

Judicial perceptions of harm in child sexual abuse matters: A compelling case for impact statements

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The purpose of this note is to investigate: the courts' approach to victim harm, prevailing judicial perceptions of the harm caused by sexual offences against children, as well as behavioural research findings of the harm caused by these offences.

Both case law (*Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) 205e; *S v Abrahams* 2002 (1) SACR 116 (SCA) 142 d), and draft legislation (Draft Sentencing Framework Bill 2000 clause 47(3); South African Law Commission (2000: 100); S 61(2) (a)(vii) of the Criminal Law (Sexual Offences and Related Matters Amendment Bill 2006), reveal that there is an increased recognition of impact evidence from victims and its role during sentencing. In addition, the recently approved Service Charter for Victims of Crime in South Africa (2004) provides the victim with a right to offer information to bring the impact of the crime to the court's attention. With the harm experienced by the victim having acquired a new focus, it is important to determine in what way this has been applied and perceived by the courts, since biased perceptions will simply continue to negate any recognition thereof. The purpose of this note is to investigate the courts' approach to victims' harm, prevailing judicial perceptions of the harm caused by sexual offences against children, as well as behavioural research findings of the harm caused by these offences.

HAPHAZARD APPROACH TO HARM

An analysis of reported case law reveals that pre-sentence presentation of harm caused to victims has been approached in a haphazard way. In 11 out of 33 rape cases the court did not refer to harm at all. In nine of the cases where harm was in fact considered, it was found not to be serious or of a long-lasting nature, or it was found that the victim had recovered from the trauma or was making good progress, or no substantial weight was attached

to the mental trauma as an aggravating factor. Thus, in only 13 out of 33 of the rape cases evaluated (i.e., in just more than a third of the cases) was substantial weight attached to the harm caused by the offence for sentencing purposes (Van der Merwe 2005a: 257). As opposed to the situation in rape cases, an analysis of sexual offences other than rape indicates that, in the majority of cases (16 out of 30), neither the presiding officer nor any of the other parties made any inquiry or mention about harm caused to the complainant (Van der Merwe *supra*). This highlights the fact that the emphasis was mostly on the accused and that only half of the version relevant to sentencing was presented to the court. For example, in *S v V* 1993 (1) SACR 736 (O) at 737g, objective recognition was given to the fact that the victim was defenceless when exploited by her step-father and would need help. Yet, this is one of many examples where no evidence on the individual victim's harm was tendered or requested.

An investigation of the sentencing process, in cases where the perpetrators were all diagnosed as paedophiles, indicates that the state presented evidence on the impact of the indecent conduct on the children concerned in only two of seven extra-familial indecent assault cases (see Van der Merwe 2005b for an explanation of the study and an analysis of expert evidence relating to the perpetrator). Both a psychologist and one complainant testified about the after-effects of the crime in *S v E* 1992 (2) SACR 625 (A), but did not convince the court. In *S v D* 1989 (4) SA 225 (C) at 232c-f the boys and their mothers were called to testify about the harmful effect of the offence, and their testimony was accorded enough

weight to justify punishment first and then treatment.

In another instance, the defence expert was asked by the court to comment with regard to the effect of the teacher's conduct on three 10-year-old girls, who then speculated about the value of intervention and the involvement of the family, to prevent the children from developing feelings of guilt (*S v S* 1977 (3) SA 830 (A) 836j-837d). Rumpff CJ took *judicial notice* of the fact that the first girl must have experienced severe mental trauma, but then relied on *hearsay* from the dicta of the same defence expert in order to find, seemingly as mitigating, recovery and no future trauma (*S v S* supra 839e-g). Although Rumpff CJ hereby demonstrated an active approach in trying to obtain essential information needed to make a decision, the source should be questioned. The defence will always try to minimise the effect and is not necessarily the best source to consult for valid and reliable information with regard to possible aggravating factors. Parents are also often not equipped to interpret trauma symptoms, or are too involved to make accurate assessments about harm (South African Law Reform Commission 2002: 348). In *S v N* 1991 (1) SACR 271 (C) 274b-c the court fully accepted the testimony of the mother that her six-year-old daughter had not displayed any visible, emotional or psychological problems, despite the fact that she seemed afraid of all males. The court thus refused to make a finding of grievous physical or emotional harm experienced by the victims. It remains to be seen to what extent the fear of men will impact negatively on future relationships of the second girl. It is clear that the mother had no insight into the situation. In addition, the child received no therapy.

In *S v O* 2003 (2) SACR 147 (C) 153h-i and 162a-c the prosecutor informed the court of the availability of the therapist of one of the boys, but, for an unknown reason, left it to the magistrate to call her. However, the magistrate refused to exercise this option because he was unaware of what the evidence would involve. On appeal, it was held that the accused in this instance had to be sentenced on the factual basis that none of his victims had suffered any injury, material prejudice, or harm. Despite the court's wide sentencing discretion to request information in terms of s 274 of the Criminal Procedure Act, the prosecution seems likely to remain responsible for placing evidence relevant to sentence on record. For the com-

pilation of impact reports they, in turn, have to rely on the co-operation of social workers. A number of difficulties are, however, often encountered, which may contribute to the haphazard use of these reports in court. Locating the victims might be problematic, the report might not be received timeously and the contents of the report might not be very helpful. This highlights the need for training of the officials compiling the reports as well as the interdependence of law and behavioural science during sentence. Furthermore, prosecutors may, in an attempt not to overburden social workers with the request of impact reports, prioritise matters where the nature and circumstances of the offence are particularly heinous.

Evidence of the impact of child sexual abuse thus appears to be presented in an inconsistent and arbitrary manner. In the absence of impact evidence, the result is that the court is not provided with a balanced version of the crime in order to determine a proper sentence. Furthermore, there is no clarity in some courts as to who bears the final responsibility to seek evidence on the impact of child sexual abuse (*S v Gerber* 2001 (1) SACR 621 (W) 623j-624b; *Rammoko v Director of Public Prosecutions* supra 205g-h), and emotion in court is allowed with regard to the accused, but not with regard to the victim.

THE ROLE OF PERCEPTIONS

Fedler and Olckers (2000: 4) point out that there is an undisclosed self of the judicial officer that is never expressed. This consists of layers of personal information, history, social circumstances, values, biases and preferences. Further, the thoughts and opinions of the judicial officer, as well as the reason for being a magistrate or a judge and intuitive responses, all play a role in, for example, understanding and interpreting evidence presented about harm or the lack thereof. Personal attitudes and perceptions can thus, throughout criminal proceedings, influence any decision or finding made by a court. The following investigation focuses on the perceptions of judicial officers as to when harm has been caused to child victims, as well as regarding the kind of harm caused by sexual offences against children. In view of the fact that there is a new focus on impact evidence from victims during sentencing, it is important to determine prevailing perceptions amongst judicial officers. Biased perceptions will simply continue to negate any recognition

of the victim and psychological harm experienced by him/her, as well as the constitutional values of dignity and equality to which the victim is entitled.

Perceptions of judicial officers regarding harm

While judicial officers often remind themselves not to be emotional in imposing sentences in child sexual abuse cases, they tend to look for some form of emotion on the part of the victim to make a finding of trauma, especially in the absence of any other evidence in this regard. It would appear that the perception exists that, in the absence of tears (*Attorney-General, Eastern Cape v D* 1997 (1) SACR 473 (E) 477f) or distress (*S v V and another* 1989 (1) SA 532 (A) 539h-I; *S v Gqamana* 2001 (2) SACR 28 (C) 35f) during the victim's testimony, there is no real or long-lasting harm done. Research has, however, shown that the abused child often suffers from dissociation and that very little emotion is displayed (Müller and Hollely (2000: 145). In *S v Pieters* 1987 (3) SA 717 (A) 726d, an expert explained to the court that, although the victim appeared calm and happy, she was suffering from denial and was experiencing inner turmoil.

The problem relating to interpretation of harm based on the emotion displayed by the victim is further illustrated in *S v Gqamana* (supra 37a). Here, the court found, notwithstanding testimony by the victim, the mother, and a probation officer before sentence, that the effect of the abuse on the girl was neither serious nor of a lasting nature. This finding was made despite the fact that evidence was led that the girl was fearful, distrusted men, and was easily shocked when someone shouted at her, was forgetful and had a nervous state of mind generally. These symptoms were all relevant at the time of sentence two years and nine months after the crime, even though the complainant had moved away from the town where the crime had occurred, to her mother's house. The court in this case was of the opinion that the complainant was 'an intelligent, well-spoken person with considerable self-assurance' (*S v Gqamana* supra 34e). She had also passed Standard 8 at the end of the year, had completed her schooling successfully and had plans to study further. In contrast to this decision, the court in *S v G* 2004 (2) SACR 296 (W) 297j-298b accepted the testimony of the probation officer and mother that the 10-year-old victim

had only superficially overcome the trauma if one considered her schoolwork and friends. The trauma had persisted not only with regard to the victim, but also with regard to the mother and immediate family.

It is clear that impressions assume more significance during the sentencing phase (Terblanche 1999: 79). It is believed by some judicial officers that, particularly in rape cases, the court should have the opportunity of observing the complainant in order to assess the degree to which she or he has been harmed by, and may still be suffering as a result of, the crime (*S v Mkhondo* 2001 (1) SACR 49 (W) 57-58). However, it is extremely dangerous for a presiding officer to make findings on the impact of the sexual offence based on his or her observations of the victim. The after-effects of sexual abuse can be lasting and of such a nature that they will not be easily discernable by mere observation. The loss of trust and the serious implications of the complainant's fearfulness seem not to have been accorded appropriate weight in *S v Gqamana* supra 37a-b, especially in view of the possible long-term effect on future relationships. In addition to the court's lack of understanding of the symptoms of trauma, Erez (1999: 554) highlights a further *problem regarding interpretation* of harm, namely unbelief:

Research has also documented that harm descriptions which legal professionals have considered exaggerated or unbelievable are indeed common experiences which those acquainted with crime's impact on victims view as within the range of "normal" reactions to victimisation.

The Appellate Division also considered the fact that a girl had been raped by a *family friend*, and his friend, whom she had met several hours before, as mitigating (*S v A* 1994 (1) SACR 602 (A) 608h). In other words, the fact that they were *not complete strangers* was perceived to be less harmful or traumatising than if they had been strangers, despite the fact that she was a virgin and had no experience of boyfriends. The court also questioned her belief that the accused had two guns, and therefore also any substantial anxiety or fear experienced by her. Yet, she escaped only once having realised that there was no gun and then hid all night to wait for help in the morning. This assumption that rape by an acquaintance is not experienced as harmful seems to be based on a judicial perception which has recently been proven to be incorrect by international research. In such

research it has been found that the experience of the victim in acquaintance rape could be compared with that of stranger rape (Sentencing Advisory Panel (2002)). It is the sense of betrayal when a relationship of trust or friendship is breached that plays a significant role in this instance. A further perception detected about harm relates to that regarding boys between the ages of 14 and 17 years. It would appear that boys are presumed to practise masturbation themselves and will therefore not really be affected by similar sexual activity with an older man.

In *S v R* 1993 (1) SACR 209 (A) 222i the court held that the boy involved was not a defenceless child, but a boy of 15 for whom masturbation was probably no shocking revelation and that there was also no question of assault. This approach highlights the court's striking lack of psychological knowledge with regard to the more damaging effect of enticement into participation in sexual activity, as opposed to the use of brute force (Finkelhor and Brown 1985: 65). Further, no recognition was given to feelings of badness, shame or guilt incorporated into the child's self-image through the enforced secrecy of the abusive events. In addition, no recognition was given to the boy's possible confusion regarding his sexual identity.

Perceptions of judicial officers as to what kind of harm is caused by sexual offences

Even in cases where the court makes a finding about present and future emotional and psychological harm caused, and regarding the weight to be attached to it, it is uncertain what the court understands this to entail. The following discussion provides a brief analysis of perceptions expressed by various courts over the years. Rape cases are dealt with first.

Rape

In *S v S* 1988 (1) SA 120 (A) 124d evidence of the victim's state of anxiety, constant fear, severe depression and problems in her relationship with her boyfriend was accepted nine months after the rape as being proof of intense psychological harm.

Nightmares, anxiety and constant reminders of the ordeal by certain sounds were experienced by the 16-year-old victim in *S v Pieters* supra. The court then expressed its own opinion about the effect of rape in its address to the accused:

Jou misdryf het haar in haar vroulike eer, integriteit en privaatheid aangetas op 'n wyse wat waarskynlik moeilik begryp kan word deur iemand wat nie so 'n ondervinding ondergaan het nie. Die gebeure moes vir haar 'n afgryslieke ondervinding gewees het. (726i-727a)

In *S v M* 1985 (1) SA 1 (A) 9d the victim, aged eight, was very nervous and scared, slept badly and could not concentrate on her schoolwork and, even though there was an improvement, a finding of long-term psychological consequences was made. With regard to the psycho-logical impact, the trial judge in *S v V and Another* supra accepted rape as being the worst form of humiliation for a woman or girl and gave his own opinion as to whether rape leaves emotional scars:

Dit is iets wat 'n vrou of meisie seker so gou moontlik wou vergeet. Maar niemand kan sê of hulle dit ooit sal kan vergeet nie. Die hof se ondervinding is dat verkragting sy letsels laat ... daarom word die misdaad deurgaans in 'n ernstige lig beskou. (539h-i)

In *S v C* 1996 (2) SACR 181 (C) 186e, the court's perceived consequence of the heinous crime of rape was described as a fate worse than the loss of life:

A rapist does not murder his victim – he destroys her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than loss of life.

In *S v R* 1996 (2) SACR 341 (T) 343i, the 14-year-old victim displayed symptoms of psychological illness after a brutal rape and the court acknowledged that she, 'as is the case with rape victims, will always experience stress in respect of her sexuality'. It then quoted from *N v T* 1994 (1) SA 862 (C) 862g-h in describing the general nature and impact of rape:

Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims ...

A further remark was made about the nature of the crime on a girl aged 11 in *Attorney-General, Eastern Cape v D* supra 477g (in which the effect of the crime was also hinted at):

This was obviously a callous and brutal crime accompanied by threats against the complainant and the frightening action of the respondent gagging her so as to cut off her screams. The respondent acted with callous disregard to the rights of the complainant and the sanctity of her body.

The most recent Supreme Court of Appeal case in which a description of harm is encountered is that of *S v Abrahams* (123d; 124d and 125d), where the specific harm caused by incest was acknowledged and led to the recognition of it (in contrast to the trial court) as an aggravating factor being accorded substantial weight. The nature thereof was described as follows:

- Forced sexual access obtained to a daughter's body constitutes a deflowering of the most grievous and brutal kind;
- the victim was deeply and injuriously affected by the rape (she changed from a diligent student to one who was rebellious, disobedient and aggressive; she refused to sleep alone, repelled physical contact and rejected her mother with whom she previously had a very close bond); and
- incestuous rape is grievous in that it exploits and perverts the bonds of love and trust that the family relation is meant to nurture.

Of significance is also *S v G* (supra 301b) where the court acknowledged the fact that the accused robbed the 10-year-old victim, who came from a caring and loving family, of her right to be carefree and happy at that age.

Indecent assault

In indecent assault cases, the courts have generally referred to the abuse of trust involved and to the abhorrent acts of the perpetrator, especially where younger children have been involved. In *S v V* 1994 (1) SACR 598 (A) at 600j the court refused to make a finding of severe, long-term effects of child sexual abuse in the absence of evidence, yet vaguely referred to the likely effect of the attempted act of penetration:

Dit is vir my ook feitlik ondenkbaar as 'n saak van algemene waarskynlikheid dat 'n daad van hierdie aard, gepleeg deur 'n volwasse man op 'n elfjarige kind, geen psigiese skade of, minstens, *beïnvloeding ten slegte*, sou veroorsaak het nie.

In *S v K* 1995 (2) SACR 555 (O) it was recognised that the street children involved in the indecent acts had begun to display deviant behaviour by committing the same deeds with one another, although it is not clear as to what exactly the deeds entailed. This conduct was probably the result of the traumatic sexualisation of the children, a matter that is further discussed below.

The Supreme Court of Appeal, in *S v McMillan* 2003 (1) SACR 27 (SCA), briefly highlighted the harmful effect caused by indecent assault and linked this to society's repugnance with regard to the act:

Gevolglik word die aftakeling van die moraliteit en geestelike welsyn van kwesbare en jong kinders waarmee die misdade waarvoor die appellat gestraf moet word gepaard gaan, deur elke regdenkende lid van die gemeenskap met wrewel en weersin bejeen. (34b)

The above examination of the perceptions of the courts with regard to rape, and particularly indecent assault, shows that the courts have very little knowledge of the real nature of the impact of sexual offences upon children. This lack of knowledge plays an important role in the evaluation of victims and contributes to inaccurate grading of the seriousness of offences, based on underlying (incorrect) perceptions. It is therefore necessary to examine briefly some research findings with regard to the legacy of child sexual abuse.

RESEARCH FINDINGS

Finkelhor and Browne (1985: 64) assert that the combination of trauma symptoms experienced by victims of child sexual abuse makes this a unique and different form of trauma (see also Miller 2000: 163). Such trauma alters the child's cognitive and emotional orientation to the world, and the resultant distortions in self-concept, worldview, and ability to show emotion create ongoing trauma for the child. The four dynamics of child sexual abuse are categorised as Traumatic Sexualisation, Powerlessness, Stigmatisation, and Betrayal.

Traumatic Sexualisation refers to the process by means of which a child's sexuality (including his or her sexual feelings and sexual attitudes) is shaped in a developmentally inappropriate and interpersonally dysfunctional way. This can be the result of repeated use of the child for sexual behaviour inappropriate to his or her level of development, of the exchange of affection, of attention, of gifts or privileges for sexual behaviour (this may lead to further confusion about sexual norms and standards, such as the role of sex in appropriate relationships, because the child is used in order to trade sex for something he or she wants), of a distorted focus on the child's body parts, of the offender's transmission to the child of misconceptions about sexual behaviour and sexual

morality, and of the child's association of very frightening memories and events with sexual activity. The extent to which traumatic sexualisation is experienced will depend on factors such as the sexual response expected from the child, enticed participation as opposed to brute force, and the child's understanding of the sexual implications of the activities.

The effects of Traumatic Sexualisation include sexual preoccupation and repetitive sexual behaviour. Developmentally inappropriate knowledge of, and interest in, sexual activity are displayed. Depending on the age of the victim, he or she might engage other children in similar activities, might display sexual aggression, might victimise peers or younger children, or might become promiscuous and sexually compulsive. Further, both genders experience a heightened awareness of sexual issues, for example boys wonder whether or not they are homosexual or girls wonder about the impairment of their desirability and whether future sexual partners will be able to tell that they have engaged in the activities concerned. Negative emotions associated with sex, such as revulsion, fear, anger and powerlessness may also contaminate later intimate relationships (Finkelhor and Browne 1985: 69).

Powerlessness is caused by the repeated invasion of the child's body space without his or her consent and is further aggravated by any coercion or manipulation used by the offender. The extent to which the powerlessness is experienced depends on fear, a trusted person's lack of understanding or disbelief that the abuse has happened, and feelings of dependency that trap the child in the situation. The victims may experience nightmares, phobias, hyper vigilance, stomach aches, depression, despair, suicidal behaviour, learning problems, or may even develop aggressive toughness to compensate for the basic feelings of powerlessness (Finkelhor and Browne 1985: 70; see also Caine and Royston 2004: 249). Feelings of powerlessness may also cause some victims, in particular male victims, to become perpetrators themselves in order to regain a sense of control (see Itzen 2000: 411-412 for research cited that confirms the fact that in the region of 50 percent of sexually abused boys become abusers themselves).

Stigmatisation can be caused by the negative connotations of badness, shame or guilt that become part of the self-image of the child.

These may have been communicated to the child directly by the abuser. Often, however, they are the result of the secrecy enforced during the abusive events or are caused by the reaction of shock or disgust on disclosure. In some cases, the offender overwhelms the child with responsibility by intimating that he (the offender) will not survive without the love of the child. The result of these feelings of stigmatisation is that the child experiences isolation, self-destructiveness (sometimes), low self-esteem and rejection (Finkelhor and Browne 1985: 69).

A feeling of Betrayal arises after the child realises that he or she has been manipulated through lies or misrepresentation about moral standards, or that the person he loves or trusts treats him or her with disregard. The extent of the betrayal is further influenced by whether the offender is a family member, a trusted person or a stranger. The child's own initial feelings of distrust of the perpetrator and a negative reaction from the person to whom disclosure is made, also contribute to feelings of betrayal. The child's later reaction to feelings of betrayal may vary and may assume the form of extreme dependency, vulnerability to future abuse (especially in the case of female victims), hostility, aggression or inability to trust a future partner, which may lead to almost pathological jealousy and result in isolation from intimate relationships.

It is of particular importance to be aware of the nature and effect of the grooming process being used by sexual offenders in targeting and getting access to children. It is an ongoing process aimed at the child accepting sexual activities (Gillespie 2004: 586) where the offender creates deceptive trust and manipulates the child (Duncan Brown 2001: 1). The impact of the grooming process in indecent assault cases is often overlooked. This breach of trust and exploitation of vulnerability could lead to problems with relationships, intimacy, and sexual adjustment in adult life (Mullen and Fleming 1998: 9).

CONCLUSION

The evaluation of case law above indicates that, though the use of impact evidence has been part of criminal courts' sentencing practice over many years, it has been presented in an inconsistent and arbitrary manner. Even in cases where evidence on harm is presented, the court's biased perception as to when harm has

in fact been caused has contributed to a negating of the importance of the victim. Despite research pointing to the contrary, the courts have often looked for emotion on the part of the victim in court in order to make a finding of harm and have had difficulty in correctly interpreting the trauma symptoms presented. Acquaintance rape and indecent assault of adolescent boys also appear not to have been perceived as harmful. In the present discussion, it has further been shown that courts have very little knowledge and understanding of the real nature of the impact of sexual offences upon children. This is of particular importance with regard to indecent assault cases where the subtle and manipulative grooming process used by the offender is relevant. The judicial officer's lack of knowledge gives rise to underlying, incorrect perceptions, and these thus play an important role in the misdirected evaluation of victims, non-recognition of aggravating factors, and ultimately the inaccurate grading of cases. Lastly, even if judicial officers have knowledge with regard to the harm caused to children by the commission of sexual offences against them, they may not take judicial notice of grievous harm. Evidence on impact is necessary and the prosecution should bear the responsibility to ensure that such evidence is presented.

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