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Do you have any suitable law reform projects to suggest?

The current law on automatism, where the accused person's temporary mentally dissociated state is caused by a so- called internal factor, is uncertain unsatisfactory and arguably unjust and should be examined with a view to making recommendations for reform. This is especially so where the person is alleged to have committed a road traffic offence. Stewart v Payne [2016] HCJAC 122 2017 SLT 159 highlights the evidential hurdles to bringing proceedings against drivers who claim to have been unconscious at the time of the commission of the alleged offence as a result of a pathological condition.

Do you have any project to suggest that would be suitable for the Commission Bill process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Please provide us with information about the issues with the law that you have identified:

The High Court of Justiciary ruled in HMA v Cunningham v H.M. Advocate 1963 JC 80 that there was no special defence short of insanity known to the law of Scotland.

Cunningham was overruled in part by a 5 judge bench in Ross v H.M. Advocate 1991 JC 15 but only in respect of cases of temporary mental dissociation caused by a so called external factor such as a 'spiked' drink, concussion, a severe allergic reaction, or the presence of toxic fumes. The court in Ross set out, and in the later case of Sorley v H.M. Advocate 1992 JC 102clarified the conditions that must be met for the defence to succeed. The external factor must not be self-induced. It must be one, which the accused was not bound to foresee and it must have resulted in a total alienation of reason amounting to a complete absence of self-control. In Sorley, the court observed that there must be clear, specific evidence to support the defence. The evidence must relate to the state of mind of the accused at the time at which the crime charged was committed and must provide a "causative link between the external factor and the total loss of control" at p 107. The Court noted that this would normally require the accused to lead expert evidence. Ross and Sorley make the position clear. The accused faces an onerous task in satisfying the conditions but there are sound public policy reasons for the bar to be set so high.

Several issues arise, however, where the temporary dissociation is caused by a so-called internal factor such as hypoglycemia, epilepsy, sleep disorder or cardiovascular disease.

Firstly Ross did not overrule Cunningham in so far as the cause of the temporary mental dissociation is an internal factor such as hypoglycaemia caused by diabetes, epilepsy, cardiovascular disease or sleep disorder. Therefore it is still the case, strictly speaking, thatan accused person who claims that they committed the alleged offence while suffering from hypoglycaemia, for example, cannot rely on a defence of automatism. The court in Finegan v Heywood 2000 JC 444 hinted that it might be prepared to consider an internal factor such as the sleep disorder known as parasomnia as a cause of automatism- although as Finegan's condition had been brought on by his voluntary consumption of alcohol the court was not required to consider Cunningham. Where an accused claims to have carried out the acts charged while unconscious of their actions, they are limited to raising a defence of insanity. However, the special defence of insanity was replaced in 2012 with a statutory defence set out in sec 51A of the Criminal Procedure (Scotland) Act 1995. A person raising the sec 51A defence must establish that they were not able to recognise the nature of, or wrongfulness of, the conduct by reason of mental disorder defined in section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 which does not refer to mental dissociation or unconsciousness caused by a physical condition such as diabetes. Therefore, an accused whose condition is caused by their physical, rather than mental, ill health is precluded from relying on the sec 51A defence.

The reported case law on unconscious driver cases since Cunningham had tended to treat the accused's condition as negating the actus reus rather than the mens rea on the grounds that strict liability offences such the main road traffic offences do not require mens rea. See for example Farrell v Stirling 1975 (Sh Ct) 71 SLT, Macleod v Mathieson 1993 SCCR 488. The cases turned on whether the loss of consciousness was an event that the accused was not bound to foresee.

The matter was thrown into particularly sharp relief by the reaction to the Lord Advocate's publicly stated reasons for the decisions not to take criminal proceedings against William Payne or Harry Clarke both of whom had suffered a temporary loss of consciousness while driving and had struck and killed a number of pedestrians. Both had previously suffered losses of consciousness due to medical conditions that had been diagnosed or were under investigation at the time of the accidents. In two public statements the Crown stated that because the prosecution was required to, but could not prove, that the accused could foresee that they would take ill on the accident itself, there was insufficient admissible evidence to justify taking proceedings against them. The reasons for the decisions appeared to rub contrary to the approach taken by the Crown in Farrell v Stirling and Macleod v Mathieson

The Lord Advocate maintained that position in Stewart v Payne (see paras 18-20) " It would be necessary to show that the respondent knew or ought to have known that he might lose consciousness at the wheel without warning and that driving on the day of the incident carried an obvious and material danger" (para 20) The court agreed with the Lord Advocate's approach (see paras 83-84) stating that the Crown had correctly considered that Payne and Clarkes state of knowledge on the day in question had to be assessed "in the context of all the information known to each of them, including their medical history and any inferences which might reasonable be drawn therefrom" [para 84] and that they did not consider that the Crown had made an error in law in reaching its decisions.

Therefore Scots law currently takes an inconsistent approach to cases of automatism depending on whether they are caused by an external or an internal factor. In external factor cases the onus is on the accused to show that they have satisfied the quite onerous condition of the Ross test for understandable public policy reasons. On the other hand in internal factor cases the Crown now appears to face a potentially insurmountable evidential barrier to taking proceedings, even in cases resulting in multiple fatalities. While the court in Stewart v Payne noted that foreseeability would depend on the facts and circumstances in each case, the issue at present is that it is not clear at what point the foreseeability threshold is crossed. There appears to be no sound reason on principle why the cases are treated differently.

The Payne and Clarke cases also attracted a great deal of adverse media comment. On the face of it, at least in the minds of the Scottish general public there was evidence that both drivers were under investigation for their medical conditions, conditions that had previously caused them to lose consciousness. If there was insufficient evidence to justify taking proceedings in those cases, just what sort of evidence would be required to show that the accused could foresee that they would take ill?

Please provide us with information about the impact these issues are having in practice:

I write as an academic and former prosecutor and so cannot offer any first hand observations about the impact of the issues in practice. However it appears to me that there may be concerns that different approaches may have be taken in similar internal factor cases because fortuitously there is evidence that a person knew or ought to have known that they should have avoided driving on the day in question in one case but not in another.

Please provide us with information about the potential benefits of law reform.

I would suggest that if the law on automatism were to be reformed it would offer clarity and certainty to police officers investigating cases, prosecutors considering whether to take criminal proceedings and solicitors and counsel advising clients. It might also go some way towards restoring public confidence in the criminal justice system. It would also allow for a consistent approach to be taken irrespective of whether the cause of the automatic state was an external factor or a physical condition.

General comments: