Coercion

Law

See *Stair Encyclopaedia*, Vol 7 para 202; Hume, *Commentaries*, Vol I, 51, 52, 53; Gordon, *Criminal Law*, 3rd ed, paragraphs 13-24 to 13-29. Renton and Brown chapter 17.

1. Of cases involving "compulsion" Hume writes:

> "But generally, and with relation to the ordinary condition of a well- regulated society, where every man is under the shield of the law, and has the means of resorting to that protection, this is at least a somewhat difficult plea, and can hardly be serviceable in the case of a trial for any atrocious crime, unless it have the support of these qualifications: an immediate danger of death or great bodily harm; an inability to resist the violence; a backward and an 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. For if the panel take a very active part in the enterprise, or conceal the fact, and detain his share of the profit, when restored to a state of freedom, either of these replies will serve in a great measure to elide his defence".
> (Hume, *Commentaries*, i. 53)

2. *Thomson v HM Advocate* 1983 JC 69 at 77 examines and approves the traditional approach taken by Hume to coercion and sets out what is generally required to support a plea of coercion:

> "[I]t is only where, following threats, there is an immediate danger of violence, in whatever form it takes, that the defence of coercion can be entertained, and even then only if there is an inability to resist or avoid that immediate danger. If there is time and opportunity to seek and obtain the shield of the law in a well- regulated society, then recourse should be made to it, and if it is not then the defence of coercion is not open. It is the danger which has to be 'immediate', not just the threat. It will be a question of circumstances in each case whether the conditions permitting the invocation of that defence have been satisfied. "Immediate danger" may have to be construed in the circumstances in which it is threatened, but clearly if there is the opportunity

> to run away or to seek the protection of the forces of law and order before the crime is committed, then the accused cannot claim to have been coerced".

3. There is authority that as a matter of law coercion may not be a defence in Scotland to the crime of murder. In *Collins v HM Advocate* 1991 SCCR 898 at 902 Lord Allanbridge had charged the jury to that effect. The Appeal Court did not require to examine that part of the charge, but it is in line with English law. The court in Thomson had reserved its opinion on the question. See also Stair *Encyclopaedia,* Vol. 7, paragraph 202. Although coercion is not a strict statutory special defence, prior notice of the intention to lead it as a defence must be given: Criminal Procedure (Scotland) Act 1995 section 78(2).

4. Where coercion may apply, the law deliberately applies an objective test. This goes some way towards ensuring consistency of approach.

5. The test requires the jury to consider whether an ordinary sober person of reasonable firmness, sharing the characteristics of the accused, would have responded as the accused did. Therefore, in a case where the accused lacks reasonable firmness, the jury must disregard that particular characteristic but have regard to his other characteristics (*Cochrane v HM Advocate* 2001 SCCR 655 at paragraphs [19] to [29]. See Renton and Brown paragraphs 17.20-17.22). *Cochrane* suggests at para 21 that age, sex and physical ability are relevant when deciding whether the accused could reasonably have been expected to resist the threat.

6. The test suggested in *Cochrane* appears to combine objective and subjective elements. This may lead to difficulties in formulating directions to the jury and great care will be required in selecting the appropriate form of words to use in any particular case. In *Cochrane* evidence was led from a psychologist that the accused was of a very low intellect. However, while his low IQ contributed to a tendency to be compliant, that tendency was within a class which included 10% of the UK population. The court held that he should not be treated as suffering from a mental illness but as a person who was "more pliable, vulnerable, timid, or more susceptible to threats than a normal person". These circumstances could not be taken into account when considering coercion (*Cochrane,* at paragraph [22]).

7. Evidence can be led about all the various aspects of an accused's make-up which affected his conduct so that the accused can have the benefit of the jury's views of the facts for the purposes of mitigation (*Cochrane*, at paragraph [25]).

8. Coercion has been relied upon in cannabis cultivations cases where the accused claims to be coerced into a gardening or keeper role even though they have been left alone for days or even weeks. (*Phan v HM Advocate* [2018] HCJAC 7, 2018 JC 195)

9. In *Phan* Lord Justice General (Carloway) said (at paragraphs [42] and [43]):

> "[42] the common law in relation to coercion is available if the circumstances reveal that an accused has been coerced into carrying out the cultivation of cannabis under threat of violence.
>
> "[43] …if the farmer is confined to a flat in which the cannabis is grown, and has reasonable grounds for believing that, if he does not tend to the crop, he will be seriously injured on the arrival of those controlling the operation, the defence may well be made out. *Thomson* correctly stressed (at 78) the need, as in the related defence of self-defence, to strike a fine balance between the nature of the danger threatened and the seriousness of the crime. Nevertheless, there may be circumstances in which a person is exposed to a threat of violence to himself or a third party from which he cannot be protected by the forces of law and order and which he is not in a position to resist. Where such a situation arises, as it may do in a trafficking situation, its effect in law would have to be assessed on its particular facts."

10. Directions may require to be considered carefully depending on the evidence in these types of cases.

11. There are circumstances in which it is the duty of a trial judge to withdraw a special defence from the jury, but it is only appropriate to do so if there is no evidence from which it can possibly be inferred that the special defence might have application. So long as there is any possibility of the jury being satisfied that the special defence applies, or in the light of evidence given in support of it, entertaining a reasonable doubt as to the accused's guilt, the special defence must not be withdrawn from consideration by the jury (*Carr v HM Advocate* [2013] HCJAC 87, 2013 SCCR 471). It is normal and accepted practice for the accused's representatives to intimate that a special defence is not being insisted upon before parties address the jury. Accordingly, if the trial judge entertains doubts as to whether there is any evidence before the jury which supports the special defence and no intimation is given of the withdrawal of a special defence, it is considered best for the trial judge to clarify the position out with the presence of the jury before parties address the

jury (*Lucas v HM Advocate* [2009] HCJAC 77, 2009 SCCR 892). See also chapter on Necessity .

Possible form of direction on coercion

In this case the accused has lodged a special defence of coercion. That was read out to you at the start of the trial, and you have a copy of it.

As I explained in the directions I gave you at the start if the trial, the only purpose of a special defence is to give notice to the Crown that a particular line of defence may be taken. The defence do not need to lead evidence in support of it. It is not for the accused to prove it but for the Crown to disprove it.

In this case the defence say that the accused was forced into acting by threats from [x] and should be acquitted. It is for the Crown to satisfy you beyond reasonable doubt that this defence should be rejected.

Normally the law regards a person's actions as being the result of their own free will and holds them responsible for what they do.

But if a person's exercise of free will has been compromised or undermined by threats of immediate and significant harm from someone else, the person's choice has been limited if they cannot resist that violence or threat. If the choice is between self-sacrifice or breaking the law, that is an unacceptable dilemma for anyone. The law says that it is not fair to hold a person responsible for their actions in these circumstances. This is the defence of coercion.

For coercion to apply two conditions must be met:

1. The person must have had reason to believe, and must have actually believed, that they were in immediate danger of death or serious injury. The threat must be of immediate harm. The threat of future harm is not enough.

2. Committing the crime must have been the only way the person could avoid the danger. In that sense the threat must have been unavoidable. If the person could have escaped, or sought the protection of the police, that is what they should have done.

[*Where appropriate:* Sometimes, in assessing an accused's credibility, it is useful to compare what the accused did at the time and what the accused says in court later. If the accused played only a minor part in committing the crime, that could point to

reluctant compliance and support what the accused now says. But if the accused took a very active part, that could point to a willingness to be involved, rather than coercion. Again, if the accused told someone of [his/her/their] involvement at the earliest safe opportunity that could support what the accused now says, but if the accused tried to hide [his/her/their] involvement that could go against the accused's acting under coercion]

[*Where appropriate:* reference to the evidence may be required to explain how the defence suggest the conditions are met in situations such as cannabis cultivation, perhaps the accused was confined in the building, and had good grounds to believe he/she/they were in immediate danger of death or serious harm on the arrival of captors if the accused did not comply, in line with *Phan*]

You have to judge the accused's actions objectively. Ask "*Would the ordinary sober person of reasonable firmness, sharing the accused's characteristics, have responded to the threat as the accused did*?" However, if you thought the accused was more pliable, vulnerable, timid or susceptible to threats than the ordinary person, you must ignore that.

[*Where appropriate:* In this case you heard evidence that the accused suffers from [*specify the mental illness, mental impairment, or a recognised psychiatric condition*]. And you heard that that condition affects the accused's ability to make decisions. You can take that into account when deciding whether the accused was coerced as I have defined it].

There is sufficient evidence for you to consider this defence, but the assessment of its quality, strength and effect is for you to decide.

You should approach the issue of coercion carefully. There are strict limits on its availability as a defence which I have explained above.

If you accept the evidence:

1. That the accused was threatened by [x] that unless the accused did [y] then [z] would happen;

2. That the accused had good grounds to believe, and did believe, [he/she/they] were in immediate danger of death or serious harm if they did not comply; and

3. That committing the crime was the accused's only way out of the dilemma

then you would find that the accused had been coerced and acquit the accused.

In support the defence rely on [set out evidence relied on]

On the other hand, the Crown say [summarise]

You should look at all the evidence, consider the points made for and against coercion, and then decide if the Crown has proved guilt beyond reasonable doubt.