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THE SCOTTISH LAW ON CHILD CRUELTY AND WILFUL NEGLECT: TIME FOR REFORM?

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THE SCOTTISH LAW ON CHILD CRUELTY AND WILFUL NEGLECT: TIME FOR REFORM?

In 2012 an Independent Advisory Committee on Child Maltreatment concluded that the English legislation on child cruelty/child neglect was difficult to implement in practice and did not cover the range of harms which can be suffered by children, particularly emotional harm. English law has now been amended to make clear, inter alia, that it is an offence to ill-treat a child "whether physically or otherwise", and that the suffering or injury caused, or likely to be caused, can be of "a psychological nature". The English offence does, however, continue to refer to "wilful neglect", a controversial term that is also used in the equivalent Scottish offence, and which has been subject to various interpretations by courts on both sides of the border. This article briefly summarises the past and current English law, describes and critiques the Scottish law, and assesses whether amendments similar to those enacted for England and Wales ought to be adopted in Scotland. It concludes that Scots Law would benefit from further clarification, and argues that the interpretation of "wilful ~~neglect~~" to include inadvertent recklessness is not appropriate.

Introduction

The United Nations Convention on the Rights of the Child (1989) provides that states must

> "take all appropriate legislative, administrative, social and educational measures to protect [children] from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."[1]

This was ratified by the UK in 1991. Similarly, the European Social Charter requires States "to ensure special protection against physical and moral dangers to which children and young persons are exposed…".[2] The domestic legislation concerning child cruelty and neglect predates these developments: namely, the

[1] UN Convention on the Rights of the Child, Art.19(1). Further, protective measures are to include "effective procedures for the establishment of social programmes to provide necessary support for [children] and for those who have [their] care …, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement" (Art.19(2)).

[2] European Social Charter, Art.7(10). The Charter was adopted in 1961 and revised in 1996. The revised version came into force in 1999.

Children and Young Persons Act 1933 (CYPA) for England and Wales, and the Children and Young Persons (Scotland) Act 1937 (CYP(S)A). As originally enacted, each statute contained very similar provisions.[3] These included:

- cruelty to children[4]
- allowing children to be in brothels[5]
- allowing children to be used for begging[6]
- giving alcohol to a child[7]
- selling tobacco to a child[8]
- exposing a child to a risk of scalding or burning[9]
- failing to provide for the safety of children at entertainments[10]
- restrictions on employment of children[11]
- a prohibition on street trading by children[12]
- a prohibition against children taking part in performances endangering life or limb[13]
- restrictions on training for performances of a dangerous nature[14]
- restrictions on children going abroad for the purpose of performing for profit.[15]

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[3] These are in Part I: "Prevention of Cruelty and Exposure to Moral and Physical Danger" and Part II: "Employment", in both the CYPA and the CYP(S)A.

[4] CYPA, s.1; CYP(S)A, s.12.

[5] CYPA, s.3; CYP(S)A, s.14. The Scottish offence has since been repealed: see now the Criminal Law (Consolidation) (Scotland) Act 1995, s.12.

[6] CYPA, s.4; CYP(S)A, s.15.

[7] CYPA, s.5; CYP(S)A, s.16. The latter was repealed by the Licensing (Scotland) Act 2005, Sch.7, para. 1. An offence of *selling* alcohol to a child or young person is now to be found in s.102(1) of the 2005 Act, and applies to children aged under 18.

[8] CYPA, s.7; CTP(S)A, s.18.

[9] CYPA, s.11; CYP(S)A, s.22.

[10] CYPA, s.12, CYP(S)A, s.23. These offences apply only where there are more than 100 children at the entertainment: CYPA, s.12(1); CYP(S)A, s.23(1).

[11] CYPA, s.18; CYP(S)A, s.28.

[12] CYPA, s.20; CYP(S)A, s.30.

[13] CYPA, s.23; CYP(S)A, s.33.

[14] CYPA, s.24; CYP(S)A, s.34.

[15] CYPA, s.25: both jurisdictions. The wording of this offence as it applies in England and Wales makes it an offence for a person having "responsibility" for a child to allow him or her to go abroad for the purpose of singing, "playing performing" [*sic*], or being exhibited, for profit, or to take part in a sport, or work as a model, for payment, without having first obtained a licence from a Justice of the Peace. A licence may only be granted where the child is at least 14 years of

Many of these provisions were drafted in language which appears antiquated to modern eyes, and applied different age limits for different offences. Some of these differences are understandable, such as the various age-ranges for restrictions on employment of children, but others seem somewhat arbitrary. Thus in both jurisdictions the offences involving cruelty, begging, and taking part in performances endangering life or limb apply to children aged under 16.[16] Giving alcohol to a child is an offence under s.5 of the CYPA only where the child is less than 5 years of age, but a later statute makes it an offence to sell alcohol to a person whose age is less than 18.[17] Selling tobacco to a child is now an offence under s.7 of that Act where the child is aged less than 18,[18] and 18 is also the age limit which applies to the restrictions on going abroad to perform for profit.[19] By contrast, the restrictions on training for performances of a dangerous nature apply only to children under the age of 12.[20] The English law offence of "exposing a child to a risk of scalding or burning from an open fire grate" originally applied to children aged less than 7 years of age, but the legislation was amended in the 1950s to include "any heating appliance liable to cause injury to a person by contact therewith",[21] and extended to children up to age 11.[22] By contrast, the age limit in the Scottish offence remains at 7, and continues to apply only to an open fire grate. Both of these provisions are mis-described — no offence is committed by "exposure to the risk" alone: the offence is committed only if a child is killed or suffers serious injury.

Wilful neglect: English law

The English law relating to child cruelty and neglect has recently been amended by the Serious Crime Act 2015, discussed in more detail below. The previous law was well summarised by Taylor and Hoyano, and readers are referred to their

age. The version of this provision which applies in Scotland (and in Northern Ireland) refers to a person having "the custody, charge or care" of a child, rather than 'responsibility'.

[16] This also applies to the brothels offence in the CYPA, s.3, which also requires the child to be aged 4 or older. Although for many of the provisions of the CYP(S)A "child" is defined as a person aged under 14 (by virtue of s.110), s.12 applies to children aged under 16.

[17] Licensing Act 2003, s.146(1). See note 7 above, for the current Scottish position.

[18] CYPA as amended by the Children and Young Persons (Sale of Tobacco etc.) Order 2007 (S.I. 2007/767), art. 2(a). For Scotland, see now the Tobacco and Primary Medical Services (Scotland) Act 2010, s.4(1), which makes it an offence to sell a tobacco product or cigarette papers to children under the age of 18.

[19] CYPA s.25 (both jurisdictions).

[20] CYPA s.24; CYP(S)A, s.34(1).

[21] Words inserted by Children and Young Persons (Amendment) Act 1952.

[22] The marginal note to this section remains: "Exposing children under seven to risk of burning".

detailed critique.[23] We offer a brief description of the pre-2015 wording of the English offence primarily to allow comparisons to be drawn with its Scottish counterpart. Legislation had provided an offence in similar terms since 1889.[24] Prior to the 2015 Act, s 1(1) of the CYPA provided:

> "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, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour…".

The maximum penalty for conviction on indictment was 10 years' imprisonment, and on summary conviction to a maximum of 6 months' imprisonment. The 2015 Act makes no changes to these penalties. Where a parent failed to provide adequate food, clothing, medical aid or lodging for a child, this was deemed to amount to "neglect".[25] This meant that the prosecution need not establish that harm was actually caused, or even that it was likely to be caused, to the child. Likewise, where a child under 3 years of age has died due to being suffocated while sharing a bed with a parent who was intoxicated at the time, this too was deemed to be neglect.[26]

Emotional abuse and the campaign for change

In 2012 the charity *Action for Children* established an Independent Advisory Committee on Child Maltreatment. Chaired by Laura Hoyano,[27] the committee undertook a comprehensive review of child neglect in the UK.[28] An earlier report referred to "the English government's definition of child neglect" as:

> "The persistent failure to meet a child's basic physical and/or psychological needs, likely to result in the serious impairment of the child's health or development. It may involve a parent or carer failing to provide adequate

[23] R. Taylor and L. Hoyano, 'Criminal child maltreatment: the case for reform' [2012] Crim. L.R. 871.

[24] For a history of the English legislation see G.R. Sneath, "The legacy of the 'peculiar people': 'wilfully neglects' in the Children's Act 1908; and R. v. Sheppard" (1981) Statute L. Rev. 154.

[25] CYPA, s.1(2)(a).

[26] CYPA, s.1(2)(b).

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[28] *The State of Child Neglect in the UK: An Annual Review by Action for Children in Partnership with the University of Stirling* (*Action for Children*, January 2013), available at: http://dspace.stir.ac.uk/bitstream/1893/11464/1/The%20state%20of%20child%20neglect%20in%20the%20UK.pdf [accessed 3 June 2015].

> food, shelter or clothing, failing to protect a child from physical harm or danger, or the failure to ensure access to appropriate medical care or treatment. It may also include neglect of, or unresponsiveness to, a child's basic emotional needs."[29]

This largely echoes the wording of s 1(1) of the CYPA, as described above, but goes further by including "emotional neglect". *Action for Children* commissioned a study of 31 jurisdictions to assess whether emotional, non-physical, psychological, or mental abuse or neglect (referred to collectively as "emotional abuse") of a child was an offence.[30] It found that this was criminalised in 25 of them. In three other jurisdictions the law was unclear; Scotland was one of these three.[31] Only in England & Wales, and Washington was this not an offence.[32] The position in English law had been made clear in 1981 by the House of Lords in the leading case of *R v Sheppard; L*ord Diplock stated that "neglect" under s.12 referred to a child's physical needs "rather than its spiritual, educational moral or emotional needs".[33] As we shall see below, this aspect of *Sheppard* has been criticised. The Hoynao Committee therefore proposed that s.1 be replaced by a new offence of "child maltreatment". A Private Member's Child Maltreatment Bill[34] proposed a rewording of s 1 of the CYPA:

> "(1) It is an offence for a person with responsibility for a child intentionally or recklessly to subject that child or allow that child to be subjected to maltreatment, whether by act or omission, such that the child suffers, or is likely to suffer, significant harm.
>
> (2) For the purposes of this section:
>
> (a) 'recklessly' shall mean that a person with responsibility for a child foresaw a risk that an act or omission regarding that child would be likely to result in significant harm, but nonetheless unreasonably decided to run that risk;

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[29] HMSO, 2006, cited in: *Neglecting the Issue: Impact, Causes and Responses to Child Neglect in the UK*, at p 4, available at: https://www.actionforchildren.org.uk/media/3232/neglecting_the_issue.pdf [accessed 3 June 2015].

[30] K. Copperthwaite, *Emotional abuse and the criminal law: An international comparison* (*Action for Children*, October 2013) available at: http://www2.actionforchildren.org.uk/media/8158679/international-comparisons.pdf [accessed 3 June 2015].

[31] The others were the Australian Capital Territory, and Canadian Federal Law.

[32] *Emotional abuse and the criminal law: An international comparison,* p. 1.

[33] [1981] A.C. 394 at 404.

[34] Bill 23, 55/3, 2013-14.

(b) 'responsibility' shall be as defined in section 17 [of the Children and Young Persons Act 1933].[35]

(c) 'maltreatment' includes (i) neglect (including abandonment), (ii) physical abuse, (iii) sexual abuse, (iv) emotional abuse (including exposing the child to violence against others in the same household), and (v) exploitation.

(d) 'harm' means the impairment of: (i) physical or mental health, or (ii) physical, intellectual, emotional, social or behavioural development.

(3) Where the question of whether harm suffered by a child is significant turns on the child's health or development, that child's health or development shall be compared with that which could reasonably be expected of a similar child."

The Committee argued that enactment of this provision would leave behind an outdated, Victorian offence that does not permit perpetrators of emotional and developmental neglect to be prosecuted. Replacing the term "ill-treatment" with "maltreatment" would standardise the language used by child protection professionals and would encompass all forms of what was traditionally termed "child abuse and neglect".[36] "Unnecessary suffering" was viewed by the Committee as an archaic term which ought to be replaced by "significant harm".[37] The revised wording would "provide a consistent threshold of when action can be taken across different agencies" and would standardise the language used in civil and criminal law.[38] The Committee concluded that enactment of the new offence would bring English law "into a greater degree of compliance" with the UK's international obligations under the Convention on the Rights of the Child and the European Social Charter, as previously described.[39]

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[35] Section 17(1) provides that the following shall be presumed to have responsibility for a child or young person: '(a) any person who— (i) has parental responsibility for him (within the meaning of the Children Act 1989); or (ii) is otherwise legally liable to maintain him; and (b) any person who has care of him'. According to s.17 (2), a person who is presumed to be responsible for a child or young person by virtue of subsection (1)(a) 'shall not be taken to have ceased to be responsible for him by reason only that he does not have care of him'.

[36] *The Criminal Law and Child Neglect: An Independent Analysis and Proposal for Reform*, p.12.

[37] It may be noted that the term "unnecessary suffering" is used in relation to cruelty to animals: the Animal Welfare Act 2006, s 4 provides that: "A person commits an offence if … an act of his, or a failure of his to act, causes an animal to suffer… and … the suffering is unnecessary." Section 4(3) lists considerations to which the court should have regard when determining whether suffering is unnecessary. These include: whether the suffering could reasonably have been avoided or reduced, whether the conduct which caused the suffering was for a legitimate purpose, such as to benefit the animal.

[38] *The Criminal Law and Child Neglect,* p.12.

[39] See notes 3 and 4, above.

Although the Child Maltreatment Bill failed to complete its passage through the Westminster Parliament, amendments were made to the CYPA by s. 66 of the Serious Crime Act 2015. These were designed to "clarify the Children and Young Persons Act 1933 to make it explicit that cruelty which is likely to cause psychological harm to a child is an offence".[40] The amended s.1 now provides (additions in italics):

> "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* …".[41]

The deeming provision in s.1(2)(b) have also been amended:

> "where it is proved that the death of a child under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the child) while the child was in bed with some other person who has attained the age of sixteen years, that other person shall, if he was, when he went to bed *or at any later time before the suffocation*, under the influence of drink *or a prohibited drug*, be deemed to have neglected the child in a manner likely to cause injury to his health."

New sections (ss.2A and 2B) provide:

> "The reference in subsection (2)(b) to the infant being 'in bed' with another ('the adult') includes a reference to the infant lying next to the adult in or on any kind of furniture or surface being used by the adult for the purpose of sleeping (and the reference to the time when the adult 'went to bed' is to be read accordingly).
>
> A drug is a prohibited drug for the purposes of subsection (2)(b) in relation to a person if the person's possession of the drug immediately before taking it constituted an offence under section 5(2) of the Misuse of Drugs Act 1971."

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[40] see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/317823/Queens_Speech_lobby_pack_FINAL.pdf, p.6 and p. 71 [accessed 3 June 2015].

[41] Section 66 was brought into force on 3 May 2015 by The Serious Crime Act (Commencement No 1) Regulations 2015, SI 2015/820, Reg. 2(k).

This closes some of the loopholes in the previous law and includes emotional abuse within the offence. However, unlike the Child Maltreatment Bill, it continues to use the term "wilfully". The Hoyano Committee had argued that replacing this with "intentionally or recklessly" would remove the difficulties in applying "wilfully" to what is usually an omission, rather than an act.[42] The proposal was supported by social workers and police officers, who reported that "the term 'wilful' is a significant barrier to prosecuting cases of neglect, being very difficult to prove and creating confusion amongst some officers".[43]

The problematic nature of "wilful neglect": English law

At first blush it might be thought that s.1 makes it an offence "wilfully to assault", or "to ill-treat", or "to neglect", or "to abandon", a child, or to expose a child to danger. However it has been held that the adverb "wilfully" qualifies each of these verbs. This was the interpretation given by the House of Lords in *Sheppard*.[44] At the age of 16 months, Martin Sheppard had died from hypothermia and malnutrition. He had suffered from gastroenteritis and vomiting for several days and had been unable to eat. His life may have been saved had medical attention been sought by his parents, but they were described as being "poor" and "of low intelligence". It seems that they did not appreciate how ill their son was, nor that they ought to have taken him to a doctor. Since a failure to provide medical aid comes within the deeming provisions, this amounted to neglect, and at issue was whether this neglect was "wilful". The trial judge directed the jury that the test was an objective one: would a reasonable parent, with knowledge of the facts known to the accused, have appreciated that failure to take the child to a doctor was likely to cause the child unnecessary suffering or injury to health? The parents' convictions were upheld by the Court of Appeal, but quashed by the House of Lords. According to Lord Diplock:

> "The actus reus in a case of wilful neglect is simply a failure, for whatever reason, to provide the child whenever it in fact needs medical aid with the medical aid it needs. Such a failure as it seems to me could not be properly described as 'wilful' unless the parent *either* (1) had directed his mind to the question whether there was some risk (though it might fall far short of a probability) that the child's health might suffer unless he were examined by a doctor and provided with such curative treatment as the examination might reveal as necessary, and had made a conscious decision, for whatever reason, to refrain from arranging for such medical examination; *or* (2) had

[42] *The Criminal Law and Child Neglect*, p.11.

[43] *The Criminal Law and Child Neglect*, p.14.

[44] [1981] A.C. 394.

so refrained because he did not care whether the child might be in need of medical treatment or not."[45]

It followed that:

> "The proper direction to be given to a jury on a charge of wilful neglect of a child … by failing to provide adequate medical aid, is that the jury must be satisfied (1) that the child did in fact need medical aid at the time at which the parent is charged with failing to provide it (the actus reus) and (2) either that the parent *was aware* at that time *that the child's health might be at risk* if it were not provided with medical aid, *or that the parent's unawareness of this fact was due to his not caring* whether his child's health were at risk or not (the mens rea)."[46]

Taylor and Hoyano have suggested that this equates wilfulness with advertent or subjective recklessness.[47]

The problematic nature of "wilful neglect": Scottish law

According to Copperthwaite, prior to the 2015 Act's amendments, s.12 of the CYP(S)A was "very similar" to s 1 of the CYPA "with the actus reus and mens rea being identical."[48] While it is true that the wording of the offences was (and remains) similar, it is not quite accurate to say that they have the same actus reus and mens rea – at least as these have been interpreted by the courts. Section 12(1) provides:

> "If any person who has attained the age of sixteen years and who has parental responsibilities in relation to a child or to a young person under that age or has charge or care of a child or such a young person, wilfully … ill-treats, neglects, abandons, or exposes him, or causes or procures him to be … ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offence …".

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[45] [1981] A.C. 394 at 404-405 (emphases in original).

[46] [1981] A.C. 394 at 408 (emphases added).

[47] R. Taylor and L. Hoyano, 'Criminal child maltreatment: the case for reform' [2012] Crim. L.R. 871 at 876. The definition of "wilfully" in *Sheppard* has been applied to cases of wilful neglect of adults, under the Mental Capacity Act 2005, s.44: *R v Turbill* [2013] EWCA Crim 1422; [2014] Crim L R 388. Under the 2005 Act, however, there is no need for the Crown to prove that the neglect was "in a manner likely to cause [the adult with incapacity] unnecessary suffering or injury to health": see *R v Patel* [2013] EWCA Crim 965.

[48] K. Copperthwaite, 'Emotional abuse and the criminal law: An international comparison' (*Action for Children*, October 2013) at p. 14.

There are some minor linguistic differences between the offences in the two jurisdictions, such as the use of the word "infant" to refer to a child under the age of three in s.1(2)(b) of the English legislation, and "responsibilities" (England) rather than "parental responsibilities" (Scotland). Notably, "assault" no longer forms part of s.12, but has been retained in s.1.[49] The same maximum penalties apply in both jurisdictions, but it is explicitly provided in the Scottish legislation that a conviction under this section may be returned instead of a conviction for common law culpable homicide.[50]

Section 12 has been interpreted in several reported criminal cases, and there are also some non-criminal cases based on referrals of children to the Children's Hearings System. The latter cases are of interest since proof that an offence under s.12 has been committed – albeit on the civil law, rather than the criminal law, standard of proof – establishes a ground for referral, and the case is remitted back to a children's hearing for consideration of what measures require to be taken to safeguard the child. Thus the criminal law regime cannot be viewed in isolation from the Children's Hearings System. The Children's Hearings (Scotland) Act 2011 provides that there is a ground for referral if "the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired due to a lack of parental care".[51] Lack of parental care can take a wide variety of forms, thus emotional abuse can be considered in a children's hearing. An alternative ground for referral is that any offence listed in Sch.1 to the Criminal Procedure (Scotland) Act 1995 has been committed in respect of the child, and this includes an offence under s.12 of the 1937 Act.[52] However, that breach of s.12 and a lack of parental care are included as separate grounds for referral suggests that the two are not necessarily synonymous.

"Neglect"

The *Oxford Dictionary* suggests that one meaning of "to neglect" is to "fail to do something".[53] This is the approach taken in the leading Scottish text, Gordon's *Criminal Law*, which states:

[49] The words "assaults," following "wilful" and "assaulted," prior to "ill-treated" were repealed by the Criminal Justice (Scotland) Act 2003 Pt. 7, s.51(5)(a). Section 51 of that Act deals with the physical punishment of children. For a recent English case involving a conviction under s.1 of the CYPA 1933 for an assault, see *R v M* (unreported, 21 March 2014) in which the accused had beaten his 8-year-old stepson with a belt and a cane.

[50] Children and Young Persons (Scotland) Act 1937 s.12(4). For a recent case in which the appellant had been charged with murder, or alternatively with a breach of s.12 see *Hainey v HM Advocate* [2013] H.C.J.A.C. 47.

[51] Children's Hearings (Scotland) Act 2011, s.67(2)(a).

[52] Ibid, s.67(2)(b).

[53] See http://www.oxforddictionaries.com/definition/english/neglect [accessed 3 June 2015].

> "Neglect is not a form of negligence; to neglect to do something is simply to omit to do it, as is shown by sentences such as 'He neglected to attend the meeting because he preferred to go to the cinema instead'."[54]

Equating "to neglect" with "to omit" may be somewhat misleading, however, since it is more common for "neglect" to be used where there is an element of fault, and often of condemnation by others. Even in Gordon's example, there is a suggestion in the use of the word neglect that the cinemagoer ought to have attended the meeting, i.e. that he was under some sort of duty to attend, and may be criticised for having failed to do so. The other definitions provided by the *Oxford Dictionary* are "fail to care for properly" and "not pay proper attention to; disregard". Similarly, another online dictionary offers:

> "The word *neglect* comes from the Latin verb *neglegere*, which means 'disregarded.' You can neglect to do your chores, meaning fail to do them, but this word is usually reserved for cases when you willingly refuse to care for something appropriately…'.[55]

As with the English offence, the Scottish legislation specifies that a failure to provide adequate food, clothing, medical aid or lodging for a child is deemed to be neglect,[56] as is the death of a child under 3 years of age due to being suffocated while sharing a bed with an intoxicated parent.[57] The first of these deeming provisions was at issue in *Henderson v Stewart*[58] (1954) in which a father was acquitted of wilful neglect of his one-year old child by failing to provide him with adequate food and clothing. The prosecution appealed on the basis that the trial judge had erred in finding that a "mere failure to provide food and clothing"[59] was insufficient to merit a conviction. The appeal court accepted the Crown's argument that the very purpose of the deeming provision was to ensure that such a failure would suffice for conviction, so long as the conduct was wilful, in the sense of "deliberate". Thus a failure by a parent to provide these basic necessities of life is to be treated as neglect, and if done deliberately, is "wilful neglect". This interpretation was also taken in *Clark v HM Advocate,*[60] (1968) discussed further, below.

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[54] G.H. Gordon, *Criminal Law* (3rd edn edited by M.G.A. Christie, Vol I, 2000), para 7.34.

[55] See http://www.vocabulary.com/dictionary/neglect [accessed 3 June 2015].

[56] CYP(S)A, s.12(2)(a).

[57] CYP(S)A, s.12(2)(b).

[58] 1954 J.C. 94.

[59] 1954 J.C. 94 at 97.

[60] 1968 J.C. 53.

Where the deeming provisions do not apply, the court has to determine whether there has been neglect. This involves an assessment of the likelihood that the child would experience "unnecessary suffering or injury to health" as a result of the failure of care. Lord Diplock in S*heppard* had suggested, albeit obiter, that "likely" should "be understood as excluding only what would fairly be described as highly unlikely."[61] It has been noted that likely "is a word capable of various meanings", but that "the ordinary meaning of 'likely' is 'more probable than not'".[62]

A different approach from that in *Sheppard* was taken by the Scottish appeal court in the conjoined cases of *H v Lees, D v Orr* (1993).[63] In the first of these cases, H had been convicted of the wilful neglect of her nine month old baby by being drunk when in charge of the child. While no actual harm had been caused to the child, who was asleep at the time, the sheriff found that the degree of the accused's intoxication had created a situation which was likely to cause unnecessary suffering or injury to the child. In the second case, D had left his 13-year-old daughter alone in the family home one evening for about six hours. There was no telephone in the house. No physical harm had resulted. According to Lord Justice General Hope, in cases such as these which are not covered by the deeming provisions, the appropriate standard is what a reasonable parent, in all the circumstances, would regard as necessary to provide proper care and attention for a child.[64] He noted that "parents may take widely varying views about what constitutes proper care and attention for their children."[65] It followed that it was "not possible to set any absolute standard as to what may amount to neglect. This must depend upon the circumstances."[66] In neither case had the trial judge made a finding that the child in question was likely to be caused unnecessary suffering or injury "in any specific and substantial respect".[67] Both convictions were quashed.

The judgment in these conjoined appeals has left Scots law in a state of some uncertainty: s.12 applies to children under 16, thus it seems that a parent who leaves a child younger than this alone in the family home may be breaking the law,

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[61] [1981] A.C. 394 at 408.

[62] *Ames and McGee v The Spamhaus Project Limited* [2015] E.W.H.C. 127 at para [53]. The court in that case referred to the dictum in *Cream Holdings Ltd and Others v Banerjee and Another* [2004] 1 A.C. 253, at 259, per Lord Nicholls of Birkenhead**:** "As with most ordinary English words 'likely' has several different shades of meaning. Its meaning depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from 'more likely than not' to 'may well'."

[63] 1993 J.C. 238.

[64] 1993 J.C. 238 at 245.

[65] 1993 J.C. 238 at 245.

[66] 1993 J.C. 238 at 245.

[67] 1993 J.C. 238 at 246.

but only where this exposes the child to a substantial risk of danger to health. How long a child under the age of 16 may be left alone is unclear. This is likely to depend on the age of the child. In *M v Normand* (1995)[68] the appellant had gone shopping in Glasgow city centre, leaving his 18-month old son unattended in the backseat of a car. The child was initially asleep, and had a blanket for warmth, the doors of the car were locked and the windows were closed. A traffic warden spotted the child and called the police. Forty-five minutes passed from when the warden noticed the child until M returned. Neither the traffic warden nor the police noted the child to be distressed when he awoke. The trial judge had found that by leaving the baby unattended, M had

> "exposed the child to various risks, including the sudden illness of the child while alone, a break-in to the car or its theft with the child inside, another vehicle colliding with the car or the child being taken by an evilly disposed or perverted person. In these circumstances, the appellant wilfully neglected the child in a manner likely to cause him unnecessary suffering or injury to his health."[69]

However, in quashing the conviction Lord Hope noted that

> "the question is whether the neglect itself was likely to lead to injury to health or to unnecessary suffering. That is the critical point in the present case to which we have directed our attention. It seems to us that the various events referred to in [the sheriff's findings in fact] are events which on the evidence in this case were speculative. They were not events which were related to any particular period of time during which the child was left alone in the car. They might have occurred at any time, and the risk that they might occur was not created by the period of the appellant's absence. They were, therefore, matters which in our opinion the sheriff ought not to have taken into account in considering whether this was neglect of the child in a manner likely to cause unnecessary suffering or injury to his health."[70]

It might, however, be suggested that in any case of alleged neglect where no harm has actually been caused, the risks to the child are always "speculative", to some extent.

"Wilfully"

Whether the accused has been charged under the deeming provisions or not, any neglect of a child must have been committed "wilfully". In *H v Lees, D v Orr*, Lord Hope noted that:

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[68] 1995 S.L.T. 1284.

[69] 1995 S.L.T. 1284 at 1285.

[70] 1995 S.L.T. 1284 at 1286.

> "No question has been raised in either of these cases as to whether what was done, if it was neglect of the child, was done wilfully. It is not suggested that the appellants were unable to appreciate what they were doing at the time." [71]

He referred to *R v Senior*, [72] an English case from 1899 in which Lord Russell of Killowen C.J. defined "wilfully" to mean "that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it."[73] In common parlance, however, "wilfully" is often used to describe an act or omission which "is done with a consciousness of the evil which is likely to result, and we may often mean to imply that there is an intention to produce that evil."[74] In *Sheppard,* Lord Keith referred to "wilfully" as "a word which ordinarily carries a pejorative sense."[75] If the objective test advocated by Lords Hope and Russell is taken, however, then a parent could be guilty of wilful neglect by deliberately doing something which the hypothetical reasonable parent would not do, or deliberately omitting to do something which this hypothetical parent would do. This is a formulation which is commonly encountered in the tort/delict of negligence, but is a questionable approach in determining criminal liability.[76]

A distinction needs to be made at this point between "advertent" and "inadvertent" recklessness. Advertent recklessness occurs where the accused is aware of a risk of harm, but nevertheless takes that risk by failing to act in circumstances in which a reasonable person would have acted to avoid it. Inadvertent recklessness applies where the accused fails to act to avoid a risk which a reasonable person would have recognised, even though the accused may not even have considered the possibility of there being such a risk.[77] Inadvertent

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[71] 1993 J.C. 238 at 243.

[72] [1899] 1 Q.B. 283. The charge was a breach of the Prevention of Cruelty to Children Act 1894, s.1, which made it a misdemeanour where a person with custody of a child "wilfully … neglects … such child … in a manner likely to cause such child … injury to its health".

[73] [1899] 1 Q.B. 283, at 290–291.

[74] J.A. Andrews, "Wilfulness: a lesson in ambiguity" (1981) *Legal Studies* 303.

[75] [1981] A.C. 394 at 418.

[76] A point which was also made by Lord Diplock in *R v Sheppard* [1981] A.C. 394, discussed further below.

[77] See *R v Caldwell* [1982] A.C. 341: "reckless" could include "not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was" (at 353-354, per Lord Diplock). This case was later over-ruled in *R v G and Another* [2003] U.K.H.L. 50, the House of Lords holding that a person is reckless in respect of a consequence of an act only if aware of a risk that this consequence will occur and in the circumstances known to the accused, it is not reasonable to take such a risk. For the meaning of recklessness in Scottish criminal law see J Chalmers, "*Leiser* and misconceptions" (2008) SCL 1115: The author suggests that " the Scottish

recklessness is generally insufficient to form the basis of criminal liability in English law, whereas it may well be sufficient in Scottish law. In many cases in which parents have been charged with "wilfully neglecting" their children, there is no intention to harm the child, nor even advertent reckless. There may, however, have been inadvertent recklessness: the parent failed to appreciate that there was a risk of harm at all, where the reasonable parent would be aware of such a risk. While in English law a conviction for wilful neglect can only be sustained if the defendant was aware that some harm might be caused to the child, as we have seen from the cases of *Lees* and *Orr,* in Scots law a conviction can be sustained if the accused's act or omission was an intentional one and, *viewed objectively*, amounted to "neglect", i.e. - an omission of the care which a reasonable parent would have provided. This approach is summarised in Gordon's *Criminal Law*:

> "Neglect may be negligent or intentional: the man who neglects his children by deliberately keeping them short of food and clothing has neglected them wilfully; the man who keeps them short of food and clothing because he is too feckless to look after them properly has neglected them negligently, or so one would expect. But the offence of wilful neglect of a child in a manner likely to cause unnecessary suffering under the Children and Young Persons (Scotland) Act 1937, s.12, is committed by neglect to seek medical attention or provide food and clothing, *whether or not the accused was aware of the needs of the child or the risk involved in his neglect, provided that the failure itself was not inadvertent but intentional.*"[78]

In support of this proposition Gordon cites *Clark v HM Advocate* (1968),[79] in which parents were charged on indictment with wilful neglect by failing to provide their daughter with adequate food and medical aid, leading to her death. Such a failure is deemed by the Act to amount to neglect, as previously noted. At the trial the couple's solicitor sought to lead evidence from a psychiatrist to the effect that the accused were only partially responsible for their actions. The prosecution's objection to this evidence was sustained by the Sheriff, and the couple were convicted. They appealed on the grounds that the doctor's evidence ought to have been allowed, arguing that in a charge under s.12 the prosecution had to prove both neglect *and* wilfulness and therefore the accused's state of mind was relevant to wilfulness. The appeal court considered that this argument proceeded "on a

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courts have not in fact established whether the relevant standard [in assessing "recklessness"] is subjective or objective, and recent authority suggests that it may in fact be subjective" (at 1117) .

[78] Gordon, *Criminal Law*, para 7.31 (footnotes omitted, emphasis added). The qualification (i.e. from *"*But the offence…*")* that a different approach to "neglect" should be taken to the offence of wilful neglect of a child under s.12 did not appear in the first edition of *Criminal Law,* but only in editions post-dating *Clark*. It is interesting to note that Counsel for the appellants did not refer the court to the first edition of Gordon's *Criminal Law* but nevertheless Gordon's original interpretation was rejected *ex proprio motu*. For an account of the initial reception *Criminal Law* received in the Scottish courts, see C.H.W. Gane, 'Sir Gerald Gordon: An Appreciation' in J. Chalmers, F. Leverick and L. Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010).

[79] 1968 J.C. 53.

confusion between the two ingredients of such an offence:- (a) that there should be neglect…which is wilful…; [i.e. deliberate] and (b) that this should be in a manner likely to cause the child unnecessary suffering or injury to health."[80] Lord Justice Clerk Grant concluded:

> "while proof of wilfulness is essential to establish head (a), the test under head (b) is an objective one. That test is whether the neglect was 'in a manner *likely* to cause…' and not whether it was 'in a manner *intended* to cause…'. It is not suggested that here that the applicants did not appreciate the nature of their acts or omissions or that these were not deliberate and intentional. The argument is … to the effect that the *consequences* were not intended or foreseen."[81]

The court refused the appeal and sustained the convictions. Thus the appropriate test was not whether the person charged with a breach of s.12 was aware that the neglect was likely to cause the child harm, but rather that the accused intended to behave in a certain way, and that behaviour, *viewed objectively*, amounted to neglect of the child. It was no defence that the harm ultimately suffered by the child owing to that neglect was not foreseen by the accused at the time of its perpetration.

The House of Lords decided *Sheppard*[82] (discussed above) 12 years after *Clark*. Although *Clark* was relied upon by the prosecution in *Sheppard*, Lord Diplock did not refer to it in his speech. This might be explained by the different approach taken in England to the concept of advertent and inadvertent recklessness, as previously explained. According to Lord Diplock:

> "It does not depend upon whether a reasonably careful parent, with knowledge of those facts only which such a parent might reasonably be expected to observe for himself, would have thought it prudent to have recourse to medical aid. The concept of the reasonable man as providing the standard by which the liability of real persons for their actual conduct is to be determined is a concept of civil law, particularly in relation to the tort of negligence; the obtrusion into criminal law of conformity with the notional conduct of the reasonable man as relevant to criminal liability, though not un-known … is exceptional, and should not lightly be extended …".[83]

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[80] 1968 J.C. 53 at 56.

[81] 1968 J.C. 53 at 57 (emphases in the original). This case was overruled in *Ross v HM Advocate* 1991 J.C. 210, to the extent that it had held that an accused could have *mens rea* even if his mind was so affected by a non self-induced and unforeseeable factor that the result was a total loss of control over his actions.

[82] [1981] A.C. 394.

[83] [1981] A.C. 394 at 403-404.

In England and Wales, the direction laid down by Lord Diplock in *Sheppard* remains good law whereas in Scotland both *Sheppard* and *Clark* have been influential.

Scottish Case Law

Clark was applied in *Kennedy v S* (1986)[84], an appeal to the Second Division of the Court of Session from a decision of a sheriff in a children's referral – i.e. a civil law case. The father and stepmother of two children had been drinking and arguing, resulting in the stepmother ordering the children out of the house. The father told the children to go to their grandfather's house but the stepmother threatened to kill the children if they went there. The children went to their grandfather's house notwithstanding this threat and were later collected from there by their father. On seeing the children returning, the stepmother brandished a dog lead at them and indicated that she was going to assault them with the lead. The children then ran away and hid in a cellar under the stairs in a close. The next day, the father reported the children as missing. The children were discovered by the police that evening. They were cold and hungry but generally well-nourished and clean, and the police noted the family home to be clean and tidy. The reporter to the children's panel referred the children to a children's hearing with the aim of proving, *inter alia*, that they had been neglected in terms of s.12. The sheriff did not find that ground to be established and the reporter appealed to the Inner House. The leading judgment was delivered by Lord Hunter who, in reversing the decision of the sheriff and allowing the appeal, noted:

> "I would have thought it plain on the basis of the findings-in-fact in the present case that the reporter had succeeded in establishing the commission by the father of an offence under the said provision of sec. 12 of the Act of 1937 in respect of both children. … Judged by the standard of the steps which a reasonable parent would take, according to what is usual in the ordinary experience of mankind, the actions of the father… amounted, in my opinion, to neglect under both subsec. (1) and also the deeming provision of subsec. (2)… Moreover I have no doubt that … the neglect was wilful."[85]

The Lord Justice Clerk (Lord Ross) added:

> "The sheriff appears to have concluded that there had been no neglect of the children because he had found in fact that the children were generally both well nourished and clean … In my opinion, the fact that the children were well nourished and clean does not justify a conclusion that they were not neglected … Children may give the appearance of being clean and well

[84] 1986 S.C. 43.

[85] 1985 S.C. 43 at 49.

fed and yet may have been the victims of neglect within the meaning of the statutes."[86]

Kennedy is a case where a finding of neglect was made on the basis of non-physical harm; arguably, the children experienced emotional harm only. It may be, however, that conviction was due to the likelihood that the children *could* have sustained physical injuries.

The test in *H v Lees* – whether the parent's acts or omissions were "likely to cause unnecessary suffering or injury to health" – was applied in both *W v Clark* (1999)[87] and *M v Aitken* (2006).[88] In the former, three children aged eight, five and two had been left in their home unsupervised from 11.30 am until 8.30 pm. The police had arrived earlier in the day and were met by a vicious dog and found a sickle lying in the hall and dog faeces on the hall carpet. There was some basic food in the fridge which could have been eaten without preparation but the rest would have required cooking. There was no baby food in the fridge and the children did not know the whereabouts of their parents. The appeal proceeded on the basis that the trial judge had not been entitled to find that the children were "likely [to be caused] unnecessary suffering or injury to health". The appeal court upheld W's conviction on the basis that there were serious deficiencies in the way that the children had been left and that the trial judge had been entitled to convict, taking into account the unpredictability of the dog's behaviour, the faeces on the carpet and the danger which could have materialised had a child attempted to cook. In *Aitken,* the accused was convicted under s.12 by having wilfully exposed her grandson in a manner likely to cause him unnecessary suffering or injury to health. She had taken him to a sex offender's house and allowed the child to sleep in a bed with the sex offender and herself, while she was drunk. There was a hunting knife in a sheath and a bucket containing excrement close to the bed. The conviction was upheld on appeal.

Several of the above cases were considered in the civil case of *S v Authority Reporter* (2012).[89] The Reporter to the children's hearing had referred the case to the sheriff for a finding as to whether grounds of referral had been established.[90] The child had sustained a fracture to his skull when his mother threw him onto a bed which resulted in him bouncing off the bed and his head hitting a piece of furniture. The sheriff held that the grounds of referral had been established, but

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[86] 1985 S.C. 43 at 49-50.

[87] 1999 S.C.C.R. 775.

[88] 2006 S.L.T. 691.

[89] 2012 S.L.T. (Sh. Ct.) 89.

[90] This was in terms of the Children (Scotland) Act 1995 s.52(2)(d), (repealed by the Children's Hearings (Scotland) Act 2011 Sch.6), which provided that the question of whether a supervision order in respect of a child was necessary would arise if, *inter alia*, any of the offences listed in the Criminal Procedure (Scotland) Act 1995 Sch.1 to had been committed. An offence under s.12 of the 1937 Act was one of the Sch.1 offences in the old Children's Hearings regime and remains so in the new regime established by the 2011 Act.

that while the act of throwing the child was intentional, the mother had not intended to injure the child, as she did not foresee that the child would bounce off the bed. The mother appealed to the Sheriff Principal on the grounds that the sheriff's finding that there was no intention to injure the child negated the *mens rea* required for an offence under s.12. Senior counsel for the appellant argued that the court should follow Lord Diplock's *dicta* in *Sheppard,* whereas the reporter argued that the correct test was that which was established in *Clark*. Sheriff Principal Stephen QC allowed the appeal and applied the test in *Sheppard*:

> "The reporter strongly urged me that *R* v *Sheppard* forms no part of Scots law. Whereas that may be correct in a narrow sense it cannot be proper in a case involving a child to pay no regard to the *dicta* of a majority in the House of Lords dealing with an equivalent offence … Applying the Diplock test the sheriff was not entitled to find the *mens rea* on the mental element of this offence established in so far as he could not establish wilful *in the sense of the mother being aware of the risk* of what she was doing to the child or that she was *not caring about the risk*. This is clearly negatived by the sheriff's own findings."[91]

It should be noted, however, that this is not an authoritative case so far as the criminal law is concerned, being the decision of a Sheriff Principal in a civil appeal.

A different approach was taken by Sheriff Reid in the criminal case of *Dunn v McDonald* (2013).[92] The charge of wilful neglect included several allegations of omissions of care on the part of the parents of a baby during the first four months of his life: failing to clothe the child adequately, failing to provide a clean home, and failing to administer medication in prescribed doses. It was not averred that the neglect had caused the child any suffering or injury to his health. At the close of the prosecution case, the defence submitted that the Crown had not proved that any such neglect was "wilful," and that the definition which the sheriff should employ for that term ought to be that favoured by the majority of the House of Lords in *Sheppard,* and followed in *S v Authority Reporter*. Sheriff Reid declined to follow either of these cases and took the view that he was bound by the decision in *Clark*.[93] He also noted that there had been various opportunities for the Scottish appeal court to over-turn, cast doubt on, or distinguish *Clark* had it seen fit to do so, but that it had declined to do so. In an impassioned end to his discussion of why he was bound by, and indeed preferred, the decision in *Clark*, his Lordship stated that s.12

> "is designed to protect the weakest, most helpless and vulnerable in our society from parents (or those having care of a child) who deliberately fail to provide proper care and attention to that child, and thereby place the child at real risk of unnecessary suffering or injury to health. The offence

[91] 2012 S.L.T. (Sh. Ct.) 89 at para.149 and para. 152 (emphases added).

[92] (2013) S.L.T. (Sh. Ct.) 34. The case is also reported as *PF Glasgow v McDonald and Morrison.*

[93] (2013) S.L.T. (Sh. Ct.) 34 at para.51.

> is committed whether or not the parent *intended* to put the child at risk, or *foresaw* that the child may be put at risk. If the offence is committed only by those who intend, or foresee, the objectively-foreseeable consequences of their own neglect then those children who have the misfortune to find themselves in the care of a parent or guardian who is too naïve, too immature, too rapt by misplaced religious zeal, or just too feckless, stupid or ignorant, to appreciate the consequences of their own dereliction of duty, would fall out with the protective arm of the law. I cannot conceive that it was the intention of Parliament to abandon those unfortunate children to their fate."[94]

In *The Principal Reporter v J. P. N., C. G* (2014)[95] Sheriff Jamieson referred to both *Dunn v McDonald* and *S v Authority Reporter.* Noting that neither case was binding on him, he nonetheless stated a preference for "Sheriff Reid's thorough analysis of the authorities and respectfully agree with the views of the law as expressed by him in *Dunn v McDonald* over the approach adopted by the sheriff principal in *S v Authority Reporter*." [96] Another ~~The most~~ recent ~~Scottish~~ case is *B v Murphy* (2014)[97] in which the appellant had gone for a shower, leaving her 9 month old daughter alone in a baby-walker in the living room, for about 10 minutes. The child's back, neck, shoulder and chest were seriously burned by a hot drink which the appellant had left in the room. The case is a somewhat unsatisfactory one, since the charge was badly worded, and the judgment of the appeal court is rather short.[98] The charge libelled that B had wilfully caused the baby unnecessary suffering or injury to health. On appeal, it was argued that under s.12 it was neither relevant nor necessary to show that the accused had intended to cause unnecessary suffering or injury, rather it was the behaviour which, judged objectively, amounted to ill treatment, neglect, etc that required to be "wilful". This plea to the relevancy of the charge ought to have been taken at an earlier stage in the proceedings,[99] and the appeal court therefore gave it short shrift. The appellant then argued that given the way the charge had been libelled, the prosecution had to prove that B had indeed "wilfully caused" the injury, but that the trial judge had found only that there had been inadequate supervision of the child. The appeal court accepted that the charge was "not a model of clarity",[100]

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[94] (2013) S.L.T. (Sh. Ct.) 34 at para.63.

[95] 2014 WL 4636822.

[96] 2014 WL 4636822, at para 201, footnote 74.

[97] [2014] H.C.J.A.C. 56. The case is also reported as *FB v PF Aberdeen.*

[98] The court discussion and decision comprises 835 words.

[99] Criminal Procedure (Scotland) Act 1995, ss.144(4) and (5) provide that: "Any objection to the competency or relevancy of a summary complaint or the proceedings thereon … shall be stated before the accused pleads to the charge or any plea is tendered on his behalf" and that: "No [such] objection … shall be allowed to be stated or issued at any future diet in the case except with the leave of the court, which may be granted only on cause shown."

[100] [2014] H.C.J.A.C. 56 at para [10].

but nevertheless held that it was one of neglect, as a result of which the child suffered a scalding injury from hot liquid. The Crown cited the objective test of "neglect" in *Clark:* "the want of reasonable care, that is the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind."[101] Cases in which no harm had befallen the child required to be distinguished from those in which harm had resulted. In the former it was obvious why a specific finding that the neglect itself was likely to lead to injury to health or to unnecessary suffering was required, whereas in cases of the latter type this could be inferred from the actual occurrence of harm resulting from the neglect. This approach was adopted by the appeal court.

It seemed, then, that in several Scottish cases, "wilfully" had been interpreted to mean "intentionally" in relation to the behaviour (which is deemed (under the terms of the Act), or had been assessed (by the court) to be "neglect". In other words, if the accused had acted or, more commonly failed to act, and that act or omission amounted to "neglect" then it was sufficient that the accused intended *the behaviour* – rather than intended the consequences which in fact occurred/could have occurred, as a result of that behaviour. Yet in common parlance, to say that X "wilfully neglected" her child surely means that she took a conscious decision to behave in a certain fashion, well aware of the possible adverse consequences to the child.

The most recent case to have considered the wording of s.12 is *M v Locality Reporter* (2015).[102] Although this concerned a finding of ill-treatment rather than neglect, it explored in some detail the meaning of "wilful", with counsel for the appellant arguing that *Clark* had been wrongly decided. M was the father of infant twins. He had lifted each of them with one hand, on more than one occasion, causing several fractures to their ribs. The Inner House refused his appeal: since the action of lifting the twins had been deliberate, and was likely to cause, and had caused, unnecessary suffering, wilful ill-treatment had been established. According to Lord Carloway the purpose of the legislation and its predecessors was to protect children from cruelty:

> "The term 'wilful' necessarily serves to exclude accidental or inadvertent conduct, as opposed to the accidental or inadvertent consequences of deliberate conduct, from the scope of the offence. It is unnecessary, and contrary to the statutory purpose, to restrict the scope of the offence by reference to the subjective awareness of the individual of the harmful nature of the conduct in question." [103]

Noting that *Clark* had been settled law for almost half a century, the Lord Justice-Clerk stressed the undesirability of the Inner House attempting "to trespass on

[101] 1968 J.C. 53 at 56, cited at para [7] of *B v Murphy* [2014] H.C.J.A.C. 56.

[102] [2015] C.S.I.H. 58.

[103] [2015] C.S.I.H. 58 at para [51].

matters of criminal law", thus any departure from *Clark* was a matter for the legislature.[104]

Although concurring with Lord Carloway, Lords Malcolm and McGhie each took a rather different approach. For Lord Malcolm, the issue was whether the appellant's behaviour had amounted to "ill-treatment". He cautioned that:

> If one does not give proper weight to the need for ill-treatment (or in another case, neglect) in the sense of cruel conduct towards children in violation of a parental or equivalent duty, there is at least a risk of criminalising deliberate conduct which falls short of ill-treatment (or neglect), if it is foreseeable that harm will be caused. [105]

He gave an example of a parent who deliberately grabbed her child's arm to stop the child from running about. If this resulted in dislocation of the child's shoulder, Lord Malcolm suggested that this would not fall within s.12, even if it were proven that injury was likely, because it would not be "ill-treatment in the sense intended by Parliament."[106]

Lord McGhie drew a distinction between what he called "wilfully acting" and "wilfully offending".[107] He gave the example of the making of a false entry in a register: a person who deliberately writes a name on a particular form acts wilfully, but there is no offence of making a false entry if the writer does not realise that he has written the wrong name. In such a case he "has not wilfully made a false entry". [108] It is submitted that the terminology of "wilfully offending" is apt to confuse, since it may tend to suggest that it is an essential component of criminal liability for an accused person to know that what she is doing is in fact an offence. Be that as it may, Lord McGhie has drawn an important distinction between what might be referred to as a "basic intention" and an "ultimate intention". In his example, an innocent accused has the basic intention (to write the name on the form), but lacks the ultimate intention (to make a false entry), and the latter intention is a pre-requisite to criminal liability. Lord McGhie concluded that "the majority of the court [in *Clark*] never contemplated the proposition that a finding of wilful ill-treatment could be made without any regard to the accused's intention."[109] Expressing dissatisfaction with "the current approach to the

[104] [2015] C.S.I.H. 58 at para [52].

[105] [2015] C.S.I.H. 58 at para [64].

[106] [2015] C.S.I.H. 58 at para [64].

[107] [2015] C.S.I.H. 58 at para [68].

[108] [2015] C.S.I.H. 58 at para [68].

[109] [2015] C.S.I.H. 58 at para [73].

provisions of section 12", he suggested that the legislature reconsider the policy behind this offence.[110]

Recommendations for reform

Many of the offences in the CYP(S)A are antiquated and fail to afford adequate protection for children. These should be repealed and re-enacted in clearer and more appropriate language.[111] In respect of the offence of "wilful neglect", specifically, there is much to be commended in the amendments introduced into English law by the Serious Crime Act 2015, described above, relating to the deeming provisions. Lord Diplock's dictum in *Sheppard* that neglect is confined to children's physical rather than emotional needs has not been explicitly adopted in any Scottish case, making the current offence potentially wider in Scotland than the previous English offence – but this is not free from doubt. The absence of reported cases alleging neglect by emotional abuse suggests that the Crown may not be bringing such cases to court. We suggest that s.12 ought to be amended to make explicit that it encompasses emotional neglect. The UK's compliance with the United Nations Convention on the Rights of the Child was called into question when the UN last reported on progress in 2008. A further progress report is due later this year. The Scottish Government's *Getting It Right For Every Child* (GIRFEC) framework programme has improved child welfare in Scotland,[112] but amending the 1937 Act to create a broader offence would provide greater clarity and contribute to the success of the GIRFEC programme.

Whether any newly worded offence should criminalise inadvertent recklessness is a more difficult question. While recognising that it is open to the two jurisdictions to interpret the law in a manner in keeping with their own traditions, it could be argued that a common approach to interpretation would be preferable. This could be achieved if Scotland was to follow *Sheppard,* rather than *Clark,* such that all forms of neglect should require either an intention to injure, or advertent/subjective recklessness. In support of the interpretation in *Sheppard*, the following passages from Lord Diplock's speech are highlighted:

> "In construing the statutory language it is not always appropriate and may often be misleading to dissect a compound phrase and to treat a particular word or words as intended to be descriptive only of the mens rea of the offence and the remainder as defining only the actus reus. But section 1 of the Act of 1933 contains in subsection (2)(a) a clear indication of a dichotomy between "wilfully" and the compound phrase "neglected him…in a manner likely to cause injury to his health." When the fact of failure to provide adequate food, clothing, medical aid or lodging, has been established, the deeming provision applies only to that compound phrase; it still leaves the

[110] [2015] C.S.I.H. 58 at para [78].

[111] See the offence provisions suggested in ss.51 and 52 of the *Draft Criminal Code for Scotland*.

[112] See http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright/background [accessed 3 June 2015].

> prosecution with the burden of proving the required mens rea – the mental element of "wilfulness" on the part of the accused."[113]

And:

> "In the context of doing to a child a positive act (assault, ill-treat, abandon or expose) that is likely to have specified consequences (to cause him unnecessary suffering or injury to health), "wilfully," which must describe the state of mind of the actual doer of the act, may be capable of bearing the narrow meaning that the wilfulness required extends only to the doing of the physical act itself which in fact results in the consequences described, even though the doer thought that it would not and would not have acted as he did had he foreseen a risk that those consequences might follow. Although this is a possible meaning of "wilfully", it is not the natural meaning even in relation to positive acts defined by reference to the consequences to which they are likely to give rise; and, in the context of the section, if this were all the adverb "wilfully" meant it would be otiose. Section 1(1) would have the same effect it if were omitted; for even in absolute offences…the physical act relied upon as constituting the offence, must be wilful in this limited sense, for which the synonym in the field of criminal liability that has now become the common term of legal art is 'voluntary.' "[114]

In their dissenting judgments, both Lords Fraser and Scarman were concerned that the majority of the court had not paid sufficient heed to Parliament's intention when passing the Act, and referred to the case of *R v Wagstaffe* (1868).[115] In this case the accused belonged to the "Peculiar People" sect whose members believed that the healing power of prayer would cure all ailments and who therefore shunned medical intervention in prayer's favour. The accused were prosecuted for the manslaughter of their child by neglecting to provide medical attention, but were acquitted because the jury accepted that the parents had believed that they had the child's best interests at heart. Their Lordships noted that this case led to the passing of the Poor Law Amendment Act 1868, s.37 of which created an offence "[w]hen any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child…whereby the health of such child shall have been or shall be likely to be seriously injured."[116] Section 37 was a forerunner to s.1 of the 1933 Act,[117] and Lord Fraser, echoing Lord Russell of Killowen CJ in *R v Senior*,[118] stated that in his view s.37 was enacted "to provide that an honest but

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[113] [1981] A.C. 394 at 403.

[114] [1981] A.C. 394 at 404.

[115] (1868) 10 Cox C.C. 530.

[116] [1981] A.C. 394 at 414, per Lord Fraser of Tullybelton.

[117] For the full legislative history of the various statutory predecessors of what is now section 1 of the 1933 Act, see [1981] A.C. 391 at 414-415 per Lord Fraser.

[118] [1899] 1 Q.B. 283 at 289.

mistaken belief that medical aid was unnecessary would not be a defence"[119] and to ensure that a *Wagstaffe* acquittal would not occur again. However, it is suggested that Lord Diplock's interpretation would allow for conviction in most such cases. His Lordship addresses these concerns when he observed in relation to *R v Senior* (which was also a "Peculiar people" case), that

> "there was not any question of the accused parent being unaware that risk to the child's health might be involved in his failure to provide it with medical aid. He deliberately refrained from having recourse to medical aid with his eyes open to the possible consequences to the child's physical health. He broke the law because he sincerely believed that to comply with its command would be sinful and would be against the interests of the child's spiritual welfare … Senior did know that some risk to the child's physical health was involved in refraining from allowing his child to have medical treatment and he deliberately decided to take it."[120]

In other words, if Parliament's intention behind the 1868 Act, and indeed its successors, was to prevent the "Peculiar People" or others who are (to quote Sheriff Reid in *McDonald*) "rapt by misplaced religious zeal"[121] from escaping criminal liability, then this intention can be realised by following Lord Diplock's interpretation.

The choice between inadvertent and advertent recklessness is an important policy decision for a legislature. If the Scottish offence is to continue to encompass inadvertent recklessness, it is submitted that the risk of harm ought to be both "obvious" and "serious". An amended Scottish offence could provide:

> "(1) It is an offence for a person with responsibility for a child intentionally or recklessly to subject that child or allow that child to be subjected to maltreatment, whether by act or omission, such that the child suffers, or is likely to suffer, significant harm.
>
> (2) For the purposes of this section
>
> (a) 'recklessly' means that a person with responsibility for a child
>
> (i) foresaw a serious risk that an act or omission regarding that child would be likely to result in significant harm, but nonetheless unreasonably decided to run that risk; or

[119] [1981] A.C. 394 at 414, per Lord Fraser of Tullybelton.

[120] [1981] A.C. 394 at 405-407.

[121] (2013) S.L.T. (Sh. Ct.) 34 at 42, para. 63.

(ii) ought to have foreseen an obvious and serious risk that acting or failing to act would result in significant harm, but nonetheless acted or failed to act where no reasonable person would do likewise; [122]

(b) 'maltreatment' includes (i) neglect (including abandonment), (ii) physical abuse, (iii) sexual abuse, (iv) emotional abuse (including exposing the child to violence against others in the same household), and (v) exploitation.

(c) 'harm' means the impairment of: (i) physical or mental health, or (ii) physical, intellectual, emotional, social or behavioural development."

This reflects the approach in *Dunn v McDonald* and in *Clark*, but it may hold some parents to too high a standard of care. A person who has a lower than average IQ or suffers from learning difficulties may be incapable of meeting the standard of the hypothetical "reasonable parent", or even of the "average parent", and it may be suggested that the law ought not to criminalise people for failing to behave in a way in which they are, in fact, incapable. Notwithstanding Sheriff's Reid's impassioned plea, perhaps the sanctions of the criminal law should be reserved for those who intend harm, or at least foresee that their actions or inactions could cause harm.

Even the most reasonable of people can occasionally cause harm inadvertently. Ms S may have intended to throw her child onto a bed, but she did not intend to injure him, nor did she foresee that he would bounce from the bed and hit his head. Similarly in the case of Ms B, while her act of leaving the child unsupervised for 10 minutes was intentional, B neither intended to injure her daughter, nor foresaw that the child would come into contact with the hot liquid. Children who are unfortunate enough to have parents who are "naïve, … immature, … feckless, stupid or ignorant"[123] can be safeguarded by the civil law – indeed, that is the raison d'être of the Children's Hearings System. Inadvertent recklessness suffices for a referral of the child under that process. Perhaps the Children's Hearings System should continue to be employed to safeguard such children, without the need to criminalise their parents. As Lord McGhie noted in *M v Locality Reporter*, for most parents the risk of causing harm to their children is a more powerful sanction than the risk of criminal conviction.[124] If this approach is adopted, then s.12 should be amended to make clear that parents may be convicted of wilful neglect only where they intended to cause harm to their children, or foresaw a serious risk that an act or omission regarding that child

[122] This definition of "recklessness" is adapted from s.10 of the *Draft Criminal Code for Scotland*. The *Code* is available from the Scottish Law Commission - see: http://www.scotlawcom.gov.uk/. See also s.51(1) of the *Code*, which suggested more than a decade ago that s.12 of the 1937 Act be replaced by a "tighter provision" which would "clarify the responsibilities of carers".

[123] (2013) S.L.T. (Sh. Ct.) 34 at para. 63, per Sheriff Reid.

[124] [2015] C.S.I.H. 58 at para [78].

would be likely to result in significant harm, but nonetheless unreasonably decided to run that risk.