

# **Delictual accountability and criminal capacity of a child: Why the age difference?**

by

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## ABSTRACT

The *doli/culpa* *incapax* presumption, which in the Republic of South Africa sets a minimum age of accountability at seven - one of the lowest in the world, derives from Roman and Roman-Dutch law. Children between the ages of seven and fourteen (the age of puberty in Private Law) rebuttably were presumed to lack accountability under the common law. In practice the *incapax* presumption was too easily rebutted: the courts incorrectly applied the accountability test and the low minimum age of accountability was out of touch with international law and disregarded the scientific evidence in childhood development. It was on this premise that the Child Justice Act amended the minimum age of criminal capacity to ten, retaining a rebuttable *doli incapax* presumption for children between the ages of ten and fourteen, albeit, in the face of criticism. However there has been no parallel amendment to Private Law despite the fact that the same test for accountability applies across the spectrum and that the problems with accountability encountered in criminal law are manifest in Private Law. The *incapax* presumption until now terminates at the age of puberty in Private Law, which may be accounted as gender discrimination. The legislature ought to rectify these discrepancies without delay, to the effect that the provisions of the civil law apply *mutatis mutandis* to the CJA. But this change would not offer a long-term solution. South Africa is a signatory country to a number of international instruments, such as the *UNCRC*, the *ACRWC* and the *Beijing Rules*, all of which require a minimum age of accountability (at least in the criminal law) to be established and which must not be set too low. The *UNCRC* declares it cannot be below twelve years and encourages the adoption of a single minimum age of accountability as opposed to the *doli incapax* presumption that applies in the RSA. The *Beijing Rules* point out that there is a close relationship between criminal and delictual capacity in being accountable. It is not easy to determine an approach to accountability for children: development science demonstrates that it is around the age of fourteen only that a child's frontal lobe (the executive seat of the brain) matures and areas of the brain associated with risk and impulse-management continue to develop into late adolescence. At age twelve a child develops hypothetico-deductive reasoning, at which stage they can conceptualize scenarios associated with possible actions. This means the child thinks abstractly and can consider consequences in relation to others for the first time. Children between

eleven to thirteen years demonstrate markedly poor reasoning skills and consequential thinking, and they tend to seek the approval of their peers in a phase of sensation-seeking, impulsivity and to take increased risks. Following a fixed minimum-age approach to accountability creates legal certainty that is fast and easy to ascertain but it disregards the characteristics of the individual child. However if a child's accountability is to be determined on a case-to-case basis it would require the use of a battery of expensive experts that may cause a delay in the execution of justice. There is no uniform method of testing for accountability and tests must be culturally adapted. In addition, one must be mindful of the autonomy of children and attend to the interest of the innocent victims who may come in contact with delinquent minors in establishing a minimum age of accountability. In the absence of statistics relating to the civil and criminal law it is difficult to make an informed recommendation and in the future these statistics should be obtained, but the most appropriate and cost-effective solution to the problems in relation to a child's accountability appears to be to set a fixed minimum age. With reference to the evidence from childhood development the age of fourteen seems to be the most appropriate. Beyond the threshold age of fourteen any party may approach a court to allege and prove that nevertheless a child lacks accountability; nothing in the law precludes such a plea.

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## **DECLARATION OF ORIGINALITY**

I, the undersigned

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Hereby declare the following in respect of this mini dissertation (MND 800):

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3. I did not make use of another student's previous work and submitted it as my own.
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5. This work has not been submitted before, in any way shape or form for any degree or examination at this University (UP) or any other academic institution, nor to any other institution or organisation whatsoever.

F.H.H. Kehrhahn

21 August 2017

## LIST OF ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the Child
AJ	Acting Judge
AMA	American Medical Association
ART	Article
BC	Before Christ
CJA	Child Justice Act 75 of 2008
CPA	Criminal Procedure Act 51 of 1977
FN	Footnote
ILRC	Ireland Law Reform Commission
IQ	Intelligence quotient
J	Judge
N	Footnote
N.O.	<i>Nomino officio</i>
PARA	Paragraph
RAF	Road Accident Fund
RSA	Republic of South Africa
S	Section
SA	South Africa
SALRC	South African Law Reform Commission
SAR&H	South African Railway and Harbours
UNCRC	United Nations Convention on the Rights of the Child
UNISA	University of South Africa
UP	University of Pretoria
V	Versus

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CHAPTER ONE  
**INTRODUCTION**

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## 1. INTRODUCTION

For a delinquent child to be held legally accountable in the criminal and delictual areas of the law a child must reach a benchmark level of development at which point he/she is able to appreciate the nature and consequences of his/her conduct and that such conduct is unlawful (cognitive test) and be able to direct his/her conduct in accordance with such an appreciation (connotative test).<sup>1</sup> However it requires the wisdom of a Solomon to know exactly when a child has reached this benchmark level of development.

## 2. THE PROBLEM

Because daily children participate in both the civil and criminal spheres of the law there must be legal rules to regulate the minimum ages of their accountability.<sup>2</sup> The question of exactly when a child reaches this benchmark level of development so as to be held legally accountable is complicated and is a matter Roman law authors grappled with as far back as 753 BC.<sup>3</sup> In an attempt to answer this question we can refer to a number of influences, *inter alia*:

- (i) The complex discipline of early-childhood development sciences: Children are an integral group in our law and society. The legal rules which pertain to children are continually changing. These rules are not suitable for classification in the traditional way, not for distinguishing between the private and public law.<sup>4</sup> There is a growing acceptance that child law cannot remain reliant solely on hard-core legal principles and that it must incorporate multiple disciplines, including the social sciences, medical sciences and anthropology.<sup>5</sup>

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<sup>1</sup> *Weber v Santam Versekeringsmaatskappy* 1983 (1) SA 381 (A) 403; *S v Ngobese* 2002 (1) SACR 562 (W) 565.

<sup>2</sup> Art 40(3)(a) of the UNCRC.

<sup>3</sup> Kleyn & Viljoen (2001) *Beginner's Guide for Law Students* 22; *Weber* (*supra* n1) 392.

<sup>4</sup> Boezaard "Child law, the child and South African private law" in Boezaard (ed) (2009) *Child Law in South Africa* 3.

<sup>5</sup> Boezaard (*supra* n4) 3.

- (ii) South Africa's international law obligations as well as international trends which indicate how foreign jurisdictions negotiate the difficult terrain of a child's legal capacity to be accountable.<sup>6</sup>
- (iii) The child's right to autonomy: There is a need to be cognisant of the fact that children are vulnerable members of our society and children need the protection of the law in certain instances.<sup>7</sup> On the other hand, one must be mindful of the autonomy of children and laws that restrict their liberty may harm their dignity and children's rights at large.<sup>8</sup> Any law which governs the legal accountability of a child must contain an approach balanced between protecting children on the one hand and their liberation on the other.<sup>9</sup>
- (iv) Practicable considerations such as time and resources constraints in conducting legal-capacity evaluations.<sup>10</sup>
- (v) Finally, an approach to the legal capacity of children to be accountable must weigh up the advantages and disadvantages of following an all-encompassing approach which is applicable to all children as opposed to an individualised child-by-child approach.<sup>11</sup>

The best interest of the child<sup>12</sup> and the duty to protect the rights of children<sup>13</sup> enjoin the legal profession to appreciate when a child reaches the capacity to be legally accountable because of the impact on a child's rights when they participate in the criminal and delictual legal spheres of the law; to hold children legally accountable when they are incapable of accountability amounts to a travesty of justice.<sup>14</sup>

In South African delictual and criminal law there is a discrepancy in the age a child is deemed to have the capacity to be accountable. The chapters that follow consider,

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<sup>6</sup> Skelton "Proposals for the review of the minimum age of criminal responsibility" (2013) *SAJ CJ* 257 271.

<sup>7</sup> Human "The theory of children's rights" in Boezaard (ed) (2009) *Child Law in South Africa* 247.

<sup>8</sup> Human (*supra* n7) 247.

<sup>9</sup> Human (*supra* n7) 247.

<sup>10</sup> Skelton (*supra* n6) 271.

<sup>11</sup> Skelton (*supra* n6) 273-275.

<sup>12</sup> S28(2) of the Constitution of the Republic of South Africa; S7 & S9 of the Children's Act 38 of 2005.

<sup>13</sup> S6(2)(a) of the Children's Act (*supra* n12).

<sup>14</sup> Skelton (1993) *Children in Trouble with the Law* 5.

*inter alia*, this discrepancy in the capacity for criminal and delictual accountability of a child, specifically the ages at which accountability commences as well as the difference in relation to gender when the presumption of incapacity is terminated. This raises the question that these differences are untenable and unconstitutional and therefore call for legal reform.<sup>15</sup>

### 3. THE CHAPTERS

The research topics addressed in the chapters are structured as follows:

**Chapter two** deals with the legal history of the accountability of children specifically the context of Roman and Roman Dutch legal authors and up to the commencement of the Child Justice Act (CJA).<sup>16</sup>

**Chapter three** deals with the common law provisions relating to the criminal capacity of a child, including the age limits of criminal capacity, the onus of proof and the test for criminal capacity. It examines the contentions against the common law that ultimately brought about changes by virtue of the CJA and the criticism levelled against the provisions of the CJA.

**Chapter four** deals with the common law provisions which relate to the delictual accountability of the child, including the age limits for establishing delictual accountability, the onus of proof and the test for delictual accountability. A comparison is made between the delictual and criminal accountability of a child. The chapter deals with contentions against the current common law provisions and raises the question of legal reform.

**Chapter five** deals with the international instruments and the main international trends elsewhere with reference to the difficult terrain of the legal accountability of children, and has the aim to consider adopting one or more of these trends as a solution to the problems plaguing the child's capacity to be held accountable in South African law.

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<sup>15</sup> Davel "The delictual accountability and criminal capacity of a child: How big can the gap be?" (2001) *De Jure* 604 607.

<sup>16</sup> 75 of 2008 commenced on 1 April 2010.

**Chapter six** initiates a dialogue between the law and science and considers how the medico-legal aspects and the science of early-childhood development can assist the legal practitioner in establishing the age of accountability of a child.

**Chapter seven** considers the options open to the legislature for law reform and the advantages and disadvantages of different approaches. This final chapter deals with the relationship between the private and public law and submits that legal reform is necessary and proposes legal reform.

#### **4. CONCLUSION**

This dissertation will consider the capacity of children to be held legally accountable and will compare the civil and criminal law provisions. It will draw on various considerations with an aim to determine exactly at what age a child reaches a level of development to have the capacity to be accountable. The legal history of the accountability of children is dealt with in the next chapter with a specific focus on Roman and Roman Dutch authors.

# LEGAL HISTORY: THE ACCOUNTABILITY OF THE DELINQUENT CHILD: A ROMAN AND ROMAN-DUTCH LAW PERSPECTIVE

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## 1. INTRODUCTION

This chapter explores the history of the delictual and criminal capacity of children in the context of Roman and Roman-Dutch law in an effort to appreciate how the current South African common law came into existence. The formative influences on the concept of accountability in both the criminal and delictual law have their origin in the civil Roman law<sup>17</sup> and the German law<sup>18</sup> to a lesser extent.<sup>19</sup> There is authority in the Roman law which states that before fault can be attributed to a child an enquiry must first be made into the capacity of a child to be accountable.<sup>20</sup> This notion was not part of the Anglo American legal system.<sup>21</sup>

Although the common law authority differentiates between the capacity of children to act intentionally (*doli capax*) and negligently (*culpae capax*), the authors focused on the area of the criminal law which mostly manifests the question of accountability.<sup>22</sup> With the necessary adaption the text which relates to the criminal law is insightful into the delictual accountability of children as accountability in both the criminal and civil law relate to a child's mental strength.<sup>23</sup> For this reason the development of the delictual and criminal capacity in the context of ancient legal history will be dealt with simultaneously, but separately for the more recent history.

## 2. THE ANCIENT LEGAL HISTORY OF THE CRIMINAL AND DELICTUAL ACCOUNTABILITY OF A CHILD

### 2.1 Roman Law<sup>24</sup>

#### 2.1.1 *The Twelve Tables*

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<sup>17</sup> Bergenthuin *Provokasie as Verweer in die Suid Afrikaanse Strafbreg* (LLD dissertation 1985 UP) 195.

<sup>18</sup> Art 20 of the *German Penal Code of 1871*.

<sup>19</sup> Burchell and Hunt (1983) *South African Criminal Law and Procedure Vol 1: General Principles of Criminal Law* 154.

<sup>20</sup> Burchell & Hunt (*supra* n19) 154 gives this authority as D29.5.14.

<sup>21</sup> Burchell & Hunt (*supra* n19) 154; *Weber* (*supra* n1) 389.

<sup>22</sup> *Weber* (*supra* n1) 393.

<sup>23</sup> *Weber* (*supra* n1) 393.

<sup>24</sup> This section does not tender a comprehensive legal history of Roman law and contains only brief and relevant excerpts from Roman law.

The earliest Roman law sources, such as the twelve tables, contain only brief references to the legal capacity of children, and which do not contribute to the true question of accountability.<sup>25</sup>

### 2.1.2 *The Corpus Juris*

We find the first reference to the accountability of children in the *Corpus Juris*, where the authors deal with the accountability of children in the context of the *actio legis aquiliae*.<sup>26</sup> The *Corpus Juris* divided children into different categories with varying levels of accountability as follows:

- (a) A child under the age of seven<sup>27</sup> could not be held liable because such a child is deemed to be of unsound mind.<sup>28</sup>
- (b) A child between the ages of seven and the age of puberty however was held liable if such a child was capable of wrongfulness, in the same way that such a child was held liable for theft.<sup>29</sup> In its turn, children under the age of puberty were held liable for theft only if they were capable of wrongfulness.<sup>30</sup> Children under the age of puberty were then further divided into the following two groups:
  - (i) A pupil close to puberty was considered capable of wrongfulness because they were capable of theft and *injuria*.<sup>31</sup> 'Theft' has the child's intention as a premise and for this reason a child under puberty can be held accountable for this crime only if he/she is

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<sup>25</sup> Plat & Diamond "The origins of the 'right and wrong' test of criminal responsibility and its subsequent development in the United States: An historical survey" (1966) *California Law Review* 1227 1229-1230.

<sup>26</sup> *Weber (supra n1)* 392. The *Aquilian* action provides for the compensation of damages of a patrimonial nature: Visser & Potgieter (2003) *Skadervergoedingsreg* 6.

<sup>27</sup> In *Weber (supra n1)* 393 the court held that looking at the late 16<sup>th</sup> century and early 17<sup>th</sup> century sources, there is little doubt that an *infantes* is a child under seven years.

<sup>28</sup> D9.2.5.2 as in *Weber (supra n1)* 392.

<sup>29</sup> D9.2.5.2 as in *Weber (supra n1)* 392.

<sup>30</sup> D47.2.23 as in *Weber (supra n1)* 392.

<sup>31</sup> D50.17.111 as in *Weber (supra n1)* 392.

close to the age of puberty and also is able to appreciate what he/she did was wrong.<sup>32</sup>

(ii) A pupil just over infancy did not differ greatly from an infant and was deemed of unsound mind because at this young age pupils were deemed not to have any intelligence.<sup>33</sup>

(c) A child that reached puberty<sup>34</sup> was deemed accountable.<sup>35</sup>

### 2.1.3 Late 16<sup>th</sup> Century to Early 17<sup>th</sup> Century

The above scenarios raised a pertinent question in relation to the ancient authors: Exactly when is a child considered to be close to puberty and subsequently accountable?<sup>36</sup> Menochius, an Italian author, refers to six different approaches to this question which shed light on how the Roman authors viewed the legal accountability of children:<sup>37</sup>

- (i) Accursius, a glossator, was of the opinion that a child that reached the average age between seven years and puberty was considered close to puberty.<sup>38</sup>
- (ii) Faber, who commented on the *Institute of Justinian*, referred to two other opinions where a child is deemed close to puberty:<sup>39</sup> when a child is approximately six months away from puberty or
- (iii) when a child is three days short of puberty, which views were vigorously implemented in the canon courts.<sup>40</sup>

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<sup>32</sup> *Justinianus Inst.* 4.1.18 as in *Weber (supra n1)* 393.

<sup>33</sup> *Justinianus Inst.* 3.19.10 as in *Weber (supra n1)* 392.

<sup>34</sup> In *Weber (supra n1)* 393 the court held that looking at the late 16<sup>th</sup> century and early 17<sup>th</sup> century sources, there is little doubt that a *puberes* is a child that reached the age of puberty, i.e. twelve years for girls and fourteen years for boys.

<sup>35</sup> Labuschagne "Strafregtelike aanspreeklikheid van kinders: Geestelike of chronologiese ouderdom?" (1993) *SALJ* 148 148; Badenhorst *Criminal Capacity of Children* (LLD dissertation 2006 UNISA) 38.

<sup>36</sup> *Weber (supra n1)* 393.

<sup>37</sup> *Weber (supra n1)* 393.

<sup>38</sup> *Weber (supra n1)* 394.

<sup>39</sup> Johannes Faber in his comments on the *Institute of Justinianus* at 3.19.9 and 3.19.10: *Weber (supra n1)* 394.



- (iv) A child over seven was deemed close to puberty<sup>41</sup> or
- (v) A child that is in his eleventh year.<sup>42</sup>
- (vi) Faber opined that a midway compromise would be to leave the decision of a child's accountability in the discretion of the court, where the court would rely on the insight of the child into his/her deed and can adjust the age of accountability accordingly as some children at ten are more insightful and have more aptitude than children aged fourteen.<sup>43</sup> The judge will rely not only on the age of the child but also on the development of the child, the nature of his/her conduct and even the area from which a child emanates as one jurisdiction may have craftier children than others.<sup>44</sup> If a judge wants to declare a boy child under ten and a half to be close to puberty and accountable, the judge needs to be convinced by the strongest indications, and to act with the greatest caution, mostly hardly ever, that the child is accountable.<sup>45</sup> When a boy child pass the age of ten and a half such strong indications become redundant and moderate indications are sufficient for a court to judge if a boy is close to puberty and therefore accountable.<sup>46</sup>

Judge Jansen in *Weber v Santam*<sup>47</sup> indicates that the above views of the ancient authors come close to the notion that a boy under fourteen is presumed to lack the ability to be accountable, but that from the age of ten and a half the opposite is readily accepted.<sup>48</sup>

Authors, like the Italian Farinacius, realised that the child's intellectual capacity is significant when testing for his/her accountability. He wrote that an *infant* and a child close to infancy are not punishable, as opposed to the child that is close to puberty, who is punishable if the child has the necessary intellectual capacity to be held

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<sup>40</sup> *Weber (supra n1)* 393-394.

<sup>41</sup> *Weber (supra n1)* 394.

<sup>42</sup> *Weber (supra n1)* 394.

<sup>43</sup> *Weber (supra n1)* 394.

<sup>44</sup> *Weber (supra n1)* 394.

<sup>45</sup> *Weber (supra n1)* 394.

<sup>46</sup> *Weber (supra n1)* 394.

<sup>47</sup> *Supra n1*.

<sup>48</sup> 394-395.

accountable.<sup>49</sup> Farinacius also wrote that numerous children under puberty are not capable of understanding even though they are very close to puberty, and in such a case these children are completely excused from the wrongful deed.<sup>50</sup> That said children close to puberty were presumed to have the necessary intellectual capacity to be accountable.<sup>51</sup>

## 2.2 Roman Dutch Law

It is against the backdrop of Roman law that authors from the end of the 16<sup>th</sup> century to the start of the 17<sup>th</sup> century in Roman Dutch law must be studied.<sup>52</sup> These authors shaped the presumptions relating to a lack of accountability we know in our law. The following influential authors, as discussed by Judge Jansen in *Weber v Santam*,<sup>53</sup> are insightful:

- (i) Tuldenus, in his comment on the *Institute of Justinian* wrote that crimes can be committed by a child under puberty who has passed infancy if they are not too far from puberty and are capable of *dolus*: Both terms are a requirement and one does not create a presumption of the other.<sup>54</sup>
- (ii) Vinnius echoed this notion by Tuldenus in his comment on the *Institute of Justinian* and wrote that when a child close to puberty reaches both these requirements he can be held criminally and delictually liable.<sup>55</sup>
- (iii) Matthaeus II, in his work *De Criminibus*, wrote that as a general rule a child under puberty cannot commit crimes, it depends on whether such a child is capable of *dolus (doli capax)*.<sup>56</sup> He argued that a sharp and experienced judge will infer the fact that a child is *doli capax* from the child's lifestyle and habits, the thinking process or from the words and

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<sup>49</sup> Weber (*supra* n1) 395.

<sup>50</sup> Weber (*supra* n1) 396.

<sup>51</sup> Weber (*supra* n1) 395.

<sup>52</sup> Weber (*supra* n1) 395.

<sup>53</sup> *Supra* n1.

<sup>54</sup> At 395.

<sup>55</sup> At 396.

<sup>56</sup> At 396.

actions of the child.<sup>57</sup> A single indication will not suffice and the court must consider multiple indicators.<sup>58</sup>

- (iv) Groenewegen, in his notes on Hugo de Groot's *Inleiding*, wrote that a child is accountable when a child leaves behind his/her childhood age.<sup>59</sup> To know when a child leaves his/her childhood behind, Groenewegen adopts Faber's compromise that it is at the discretion of the judge, a view echoed by Simon van Leeuwen in his work *Censura Forensis*.<sup>60</sup>
- (v) Moorman van Hasselt, in his work *Verhandeling over de Misdaden*, wrote that the question if a child can commit a crime cannot be answered with disregard to the age of the child as a child must have sufficient knowledge and be mindful so as to be able to distinguish between right and wrong.<sup>61</sup>
- (vi) Decker, in his notes on Simon van Leeuwen's *Rooms-Hollands Recht*, wrote that young children between ten and twelve years, who are not deemed children, who do not have enough knowledge to appreciate their conduct and who have no will or ability to choose what is right, are not accountable.<sup>62</sup>
- (vii) Johannes van der Linden, in his work *Regtsgeleerd Practicaal en Koopmans Handboek*, wrote that children under seven years lack accountability. Children between seven and fourteen years were punished by their parents for minor crimes but for more severe crimes, if one has grounds to infer intentional evil, in which case they received corporal punishment or incarceration.<sup>63</sup>
- (viii) Van der Keesel, in his work *Voorlesinge oor die Hedendaagse Reg*, wrote that children older than a young child are delictually accountable, but accountability is subject to the discretion of the judge who must decide if the child is capable of accountability.<sup>64</sup> If such a child knows what he/she

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<sup>57</sup> At 396.

<sup>58</sup> At 396.

<sup>59</sup> At 395.

<sup>60</sup> At 396.

<sup>61</sup> At 397.

<sup>62</sup> At 397.

<sup>63</sup> At 397.

<sup>64</sup> At 398.

is doing, the child will be criminally accountable.<sup>65</sup> In his work *Praelectiones* Van der Keesel wrote in relation to offences, that children of tender years do not yet comprehend what they are doing and are not of capable mind or capable of wrongful intent.<sup>66</sup> Accordingly, an infant under seven years will not be held liable as the child's innocence of mind protects him/her.<sup>67</sup> Van der Keesel was inclined to interpret a child close to puberty as being absolved from capital punishment, unless the child willfully perpetrated a heinous offence when close to puberty, specifically after their thirteenth year.<sup>68</sup>

Viewed holistically, the Roman Dutch authors hold the opinion either explicitly or a view that at least is reconcilable with the notion that a child under puberty is accountable only if capable of fault in the subjective sense of the word and judged according to the child's individual abilities.<sup>69</sup> Judge Jansen held if one accepts that the ripeness of the child under puberty is crucial, any arbitrary age for accountability is rather redundant.<sup>70</sup> This notion must be considered the most pure notion from the common law.<sup>71</sup> The court however is quick to warn that the age of a child is not irrelevant and general human experience has it that a child's ripeness generally coincides with his age.<sup>72</sup>

Some supporters of Accursius, such as Von Savigny, attached a presumption to the age limits set by Accursius to the effect that children close to puberty were presumed accountable until the contrary was proven, whereas authors such as Tuldenuus and Vinnius insisted that the child under the age of puberty must be close to puberty and

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<sup>65</sup> At 396.

<sup>66</sup> D9.25.2 as in *Weber* (*supra* n1) 398.

<sup>67</sup> D48.8.12 as in *Weber* (*supra* n1) 398.

<sup>68</sup> *Weber* (*supra* n1) 398.

<sup>69</sup> *Weber* (*supra* n1) 399-400.

<sup>70</sup> *Weber* (*supra* n1) 399.

<sup>71</sup> *Weber* (*supra* n1) 399.

<sup>72</sup> *Weber* (*supra* n1) 399.

capable of accountability, thereby denying that there is a presumption of accountability.<sup>73</sup>

If Faber's position that the subjective test for accountability is directive is accepted, one cannot link the test for accountability to a rigid age and the presumption of accountability until the contrary is proven then is absolute.<sup>74</sup> The plaintiff must prove in each and every case that a child defendant, under puberty, is accountable.<sup>75</sup> Put somewhat differently, there is a rebuttable presumption that a child under puberty is *doli/culpa*e incapax, unless the contrary is proven.<sup>76</sup> It was on this premise that the rebuttable presumption of *doli/culpa*e incapax was introduced into our law.<sup>77</sup>

### 3. RECENT HISTORY

#### 3.1 Criminal Law

The recent common law position will be discussed in the next chapter. It is prudent to note that in matters concerning the criminal responsibility of children the court did not always draw a clear distinction between accountability and culpability, however recently the courts<sup>78</sup> and the legislature<sup>79</sup> have given clear definitions of capacity as a distinct concept from culpability.<sup>80</sup>

#### 3.2 Civil Law

The recent common law position similarly will be discussed in the next chapter. Before 1965 the courts did not distinguish between the capacity to be

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<sup>73</sup> *Weber (supra n1)* 399.

<sup>74</sup> *Weber (supra n1)* 399.

<sup>75</sup> *Weber (supra n1)* 399.

<sup>76</sup> *Weber (supra n1)* 399.

<sup>77</sup> Van der Merwe & Olivier (1989) *Die Onregmatige Daad in die Suid Afrikaanse Reg* 115.

<sup>78</sup> *S v S* 1977 (3) SA 305 (O) 312.

<sup>79</sup> S78 of the Criminal Procedure Act 51 of 1977. The legislature acted on the recommendations of the Rumpff Commission (RP 69/1967 para 9 97 2) and codified the criminal capacity of the mentally insane. The court in *Weber (supra n1)* at 389 laid down this same test as the test for the delictual accountability of a child.

<sup>80</sup> Burchell & Hunt (*supra n19*) 154.

accountable and negligence and found it unnecessary to decide if the rebuttable presumption of *doli/culpa*e *incapax* applied to the law of delict in South African law<sup>81</sup> until 1963.<sup>82</sup> The enactment of the Apportionment of Damages Act<sup>83</sup> led the courts to review this approach. The Act did away with the all-or-nothing principle in terms of which courts were not required to apportion damages or weigh negligence.<sup>84</sup>

#### 4. CONCLUSION

It is apparent that the Roman law authors were cognisant of the fact that children develop differently and that variables such as intelligence, their level of development, the nature of their conduct and other subjective factors play a role in determining the child's ability to be accountable. Faber notes that a boy child under ten and a half hardly ever will be held accountable. Even though there is authority in the Roman law that a clear distinction must be made between accountability and fault, the incorporation of this understanding into the modern law was lethargic and was only recently properly applied in modern law. In the next chapter the latest developments pertaining to the criminal capacity of a child will be discussed.

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<sup>81</sup> Cooper (1987) *Motor Law* 173.

<sup>82</sup> In *Van Oudshoorn v Northern Assurance* 1963 (2) SA 642 (A) the court found that the presumptions of *doli/culpa*e *incapax* apply in the law of delict. In the earlier cases of *Lentzner v Friedman* 1919 OPD 20 a nearly 5-year-old child and in *Adams v Sunshine Bakeries* 1939 CPD 72, a 6-year-old child were found capable of being accountable; *Belstedt v SAR&H* 1936 CPD 399 409.

<sup>83</sup> 34 of 1956.

<sup>84</sup> Cooper (*supra* n81).

# THE CRIMINAL CAPACITY OF A CHILD

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## 1. INTRODUCTION

Before the commencement of the CJA South Africa lacked a separate legal system for dealing with minors charged with criminal offences and the justice system treated minors as a younger version of the adult offender. Various legislation<sup>85</sup> allowed for some differentiation in treatment.<sup>86</sup> However, the condition of children was high on the agenda of the newly-elected democratic government and it committed itself to transform child justice in light of the atrocious treatment of children accused of committing a crime under the previous political dispensation.<sup>87</sup>

This chapter firstly considers the contents of the common law provisions of the criminal capacity of a child, the contentions against these provisions prior to the CJA and which brought about necessary changes to the minimum age of criminal capacity. In conclusion this chapter considers the criticism levelled by academic writers against the CJA.

## 2. THE COMMON LAW PROVISIONS REGULATING THE CRIMINAL CAPACITY OF CHILDREN

### 2.1 The Criminal Capacity of a Child

Before the CJA the common law regulated the criminal capacity of a child.<sup>88</sup> The common law provided that a child under the age of seven<sup>89</sup> irrebuttably was

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<sup>85</sup> Correctional Services Act 58 of 1959; Criminal Procedure Act (*supra* n79); Child Care Act 74 of 1983; Probation Services Act 116 of 1991; Probation Services Amendment Act 35 of 2002 and the Criminal Law (Sentencing) Amendment Act 38 of 2007.

<sup>86</sup> SALRC *Issue Paper 9 on Juvenile Justice (Project 106)* August 1997 para 1.3; Badenhorst "Overview of the implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good intentions, questionable outcomes" (2011) *Open Society Foundation for South Africa* 6.

<sup>87</sup> Skelton "Developing a juvenile justice system for South Africa: International instruments and restorative justice" (1996) *Acta Juridica* 180 180.

<sup>88</sup> Bedil "Youthful offenders" (1988) *Annual Survey of South African Law* 89 92; De Villiers *Die Strafrechtelike Verantwoordelikheid van Kinders* (LLD dissertation 1989 UP); Labuschagne & Van den Heever "Accountability of children in rudimentary legal systems: A criminal law –evolutionary view" (1993) *CILSA* 98 98; Labuschagne (*supra* n35) 148; Van Oosten "Non-pathological criminal incapacity v pathological criminal incapacity" (1993) *SAJCJ* 127 132.



presumed to lack criminal capacity (*doli incapax*),<sup>90</sup> a child between the ages of seven and fourteen was rebuttably presumed to lack criminal capacity (presumed *doli incapax*)<sup>91</sup> and a child over fourteen was presumed to have full criminal capacity (*doli capax*).<sup>92</sup>

## 2.2 The Common Law Test for the Criminal Capacity of a Child

For a child to have criminal capacity the child must be able to appreciate the distinction between right and wrong<sup>93</sup> in the context of the facts of the particular case.<sup>94</sup> This is the cognitive and first leg of the test. The child's ability to distinguish right from wrong is determined by the minor accused's mental faculties at the time of committing the alleged offence: to determine if the child was sufficiently developed and unimpaired so as to render the child capable of appreciating the nature of his/her conduct and the wrongfulness thereof.<sup>95</sup>

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<sup>89</sup> This is one of the lowest ages for the commencement of criminal capacity: Skelton (*supra* n87) 186.

<sup>90</sup> S25 of the Transkei Penal Code Act 24 of 1886; *S v Mnyanda* 1976 (2) SA 751 (A) 761F. This is a purely physical test and the child's mental development is irrelevant in dealing with children under seven, according to Van Oosten (*supra* n88) 133. According to Burchell and Hunt (*supra* n19) 158 this is sometimes regarded as a rule of evidence although it is actually a rule of substantive law.

<sup>91</sup> This test is a physical and psychological test according to Van Oosten (*supra* n88) 133; Snyman (2006) *Strafreg* 178; *Attorney-General Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 434; *S v K* 1956 (3) SA 353 (A) 353-354; Barrie "Doli incapax as defence on criminal charge-whether this presumption still good in law" (1995) *De Rebus* 32 32.

<sup>92</sup> Burchell & Hunt (*supra* n19) 155; *S v S* (*supra* n78) 312.

<sup>93</sup> *R v Gufakwezwe* 1916 NPD 423 425; *R v Tsutso* 1962 (2) SA 666 (SR) 668.

<sup>94</sup> *S v K* (*supra* n91) 357C; *S v Dyk and Others* 1969 (1) SA 601 (C) 603; *S v Pietersen* 1983 (4) SA 904 (OK) 906G-H. This is the *mens rea* element and show that the child had evil motives or a malicious mind.

<sup>95</sup> *S v Mbanda* 1986 PH 108 189 held that not only must the child know that his/her conduct is wrong, but that his/her conduct amounts to a crime, otherwise the conduct may be merely a moral error. In *S v Dyk* (*supra* n94) 601 judge Corbett calls this knowledge a "malicious mind".

For the second connotative leg of the test the child must also be able to act in accordance with this appreciation of right and wrong.<sup>96</sup> The connotative aspect of the enquiry relates to the judgement of the child and covers the child's ability to control irrational acts in line with the child's appreciation of the wrongful act.<sup>97</sup> The test for the criminal capacity of a child is a subjective test<sup>98</sup> and is similar to that of an adult.<sup>99</sup>

### **2.3 The Onus and Burden of Proof was on the State to Rebut the Presumption of *Doli Incapax***

The state had the onus of rebutting the presumption that a child between the ages of seven and fourteen lacks criminal capacity beyond any reasonable doubt.<sup>100</sup> Because intellectual and judgemental development varies among children and because the presumption of *doli incapax* is undoubtedly arbitrary, the law allows the state to present evidence to rebut the presumption.<sup>101</sup> If the presumption is applied correctly, most children under the age of fourteen who come in conflict with the law should be regarded as *doli incapax*.<sup>102</sup>

When a court is called upon to consider if the state discharged their onus of rebutting the presumption of *doli incapax*, the court should be careful not to place an old head on young shoulders and must take into consideration the child's age,<sup>103</sup>

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<sup>96</sup> Davel & Jordaan (2002) *Personereg* 88; Snyman (*supra* n91) 178; *S v K* (*supra* n91) 356; *S v Ngobese* (*supra* n1) 564; SALRC *Discussion Paper 79 on Juvenile Justice (Project 106)* March 1999 94-95.

<sup>97</sup> Burchell and Hunt (*supra* n19) 160.

<sup>98</sup> Labuschagne "Strafregtelike aanspreeklikheid van kinders weens nalatigheid" (1983) *THRHR* 222 228; Labuschagne "Beskonkenheid en strafregtelike aanspreeklikheid" (1981) *De Jure* 335 338; *S v M* 1982 (1) SA 240 (N) 242; *Weber* (*supra* n1) 410.

<sup>99</sup> *S v Ngobese* (*supra* n1) 565; Labuschagne "Strafregtelike aanspreeklikheid van kinders" (1978) *TSAR* 250 251.

<sup>100</sup> *S v M* 1979 (4) 564 (B) 564.

<sup>101</sup> *S v Ngobese* (*supra* n1) 564.

<sup>102</sup> Skelton (*supra* n6) 266.

<sup>103</sup> The presumption of *doli incapax* weakens with the increase in age: *S v K* (*supra* n91) 358D-E; *S v Nhambo* 1956 (1) PH H28.

knowledge,<sup>104</sup> the nature of the crime,<sup>105</sup> the circumstances under which the crime was committed<sup>106</sup> and the experience and the judgement of the child in the specific circumstances.<sup>107</sup>

## **2.4 The Contentions against the Common Law Doctrine that Regulated the Criminal Capacity of Children**

In terms of the common law provisions a number of problems manifested themselves in practice. The *doli incapax* doctrine was counterproductive in that it was designed by its very nature to protect and to safeguard children,<sup>108</sup> however the presumption was too easily rebutted and children did not enjoy the protection that they ought to have received.<sup>109</sup> It was this concern, amongst others, that motivated calls for a more balanced approach in determining the appropriate minimum age for criminal capacity and for better safeguards in order to make it more difficult to rebut the *doli incapax* presumption, for example to make it compulsory for the prosecution to lead expert evidence.<sup>110</sup> Some of the problems were:

### *2.4.1 The (Unwelcome) Practice of Rebutting the Doli Incapax Presumption*

The state rebutted the *doli incapax* presumption merely by calling the child accused's parents, a guardian or caregiver to testify that the child knows the difference between right and wrong and that the child could act according to this appreciation.<sup>111</sup> This practice was greatly criticised in the following ways:<sup>112</sup>

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<sup>104</sup> Snyman (*supra* n91) 179.

<sup>105</sup> *R v Kaffir* 1923 CPD 261; *R v Maritz* 1944 RDL 101.

<sup>106</sup> *R v Lourie* (1892) 9 SC 432 434.

<sup>107</sup> *Weber* (*supra* n1) 400.

<sup>108</sup> Gallinetti "Getting to know the Child Justice Act" (2009) *Child Justice Alliance* 1 18.

<sup>109</sup> Skelton (*supra* n87) 186-187.

<sup>110</sup> Skelton & Badenhorst "The criminal capacity of children in South Africa: International developments and considerations for a review (2011) *Child Justice Alliance* 1 15; SALRC (*supra* n86) para 3.6.

<sup>111</sup> Skelton & Badenhorst (*supra* n110) 15.

- (i) The witnesses were under the impression that they testified in favour of and in mitigation of the child, whereas in fact they assisted the state in rebutting the *doli incapax* presumption.
- (ii) Many of the children were not legally represented.
- (iii) Children and their parents were ill-equipped to defend the charges in the criminal proceedings.

#### 2.4.2 *The Courts Ignored the Connotative (Second) Leg of the Test*

In practice the rebuttal of the *doli incapax* presumption focused only on the ability of the child to distinguish between right and wrong and completely disregarded the child's ability to act in accordance with this appreciation.<sup>113</sup> This unwelcome practice of the courts in the adjudication on the rebuttal of the *doli incapax* presumption is contrary to the court's mandate to act in the best interest of the child<sup>114</sup> as the highest guardian of all minors.<sup>115</sup> It is quite common for children to act impulsively or to be influenced by adults and older children to such an extent that their resistance against what is wrong either is non-existent or substantially less than that of an adult.<sup>116</sup>

#### 2.4.3 *The Minimum Age of Seven was Unacceptably Low*

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<sup>112</sup> Skelton & Badenhorst (*supra* n110) 15; Skelton (*supra* n14) 5; Burchell & Hunt (1991) *Principles of Criminal Law* 125; Davel (*supra* n15) 606; van Dokkum "Unwelcome assistance: Parents testifying against their children" (1994) *SAJJC* 213 221; SALRC (*supra* n86) para 3.6, 3.7 & 3.15; SALRC (*supra* n96) 95.

<sup>113</sup> SALRC (*supra* n96) 95-96; Snyman (*supra* n91) 179; *S v Kenene* 1946 EDL 18 21; *S v Tsutso* (*supra* n93) 666; *S v Dyk* (*supra* n94) 603.

<sup>114</sup> S4(3) *UNCRC*; S4(1) *ACRWC*; S28(2) of the Constitution of the Republic of South Africa; Preamble of the CJA, S10 of the Children's Act (*supra* n12).

<sup>115</sup> In *S v M* (*supra* n98) 242, the court held that all courts must exercise caution when dealing with the rebuttal of the presumption of criminal incapacity, more so if the accused are illiterate, unsophisticated and specifically if they are children with a limited grasp of the proceedings.

<sup>116</sup> *S v Ngobese* (*supra* n1) 565.

South Africa had one of the lowest threshold ages for criminal capacity compared to other countries.<sup>117</sup> In this comparison with other jurisdictions<sup>118</sup> the minimum age of seven was criticised as being unacceptably low and out of touch with trends in international law and the science of early-childhood development.<sup>119</sup>

#### 2.4.4 *Expert Evidence was Not Used to Rebut the Doli Incapax Presumption*

The fact that expert evidence was not utilised to rebut the *doli incapax* presumption was subject to criticism.<sup>120</sup>

### 3. THE PROVISIONS OF THE CJA PERTAINING TO CRIMINAL CAPACITY

*Inter alia*, because of the above mentioned problems with the common law doctrine the CJA came into operation and created a separate procedural criminal system that protects the rights of children accused of a crime.<sup>121</sup> In terms of the CJA a child under ten irrebuttably is presumed to lack criminal capacity and cannot be prosecuted for an offence.<sup>122</sup> A child between the ages of ten and fourteen is

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<sup>117</sup> SALRC (*supra* 96) 99.

<sup>118</sup> For a discussion of international trends and instruments see chapter 5.

<sup>119</sup> Skelton & Badenhorst (*supra* n110) 15; SALRC (*supra* 86) para 3.6. For a discussion on the early-childhood development science, see chapter 6.

<sup>120</sup> Skelton & Badenhorst (*supra* n110) 15; SALRC (*supra* n86) para 3.6.

<sup>121</sup> Gallinetti "Child justice in South Africa: The realisation of the rights of the children accused of crime" in Boezaard (ed) (2009) *Child Law in South Africa* 636.

<sup>122</sup> S7(1); Le Roux-Bouwer "Juvenile offenders in South African law" in Bezuidenhoud (ed) (2013) *Child and Youth Misbehaviour in South Africa: A Holistic Approach* 212 write that the only material shift in the common law is the change in the minimum age from seven to fourteen years. On the other hand, in Walker "The requirements of criminal capacity in section 11(1) of the new Child Justice Act 2008: A step in the wrong direction?" (2011) *SAJCJ* 33 the author is of the view that the CJA diminishes the common law as the new requirement for criminal capacity is that the child has the capacity to appreciate the difference between right and wrong as opposed to appreciating the wrongfulness of their own conduct. See to this point *S v Mbanda* (*supra* n95) 189 and *S v K* (*supra* n91) 356 as confirmation that Walker has it wrong and that the test was always that a child must be able to differentiate between right and wrong, a view which is supported by the Roman-Dutch legal author Moorman (*supra* n61).

rebuttably presumed to lack criminal capacity<sup>123</sup> and the state has the onus of proving beyond a reasonable doubt that such a child has the necessary criminal capacity if the state wishes to prosecute a delinquent child.<sup>124</sup> The state will have to prove that the child can distinguish between right and wrong at the time of committing the offence and can act in accordance with such appreciation for a child to be held criminally accountable.<sup>125</sup>

The legislature was uncertain about the minimum age of ten years, and for this reason the CJA provides that the Minister of Justice, not later than five years after the commencement of the CJA, must submit a report to parliament to determine if the minimum age of criminal capacity should be increased.<sup>126</sup> The reason the legislature requires this age to be reviewed no later than five years after the commencement of the CJA<sup>127</sup> is because the medical and anthropological facts in early-childhood development make a compelling argument that the age should be higher than ten.<sup>128</sup> In assisting the legislature with this endeavour, the CJA requires research to be undertaken on the statistics of children between the ages of ten and thirteen who are alleged to have committed an offence.<sup>129</sup>

On 22 February 2016 it was reported that the Minister in the Presidency, Jeff Radebe, announced that the cabinet had approved the submission of the report detailing the review of the minimum age of criminal capacity to parliament, and noted that the minimum age of accountability in terms of the CJA would soon be raised to twelve years.<sup>130</sup>

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<sup>123</sup> S7(2).

<sup>124</sup> S11(1).

<sup>125</sup> S11(1).

<sup>126</sup> S8.

<sup>127</sup> S8 commenced on 1 April 2010.

<sup>128</sup> SALRC *Discussion paper 103 Review of the Child Care Act (Project 110)* December 2002 31; According to Skelton & Gallinetti "A long and winding road: The Child Justice Bill and civil society advocacy" (2008) *SA Crime Quarterly* 1 8 civil society nearly persuaded the Justice Portfolio Committee to increase the minimum criminal age of criminal capacity to twelve. For a comprehensive discussion of early- childhood development science see Chapter 6.

<sup>129</sup> S96(4).

<sup>130</sup> Hartley "The minimum age of criminal capacity could be raised to 12 years" 22 February 2016 *Business Day*.

The CJA provides that if a prosecutor considers the prosecution of a child between ten and thirteen, he must consider the educational level, cognitive ability, domestic and environmental circumstances and age and maturity of the child,<sup>131</sup> as well as establish the prospects that a court will find that the child had criminal capacity at the time of committing the offence.<sup>132</sup> If a prosecutor wants to proceed with the prosecution of a child, he will refer the matter to a preliminary inquiry<sup>133</sup> where the inquiry magistrate, of his own accord or by request of the legal representatives of the parties, may order an evaluation of the criminal capacity of the child by a suitably qualified person and which must include an assessment of the cognitive, moral, emotional, psychological and social development of a child.<sup>134</sup>

The Judicial Matters Third Amendment Bill,<sup>135</sup> if enacted, will amend section 11(2) of the CJA to ensure that the inquiry magistrate in making a decision on the criminal capacity of a child must consider the cognitive, moral, emotional, psychological and social development of a child, which is not the case as the CJA currently reads. Therefore, it follows that expert evidence is crucial in the rebuttal of the *doli incapax* presumption.

#### 4. CRITICISM AGAINST THE CJA

The new minimum age of ten years was the subject of criticism<sup>136</sup> and the current system is beset, *inter alia*, by the followings complications:<sup>137</sup>

- (i) There is a shortage of resources: after the commencement of the CJA, there was an increase in the number of medico-legal assessments testing the capacity of children accused of a crime, thereby depleting state resources, while private assessments come with a high price tag.

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<sup>131</sup> S10(1)(a).

<sup>132</sup> S10(1)(f).

<sup>133</sup> S10(2)(a)(ii).

<sup>134</sup> S11(3).

<sup>135</sup> B53 of 2013.

<sup>136</sup> Doek "Child justice trends and concerns with a reflection on South Africa" in Gallinetti, Kassan & Ehlers (eds) (2006) *Child Justice in South Africa: Children's Rights Under Construction Conference Report* 13.

<sup>137</sup> Skelton (*supra* n6) 265-266.

- (ii) There is an undue delay in the finalisation of trials involving children.
- (iii) There is widespread uncertainty among the medical profession as to how to test the criminal capacity of a child as it is a complex issue encompassing numerous disciplines of expertise. This problem is further exacerbated by the lack of adequate psychometric assessment tools for local use,<sup>138</sup> which often leads to diverse outcomes and discriminatory practices.
- (iv) There is an incorrect perception that children between ten and thirteen have the necessary criminal capacity, thereby putting them in contact with the mental health profession.

The mentioned problems with the CJA cause delays in criminal adjudication of cases involving children, which is an infringement of a child's constitutional right to an expeditious trial.<sup>139</sup>

## 5. CONCLUSION

It is as a consequence of a growing appreciation that children's rights are not based purely on 'hard' law and that the law must incorporate multiple disciplines<sup>140</sup> that the general legal fraternity recognises that young children were convicted of a crime

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<sup>138</sup> Foxcroft "Psychological testing in South Africa: Perspectives regarding the ethical and fair practices" (1997) *European Journal of Psychological Assessment* 229 229 elaborate on these practices, stating that under apartheid, policies residential areas and education were segregated and employment was reserved along racial lines, and that in such a deeply-segregated society it is inevitable that psychological tests would evolve along cultural lines as there is little need for common tests because common tests are applicable to groups that compete with each other. At 234, Foxcroft states that without culturally-relevant content and appropriate norms being incorporated into testing methods, ethical and fair testing will be compromised.

<sup>139</sup> S35(3)(d) of the Constitution of the Republic of South Africa; S342A of the CPA (*supra* n79) provides grounds that a presiding officer must take into consideration where it is alleged that there is an undue delay of the trial: *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) 38-39; Joubert (ed) (2005) *Strafprosesreg Handboek* 250; Art 10(2)(b) of the *International Covenant on Civil and Political Rights* and Art 20 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The *Beijing Rules*") provide that juveniles be brought to adjudication as speedily as possible.

<sup>140</sup> Chapter 1, para 2.



when factually they did not have the capacity to be criminally accountable. The *doli incapax* presumption was too easily rebutted, the courts applied the test for accountability incorrectly and the minimum young age of seven years for criminal capacity was unacceptably low and out of touch with international law and early-childhood development science. The CJA rectified these contentions to a certain degree, however not without criticism by academic writers. The next chapter deals with the delictual accountability of a child, in which case there have been no parallel amendments to the common law provisions regulating the delictual accountability of a child.

# DELICTUAL ACCOUNTABILITY OF A CHILD

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## 1. INTRODUCTION

The previous chapter has dealt with the CJA which lifted the minimum age of criminal capacity from seven to ten years. There have been no parallel amendments to common law provisions governing the delictual accountability of a child despite the fact that the test for the delictual accountability of a child was derived from the criminal law,<sup>141</sup> though this still may be debatable.<sup>142</sup> This chapter deals with the delictual accountability of the child and the contentions against the common law provisions that govern the delictual accountability of children to this day.

## 2. THE COMMON LAW PROVISIONS OF DELICTUAL ACCOUNTABILITY

### 2.1 The Delictual Accountability of a Child

A child under the age of seven years irrefutably is presumed to be *culpaie incapax* and cannot be held accountable for a delict due to his/her fault as the infant cannot act negligently or intentionally.<sup>143</sup> When a child institutes an action to recover damages the defendant cannot plead that the child under seven was contributory negligent.<sup>144</sup> However, an infant can be held accountable for his conduct where fault is not a requirement for delictual accountability.<sup>145</sup> For a child between the ages of

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<sup>141</sup> *De Bruyn v Minister van Vervoer* 1960 (3) SA 820 (O) 825; Davel (*supra* n15) 607. In the unreported judgement of *N obo N v RAF* (17439/2013) [2015] ZAGPJHC (27 April 2015) para 22, judge Weiner held that it was not necessary to decide if the provisions of the CJA applies to negligence in the civil law.

<sup>142</sup> *Nieuwenhuizen v Union & National Insurance* 1962 (1) SA 760 (W) 761; Van der Vyfer & Joubert (1991) *Persone- en Familiereg* 194.

<sup>143</sup> *Roxa v Mtshayi* 1975 (3) SA 76 (A); *Damba v AA Mutual* 1981 (3) SA 740 (E); *Haffejee v SAR&H* 1981 (3) SA 1062 (W). This is a rule of substantive law as opposed to a rule of evidence according to Burchell and Hunt (*supra* n19) 158. As such, even if a child under seven can be accountable, the child will not be held delictually accountable.

<sup>144</sup> Cooper (*supra* n81) 172; Apportionment of Damages Act (*supra* n83) as amended by the Apportionment of Damages Amendment Act 58 of 1971. In *De Bruyn* (*supra* n141) 826, the court found that where no *culpaie* can be attributed to a child, the child cannot be held contributory negligent.

<sup>145</sup> *Green v Naidoo* 2007 (6) SA 372 (W) see an example relating to faultless accountability, the *actio de pauperie* (dog bite claims). Examples of other faultless actions are the *actio de pastu* (claim for an animal that eat plants) and *actio de feris* (claim for wild or dangerous animals that cause damages by being on a road).

seven and puberty, although the situation previously was uncertain,<sup>146</sup> it is now trite that there is a rebuttable presumption that the child is *culpaē incapax* and not delictually accountable.<sup>147</sup> The age at which this rebuttable presumption terminates is contentious and views on the legal position differ.<sup>148</sup> In some judgments the presumption terminates at the age of puberty<sup>149</sup> whereas others hold the correct termination age is fourteen for boys and girls.<sup>150</sup> Interestingly, in the criminal law the courts always refer to the age of fourteen and there is no age differentiation in respect of gender in the criminal law.<sup>151</sup> Clarity from either the legislature or courts will be welcome. Children older than puberty are treated like adults and they are *culpaē capax* and accountable for their delinquent acts.<sup>152</sup>

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<sup>146</sup> De Bruin “Kinders en die toets vir nalatigheid in die privaatreë” (1979) *THRHR* 178 181, is of the view that in 1979 the dominant perception was that there was no *doli incapax* presumption applicable to children between seven and twelve for girls and fourteen for boys. De Bruin is cognisant that at that time Van der Vyfer was of the view that a presumption of *doli incapax* existed, as per Van der Vyfer “*Netherlands Insurance Co of SA Ltd v Van der Vyfer* 1968 (1) SA 412 (A): Onregmatige daad- Derdepartyversekering- Toestemming tot risiko van benadeling-Bydraende opset” (1968) *THRHR* 393 394.

<sup>147</sup> *S v Dyk* (*supra* n94); *South British Insurance v Smit* 1962 (3) SA 826 (A) 836; Weber (*supra* n1) 403E; *S v Pietersen* (*supra* n94).

<sup>148</sup> Van der Vyfer & Joubert (*supra* n142) 194.

<sup>149</sup> In Weber (*supra* n1) and *Jones v Santam* 1965 (2) SA 542 (A) the courts applied the ages of puberty, i.e., twelve for boys and fourteen for girls. Van der Vyfer & Joubert (*supra* n142) 194 are of the view that this approach has its origin in the *Corpus Iurus* text.

<sup>150</sup> In *Nieuwenhuizen* (*supra* n142) the court made reference to the age of fourteen, as opposed to the distinction between the ages of twelve and fourteen; *Knouws v Administrateur, Kaap* 1981 (1) SA 544 (C) 555; In *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) 511, the court made an *obiter* remark that the application of the puberty ages may be constitutionally unjustifiable. It is unfortunate that the court failed to make a ruling on this aspect to resolve the question of gender discrimination once and for all; Davel (*supra* n15) 607 criticises the age discrepancy, and opines that it is unthinkable that accountability in delict could depend on gender and expresses a hope that we have reached a stage where it is accepted that sexual maturity has nothing to do with accountability.

<sup>151</sup> Van der Vyfer “Constitutional protection of children and young persons” in Robinson (ed) (1997) *The Law of Children and Young Persons in South Africa* 287 fn117 and 290 fn129.

<sup>152</sup> Boezaard (*supra* n4) 37.

## 2.2 The Test for Accountability

A child is accountable (*culpa capax*) for his/her wrongful acts if the child has the mental faculties to appreciate the difference between right and wrong and to act in accordance with such an appreciation.<sup>153</sup> Accountability is a prerequisite for fault,<sup>154</sup> and a child must first be accountable before fault can be considered in a delictual case.<sup>155</sup>

The test employed to establish the fault of a child, as opposed to testing for accountability, was an objective reasonable child test prior to 1965, but in *Jones v Santam*, a new approach was adopted by the Appellate Division.<sup>156</sup> In line with this new approach the test for negligence (or intention) is always objective and is that of the reasonable man as opposed to that of the reasonable child.<sup>157</sup> The court held that first it must consider if the child's conduct is in line with the *diligens paterfamilias* and, secondly, if the child's conduct is not in line with the reasonable man test, the court must establish if the child is *culpa capax*.<sup>158</sup> This new approach was subject to the following criticism:<sup>159</sup>

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<sup>153</sup> *S v Mnyanda* (*supra* n90) 763F; *Weber* (*supra* n1) 403; *Davel & Jordaan* (*supra* n96) 55; *Boezaard* (*supra* n4) 36.

<sup>154</sup> Negligence (*culpa*) or intention (*dolus*).

<sup>155</sup> *Boezaard* (*supra* n4) 36. In *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) para 9, the court correctly held that the test for wrongfulness precedes that of fault.

<sup>156</sup> *Jones* (*supra* n149) 551.

<sup>157</sup> Neethling, Potgieter & Visser (2006) *Deliktereg* 130.

<sup>158</sup> Neethling, Potgieter & Visser (*supra* n157) 130.

<sup>159</sup> This approach has been widely criticised by academic writers but the debate falls beyond the scope of this work: See Van der Vyfer "Subjectivity or objectivity of fault: The problem of accountability and negligence in delictual accountability" (1983) *SALJ* 575 575; Kemp J Kemp "The criterion for establishing delictual negligence-subjective or objective" (1979) *Obiter* 18; Labuschagne "Subjektivering van die vermoede van ontoerekeningsvatbaarheid van kinders tussen 7 en 14 jaar *CC (A minor) v DPP* [1996] 1 Cr App R 375 (QB)" (1997) *Obiter* 145; Neethling, Potgieter & Visser (*supra* n157) 130; Cooper (*supra* n81) 182-189; De Bruin (*supra* n146) 178; Boberg "The little reasonable man" (1968) *SALJ* 127; Boberg "Negligence and contributory negligence in relation to children" (1960) *SALJ* 410 411. As for a child's negligence, for which accountability is a prerequisite, the court in *S v Van As* 1976 (2) SA 921 (A) 929, made an *obiter* statement wherein it doubted the correctness of *R v Meiring* 1927 AD 41, in which case it was decided that the reasonable person test in the criminal and civil law is the same. De Bruin (*supra* n146) 196, is also of the view that there is a difference between the criminal and civil law testing for fault: one deal with punishment and the other with damages.

- (i) The reasonable child test was more realistic when one considers the apportionment of damages: when a child is held accountable and his/her claim for damages must be apportioned, the court must consider the degree of *culpa*e of the parties in apportioning the damages.<sup>160</sup> In the traditional approach it was accepted that the negligent conduct of an adult was not necessarily negligent conduct in a child or that serious negligent conduct was less serious when committed by children, and it follows that the degree of negligence in relation to the same conduct was viewed differently with regard to adults when compared to children.<sup>161</sup> The court could reduce an adult's claim by 70% and a child's claim by only 50% for the same conduct. In terms of the new approach, the apportionment of damages will be the same for adults and children;<sup>162</sup>
- (ii) The test for capacity ought to precede the test for *culpa*e.<sup>163</sup>

### 2.3 How is the *Culpa Incapax* Presumption Rebutted and Who Bears the Onus?

The *culpa incapax* presumption can be rebutted by proving that a child can distinguish between right and wrong and acts in accordance with such an appreciation, in which case the said child will be held accountable<sup>164</sup> and/or

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<sup>160</sup> Neethling, Potgieter & Visser (*supra* n157) 131 fn101.

<sup>161</sup> Reduced accountability can reduce the general damages (*actio iniuriarum*) awarded against a child defendant in a defamation case: Neethling, Potgieter & Visser (*supra* n157) 119 fn10. Van der Merwe & Olivier (*supra* n77) 138 hold the view that reduced accountability ought to reduce the minor plaintiff's contributory negligence, a contention supported by Weber (*supra* n1) 401 where the court held that if a defendant has dealings with an impulsive child (plaintiff) and the defendant was negligent by not being cautious in dealing with the child, the defendant's negligence must exceed that of the child plaintiff. In *South British Insurance* (*supra* n147) 836 the court held that, had the ten-year-old claimant been an adult, his conduct in running across the street would have made him negligent in a materially greater degree than the driver who collided with him. In Boberg (1984) *The Law of Delict* 680, the author relied on *Nieuwenhuizen* (*supra* n142) to argue that a minor's youth affected the comparative culpability of the parties.

<sup>162</sup> Neethling, Potgieter & Visser (*supra* n157) 131 fn101.

<sup>163</sup> In *Roxa* (*supra* n143) 765-766 the court agreed with this approach.

<sup>164</sup> *Damba* (*supra* n143).

contributory negligent.<sup>165</sup> The onus is on the defendant to prove on a balance of probabilities<sup>166</sup> that the child was indeed *culpa capax*.<sup>167</sup>

The test for the capacity to be delictually accountable is a subjective test,<sup>168</sup> if based on facts,<sup>169</sup> which determines if the child's emotional and intellectual capacity, mental maturity and an ability to control impulses are developed<sup>170</sup> to such a degree that the child has sufficient discretion to distinguish between right and wrong.<sup>171</sup> A child's maturity is of importance (especially relating to the second leg of the test) to establish accountability, whereas maturity, in its turn, connotes some ability based

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<sup>165</sup> Apportionment of Damages Act (*supra* n83).

<sup>166</sup> *Damba* (*supra* n143) 743.

<sup>167</sup> *Van Oudshoorn* (*supra* n82) 648G; *Neuhaus v Bastion Ins* 1968 (1) SA 398 (A) 406F; *Knouwds* (*supra* n150) 555; *Damba* (*supra* n143) 743; *Seti v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1062 (E) para 22 & 25; Unreported judgement of *Mguzulwa v Road Accident Fund* (9404/2008) [2009] ZAECHC (29 January 2009) para 10; Neethling, Potgieter & Visser (*supra* n157) 119 fn13 erroneously state that the onus is on the plaintiff.

<sup>168</sup> De Bruin (*supra* n146) 180.

<sup>169</sup> *Weber* (*supra* n1) 389H-400A.

<sup>170</sup> *R v Momberg* 1953 (2) SA 685 (O) 689; *Gouws v Minister van Gemeenskapsbou* 1976 (1) PH J33 (N).

<sup>171</sup> In *Weber* (*supra* n1) 400 the court took a dim view of the existing practice by which courts place all the emphasis on a child's intelligence and schooling and demonstrate ignorance of the fact that a child labours under the inherent weaknesses of childhood. The court warns that an old head must not be placed on young shoulders, as per *Levy v Rondalia Assurance* 1971 (2) SA 598 (A). *Weber* (*supra* n1) was a watershed judgement and many judges took a different approach in favour of the child after *Weber*. Despite this change in practice it often happens that a decision on a child's delictual accountability is made to the detriment of the child: In the unreported judgement of *Pro Tempore v Van der Merwe* (20853/2014) [2016] ZASCA 39 (24 March 2016) the SCA confirmed the judgement of Straus AJ who found that a thirteen- year-old child contributed 20% to his injuries. The SCA was not tasked to make a determination on the accountability of the child, despite the fact that the court *a quo* held that the child could not be educated in a mainstream school, suffered from epilepsy, an adjustment disorder, anxiety and depression, was hyper active and had not reached his milestones at a normal age, which caused him to be inept at performing in a mainstream school. The court completely disregarded the question of the child's accountability. In *RAF v Myhill N.O* 2013 (5) SA 399 (SCA) para 6, a senior claims handler in the employ of the Road Accident Fund (RAF) conceded that it is the RAF's standard practice to apportion a minor's claim, irrespective of the facts of the case and if a claim can be subject to an apportionment (in terms of the Apportionment of Damages Act).

on knowledge and experience to restrain impulses in the situation under consideration.<sup>172</sup>

When the courts consider the above factors they ought not to test the capacity of the child in the abstract but in relation to the specific child's circumstances.<sup>173</sup> The enquiry must relate to a particular act or omission that forms the basis of the case (as opposed to a delict in general).<sup>174</sup> If the child has the intelligence to appreciate the danger (for example, the danger when crossing a road) to be avoided in relation to a specific act or omission (crossing the road) and has knowledge of how to avoid it and is sufficiently mature and developed so as to control his/her irrational or impulsive conduct, it can be said that the child is accountable.<sup>175</sup>

In other words, for a child to be accountable the child must have the capacity to apprehend intelligently the duty, obligation or caution neglected and this capacity to a large degree depends on the nature of that which has been neglected as well as on the intelligence and maturity of the child.<sup>176</sup>

## **2.4 The Contention against the Common Law Doctrine of Delictual Accountability.**

The problems that have manifested in terms of the criminal capacity of children apply *mutatis mutandis* to the delictual accountability of children.<sup>177</sup> As was the case in the criminal law an unwelcome practice has developed in respect of the rebuttal of the *culpa incipax* presumption, where the courts rely on the evidence of the child's parents pertaining to the child's experience, education and lessons taught so as to determine if the child is accountable.<sup>178</sup> The court considers the demeanour of the

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<sup>172</sup> *Jones (supra n149)* 554.

<sup>173</sup> *Roxa (supra n143)* 766A. In *Weber (supra 1)* 399H-400A, the court held that there is a cautionary rule for children over but close to the age of seven, and the court criticised *Jones (supra n149)* where the judge ignored the cautionary rule.

<sup>174</sup> *Eskom (supra n150)* para 19.

<sup>175</sup> *Jones (supra n149)* 554.

<sup>176</sup> Per Lord Justice Clerk Moncrieff in *Campbell v Ord and Maddison* (1873) 1 R 149, quoted in *Feinberg v Zwarenstein* 1932 WLD 73 75; *Jones (supra n149)* 553H; *Bower v Hearn* 1938 NPD 399 407; *Singh v Premlal* 1946 NPD 134 137.

<sup>177</sup> Chapter 3, para 2.4.

<sup>178</sup> In *Jones (supra n149)* 554 a nine-year-old child of normal intelligence was taught about and was accustomed to traffic and was taught to be self-reliant, on which premise the child was held delictually



child on the witness stand, at which juncture the court gains an impression of the child's intelligence and experience, notwithstanding that the matter usually has proceeded to trial at a much later date than the course of action and notwithstanding that the child testifies with the benefit of hindsight.<sup>179</sup> This practice was the subject of

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accountable and his personal injury claim reduced by 50%. In *Neuhaus* (*supra* n167) 407 a child just over seven years of age and of average intelligence, who did reasonably well at school, had been warned to be careful and was sent on errands, and whose mother was satisfied that he was very careful, on which premises he was held accountable. In *Hendricks v Marine & Trade Insurance* 1970 (2) SA 73 (C) 74 a twelve-year-old child, although not highly intelligent, was obviously of sufficient intelligence to be able to visualise a situation and appreciate the danger to be avoided and was held accountable and his claim reduced by 75%. In *Nieuwenhuizen* (*supra* n142) 761, a ten-year-old child knew that he should not be cycling on the wrong side of the road and that cars might overtake him from behind, was held accountable and his claim reduced by 30%. The court ignored the connotative leg of the test. In *South British Insurance* (*supra* n147) 836F an intelligent ten-year-old that rode on his bicycle to school regularly and who was taught safety measures was held accountable. The court ignored the second leg of the test. In *Roxa* (*supra* n143) 768, the court *a quo* found a seven-year-old child to be accountable because the child was taught by his mother not to play in the busy street. He went to school some distance from his home, he had to negotiate streets alone and he was sent on errands with confidence. His mother cautioned him about the dangers of the road and she was sure he appreciated the dangers of the road. In *Pasquallie v Shield Insurance* 1979 (2) SA 997 (C) 1001, the court found a twelve-year-old child accountable because the child is intelligent and fully aware of the risks connected with road traffic.

<sup>179</sup> In *Damba* (*supra* n143) the court ruled, although the seven-year-old child was in sub B, he used to walk to school, he had been alerted to the dangers of the road, he was told to look before crossing the road and he seemed reasonably intelligent, the court was not satisfied that this was ample proof of the fact that the child is *doli/culpae capax*. The court found that it had no reliable means to evaluate the child's intelligence, maturity, understanding of dangers and knowledge, nor did the court feel it can on the child's evidence (the only witness) make a decision as to the child's accountability. The court found that the child testified three years after the incident and his current knowledge and experience influenced his testimony. Sadly, the court went on to state that its views might be different were the mother to testify although the mother is not an expert on cognitive development. Similarly, in *Ndlovu v AA Mutual Insurance* 1991 (3) SA 655 (E) 664, the court noted that the aunt of a ten-year-old child testified that the child knows how to cross the road and to wait for traffic to pass, however the child was not found *culpae capax*, as the court was of the view that such evidence does not indicate that the child had the emotional capacity to curb his youthful impulses.

criticism.<sup>180</sup> The abovementioned factors in isolation certainly cannot be a reflection of a child's capacity to be legally accountable.<sup>181</sup>

On numerous occasions the courts have expressed the view that in relation to their slow development children's conduct is wanting.<sup>182</sup> If one accepts that a child's accountability is intricately linked to the child's level of development, it follows that expert evidence on the child's development is vital for the court in determining whether a child is of sufficient maturity and has developed enough to be accountable.

In the law of delict a child does not have protection in respect of accountability as is the case in criminal law where the minimum age of accountability is ten years and it is clear that courts place no value on the child's actual cognitive and connotative abilities when adjudicating matters involving children.<sup>183</sup>

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<sup>180</sup> In *Weber* (*supra* n1) 400B, the court warned against over-emphasising the intelligence and schooling of a child as opposed to the inherent weaknesses associated with tender age and the propensity of children, however well-schooled, to commit irrational and impulsive acts.

<sup>181</sup> *Roxa* (*supra* n143) 664.

<sup>182</sup> In *R v Naidoo* 1932 NPD 343 349, the court said that normal children often do not show the mature intelligence of an adult and make stupid decisions at the last minute. In *Levy* (*supra* n171) 599, the court found that children have a tendency to dash heedlessly across the road, and in deciding on the issue of negligence the court must not place an old head on young shoulders. In *Ndlovu* (*supra* n179) the court found that it is notorious that in traffic situations children are foolish, incautious, imprudent, indiscreet, irresponsible, injudicious, unwise, ill-considered, impetuous, impulsive, hasty, short-sighted, heedless, unheeding, foolhardy, headlong, rash, unwary, thoughtless, careless, reckless, spontaneous, unpremeditated, sudden and precipitate. *Jones v Lawrence* [1969] All ER 268 held that there is a propensity in children to forget altogether what they have been taught. In *Jones* (*supra* n149) 553, the court found that children have a propensity to run heedlessly across the road, that children lose themselves in their play to the exclusion of all other things and that they are impulsive. In *R v Press* 1938 CPD 356 the court found that children can be impulsive, unpredictable and irresponsible. In *Lentzner* (*supra* n82) 27, the court said that a child in exercising their judgement regarding safety may be little superior to a dumb animal.

<sup>183</sup> *Pro Tempo* (*supra* n171).

### 3. CONCLUSION

The delictual accountability of a child most probably derives from the criminal law,<sup>184</sup> despite this fact and despite the similar test for accountability in the delictual and criminal law, nevertheless the common law provisions governing the delictual accountability of a child remain unchanged and a child is presumed *culpaе incapax* between the age of seven and puberty.<sup>185</sup> In criminal law there is a rebuttable presumption that children between the ages of ten and fourteen are *doli incapax*. One can only ask why the difference. The next chapter considers the international instruments relevant in the matter of the accountability of delinquent children and international trends how foreign jurisdictions deal with the accountability of children.

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<sup>184</sup> *De Bruyn (supra n141)* 825H.

<sup>185</sup> *Davel (supra n15)* 607.

# LEGAL ACCOUNTABILITY: INTERNATIONAL INSTRUMENTS AND TRENDS IN FOREIGN JURISDICTIONS

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## 1. INTRODUCTION

A consideration of the good sense (or lack thereof) of the existing law that regulates the legal accountability of children in the face of criticism, *inter alia*, by academic authors<sup>186</sup> requires we turn to international law for guidance. The Constitution requires us to consider international law when interpreting the law<sup>187</sup> and preferably to interpret South African law in a fashion that is consistent with international law.<sup>188</sup>

This chapter first deals with the international instruments that give state parties guidance on the correct approach to the difficult terrain of a child's legal accountability and, secondly, considers the trend in various countries in dealing with the complex issue of accountability.

## 2. INTERNATIONAL INSTRUMENTS

Because criminal accountability of children receives much greater attention on the international front, the international instruments relate almost exclusively to the criminal capacity of the child. Similarly, in South Africa the delictual accountability for unlawful acts plays a less important role in comparison with the interest in criminal law.<sup>189</sup> Academic writers have argued that it is because in criminal law reduced accountability is a mitigating factor for which no counterpart exists in the law of delict.<sup>190</sup> With necessary adaptations the provisions relating to the criminal capacity offer insight into the delictual accountability of the child.<sup>191</sup> On this premise the following international instruments are relevant to the discussion of the legal accountability of children:

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<sup>186</sup> Chapter 3, para 2.4; chapter 4, para 2.4.

<sup>187</sup> S39(2) of the Constitution.

<sup>188</sup> S233 of the Constitution.

<sup>189</sup> Boezaard (*supra* n4) 36 fn291; Neethling, Potgieter & Visser (*supra* n157) 119 fn10; Davel & Jordaan (*supra* n96) 88 fn 299.

<sup>190</sup> Neethling, Potgieter & Visser (*supra* n157) 119 fn10. This is a flawed argument and it is submitted at chapter 4, para 2.2, that reduced capacity plays a role in the reduction of damages and a child's contribution to the damages.

<sup>191</sup> Chapter 2, para 1.

## 2.1 The United Nations Convention on the Rights of a Child (*UNCRC*)<sup>192</sup>

South Africa, which ratified the *UNCRC*, is bound by its provisions from an international law point of view.<sup>193</sup> The *UNCRC* directs that state parties must promote the establishment of laws that will establish a minimum age below which children shall be presumed not to have infringed a penal law.<sup>194</sup>

In a general comment issued by the *UNCRC* the committee recorded that a minimum age for criminal accountability below twelve years is unacceptably low.<sup>195</sup> The committee held the view that the general principles of the *UNCRC* have not been reflected adequately in national legislation or the practices of some signatory countries and a particular concern was raised about the subjective and arbitrary criteria (such as with regard to the attainment of puberty, the age of discernment or the personality of the child) that still prevail in the assessment of criminal responsibility and a call was made for objective measures to be applied.<sup>196</sup> The committee encourages the use of expert evidence in assessing the maturity of the child<sup>197</sup> and expressed its concern with regard to two minimum ages of criminal capacity (i.e., the *doli incapax presumption*) applicable in some state parties, such as in South Africa, because assessing the maturity of the child is left to the court without considering expert psychological evidence.<sup>198</sup>

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<sup>192</sup> The *UNCRC* was adopted on 20 November 1989 and entered into force on 2 September 1989: Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in the international and South African child law" in Boezaard (ed) (2009) *Child Law in South Africa* 309; Detrick (1999) *Commentary on the United Nations Convention on the Rights of the Child* 676 *et seq.*

<sup>193</sup> On 16 June 1995: Mahery (*supra* n192) 323.

<sup>194</sup> Art 40(3)(a); Van Bueren (1995) *The International Law on the Rights of the Child* 171.

<sup>195</sup> The Convention on the Rights of the Child, General Comment No. 10 (2007) *Children's Rights in Juvenile Justice* para 32. The general comments issued by the *UNCRC* are not binding in South African law but have an interpretative value: *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC) para 29 *et seq.*; Sloth-Nielsen "A new vision for child justice in international law" (2007) *Article 40* 11.

<sup>196</sup> Summary Report on Committee on the Rights of the Child Day of General Discussion para 218 & 226. The Committee on the Rights of the Child, the monitoring body responsible for receiving reports from state parties under the *UNCRC* consistently has criticised countries which have established a minimum age for criminal capacity of ten years or younger.

<sup>197</sup> General Comment 10 (*supra* n195) para 30.

<sup>198</sup> Skelton & Badenhorst (*supra* n110) 27.

In respect of South Africa's minimum age for criminal accountability set at ten years the committee held that the age of ten years was still too low as the *de facto* minimum acceptable age for the committee is twelve years.<sup>199</sup> Civil society also has criticised the age limit of ten based on the advances in neurological science, which demonstrate that adolescent brains are far less developed than previously believed.<sup>200</sup>

## **2.2 The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>201</sup>**

The *ACRWC* directs that state parties shall ensure a minimum age below which a child shall be presumed to lack criminal capacity.<sup>202</sup>

## **2.3 The United Nations Standard Minimum Rules for the Administration of Justice (Beijing Rules)<sup>203</sup>**

*The Beijing Rules* direct that the start of the age for criminal capacity should not be fixed at too low an age considering the emotional, mental and intellectual maturity of children.<sup>204</sup> The official commentary on the *Beijing Rules* notes that the modern approach to the criminal capacity of a child is to consider whether a child can live up to the moral and psychological requirements of criminal capacity, which entail a child's capacity to be responsible for behaviour deemed by the law to be a crime, by virtue of the child's individual discernment and understanding.<sup>205</sup> The commentary

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<sup>199</sup> The UN Committee on the Rights of the Child Consideration of Reports Submitted by State Parties under art 44-Concluding Observations of the Committee on the Rights of the Child: South Africa para 17.

<sup>200</sup> Gallinetti (*supra* n121) 651-652. See Chapter 6 for a detailed discussion on the medico-legal factors affecting the legal accountability of children.

<sup>201</sup> The *ACRWC* was ratified by South Africa on 7 January 2000: Viljoen "The African Charter on the Rights and Welfare of the Child" in Boezaard (ed) (2009) *Child Law in South Africa* 348.

<sup>202</sup> Art 17(4).

<sup>203</sup> The *Beijing Rules* were adopted by the General Assembly of the United Nation in 1985: Gallinetti (*supra* n121) fn 4. It creates non-binding rules or 'soft' law: Ramages *Investigating the Minimum Age of Criminal Responsibility of African Legal Systems* [LLM dissertation 2008 UWC] 9.

<sup>204</sup> Art 4.1.

<sup>205</sup> Skelton & Badenhorst (*supra* n110) 5.

also points out that there is a close relationship between the notion of responsibility for criminal behaviour and other social rights and responsibilities (such as delictual accountability).<sup>206</sup> The commentary notes that the minimum age limits for criminal capacity in various countries differ vastly for historical and cultural reasons<sup>207</sup> and reminds, if there is no age limit or if the age limit for accountability is too low, the notion of responsibility becomes redundant. For this reason member countries are urged to agree on a reasonable age below which children lack capacity in line with international standards.<sup>208</sup>

### **3. LEGAL ACCOUNTABILITY OF CHILDREN: INTERNATIONAL TRENDS**

#### **3.1 International trends as opposed to a single jurisdiction**

A consideration of the notion of a child's legal accountability in a legal framework requires one to keep track of numerous variables, such as the political dispensation, the financial strength of the country, social and cultural influences, legal history and so on, that render a single comparative study trivial as these variables differ vastly in most countries. Instead, a study is made of international trends in general, which allows a country such as South Africa to draw on these trends selectively and appropriately for local use.

#### **3.2 Internationally, generally there is a distinction made between the criminal and delictual accountability of a child**

Internationally the age limits for delictual accountability generally differ widely from those for criminal capacity.<sup>209</sup> Of note is that South Africa's international law obligations, specifically the *Beijing Rules*, make it an international law imperative to reduce the age difference between the criminal and delictual ages of accountability.<sup>210</sup>

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<sup>206</sup> Skelton (*supra* n6) 272.

<sup>207</sup> The *Beijing Rules* and commentary on Rule 4.1.

<sup>208</sup> The *Beijing Rules* and commentary on Rule 4.1.

<sup>209</sup> Tunc (ed) (1983) *International Encyclopaedia of Comparative Law Vol XI Torts* 94.

<sup>210</sup> Chapter 4, para 1.



### 3.3 The three main international trends

#### 3.3.1 Children are treated as if adults

*Delictual:* In some countries children are liable for all their delicts and their liability is determined in the same fashion as for adults.<sup>211</sup> These countries include, *inter alia* Iraq,<sup>212</sup> Iran,<sup>213</sup> Mexico,<sup>214</sup> Syria, Libya, Lebanon and Spain.<sup>215</sup> In Denmark<sup>216</sup> and Ethiopia<sup>217</sup> the law specifically states that a child's liability is determined according to the same criteria as that of an adult.<sup>218</sup>

*Criminal:* Malaysia employs a dual system of secular and Islamic law which results in a number of different minimum ages of accountability, but all children can be prosecuted for an offence under the Internal Security Act regardless of the child's age.<sup>219</sup>

#### 3.3.2 Complete immunity for children

In the second trend the actions of a child below the age of discretion are treated as being like the acts of an animal or as mere accidents and such children are completely immune from legal liability.<sup>220</sup> This notion is manifested in three separate groups:

##### (a) *Ad hoc* approach

*Delictual:* If a child lacks discretion he will lack accountability, and the test for immunity is thus simply the lack of discretion and each case is determined on its own

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<sup>211</sup> Tunc (*supra* n209) 94.

<sup>212</sup> Art 191 Iraqi Civil Code 40 of 1951 para 1; Stigall "A closer look at Iraqi property and tort law" (2008) *Louisiana Law Review* 765 809.

<sup>213</sup> Art 1216 Iranian Civil Code of 1928; Art 7 of the Iranian Tort Liability Act of March 1960, holds that when a person who must care for a minor fails in this duty he/she shall be liable for damages, unless he/she is unable to answer for it, in which case the minor shall answer for it.

<sup>214</sup> Art 1911 Mexican Civil Code of 1884.

<sup>215</sup> Tunc (*supra* n209) 95.

<sup>216</sup> Art 3 of the Danish Minority and Tutelage Act 277 of June 1922.

<sup>217</sup> Art 2030 Ethiopian Civil Code of 1960.

<sup>218</sup> Tunc (*supra* n209) 96.

<sup>219</sup> Art 3 of Regulation 1975.

<sup>220</sup> Tunc (*supra* n209) 97.

merits.<sup>221</sup> One such state in the United States is Louisiana.<sup>222</sup> Other countries include Turkey,<sup>223</sup> Austria,<sup>224</sup> Switzerland, Czechoslovakia<sup>225</sup> and Hungary.<sup>226</sup>

*Criminal:* In Mauritian law there is no clear explicit minimum age of accountability and children that have reached the age of discernment can be held criminally liable.<sup>227</sup>

(b) Rigid age of accountability

*Delictual:* In the second group a country's legislation provides for a rigid minimum age at which children lack delictual accountability.<sup>228</sup> If a child is older than the legislated age, he will be held delictually accountable irrespective of his level of development and the state of his mental faculties.<sup>229</sup> In Chile this age is seven,<sup>230</sup> it is ten in Argentina<sup>231</sup> and Columbia,<sup>232</sup> thirteen in Poland<sup>233</sup> and was fifteen in the Soviet Union.<sup>234</sup>

*Criminal:* In Uganda, the rigid age of accountability is twelve.<sup>235</sup>

(c) A combination of a rigid age and *ad hoc* approaches

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<sup>221</sup> Tunc (*supra* n209) 97.

<sup>222</sup> Art 1053 Louisiana Civil Code of 1987; *Yancey v Maestri* 155 So. 509 (La. App. 1934).

<sup>223</sup> Art 16 Turkey Civil Code of 1926 para 3.

<sup>224</sup> S1308 Austria Civil Code of 1811.

<sup>225</sup> S422 Czechoslovakia Civil Code 40 of 1964.

<sup>226</sup> S352 Hungary Civil Code Act IV of 1959 para 1.

<sup>227</sup> S44 & S45 of the Criminal Code Act of 1838.

<sup>228</sup> Tunc (*supra* n209) 97.

<sup>229</sup> Tunc (*supra* n209) 97.

<sup>230</sup> Art 2319 Chilean Civil Code of 1855.

<sup>231</sup> Art 1110 Argentine Civil Code of 1871.

<sup>232</sup> Art 2346 Columbia Civil Code of 1873.

<sup>233</sup> Art 426 Poland Civil Code of 1964. In Polish law this age was set for two reasons: (1) It is the age under which common experience has shown it is impossible to expect of a minor to be capable of making prudent decisions and to comprehend their effects and (2) the age corresponds with the age limit set for the lack of capability to perform acts in law: Heiderhoff & Zmij (ed) (2009) *Tort Law in Poland, Germany and Europe* 110.

<sup>234</sup> Art 450 Russian Soviet Federative Socialist Republic Civil Code of 1965 para 1.

<sup>235</sup> Art 89 of the Uganda Children's Statute Act 6 of 1996.

*Delictual:* The third group is a combination of the first two groups. A rigid age is set under which age a child lacks accountability and if a child is older than the set minimum age and he/she has not reached the ability to distinguish between right and wrong he/she lacks accountability.<sup>236</sup> In East Germany it was a child under six years;<sup>237</sup> in West Germany a child under seven years<sup>238</sup> and in Greece a child under ten years<sup>239</sup> completely lacks accountability. Thereafter they are held generally accountable to the age of eighteen years (fourteen in Greece), unless they are unable to appreciate the wrongfulness of their conduct.<sup>240</sup> Alternatively, a child below a certain age (seven in South Africa) completely lacks accountability, and above that age there is a rebuttable presumption that a child lacks accountability up to a certain age (the age of puberty in South Africa).

*Criminal:* In England, the *doli incapax* presumption has been abolished<sup>241</sup> and from the age of ten there is a rebuttable presumption that a child is accountable.<sup>242</sup> In Australia and in South Africa there is a rebuttable presumption that children between ten and thirteen lack accountability.<sup>243</sup>

### 3.3.3 *Minor's liability based on equitable considerations*

A *third* trend applies exclusively to the private law where the minor's liability is based neither on complete accountability nor on complete immunity but on equitable considerations.<sup>244</sup> If a child is completely delictually liable in the same way as an adult, the law ignores the mental development of a child, whereas complete immunity ignores the interest of the innocent victim.<sup>245</sup> Both of these scenarios are unsatisfactory and undesirable to some observers and for this reason many legislatures have opted for an intermediate solution, resorting to an approach that

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<sup>236</sup> Tunc (*supra* n209) 97.

<sup>237</sup> S348 East Germany Civil Code of 1975.

<sup>238</sup> S828 West Germany Civil Code of 1949.

<sup>239</sup> Art 916-917 Greece Civil Code of 1946.

<sup>240</sup> Tunc (*supra* n209) 97.

<sup>241</sup> S34 of the Crimes and Disorder Act of 1998.

<sup>242</sup> Badenhorst (*supra* n35) 19.

<sup>243</sup> Urbas "The age of criminal responsibility: Trends and issues in crime and criminal justice" (2004)

181 *Australia Institute of Criminology* 1 1.

<sup>244</sup> Tunc (*supra* n209) 97.

<sup>245</sup> Tunc (*supra* n209) 98.

provides for numerous variables, for example, the financial position of the child, the fact that the child has insurance and so on are considered in the equation when establishing legal accountability.<sup>246</sup> The number of countries that have adopted the principle of equitable liability is considerable.<sup>247</sup> There are many examples of such jurisdictions and these examples are discussed, firstly, in the context as an exception to the general delictual immunity rule and, secondly, in the context as the exceptions to the general accountability rule:

- (a) In most countries where delictual accountability is based on equitable consideration, the equitable considerations manifest as an exception to the general rule of immunity for children of tender years.<sup>248</sup> This means that children of tender years generally are not delictually accountable but that certain exceptions are legislated. Many countries deem a child generally as unaccountable and instead opt to hold a child's parent or guardian liable, however with a rider that the child can be held liable if the victim is unable to get adequate compensation from a parent or guardian. One of many such countries<sup>249</sup> is Egypt.<sup>250</sup> Secondly, in countries such as Portugal children generally are not accountable, but the courts may take the child's general circumstances<sup>251</sup> into consideration nevertheless to justify an order of total or partial accountability for the child. The circumstances that the court may take

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<sup>246</sup> Tunc (*supra* n209) 98.

<sup>247</sup> Tunc (*supra* n209) 98.

<sup>248</sup> Tunc (*supra* n209) 98.

<sup>249</sup> Art 2047 Italy Civil Code of 1942 para 2; Art 489 Portugal Civil Code of 1967 para 1; S829 Germany Civil Code of 1900; Art 167 Libyan Civil Code of 1954 para 2.

<sup>250</sup> Art 164 Egypt Civil Code of 1949 para 2.

<sup>251</sup> Art 63 Danish Minority and Tutelage Act (*supra* n216), provide that the court can consider the mental development of a child below fifteen; S1-1 The Norwegian Act on Reparation of Damages in Certain Cases 26 of 1969 and Chapter 2, S2 of the Swedish Tort Liability Act of 2 June 1972 provide that age and degree of maturity under the age of eighteen must be considered. Art 1310 of The Austrian Civil Code (*supra* n224) obliges the court to consider the fact that the victim refused to defend himself to avoid hurting the attacker and Art 1308 provides that if the victim gave the child below the age of discretion an opportunity to cause harm, the victim cannot claim damages.

into consideration are not listed or limited<sup>252</sup> and the courts may consider any relevant circumstances.<sup>253</sup> In countries such as the Lebanon the courts must consider the situation of the parties,<sup>254</sup> and in countries such as Taiwan the court must consider the financial resources of the child and the victim.<sup>255</sup>

(b) Equitable considerations also manifest as an exception to the general rule of accountability. Minors then generally are liable, as if adults, but the law provides for exceptions to this rule.<sup>256</sup> Danish courts may absolve a minor from liability in full or in part if it is just and equitable considering the child's mental development.<sup>257</sup> In Ethiopia a judge may reduce the amount of damages if it is in the interest of justice.<sup>258</sup> In Swedish law a court may consider the fact that a victim can recover his damages from a third party and thereby accordingly reduce the minor's liability.<sup>259</sup>

#### 4. CONCLUSION

Internationally, there is a myriad of different approaches to the legal accountability of children. Each country negotiates different variable circumstances such as financial, political and economic status, levels of education and the development of the children. By the very nature of the different international trends there are advantages

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<sup>252</sup> Some of the circumstances may be: (i) the child's behaviour and mental abilities - Danish Minority and Tutelage Act (*supra* n216); Norwegian Act on the Reparation (*supra* n251) or (ii) whether the victim was at fault.

<sup>253</sup> Art 489 Portuguese Civil Code (*supra* n249) para 1.

<sup>254</sup> Art 1187 Venezuelan Civil Code of 1982; Art 122 Lebanese Civil Code of 1932 para 3.

<sup>255</sup> Art 187 Taiwanese Civil Code of 1945 para 3; Art 2047 Italian Civil Code (*supra* n249) para 2. In terms of S829 of *the* German Civil Code (*supra* n249) the court may award damages against a child in so far as justice requires it in the circumstances, provided the child is not deprived of means sufficient for his upkeep according to the child's position in society or for the performance of any duty of maintenance he/she may owe. In the Sweden Tort Liability Act (*supra* n251), the courts may take third party liability insurance and economic factors at large into consideration.

<sup>256</sup> Tunc (*supra* n209) 98.

<sup>257</sup> Art 63 of the Denmark Minority and Tutelage Age (*supra* n216). A Danish court held a four-year-old girl liable who injured another child by throwing a stone, as well as a child that caused a road accident. These decisions were influenced by insurance claims: Tunc (*supra* n209) 96 fn962.

<sup>258</sup> Art 2099 Ethiopia Civil Code (*supra* n217).

<sup>259</sup> Tunc (*supra* n209) 98.

and disadvantages to each option and there is no solution that contains only benefits. In comparing the South African position with foreign trends one must be mindful that South Africa is a country with a vast wealth disparity and is a multi-cultural, racial and, linguistic country that is plagued by the consequences of 'apartheid' policies. In the case of legal reform the legislature will need the wisdom of Solomon to decide on the best approach. In the next chapter the medico- legal aspects relating to early-childhood development are dealt with.

# DEVELOPMENTAL SCIENCE: THE AFFECT ON THE LEGAL CAPACITY OF CHILDREN

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## 1. INTRODUCTION

In order to determine the relation between the development<sup>260</sup> of children and their accountability for delinquent behaviour, one needs assess the change in their capacity to commit wrongful actions, consciously and willingly, as the child develops.<sup>261</sup> It is important to consider in determining a child's legal capacity the stage at which children acquire the capacity to understand or conform to a certain act, when they start becoming aware of the consequences of their behaviour and can control their behaviour.<sup>262</sup> A capacity to be accountable at best is understood as a composite of various threads of cognitive and behavioural functioning, which by its very nature makes any attempt at a definition or at measurement complex.<sup>263</sup>

In raising the question as to the contribution of the social sciences to the understanding of a child's legal capacity to be held accountable, this chapter initiates a dialogue between the law and psychology in a endeavour to offer considerations pertaining to the setting of an age of legal responsibility. Psychologists are alert to the difficulty in assessing the cognitive, moral, emotional, psychological and social development of a child.<sup>264</sup> These areas of a child's functioning can be tested in the context of child development, but it is a more complicated issue to test these functional abilities with the aim of producing a finding as to the legal capacity of the child.<sup>265</sup>

Legal and medical absolutes are uncomfortable bedfellows. Neuro- and behavioural scientific research can be valuable in bringing them together and shedding light on a child's legal capacity.<sup>266</sup> This problematic state of affairs is aggravated by the legal fraternity's refusal to accept that the results of scientific research have a universal validity and carry probative value on the tenuous grounds the neither the research

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<sup>260</sup> Psychological and other types.

<sup>261</sup> Ferreira "Putting the age of criminal and tort liability into context: A dialogue between law and psychology" (2008) *The International Journal of Children's Rights* 29 32.

<sup>262</sup> Ferreira (*supra* n261) 32.

<sup>263</sup> Pillay & Willows "Assessing the criminal capacity of children: A challenge to the capacity of mental health professionals" (2015) *Journal of Child & Adolescent Mental Health* 91 91.

<sup>264</sup> Pillay & Willows (*supra* n263) 93.

<sup>265</sup> Pillay & Willows (*supra* n263) 94.

<sup>266</sup> Delmage "The minimum age of criminal responsibility: A medico-legal perspective" (2013) *Youth Justice* 102 108.



methods nor the researcher is entirely neutral.<sup>267</sup> This chapter does not present a *numerus clausus* of developmental factors relevant to the delinquent behaviour of children as it is beyond the scope of a legal dissertation. Nevertheless, this chapter highlights various factors that may impact on a child's ability to distinguish between right and wrong and to act in accordance to this appreciation.

## 2. THE ROLE OF SOCIAL SCIENCE IN CONSIDERING THE RESPONSIBILITY OF A CHILD

The social sciences do not claim to have complete assurance on all the questions which relate to a child's accountability, but their competence can illuminate the limits, contents and the good sense (or lack thereof) of an existing law.<sup>268</sup> Children go through distinct periods of development as they progress from infancy to adulthood as they undergo numerous changes as a result of the development of the brain, mostly genetic. However non-genetic factors such as interaction with key individuals in the child's life and environmental circumstances also have a significant influence on how a child develops.<sup>269</sup> A child's history and experience are significant with reference to the legal capacity of a child, and in its turn experience accumulates over a period of time through encountering, observing and undergoing life.<sup>270</sup> The legal professional might find it desirable to leave it to social scientists to solve all their difficulties in relation to the legal capacity of children, however this is not possible. Human development is non-linear and by no means is unique,<sup>271</sup> but evidence strongly suggests consistent and universal differences in judgement and consequential-thinking processes among children and young people, which would be a helpful contribution to the understanding (and judging) of children's legal capacity.<sup>272</sup>

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<sup>267</sup> Ferreira (*supra* n261) 31.

<sup>268</sup> Ferreira (*supra* n261) 31.

<sup>269</sup> Blakemore & Choudhury "Development of the adolescent brain: Implications for executive functions and social cognition" (2006) *Journal of Child Psychology and Psychiatry* 296 296.

<sup>270</sup> McDiarmid "An age of complexity: Children and criminal responsibility in law" (2013) *Youth Justice* 145 153.

<sup>271</sup> Delmage (*supra* n266) 108.

<sup>272</sup> Delmage (*supra* n266)108.

### 3. THE ROLE OF THE SOCIAL SCIENTIST

In this scenario a legal professional turns to a scientist to offer their expertise in relation to the question of a child's legal capacity. In court the scientist must be vigilant to respect the boundary between science and the law, specifically that science absolutes do not always translate into legal absolutes, so as to avoid erroneous oversimplification and overreach.<sup>273</sup> This would be the pattern for testing the child's legal capacity, in which the social scientist draws on multiple developmental disciplines such as in the context of cognitive, emotional and social factors that can compromise the ability of children to be accountable.<sup>274</sup>

### 4. THE ROLE OF COMPLEX BRAIN SCANNING TECHNIQUES

By employing complex scanning techniques, detailed images of the developing brain can be produced which allow tentative links to be drawn between developmental theory and the actual brain structure, and which can be interpreted in alliance with other biological factors, such as hormones and behaviour.<sup>275</sup> However neuro-imaging<sup>276</sup> demonstrates associations (and not causality) and we need to exercise caution in superimposing terms such as empathy and consequential thinking onto legally familiar terms such as culpability and responsibility.<sup>277</sup> Neuro-imaging assists in the development of gradations, which allow us to understand the specific area of the brain associated with empathy, working memory, consequential thinking, reasoning, judgement, planning and inhibition of behaviour, all of which carry weight in establishing the concept of responsibility.<sup>278</sup>

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<sup>273</sup> Delmage (*supra* n266) 105.

<sup>274</sup> Lamb & Sim "Developmental factors affecting children in legal contexts" (2013) *Youth Justice* 131.

<sup>275</sup> Delmage (*supra* n266) 105.

<sup>276</sup> Examining blood flow, oxygen, and glucose uptake whilst the subject is asked to engage in specific cognitive tasks and thought process: See Delmage (*supra* n266) 106.

<sup>277</sup> Delmage (*supra* n266) 105.

<sup>278</sup> Delmage (*supra* n266) 106.

## 5. THE PHYSICAL STRUCTURES OF THE BRAIN

Neuro-scientists study the physical structure and nervous system of the brain,<sup>279</sup> a daunting undertaking as the human brain has been dubbed the “*most complex three pound mass*” known to man.<sup>280</sup> The child’s brain in particular undergoes change in significant ways during a child’s development,<sup>281</sup> a fact which it is important for the law to consider in developing the concept of accountability. Social scientists draw on this information in their study of the mind, behaviour and cognition, in particular how the nervous system processes, represents and transforms information.<sup>282</sup> The brain grows sequentially, from the bottom (least complex: the brainstem) to the top (most complex: the cortex).<sup>283</sup> At the highest level is the frontal lobe, the largest part of the brain, with the pre-frontal cortex (a small area of this frontal lobe) situated behind the forehead which controls the most advanced functions that allow humans to prioritise, imagine, think in the abstract, anticipate consequences, plan and control impulses.<sup>284</sup> Naturally these attributes are relevant to the concept of legal accountability.

Children are born with 100 billion neurons which make connections (called synapses), wiring the brain for action.<sup>285</sup> The daily experiences of children have an impact on the type and number of neuron-connections. These connections begin prior to birth and are created at a rapid rate through to age three.<sup>286</sup> Generally speaking, the synaptic density (the number of synapses per unit volume of brain tissue) in the early postnatal development stage greatly exceeds that of adults.<sup>287</sup> These early peaks in synaptic density are followed by a period of synaptic

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<sup>279</sup> Gage “Neuroscience: The study of the nervous system & it’s functions” (2015) *Daedalus, the Journal of the American Academy of Art & Science* 5 5.

<sup>280</sup> Ortiz “Adolescence, brain development and legal culpability” (2004) *National Criminal Justice Reference* 1 1

<sup>281</sup> Delmage (*supra* n266) 106.

<sup>282</sup> Ortiz (*supra* n280) 2.

<sup>283</sup> Edie “Brain development and early learning” (2007) *Wisconsin Council of Children & Families* 1 1.

<sup>284</sup> Ortiz (*supra* n280) 5.

<sup>285</sup> Edie (*supra* n283) 1.

<sup>286</sup> Edie (*supra* n283) 1.

<sup>287</sup> Blakemore & Choudhury (*supra* n269) 297.

elimination, where frequently used connections are strengthened and infrequently used connections eliminated (the proverbial ‘use it or lose it’ pruning).<sup>288</sup>

The area of the brain that deals with the executive function of a person, and that makes the largest contribution to the accountability of children, is the pre-frontal cortex,<sup>289</sup> which is subject to greater change during adolescence than at any other time.<sup>290</sup> Studies in the 1960s and 1970s revealed that the structure of the pre-frontal cortex undergoes significant changes during puberty and adolescence.<sup>291</sup> Research also shows that the transmission speed of the neural information in the frontal cortex increases throughout childhood and adolescence.<sup>292</sup> Synaptic pruning in the pre-frontal cortex, however, has a rather different timing than in other areas of the brain; pruning occurs during childhood (as in the other areas of the brain) but again at puberty when it is followed by a peak phase and thereafter an elimination and reorganisation of the pre-frontal-synaptic connections occur.<sup>293</sup> The teenage years see a proliferation of grey matter (thought to be involved in processing) followed by a period during which the brain loses grey matter to be replaced by so-called white matter (thought to be involved in transmitting information between different parts of the brain).<sup>294</sup> The grey matter in the frontal lobe increases and peaks at ages eleven (girls) to twelve (boys), and is followed by a decline post-adolescence.<sup>295</sup>

Neuro-scientific research has found that frontal lobe maturity takes place around the age of fourteen only.<sup>296</sup> In 1999 researchers found that the adolescent brain, being a developing structure, reaches maturity only during early adulthood.<sup>297</sup> The American

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<sup>288</sup> Blakemore & Choudhury (*supra* n269) 297.

<sup>289</sup> Blakemore & Choudhury (*supra* n269) 296.

<sup>290</sup> Delmage (*supra* n266) 106.

<sup>291</sup> Blakemore & Choudhury (*supra* n269) 296.

<sup>292</sup> Blakemore & Choudhury (*supra* n269) 297.

<sup>293</sup> Blakemore & Choudhury (*supra* n269) 297.

<sup>294</sup> Delmage (*supra* n266) 106.

<sup>295</sup> Blakemore & Choudhury (*supra* n269) 299.

<sup>296</sup> The editor “Child defendants” (2006) *Royal College of Psychiatrists Occasional Paper 1* 56.

<sup>297</sup> Pillay & Willows (*supra* n263) 98.

Medical Association (AMA)<sup>298</sup> maintains that adolescent brain structure and behaviour are not equally mature in comparison with adults and that in areas crucial to decision-making the human brain continues to develop into young adulthood.<sup>299</sup> Adolescents rely greatly on the amygdala part of the brain (thought to be responsible for primitive impulses such as aggression, anger and fear); by way of contrast adults process similar information through the frontal cortex (the area of the brain responsible for impulse control and judgement).<sup>300</sup> The AMA also state that the area of the brain associated with risk and impulse management, and moral reasoning and thought develop last and only during late adolescence.<sup>301</sup> It is not only physical development but also cognitive brain functioning that continues before and after puberty, into the early twenties.<sup>302</sup>

## **6. DEVELOPMENTAL FACTORS AFFECTING THE CAPACITY OF CHILDREN**

### **6.1 Developmental theory**

The notions of the development and maturation of the child are central in understanding a child's legal capacity.<sup>303</sup> Recent research highlights the relevance of development trajectories, especially neuro-developmental milestones that must be considered in the debate around the minimum age of accountability.<sup>304</sup>

To this end, the developmental psychology theories which pertain to a child's capacity to be accountable largely are cognitive and moral development theories, of which Piaget<sup>305</sup> & Kohlberg are the chief advocates.<sup>306</sup> These proponents of

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<sup>298</sup> The AMA submitted *amicus curia* briefs in the case of *Roper v Simmons* 543 U.S. 551 (2005), where a seventeen-year old was convicted of murder and received a death sentence: Pillay & Willows (*supra* n263) 98.

<sup>299</sup> Pillay & Willows (*supra* n263) 98.

<sup>300</sup> Pillay & Willows (*supra* n263) 98.

<sup>301</sup> Pillay & Willows (*supra* n263) 99.

<sup>302</sup> Delmage (*supra* n266) 106.

<sup>303</sup> Pillay & Willows (*supra* n263) 94.

<sup>304</sup> Pillay & Willows (*supra* n263) 94.

<sup>305</sup> Jean Piaget is a Swiss clinical psychologist known for his pioneering work in child development. Piaget's theory of cognitive development and his epistemological view together are called "*genetic*

development argue that development is not solely influenced by the age of a child because social learning and psycho-analytic perspectives also have an impact on development and deserve due consideration. Nevertheless, age remains the most important indicator in the moral development of a human being and in this area cognitive developmental theory remains the most convincing and solid theory.<sup>307</sup> This theory rejects classifying an action of a child as moral or immoral without first having established the reasons that moved the child to action and it accepts that moral development is a construction of a person that interacts with his/her environment and is not to be construed merely from the influences exercised on him/her.<sup>308</sup>

According to Piaget there are four main stages that children typically pass through at various age thresholds and at transitional times, but these stages are not cast in stone and cannot necessarily be used to denote psychopathology if an individual child does not meet precisely the stages set out by Piaget.<sup>309</sup>

- (i) Birth to age two: Sensori-motor
- (ii) Two to seven: Pre-operational
- (iii) Seven to twelve: Operational
- (iv) Twelve to adult: Formal operations

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*epistemology*": Ferreira (*supra* n261) 32 submits that he is the most renowned psychologist of the 20<sup>th</sup> century and although his theories have been criticised (fn 309 *infra*) they have not been negated.

<sup>306</sup> Pillay & Willows (*supra* n263) 96.

<sup>307</sup> Ferreira (*supra* n261) 43.

<sup>308</sup> Ferreira (*supra* n261) 43.

<sup>309</sup> Pillay & Willows (*supra* n263) 96-97. The social learning theorists argue to the contrary that moral development should not be conceptualised in stages and, although they accept developmental trends, the stages overlap and objective and subjective judgements exist simultaneously at all stages. Cognitive skills and performance preferences have a more vital role in the acquisition of moral judgement than a fixed developmental age: Rutter and Rutter (1993) *Developing Minds: Challenges and Continuity Across the Lifespan* 1-3 argue that Piaget and other theorists relied too heavily on the universal development path with a fixed point of normal development and neglected the individual differences in child development. They submit that genetic factors, biological maturation and brain pathology are ignored as is the impact of a child's social life on development. Piaget is also under fire for the fact that his research is culturally biased and is based on the middle class. See Ferreira (*supra* n261) 36-37. For an in-depth discussion on the relevance of culture in psychological testing see Foxcroft (*supra* n138) 229.

Children at the age of twelve develop hypothetico-deductive reasoning abilities, during Piaget's stage of formal operation.<sup>310</sup> What this means is that children in this stage form 'if-then' assumptions at which point they are able to formulate consequential scenarios in response to possible actions.<sup>311</sup> During this stage a child thinks in a more abstract manner and also becomes aware of consequences for others<sup>312</sup> as opposed to himself/herself.<sup>313</sup> In terms of the assessment of the capacity for accountability of the child it means that a child cannot be deemed blameworthy until he reaches the age of twelve because of an inability to conceptualise the consequences of his/her actions.<sup>314</sup> Furthermore, age cannot be considered in isolation from psychological factors such as intelligence, cognitive development, children's actions, pure influence, puberty and moral development. Although development theories are helpful in establishing a general picture, they do not encompass all aspects of child development.<sup>315</sup>

## 6.2 Psychological factors

The assessment of a child's legal capacity essentially is concerned with the child's level of psychological development.<sup>316</sup> Psychologists draw on variable factors such

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<sup>310</sup> Pillay & Willows (*supra* n263) 97. Pillay "Criminal capacity in children accused of murder: Challenges in the forensic mental health assessment" (2006) *Journal of Child and Adolescent Health* 17 20 state that hypothetico-deductive reasoning entails interpretations of the world that are no longer limited to perceived realities, but include propositional assumptions and formulations. The reasoning process consists of linking up these assumptions and drawing out the necessary consequences, even when their validity is only provisional.

<sup>311</sup> Pillay & Willows (*supra* n263) 97.

<sup>312</sup> Pillay and Willows (*supra* n263) 97-98: The ventro-medial pre-frontal cortex is a critical neural substrate for the acquisition and maturation of moral competency that goes beyond self-interest to consider the welfare of others. There is also the issue of moral judgement versus moral behaviour in that knowledge does not necessarily predict accordant behaviour. To this end, morality involves four components: moral sensitivity, judgement, motivation and action.

<sup>313</sup> Pillay & Willows (*supra* n263) 97.

<sup>314</sup> Pillay & Willows (*supra* n263) 97.

<sup>315</sup> Royal College of Psychiatrist (*supra* n296) 30.

<sup>316</sup> Pillay (*supra* 310) 18.

as age, intelligence, cognitive and moral development and social competence in assessing a child's capacity.<sup>317</sup> These factors are but some of the significant markers of human development and together with maturity they provide, to some degree, a measuring tool.<sup>318</sup> A form of measurement is important as the courts prefer assessments that provide discrete quantifiable results unfortunately, these are results medical health professionals cannot always provide.<sup>319</sup>

### 6.3 Intelligence

Although intelligence<sup>320</sup> is a highly pertinent variable that assists in establishing the legal capacity of a child, in the context of accountability it is not given enough weight to prevail over the importance attached to age.<sup>321</sup> A reason may be that intelligence testing and its interpretation are not without controversy, and in South Africa the validity and reliability of these tests in relation to the majority of South Africans are highly questionable.<sup>322</sup> The major feature pointing to the intelligence of a child is the presence or absence of significant retardation.<sup>323</sup> In order to be effective forensic medical health assessment specifically must pay attention to conceptual issues beyond those which form part of the standard intelligence test because legally a person is required to have sufficient intelligence to understand the nature of his/her consequences.<sup>324</sup> It follows that intelligence alone is not sufficient in establishing accountability.<sup>325</sup> It is also not recommended that an IQ of an individual be converted into a mental age so as to present the test results in a frame of reference the court understands. On the one hand most intelligence testing has discontinued the

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<sup>317</sup> Pillay (*supra* n310) 18.

<sup>318</sup> Pillay (*supra* n310) 18.

<sup>319</sup> Pillay (*supra* n310) 18.

<sup>320</sup> Attempts at a definition have never resulted in a universally accepted definition, but for some theorists it is the ability to reason and think abstractly, whereas for others it is the capacity to learn and acquire knowledge: Pillay (*supra* n310) 19.

<sup>321</sup> Ferreira (*supra* n261) 35.

<sup>322</sup> Pillay (*supra* n310) 19. It is questionable because of cultural factors and the fact that tests have not been developed for the South African population. Also see Foxcroft (*supra* n138).

<sup>323</sup> Pillay (*supra* n310) 19.

<sup>324</sup> Pillay (*supra* n310) 19.

<sup>325</sup> Pillay (*supra* n310) 19.



practice of scoring in mental ages because of its unreliability and, on the other hand mental scores interpreted by non mental-health specialists present obvious problems.<sup>326</sup>

#### 6.4 Cognitive development

The pre-frontal and parietal cortex areas of the brain consistently have been shown to undergo continued development during adolescence and, given the structural changes to these brain areas during adolescence, it might be expected that cognitive abilities that rely on the functioning of these brain regions and their complex interconnectivity with other regions similarly experience changes.<sup>327</sup>

Piaget's theory of child development suggests that the child builds cognitive structures consisting of a network of concepts which enable the child to understand and respond to external stimuli provided by the child's surrounding environment, and that these structures increase in sophistication throughout a child's development.<sup>328</sup> The child will encounter new experiences that do not fit into the child's existing cognitive structures, that will threaten the balance, and a child is forced to alter his/her known cognitive structures in order to incorporate these new experiences, resulting in the increase in satisfactory cognitive structures.<sup>329</sup>

According to Piaget between the ages of seven and eleven the child moves from a pre-operational to a concrete operational phase where, due to the child's physical experiences, they start to conceptualise and create logical structures.<sup>330</sup> It is during these ages that the child gains the ability to resolve abstract problems, although the child's thinking remains less abstract and centristic.<sup>331</sup> Brain developmental experts have long been aware that there are significant changes in a child's ability to engage in problem-solving and logical thinking between the age of eleven and fifteen

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<sup>326</sup> Pillay (*supra* n310) 20.

<sup>327</sup> Blakemore & Choudhury (*supra* n269) 300.

<sup>328</sup> Ferreira (*supra* n261) 33.

<sup>329</sup> Ferreira (*supra* n261) 34.

<sup>330</sup> Ferreira (*supra* n261) 34.

<sup>331</sup> Ferreira (*supra* n261) 34.

years.<sup>332</sup> In fact, the capacity to form judgement develops incrementally and continues into the early twenties.<sup>333</sup>

The commencement of the next Piaget phase (ages twelve to adulthood) is marked by the transition from concrete operational to formal operational thinking (or abstract reasoning which helps with consequential thinking and judgement)<sup>334</sup> and by the end of the period most young people have an understanding of risk and probability that can be considered comparable to that in adults.<sup>335</sup> However this ability to understand risk and probability is not associated with an equivalent sophisticated ability to apply and appreciate that information.<sup>336</sup> For this reason older teenagers appear less capable than adults at applying information about risk, including estimates of the probability of being caught following a transgression, because they tend to place a too high value on the possible benefits of the transgression, despite their simultaneously understanding the costs and penalty associated with the transgression. This will be the case until they are approximately twenty years old.<sup>337</sup>

Most relevant to the notion of accountability are those areas of the brain that have an impact on decision-making, morality, and judgement, capabilities which are assigned to the frontal lobes of the brain and traditionally are thought to shape planning, personality and social-behaviour responses.<sup>338</sup> Executive functioning (the capacity that allows humans to control and to co-ordinate their thoughts and behaviour, skills which include attention, decision-making, voluntary response and working memory)<sup>339</sup> as part of frontal lobe development increases over the course of adolescence in tandem with an ability to engage in consequential thinking.<sup>340</sup> For example, selective attention, decision-making and response inhibition skills, along with the ability to carry out multiple tasks at once, improve during adolescence.<sup>341</sup>

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<sup>332</sup> Lamb & Sim (*supra* n274) 135.

<sup>333</sup> Delmage (*supra* n266) 106.

<sup>334</sup> Delmage (*supra* n266) 105.

<sup>335</sup> Lamb & Sim (*supra* n274) 135.

<sup>336</sup> Lamb & Sim (*supra* n274) 135.

<sup>337</sup> Lamb & Sim (*supra* n274) 135.

<sup>338</sup> Delmage (*supra* n266) 105.

<sup>339</sup> Blakemore & Choudhury (*supra* n269) 301.

<sup>340</sup> Delmage (*supra* n266) 106.

<sup>341</sup> Blakemore & Choudhury (*supra* n269) 301.

These executive functions are relevant and play a role in cognitive control, for example, in inhibiting impulses.<sup>342</sup> Children from eleven to thirteen years demonstrate markedly poor reasoning skills and consequential thinking as opposed to children aged sixteen to seventeen.<sup>343</sup> Even though adolescents develop capacities similar to those of adults, in some areas their reasoning ability is not as well developed.<sup>344</sup> Neuro-developmental research indicates that adolescents do not develop into the category of typical adults until their early twenties.<sup>345</sup>

## 6.5 Behavioural studies

The child's capability to distinguish between right and wrong does not necessarily equate with a capacity to take personal responsibility for their actions.<sup>346</sup> Studies show that adolescents continue to develop in areas that include inhibitory control, processing speed, working memory and decision-making.<sup>347</sup> In children executive functions such as selective attention, working memory and problem-solving improve during adolescence, whereas other executive functions such as strategic behaviour formed earlier, which indicates that different executive functions develop at a different developmental rate.<sup>348</sup>

Performance development is linked to the pruning of synapses in the frontal cortex during adolescence.<sup>349</sup> Prospective memory continues to develop during adolescence, which is in line with the notion of frontal lobe maturation in the brain.<sup>350</sup> Testing of children aged ten to fourteen shows a lack of improvement with

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<sup>342</sup> Blakemore & Choudhury (*supra* n269) 301.

<sup>343</sup> Delmage (*supra* n266) 106.

<sup>344</sup> Pillay & Willows (*supra* n263) 98.

<sup>345</sup> Pillay & Willows (*supra* n263) 98.

<sup>346</sup> Lyons "Dying to be responsible: Adolescence, autonomy and responsibility" (2010) *Legal Studies* 257 273, a claim that was echoed by those with considerable expertise in psychological and cognitive development: Royal College of Psychiatrists (*supra* n296).

<sup>347</sup> Blakemore & Choudhury (*supra* n269) 301.

<sup>348</sup> Blakemore & Choudhury (*supra* n269) 301.

<sup>349</sup> Blakemore & Choudhury (*supra* n269) 301.

<sup>350</sup> Blakemore & Choudhury (*supra* n269) 301.

prospective memory, which is related to their pubertal status.<sup>351</sup> For example, until pruning occurs at the stage of puberty, psycho-physical tests suggest that synaptic connections in the frontal cortex generate a low signal to noise ratio due to an excess of synapses, which renders the cognitive performance less effective.<sup>352</sup>

## 6.6 Peer influence

Young children look up to their parents as a primary reference source, but in early adolescence there is a significant social shift from parents to peers.<sup>353</sup> This shift commences during the beginning of middle childhood when children find increasing pleasure in interactions with peers rather than adults, and the tendency accelerates between the ages of ten and fourteen years.<sup>354</sup> This shift in a primary reference source to peers is marked by a shift from behaviour that elicits approval from parents to behaviour that meets with the approval of their peers.<sup>355</sup> The frontal lobe of the brain is the slowest to develop in contrast to the amygdala (the area of the brain responsible for reward and emotion processing), which accounts for an increase in risk-taking behaviour and arousal.<sup>356</sup> The shift to seeking the approval of peers is accompanied by anxiety and concern on the part of the adolescent about their own identity and social standing, which uncertainty increases the extent to which children look to others for approval and direction.<sup>357</sup> The child's increased desire to be socially accepted occurs simultaneously with the focal shift from parents to peers, a shift that leads children to be particularly focused on obtaining approval from peers who, ironically themselves, have immature and inappropriate means of judging the appositeness and or appropriateness of conduct.<sup>358</sup> Adolescence is thus represented by a phase of seeking sensation, taking increased risks and impulsivity. This

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<sup>351</sup> Blakemore & Choudhury (*supra* n269) 302.

<sup>352</sup> Blakemore & Choudhury (*supra* n269) 302.

<sup>353</sup> Lamb & Sim (*supra* n274) 135.

<sup>354</sup> Lamb & Sim (*supra* n274) 135.

<sup>355</sup> Lamb & Sim (*supra* n274) 136.

<sup>356</sup> Delmage (*supra* n266) 106.

<sup>357</sup> Lamb & Sim (*supra* n274) 136.

<sup>358</sup> Lamb & Sim (*supra* n274) 136.

developing ability to emphasise, as well as the increased vulnerability to peer influence, affects decision-making and ultimately legal capacity.<sup>359</sup>

## 6.7 Puberty

If one accepts the maxim that '*biology impacts upon behaviour*',<sup>360</sup> it follows that puberty (a biological transitional event mainly related to the reproductive maturation of boys and girls) is associated with an increase in seeking sensation, emotional lability, emotionality and insufficient inhibitory self-control.<sup>361</sup> Psychological development heavily depends on biological maturation and the functioning of the mind to a degree is influenced by the structure and organisation of the brain.<sup>362</sup> These characteristics of puberty are associated with the immature and developing limbic system<sup>363</sup> in adolescence.<sup>364</sup> The structural and functional maturation of the limbic system remains incomplete until mid-adolescence (fifteen to seventeen years).<sup>365</sup> The development in emotional maturity of a child coincides with changes in the child's ability to judge the future consequences of their behaviour, a skill that does not fully develop until around the age of twenty.<sup>366</sup> Such reasoning is located in the pre-frontal cortex area of the brain, which is the seat of the executive function<sup>367</sup> and which part of the brain is not fully developed until the early twenties.<sup>368</sup> The pre-frontal cortex directs goal-driven conduct which entails planning and response inhibition that, ultimately, allows one to pause and to take stock of a situation, to assess one's options and to develop a goal-driven plan, and to execute such a

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<sup>359</sup> Delmage (*supra* n266) 106.

<sup>360</sup> Delmage (*supra* n266) 108.

<sup>361</sup> Lamb & Sim (*supra* n274) 136.

<sup>362</sup> Rutter & Rutter (*supra* n309) 13.

<sup>363</sup> A complex system of nerves and networks in the brain involving several areas near the edge of the cortex concerned with instinct and mood. It controls the basic emotions (fear, pleasure, anger) and drives (hunger, sex, dominance, care of offspring): Delmage (*supra* n266) 108.

<sup>364</sup> Lamb & Sim (*supra* n274) 136.

<sup>365</sup> Lamb & Sim (*supra* n274) 136.

<sup>366</sup> Lamb & Sim (*supra* n274) 136.

<sup>367</sup> Lamb & Sim (*supra* n274) 136.

<sup>368</sup> Pillay & Willows (*supra* n263) 98.

plan.<sup>369</sup> That the structural and functional maturation of this part of the brain is not complete until the early twenties demonstrates that the ability to employ executive functions reaches maturity only at approximately age twenty.<sup>370</sup> At the same time there seems to be little reliable connection between the external signs of puberty and the stages of psychological development.<sup>371</sup>

## 6.8 Social competence

Social competence is an important index which is utilised in measuring a child's level of development.<sup>372</sup> Social competence refers to a person's ability to solve problems posed by the cultural environment within which they manifest.<sup>373</sup> Children's abilities to cope with the demands and challenges posed by their environment appear to be more relevant when assessing maturity than intelligence<sup>374</sup> and for this reason a substantive social and behavioural history are significant when experts determine the child's competencies.<sup>375</sup> This pool of information helps the experts to understand and interpret the social rules that children conform to, the child's abilities to control their behaviour and their interpersonal concerns and sensitivities.<sup>376</sup>

## 6.9 Maturity

An individual is deemed mature when autonomous in both the emotional (affective) and social integration spheres.<sup>377</sup> Children's incapacity in respect of discernment is ended when they mature through the evolutionary dynamics experienced during

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<sup>369</sup> Pillay & Willows (*supra* n263) 98.

<sup>370</sup> Lamb & Sim (*supra* n274) 136.

<sup>371</sup> Steinberg & Schwartz "Developmental psychology goes to court" in Grisso & Schwartz (eds) (2000) *Youth on Trial: A Developmental Perspective on Juvenile Justice* 20.

<sup>372</sup> Pillay (*supra* n310) 20.

<sup>373</sup> Pillay (*supra* n310) 20.

<sup>374</sup> Pillay (*supra* n310) 21.

<sup>375</sup> Pillay (*supra* n310) 21.

<sup>376</sup> Pillay (*supra* n310) 21.

<sup>377</sup> Ferreira (*supra* n261) 44.

adolescence.<sup>378</sup> It is ironic that modern children are considered less mature than those in the past.<sup>379</sup> In considering if an individual is responsible one has to individualise and measure all the dominant required elements of the individuals' concrete situation, including education, dynamics of interpersonal relationships, reasoning capacity, susceptibility, infantile characteristics, deficit in structuring the personality, and so on.<sup>380</sup> In consequence in assessing the level of discernment of the child the specific wrongful act must be considered as opposed to wrongful conduct in general, as certain forms of behaviour in a child require a greater measure of maturity than others.<sup>381</sup> Maturity and discernment cannot be objectively analysed in isolation and experts must consider a normative analysis that requires a comparison with similar situations.<sup>382</sup>

For this reason since the 1970s external factors, such as the socio cultural context surrounding the child, have been part of analysing the level of discernment of the child and nowadays individual psychological factors are integrated with social environmental factors when experts are called upon to determine the development of a child's personality.<sup>383</sup> Since the 1980s numerous studies have found that mature children that grew up in an under-privileged environment may not be able to manifest adequate models of behaviour and social valuation because of the environment in which they grew up.<sup>384</sup> In other words, in assessing accountability courts may consider what another child of the same age in the same circumstances would have done.<sup>385</sup>

Legal certainty allows for some flexibility on the part of the court since it deals with a myriad of complex factors that may be relevant to assessing the level of discernment of the child.<sup>386</sup>

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<sup>378</sup> Ferreira (*supra* n261) 44.

<sup>379</sup> Ferreira (*supra* n261) 44.

<sup>380</sup> Ferreira (*supra* n261) 44.

<sup>381</sup> Ferreira (*supra* n261) 44.

<sup>382</sup> Ferreira (*supra* n261) 44.

<sup>383</sup> Ferreira (*supra* n261) 44.

<sup>384</sup> Ferreira (*supra* n261) 44.

<sup>385</sup> Ferreira (*supra* n261) 45.

<sup>386</sup> Ferreira (*supra* n261) 44.

## 7. IS EXPERT EVIDENCE NECESSARY?

If one accepts that a child's legal accountability relates to the cognitive<sup>387</sup> and connotative<sup>388</sup> abilities of a child,<sup>389</sup> it follows that expert evidence<sup>390</sup> is required to assist the court, as expertise in the development of the human mind falls within the discipline of psychology. There are certain questions that cannot be resolved without the assistance or guidance of an expert, for example, a question of a psychological nature.<sup>391</sup> A court lacks expertise and ought to seek guidance from a multi-disciplinary panel of experts<sup>392</sup> when adjudicating accountability disputes in respect of young children.

## 8. THE RELATIONSHIP BETWEEN DEVELOPMENTAL FACTORS AND LEGAL RESPONSIBILITY: A CONCLUSION

Many variables have an impact on the rate of a child's development and, although of indeterminate value from a preventative and curative medico-legal perspective, they cannot assist in establishing a universal and definitive all-encompassing chronological age that accurately reflects the actuality of a child's capacity to be accountable.<sup>393</sup> It is trite to say that children mature at different rates<sup>394</sup> and mental

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<sup>387</sup> The mental action or process of acquiring knowledge and understanding through thought, experience, and the senses: Delmage (*supra* n266) 108.

<sup>388</sup> The mental faculty of purpose, desire, or will to perform an action; volition.

<sup>389</sup> Snyman (*supra* n91) 178; *S v Ngobese* (*supra* n1).

<sup>390</sup> The unreported judgement of *Venter en Andere v Oosthuizen en Andere* (33A/09) [2013] ZANWHC 58 (13 June 2013) para 23 is a rare example where a civil court relied on expert evidence to determine the accountability of a child.

<sup>391</sup> Schwikkard & Van der Merwe (2009) *Beginnels van die Bewysreg* 99. In *Ruto Flour Mills v Adelson* 1958 (4) SA 235 (T) the court held that the opinion of an expert will be accepted where the expert's skills and expertise are more than those of the court and if the expert can be of appreciable help to the court.

<sup>392</sup> They include, *inter alia*, neuro-surgeons, clinical and neuro-psychologists, neurologists, psychiatrist, speech and language therapists and educational psychologists.

<sup>393</sup> Pillay & Willows (*supra* n263) 97-98.

<sup>394</sup> Pillay (*supra* n310) 19.



health examinations and testing for accountability have low rates of accuracy.<sup>395</sup> The developmental element and testing, although helpful, are unable to provide absolute criteria which enable the determination of accountability.<sup>396</sup> In addressing the question of accountability, one must take into account the complex sphere of human development and behaviour, individual variation and non-specific concepts such as intelligence and individual moral development.<sup>397</sup> All of which equates to a vision of reality given to us by empirical science, however it is a partial vision and the courts cannot be discharged from their function in making decisions based on judgements of value.<sup>398</sup> Nevertheless, we cannot discount the importance of the literature and studies in the field of psychology relating to the concept of maturity,<sup>399</sup> and of science in general.

Ultimately, the law and policy, legal and mental health practitioners must be familiar with the complex field of childhood development in order to make informed decisions about age-related laws that will be developmentally appropriate and scientifically justifiable.<sup>400</sup> In the next chapter the minimum ages of accountability are critically examined, and a conclusion will be reached which will consider if the law is due for reform.

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<sup>395</sup> Pillay & Willows (*supra* n263) 99.

<sup>396</sup> Pillay & Willows (*supra* n263) 100.

<sup>397</sup> Pillay (*supra* n310) 21.

<sup>398</sup> Ferreira (*supra* n261) 46.

<sup>399</sup> Ferreira (*supra* n261) 46.

<sup>400</sup> Steinberg & Schwartz (*supra* n371).

# CONCLUSION AND RECOMMENDATIONS

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## 1. INTRODUCTION

A child between the ages of seven and puberty is rebuttably presumed to lack delictual accountability,<sup>401</sup> and children between the ages of ten and fourteen are rebuttably presumed to lack criminal capacity.<sup>402</sup> The ages at which the presumption of incapacity commences and terminates differ between private and public law. Consequently, the delictual accountability of children is beset by a variety of problems.<sup>403</sup> These problems were present in the criminal accountability of children but to some degree were rectified by the CJA, although there are criticisms of its current form.<sup>404</sup> This chapter argues that the discrepancies in the regulation of private and public law are unjustifiable and I submit, as a short term solution, the law governing the delictual accountability of a child must be amended to apply *mutatis mutandis* to the criminal accountability of children. This chapter considers factors that the legislature must consider that are relevant to legal reform in the long term and proposes the way forward.

## 2. CHILDREN'S ACCOUNTABILITY IN PUBLIC AND PRIVATE LAW: UNTENABLE AGE DIFFERENTIATION

The criminal law aims to punish, rehabilitate and deter children who have been accused of a crime, whereas the law of delict deals with compensation for damages.<sup>405</sup> The criminal law has alternative ways of dealing with children accused of a crime, for example, through the welfare system,<sup>406</sup> a solution unavailable in private law.<sup>407</sup> It is an imperative to establish the facts in relation to finding if a child has the capacity to be accountable as legal capacity is a prerequisite for fault in both the criminal and delictual spheres of the law. For that reason there is no justification

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<sup>401</sup> Chapter 4, para 2.1.

<sup>402</sup> Chapter 3, para 3.

<sup>403</sup> Chapter 4, para 2.4.

<sup>404</sup> Chapter 3, para 4.

<sup>405</sup> De Bruin (*supra* n146) 796.

<sup>406</sup> Lamb & Sim (*supra* n274) 131.

<sup>407</sup> A large number of children participate in the private law by virtue of claiming compensation for personal injuries pursuant to road accidents. The Road Accident Fund Act 56 of 1996, as amended, provides social insurance that compensates injured children. This is an example of an alternative way (equitable consideration) in dealing with children in the private law.

for the application of different tests and for different age thresholds in approaching a child's capacity to be accountable.

In accordance with the *Beijing rules* there needs to be an equitable relationship between civil and criminal law, which equates with a close relationship between the notions of criminal and delictual responsibility, and establishes an international imperative to reduce the inequality in the application of the law between different ages with reference to different responsibilities.<sup>408</sup> In addition, the test for the delictual accountability of a child was derived from the criminal law,<sup>409</sup> both tests relate to the mental strength of the child<sup>410</sup> and comprise a cognitive and a connotative test to provide an answer to the question: Can the child appreciate the wrongfulness of his/her conduct and act in accordance with such an appreciation?<sup>411</sup> Davel, a notable child law activist, proposes that the legislature provide clarity with reference to the delictual accountability of a child by allowing the current law of delict to apply *mutatis mutandis* to the criminal law.<sup>412</sup> There is no justification for differentiation in the minimum ages of responsibility and I recommend that the law be reformed so as to eliminate this difference in terms of the private and public law.

### 3. UNTENABLE GENDER DIFFENTIATION

Although uncertain in terms of facts,<sup>413</sup> the delictual *culpa incapax* presumption terminates at the age of puberty, that is, twelve years for girls and fourteen years for boys.<sup>414</sup> It is suggested that psychological development is under the influence of biological maturation,<sup>415</sup> there is no confirmation of the suggestion through research.<sup>416</sup> In its absence Davel contends that it is unthinkable that accountability

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<sup>408</sup> Skelton (*supra* n6) 272; Ferreira (*supra* n261) 29; Lyons (*supra* n346) 257; Sloth-Nielsen & Kruse "A maturing manifesto: The constitutionalisation of children's rights in South African jurisprudence 2007-2012" (2013) *International Journal of Children's Rights* 646 650-678.

<sup>409</sup> Chapter 4, para 1.

<sup>410</sup> Weber (*supra* n1) 393.

<sup>411</sup> S11(1) of the CJA; Weber (*supra* n1) 403.

<sup>412</sup> Davel (*supra* n15) 609.

<sup>413</sup> Chapter 4, para 2.1.

<sup>414</sup> Chapter 4, para 2.1.

<sup>415</sup> Chapter 6, para 6.7.

<sup>416</sup> Chapter 6, para 6.7.

has reference to a child's gender, as sexual maturity should not be the test for accountability and that the age/gender combination amounts to gender discrimination.<sup>417</sup> The law must be reformed to do away with discrimination and the age at which the *culpaе incapax* terminates must be amended to fourteen years as is the case in criminal law.

#### 4. A CALL FOR LEGAL REFORM

Amending the law of delict to apply *mutatis mutandis* to the criminal law is a short-term imperative that can be implemented by the legislature without delay. These differences *prima facie* infringe a child's constitutional rights to gender,<sup>418</sup> dignity<sup>419</sup> and equality, issues which are beyond the scope of this dissertation,<sup>420</sup> however the differentiation is unjustifiable and demands, in the short term, immediate legal reform.

The criticism by academic authors and others,<sup>421</sup> forces the consideration of the soundness of the criminal law (and should the legislature heed the call for reform, the law of delict) provisions regulating a child's accountability and whether an overhaul of the law governing a child's accountability is necessary. In the circumstances these are the questions: What options are open to the legislature for legal reform and what must the legislature consider in deciding which option (or combination of options) will serve children best and will conform to uniquely South African conditions?

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<sup>417</sup> Davel (*supra* n15) 607; *Eskom* (*supra* n150) 511G-H.

<sup>418</sup> In *Volks v Robinson* 2005 (5) BCLR 466 (CC) the court held that racism can be exposed more easily than sex discrimination, which is so ancient and all pervasive and is incorporated into the practice of daily life so as to appear socially and culturally normal and legally invisible.

<sup>419</sup> S10 of the Constitution; Chaskalson submitted, as an abstract value that is uniform to the values of the Constitution, dignity informs the content of all the concrete rights and has the duty to perform a balancing act necessary to bring other rights into harmony in Chaskalson "Human dignity as a foundational value of our Constitutional order" (2000) *SAJHR* 193 198.

<sup>420</sup> S9 of the Constitution. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 promotes the achievement of equality and forbids unfair discrimination.

<sup>421</sup> Chapter 3, para 4; Chapter 4, para 2.4.

## 5. OPTIONS FOR LEGAL REFORM

South Africa is a diverse society, in many ways it is unique, and an approach to legal accountability must correspond to South African conditions and be in line with the best interest of the child, which is paramount.<sup>422</sup> The following approaches can be considered:

- (a) Do away with the *doli/culpa* *incapax* presumption and set a fixed minimum age for legal accountability, for example, at age fourteen.<sup>423</sup>
- (b) Adopt the position set out in the CJA (the proverbial dual approach) in which case current law of delict *mutatis mutandis* will apply to the criminal law. A child under ten years lacks legal accountability, and children between the ages of ten and fourteen are rebuttably presumed to lack accountability.<sup>424</sup> Greater emphasis on rebutting the presumption must then be put in place, such as including a requirement that expert evidence must be presented.<sup>425</sup>
- (c) Establish the capacity of each individual child on a case by case basis. Various academic writers argue for an individualised case by case approach as opposed to setting an arbitrary age and base their arguments on the findings of research into child development.<sup>426</sup> A child's intelligence and maturity can be utilised on a case by case basis so as to establish if the child can distinguish between right and wrong and act in accordance with this appreciation.<sup>427</sup>
- (d) Treat adults and children equally: This is a radical approach that represents the application of the reasonable person test for negligence, in which there is

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<sup>422</sup> S28(2) of the Constitution; S7 & S10 of the Children's Act (*supra* n12).

<sup>423</sup> SALRC (*supra* n96) 96.

<sup>424</sup> SALRC (*supra* n96) 96.

<sup>425</sup> SALRC (*supra* n96) 96.

<sup>426</sup> Delmage (*supra* n266) 102; Newton & Bussey "The age of reason: An examination of psychological factors involved in delinquent behaviour" (2012) *Legal and Criminal Psychology* 75 88; Goldson "Unsafe, unjust and harmful to wider society: Grounds for raising the minimum age of criminal responsibility in England and Wales" (2013) *Youth justice* 111 111.

<sup>427</sup> In the Canadian decision of *Gargotch v Cohen* [1940] O.W.N 479 480 the court held that it is the intelligence and not the age limit that determines if a child is contributory negligent.

no prerequisite that children must be capable of being accountable<sup>428</sup> and is applicable to both adults and children alike, and completely disregards the child's level of maturity and intelligence.<sup>429</sup>

(e) Employ a reasonable child negligence test: The Irish Law Reform Commission (ILRC) suggested, as a proposal for law reform, that the reasonable child test be used in dealing with a child's accountability. Currently, our law provides for an accountability test as a prerequisite for fault. Once accountability has been established the child's negligence is tested by way of the objective reasonable person test as for an adult.<sup>430</sup> In terms of the ILRC's proposal the standard of negligence for minors will be determined by what is appropriate for a reasonable child of the same age as the child in question.<sup>431</sup> Effectively, this test will do away with the accountability requirement as a prerequisite for *dolus* or *culpa*.

## **6. FACTORS TO CONSIDER IN APPROACHING CHILDREN'S LEGAL ACCOUNTABILITY**

In establishing which option offers a satisfactory solution to the problems surrounding accountability in children various factors must be taken into account. The factors, in no particular order, are:

### **6.1 Medico-legal considerations<sup>432</sup>**

The previous chapter demonstrated, although children may be able to distinguish between right and wrong, perhaps from a reasonably young age, the main problem is that they cannot will their conduct to conform to this appreciation.<sup>433</sup> This second element in assessing a child's accountability is widely misunderstood and has led to a situation where children between the ages of ten and fourteen generally are

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<sup>428</sup> Ireland Law Reform Commission *Report on the Liability in Tort of Minors and the Liability of Parents for Damages Caused by Minor* April 1985 45-46.

<sup>429</sup> Chapter 5, para 3.3.1.

<sup>430</sup> Chapter 4, para 2.2.

<sup>431</sup> ILRC (*supra* n428) 45-46.

<sup>432</sup> Chapter 6.

<sup>433</sup> Chapter 6, para 6.5.



deemed to be accountable.<sup>434</sup> Medico-legal considerations cannot determine without question when children actually reach the age of discernment because development is non-linear in form and occurs at different rates.<sup>435</sup> As a result there is support for a legal approach to child accountability in which the ability to be accountable is tested on a case by case basis. An examination of mental health that tests a child's accountability is inaccurate and expensive<sup>436</sup> and ultimately it is the responsibility of the court to reach a decision based on judgements of value unless the legislature intervenes and introduces an approach that is beyond the discretion of the court.<sup>437</sup> Nevertheless, research has shown that children display consistent and universal differences in development,<sup>438</sup> and the legislature should rely on these findings to reach a decision with regard to accountability of children which supports the application of a single minimum age of accountability.

Neuro-scientific research shows only around the age of fourteen the frontal lobe matures and the area of the brain associated with risk and impulse management and moral reasoning develops in late adolescence.<sup>439</sup> It is this ability to manage impulses that makes a child accountable in terms of the second element of the test for accountability. Children at age twelve develop hypothetico-deductive-reasoning abilities, which means they can form "*if then*" assumptions and can conceptualise scenarios relating to the possible consequences of their actions.<sup>440</sup> At this stage a child thinks more abstractly and for the first time considers consequences for others.<sup>441</sup> Significant change occurs in the child's ability to engage in problem-solving and logical thinking between the ages of eleven and fifteen years, and continues into the early twenties.<sup>442</sup> Older teenagers are less capable in applying information relating to risk as they place too high a value on the rewards of

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<sup>434</sup> Chapter 3, para 4(iv).

<sup>435</sup> Chapter 6, para 8.

<sup>436</sup> Chapter 3, para 4.

<sup>437</sup> Chapter 6, para 8.

<sup>438</sup> Chapter 6, para 2.

<sup>439</sup> Chapter 6, para 5.

<sup>440</sup> Chapter 6, para 6.1.

<sup>441</sup> Chapter 6, para 6.1.

<sup>442</sup> Chapter 6, para 6.4.

behaviour.<sup>443</sup> Children of eleven to thirteen years demonstrate markedly poor reasoning skills and consequential thinking,<sup>444</sup> although some executive brain function develops at different stages.<sup>445</sup> Between the ages of ten and fourteen children tend to elicit the approval of their peers, this development is characterised by a phase of sensation-seeking during which they demonstrate increased risk-taking and impulsivity.<sup>446</sup>

## 6.2 The autonomy of the child

From a young age children are granted age-appropriate legal liberties. From the age of ten a child consents to his own adoption<sup>447</sup> and a twelve-year-old may consent to medical treatment and surgery without the assistance of a parent.<sup>448</sup> Boys of fourteen years and girls of twelve years may enter into a marriage with the consent of their parents.<sup>449</sup> From the age of fourteen a child can be a witness to a will.<sup>450</sup> Any minor female may terminate a pregnancy without parental consent,<sup>451</sup> provided she is capable of giving consent.<sup>452</sup> The legislature cannot deem children capable of making legal decisions, on the one hand, and then hold that they lack the ability to be legally accountable on the other.

As a general rule the rights and liberties which are extended to adults should also apply to children, unless substantial and compelling reasons direct otherwise.<sup>453</sup>

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<sup>443</sup> Chapter 6, para 6.4.

<sup>444</sup> Chapter 6, para 6.5.

<sup>445</sup> Chapter 6, para 6.5.

<sup>446</sup> Chapter 6, para 6.6.

<sup>447</sup> S233(1)(c)(i) of the Children's Act (*supra* n12).

<sup>448</sup> S129 of the Children's Act (*supra* n12).

<sup>449</sup> Boezaard (*supra* n4) 19.

<sup>450</sup> S1 of the Wills Act 7 of 1953.

<sup>451</sup> S5(1) of the Choice of Termination of Pregnancy Act 92 of 1996.

<sup>452</sup> In *Christian Lawyers Association v The Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (T), the court held that the legislature used the capacity to give informed consent to the termination of a pregnancy without fixing a rigid age for consent. The age for consent is now fixed at twelve years by virtue of S129 of the Children's Act (*supra* n12), however the Children's Act requires the child to be of sufficient maturity, age and mental capacity to understand the risks and implications of such treatment by surgery.

<sup>453</sup> Freeman (1983) *The Rights and Wrongs of Children* 40.

Freeman argues that respect for children requires that society grants every child a childhood and not adulthood.<sup>454</sup> To disregard age-related barriers is to ignore the evidence of a child's cognitive abilities.<sup>455</sup> The double standard which results in treating adults and children differently is based on the immaturity of children and their incapacity to take sound decisions for themselves.<sup>456</sup> Not only must one recognise the child's integrity but also the danger of complete liberation, which ultimately calls for policies and practices that protect children as well as their rights.<sup>457</sup>

### **6.3 An *ad hoc* or generalised approach to the accountability of children**

In dealing with the accountability of children, testing their capacity to be accountable either follows a fixed one-size-fits-all approach or a case by case (*ad hoc*) approach. Both approaches have advantages and disadvantages. In a country such as South Africa which follows a dual approach (or a combination of the two approaches), that is, a fixed minimum age under which children lack accountability and a threshold of ages at which the child is presumed to lack accountability, similarly the advantages and disadvantages apply.

#### *6.3.1 Disadvantages of a case-by-case approach*

Freeman advocates an *ad hoc* approach in assessing the actual capacity for the particular activity of the individual child.<sup>458</sup> The problem in this approach is that there is no uniform model for the medico-legal evaluation of a child's capacity, which arouses widespread caution among the mental health professions regarding the assessment of a child's capacity.<sup>459</sup> The question of a child's capacity is multi-faceted and takes into account the complex area of human development, human behaviour, individual variation and non-specific concepts such as intelligence and moral development,<sup>460</sup> which requires a multi-disciplinary team of experts to assess the

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<sup>454</sup> Human (*supra* 7) 253.

<sup>455</sup> Freeman (*supra* n453) 45-46.

<sup>456</sup> Freeman (*supra* n453) 45-46.

<sup>457</sup> Freeman (*supra* n453) 3-4.

<sup>458</sup> Freeman (*supra* n453) 45-46.

<sup>459</sup> Skelton (*supra* n6) 265.

<sup>460</sup> Skelton (*supra* n6) 266.

level of discernment of the child. The mental health professionals' role in the forensic assessment of children is not well- documented and a great deal of development and refinement is needed in this area, a task which is made more difficult by the inadequacy of psychometric measuring instruments that are fit for local use.<sup>461</sup> Medico-legal testing is expensive, experts charge an expert witness fee, and the duration of litigation is lengthened by taking expert evidence, which also makes litigation more expensive.<sup>462</sup> Because of the additional procedural requirement of expert evidence there may be undue delay in the finalisation of matters involving children.<sup>463</sup>

Additional problems which arise where accountability is to be established on a case by case basis, especially in the context of a presumption of incapacity, are that children are too easily held accountable as a result of parents testifying that they have taught their children the difference between right and wrong and that courts ignore (or do not understand) the second leg of the accountability test, in that children must be able to conform their conduct to an appreciation of a wrongful act.<sup>464</sup> The competency of presiding officers' ability to establish the legal capacity of children is questionable.<sup>465</sup> Further, there is an incorrect perception that children between the ages of ten and thirteen are capable of being accountable.<sup>466</sup>

In general, a case by case approach results in an absence of legal certainty as there is no uniform model for testing the legal capacity of a child and no uniform age to be employed to decide the accountability of children, and it seems to be a complicated and time-consuming approach. It also creates obvious discriminatory and arbitrary practices and decisions and requires children unnecessarily to enter the mental-

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<sup>461</sup> Pillay (*supra* n310) 22. South Africa is a diverse and pluralistic country where the life of one child differs vastly from that of another child based on different cultures, socio-economic status, education and urbanisation, all of which impact on the notion that children develop differently: SALRC *Report on Juvenile Justice (Project 106)* July 2000 27.

<sup>462</sup> Skelton (*supra* n6) 265.

<sup>463</sup> Badenhorst (*supra* n86) 30; Skelton & Badenhorst (*supra* n110) 28.

<sup>464</sup> Weber (*supra* n1) 400C-D.

<sup>465</sup> Skelton & Badenhorst (*supra* n110) 28.

<sup>466</sup> Chapter 3, para 4.

health system. All these problems can be resolved by abolishing the *doli incapax* presumption and setting a fixed minimum age of accountability.<sup>467</sup>

### 6.3.2 *Advantages of a case-by-case approach*

The *ad hoc* approach acknowledges the need to treat younger children differently from older children and is a flexible approach which focuses on the individual child.<sup>468</sup>

### 6.3.3 *Disadvantages of a general approach*

Setting a fixed minimum age of accountability is inflexible and a child's individual level of maturity is disregarded, which leads to some children with an actual capacity to be accountable to escape the consequences of their conduct and penalising the slow developer who may not have the actual capacity to be accountable.<sup>469</sup> A general approach does not favour the plural nature of South Africa, where there are significant differences in the upbringing, maturity and development of children.<sup>470</sup> Different cultures, rural or urban environments, socio-economic circumstances and educational factors play a role in shaping a child's development and the age at which a child attains legal capacity.<sup>471</sup>

### 6.3.4 *Advantages of a general approach*

It is easy to apply, is predictable, creates legal certainty, does not require costly expert evidence and avoids undue delay.<sup>472</sup>

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<sup>467</sup> Skelton & Badenhorst (*supra* n110) 28.

<sup>468</sup> SALRC (*supra* n96) 101.

<sup>469</sup> ILRC (*supra* n428) 46.

<sup>470</sup> SALRC (*supra* n96) 105.

<sup>471</sup> SALRC (*supra* n96) 105.

<sup>472</sup> SALRC (*supra* n96) 105.

#### **6.4 Can a child's legal liability mirror the adult test for liability?**

A test which closely resembles that which tests an adult's accountability, without any subjective considerations, disregards medico-legal consideration of early-childhood development and amounts to a travesty of justice and is irrational. Any suggestion that a reasonable person test be applied, without a prerequisite of a capacity to be accountable, is dismissed outright due to the arbitrary and unjust treatment of the child. This approach manifestly is unfair as it would apply a standard of behaviour which by no fault of his/her own a child cannot attain.<sup>473</sup>

#### **6.5 Can a reasonable child test be applied?**

This approach entails that a child's accountability is tested by the standard of a reasonable child of the same age and mental development and/or experience of the child in question. This approach summarily is discounted as it further complicates an already complicated system by being based on the complex question of what is reasonably expected of a child of a certain age. In other words, it is impossible to establish a singular yardstick of a reasonable child in terms of the science of childhood development against the background of the diverse nature of South Africa's children. In all probability the court will have to rely on expert evidence, in which case there will be time delays, it will not be cost effective and it will be subject to medical uncertainty which will create legal uncertainty. Because South Africa is a multi-cultural, multi lingual county, with great variation in *per capita* income it will be impossible to establish what is a reasonable child .

#### **6.6 Is there still a place for the *doli/culpae incapax* presumption?**

In 2009 the *UNCRC* issued general comment 10, in which they urged parties to abandon dual minimum age-thresholds such as the *doli incapax* presumptions.<sup>474</sup> With reference to criminal law many academic writers propose that the wording of the legislation should no longer employ the term 'criminal capacity' and a single minimum age of liability should be set, by means of which the *doli/culpae incapax*

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<sup>473</sup> ILRC (*supra* n428) 45.

<sup>474</sup> General Comment 10 (*supra* n195) para 32.

presumption is to be abolished.<sup>475</sup> This proposal is as a result of the problems mentioned above which pertain to a case by case approach.<sup>476</sup>

There are arguments in favour of the retention of the *doli/culpa* *incapax* presumption and of lifting the minimum age of legal capacity. These arguments include:<sup>477</sup>

- (a) The presumption allows the state to set a relatively low minimum age of legal capacity;
- (b) The protection advanced to children applies automatically to children by virtue of their age;
- (c) Children between ten and fourteen can be treated in a flexible manner, which suits the diverse nature of South African society;
- (d) Children will not be used by adults as a tool to commit crime as the adults know that the children may be found legally liable and;
- (e) If the presumption is removed, the minimum age of legal capacity may be set too low, which will prejudice children caught up in the legal system who do not have legal capacity.

Skelton, a renowned child law advocate, favours abolishing the *doli (culpa) incapax* presumption and holds the view that a minimum age below which children lack legal responsibility should be set and she submits that the wording of the CJA must no longer use the term 'criminal capacity'.<sup>478</sup>

### **6.7 The test for accountability must consider the specific act or omission of the child as opposed to conduct in general**

Apart from the fact that childhood development is non-linear and differs from child to child, one must recognise that a child's capacity to be accountable depends on the action (or omission) in each particular case.<sup>479</sup> The criminal capacity test as

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<sup>475</sup> Van der Vyfer & Joubert (*supra* n142) 194; Labuschagne (*supra* n98) 228; Skelton (*supra* n6) 273-275. Goldson (*supra* n426) 111 call for immunity from prosecution for children below a certain age.

<sup>476</sup> Skelton & Badenhorst (*supra* n110) 28.

<sup>477</sup> Skelton & Badenhorst (*supra* n110) 29.

<sup>478</sup> Skelton (*supra* n6) 273.

<sup>479</sup> Chapter 4, para 2.3.

contemplated by the CJA does not specifically state the test must be applied in the context of the specific facts of each case.<sup>480</sup> Despite this omission in the CJA, it follows that the connotative leg of the test assesses that a child's behaviour corresponds to an appreciation of wrongfulness, which inherently entails that the specific act or omission must be considered, and as such the CJA did not amend the common law test of accountability.

### **6.8 The interest of the innocent victims and opponents to litigation**

In civil litigation the legislature has to weigh the protection of children's rights on one hand (in their capacities as plaintiffs and defendants) against the protection of the rights of the child's opponent whose case may be prejudiced by a child's<sup>481</sup> age.<sup>482</sup> When the SALRC considered amendments to the common law criminal provisions of the accountability of children, they were faced with an ethical debate that called for balancing a child's culpability against a strong belief that children can be evil deliberately.<sup>483</sup> A political risk the SALRC faced was the use of children by adults to commit crime in the knowledge that children will not be accountable.<sup>484</sup> Any amendment to the law must be cognisant of the fact that the counter parties involved in litigation against children also require the protection of the law and their rights similarly must be protected. A person unjustifiably must not be denied a course of action by virtue of the mere fact that his opponent is a child. For this reason the minimum age of accountability cannot be set too high.

### **6.9 The politics of the day**

The age of accountability and the minimum age are contentious issues according to Skelton, who argues in favour of the obvious choice of fourteen years, the current upper age limit in the presumption of legal capacity, and that to set it at a lower age

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<sup>480</sup> Walker (*supra* n122) 41.

<sup>481</sup> A *doli/culpa* *incapax* child plaintiff lacks the capacity to be contributory negligent and a child defendant can raise the fact that he/she is *doli/culpa* *incapax* as an absolute total defence.

<sup>482</sup> The SALRC (*supra* n96) 105-106.

<sup>483</sup> Sloth-Nielsen *The Role of International Law in Juvenile Justice Reform in South Africa* (LLD dissertation 2001 UWC) 117-157.

<sup>484</sup> Sloth-Nielsen (*supra* n483) 117-157.



diminishes the rights of eleven to thirteen-year-old children.<sup>485</sup> Skelton submits, although the correct single age ought to be fourteen, the age of twelve probably is more realistic with reference to political and legal circumstances, as well as the internationally acceptable minimum age of criminal capacity.<sup>486</sup> Voters may see these changes as being 'soft' on delinquent children, to the detriment of the government, if the minimum age of accountability is set too high. The SALRC admitted that it was a challenge to establish and recommend a revised minimum age of criminal capacity because of these political and practical considerations.<sup>487</sup> Of course political considerations ought not to have an influence and the best interests of the child, based on scientific findings in early-childhood development research should guide the legislature in the way forward.

### **6.10 Statistics and finances**

Skelton submits that it is difficult to make a recommendation on the way forward, in the absence of proper statistics<sup>488</sup> and without knowledge of the financial

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<sup>485</sup> Skelton (*supra* n6) 273.

<sup>486</sup> Skelton (*supra* n6) 273. In Flattery "The significance of the age of criminal responsibility within the Irish youth system" as quoted in Badenhorst & Skelton (*supra* n110) 5, Flattery acknowledges the necessity of a minimum age threshold but is of the view that setting an age limit is arbitrary since there is no magical transformation of a child into a mature adult when a child turns twelve; Odongo opines that a set minimum age may be arbitrary, but the choice that the state makes in selecting the age must not be arbitrary, in Odongo "A case of raising the minimum age of criminal capacity: Challenges regarding the age of criminal responsibility" (2007) as quoted in Skelton & Badenhorst (*supra* n110) 5. The Interagency Panel on Juvenile Justice Reform "Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes" (2010) *United Nations Office on Drugs and Crime* 29 set an objective that a reasonable minimum age of criminal capacity must be set.

<sup>487</sup> SALRC (*supra* n461) 23.

<sup>488</sup> S96(4) of the CJA requires research to be undertaken on the statistics of children accused of committing crimes: These statistics must include the number of children between ten and thirteen that committed crimes, the type of offences, the sentences imposed, the number of matters that did not go to trial as the prosecutor was of the view that the child was *doli incapax*, the reasons for the decision in each case as well as the number of cases where expert evidence on criminal capacity was led and the outcome of each matter.

implications in such a recommendation.<sup>489</sup> The government should implement a strategy to collect the statistical information in order to be able to take an informed decision in the future, which not only must be the case for children involved in criminal legal matters but also children in relation to private law. Once the legislature knows how many children are involved, proper financial costing can be calculated and an informed decision taken on the feasibility of any proposed resolution to the problem of children's legal accountability.

## 7. CONCLUSION AND RECOMMENDATIONS

Making a recommendation on the way forward is a challenge as effectively it requires one to choose the lesser of two evils. There is no easy answer to the complex question of a child's accountability. Because of the various problems associated with a case by case approach to the accountability of children this is not a viable option, at least it is not in the absence of a set minimum age for accountability.

Effectively, this situation results in there being two plausible scenarios for legal reform. The first is to set a fixed minimum age for accountability and the other is to retain the *doli incapax* presumption and to regulate how the presumption can be rebutted, where accountability is effectively dealt with on an *ad hoc* basis.

Some kind of liability age limit appears to be extremely useful because it creates legal certainty in which the *ad hoc* determination of a child's capacity is eliminated, and it is economically effective because it negates the necessity of employing a panel of costly experts whose task it is to conduct tests to discern individual capacity.<sup>490</sup> Setting a minimum age limit in juvenile justice is considered the core element in a comparative juvenile justice policy by the UNCRC<sup>491</sup> and setting

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<sup>489</sup> Statistics from the Department of Correctional Services are available but are of little assistance: The Editor "Report on the SA Law Commission seminar on age and capacity" (1999) *Volume 40* 1 9. Some statistics have been produced by the Parliamentary Monitoring Group (2003) *Justice and Constitutional Development Portfolio Committee 25 February 2003 Child Justice Bill: Public Hearings*. The reason the minimum age was set at ten and not twelve was due to a lack of proper statistics: Parliamentary Monitoring Group (2008) *Child Justice Bill: Department Briefings & Public Hearings 5 February 2008*.

<sup>490</sup> Ferreira (*supra* n261) 47.

<sup>491</sup> Ferreira (*supra* n261) 47.

impersonal standards is both justifiable and recommended.<sup>492</sup> Whatever framework in terms of age liability is selected the relevant elements in relation to the maturity and discernment of the child must be integrated.<sup>493</sup> If a child exceeds the minimum age of accountability, nothing in our law precludes such a child from alleging (and proving) that he/she lacks legal capacity.

Employing the alternative *ad hoc* approach, effectively and in the best interest of the child, requires a multi-disciplinary team of experts to evaluate the delinquent child as a court cannot make a determination on a child's capacity without having heard expert evidence on the child's level of development. This alternative approach not only presents a logistical nightmare, but it is extremely time-consuming as it will take time to examine and to evaluate the child, and it will take time to present the evidence in court, especially if it is contested. In a country in which the majority of children live in extreme poverty and the treasury is cash-strapped, this approach is not viable and although good intentions are behind it, the child's best interest are not served. A single minimum age for accountability is recommended; what remains is the question of what age.

Ferreira convincingly argues that in the case of children's involvement in legal liability, their liability must be specifically attenuated.<sup>494</sup> The UNCRC proposes that criminal responsibility be set at sixteen, or fourteen at the very least.<sup>495</sup> Children should be protected at least to the age of fourteen and, in terms of scientific research into early-childhood development, it seems to be the correct age at which children can be held legally accountable, which approach also won't remove existing rights and protection.

In the existing political climate the central argument in this research may fall on deaf ears but it is the basic contention that scientific research has to be reflected in a clear and defined manner in the formulation of coherent law making, more specifically the minimum age of accountability.<sup>496</sup>

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<sup>492</sup> Ferreira (*supra* n261) 47.

<sup>493</sup> Ferreira (*supra* n261) 47.

<sup>494</sup> Ferreira (*supra* n261) 47.

<sup>495</sup> S8-S10 General comment 10 (*supra* n195).

<sup>496</sup> Delmage (*supra* n266) 108.

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