

Criminal Law (Consolidation) (Scotland) Act 1995:

Incest

Law

Statutory provisions

Section 1

“(1) Any male person who has sexual intercourse with a person related to him in a degree specified in column 1 of the Table set out at the end of this subsection, or any female person who has sexual intercourse with a person related to her in a degree specified in column 2 of that Table, shall be guilty of incest, unless the accused proves that he or she –

- (a) did not know and had no reason to suspect that the person with whom he or she had sexual intercourse was related in a degree so specified; or
- (b) did not consent to have sexual intercourse, or to have sexual intercourse with that person; or
- (c) was married to that person, at the time when the sexual intercourse took place, by a marriage entered into outside Scotland and recognised as valid by Scots law.

Table - Degrees of Relationships	
1. Relationships by Consanguinity	
Column 1	Column 2
Mother	Father
Daughter	Son
Grandmother	Grandfather
Grand-daughter	Grandson
Sister	Brother
Aunt	Uncle

Niece	Nephew
Great grandmother	Great grandfather
Great grand-daughter	Great grandson

<i>2. Relationships by Adoption</i>	
<i>Column 1</i>	<i>Column 2</i>
Adoptive mother or former adoptive mother	Adoptive father or former adoptive father
Adoptive daughter or former adopted daughter	Adopted son or former adoptive son

<i>3. Relationships by virtue of Part 2 of the Human Fertilisation and Embryology Act 2008</i>	
<i>Column 1</i>	<i>Column 2</i>
Mother	Father
Daughter	Son
Second female parent by virtue of section 42 or 43 of that Act.	

(2) For the purpose of this section, a degree of relationship exists in the case of a degree specified in paragraph 1 of the Table –

- (a) whether it is of the full blood or the half blood; and
- (b) even where traced through to any person whose parents are not or have not been married to one another.

(3) For the avoidance of doubt sexual intercourse between persons who are not related to each other in a degree referred to in subsection (1) above is not incest.”

Legal principles

1. The offence of incest is committed by any male or female person who has sexual intercourse with a person to whom he or she is related within the degrees set out in

section 1. Proof of sexual intercourse is constituted in the same way as proof of rape. Sexual activity between persons in the prohibited degrees which falls short of sexual intercourse could previously have been charged as shameless indecency: [R v HM Advocate 1988 SCCR 254](#) but the crime of shameless indecency has since been abolished (see [Webster v Dominick 2003 SCCR 525](#)). Consensual sexual activity between adults within the prohibited degrees which does not involve penile penetration of the vagina is not, *per se*, a criminal act. However, where such conduct involves a child, the relevant charge is likely to be one under the Sexual Offences (Scotland) Act 2009 or a charge of lewd, indecent and libidinous practices.

2. Once the Crown proves that sexual intercourse took place and that the parties were related within the prohibited degrees, the accused will be guilty of incest unless he proves on the balance of probabilities one of the defences in paras (a) to (c) of section 1(1) – see above.

Reverse burden of proof

3. Problems may arise with the reverse burden of proof. The different approaches to the thorny issues of legal and evidential burdens taken in the obiter opinions in [R v Lambert \[2002\] 2 AC 541](#), [2001] 3 WLR 206, [2001] 3 A ER 577 and [R v Johnstone \[2003\] 1 WLR 1736](#), [2003] 3 A ER 884, and considered by the House of Lords in *Sheldrake v DPP* [2005] 1 A ER 237 have not really been resolved in a way that eases the task of trial courts. Unless the Crown or the defence give notice under section 72(1)(d) of the 1995 Act to raise the issue pre-trial, or unless the jury speeches make clear the parties are agreed on the nature of the burden – at the moment the trial court is only left with [AG's Ref \(No 1 of 2004\) \[2004\] 1 WLR 2111](#) at [52] as a general guide as to whether a legal burden on the accused should be read down to become simply an evidential burden. In that event a direction in the style of what is generally said about special defences would be appropriate.

In brief, AG's Ref says:

1. At present, Johnstone is the latest word on the subject.
2. Reverse legal burdens are probably justified where the Crown has to prove the essential ingredients of the case, but there are significant reasons why it is fair and reasonable to deny the accused the normal protection of the presumption of innocence.
3. Where an exception is proportionate, it is sufficient if the exception is reasonably necessary.
4. An evidential burden on an accused does not contravene Art 6(2).

5. The court has to decide what will be the realistic effects of the reverse burden. If an Act creates an offence plus an exception, that strongly indicates no breach of Art 6(2).
6. The easier an accused can discharge a burden, the more likely it is that it is justified.
7. The ultimate question is: "Would the exception prevent a fair trial?" If it would the provision must be read down if possible, or declared incompatible.
8. The need for a reverse burden is not necessarily reflected by the gravity of the offence.
9. [*Salabiaku* 13 EHRR 379](#), 388 para 28 gives guidance on the European approach.

Possible form of direction on incest

Section 1: Criminal Law (Consolidation) (Scotland) Act 1995: Incest

Note: The following direction refers to a male accused and female complainer but the accused could be female, or both parties could be charged in the same charge. In either case the direction will require to be adapted.

Note: The direction on corroboration for this offence was amended in May 2024 in accordance with the law as stated in [Lord Advocate's Reference No 1 of 2023 \[2023\] HCJAC 40, 2024 JC 140](#).

Charge [x] is a charge of incest under the 1995 Act.

The crime consists of engaging in sexual intercourse with a person of the opposite sex, who is within one of the specified close degrees of blood relationship or adoptive relationship.

In this case, it is alleged that the accused had sexual intercourse with his/her [specify the relationship] which is one of the prohibited categories.

Sexual intercourse between people in such a relationship is a criminal act and so consent is irrelevant.

Sexual intercourse

There must be penetration of the vagina by the penis. Any degree of penetration is enough. Ejaculation of semen is not necessary.

The relationship

The accused and complainer must have been related to each other in one of the prohibited categories.

[Where appropriate: In this case it is not in dispute that the accused and complainer were [\[specify the relationship\]](#). That is one of the prohibited categories and so you need not consider that matter further.]

Corroboration

Both the commission of the crime, and that the accused committed it, must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only and do not need corroboration. They appear in the charge in order to give the accused fair notice of how this crime is alleged to have been committed.

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of distress**

[Use [directions from s1](#) as appropriate.]

- **Where there is evidence of a *de recenti* statement in the context of distress**

[Use [directions from s1](#) as appropriate.]

- **Other sources of corroboration**

[Where appropriate, judges should identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "[Corroboration generally/Corroboration in rape etc](#)".]

Additional directions

[One or more of the following directions on "myths" should be given where relevant:]

- A [delayed reporting direction](#) (section 288DA).
- A [lack of emotion direction](#).

Where there is a defence in terms of s1(a), (b) or (c)

In this case the accused says that [he/she/they]:

[Select one or more of the following:]

- Did not know, and had no reason to suspect, that the complainer was *[related to the accused as stated in the charge]*
- Did not consent to sexual intercourse
- Did not consent to sexual intercourse with the complainer
- [Was/were married] to the complainer in another country by a marriage recognised as valid in Scotland.

That would be a complete defence to the charge.

[Where the defence is that the accused did not consent to sexual intercourse give a direction on consent. The standard direction on consent will require to be adapted so that it is clear that the question is whether it is proved that *the accused* (rather than a complainer) did not consent to sexual intercourse.]

It is for the accused to establish this defence. But there are two important things for you to bear in mind:

First the accused has to do so on the balance of probabilities. Proof on the balance of probabilities is a lower standard than proof beyond reasonable doubt and means that the defence is more probable, or more likely to be true, than not.

Second, evidence to support the accused's position does not need to be corroborated.

If you think the accused has proved the defence on the balance of probabilities, then you must acquit.

REMEMBER: Warning re reverse burden of proof

Summary

For the Crown to prove this charge, you would need to be satisfied that:

1. The accused and the complainer were related to each other by being *[specify the relationship]*; and
2. The accused had sexual intercourse with the complainer.

[Where there is a defence in terms of s1(a), (b) or (c):]

If you are not satisfied of either or both of those matters beyond a reasonable doubt then you must acquit. However, if you are satisfied of both matters, then you must

go on to consider whether the accused has satisfied you, on the balance of probabilities, that [*Specify the defence*]. If you are satisfied that the defence applies, then you must acquit. If you are not satisfied that the defence applies, and are satisfied of the Crown case beyond reasonable doubt then you should convict.