

### Section 5 “Causing or Allowing” – The Catch 22 Provision

‘Baby-shaking’, or ‘baby-shaking syndrome’ is a colloquial term used to describe the situation where the prosecution allege that a baby has either died or suffered serious injury as the result of being shaken. In a large number of these cases the prosecution are able to show that at the time of the causative event the child was in the sole care of its parents; the difficulty that arose historically however was when it was not possible to prove *which* of the two parents was the actual perpetrator. Prosecutors often found themselves in this scenario, with not enough evidence to conclusively prove which parent caused the harm to the child and neither parent prepared to implicate the other. However, on 21<sup>st</sup> March 2005, *Section 5 of the Domestic Violence, Crime and Victims Act 2004* became law, and it meant that prosecutors could now take a different approach, one that didn’t require them to single out the primary offender.

The original 2004 wording of the Act only provided for the scenario where the *death* of a child or vulnerable adult had occurred. It wasn’t until the 2012 amendment that the words “*or suffers serious physical harm*” were added, and the legislation now plays a central part in the prosecution of ‘baby-shaking’ and ‘baby-shaking’-like offences.

Section 5 reads as follows:

**5(1)** *A person (“D”) is guilty of an offence if—*

**(a)** *a child or vulnerable adult (“V”) dies or suffers serious physical harm as a result of the unlawful act of a person who—*

**(i)** *was a member of the same household as V, and*

**(ii)** *had frequent contact with him,*

**(b)** *D was such a person at the time of that act,*

**(c)** *at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and*

**(d)** *either D was the person whose act caused the death or serious physical harm or—*

**(i)** *D was, or ought to have been, aware of the risk mentioned in paragraph (c),*

**(ii)** *D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and*

*(iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.*

The purpose of the Act is to allow for prosecutions to take place in cases where a child or vulnerable adult has died, or has suffered serious harm, but where it might also be problematic to prove definitively which member of the household was responsible. It allows for any member, who had frequent contact with the said child/vulnerable adult at the time of the harm, to be indicted, as the prosecution is not obliged to prove which of the household members actually *caused* the harm, only that they *allowed* it to happen.

In *Mills* [2017] 2 Cr App R (S) 7 (38), the Court of Appeal stated that '*allowing*' a child or vulnerable adult to die was not necessarily less culpable than '*causing*' that outcome. Section 5 is also not suitable for a 'special verdict' and so a jury will not be asked whether they found a defendant guilty of either the '*causing*' or '*allowing*' element of the offence. Sentence too, therefore, need not reflect which of the defendants actually caused the harm.

However, even only having to prove an alleged offender *allowed* the harm, the prosecution still has to negate the caveats set out in paragraph D, subsections (i)-(iii), regarding a risk to harm and the reasonability of taking steps to protect the victim from it.

Under s. 5(1)(c) there has to be a 'significant risk of *serious* physical harm', which is defined in s. 5(6) as 'harm that amounts to grievous bodily harm for the purposes of the Offences Against the Person Act 1861'. The risk must also be a 'significant' one; significant being an ordinary English word which should not be further defined for the jury and it is incorrect to tell the jury that it means 'more than minimal' (*Stephens* [2007] 2 Cr App R 26 (330)).

But even having to reach the high standard of proof that s. 5(1)(D) imposes, the implementation of the Act has helpfully navigated what was a perceived difficulty in convicting offenders who wanted to keep quiet prior to its enactment.

Beforehand, it would often be the case that defendants would remain silent in interview and refuse to give evidence at their trial, when indicted with offences against a child, where it was alleged to have been committed behind closed doors in a domestic setting, with more than one possible offender.

In doing so they protected themselves against self-incrimination under cross-examination. If all other evidence was mostly circumstantial, a conviction would be difficult. After all, all the defence would have to show was that there was the possibility the offence had been committed by another and the jury would rightly have to acquit.

However, not only did the Act make it unnecessary for the prosecution to identify who the perpetrator was, it also forced those accused to explain – or at least try to – what had happened. Under s. 6(2) of the Act, where by virtue of the CJPO 1994, s. 35(3), inferences may be drawn in relation to the s. 5 offence from the accused's failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether he is guilty of murder or manslaughter (or any alternative verdict offence on those charges) even if there would otherwise be no case for him to answer in relation to murder or manslaughter (or the alternative verdict offence).

Essentially, it is stating that if, for example, a defendant is charged with murder and s. 5 in the alternative, a refusal on his part to offer any evidence in relation to the s. 5 offence would allow a jury not only to hold his silence against him and infer guilt with regard to the s. 5 offence, but also permit them to infer guilt on the murder charge, notwithstanding that there may not have been a *prima facie* case of murder against them at the outset. In a practical sense, it forces defendants into giving evidence when they previously would not have done.

In short, s. 5 has become an extremely valuable tool for allowing justice to be served in cases where, before its implementation, those responsible for killing or inflicting serious harm upon a child or vulnerable adult, may have escaped it. It is now not 'all or nothing' when it comes to convicting individuals with murder, manslaughter or GBH, as prosecutors are now able to charge s. 5 in the alternative or even as the only offence on the indictment. It has become an almost 'catch-22' provision.

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