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## Introduction

The provision of defences in the criminal law is perhaps the first and most basic requirement of equality of arms. The criminal justice system (in both Scotland and England and Wales) is set up so that, initially, the state applies its resources to prove that the accused carried out the proscribed conduct with the requisite mental attitude. There is then an opportunity for the defendant to present to the court exculpatory evidence. General defences formalise this second process, creating defined mechanisms in terms of which the accused may put forward “good” or legally recognised reasons for his/her conduct which, in law, will render him/her criminally blameless. This chapter will consider the defences of automatism, coercion, and necessity as these are defined in Scots law. It will examine particularly the way in which these defences operate in relation to the negation of *mens rea* looking at whether this is the central basis of the exculpation which they offer.

## The Structure of the Criminal Law following *Drury*

The role of defences, and the way in which they function to provide exoneration in Scots law, was put under scrutiny by the decision of a five-judge bench in an appeal to the High Court of Justiciary in the case of *Drury v HM Advocate*.<sup>1</sup> At his trial, Stuart Drury had pled the partial defence of provocation to a charge of murdering his former partner. He was, nonetheless, convicted of murder and appealed on the basis that the test of provocation, where the provoking act was the discovery of sexual infidelity, had been wrongly explained to the jury as one of proportionality.<sup>2</sup> In principle, then, all that the appeal court was required to determine was this limited issue: the test for provocation in these circumstances. In fact, it effected a change to the *mens rea* of murder itself

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<sup>1</sup> 2001 SLT 1013

<sup>2</sup> Only two provoking acts are recognised in Scots law – an initial attack by the ultimate deceased (see *Gillon v Advocate* 2007 JC 24 and the discovery of sexual infidelity the test for which was clarified in *Drury* (n 1). For a critique of the law see Claire McDiarmid, “Don’t Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law” in James Chalmers, Fiona Leverick and Lindsay Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010) 195-217

doing so in a manner which, “threaten[ed] to turn the Scottish law of criminal defences upside down.”<sup>3</sup>

Prior to *Drury*, two alternative *mentes rea* for murder existed. These can be summarised as “intention to kill” and “wicked recklessness”.<sup>4</sup> In the case, from the outset of his *dicta* on the first form (intention to kill), Lord Justice-General Rodger seemed to envisage a coming together of mental element and defence. He said:

as it stands, the definition [ie, in summary, intention to kill] ... is at best incomplete and, to that extent, inaccurate. Most obviously, someone who is subject to a murderous attack may defend himself by intentionally killing his assailant. ... But, of course, a person who intentionally kills in self defence is not guilty of murder or indeed of any other crime.<sup>5</sup>

Accordingly, he went on to argue that the first form (intention to kill) was incorrect: “The definition of murder in the direction is somewhat elliptical because it does not describe the relevant intention. In truth, just as the recklessness has to be wicked so also must the intention be wicked.”<sup>6</sup> An intention to kill, then, had ceased to be sufficient for murder. “Wickedness” of that intention also had to be established. Further on, Lord Justice-General Rodger explained that provocation did not “reduce” murder to culpable homicide but was “simply one of the factors which the jury should take into account in performing their general task of determining the accused's state of mind at the time when he killed his victim.”<sup>7</sup> In short, if the accused had been provoked, then, while s/he would still have intended to kill, that intention would be shorn of its wickedness. A conviction for culpable homicide would still be apposite but the *mens rea* of murder (which now required a “wicked intention”) would not have been made out.

Thus, as a number of commentators pointed out,<sup>8</sup> the all but mathematical equation which had previously been applied in Scottish criminal procedure (*actus reus* + *mens rea* = crime **unless** there is

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<sup>3</sup> James Chalmers, “Collapsing the Structure of Criminal Law” [2001] SLT 241, 242.

<sup>4</sup> The “classic” definition is that provided by JHA Macdonald in his *Practical Treatise on the Criminal Law of Scotland* (5th edn by James Walker and D J Stevenson, W Green, 1948) 89

<sup>5</sup> *Drury* (n 1) [10]

<sup>6</sup> *Ibid* [11].

<sup>7</sup> *Ibid* [17]. This view was shared by Lord Nimmo Smith in his judgment *ibid* [3].

<sup>8</sup> This was done most explicitly by Chalmers (n 2). In a commentary to the case, Gerald Gordon stated: “It seemed that what the court has done has been to incorporate the defences to the crime of murder into the definition of the crime by using the word ‘wicked’ as a shorthand for all of them. ... I remain uneasy, however, about the concept of ‘wicked intention’ in the context of a modern system of law ... And this is apart from the fact that it is, I think, analytically helpful to distinguish between the definition of a crime, and matters which can constitute defences to the crime.” (Commentary to *Drury* (n 1) 2001 SCCR 583 at 618-19.) See also

a defence) seemed to have been displaced. On Lord Rodger's definition, *mens rea* could not be made out without consideration of any defence which might negate it. *Mens rea* and defences appeared to be collapsing into each other.

Of course, this state of affairs applied directly only to murder but murder is something of a figurehead or motif for the rest of the criminal law – partly by virtue of its symbolic status as the most serious crime, partly, perhaps, because it is one of few crimes where the *degree* of culpability may be considered at the stage of determining guilt (in the possibility of the return of a culpable homicide verdict instead) and not only at sentence. As Chloe Kennedy has noted “judicial decisions on the *mens rea* of homicide have genuine influence over the rest of the law, rather than being confined to that sphere.”<sup>9</sup> Rather more graphically, Gordon has stated that

There is no doubt that the law of murder still lives in the shadow of the gallows, or that discussions of *mens rea* in general tend to be influenced by cases of murder, if only because most of the cases on *mens rea* were murder cases.<sup>10</sup>

Arguably, in relation to murder, a common sense view has prevailed that the *mens rea* of wicked intention to kill is established where the accused intended to kill **and** no recognised defence applies.<sup>11</sup> In stating “[w]e reject any suggestion that the question of the wickedness of an intention to kill is at large for the jury in every case, or that the determination of that question is not constrained by any legal limits”<sup>12</sup> the case of *Elsherkisi v HM Advocate* reined in some of the uncertainty arising from *Drury*. *Elsherkisi* did not, however, lay bare the underlying structural issue as to the relationship between *mens rea* and defences.<sup>13</sup> Given the way in which murder permeates the legal landscape, then, this may still be of importance in relation to other general defences. Even if this is not the case, their own relationship to *mens rea* (and, indeed, *actus reus*) is highlighted as worthy of consideration by the way in which the matter was dissected by *Drury*'s five-judge bench. Accordingly, this chapter will now turn its attention to automatism, coercion and necessity in Scots law.

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Michael G A Christie, “The Coherence of Scots Criminal Law: Some Aspects of *Drury v HM Advocate* [2002] *Juridical Review* 273 especially 281-84.

<sup>9</sup> “Criminal Law and the Scottish Moral Tradition” (PhD thesis, University of Edinburgh, 2013).

<sup>10</sup> Commentary to *Petto v HM Advocate* 2011 SCCR 519, 534. See also Pamela R Ferguson and Claire McDiarmid, *Scots Criminal Law: A Critical Analysis* (Dundee University Press 2009) para 9.2.1

<sup>11</sup> See *Elsherkisi v HM Advocate* [2011] HCJAC 100, 2011 SCCR 735; 2012 SCL 181 [11]-[13]

<sup>12</sup> *Ibid* [12] (Lord Hardie)

<sup>13</sup> *Ibid* especially [12]

## The Operation of Automatism

Automatism is an interesting defence for a number of reasons, including that its appearance in the Scottish case reports is so patchy, with a successful plea in 1925 in *HM Advocate v Ritchie*<sup>14</sup> (though the defence was not so called in the report) followed by a barren period until 1991<sup>15</sup> when success in *Ross v HM Advocate*<sup>16</sup> brought a (small!) glut – in all of which cases the defence ultimately failed.<sup>17</sup> Another interesting side-issue is that the interpretation of the facts of *Ritchie* which, to an extent, underpinned the decision in *Ross* may not have been entirely correct.<sup>18</sup> Finally, in terms of its theoretical basis,<sup>19</sup> while automatism could not justify the accused's conduct, it might operate either as an excuse – “what the accused did was wrong but automatism provides a good reason why s/he is not blameworthy” or as an exemption or capacity defence in that its essence is the absence of rationality on the accused's part. In *Ross*, the statement of the principles of automatism drew closely on the then definition of insanity in Scots law (“absolute alienation of reason”)<sup>20</sup> but that defence (now known as “mental disorder”) has been changed in its recent passage into legislation.<sup>21</sup>

For present purposes, interest is directed towards automatism's actual operation in terms of the way in which the courts apply it to elide blameworthiness. There appears to have been no significant case since *Drury*. Thus, there has been no occasion to challenge automatism's status as a free-standing defence coming into play after establishment of *actus reus* and *mens rea*. We may therefore accept that it is correct to characterise it as working solely to demonstrate the accused's lack of culpability where, *prima facie*, there is clear evidence that s/he is the medium by which the proscribed harm constituting the gravamen of the charge has been brought about. In his judgment in *Ross*, Lord McCluskey made no bones about this. He said: ‘I know of no exceptions, other than statutory ones, to the rule that the Crown must prove *mens rea* beyond reasonable doubt. ... If

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<sup>14</sup> 1926 JC 45

<sup>15</sup> Though accused persons did occasionally seek to use the plea in this period. See, for example, *Stevenson v Beatson* 1965 SLT (Sh Ct) 11.

<sup>16</sup> 1991 JC 210

<sup>17</sup> *Sorley v HM Advocate* 1992 JC 102; *Cardle v Mulrainey* 1992 SLT 1152; *Ebsworth v HM Advocate* 1992 SLT 1161.

<sup>18</sup> See Jenifer M Ross, “A Long Motor Run on a Dark Night: Reconstructing *HM Advocate v Ritchie*” (2010) 14 *Edin LR* 193. The accused was adversely affected by “toxic exhaustive factors”. This phrase had been taken to mean toxic car exhaust fumes (a factor external to the accused). Ross's research into the original evidence presented in the trial uncovered that, in fact, it referred to a medical condition arising from injuries sustained in the First World War (which might have been characterised as an internal factor).

<sup>19</sup> See, for example, Celia Wells and Oliver Quick, *Lacey, Wells & Quick Reconstructing Criminal Law: Text and Materials* (4<sup>th</sup> edn, 2010 Cambridge University Press) 119-23

<sup>20</sup> Baron David Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, vol I (4<sup>th</sup> edn, 1844 The Law Society of Scotland 1986 reprint) 37

<sup>21</sup> Criminal Procedure (Scotland) Act 1995, s 51A

there were to be no such evidence at all the proper verdict even in such a case would be a simple verdict of "not guilty".<sup>22</sup>

Ross then, falls back on what may be regarded as the logical order of the criminal law (*mens rea* (delineated narrowly as the specific, proscribed mental state in the offence definition) + *actus reus*) = crime **unless** automatism applies. In other words, proof of the absence of automatism is not required to establish the *mens rea* of the crime charged. The defence is a separate and subsequent issue. Unlike *Drury's* conception of provocation as "just" one of several sources of evidence on the accused's mental state, automatism is a general defence with clear rules of engagement. Nonetheless, these relate so closely to the presence or absence of *mens rea* (and/or *actus reus*) that it serves as much to disprove the Crown's case as separately to elide the accused's culpability. Indeed, automatism has been categorised as a "failure of proof" defence being an "instance[...] where the prosecution, because of the 'defence', are unable to prove all of the required elements of the offence."<sup>23</sup> How, then, does automatism work?

We may deal with its principles in short compass. First there must be "some external factor which was outwith the accused's control and which he was not bound to foresee."<sup>24</sup> The case offers some examples of external factors for this purpose including 'the consumption of drink or drugs' or 'toxic exhaust fumes',<sup>25</sup> 'a blow on the head causing concussion' or 'the administering of an anaesthetic for therapeutic purposes'.<sup>26</sup> The external factor must also 'have resulted in a total alienation of reason amounting to a complete absence of self-control'.<sup>27</sup> The facts of *Ross* provide a clear illustration. The accused had been drinking lager from a can into which, **without his knowledge**, had been put, five or six Temazepam tablets and an unspecified quantity of LSD which he then ingested with the lager. Together, these drugs constituted the "external factor". Shortly after ingestion, Ross started to scream and to lunge with a knife, attacking a number of people such that he was eventually charged with seven counts of attempted murder (among other offences). Ross was convicted at trial and appealed. The defence argued that the drugs had adversely affected his ability to exercise self-control and to formulate *mens rea*.

Essentially, automatism goes to the very roots of the capacity-based approach to the attribution of criminal responsibility which requires that individuals exercise freewill and understanding in making the choice to commit crime **and** that the circumstances are such that they would have had a fair

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<sup>22</sup> *Ross* (n 16) 228

<sup>23</sup> James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (W Green, 2006) para 1.06

<sup>24</sup> *Ross* (n 16) 218 (LJ-G Hope)

<sup>25</sup> *Ibid* 214 (LJ-G Hope)

<sup>26</sup> *Ibid* 216 (LJ-G Hope quoting Lord Diplock in *R v Sullivan* [1984] AC 156, 172)

<sup>27</sup> *Ibid* 218 (LJ-G Hope)

chance to do otherwise.<sup>28</sup> If avoidance of the criminal behaviour was impossible in an individual case then, no liability should attach. At the risk of oversimplification, to be subject to the norms of the criminal law, conduct must be voluntary. Automatism is often discussed as “involuntariness” whether in relation to the ingestion or application of the external factor or the subsequent ‘criminal’ activity or both.<sup>29</sup>

In *Ross*, the appeal court characterised the matter as an inability on the accused’s part to formulate *mens rea*.<sup>30</sup> If the issue is one of involuntariness, however, then this compels us to consider firstly whether, in fact, the accused acted at all. In other words, there may be a case that it is the *actus reus* with which automatism engages and which it operates to negate, without any need to consider at all its role in *mens rea*.<sup>31</sup> At one level, this is compelling. Involuntariness equates, or is certainly taken to equate, to the negation of criminality *tout court*. Indeed, in summarising the Crown submissions, Lord Justice-General Hope noted, “I understood [the Solicitor General] to accept that there was evidence that the appellant had no control over his actions with the result that they were involuntary.”<sup>32</sup>

In practice, however, it would appear that there are degrees of voluntariness (of acting) all of which are on a continuum towards the mental element of strongly intending. On this analysis then, the *actus reus* and the *mens rea* of any crime cannot be *completely* separated from each other. Gordon explains that: “To be classed as automatic, behaviour must be wholly unconscious, and a person who acts when his consciousness is reduced, impaired or merely clouded is not acting automatically.”<sup>33</sup>

Scots law has recognised the absence (which may be different from the negation) of the *actus reus* in the case of *Hogg v Macpherson*<sup>34</sup> where a strong gust of wind blew over the accused’s horse-drawn furniture van and it, in turn, knocked a municipal lamp standard to the ground, breaking the bulb. It was held that the “breaking of the lamp was not the appellant's act at all, either negligent or accidental.”<sup>35</sup> It was the wind. In automatism cases, on the other hand, a proscribed act will have occurred ‘through’ the accused. *Ross*, for example, stabbed a number of people. It is unclear whether it is this proximity to mediating the wrongful behaviour which has left the *actus reus* in

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<sup>28</sup> This is famously iterated by HLA Hart in *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1968) especially Chapter 1.

<sup>29</sup> See, for example Gerald H Gordon, *The Criminal Law of Scotland* vol I, (3rd edn by Michael G A Christie, W Green 2000) para 3.16; TH Jones & MGA Christie, *Criminal Law* (5th edn, W Green 2012) from para 4-11

<sup>30</sup> *Ross* (n 16) 231-14 (LJ-G Hope)

<sup>31</sup> This argument has been advanced by, among others, Pamela Ferguson. See “The limits of the automatism defence” (1991) 36 JLSS 446.

<sup>32</sup> *Ross* (n 16) 214

<sup>33</sup> Gordon (n 29) para 3.16

<sup>34</sup> 1928 JC 15

<sup>35</sup> *Ibid* 17 (LJ-G Clyde)

place in automatism cases or whether it is that the definition of the offence using “insanity” terminology simply serves to direct inquiry to the accused’s mental state. Certainly, it has been suggested that no criminal liability would attach to a “real” reflex act.<sup>36</sup> Nonetheless, while automatism has been pled to a strict liability charge, with no apparent difficulty, though, equally, with no specific discussion,<sup>37</sup> the High Court’s approach has been to concentrate on its effect in relation to *mens rea*.

The real issue in *Ross* was whether a mental condition which did not meet the legal definition of insanity could offer exculpation. This was not in terms of the actual mental state in which Ross committed the offences – no one seems to have doubted that it amounted to a “total alienation of reason”. It was to do with its cause. At the time, insanity required that that mental state should arise “as the result of mental illness, mental disease or defect or unsoundness of mind”.<sup>38</sup> Ross’s mental state arose from the ingestion of drugs. Ross was not at fault for this however. The ingestion was involuntary.<sup>39</sup> At one level, then, all that *Ross* determined was that, in these circumstances a defence (automatism) was available. All of the judges characterised it as the absence of *mens rea*<sup>40</sup> but, clearly, if the Crown is unable to prove *mens rea* in *any* case, the accused must be acquitted. The case’s real innovation was its affirmation that that particular reason for the absence of *mens rea* – an external factor neither self-induced nor foreseeable – was acceptable in law. It is as a formal mechanism by which the accused may bring to the court’s attention that his/her reason was alienated blamelessly that automatism operates as a defence.<sup>41</sup>

*Mens rea* must be completely absent. Automatism is not comparable, in that sense, to diminished responsibility where the accused may retain *some* ability to rationalise thought and behaviour.<sup>42</sup> This was clarified in the case of *Cardle v Mulrainey*<sup>43</sup> where Lord Justice-General Hope stated:

Where ... the accused knew what he was doing and was aware of the nature and quality of his acts and that what he was doing was wrong, he cannot be

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<sup>36</sup> See *Jessop v Johnstone* 1991 SCCR 238, 240 (LJ-C Ross)

<sup>37</sup> See *Mulrainey* (n 17) where the accused was charged with a number of road traffic offences, some of which were of strict liability. See also *Ferguson and McDiarmid* (n 10) from para 20.20.2

<sup>38</sup> *Brennan v HM Advocate* 1977 JC 38, 45 (LJ-G Emslie)

<sup>39</sup> No matter its effect on actual mental state, *voluntary* intoxication is not a defence in Scots law: *Hume* (n 20) 45; *Brennan (ibid)* 46; *Ross* (n 16) 214 (LJ-G Hope)

<sup>40</sup> *Ross* (n 16) 213-14 (LJ-G Hope); 221 (Lord Allanbridge); 229 (Lord McCluskey); 232 (Lord Brand). Lord Weir did not specifically refer to the absence of *mens rea* but stated at 232: “the state of mind of the accused is at the heart of the issue”

<sup>41</sup> It is recognised as a defence in terms of the Criminal Procedure (Scotland) Act 1995, s 78(2).

<sup>42</sup> The legal test in Scotland is one of substantial impairment of the ability to determine or control conduct by reason of abnormality of mind: *Ibid*, s 51B(1)

<sup>43</sup> (n 17)

said to be suffering from some total alienation of reason in regard to the crime with which he is charged which the defence requires. ... [An] inability to exert self control, which the [first instance judge] has described as an inability to complete the reasoning process, must be distinguished from the essential requirement that there should be a total alienation of the accused's mental faculties of reasoning and of understanding what he is doing. As in the case of provocation, which provides another example of a stimulus resulting in a loss of self control at the time of the act, this may mitigate the offence but it cannot be held to justify an acquittal on the ground that there is an absence of *mens rea*.<sup>44</sup>

In this case, the accused had ingested amphetamine which had been introduced, without his knowledge, into a can of lager from which he had been drinking. He was aware that what he was doing (he committed a number of motoring offences) was wrong but claimed that the effect of the external factor (the amphetamine) was that he was unable to stop himself doing so.

The reference to provocation is perhaps unhelpful here in that automatism, even if pled to murder, would not constitute a partial defence. It operates on an all-or-nothing basis. The accused in *Cardle v Mulrainey* was charged, *inter alia*, with attempted theft, the *mens rea* of which is an intention to deprive the owner of his/her property. His automatism plea was based on volition – indeed it was an almost textbook one of “inability to resist an impulse” or to control action. While this is a key component of criminal capacity on the Hartian definition espoused above, it was not specifically considered. For those offences for which it was necessary, bearing in mind that a number of the charges against Mulrainey related to strict liability crimes, the accused was held to have *mens rea*. The court must be deemed to have considered that this rested on criminal capacity, defined, presumably in a restricted fashion to include only understanding of the nature of the behaviour.<sup>45</sup> Perhaps the argument is that, if *some* rationality is retained, no impulse is, in fact, irresistible. The conceptual difficulty (in relation to the strict liability offences) of holding that automatism operates in relation to *mens rea* was similarly not addressed.

If it can be accepted, then, that automatism works by setting up, in law, as a good reason for a complete loss of rationality, the application to the accused of an external factor, one further question remains: why should a factor *internal* to the accused but having the same effect not also serve the same exculpatory function? The basic answer to this, arising from the doctrine of

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<sup>44</sup> *Ibid*, 1160

<sup>45</sup> For a full discussion of one possible view of the relationship between *mens rea* and criminal capacity, see Claire McDiarmid, *Childhood and Crime* (Dundee University Press, 2007) Chapter 3



precedent, is found in the case of *Cunningham v HM Advocate*<sup>46</sup> in which the line of defence put forward (to a number of motoring offences) was that the accused had committed these whilst in the throes of an “epileptic fugue”.<sup>47</sup> Lord Justice-General Clyde said: “Any mental or pathological condition short of insanity—any question of diminished responsibility owing to any cause, which does not involve insanity—is relevant only to the question of mitigating circumstances and sentence.”<sup>48</sup> *Ross* expressly overruled this principle in relation to *external* factors. Scots law has accepted (at sheriff court level only but subsequent to *Ross*) that hypoglycaemia caused by diabetes could constitute an external factor<sup>49</sup> but only where it was a first attack. If the accused knew that s/he suffered from diabetes, the foreseeability strand of the *Ross* test could not be satisfied. The underlying justification is public safety in that conditions of this nature might recur.<sup>50</sup> The application of an external factor (the spiking of a drink etc) is, by its nature, a one-off.

Some aspects of automatism do remain somewhat obscure. Its definition of the mental state required for exculpation is based on an old formulation of the insanity defence which no longer applies in Scotland. There is no indication of whether this might, or, indeed, should, change in line with the shift to inability to appreciate the nature or wrongfulness of the conduct which is now the basis of the defence of mental disorder.<sup>51</sup> Automatism’s engagement with conditions like epilepsy and diabetes, which may be *difficult* to control,<sup>52</sup> is still rudimentary and may not properly capture blameworthiness. Overall, however, where an accused has, without fault, lost all rational control of his/her actions, criminal liability is inappropriate and automatism recognises this where the cause is an unforeseeable external factor which was not self-induced. While the effect of the defence on the foundational elements of the crime charged is, necessarily, direct, these elements remain intact. Automatism does not affect the boundary between offence and defence. It is necessary now to consider this issue in relation to coercion.

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<sup>46</sup> 1963 JC 80

<sup>47</sup> *Ibid*, 83

<sup>48</sup> *Ibid*, 84

<sup>49</sup> *MacLeod v Mathieson* 1993 SCCR 488

<sup>50</sup> *Ross* (n 18) 203

<sup>51</sup> Criminal Procedure (Scotland) Act 1995, s 51A(1)

<sup>52</sup> For a discussion of certain aspects of the English position, see J Rumbold and M Wasik, “Diabetic drivers, hypoglycaemic unawareness and automatism” [2011] *Crim LR* 863

## Coercion

### Introduction

Coercion has been recognised in Scots law since the time of Baron David Hume<sup>53</sup> and, indeed, the modern law (in which there are few cases) rests on his exposition.<sup>54</sup> Developments in the defence of necessity<sup>55</sup> have brought some overlap however the two defences have not been collapsed into a generalised form of duress and, for that reason, they will be discussed separately. The essence of coercion is that the accused was forced, by threats made against him/her by a third party, to commit a crime. It is in the way in which the law characterises the accused's response to such threats that the defence's relationship to the *mens rea* for the crime is most clearly discernible. There is both a factual and a normative element to that characterisation.

### Key Principles

According to Hume, coercion could be established where there was "an immediate danger of death or great bodily harm [and] an inability to resist the violence".<sup>56</sup> The implicit emphasis on the effect on the accused of the fear thus generated is discernible in some attempts to explain the modern law. In his charge to the jury in *HM Advocate v Raiker*<sup>57</sup> for example, Lord McCluskey stated:

the law is that where a person has a real, a genuine, a justifiable fear that if he does not act in accordance with the orders of another person, that other person will use life-threatening violence against him or cause it to be used, and if as a result of that fear and for no other reason he carries out acts which have all the typical external characteristics of criminal acts like assault or theft, then in that situation he cannot be said to have the evil intention which the law says is a necessary ingredient in the carrying out of a crime. In other words, he lacks the criminal state of mind that is a necessary ingredient of any crime, he lacks the

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<sup>53</sup> The first edition of his *Commentaries* was published in 1797 with the fourth and final version issued in 1844 (n 20).

<sup>54</sup> *Ibid*, 53

<sup>55</sup> See *Moss v Howdle* 1997 JC 123

<sup>56</sup> Hume (n 20) 53. He also required (*ibid*) "a backward and inferior part in the perpetration; and a disclosure of the fact, as well as restitution of the spoil, on the first safe and convenient occasion." In *HM Advocate v Thomson* 1983 JC 69 these were considered not to be conditions of the use of the defence but rather merely "measures of the accused's credibility and reliability on the issue of the defence." (*ibid* 78 (LJ-C Wheatley))

<sup>57</sup> 1989 SCCR 149

evil intention which I have sought to describe earlier and which is part of my description or definition of assault.<sup>58</sup>

This explanation, given for the use of the lay members of the jury, seems straightforwardly to indicate that coercion operates to elide *mens rea*. There is no issue in relation to the *actus reus*: the accused acted in a way which was willed. We see again, here, however, the existence of the continuum mentioned above in relation to automatism between acting voluntarily<sup>59</sup> and directly intending an outcome. The essence of coercion, on this explanation, is that the accused was so frightened by the threat made against him/her that s/he acted in a way in which s/he would not otherwise have done. It is not entirely clear from this charge (and the matter was not tested on appeal) whether Lord McCluskey's view is that the accused simply does not have *mens rea* ("s/he did not intend at all") or whether he is falling back on the old concept of *dole*. This was defined by Baron Hume as

that corrupt and evil intention, which is essential (so the light of nature teaches, and so all authorities have said) to the guilt of any crime ... [For *dole* to be established] the act must be attended with such circumstances as indicate a corrupt and malignant disposition, a heart contemptuous of order and regardless of social duty.<sup>60</sup>

In other words, it is not obvious, examining this *dictum* from *Raiker*, whether the jury was to understand that coercion elides the intention itself or merely its "evil" quality. (The co-accused in the case were charged, *inter alia*, with a number of assaults arising from a prison riot and hostage-taking.) The former, more straightforward interpretation is more likely, given that the case occurred prior to *Drury* so that the issue of negation of an evaluative moral component (the "evil" of "evil intent" which is the *mens rea* of assault) had not, in 1989, been canvassed in Scots law. The idea that extreme fear would, or could, paralyse the exercise of moral and rational constraint seems to be taken for granted.

In charging the jury in the earlier case of *Thomson*, the trial judge had used a similar formulation. That case was appealed but the appeal court's judgment expressly endorsed the "essence [of] the

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<sup>58</sup> *Ibid* 154

<sup>59</sup> The matter was touched on in the trial judge's report to the appeal court in *Thomson* (n 56) where Lord Hunter said "I leave out of account situations where evil intent is manifestly absent—for example, if a person has been compelled by sheer physical force to place his hand on a weapon with which others have inflicted a wound on a victim" (*ibid* 72)

<sup>60</sup> Hume (n 20) 21, 22

view of the law taken and applied by the trial judge”.<sup>61</sup> As part of his charge he (Lord Hunter) had said: “if a defence of this sort as a complete defence leading to an acquittal is to succeed the will and resolution of the accused must, in fact, have been overborne and overcome by the threats and the danger.”<sup>62</sup> The use of the term “will” is not entirely helpful in determining whether the matter relates to mind or act. Nonetheless, both juries (in *Raiker* and in *Thomson*) would have understood that, for coercion to succeed, the fear generated must have been so strong that it interacted with (indeed overrode) the accused’s ability to determine his/her own actions. On this explanation, then, the relationship between the defence and, certainly, the *mens rea*, is particularly close. As with automatism, if there is no *mens rea* then the Crown has not proved its case. It is hard to see, conceptually, how it is possible to say that *mens rea* has been established but, subsequently considering the defence of coercion, in fact, the extreme fear meant that the mental element was not made out. Either the accused has *mens rea* or s/he does not.

Ultimately, however, on appeal, *Thomson*<sup>63</sup> fell back on a straightforwardly factual interpretation of coercion,<sup>64</sup> which served to reinforce its separation from *mens rea*. The key point was that not only must the threats themselves be made contemporaneously with the commission of the crime but the (irresistible) danger which will result from non-compliance must also be bearing down on the accused.<sup>65</sup> The “gun to the head” scenario is, therefore, the classic example. Coercion then, on this analysis, would sit clearly within the traditional *actus reus* + *mens rea* = offence equation, with the defence itself falling to be considered once the commission of the offence has, *prima facie*, been established.

This analysis of its operation was affirmed in the case of *Cochrane v HM Advocate*<sup>66</sup> which moved even further away from the direct effect of the threat and the fear it generates on the accused’s ability personally to decide to commit the crime. *Cochrane*, one of few cases outwith the game of Cluedo where a candlestick was used as a weapon (here, in a robbery), arose from relatively non-specific (and probably future) threats<sup>67</sup> made against an accused who was, on a formal psychological assessment, “highly compliant”<sup>68</sup> and therefore much more likely than members of the general population to be persuaded – and terrified – by such intimidation. The appeal court held, faced with

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<sup>61</sup> *Thomson* (n 56) 80 (LJ-C Wheatley)

<sup>62</sup> *Ibid* 75 (LJ-C Wheatley quoting Lord Hunter). See also Chalmers and Leverick (n 23) para 5.04 where they argue that coercion does not operate to negate *mens rea*

<sup>63</sup> *Ibid*

<sup>64</sup> *Ibid* 77-80

<sup>65</sup> Some elements of the threat on which the accused sought to rely related to future events. *Ibid* 76

<sup>66</sup> 2001 SCCR 655

<sup>67</sup> In the accused’s own words, the alleged coercer had said “If you don’t [carry out the robbery], I’ll hammer you and blow your house up” *ibid* [6]

<sup>68</sup> *Ibid* [7] (LJ-G Rodger)

these facts, that the test for coercion was primarily objective, stating it to be: “whether an ordinary sober person of reasonable firmness, sharing the characteristics of the accused, would have responded as the accused did.”<sup>69</sup> It elucidated the matter further as follows:

Therefore, in a case where the accused lacks reasonable firmness, the jury must disregard that particular characteristic but have regard to his other characteristics. At the same time I bear firmly in mind that the judge is entitled to have regard to all the accused's characteristics in determining what punishment, if any, is appropriate in the particular circumstances.<sup>70</sup>

By definition, objective tests focus attention away from the effect of exculpatory factors on the accused him or herself. The concern is, primarily, on hypothesising as to how such factors would have affected an individual regarded as representative of the general population – an “average” person or, in coercion, an “ordinary” one who is “sober” and “of reasonable firmness”. In other words: “[h]eroic qualities are not required by the law in this context, nor is allowance made for excessive cowardice or timidity.”<sup>71</sup>

The jury’s task is complicated by the fact that the relevant ordinary person *also* shares the characteristics of the accused. Since it is logically impossible for an individual to be, simultaneously “of reasonable firmness” and “highly compliant”, individual characteristics relating specifically to levels of bravery are to be disregarded for the purpose of coercion.

The insistence on objectivism does assist, however, in clarifying the relationship between *actus reus*, *mens rea* and coercion and the operation of the defence on the elements of the crime. If the concern is specifically *not* with the effect **on the accused** of the threats and the resultant fear but rather on what would have been their effect on the defined representative of the general population, then the defence is clearly detached from the prior question of whether the elements of the crime have been proved beyond reasonable doubt. The Crown must prove that the accused, individually, carried out the proscribed act and that s/he did this with the proscribed mental attitude. The defence is only slightly concerned with whether the threat operated to elide either element. Rather, it is focused more on the acceptability generally of such a claim in the context created by the circumstances of the case. It is here that we can identify the normative component: in the “ordinary, sober person of reasonable firmness” the law is setting out the basic standard of stoicism or courage which all citizens should meet.

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<sup>69</sup> *Ibid* [29] (LJ-G Rodger)

<sup>70</sup> *Ibid* [30] (LJ-G Rodger)

<sup>71</sup> *Thomson* (n 56) 72 (Lord Hunter – trial judge’s report)

It is submitted, therefore, that the objective approach brings into the spotlight the *reasons* for permitting a defence of coercion both generally and in the individual case. In *Cochrane*, for example, the psychological evidence was that

the appellant had 'most certainly not' wanted to behave in the manner that he did at the time of the offence. [The expert psychological witness] added that he believed that the appellant had believed that he would be assaulted and that his house would be blown up. The appellant had been of the belief that he would be quite severely assaulted if he did not behave in the manner he was instructed to.<sup>72</sup>

Whether this extreme fear had, in fact, negated *Cochrane's mens rea* is debatable but the matter was not at issue. Coercion weighs the quality of the threat and the nature of the fear which it generates in their own right. Only if these stand up to scrutiny, detached from the accused's own response to them, will the defence be made out. There is no direct effect on presence or absence of the core elements of the crime. Coercion stands alone to be determined subsequently. The only overlap (or collapse of *mens rea* and coercion into each other) might arise if the accused claimed that s/he did not have the relevant mental element at all. In most cases, however, absent a claim of hypnotic control or the equivalent, this is unlikely to be successful because the accused will have taken a decision to carry out the crime (albeit in preference to succumbing to the danger threatened). These issues – of danger, choice and objectivism – are also prominent in the defence of necessity which will now be considered.

### Necessity

Until the case of *Moss v Howdle*<sup>73</sup> in 1997, necessity was ill-defined in Scots law. Compared to international, historical cases involving tales of cannibalism<sup>74</sup> and shipwreck,<sup>75</sup> *Moss's* facts (speeding on the M74 motorway) are prosaic. Nonetheless, it brought some precision to the law, confirming, at its outset, that the defence is available, in appropriate circumstances, for *all* crimes. It did this by rejecting the possible interpretation of *Thomson*<sup>76</sup> that a defence based in any form of duress was available only for "atrocious crimes".<sup>77</sup> The charge in *Moss* related to an offence of strict liability<sup>78</sup> and the court had no difficulty in determining that necessity could be pled. It can be inferred from this that necessity cannot operate to negate *mens rea* – or, at least, that this could not be its only

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<sup>72</sup> *Cochrane* (n 66) [7]

<sup>73</sup> (n 55)

<sup>74</sup> *R v Dudley & Stephens* (1884) 4 QBD 273

<sup>75</sup> *United States v Holmes* (1842)

<sup>76</sup> (n 56)

<sup>77</sup> *Ibid* 78. See *Moss* (n 55) 126 (LJ-G Rodger)

<sup>78</sup> Motorway Speed (Regulations) 1974, SI 1974/502, reg 3

function – since, by definition, strict liability offences are established by commission of a criminal act only. Coercion, as has been discussed, arises when the accused is faced with life-threatening violence. Necessity can be pled in a broader range of circumstances. The severity of the threat must be as desperate<sup>79</sup> but it may arise from “some contingency such as a natural disaster or illness rather than from the deliberate threats of another.”<sup>80</sup> It is regarded as “consistent with the ethos of [the Scottish] system”<sup>81</sup> that the defence should be capable of use where the actions were to save a third party rather than the accused him or herself. Finally, if any alternative course of action existed which would have been lawful, the defence will not succeed.<sup>82</sup>

Necessity builds, in some respects, on the principles of coercion as set down in *Thomson*<sup>83</sup> however it is fair to say that the nature of the fear generated by the extreme danger is likely to be slightly different, since the accused’s own life need not be endangered – altruistic action is equally acceptable. Also, the range of possible responses to the danger is likely to be broader. In coercion, the coercer seeks to force the commission of a particular crime. In necessity, the accused may have a number of alternative courses of action available and, given that the defence fails if any of these would have been legal, there is a greater element of choice and greater rationality is expected. This can be seen in the case of *Dawson v Dickson*<sup>84</sup> where Lord Sutherland stated that:

the defence of necessity only arises when there is a conscious dilemma faced by a person who has to decide between saving life or avoiding serious bodily harm on the one hand and breaking the law on the other hand. If, in the circumstances of the case, he elects to break the law rather than risk life, the defence of necessity may well be open to him.<sup>85</sup>

This demonstrates the separation between *mens rea* and necessity. There is no suggestion that fear overrode the accused’s ability to decide to commit the crime. Rather, this “elect[ion]” is central. The possible courses of action available for avoiding the danger are recognised to be limited but the accused still has choice and control over which of these to choose. *Dawson* turned on this element of choice. In fact, the accused’s commission of the crime (careless driving under the influence of alcohol) was **not** because the danger was so pressing that offending was his only option. He had not, in fact, thought about the danger (which, nonetheless, did exist) at all and would have driven regardless. The absence of a (personal) dilemma was fatal to the use of the defence.

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<sup>79</sup> According to Lord Justice-General Rodger, “the minimum requirement of any defence of this kind is that the accused acted in the face of an immediate danger of death or great bodily harm.” *Moss* (n 55) 126

<sup>80</sup> *Ibid* 128 (LJ-G Rodger)

<sup>81</sup> *Ibid* 128 (LJ-G Rodger)

<sup>82</sup> *Ibid* 129-30

<sup>83</sup> (n 56)

<sup>84</sup> 1999 JC 315

<sup>85</sup> *Ibid* 318

The clear distinction between the offence elements and necessity is also accentuated in the *Lord Advocate's Reference (No 1 of 2000)*<sup>86</sup> which adopted an objective approach, similar to that of *Cochrane* in relation to the effect which the danger had to have. The case related to a charge of malicious mischief where nuclear protestors had boarded a naval ship berthed in Loch Goil and, *inter alia*, thrown equipment overboard. They argued that they had had to do so to prevent another crime: the use of nuclear weapons by the United Kingdom which, they asserted, would have been contrary to customary international law.

According to Lord Prosser, "the defence will only be available if a sober person of reasonable firmness, sharing the characteristics of the actor, would have responded as he did"<sup>87</sup> showing the law's recognition that "different people respond to danger in different ways."<sup>88</sup> In the same way as for coercion, then, this objective approach affirms the separation between the elements of any offence and the defence of necessity.

Overall, necessity, having been adapted from the (historical) principles of coercion is possibly more stringent than it needs to be, given that individuals may be faced with dangers which are not in any way life-threatening but which might still reasonably be countered with minor breaches of the criminal law.<sup>89</sup> Equally, if the (criminal) course of action is reasonable in all the circumstances, it is harsh that it will not exculpate if *any* other legal way of proceeding could be identified.<sup>90</sup> Nonetheless, there is no doubt that this strict and objective formulation leaves intact the separation between the elements of the offence and the defence of necessity. Commenting on the *Lord Advocate's Reference (No 1 of 2000)*, Chalmers said:

in [this case which was] the first major criminal appeal decision since *Drury*, ... the traditional tripartite analysis of criminal offences was reaffirmed. ... [T]he court was adamant that a defence of necessity would *not* affect the mens rea of malicious mischief. Instead, it operates as a freestanding defence. The mens rea of malicious mischief is simply intention or recklessness. There is no question, it seems, of malicious mischief requiring "malicious intent", which can then be rendered non-malicious if the accused believed that his actions were justified. That, it is submitted, is the correct

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<sup>86</sup> 2001 JC 143

<sup>87</sup> *Ibid* [42]

<sup>88</sup> *Ibid* [43]

<sup>89</sup> See Gerald Gordon's commentary on *Moss* (n 70) 1997 SCCR 215, 224. See also *Ruxton v Lang* 1998 SCCR 1 and *D v Donnelly* 2009 SLT 476 in both of which cases the appeal court ruled that the danger had passed so that the defence of necessity was no longer available though, in each, the accused's subjective perspective may have been that she was not (yet) safe.

<sup>90</sup> See Victor Tadros, "The Structure of Defences in Scots Criminal Law" (2003) 7 *Edin LR* 60, 68



approach -- but at the same time, it is entirely inconsistent with the *Drury* analysis.<sup>91</sup>

### Conclusion

The approach taken by *Drury*<sup>92</sup> to the offence / defence structure in Scots criminal law is not replicated in relation to other defences. Automatism, coercion and necessity each provide good reasons for exculpating an accused person. In the latter two, the objectivism of the defence definition actually serves to spotlight the importance of having such reasons. Where the defence is not concerned with the accused's own response to extreme danger but rather with that of an "ordinary" person any connection between the *actus reus* and the *mens rea* on the one hand, and the defence on the other is, necessarily, attenuated. This brings about a more detached focus on whether the reasons for allowing exoneration are actually good ones. Coercion and necessity both exculpate a criminal response to extreme danger. Both are restrictive. The reported cases show few successful pleas. In coercion, the outstanding question is whether a more subjective response could still strike an appropriate balance between the rights of the accused and the public interest. In necessity, calls for a relaxation of the stringency of the tests where the danger (and the response) are not of death or great bodily harm should be considered. Automatism, rightly, recognises the unfairness of convicting an accused where s/he has been unable to exercise rational control over his/her actions through no fault attributable to him/her. It would benefit from greater clarity in relation to the internal/external factor distinction.

In general, *Drury*, while an interesting examination of the criminal law of homicide in its historical context, did little to clarify or elucidate the principles of general defences in the criminal law of Scotland. It did, however, serve to focus attention on their operation, at least in homicide, a worthwhile exercise which has been carried forward here. Ultimately, automatism, coercion and necessity accord with the traditional structure of criminal law and procedure which postpones consideration of any defence until the offence elements (*actus reus* and *mens rea*) have, at least *prima facie*, been made out by the prosecution. While the relationship to *mens rea* may sometimes be close and direct, the view taken here is that the separation of defences is most conducive to fairness in the administration of justice.

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<sup>91</sup> Chalmers (n 3) 242-43

<sup>92</sup> (n 1)