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# An Empirical Study of Criminal Defences

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*Although much has been written about the theory of criminal defences, little is known about how criminal defences operate in practice, particularly in Scotland. This research presents findings on the use of criminal defences in Scottish homicide cases across an 11-year period. It draws distinctions between the stages of accusation and conviction in order to better illuminate the circumstances in which criminal responsibility or criminal liability is allocated. It also offers an understanding of the contexts in which defences operate in practice, embedded in particular within intimate partner homicide as a phenomenon. Thus, this work contributes to a number of different and intersecting bodies of literature: studies on homicide, literature on criminal defences and feminist literature which has considered women's experiences before the law. Its findings have important implications for future law reform and the lens through which criminal defences are conceptualised: and this has particular resonance, given the current review of homicide and defences to murder being undertaken by the Scottish Law Commission.*

## Introduction

Despite a wealth of discussion about criminal defences at a theoretical level,<sup>1</sup> little is known about how criminal defences currently operate in practice, particularly in Scotland.<sup>2</sup> This research seeks to bridge a gap in existing knowledge by identifying how criminal defences are used in practice. It draws distinction between the stages of accusation and conviction in order to better illuminate the circumstances in which criminal liability is allocated and offers an understanding of the context in which defences operate in practice, embedded within the broader context of homicide as a phenomenon and focusing on intimate partner homicide in particular.

The findings presented relate to instances in which someone was accused of murder or culpable homicide in Scotland between the period 2008 and 2019. Results are presented on four categories of defences: lack of capacity defences; defences resulting from a response to a threat; failure of proof defences relating to the commission of the *actus reus* and failure of proof defences relating to *mens rea*. The findings presented offer an evidence base as to how criminal defences operate in practice in Scotland, and illustrates the differences which exist between how male and female accused utilise these defences in homicide cases.

## Existing data on criminal defences in practice

In Scotland an accused person is required to provide advance notice of a 'special defence'.<sup>3</sup> Such defences, although not definitively listed, have generally been considered as those which puts in issue a fact, not referenced in the libel, but which, if accepted, will result in the

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<sup>1</sup> See, for example, M. Dsouza, *Rationale-Based Defences in Criminal Law* (Oxford: Hart, 2019); P.H. Robinson, "Criminal Law Defenses: A Systematic Analysis" (1982) 82(20) *Columbia Law Review* 199.

<sup>2</sup> There is more literature on how defences operate in practice in England and Wales than in Scotland as a result of the activities of the Law Commission of England and Wales and the Centre for Women's Justice.

<sup>3</sup> Criminal Procedure (Scotland) Act 1995, section 78.

accused being acquitted. The subsequent introduction of defence statements in Scotland has lessened the significance of special defences as a category, but it has not eradicated them. It is now the case that an accused must disclose any and all defence positions to the prosecution fourteen days in advance of trial.<sup>4</sup> The accused is able to give notice of more than one defence, even where they would appear to be mutually exclusive to one another.<sup>5</sup>

As such, it might be expected that records would be available on how criminal defences are used in practice in the Scottish courts. However, this is not the case; central databases do not record how defences are used: the Scottish Government does not provide details pertaining to defences/pleadings in its annual *Criminal Proceedings* publication. Usable records of special defences or defence statements are not documented by the Scottish Courts and Tribunal Service (SCTS). FOI requests submitted by the author revealed that where there were multiple hearings for the same case for the same accused person, data on special defences are recorded by the number of hearings rather than the number of accused. The SCTS's Quarterly Criminal Court Statistics publication is produced at case level and since a case can involve multiple accused, there is no way of assigning a gender to a complaint or indictment meaning that there was no way of ascertaining data pertaining to gender and the use of criminal defences. Although the Faculty of Advocates Library does hold a selection of papers for cases heard in the High Court of Justiciary, these are limited to those cases which were reported in Justiciary Cases. Furthermore, for reasons of data protection, they have been unable to collect any papers for cases reported after 2011-12.<sup>6</sup>

Chalmers has previously noted the lack of empirical evidence available on the operation of partial defences to murder in Scotland<sup>7</sup>, but such an observation is relevant to other defences and other jurisdictions. Valdes's study is one of the few empirical studies on the operation of criminal defences in Anglo-American systems.<sup>8</sup> He conducted 400 surveys with American judges, prosecutors and defence lawyers in order to ascertain more about the frequency and success of entrapment, statutes of limitations, double jeopardy, diplomatic immunity, insanity, and reasonable mistake of law. He observed that defences tend to be raised in negotiation rather than litigation, with the existence of a valid defence being viewed as a strong bargaining tool, indicating one of the difficulties which exists when attempting to assess and measure how defences operate in practice.

Yet, any future reform of criminal defences to homicide in Scotland should be underpinned by some understanding as to how such defences are operating in practice. The choice and use of criminal defences in the context of intimate partner homicide (IPH) may also give rise to significant concern, given that most IPH is preceded by male perpetrated abuse. At a time when violence against women and girls has been described as "endemic",<sup>9</sup> it is crucial that responses to IPH do not further contribute to the inequality which facilitates

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<sup>4</sup> Criminal Procedure (Scotland) Act 1995, section 70A, as introduced by section 124 of the Criminal Justice and Licensing (Scotland) Act 2010.

<sup>5</sup> However, lodging and then withdrawing a defence can place the accused at a legal disadvantage, resulting in later questioning over their credibility, A. Ringnalda, "Inquisitorial or adversarial? The role of the Scottish prosecutor and special defences" (2010) 6(1) *Utrecht Law Review* 119.

<sup>6</sup> Personal Communication with Advocates Library, December 2020.

<sup>7</sup> Chalmers, J, *Partial Defences to Murder in Scotland: An Unlikely Tranquillity*. In Reed, A, and Bohlander, M (eds) *Loss of Control and Diminished Responsibility*. (London: Ashgate, 2011).

<sup>8</sup> S.G. Valdes, "Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitution Evidentiary Claims, and Plea Negotiations" (2005) 153 *University of Pennsylvania Law Review* 1709.

<sup>9</sup> Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services. 2021. *Inspection into how effectively the police engage with women and girls*.

such violence and abuse in the first place. Certainly, feminist concerns about criminal defences are long standing.

### **A feminist account of criminal defences**

Feminist accounts of criminal law have pointed to the gendered application of criminal defences, situating this in the context of the criminal law's tendency to reflect and uphold male standards of behaviour.<sup>10</sup> The trend to employ lack of capacity defences to explain female offending has been widely recognised against the background of literature which has discussed the tendency to stereotype women who offend as either 'mad' or 'bad'. Lack of capacity defences are often satisfied with reference to syndrome evidence (although syndrome evidence has also been evident in other defences such as provocation and self-defence). In the context of cases where women have killed intimate male partners against a background of domestic abuse, 'battered woman syndrome' is often cited to explain women's actions.<sup>11</sup> As such, there is deference to medical models of criminal responsibility to explain female offending. This has been especially true where women commit filicide, viewed as an aberration of nature in itself.<sup>12</sup> It has also been recognised internationally that women face difficulty accessing self-defence, despite its suggested relevance in cases where women kill their intimate partners.<sup>13</sup> Feminist commentators have long highlighted the development of self-defence around male experiences of public violence.

The difficulties associated with women's access to the defence of necessity in Scotland has also been illustrated.<sup>14</sup> Cases such as *Ruxton v Lang*<sup>15</sup> and *D v Donnelly*<sup>16</sup> (which both involved convictions for driving while under the influence of alcohol in circumstances where the female accused were seeking to flee the threat of male perpetrated violence) evidence the difficulty the law has in reflecting women's lived experiences of domestic abuse and sexual violence.<sup>17</sup>

Before considering how defences have been found to operate in practice, it is necessary to offer an account of how criminal defences have been understood for the purpose of this study.

### **Defining criminal defences**

Providing a clear definition of a criminal defence is not without difficulty. It has been recognised that previous definitions offered in literature risk capturing circumstances which

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<sup>10</sup> N. Naffine, *Criminal Law and The Man Problem*. (Oxford: Hart, 2019).

<sup>11</sup> F.E. Raitt and M. Zeedyk. *The implicit relation of psychology and law: Women and syndrome evidence*. (London: Routledge, 2000).

<sup>12</sup> F. Brookman and J. Nolan, "The Dark Figure of Infanticide in England and Wales: Complexities of Diagnosis" (2006) 21(7) *Journal of Interpersonal Violence*, 869-889.

<sup>13</sup> S.K. Howes, K.S. Williams and H. Wistrich, "Women who Kill: Why Self-Defence Rarely Works for Women Who Kill Their Abuser" (2021) 11 *Criminal Law Review* 944; E.A. Sheehy, *Defending Battered Women on Trial: Lessons from the transcripts* (Vancouver: UBS Press, 2014); J. Tolmie, S. Tarrant and G. Giudice, *Transforming Legal Understandings of Intimate Partner Violence*. (Queensland: Queensland: Australia's National Research Organisation for Women's Safety Limited, 2019).

<sup>14</sup> S. Cowan, C. Kennedy and V. Munro, *Scottish Feminist Judgments: (re) creating the law from the outside in*. (Oxford: Hart, 2019), see especially chapter 5 in which Cowan and Munro provide a feminist judgment of *Ruxton v Lang* accompanied by a commentary from Liz Campbell.

<sup>15</sup> 1998 S.C.C.R. 1.

<sup>16</sup> 2009 S.L.T. 476.

<sup>17</sup> Although, it must also be recognised that broader difficulties exist with necessity in Scots law, stemming from institutional writer Hume's disapproval of the plea, D. Hume, *Commentaries on the Law of Scotland Respecting Crimes Vol i*. (Edinburgh: Bell and Bradfute, 1844, 4<sup>th</sup> ed), p 55.

do not fit with a normative understanding of the concept of a defence, such as an offender's ability to evade capture.<sup>18</sup> For Chalmers and Leverick:

A criminal defence is 'any identifiable set of conditions or circumstances that provides sufficient reason why the accused *ought* not to be convicted of a particular offence or *ought* not to stand trial for a particular offence'.<sup>19</sup>

Duff offers an account of the structure of criminal defences which distinguishes between responsibility for conduct and liability. For him, although it may be tempting to count all attempts to avert a conviction as 'defences', it is important to distinguish 'conviction-averting pleas which deny responsibility from those which admit responsibility but deny liability'.<sup>20</sup>

Where an accused is charged with murder or culpable homicide, the significance of a defence is obvious. A successful defence may render the accused's actions justifiable, absolving them of criminal responsibility. Other defences may not conceptualise the accused's actions as justifiable but may nevertheless operate to ensure that the accused is not held responsible for the act, and secures an acquittal. In Scots law, such 'full' defences to murder include self-defence, automatism and acquittal on the grounds of mental disorder. It is unclear whether coercion and necessity apply in the context of fatal offences against the person<sup>21</sup>. This can be contrasted to the position in England and Wales where the common law defence of duress explicitly excludes murder and attempted murder.<sup>22</sup> Two partial defences to murder are also currently recognised in Scots law: provocation and diminished responsibility. Where either is accepted, a conviction for culpable homicide rather than murder will result.

Other positions may also be advanced in the context of a homicide charge. The accused may allege that they were elsewhere at the time of the offence (alibi) or contend that another person is responsible for the alleged act (incrimination). The accused may also advance other failure of proof positions, which acknowledge responsibility for the conduct in question but may nonetheless impact upon their liability. These include a claim that the accused did not have the necessary *mens rea* for murder (wicked intention to kill or wicked recklessness<sup>23</sup>). The accused may specifically posit that they lacked *mens rea* because the death was accidental. Where it is alleged that the *actus reus* of a crime was committed by means of an omission, the accused may argue that they did not have a legal duty to act or that they had taken reasonable steps to discharge a duty which did exist. Where it is alleged that an accused was acting in concert, it may be advanced by way of a defence that the principal

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<sup>18</sup> J. Chalmers and F. Leverick, *Criminal Defences and Pleas in Bar of Trial* (Edinburgh: W Green, 2006)

<sup>19</sup> J. Chalmers and F. Leverick, *Criminal Defences and Pleas in Bar of Trial* (Edinburgh: W Green, 2006), para 1-01, emphasis in original.

<sup>20</sup> R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2007), pp 22-23.

<sup>21</sup> In the case of *HM Advocate v Collins* 1991 S.C.C.R. 898. Lord Allanbridge commented that the defence of coercion would not be available to a charge of murder (although that was not the context of the case). This would be in keeping with England and Wales where the defence has been ruled out in this context, *R v Howe* [1987] A.C. 417. There are no reported cases on the application of necessity in the context of murder, but it does appear to have been accepted in *HM Advocate v Anderson* 2006 (unreported), discussed by P.R. Ferguson and C. McDiarmid, *Scots Criminal Law: A Critical Analysis* (Edinburgh: Edinburgh University Press, 2014, 2<sup>ND</sup> ed), p 55. They note that the trial judge- Lord Carloway, now Lord Justice-General- directed the jury that necessity could be accepted as a defence to murder.

<sup>22</sup> *R v Gotts* [1992] 2 A.C 417. In 2006, the Law Commission of England and Wales recommended that duress should operate as a full defence to murder and attempted murder, The Law Commission. *Murder Manslaughter and Infanticide*, para 6.21. (London: Law Commission, 2006).

<sup>23</sup> *Drury v HM Advocate* 2001 S.L.T 1013.

offender's actions were unforeseeable to the accused and had gone beyond the common purpose of those within the group. As such, there are a number of positions which may be offered by an accused person, some of which go beyond the traditional understanding of a 'defence'<sup>24</sup>. All of these claims warrant being considered together since they represent the variety of ways in which a person charged with homicide may deny responsibility.

## Methods

In order to examine the operation of criminal defences in practice, distinction has to be made between stages of charge and conviction. In this study, cases were identified and mapped using a variety of methods: reported appeals, sentencing statements and media reporting. There exists precedent for relying on media reporting in socio-legal studies where there is a lack of centralised data on homicide.<sup>25</sup> If a defence has been accepted and there is no resulting conviction, media reports are likely to be the only way through which information about the case can be ascertained.

Key terms were used to search for cases through the search engine Google and LexisNexis News in order to identify those who had been accused but not convicted of homicide: terms such as "accused" and "arrested" and "murder" were used alongside other terms such as specific defences and specific High Courts in Scotland. The limitations of using media reports must be recognised- most obviously that legal terms will be misused or reported inaccurately. Attempt was made to overcome this danger through corroboration of reporting. Despite the recognised limitations, this proved to be a useful method of identifying cases, especially those where there was no conviction because a full defence had been successful.

The results presented explain not just how defences are used in quantitative terms, but also the circumstances in which defences are successfully pled. They align the use of criminal defences in the context of homicide with what is known about homicide as a phenomenon, particularly in relation to intimate partner homicide (IPH).

## Data

In total, 740 people were identified as having been charged with either murder or culpable homicide in relation to deaths occurring between 2008 and 2019 in Scotland. Of this, 111 (15%) were female accused and 629 were male accused (85%). To offer some context to these figures, between 2008 and 2019, the Scottish Government (2019) recorded 793 cases of homicide involving 805 victims and 1,088 accused.<sup>26</sup> Of these cases recorded by the Scottish Government, 148 accused were female (13.6%) and 940 were male (86.4%).

Within the study group, women were most commonly accused of killings their male partners or ex-partners. This is in keeping with studies on female perpetrated homicide which

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<sup>24</sup> And may be argued by some not to be defences at all. For further discussion see D.N. Husak, "The Serial View of Criminal Defenses" (1992 ) 3(3) *Criminal Law Forum* 369.

<sup>25</sup> C. Gillespie, *Justifiable Homicide: Battered Women, Self Defense and the Law* (Columbus: Ohio State University, 1989); M. Moen and P. Shon, "Female Victims and Offenders in South African Parricides, 1990-2019" (2020) 15(6) *Victim & Offenders* 793; E.A. Sheehy, *Defending Battered Women on Trial: Lessons from the transcripts* (Vancouver: UBS Press; 2014).

<sup>26</sup> Scottish Government data relate to the year of arrest; homicides in this study were recorded by the year of the fatality.

have repeatedly noted that most women who kill do so within the family context<sup>27</sup> - and most often killing intimate male partners against a background of domestic abuse.<sup>28</sup>

Most men in the study group were accused of killing another man, most commonly a male known to them. In 9% of the cases identified, a male was accused of killing his female partner or ex-partner. To offer some context on this category, the Scottish Government statistics for the same period record that 11.9% of male-perpetrated homicides involved a female partner or ex-partner.<sup>29</sup> Internationally, most women are killed by men known to them.<sup>30</sup>

## Findings

### *Lack of capacity defences*

**Table 1: Number of accused who raised a lack of capacity defence (n=62)**

| Defence                                   | FEMALE ACCUSED |                 |          |                    |           | MALE ACCUSED |                 |          |                    |           |
|---|----------------|-----------------|----------|--------------------|-----------|--------------|-----------------|----------|--------------------|-----------|
|   | Pled           | FULL ACCEPTANCE |          | PARTIAL ACCEPTANCE |           | Pled         | FULL ACCEPTANCE |          | PARTIAL ACCEPTANCE |           |
|   |                | Pre trial       | At trial | Culpable homicide  | Non-fatal |              | Pre trial       | At trial | Culpable homicide  | Non-fatal |
| Unfit for trial                           | -              | -               | -        | -                  | -         | 2            | 2               | -        | -                  | -         |
| Acquittal on the basis of mental disorder | 1              | 1               | -        | -                  | -         | 7            | 1               | 6        | -                  | -         |
| Automatism                                | -              | -               | -        | -                  | -         | 1            | -               | -        | -                  | -         |
| Diminished responsibility                 | 14             | 10              | -        | N/A                | N/A       | 37           | 19              | 5        | N/A                | N/A       |

**Full acceptance rate: 71%**

**Full acceptance rate for female accused: 73.3%**

**Full acceptance rate for male accused: 70.2%**

Diminished responsibility was the lack of capacity defence most commonly pled. For male accused, IPH was the main context in which male diminished responsibility was raised: in 21.4% of all cases in the study group in which a male was accused of killing his female partner or ex-partner, diminished responsibility was pled and the plea was accepted in 75% of these cases.

For female accused, diminished responsibility was the most common route through which filicide accusations were resolved but it also had some relevance in IPH cases: in 12.9% of all cases in the study group in which a female was accused of killing her partner or

<sup>27</sup> W. Chan, *Women, Murder and Justice* (London: Palgrave, 2001); L. Eriksson, S. McPhedran, S. Caman, P. Mazerolle, R. Wortley and H. Johnson, "Criminal Careers Among Female Perpetrators of Family and Nonfamily Homicide in Australia" (2018) April *Journal of Interpersonal Violence* 1.

<sup>28</sup> E. Moen, L. Nygren and K. Edin, "Volatile and Violent Relationships Among Women Sentence for Homicide in Sweden Between 1986 and 2005" (2016) 11(3) *Victims & Offenders* 373.

<sup>29</sup> Scottish Government, *Homicide in Scotland 2017-2018* (Edinburgh: Scottish Government, 2019), Table 10.

<sup>30</sup> United Nations, *Global Study on Homicide* (Vienna: United Nations Office on Drugs and Crime, 2019).

ex-partner, diminished responsibility was pled and the plea was accepted in 50% of these cases.

Therefore, and perhaps surprisingly, diminished responsibility was more commonly utilised by male accused than female accused in the context of IPH.

### *Defences resulting from a response to a threat*

Table 2: Number of accused who raised a defence resulting from a response to a threat (n=148) <sup>31</sup>

| Defence                      | FEMALE ACCUSED |                 |          |                    |           | MALE ACCUSED |                 |          |                    |           |
|------------------------------|----------------|-----------------|----------|--------------------|-----------|--------------|-----------------|----------|--------------------|-----------|
|                              | Pled           | FULL ACCEPTANCE |          | PARTIAL ACCEPTANCE |           | Pled         | FULL ACCEPTANCE |          | PARTIAL ACCEPTANCE |           |
|                              |                | Pre trial       | At trial | Culpable homicide  | Non-fatal |              | Pre trial       | At trial | Culpable homicide  | Non-fatal |
| Self-defence                 | 8              | -               | -        | 4                  | 1         | 80           | -               | 9        | 24 <sup>32</sup>   | 4         |
| -against rape                | 2              |                 |          | 1                  | -         | -            | -               | -        | -                  | -         |
| -third party                 | -              | -               | -        | -                  | -         | 1            | -               | -        | 1                  | -         |
| Provocation                  | 14             | 9               | 2        | N/A                | 1         | 40           | 20              | 11       | N/A                | N/A       |
| Provoking sexual act/advance | -              |                 |          |                    |           | 3            | -               | -        | -                  | -         |

Full acceptance rate: 33.8%

Full acceptance rate for female accused: 41.7%

Full acceptance rate for male accused: 32.2%

Amongst male accused who raised provocation, the most common context was that of killing a male known to them (87.5%). Similarly, most men who raised a defence of self-defence did so in the context of cases which involved the death of a male known to them (71.3%). Only two male accused raised provocation in the context of IPH. Both cases involved a background of domestic abuse by the accused towards the female victim and both men were convicted of murder. Three men sought to rely on self-defence in the context of IPH. All three were convicted of murder.

The circumstances of cases in which self-defence was raised by female accused were diverse and only three cases involved a context of IPH. However, two of these three cases resulted in convictions for murder. Both women claimed to have been subject to abuse or rape by the male deceased. Contrastingly, most women raised provocation in the context of IPH (71%).<sup>33</sup> In 50% of these cases, domestic abuse was reported and/or alleged and in all of these cases provocation was accepted. In the two cases where murder resulted it would not appear that equivalent defences, such as loss of control, would have been available to the accused, given the circumstances.

<sup>31</sup> Reference to provocation being 'fully accepted' refers to a conviction for one of culpable homicide resulting.

<sup>32</sup> One accused convicted of culpable homicide was also convicted of murder, having been accused of two murders.

<sup>33</sup> One of these cases involved a female partner.



### ***Failure of proof positions relating to the commission of the actus reus***

**Table 3: Number of accused who raised failure of proof positions relating to the *actus reus* (n=66)**

| Defence          | FEMALE ACCUSED |                 |          |                    |           | MALE ACCUSED |                 |          |                    |           |
|------------------|----------------|-----------------|----------|--------------------|-----------|--------------|-----------------|----------|--------------------|-----------|
|                  | Pled           | FULL ACCEPTANCE |          | PARTIAL ACCEPTANCE |           | Pled         | FULL ACCEPTANCE |          | PARTIAL ACCEPTANCE |           |
|                  |                | Pre trial       | At trial | Culpable homicide  | Non-fatal |              | Pre trial       | At trial | Culpable homicide  | Non-fatal |
| Alibi            | 1              | -               | -        | -                  | -         | 7            | -               | -        | -                  | -         |
| Incrimination    | 6              | -               | 2        | -                  | -         | 29           | -               | 5        | 4                  | -         |
| - of co-accused  | 6              | -               | 1        | -                  | 2         | 16           | -               | 1        | 4                  | -         |
| Reasonable steps | -              | -               | -        | -                  | -         | 1            | -               | 1        | -                  | -         |

**Full acceptance rate: 15.1%**

**Full acceptance rate for female accused: 23.1%**

**Full acceptance rate for male accused: 13.2%**

The defences of alibi and incrimination were not relevant in the context of IPH: only one male and one female accused raised the defence of incrimination in this context. Both were convicted of murder.

This category of defences did have some significance in filicide cases. The defence was raised by three women accused of familial filicide, accepted in one case (where her male partner was convicted of the murder). Three males also raised the defence in the context of filicide.<sup>34</sup> Two were convicted of murder and one culpable homicide.

### ***Failure of proof position relating to mens rea***

**Table 4: Number of accused who raised a failure of proof defence relating to the *mens rea* (n=95)**

| Defence           | FEMALE ACCUSED |                 |          |                    |           | MALE ACCUSED |                 |          |                    |           |
|-------------------|----------------|-----------------|----------|--------------------|-----------|--------------|-----------------|----------|--------------------|-----------|
|                   | Pled           | FULL ACCEPTANCE |          | PARTIAL ACCEPTANCE |           | Pled         | FULL ACCEPTANCE |          | PARTIAL ACCEPTANCE |           |
|                   |                | Pre trial       | At trial | Culpable homicide  | Non-fatal |              | Pre trial       | At trial | Culpable homicide  | Non-fatal |
| Lack of intention | 6              | -               | -        | 6                  | -         | 78           | -               | -        | 53                 | 1         |
| Accident          | -              | -               | -        | -                  | -         | 11           | -               | -        | 3                  | -         |

**Full acceptance rate: 0%**

**Partial acceptance rate: 66.3%**

Most cases involving a male accused citing a 'lack of intention' defence involved a male victim (78.2%), most commonly, a male known to the accused, but this was the most

<sup>34</sup> Two familial filicides and one non-familial.

common defence position advanced for men accused of filicide in the study group. The defence was accepted in all five filicide cases in which it was raised, despite a background of the male accused's domestic abuse being reported in two. Of the 12 cases involving female victims (15.4%), six were IPH cases and domestic abuse was reported in three. In only one of these six cases (not one in which domestic abuse was reported) was the defence accepted; in the remaining five a murder conviction resulted. In two 'lack of intention' cases male accused specifically claimed that the fatality occurred during sexual intercourse- the 'rough sex' defence. In one of these cases, this position was rejected completely, but in the other, it resulted in a conviction for culpable homicide.

IPH was also a relevant context to the defence of accident, raised only by male accused in the study group. This defence position was raised in IPH cases even where it was reported that there was a history of domestic abuse by the male accused towards his female victim or that there had been a recently ended relationship or jealousy about a new relationship- both of which can be risk factors associated with intimate partner femicide.<sup>35</sup>

## Discussion

Homicide as a phenomenon is gendered; it is carried out mostly by men, and as a result the methodological framework commonly employed by homicide studies is one focused on male violence.<sup>36</sup> Women are most likely to be killed by their partners or ex-partners<sup>37</sup> and women who kill are most likely to kill male partners following domestic abuse.<sup>38</sup> Women's experiences of homicide are thus deeply embedded within experiences of domestic abuse. As such, the manner in which IPH cases are resolved is highly significant. Any policy which seeks to counter gender-based violence must also take into consideration how IPH cases are resolved by the criminal law and the specific ways in which injustices are likely to present themselves in this context: that women are rarely acquitted of homicide on the basis of self-defence, that men who commit violence against women will have their criminal responsibility mitigated.

The results of this study suggest that closer consideration should be given the use of diminished responsibility by male accused in the context of IPH. This was the primary context in which male accused pled diminished responsibility and was more commonly utilised by male accused than female accused in the context of IPH. The problem is not that diminished responsibility is available as a defence position. The problem is that the plea is often accepted by the Crown before trial. For example, in *HM Advocate v Reilly*, where the plea was accepted by the Crown, it was commented in sentencing that: "Social workers say that in their opinion you will pose a significant risk of harm to any future partners. You have two previous convictions for crimes of violence."<sup>39</sup>

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<sup>35</sup> J. Monckton Smith, *In Control: Dangerous Relationships and How They End in Murder* (London: Bloomsbury Publishing, 2021).

<sup>36</sup> D. Kirkwood, D. "Female Perpetrated Homicide in Victoria between 1985 and 1995" (2003) 36(2) *The Australian and New Zealand Journal of Criminology* 152.

<sup>37</sup> R.E. Dobash, R.P. Dobash, K. Cavanagh and J. Juanjo Medina-Ariza, "Lethal and Nonlethal Violence Against an Intimate Female Partner" (2007) 13(4) *Violence Against Women* 329; Scottish Government, *Homicide in Scotland 2019-2020* (Edinburgh: Scottish Government, 2020), Table 10; S. Walklate, K. Fitz-Gibbon, J. McCulloch and J. Maher, *Towards a Global Femicide Index: Counting the Costs* (Milton. Routledge, 2019).

<sup>38</sup> W. Chan, *Women, Murder and Justice* (London: Palgrave, 2001).

<sup>39</sup> *HM Advocate v Reilly*, 2012 (unreported), comments taken from BBC. (2012, May 25). *Christopher O'Reilly killed partner Karen Gallagher over baby row*. <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-18206180>

But there is also a problem of sentencing where cases are taken to trial and juries accept the plea. In *Reilly*, the sentence given was 7 years and 6 months' imprisonment. This appears to be at odds with the Domestic Abuse (Scotland) Act 2018 which provides a maximum sentence of 14 years' imprisonment for a conviction on indictment under section 1 of the Act.<sup>40</sup> Of the eight males who had pleas of diminished responsibility accepted in the context of IPH in the study group, four were subject to medicalised forms of sentencing and one received probation. The average length of sentence amongst the other three was 6 years and 2 months' imprisonment. Sixteen men were convicted of culpable homicide on the basis of diminished responsibility in the context of other types of homicide. Six were subject to medicalised forms of sentencing. The average sentence amongst the remaining ten offenders was 9 years and four months' imprisonment. Although this relates to a very small number of cases, these figures suggest that IPH is considered less serious than other forms of homicide. Concerns relating to the sentencing of domestic homicide are likely to be highlighted by the independent review of domestic homicides being undertaken by Clare Wade QC.<sup>41</sup> For now, what can be said is that training directed at prosecutors would lessen the likelihood of such defences being accepted before trial and judicial training would also increase awareness about the broader context of violence against women in which IPH takes place.

The propensity for lack of intention defences to be used in IPH cases has been recognised.<sup>42</sup> Although a 'lack of intention' defence and the closely related defence of accident were rejected in most IPH cases in the study, it must be noted that 'lack of intention' was the most common defence position adopted by men accused of filicide. In all five cases, this position was accepted, resulting in a conviction for culpable homicide. This is despite the fact that in two cases, a history of domestic abuse was recognised. The different contexts in which male violence might be manipulated for the purposes of a 'lack of intention' defence must be recognised. However, it should also be noted that 'lack of intention' as a position may be reported less frequently in media reports than other defence positions, since, if a basis to suggest a lack of intention does exist, it will often lead to a lesser charge at the outset, rather than being tested at trial. Caution, therefore, must be exercised when relying on media reporting to ascertain how this defence position operates in practice.

Lack of intention, in the form of a 'rough sex' defence, also led to a conviction of culpable homicide for one of the two men who raised this position. There is precedent for Scottish juries making a finding of culpable homicide arising in circumstances where the accused claimed that the victim consented to strangulation during intercourse, despite warning that 'the crime does not cease to be murder merely because the victim has consented, or even has urged the commission of the deed'<sup>43</sup>, but this is at odds with the unequivocal position that a person cannot consent to their own physical injury. Certainly, it has been an issue of feminist concern that such a defence is allowed before a jury for consideration.<sup>44</sup> Section 71 of the Domestic Violence Act 2021 seeks to re-emphasise through codification the position set out in *R v Brown*<sup>45</sup>: that consent to serious harm for the purposes of sexual gratification is no defence. This provision has no application in Scotland, although the

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<sup>40</sup> Domestic Abuse (Scotland) Act 2018, section 9.

<sup>41</sup> See 'Spotlight on domestic homicides as independent reviewer appointed'.

<https://www.gov.uk/government/news/spotlight-on-domestic-homicides-as-independent-reviewer-appointed>

<sup>42</sup> J. Monckton Smith, *In Control: Dangerous Relationships and How They End in Murder* (London: Bloomsbury Publishing, 2021).

<sup>43</sup> *HM Advocate v Rutherford* 1947 S.L.T 3.

<sup>44</sup> H. Bows and J. Herring, "Getting away with murder? A Review of the 'Rough Sex Defence'" (2020) 84(6) *Journal of Criminal Law* 525.

<sup>45</sup> [1993] UKHL 19.

common law position under Scots law is, in principle, the same. The Scottish Law Commission has sought views on whether a similar provision is required in Scotland.<sup>46</sup>

The limitations of using non-legal sources to understand the legal landscape are recognised and are emphasised with an intention of bringing attention to the lack of reliable centralised data on criminal defences. Given the procedure of advance notice which operates in relation to criminal defence, there exists scope for a robust account of defences to be recorded. This would be useful moving forward, especially if defences to murder are going to face reform. It would allow for future research to more easily ascertain how defences are being used in practice. As has been recognised elsewhere, record keeping can itself create a reality.<sup>47</sup> Currently, it is very difficult to ascertain which groups may be especially excluded from defences. Proper recording of how defences are used, in all jurisdictions, has the potential to illuminate where injustices exist.

## **Conclusion**

This study has offered insight into the operation of criminal defences in practice in the context of homicide. This is more than a descriptive account of the landscape: by focusing on a practical application and the context of cases in which defence arguments are advanced and accepted, sites of potential injustices can be revealed. This is especially true in the context of IPH which is especially relevant to women's experiences of homicide as a phenomenon.

This work has shown where such sites of injustice lie and evidenced that there are a number of existing defences which are under-utilised in practice. Regardless of whether new defences are introduced to the landscape of Scottish criminal law in future years, it may be appropriate to consider whether existing defences can be utilised differently both in terms of limiting, extending or clarifying the existing scope, and how the use of criminal defences in practice can be best recorded.

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<sup>46</sup> Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Edinburgh: Scottish Law Commission, 2021), paragraphs 12.81-12.88 at pp 188-190.

<sup>47</sup> S. Motha and H. von Rijswijk, *Law, Memory, Violence Uncovering the Counter-Archive* (New York: Routledge, 2016).