

Clarifying the *mens rea* for child cruelty and revisiting the objective element of recklessness in *R v G*

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R v BCZ [2025] EWCA Crim 1465

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Child cruelty, wilful assault, mens rea, wilfully, recklessness, unreasonable risk

This case involved an appeal against the appellant's conviction for child cruelty under section 1 of the Children and Young Persons Act 1933. There was a single ground of appeal, namely that the trial judge wrongly directed the jury on the mental elements required for the offence.

The appellant's wife reported to the police a number of assaults that were alleged to have taken place in the family home. These resulted in the appellant being charged with four offences. He was acquitted of three charges involving allegations of assaults against the appellant's wife (counts 1, 2 and 4), but he was convicted of one count of child cruelty against his son, under section 1 of the Children and Young Persons Act 1933 (count 3).

The particulars of the conviction were that the appellant wilfully assaulted his son in a manner likely to cause him unnecessary suffering or injury to health. The prosecution case was that the wilful assault involved the appellant twisting his son's ear, causing pain which was by its nature likely to cause unnecessary injury or suffering. The prosecution case was based upon testimony from the appellant's wife, who stated that she left her son (apparently well) with the appellant and ran a bath. Around 15 to 20 minutes later, her son came into the bathroom in a distressed state and holding his ear. The appellant's wife took a video of her son showing distress and pointing to his ear. There was no sound to accompany the video, but the prosecution case was that it could be inferred that her son's distress was from pain caused to his ear. The prosecution also relied upon the appellant's testimony that he had pulled his son's ear to discipline him. The jury heard evidence relating to the appellant's bad character, and in particular, about offences that he had previously committed towards his wife, which the prosecution argued indicated a propensity to offend in a domestic setting.

The defence case was that the act had occurred, but that it did not amount to a wilful assault, and it was not done in a manner likely to cause unnecessary suffering or injury to health. The appellant's testimony was that his son had slapped him, so he grabbed and pulled his son's ear to a limited extent in order to

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teach his son a lesson. The appellant claimed that he did not intend the act to hurt and that it did not amount to an assault.

The wording of section 1(1) of the Children and Young Persons Act 1933 is as follows:

If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats (whether physically or otherwise), neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated (whether physically or otherwise), neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (whether the suffering or injury is of a physical or a psychological nature), that person shall be guilty of an offence...

In respect of the offence of child cruelty (count 3), the trial judge provided the jury with the following written directions:

If you are to convict on count 3 on the indictment, the prosecution must prove so that you are sure that the defendant:-

1. **Being a person had attained the age of 16 years**

This is not in dispute.

2. **And having responsibility for [the complainant], a child under that age**

It is not in dispute that the child was under 16 or that the defendant had responsibility for [the complainant].

3. **Assaulted**

'Assault' means the intentional use of unlawful force.

4. **Wilfully**

Means deliberately, in other words, that is by conscious decision.

5. **In a manner likely to cause [the complainant] unnecessary suffering or injury to health**

Any degree of suffering or injury to health is enough, but it must be more than a slight fright or some small anxiety.

'Unnecessary' and 'likely to cause' have their everyday meanings.

It matters not, if no suffering or injury was in fact caused to the child, as the requirement in law is that it is 'in a manner likely to cause' such suffering or injury.

The judge also provided the jury with the following route to verdict:

One way to arrive at your verdict is to answer the following questions bearing in mind the definitions given above:

1. **Are we satisfied so that we are sure that the defendant wilfully assaulted [the complainant]?**

If no—you will find the defendant Not Guilty of count 3.

If yes—go onto consider question 2.

2. **Are we satisfied so that we are sure that the assault was in a manner likely to cause [the complainant] unnecessary suffering or injury to health?**

If no, you will find the defendant Not Guilty of Count 3.

If yes, you will find the defendant Guilty of Count 3.

The jury convicted the appellant of child cruelty, and the appellant appealed against his conviction with the leave of the single judge. The ground of appeal was that the trial judge failed to direct jury on the mental element required for the offence of child cruelty, and as a result the conviction was unsafe.

The appellant argued that the only element of the *mens rea* addressed by the judge was the requirement for the assault to be wilful (i.e., intentional), but that a further mental element was needed, namely foresight of harm through the appellant's actions. After initially disputing the appellant's ground of appeal, the prosecution later conceded that the trial judge had misdirected the jury in failing to address the *mens rea* of the offence, although the prosecution argued that the conviction was safe. After reformulation, the appellant's single ground of appeal was that the conviction was unsafe because "the jury was not directed that the defendant must have been reckless as to causing unnecessary suffering to the child or injury to the child's health" (at [14]). With assistance from counsel, the Court of Appeal identified the common ground between the parties and the one area of dispute on the law.

The common ground

Both the prosecution and the appellant agreed that the approach taken by the House of Lords in *R v Sheppard* [1981] AC 394 to the meaning of "wilful" in section 1(1) of the Children and Young Persons Act 1933 must now be read in light of the House of Lords' decision in *R v G* [2003] UKHL 50. In *R v Sheppard* [1981] AC 394, Lord Diplock considered the proper direction to be given in respect of a charge of wilful neglect of a child and thought that "wilfully" meant the same thing when applied to any of the five verbs in section 1(1), including acts (assault, ill-treatment, abandonment or exposure) and omission (neglect). Of course, *R v G* concerned a different statutory provision (section 1 of the Criminal Damage Act 1971) and the issue in that case was the meaning of recklessness in the context of that provision.

The common ground between both parties in this appeal was that the trial judge should have directed the jury about the *mens rea* for the offence and that the *mens rea* included intention or recklessness as to the manner of the assault on the complainant (at [24]). Both parties agreed that "the jury should have been directed to consider whether they were sure that the Appellant either intended or was, in the sense identified by Lord Bingham in *R v G*, reckless as to whether the manner in which he carried out the assault was likely to cause the child unnecessary suffering or injury to health" (at [25]).

The area of dispute

The remaining area of dispute related to the precise content of the recklessness direction, and in particular, to whether recklessness includes an objective element. The appellant argued that the jury would need to find that the risk as to the manner of the assault was an unreasonable one to take. However, the prosecution argued that the objective element only applies in respect of results and not circumstances, and thus, that a purely subjective approach should be taken. As the heart of this dispute is the interpretation that should be given to Lord Bingham's formulation of the test for recklessness from clause 18(c) of the Criminal Code Bill. The Court asked the parties to agree a direction which should have been given to the jury. Counsel provided the following (at [30]):

[Agreed] Are we satisfied so that we are sure that when he assaulted the child the defendant was aware of the risk that the manner in which he carried out that assault was likely to cause the child unnecessary suffering or injury to health?

[Not agreed] Are we satisfied so that we are sure that in the circumstances known to the defendant it was unreasonable for him to have taken that risk?

Lord Bingham's formulation of the test for recklessness was derived from clause 18(c) of the Criminal Code Bill (annexed by the Law Commission to its Report on Criminal Law, *A Criminal Code for England and Wales and Draft Criminal Code Bill, Vol 1* (Law Com No 177, April 1989)). This was expressed as follows (at [23]):

A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to—(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take that risk.

Ultimately, the Court of Appeal declined to rule upon this point, pointing out that it was “not necessary for [it] to resolve the interesting point of law” and concluding that “[i]t has waited 25 years already and it will have to a bit longer” (at [40]).

HELD (ALLOWING THE APPEAL), that the defendant’s conviction was unsafe and must be quashed because the trial judge failed to properly direct the jury on the *mens rea* of the offence.

Commentary

The main issue in this case was the direction that should have been given to the jury in respect of the meaning of the word “wilful” in the context of the offence of child cruelty. In determining whether the act of child cruelty was “wilful”, the trial judge had only directed the jury to consider whether the act was “deliberate”, and the jury had not been directed that they could convict the defendant on the basis of recklessness (i.e., if he foresaw a risk of harm). In light of the absence of evidence as to the defendant’s awareness of the risk and any such direction to the jury, the Court held that it would be usurping the function of the jury if it made assumptions about what evidence might have been given and what the jury might have decided. There was a gap in the evidence as to a material issue and a gap in the directions which meant that “the jury never applied their collective mind to whether the Appellant was aware of the risk of causing unnecessary suffering” (at [38]), the conviction was unsafe. This omission could have been avoided had the trial judge had the benefit of guidance from counsel in the case, and the Court noted that it was “very regrettable” that none of the arguments before the appellate Court were put before the trial judge. The Court emphasised the duty of counsel to assist the judge with argument as to the legal directions on the offence, stating that she “did not receive the degree of assistance which she was entitled to expect from counsel” (at [16]).

In dealing with the mental element required for the offence of child cruelty and the meaning of “wilful”, the Court of Appeal in *R v BCZ* also considered the approach that should be taken in respect of the objective element of Lord Bingham’s test of recklessness in *R v G*. Ultimately, the Court of Appeal declined to decide upon the disputed point relating to whether the objective element of the test in *R v G* relates solely to a defendant’s awareness of the risk that a result will occur (limb (ii)), or whether it also relates to a defendant’s awareness of the risk that a circumstances will occur (limb (i)). This element exists in order to allow for justifiable risk taking, where the social utility in the action justifies the risk. The degree of risk needs to be balanced against the social utility in taking the action. For example, the driver of an ambulance who is speeding to attend to an emergency would foresee that there is a risk that they could cause injury to a person or damage to property by their driving, but the specialist driving training received by the driver should reduce that risk, and the risk taking is justified by the social utility in attending the emergency. Recklessness is then limited to risk taking which is unreasonable.

It is interesting to note that academic and practitioner texts differ in the precise punctuation and layout of the latter part of the test. For instance, there is a difference in the way that the test was laid out in Lord Bingham’s opinion in *R v G* and the text reproduced in *Archbold*. Paragraph 41 of Lord Bingham’s opinion is set out below:

I would answer the certified question obliquely, basing myself on clause 18(c) of the Criminal Code Bill annexed by the Law Commission to its Report ‘A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill’ (Law Com No 177, April 1989):

‘A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to—

- (i) a circumstance when he is aware of a risk that it exists or will exist;
 - (ii) a result when he is aware of a risk that it will occur;
- and it is, in the circumstances known to him, unreasonable to take the risk.'

By contrast, in *Archbold*, the test is laid out as follows:

In *G*, it was held that a person acts recklessly with respect to—

- (a) a circumstance when they are aware of a risk that it exists or will exist, and
- (b) a result when they are aware of a risk that it will occur, and it is in the circumstances known to them unreasonable to take the risk.

When comparing these versions of the test, it is possible to see how confusion has arisen. It is respectfully submitted that taking into account the punctuation and layout of the test adopted by Lord Bingham in *R v G*, the most sensible interpretation of the objective element is that it applies equally to both awareness of a risk re: results and circumstances. Arguably, had Lord Bingham intended an alternative interpretation, then the test would have been produced as set out in *Archbold*. It is unfortunate that this issue could not have been clarified by the Court of Appeal in *R v BCZ*, but both counsel accepted that “in the 25 years since *R v G* was decided, the point has not been resolved and remains at large” (at [31]) and the Court of Appeal held that it was not necessary for the Court to resolve the issue: “It has waited 25 years already and it will have to wait a bit longer” (at [40]).

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