

The basic definition of cruelty in Scots law is very similar to the one prevailing in England.

“Personal violence, as assault upon the woman, threats of violence which induce the fear of immediate danger to her person, maltreatment of her person so as to injure her health... (Furthermore,) any conduct towards the wife which leads to any injury either creating danger to her life or danger to her health, that too must be taken as sufficient ground for divorce.” (Lord Brougham in *Paterson vs. Russell*, (1850) 7 Bell’s App. 337 at p. 363).

However, the Scottish courts have interpreted this definition with more rigidity of late than have the English judges. Intention to injure on the part of the defender is virtually an essential element in actions based upon cruelty. Particularly in cases of mental cruelty, the Scottish courts have stressed that the conduct complained of must have been “aimed at” the pursuer, even though such conduct did cause an injury to health and that the consequence of it could be foreseen by the defender. Lord President Clyde observed in *Hutton vs. Hutton* (1962, S.L.T. 67):

“To establish cruelty the facts must enable the courts to infer that the defender’s persistence in a course of crime was deliberately pointed at the wife.”

In cases of alleged cruelty, the English and Scottish law are not identical. The Scottish courts have held that to be guilty of cruelty, volition must be shown. Thus under Scots law, insanity is a good defence against cruelty (*Breen vs. Breen*, 1961 S.C. 1583, c.f. *Williams vs. Williams*).

There is a further difference between the two British legal systems on cruelty. This rests on that provision of the 1938 Act which gave the courts power to grant divorces on the ground of such cruelty as would justify the granting of a decree of judicial separation under the existing law. At that time, to obtain a decree of judicial separation, it was necessary to establish not only that the defender had acted cruelly but that the pursuer could not in safety resume cohabitation. Thus, consideration of future danger to the petitioner is relevant in Scots law. While in England divorces on the ground of cruelty are based purely on past behaviour, in Scotland the future protection of the spouse is a vital factor. The actual test is not whether the pursuer was in danger at the time of the action or prior to it but whether he or she would be in danger if cohabitation were resumed. It is, of course, incumbent upon the defender of the action to establish that he has reformed his conduct, and that the spouse would not be in danger.

There is one other interesting provision of the Scottish law on cruelty. By the *Licensing Act* of 1903, section 73, habitual drunkenness, as defined by the *Habitual Drunkards Act*, 1879, section 3, if established in a matrimonial cause, is held to be equivalent in law and to have the same effects as cruelty and bodily violence by the habitual drunkard toward his or her spouse. No ill-treatment of the other spouse by the habitual drunkard is necessary to satisfy this statute.

5. *Sodomy or Bestiality*

These grounds were added by the statute of 1938. The crime must have been committed since the marriage, and under the criminal law of Scotland, it seems that they refer to acts committed by males but not by females. The 1938 Act,