors:**
 - Age: the older the child the more likely the child is to sufficient maturity;
 - Knowledge: children who know about HIV and its implications are more likely to understand;
 - Views: children who can articulate their views on HIV testing and whether it is in their best interests;
 - Personal circumstances: an assessment of a child's personal circumstances and the motivation for the HIV test may assist in determining maturity.



CENTRE FOR CHILD LAW

- **Other people who may consent:**
 - Provincial Head of the Department of Social Development
 - Child Protection Organisation arranging placement
 - Superintendent of the Hospital if there is no parent or care-giver or child protection organisation
 - Children's Court if consent is unreasonably withheld
- **Special circumstances when a child may be tested:**
 - If during the course of medical treatment a health worker has contact with any substance from the child's body and there is a suspicion the health worker may have contracted HIV
 - If any other person may have contracted HIV due to contact with a substance from the child's body and the test must be authorised by Court.



CENTRE FOR CHILD LAW

Pre and post counselling for HIV testing

- HIV testing may only be done after proper counselling by an appropriately trained person
- Obligation on HIV testing facilities:
 - Staffed with personnel who can assess a child's developmental capacity
 - Ensure that pre- and post-test counselling is done
 - Establish the child's maturity to understand
 - Counsel children who are old enough
 - Inform children who are not old and mature enough that their parent/care-giver needs to be involved
 - Advise children who are old enough they may voluntarily involve their parents



CENTRE FOR CHILD LAW

Confidentiality of HIV status – section 133

- Constitutional right to privacy and physical integrity
- No one may disclose that a child is HIV positive except
 - When authorised by law;
 - For legal proceedings or when ordered by a court.
- The child may consent to disclosure if the child older than 12 or if younger than 12 if sufficiently mature.
- Parent or guardian if the child is under 12.
- Child protection organisation
- Superintendent of the Hospital
- Children's Court



CENTRE FOR CHILD LAW

Access to contraceptives – section 134

- No person may refuse to sell or provide condoms to a child over the age of 12.
- Other contraceptives may be provided without the consent of a parent or guardian if :
 - The child is at least 12 years of age; and
 - Proper medical advice is given to the child; and
 - A medical examination is carried out on the child to make sure there is no medical reason why a child should not be provided with contraceptives.
- Child is entitled to confidentiality



CENTRE FOR CHILD LAW

OTHER ISSUES:

PRESIDING OFFICERS AND CHILDREN'S COURTS:

Every magistrate is a presiding officer of the Children's Court in the district where he has jurisdiction.

Normally there will be a designated presiding officer for each Children's Court

Please take note that placement of a child in the care of an institution or in foster care with a court order does not make the carer the child's 'legal guardian'.

A care-giver may consent to medical treatment but not to surgical operations.

Child protections system – mostly implemented by social workers

Fill in the J88 to assist the social worker



CENTRE FOR CHILD LAW

Abortion:

Choice on Termination of Pregnancy Act, no 92 of 1996 *Wet op Keuse oor die Beëindiging van Swangerskap*

Section 5 (3): in the case of a pregnant minor, a medical practitioner or registered midwife must advise that minor to consult her parents, guardian, family members or friends before the termination of the pregnancy. But, the termination of the pregnancy can not be denied if the minor decides not to consult them.



CENTRE FOR CHILD LAW

CONFIDENTIALITY:

- The doctor should respect the rules of professional confidentiality.
- Section 14 of the Constitution
- Section 13 of the Children's Act
- Rule 12 of the HPCSA ethical rules
- Can be forced to testify in court – no medical privilege



CENTRE FOR CHILD LAW

WHO WILL PAY THE DOCTOR'S FEES?



CENTRE FOR CHILD LAW

CHILD ABUSE:

Children's Act 38 of 2005, section 110

Criminal Law Amendment Act 32 of 2007,
section 54 (reporting of sexual abuse)



CENTRE FOR CHILD LAW

Mandatory reporting – section 110(1)

- Dentist, homeopath, medical practitioner, midwife, nurse, occupational therapist, physiotherapist, psychologist, speech therapist, traditional health practitioner
- Who on reasonable grounds **concludes** that a child has been abused in a manner which causes **physical injury** or **sexual abuse** or **deliberately neglect**
- **Must** report to a child protection organisation, the Dept of Social Development or a police officer on Form 22.
- 'Concludes' indicates some sort of investigation, substantiated grounds
- You must report otherwise liable to imprisonment of 10 years and/or fine



CENTRE FOR CHILD LAW

Discretionary reporting – section 110(2)

- Any person who **on reasonable grounds believe** that a child is in need of care and protection
- **May** report to a child protection organisation, the dept of social development or a police official.
- For 110(1) and 110(2) you must substantiate your conclusion or belief and if you reported in good faith you are not liable to civil action based on the report.
- If you make the report in good faith then you are not liable to civil action on the basis of the report.



CENTRE FOR CHILD LAW

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

- Section 54 – a person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official.
- If you fail – liable to a fine or imprisonment for max 5 years
- Same applies to sexual offence against a mentally disabled
- If you are acting in good faith then there is no civil liability



CENTRE FOR CHILD LAW

THE CRIMINAL LAW AMENDMENT (SEXUAL OFFENCES) ACT 32 OF 2007

- Chapter 2 of the Act
- Part 1: Rape & Compelled rape
- Part 2: Sexual assault, compelled sexual assault, compelled self-sexual assault
- Part 3: Persons 18+: compel / cause to witness sexual acts, flashing, child porn, engage sexual services
- Part 4: Incest, bestiality & sexual acts with corpse



CENTRE FOR CHILD LAW

Part 1: Rape – s 3

- Any person who unlawfully & intentionally commits an act of sexual penetration with a complainant, without consent
- Sexual penetration - definition
- Consent – s 1(2) & 1(3)
- S 56 - defences
- S 57 – inability to consent: u/12, mentally disabled (def)



CENTRE FOR CHILD LAW

Definitions

- Sexual penetration
 - Any act causing penetration to any extent
 - by genital organs of 1 into or beyond genital organs, anus or mouth of another
 - any other part of body of 1 or any object, incl. any part of body of animal, into or beyond the genital organs or anus of another person OR
 - Genital organs of animal, into or beyond the mouth of another person
- Genital organs
 - Includes whole or part of male & female genital organs, incl. surgically constructed or reconstructed genital organs



CENTRE FOR CHILD LAW

Part 1: Compelled rape – s 4

- Any person (A) who unlawfully & intentionally
- compels a 3rd person (C)
- to commit an act of sexual penetration
- with a complainant (B),
- without consent of B
 - Definitions
 - S 56, s 57



CENTRE FOR CHILD LAW

Part 2: Sexual assault – s 5

- A person who unlawfully & intentionally sexually violates a complainant, without consent
- A person who unlawfully & intentionally inspires the belief in a complainant (B) that B will be sexually violated
 - Definitions
 - S 56, s 57
- Compelled sexual assault – s 6
- Compelled self-sexual assault – s 7



CENTRE FOR CHILD LAW

Definition – sexual violation

- Any act that causes direct or indirect contact
 - Genital organs/anus/breasts of 1 with any part of body of another, incl object
 - Mouth of 1 and
 - Genital organs/anus/breasts of another
 - Mouth of another
 - Any other part of body of another which could be used in act of sexual penetration; cause sexual arousal/stimulation; be sexually aroused/stimulated thereby
 - Mouth of complainant & genital organs/anus of animal
- Masturbation of 1 by another
- Insertion of object resembling / representing genital organs of person / animal into / beyond mouth of another



Part 2: Compelled sexual assault – s 6

- A person (A) who unlawfully & intentionally
- compels a 3rd person (C)
- without consent of C,
- to commit act of sexual violation
- with complainant (B)
- without the consent of B
 - Definitions
 - S 56, s 57



Part 4: Incest – s 12

- Persons who may not lawfully marry each other
- on account of consanguinity, affinity or adoptive relationship, and
- who unlawfully & intentionally engage in act of sexual penetration with each other,
- despite mutual consent to engage in act
 - Prohibited degrees – consanguinity (blood relations) & affinity: s 12(2)
 - Prosecution authorised in writing – NDPP: s 12(3)(a) - may not delegate power: s 12(3)(b)



CENTRE FOR CHILD LAW

Ch 3: Sexual offences - children

- Part 1: consensual sexual acts – certain children
- Part 2: sexual exploitation & sexual grooming, expose - porn
- Part 3: compel/cause children to witness sexual offences
- Child – person under 18
- A child below the age of 12 is incapable of giving consent to any sexual activity
- S 15 & 16: 12+ but under 16



CENTRE FOR CHILD LAW

Part 1: Statutory rape – s 15

- Person (A) who commits act of sexual penetration with a child (B), despite consent
 - Child (B): def – 12+ but under 16
- NDPP must authorised – in writing – prosecution if both A & B were children at time of commission of offence
- If prosecution is authorised, both A & B must be charged
 - NDPP may not delegate authority
 - Defence – s 56(2)



CENTRE FOR CHILD LAW

Part 1: Statutory sexual assault – s 16

- Person (A) who commits act of sexual violation with child (B), despite B's consent
 - Child (B): def – 12+ but under 16
- DPP must authorised – in writing – prosecution if both A & B were children at time of commission of offence
- If prosecution is authorised, both A & B must be charged
 - DPP may not delegate authority
 - Defence – s 56(2)



CENTRE FOR CHILD LAW

Part 2: Sexual offences - child

- 18(1) – promoting sexual grooming
- 18(2) – sexual grooming
- 19 – expose / display of or causing exposure or display of pornography to children
- 20(1) – using children for child pornography
- 20(2) - benefiting from child pornography



CENTRE FOR CHILD LAW

Ch 7: Part 6: Trafficking

- Section 71 – trafficking in persons for sexual purposes
 - Definitions – s 70
- Chapter 18 of the Children’s Act
 - Includes adoption through illicit means



CENTRE FOR CHILD LAW

The Prevention of Family Violence Act 33 of 1993

Section 4 (*Artikel 4*): “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 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).”



CENTRE FOR CHILD LAW

The Domestic Violence Act 116 of 1998

This act provides for the issuing of protection orders with regard to domestic violence, and for matters concerned therewith.

According to section 4 of this act, any child, or any person on behalf of that child, may apply to the court for a protection order without the assistance of a parent, guardian or any other person.

Section 3 allows a peace officer to arrest, without warrant, any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant.



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