

Children - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

***In the Marriage of JG and BG* (1994) 122 FLR 209; (1994) FLC 92-515; (1994) 18 Fam LR 255 (30 September 1994) – Family Court of Australia**

Chisholm J at [260]-[262]: ‘The authorities, then, require the court to make a judgment about the relevance of family violence to the welfare of the children. In what circumstances is family violence relevant to children's welfare? Its relevance may be more obvious in some situations than in others. Where the violence is directed at the children themselves, it is obviously and directly relevant to their welfare. Section 64(1)(va), quoted above, expressly requires the court have regard to the need to protect the child from abuse and ill treatment. Similarly, when the violence is committed in the presence of children, it will obviously have the potential to frighten and distress them.

I do not think it can be said as a matter of law that other forms of family violence are incapable of being relevant to the welfare of the children. Violence occurring between household members, even though occurring away from the children, may have the potential to cause them distress and harm, for example where it affects the parenting of the custodial parent. Similarly, threats of violence may have an impact on the welfare of children. The nature and extent of such harm must of course be assessed in the light of the evidence and findings in each case. In some cases, the court may be assisted by expert evidence on the impact of violence on the children. Violence may take many forms and have a quite different significance in different cases. It might be, for example, a single outburst, out of character, caused by a stressful situation, for which the violent persons feels immediately regretful and apologetic. It might be the result of mental instability or disease. It might stem from a person's inability to control his or her temper. It might represent a deliberate pattern of conduct through which the violent person exercises a position of dominance and power over the other. It might be associated with a particular situation, and be unlikely to be repeated in different situations, or it might be a recurrent pattern of behaviour occurring in many situations. The violent person may deny the violence, or seek to justify it, or alternatively might accept responsibility for it and be willing to take appropriate measures to prevent it happening again.

These and many other aspects of violence may be highly relevant to the court in its task of attempting to determine the relevance of the violence to the children's welfare. The court's ability to make this determination will of course depend on the evidence available to it. Violence associated with a pattern of

dominance, for example, may be particularly serious. For children to grow up in a climate of a potentially violent and dominating relationship between their parents seems to me to be an unacceptable model of family relationships, and would be very likely to create a situation of stress and fear that may well be damaging over a period. It is quite wrong, in my opinion, to assume that violence can be relevant only if it is directed at the children or takes place in their presence. It is equally wrong to assume that violent behaviour will necessarily be repeated, or to assume too readily that it will harm children, or to give it excessive importance; it is of course only one factor relevant to the assessment of what the child's welfare requires, and it will be more important in some cases than in others'.

***R v Rogers* [2014] ACTSC 124 (1 April 2014) – Australian Capital Territory Supreme Court**

Penfold J at [7]: 'The offences were all serious examples of the relevant offences. Both assaults were at the higher end of the spectrum of assaults appropriate for a charge of assault occasioning actual bodily harm, especially given the extended period over which the assaults took place and the fear of more serious assaults that seems to have been present throughout. The presence of KN's son, and his fear and distress at the events he witnessed, seriously aggravated the second assault occasioning actual bodily harm. The unlawful confinement offence must have been especially terrifying to the victim. All the offences were further aggravated by the breach of trust that is in my view inherent in most if not all domestic violence offences, especially those that occur in the privacy of a home shared by the victim and the perpetrator, a circumstance which of itself – that is the sharing of the home – seems to me to establish a mutual relationship of trust'.

***Elson v Ayton* [2010] ACTSC 70 (15 July 2010) – Australian Capital Territory Supreme Court**

Refshauge J at [70]: 'It is clear that the courts have a duty to express the community's particular interest in denouncing family violence especially by appropriately severe sentences where it is aggravated by being committed in the presence of children. Where this occurs, it not only increases the humiliation and sense of powerlessness of the victim, but it is also likely to cause real psychological damage to the children and risks creating offenders of the children themselves. The courts must show that this is unacceptable and to be condemned as such'.

***R v AKB* [2018] NSWSC 1628 (2 November 2018) – New South Wales Supreme Court**

At [25], Davies J stated –

The murder was seriously aggravated by having been carried out in the presence of the two children of the offender and the deceased, and in circumstances where the offender actively prevented WB from trying to save his mother. It was aggravated by having been committed at the deceased's home where she was entitled to feel safe. It involved gratuitous cruelty inasmuch as the deceased was burnt to death whilst being prevented from escaping from the fire.

Allen v Kerr [2009] TASSC 10 (25 February 2009) – Supreme Court of Tasmania

Porter J at [13]: ‘There were two young children present at the time of the attack. It is not clear, but presumably they were in the vehicle with the complainant. In any event, it was not disputed that they were present throughout the incident. One was about 8 years old, the other about 1 year old. The *Family Violence Act*, s13, reflects the common law, but it is of some significance that Parliament has seen fit to expressly recognise the presence of children as an aggravating factor in the case of family violence offences. The reasons that the presence of children is an aggravating factor of some significance are largely self-evident. Violence witnessed by children in the domestic environment not only is distressing (usually the victim is a parent or someone in the place of a parent), but it also serves to desensitise impressionable minds to violence, and to encourage the notion that resort to violence is acceptable’.

El Tahir v The Queen [2011] VSCA 46 (4 March 2011) – Victorian Court of Appeal

Mandie JA at [23]: ‘In my opinion the sentence was not manifestly excessive and, indeed, properly reflected the gravity of the offence after taking into account all mitigatory factors including the plea of guilty. The Court rightly treated with the utmost seriousness the appellant’s knife attack on his defenceless wife in the presence of their children and in circumstances which included the invasion of her home in breach of a court order. Further, the relative brevity of the non-parole period might be thought to properly and adequately take into account the personal circumstances of the appellant’.

Bropho v Hall [2015] WASC 50 (9 February 2015) – Supreme Court of Western Australia

Mitchell J at [18]: The second circumstance of aggravation was that children were present when the offence was committed. ‘The facts of this case illustrate a tragic cycle of violence with which the courts are depressingly familiar. A person exposed to domestic violence in his early life goes on as an adult to perpetrate the violence to which he was exposed as a child, damaging members of his community in the same way he was damaged as a child. For that reason, the fact that the appellant’s offence was committed in the presence of children was a significant aggravating factor’.