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Laura Sharp
February 2016

The Criminal Justice and Licensing (Scotland) Act Section 38: The implications of *Paterson v Harvie*

Introduction

The Criminal Justice and Licensing (Scotland) Act 2010 section 38 created a new statutory offence of behaving in a threatening or abusive manner. Such an offence was deemed necessary after the test for the *actus reus* of breach of the peace was restated in *Smith v Donnelly* [1] and affirmed in the Full Bench decision of *Harris v H. M. Advocate* [2] The consequence of these decisions was that many instances of rowdy, disorderly or verbally violent behaviour that were once prosecuted as breaches of the peace no longer fell within the scope of that offence unless the conduct complained of also amounted to the common law crime of uttering threats or some other statutory offence; conduct that would have been considered worthy of the attention of the police and procurator fiscal had it still been open to them to take action.

In August 2014 a Bench of five judges gave its interpretation of the conduct required for the *actus reus* of a contravention of section 38. This article begins by setting out the changes to the test for breach of the peace set out in *Smith*[3] which brought about the need for the new offence. It then examines the reported cases in which section 38 was interpreted up to and including *Paterson v Harvie*[4] and considers the likely effect of the decision. Finally it suggests that section 38 as drafted and interpreted in *Paterson*[5], and breach of the peace still may not catch all the examples of non- aggravated disorderly conduct in which action by the police and procurator fiscal would appear to be indicated.

Breach of the Peace

[1] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[2] [2009] HCJAC 80, 2010 J.C.245, 2009 S.L.T 1078, 2010 S.C.L 56, 2010 S.C.C.R 931, 2010 G.W.D 35-724
[3] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[4] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 GWD 26-517
[5] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517

As any student of criminal law should be able to tell you, prior to the decision of the High Court of Justiciary in *Smith*[6] the type of conduct required for the *actus reus* of breach of the peace was said to be conduct of almost any kind that either, did cause or was reasonably likely to have caused, fear, alarm, upset, annoyance or distress to another or others. This has led over the years to conduct as diverse as fighting, shouting and swearing, energetic and persistent begging, unconvincing cross dressing, glue sniffing, playing football in the street, peeping tom type behaviour, walking naked in public, and attempting to have sexual intercourse with a bicycle in a locked room in a hostel, being prosecuted successfully as breach of the peace.[7] The *actus reus* of breach of the peace was restated in *Smith* as "conduct severe enough to cause alarm to ordinary people and threaten serious disturbance in the community" and "conduct which does present as genuinely alarming and disturbing in its context to any reasonable person."[8] In the absence of evidence that the alleged disorderly conduct resulted in actual alarm, then to justify a conviction the conduct required to be 'flagrant' [9]

The restatement of the test in *Smith*[10] had the practical effect of significantly raising the threshold of seriousness of the conduct required to commit breach of the peace. As the High Court anticipated, this clarification had the effect of removing some types of conduct from the ambit of the offence altogether. As it noted, conduct including the mere use of bad language, or the refusal to co-operate with the police "even if forcefully or truculently stated,"[11] would no longer meet the test. Similarly prosecutions of deeds done or utterances spoken in private

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[6] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[7] See for example, *Saltman v Allan* 1989 SLT 262, *Derret v Lockhart* 1991 SCCR 109, *Wyness, v Lockhart* 1992 SCCR 808, *Stewart v Lockhart* 1991 SLT 835, *Cameron v Normand*, 1992 SCCR 866, *MacDougall v Dochree* 1992 JC154, and *Robert Stewart* (Unreported,13 November 2007, Ayr Sheriff Court) cited in P. R Ferguson and C. McDiarmid, *Scots Criminal Law, A Critical Analysis* , 2nd edn (Edinburgh, Edinburgh University Press 2014) paras 15.2.7,15.2.8 15.3.2
[8] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011 at [20]
[9] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011 at [21]
[10] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[11] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011 at [20]

because of the unpleasant or disgusting nature of the conduct rather than any risk that it would provoke a disturbance would be no longer likely to meet the test. *Smith*[12] was affirmed in the Full Bench decision of *Harris v H.M. Advocate.*[13] Harris was accused of making comments to one police officer in person within the confines of the police station, and to another over the telephone that he knew where they and their families lived, and held personal information about their financial circumstances. Even though there was clear evidence that the officers found this alarming and distressing, the court ordered that the charges be dismissed as irrelevant because the conduct lacked the essential public element. Lord Justice – General Hamilton stated: "If, as we hold it to be, it is necessary to constitute breach of the peace that the conduct, in some sense must threaten serious disturbance to the community, it is difficult to see how a statement made in private by one person to another can, without more, constitute breach of the peace." [14]

The effect of these decisions on the prospects of success for prosecutions for verbal domestic abuse committed in the relative privacy of the home was raised in *Hatcher v Harrower.*[15] The court acknowledged that where that public element was lacking, as it was in *Hatcher,*[16] then such disturbances could not be prosecuted successfully as breaches of the peace. The court did not go so far as to hold that verbal domestic abuse could never amount to breach of the peace. Whether the test is met will depend on the facts and circumstances in the context of each case. In *Hatcher*,[17] although the couple's children were in the house there was no finding that they or any other witnesses had heard or were affected by the disturbance.

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[12] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[13] [2009] HCJAC 80, 2010 J.C.245, 2009 S.L.T 1078, 2010 S.C.L 56, 2010 S.C.C.R 931, 2010 G.W.D 35-724
[13] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[14] [2009] HCJAC 80, 2010 J.C.245, 2009 S.L.T 1078, 2010 S.C.L 56, 2010 S.C.C.R 931, 2010 G.W.D 35-724 at [16]
[15] [2010] HCJAC 76, 2011 J.C 90, 2011 S.C.L 114, 2010 S.C.C.R 903, 2010 GWD 30-617
[16] [2010] HCJAC 76, 2011 J.C 90, 2011 S.C.L 114, 2010 S.C.C.R 903, 2010 GWD 30-617
[17] [2010] HCJAC 76, 2011 J.C 90, 2011 S.C.L 114, 2010 S.C.C.R 903, 2010 GWD 30-617

This left the criminal justice agencies with the problem of what to do about private conduct that was psychologically damaging, genuinely frightening, alarming or distressing in its context, but did not involve violence, or which would not otherwise have given grounds for charges of assault or making threats. The Scottish Government, which claimed to be supportive of victims of domestic abuse, was faced with a gap in the criminal law. It appeared that swift action was required.

A statutory solution

In an attempt to address the mischief highlighted in *Hatcher*[18], John Lamont MSP proposed an amendment to the Criminal Justice and Licensing (Scotland) Bill. Mr Lamont's version of the offence required only that the accused behave in such a manner that another person would be likely to be caused fear, alarm or distress. This has echoes of the pre *Smith*[19] test for breach of the peace set out in such cases as *Wilson v Brown*[20]. Although the lack of specification of the nature or severity of the conduct required may have led to challenges, the section did have a much narrower intended application than the Government amendment which eventually became section 38. Mr Lamont's proposed offence applied only to persons in a relationship such that the victim would have been eligible to apply for a matrimonial or domestic interdict under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

In the event, Mr Lamont's amendment was withdrawn after the Scottish Government introduced what would become section 38 of the 2010 Act at Stage 3 of the progress of the Bill. Section 38 does not abolish or replace breach of the peace. Addressing the Justice Committee on 30 June 2010 then Justice Minister Kenny MacAskill gave examples of the type of conduct that the section was intended to address:" I am talking about people who, for example, shout abuse at policemen when no other members of the public are present or shout abuse in their home as

[18] [2010] HCJAC 76, 2011 J.C 90, 2011 S.C.L 114, 2010 S.C.C.R 903, 2010 GWD 30-617
[19] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[20] 1982 SLT 361, 1982 S.C.C.R 49

a form of domestic violence."[21] The foregrounding of the reference to shouting abuse at police officers rather than domestic abuse suggests that the Scottish Government may have been more concerned about the former mischief than the latter.

Section 38

Section 38 (1) states that a person 'A' commits an offence if- (a) A behaves in a threatening or abusive manner, (b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm and c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm. Section 38(2) provides that it is a defence for a person charged with an offence under subsection (1) to show that the behaviour was in the particular circumstances reasonable. The type of behaviour required is defined as, "behaviour of any kind including in particular things said or communicated or done.[22] The section applies both to single incidents and to courses of conduct.[23] "Threatening" or "abusive" are not defined in the Act.

The offence is triable on indictment or summarily. The maximum penalties are imprisonment not exceeding 5 years, a fine, or both for convictions on indictment and imprisonment for not more than 12 months, a fine not exceeding the statutory maximum, or both, on summary complaint. Contraventions of section 38 can also be dealt with by means of a fiscal fine but not by police antisocial behaviour penalty notice.

Judicial Interpretation of Section 38

Three reported cases so far have considered the appropriate interpretation of section 38(1). This part of the article examines these judgements. In *Rooney v Brown*[24] the charge libelled that the appellant shouted, swore and uttered sectarian and racist threats of violence both in public and while in a police van en route for the police office; conduct said to have been aggravated by racial and religious prejudice. The evidence was to the effect that the police officers did not suffer fear and alarm

[21] Scottish Parliament, Official Report, Meeting of the Parliament 30 June 2010 thttp://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=5608&mode=html [Accessed February 17 2016

[22] Criminal Justice and Licensing (Scotland) Act 2010 s38(3)(a)

[23] Criminal Justice and Licensing (Scotland) Act 2010 s 38(3)(b)

[24] [2013] HCJAC 57, 2013 S.C.L 615, 2013 S.C.C.R 334, 2013 G.W.D 17-354

themselves, but the sheriff convicted because he was satisfied that the remarks were likely to cause a reasonable person to suffer fear or alarm. Lady Dorrian, delivering the opinion of the court, stated that the matter was "not to be decided by the reaction of individual police officers but on an objective basis." at [6] The court required to look at the matter from "the standpoint of the reasonable man placed in the shoes of these police officers. We have to assume that the behaviour occurs in the presence of such a person, we do not require to consider the likelihood of the remarks actually reaching such a person." at [6] In the context in which the conduct took place, the court held that the sheriff was entitled to conclude that the appellant's behaviour was likely to cause a reasonable person to suffer fear and alarm. In other words, provided the conduct was threatening or abusive in nature and provided the court concluded that, viewed objectively, such conduct would be likely to cause a reasonable person fear and alarm, and provided that the accused intended that to be the case or was reckless as to the effect of his behaviour on others, the offence was committed.

However, in August 2013, *Jolly v H.M.Advocate*[25] cast doubt on the interpretation of section 38 set out in *Rooney*[26]. The decision had, for a time, the result of severely limiting the circumstances in which section 38 could be used. The facts of the case were somewhat out of the ordinary. Andrew Jolly had been sentenced to a period of detention in 2011 after being convicted of contraventions of section 38 by sending offensive and threatening letters to a former girlfriend. During conversations he had had with social workers who were preparing pre-release reports, he was alleged to have made threats about the same ex-girlfriend and her family. No threats were directed to the social workers themselves but they reported being put in a state of fear and alarm on behalf of the young woman. He was indicted on two charges alleging contraventions of section 38. Jolly objected to proceedings on the grounds of oppression, and also to the admissibility of the evidence of his comments made to the social workers. The case came before the High Court of Justiciary after the

[25] [2013] HCJAC 96, 2014 J.C. 171, 2013 S.L.T 1100, 2013 S.C.L 832
[26] [2013] HCJAC 57, 2013 S.C.L 615, 2013 S.C.C.R 334, 2013 G.W.D 17-354

Crown appealed the decision of the sheriff at a first diet to uphold the objection to the admissibility of the evidence, and the appellant appealed the decision to repel the plea of oppression.

The case turned on interpretation of section 38(1) and whether there required to be evidence of actual fear or alarm being suffered by the complainer or whether it was sufficient that a hypothetical reasonable person would be likely to suffer fear or alarm. The advocate depute argued that the terms of section 38 required behaviour that was threatening or abusive and where that behaviour was likely to cause a reasonable person to suffer fear or alarm that was sufficient for the *actus reus* of the offence. The section as framed did not require the behaviour to be directed to the person about whom the comments were made. Provided the behaviour, viewed objectively, was of a threatening or abusive nature then the court needed only to satisfy itself that it was such that it could cause a reasonable person to suffer fear or alarm. Counsel for the appellant disagreed, arguing that there did require to be a complainer who was present at the time and to whom that conduct was directed.

Delivering the opinion of the Court, Lady Smith outlined the terms of section 38 and extrapolated from the section the following; "Accordingly, if a person behaves in a threatening or abusive manner, and that behaviour *in fact* (emphasis added) causes another person to feel fear or alarm, *and* (emphasis added) a reasonable person would have suffered fear or alarm in the circumstances and causing that fear and alarm was the intention of the person or at least he was reckless as to whether he caused it then, *and only then*, (emphasis added) has the offence in section 38 been committed."[27] She went on to say that it was not enough that the conduct caused someone to suffer fear and alarm. A reasonable person in a similar position would also require to have had the same reaction. However if all that could be said was that a hypothetical and absent reasonable person would have, had they been there, suffered fear or alarm then no contravention of section 38 will have occurred. While this interpretation had the advantage of avoiding convictions in situations where the an overly sensitive or nervous complainer suffered an

[27] [2013] HCJAC 96, 2014 J.C. 171, 2013 S.L.T 1100, 2013 S.C.L 832 at[28]

adverse reaction to innocuous conduct, it also seemed that it would exclude cases involving witnesses such as police officers and emergency workers, whose regular exposure to rowdy and abusive behaviour in the line of duty may have made them immune to the effects of all but the most egregious examples of such behaviour. The court considered that it would have been extraordinary had the Scottish Parliament intended to create an offence that could be committed without the need for actual fear and alarm which would have been shared by a reasonable person. Accordingly, it was held that *Rooney*[28] was not authority for the proposition that there was no need under section 38(1) for any person present to suffer actual fear or alarm and could be distinguished on its facts from *Jolly.*[29] The Court was satisfied that the legislation was intended to address situations only where there was a real (presumably reasonable) witness who had suffered real fear or alarm at the time the conduct took place.

It is not clear why the court insisted on there being evidence of the occurrence of actual fear and alarm. The section as passed did not expressly require it. Also, section 38 was passed to address the gap in the law which had appeared with the restatement of the test for the *actus reus* of breach of the peace. As Lord Justice- Clerk Carloway later noted in *Montgomery v Harvie*[30] while it is not enough that the conduct alleged in a breach of the peace merely alarmed or disturbed someone, by the same token, it is not fatal to proceedings that no actual fear and alarm occurred. The test in breach of the peace is an objective one. The court must look at the case from the standpoint of the reasonable person as if he or she was observing or experiencing the conduct. It is unlikely that the Scottish Parliament intended to attempt to close the loophole arising from the judgment in *Smith*[31] with a statutory offence that was in some respects more restrictive than breach of the peace, by requiring both that actual alarm be experienced and that a reasonable person observing the conduct would have had the same reaction.

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[28] [2013] HCJAC 57, 2013 S.C.L 615, 2013 S.C.C.R 334, 2013 G.W.D 17-354
[29] [2013] HCJAC 96, 2014 J.C. 171, 2013 S.L.T 1100, 2013 S.C.L 832
[30] 2015 [HCJAC] 2, 2015 J.C 223, 2015 S.L.T 106, 2015 S.C.L 285
[31] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011

The decision in *Jolly*[32] had the consequence, for a time at least, of rendering the offence created by section 38 of very limited practical use unless the threatening or abusive conduct was actually directed at the person who might have been expected to have been frightened by it. The Court appeared to have read into the section an additional condition, and attributed to the Scottish Parliament a restriction to its legislative intent that a strict reading of the section or the few public pronouncements that we have on its intended purpose do not seem to admit. This is in effect what the court subsequently held in *Paterson*.[33]

As there were now two, apparently conflicting, decisions on the interpretation of section 38, a Bench of 5 judges was convened to consider the appeals of three appellants who were individually convicted of contravening section 38(1). Lord Justice General Gill delivered his opinion with which the Lord Justice- Clerk, Lords Brodie and Drummond Young and Lady Clark of Calton concurred on 14th August 2014. The court firstly examined the decisions in *Rooney*[34] and *Jolly*[35] and then considered the circumstances of the offences in respect of which the appellants were convicted. The three appeals offer a cross section of the type of conduct that might be expected to fall within the ambit of section 38, although none of them is an example of verbal domestic abuse committed in private- a mischief which the section sought to address. In the appeals of Ewan Paterson and David Bow neither complainer claimed to have suffered fear or alarm.

Paterson[36] is similar on its facts to *Rooney,*[37] but without the religious and sectarian aggravation. The appellant had been convicted of shouting and swearing and challenging police officers to fight both before he was arrested and while in a police vehicle. The officers present had not suffered fear or alarm themselves. The sheriff held that as the behaviour took place in public in a residential area known for youth disorder, the

[32] [2013] HCJAC 96, 2014 J.C. 171, 2013 S.L.T 1100, 2013 S.C.L 832
[33] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517
[34] [2013] HCJAC 57, 2013 S.C.L 615
[35] [2013] HCJAC 96, 2014 J.C. 171, 2013 S.L.T 1100, 2013 S.C.L 832
[36] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517
[37] [[2013] HCJAC 57, 2013 S.C.L 615, 2013 S.C.C.R 334, 2013 G.W.D 17-354

appellant was out of control and his behaviour could have proved a catalyst for further disorder, there was sufficient evidence that his behaviour would cause a reasonable person to suffer fear or alarm.

David Bow was convicted of a racially aggravated contravention of section 38(1) by repeatedly shouting racial abuse and swearing at a complainer of Indian extraction who was in his car on the way to collect his daughter from school and had edged out to get past a refuse lorry that was blocking the road. The appellant who was one of the bin men took exception to this action and behaved as libelled. The complainer told the court that he had not suffered actual fear or alarm.

Jamie Love was convicted of posting sectarian and abusive comments on his Facebook page. A woman who had seen the comments complained to the police and she, and the police officer to whom she had reported the matter, stated in evidence that they were upset and offended by the comments. The appellant had claimed that his comments were "intended as banter with mates" but admitted that his conduct was stupid.

The Lord Justice General disposed of the three appeals in short order. He rejected the submissions of Counsel for each appellant that there was patent ambiguity in section 38(1), and that in order to ascertain the intention of Parliament, the court should refer to statements of the Secretary of State for Justice at Stages 2 and 3 of the Bill, and to the amendments made to it. His Lordship held that section 38(1) set out "three clear and concise constituents of the offence".[38] Paragraphs a and b set out the *actus reus* and paragraph c set out the *mens rea* requirement. He held that establishing parts a and b were "straightforward questions of fact." [39]

The Lord Justice- General took the view that the question under paragraph b was not whether the complainer suffered actual fear or alarm. If that had been the intention of Parliament, then that is what the paragraph would have said. As section 39 of the 2010 Act, which created a new offence of stalking, required that the accused's behaviour caused

[38] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517 at [19]
[39] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517 at [19]

fear or alarm to be suffered by the target of the conduct, the court concluded that a conscious decision had been made to draft the sections differently. It was held that that the subsection sets out an objective test. If the conduct admitted or proved is threatening or abusive in nature and it would be likely to cause a reasonable person to suffer fear or alarm, then paragraph b is made out. As the Lord Justice General put it, if a reasonable person would have suffered fear or alarm, it follows that it is no defence if fortuitously no actual fear or alarm is caused to the witness who might be "an intrepid Glasgow police officer". [40] The Court was in no doubt that Lady Smith had read an additional condition into subsection 1. The court refused the three appeals and held that *Jolly*[41] had been wrongly decided and should be overruled. His Lordship endorsed the formulation of the *actus reus* of section 38 set out in *Rooney*[42]. To conclude their deliberations, the court revisited *Jolly*[43] noting that even though the court had not needed to consider the defence in s 38(2) that the behaviour was in the particular circumstances reasonable, "had section 38(2) been cited it would have presented an irresistible defence to such an unreasonable prosecution." At [29]

The objective test set out in *Paterson*[44] is similar to that in pre *Smith*[45] breaches of the peace. In *Wilson*, for example, Lord Dunpark stated "It is well settled that a test which may be applied in charges of breach of the peace is whether the proved conduct may reasonably be expected to cause any person to be alarmed upset, annoyed or to provoke a disturbance of the peace. Positive evidence of actual harm, upset, annoyance or disturbance created by reprisal is not a prerequisite for conviction."[46] Also, instead of the all-encompassing "disorderly" conduct required for breach of the peace, section 38 is more specific and possibly more limited in scope. This point is addressed in greater detail below.

Discussion

[40] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517 at [20]
[41] [2013] HCJAC 96, 2014 J.C. 171, 2013 S.L.T 1100, 2013 S.C.L 832
[42] [2013] HCJAC 57, 2013 S.C.L 615, 2013 S.C.C.R 334, 2013 G.W.D 17-354
[43] [2013] HCJAC 96, 2014 J.C. 171, 2013 S.L.T 1100, 2013 S.C.L 832
[44] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517
[45] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[46] 1982 SLT 361 at 362, 1982 S.C.C. R 49

The decision in *Paterson*[47] has created some certainty by clarifying the conditions that must be satisfied before a contravention of section 38(1) is made out. At the time of writing there is no indication that the interpretation of the section is causing difficulties in the lower courts. Two questions remain however. Firstly does section 38 permit the prosecution of all instances of shouting and swearing at police officers as the Scottish Government seem to have intended? Secondly, do section 38 and breach of the peace between them cover all common or garden instances of non-aggravated disorderly conduct that are considered worthy of the attention of the procurator fiscal? This section of the article explores those possibilities by examining reported cases of successful appeals against conviction for breach of the peace to see which if any of them might have been appropriately prosecuted as a contravention of section 38 instead. The main difference between the pre *Smith*[48] iteration of breach of the peace and section 38 is that s38 (1) requires that the accused behave in a threatening or abusive manner rather than in just any way that could reasonably be expected to cause fear or alarm, upset or annoyance or to provoke a disturbance to the peace. Hence the wide range of aggressive, noisy, potentially disconcerting or bizarre behaviour that featured in the pre *Smith*[49] reported cases.

The terms “threatening” or “abusive” are not themselves defined in section 38 but as section 38(1) applies to “conduct of any kind including things said or otherwise communicated as well as things done”, the section appears intended to catch any behaviour that is on its facts and in its context threatening or abusive, including postings or electronic communications of the kind that may also be caught by the Communications Act 2003 s 127. Dictionary definitions of ‘abusive’ involve behaviour characterised by insulting or coarse language, habitual violence or cruelty. If a person or their behaviour is described as “threatening”, it suggests that harm, danger or pain are imminent, or there is an intention to inflict harm, pain or misery. Threatening behaviour has a hostile or

[47] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517
[48] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[49] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011

deliberately frightening quality that causes or may cause another person to feel vulnerable or at risk. Section 38 does not require that the accused's behaviour is threatening or abusive to the person hearing it. The provision is drafted sufficiently widely to encompass behaviour that is threatening or abusive of, or about another person, provided it is witnessed and provided the conduct would be likely to cause a reasonable person to suffer fear and alarm.

Kinnaird v Higson[50] was decided in the light of the pre *Smith*[51] test. K was convicted of breach of the peace after taking exception to being asked to wait until police officers checked if there was a warrant for the his arrest. The extent of his conduct was to swear at the officers, telling them only to "**** off" and trying to walk away, whereupon he was arrested. His conviction was quashed, as there was no evidence or finding to the effect that he had shouted or that his behaviour had caused or was likely to cause distress or alarm. Similar on its facts is *Miller v Thomson*[52] in which the conduct complained of consisted of the accused using offensive language to police officers when they approached the appellant and asked for his personal details without giving an explanation for doing so. In quashing the conviction the court observed that his actions could be regarded as" a mild, albeit rudely expressed, protest at what appeared to be wholly unjustified harassment on the part of the police officers." [at 15] The trial in *McMillan v Higson*[53] was concluded before *Smith*[54] but the appeal was heard after it was decided. The accused's conduct exemplified the "truculent or obdurate refusal to co-operate" with the police described by Lord Coulsfield in *Smith*.[55] He used his car to prevent others, with whom he was in dispute, to gain access to a private road or leave the scene, and threw away his car keys when arrested. His conviction was quashed on appeal on the grounds that on the basis of the facts admitted or proved, no serious disturbance was likely to ensue. In the

[50] 2001 S.C.C.R 427, 2001 G.W.D 16-592
[51] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[52] 2009 [HCJAC] 4, 2009, S.L.T 59, 2009 S.C.L 385, 2009 S.C.C.R 179, 2009 G.W.D 2-30
[53] 2003 S.L.T 573, 2003 S.C.C.R 125, 30023 G.W.D 1-14
[54] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[55] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011

circumstances of the dispute it appeared that neighbours were in sympathy with the appellant.

In all these cases, the conduct described is of the type intended to be caught by section 38, at least according to the former Cabinet Secretary for Justice. However such behaviour is also unlikely to be viewed as threatening or abusive in the normal meaning of those terms as described above. The conduct complained of was short –lived and even when taken at its highest, relatively innocuous. In *Kinnaird* and *Miller* it also appears to have been prompted by the actions of the police officers. Even if the conduct was to be thought to be threatening or abusive, it is highly unlikely that a court would hold that the condition in s38 (1) (b) had also been satisfied in the particular circumstances of those cases. Admittedly, in *Miller,*[56] the Justices had convicted on the basis of their preferred, otherwise unsupported, version of two inconsistent accounts of the accused's conduct given by the police witnesses, but even so the court was not satisfied that the test in *Smith*[57] had been made out. Much will depend on the facts, circumstances and context of each case. One brief instance of shouting, swearing or gesticulating at police officers in an otherwise empty street in the small hours of the morning is unlikely, on the face of it, to be considered threatening or abusive. The type of behaviour described *Rooney*[58] and *Paterson*[59], was much more severe and had much more scope for escalation. Furthermore, in those cases, the reasons for holding that the condition in section 38(1) (b) was satisfied were explained in the respective stated cases to the satisfaction of the court. The type of conduct complained of in *Harris*[60] would now be caught by section 38. The things said to the police officers in private may not have been abusive, but they undoubtedly had a hostile or frightening quality and it could be inferred they were designed to dissuade the officers from investigating the accused's conduct further. If the intention of the

[56] 2009 [HCJAC] 4, 2009, S.L.T 59, 2009 S.C.L 385, 2009 S.C.C.R 179, 2009 G.W.D 2-30
[57] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[58] [2013] HCJAC 57, 2013 S.C.L 615, 2013 S.C.C.R 334, 2013 G.W.D 17-354
[59] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517
[60] [2009] HCJAC 80, 2010 J.C.245, 2009 S.L.T 1078, 2010 S.C.L 56, 2010 S.C.C.R 931, 2010 G.W.D 35-724, 2010 S.C.C.R 931, 2010 G.W.D 35-724

Scottish Government in passing section 38 was to render all instances of shouting at, or the use of bad language to police officers criminal, then section 38, as currently drafted does not achieve its aim.

As noted, section 38 is intended to address situations where the conduct complained of is not as severe as is required to meet the test in *Smith*,[61] or is, but takes place in private in circumstances in which it is unlikely to be discovered, as exemplified in *Harris*[62] and *Hatcher*.[63] *Farrell v Harvie*[64], decided prior to *Paterson*[65] is an example of threatening or abusive conduct in a domestic setting successfully prosecuted as a contravention of sec 38(1). The conviction was upheld to the extent that the appellant shouted "f***ing idiot" at his wife in an aggressive manner as he was being taken away by the police. The sheriff found that the complainer was upset when the police attended and was not "robust mentally or physically". While to the disinterested outsider the conduct complained of in this case might appear minor, the accused spoke abusively to his wife and there was evidence that she was distressed. Much will depend on the context and circumstances however. In *McGuinness v Brown*[66] the conduct complained of took place in public. It consisted only of the appellant approaching his estranged wife where she had taken refuge in her car and asking to speak to her. There was no disorderly conduct *per se,* and when it became apparent that his wife's mother was calling the police, he drove off at speed. This appeal succeeded because the conduct itself had not met first part of the test. It is difficult to see how it could be a contravention of s 38 either. It differs from *Farrell*[67] in that M did not shout, swear or threaten violence and his conduct was not abusive to or about the complainer. It may well have appeared extremely threatening to the complainer who had previously felt

[61] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011
[62] [2009] HCJAC 80, 2010 J.C.245, 2009 S.L.T 1078, 2010 S.C.L 56, 2010 S.C.C.R 931, 2010 G.W.D 35-724, 2010 S.C.C.R 931, 2010 G.W.D 35-724
[63] [2010] HCJAC 76, 2011 J.C 90, 2011 S.C.L 114, 2010 S.C.C.R 903, 2010 GWD 30-617
[64] [2014] HCJAC 55, 2014 S.C.L 664, 2014 G.W.D 25-483
[65] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517
[66] [2013] HCJAC 82, 2014 J.C 131, 2013 S.C.L 789, 2013 S.C.C.R 442, 2013 G.W.D 25-484
[67] [2014] HCJAC 55, 2014 S.C.L 664, 2014 G.W.D 25-483

the need to seek a non- harassment order to protect herself from the appellant, but viewed objectively, the accused's behaviour was not of a nature to draw attention to itself. In the absence of other more damning evidence, a court would be unlikely to hold that such outwardly innocuous conduct would cause a reasonable person to suffer fear or alarm as required by section 38(1) (b). Similarly in the older case of *Farrell v Normand*[68], the conduct consisted of beckoning a 15-year-old girl over and offering her a drink. Even though she was distressed by this behaviour, the court concluded that the conduct was not such that it would be likely to place a reasonable person in a state of rear and alarm. Again, this sort of behaviour is not on the face of it likely to be considered threatening or abusive, nor is it likely that the court would hold that a reasonable person would be likely to suffer fear or alarm as a result.

Conclusion

The court in *Paterson*[69] explained clearly how section 38(1) is to be interpreted. At the time of writing, no other cases have been reported which concerned appeals against convictions for section 38. If the Scottish Government intended section 38 to capture every instance of low- level rowdy, disorderly or unpleasant conduct that might once have been prosecuted as breach of the peace, then the section as drafted does not fully meet its policy aim. Even though the test in section 38(1) (b) as explained in *Paterson*[70] appears to herald a return to the pre *Smith*[71] *actus reus* of breach of the peace in statutory form, the requirement that the behaviour is threatening or abusive may be its saving grace. Conduct that is de *facto* threatening or abusive in its context is narrower and more specific than the just about "anything goes" nature of the old common law *actus reus* of breach of the peace. Provided the court takes a robust approach to what is deemed to be threatening or abusive conduct in the context and circumstances of the case, it seems that section 38 is drafted narrowly enough to avoid us returning to the days when merely shouting

[68] 1993 S.L.T 793, 1992 S.C.C.R 859
[69] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517
[70] [2014] HCJAC 87, 2015 J.C 118, 2014 S.L.T 857, 2014 S.C.L 606, 2014 S.C.C.R 521, 2014 G.W.D 26-517
[71] 2002 J.C. 65, 2001 S.L.T. 1007, 2001 S.C.C.R 800, 2001 G.W.D 26-1011

and swearing, or being rude to police officers regardless of the circumstances could be enough to justify a conviction. We now have a clear interpretation of the *actus reus* of section 38 which should be a useful addition to the prosecutor's tool kit. However, it is to be hoped that no proceedings are taken without the police and procurator fiscal first taking careful account of the conduct complained of to satisfy themselves that it is indeed threatening or abusive. It is also to be hoped that accused persons will seek legal advice before simply accepting a conditional offer of a fiscal fine or pleading guilty to any accusation of minor unruly behaviour. Provided that police and prosecutors apply the section carefully there is only a small risk that Scottish courts will see the wholesale return of the so called "two cop breach". However, because there may still be circumstances, mostly in the context of harassment or domestic abuse in which the conduct may in fact cause fear and alarm to a complainer and more importantly for the purposes of section 38, cause a reasonable person fear or alarm, but is not threatening or abusive in itself, the Scottish Government may wish to review the precise wording of the offence.