

EXPOSING CHILDREN TO SEXUAL ACTIVITIES IS INDECENT
ASSAULT :
The James McNeil¹ Case

Introduction

Child pornography is a “crime scene”. It is evidence of the fact that a child has been, in some sense, abused. At its worst, it is evidence of a sexual assault and therefore a picture of a serious and often unspeakable crime against a child by everyone involved in the making of such an image. The collection and distribution of child pornography is not so far removed from the original crime that the viewer may escape the approbation of society and criminal sanctions for what is, effectively, *secondary* sexual assault of the child. However, the creation, collection and distribution of child pornography are offences against the child-victim depicted in the picture. The significance of the judgment in the *McNeil* case lies in the court’s finding with regard to the charge of exposing a child to pornographic materials or overt sexual activities, in circumstances where the child is not, at the time, touched or abused physically.

S v J McNeil

James McNeil was found guilty of, in addition to the sexual abuse of children and possession of child pornography, indecent assault, the evidence for which consisted of a videotape of McNeil engaged in sexual

activities with a woman who had her infant child with her at the time. The Court found that :

“Although...the accused does not touch the child, neither does the child touch the accused, there is no doubt in the Court’s mind from what is observed and heard on the video, that the accused both overtly and directly participated in involving the child in the sexual activities between himself and the female, and also intentionally exposed the child to sexual acts and objects. (Emphasis added)

“Having decided this, the Court has to finally ascertain whether the accused’s actions constituted an assault of an indecent character on the child. From the evidence accepted...the Court finds that the accused did in fact actively manipulate and coerced sexual conduct with the child, by the female. The Court rules out the possibility of such contact being a natural mother/child relationship.

“The child was enticed into performing unnatural sexual acts with the mother, the female, and further exposed to sexual activities and sex objects, clearly with a view to grooming the child.

“This type of behaviour is clearly contra bonos mores, and frowned at by society, and the Court has no hesitation in finding that it constituted an assault of an indecent character upon the child...”²

¹ Case No. 24/904/01, Magistrate’s Court, Cape Town

² Pages 324 – 325 of the transcript

The evidence

The videotape is a recording of the accused, a female in her late teens and a child of approximately one year old. The video shows the child laying on the bed next to the female (presumably the mother), playing with a toy car. Apart from a T-shirt, the female is naked is stroking herself while reading a magazine. The accused is then seen repositioning the female so that her lower body faces the camera, and he continues to videotape her as she strokes herself. The accused then proceeds to stroke her himself until she reaches orgasm, after which the female cuddles the child.

Next, the female is seen seated on the bed with wearing only a panty. The child reaches out and sucks her breast. The accused is heard to say : *"Let her go for it. I love watching this"*, referring to the child sucking the breast. He is heard to say, further : *"You feel nice when she sucks your breast. That is good. Let her carry on sucking your breast"*. The accused then hands the female an orange-coloured toy penis. The child is attracted to it and reaches out for it. The female puts it in her mouth. She then puts the object into her vagina and then puts it into her mouth. The female then kneels on the bed and inserts the object into her anus. The child is then seen sucking on the object.

The female asks the accused for a toy for the child and he brings the child a toy car. While the child plays with the toy car, the accused fondles and strokes the female with his fingers and then uses the toy penis to stimulate her to orgasm, while now and then looking at the child. The child whimpers and the accused says : *"All right baby, don't be scared"*, and asks the female to turn around so that the child sucks the breast while he inserts the object into her vagina. The child looks at the accused. The

female then inserts the toy penis into her vagina and then takes out , shows it to the child and then puts it back into her vagina.

The accused and the female engage in various sexual activities, while the child sucks the breast, plays with the female's navel, tugs at the female's hair, sucks the female's body in the region of her stomach and sucks her face.

The child is seen as an integral part of the sexual activities between the accused and the female, and is seen lying on the bed between the accused and the female while they were resting from their sexual activities.

Exposing a child to pornography as a form of non-contact sexual abuse

Child protection practitioners have long recognised, from their experiences in working with children with problems, that sexual abuse occurs in different forms, but that the effects of non-contact sexual abuse are no less traumatic on a child than contact sexual abuse. Non-contact sexual abuse includes the exposure of children to pornographic materials as well as to overt sexual activities.

Effects of non-contact sexual abuse

A number of researchers in the area of child behavioural problems have established a connection between traumatised children and non-contact sexual abuse like exposure to pornographic materials and overt sexual activities.

- Araj³ found, in the interaction patterns in the homes of sexually abusive children, aggression, conflict and “non-normative sexual environments”, such as exposure to adult sexual activities or pornographic materials. She cautions that sexually abusive children should always be evaluated for the possibility of having been exposed to sexually explicit material. Hewitt⁴ also makes the point that in all cases of child sexual abuse, it is important to screen for the possibility that the child was exposed to pornographic materials as this exposure itself can cause the same impact on a child as sexual abuse. See also Myers⁵ : *“Sexual touching is not the only kind of child sexual abuse. It is abuse to intentionally expose a child to pornography.”*
- Gill and Johnson⁶ describe the experience of a child's exposure to explicit sexuality as follows :

³ S K Araj, *Sexually aggressive children*, Sage Publications (1997)

⁴ *Assessing allegations of sexual abuse in preschool children*, Sage Publications (1999)

⁵ *A mother's nightmare – incest*, Sage Publications (1997)

⁶ *Sexualised children*, Launch Press (1993)

“.....a frightened four-year who is forced to observe or be part of sexual intercourse between two adults cannot fully understand what is happening. The child may comply and go through the motions while emotionally he leaves his body or pretends to be invisible. The child's memory of the event may not be intact, yet he may suddenly repeat phrases he heard during the experience, have intrusive flashbacks of the adult's faces.....may suddenly become terrified in the presence of a male adult or may refuse to go to bed, remembering on some level what occurred previously in that bed. These are ways in which children re-experience fragmented aspects of trauma through behaviour, sleep disturbances, or post-traumatic stress symptoms such as intrusive flashbacks.”

- According to Dr Renee Potgieter⁷, what Gill and Johnson describe is a very typical reaction of children who have been exposed to pornography. *“In one case handled at the RP Clinic a child of eight years old, who had viewed pornographic material, suddenly lost all interest in school...during assessment of the child it became clear that he was pre-occupied with the pornographic material to which he had been exposed. In therapy he kept on drawing the explicit sexual material that he had been exposed to.”*

⁷ *The Relationship Between Pornography and the Sexual Abuse of Children : View from Literature and Personal Experience*, Pretoria (2001)

While the causal connection between exposure to sexually explicit materials and behavioural problems may be persuasive but not conclusive, the evidence of many researchers and the experience of many child protection practitioners suggest that non-contact sexual abuse, such as intentionally exposing a child to pornographic materials or overt sexual activities, is no less harmful and traumatising to children than physical sexual abuse. Young children are neither neurologically ready nor sufficiently experienced to process sexually stimulating information, and children are easily disturbed and traumatised by experiences that they cannot fully comprehend or assimilate. Even if the causal connection between a traumatised child and exposure to pornography is only anecdotal, exposure to pornography is often part of the "grooming process" to seduce children into sexual activities.

The *McNeil* case lends its weight, even if it does not enjoy the status of a *stare decisis* of a court of superior jurisdiction, in support of those who, on the basis of their experience of traumatised children, hold that exposing children to pornographic materials and overt sexual activities is a form of non-contact sexual abuse and that it constitutes indecent assault.

Iyavar (2004)