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SLIPPING THROUGH THE CRACKS: HOW THE DISTINCTION BETWEEN COMPULSION AND DURESS OF CIRCUMSTANCES FAILS BATTERED DEFENDANTS

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Abstract

Feminist critique of criminal defences has largely focused on the inaccessibility of self-defence to victims of domestic violence who go on to offend. Yet these battered defendants also struggle to access duress-based defences, despite being subject to duress in many aspects of their lives. New Zealand's duress-based defences of compulsion and duress of circumstances are no exception to their struggle.

This essay argues that the inaccessibility of these defences for battered defendants stems from two key issues. First, applying a social entrapment understanding of domestic violence, the defence of compulsion is overly restrictive. Second, this essay finds that the human versus non-human distinction between compulsion and duress of circumstances is divorced from these defences' jurisprudential basis of moral involuntariness. These issues have created a crack between the defences – that where the threat is human sourced, it is 'compulsion or nothing' – which battered defendants are slipping through. Canadian and Australian law, while also flawed for battered defendants, have made progress in recognising their lived experiences. These jurisdictions illustrate two possible approaches for reform in New Zealand. This essay finds New Zealand should adopt a statutory solution to the gap, and upon analysing key considerations for reform, offers draft wording for a proposed new defence of coercion which it is envisaged may better encompass the lived experience of battered defendants.

Key words: "compulsion", "duress of circumstances", "battered defendants", "domestic violence", "New Zealand".

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I Introduction

In the early hours of 11 October 1998, Sharon Kāwiti drove almost 100 kilometres from Taipa to Kawakawa's emergency department in Northland.[1] She sought treatment for a shoulder injury that was causing her excruciating pain.[2] The shoulder injury was the result of her partner, Mr Nathan, violently assaulting her earlier that morning after an argument between them, where she was punched, kicked in the shoulder "karate-style" causing its dislocation, and kicked while on the ground.[3] She feared being assaulted again if she stayed where she was, and she had nowhere to turn for help: she had not been properly welcomed onto the marae where they were staying, nor could she see a telephone there she could use to call for assistance; she was a stranger to the area, and could not see any houses close by with lights on; and other people in the group she was staying with had urged Mr Nathan on as he assaulted her.[4]

It was in these severely constrained circumstances that Ms Kāwiti chose to drive to the emergency department with excess blood alcohol and while disqualified, issues with which she was later charged.[5] In court, her counsel attempted to raise duress of circumstances, one of New Zealand's two duress-based defences, to reflect the constraints on her decision-making when she offended.[6] The High Court denied her the defence as where the threat is human-sourced – the threat here being Mr Nathan – it is compulsion or nothing.[7] Yet compulsion, the other duress-based defence, was unavailable to her, because Mr Nathan had not threatened her in the "do this or else" manner that created a standover, gun-to-the-

[1] *Police v Kawiti* [2000] 1 NZLR 117 (HC) at 118; and Julia Tolmie and Khylee Quince "Commentary on *Police v Kawiti*: Kāwiti at the Centre" in Elisabeth McDonald and others (eds) *Feminist Judgment of Aotearoa New Zealand: Te Rino: a Two-Stranded Rope* (Bloomsbury Publishing, London, 2017) at 481.

[2] *Police v Kawiti*, above n 1, at 119.

[3] At 119.

[4] At 118–119. On the context of Māori customary law, see generally Khylee Quince "Teaching indigenous and minority students and perspectives in criminal law" in Kris Gledhill and Ben Livings (eds) *The Teaching of Criminal Law: the Pedagogical Imperatives* (Taylor & Francis Group, London, 2016) 182 at 187–189; and Tolmie and Quince, above n 1, at 486–488.

[5] *Police v Kawiti*, above n 1, at 118.

[6] At 119.

[7] At 123.

head-type situation like the kind required by compulsion, nor was she in any immediate danger from him when she offended.[8]

A straightforward application of the law made it clear that Ms Kāwiti did not fit within either of these defences. However, from a principled point of view, duress-based defences are often said to be based on the concept of moral involuntariness, where an individual is forced, in deeply constrained circumstances, to choose between two morally unacceptable options.[9] If this is so, Ms Kāwiti is clearly a candidate for such a defence: she could continue to suffer in unbearable pain from her injuries, or drive to the emergency department while disqualified and over the legal limit. The coercive context in which she made this decision – as a victim of domestic violence – bolsters this argument. Battering relationships are rife with coercion; victims of domestic violence do what they can to placate their batterer "to avoid becoming the target of his violence".[10] In this way, "every action a battered… [victim] takes is thus coerced" making "crimes… [they] may commit… simply an extension of the same duress that leads [them] to cook his favourite meal or keep the children quiet".[11] While "[they] may have made a choice to commit a crime, the odds were so heavily against [them] as to make that choice *almost farcical*".[12] Thus, battered defendants seem to be "most able to rely on" these types of defences.[13]

Ms Kāwiti's situation illustrates a significant disharmony between the jurisprudential basis for these defences and how the law has been formulated, which has caused a crack between the defences that she slipped through. She could not access compulsion, which is often too restrictive to be accessible for battered defendants. Defendants like Ms Maurirere, who

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[8] *Police v Kawiti*, above n 1, at 119.

[9] Frances E Chapman and Georgette M Lemieux "The Troubled History of the Defence of Duress and Excluded Offences: Could the Reasoned Use of Mitigation on Sentencing Prevent Duress from (Further) Becoming Archaic, Gendered, and Completely Inaccessible?" (2021) 44 MLJ 33 at 44–45.

[10] Susan Appel "Beyond Self-defence: The Use of Battered Woman Syndrome in Duress Defences" [1994] U Ill L Rev 955 at 977–978 as cited in Elisabeth McDonald "Women Offenders and Compulsion" [1997] NZLJ 402 at 403 (emphasis added).

[11] At 977–978.

[12] At 977–978.

[13] McDonald, above n 10, at 403.

could not access compulsion because the threat of being "smashed up" accompanied a backhanded hit to the face, alongside a history of quite serious violence failed to meet the standard of a threat of death or grievous bodily harm;[14] or Ms Witika, who could not access the defence because of breaks in physical presence despite her abusive partner creating an environment of ongoing coercive control, are evidence of this.[15] Yet where the threat is human-sourced – which it predominantly will be in a domestic violence context – only compulsion is available. In this way, the law of duress-based defences in New Zealand has failed, and continues to fail, to adequately consider the coercive circumstances of battered defendants. It is this failure that forms the basis for this paper.

Part II of this paper outlines the background to domestic violence, including two key theoretical frameworks. Part III sets out the current New Zealand law of compulsion and duress of circumstances. Part IV critiques the restrictive defence of compulsion and the distinction between compulsion and duress of circumstances – human versus non-human threats – that have led to battered defendants slipping through the crack. Part V compares other jurisdictions' approaches to duress. Finally, Part VI proposes reform to recognise the experiences of battered defendants in law.

II Understanding Domestic Violence

Ms Kāwiti's experience as a victim of domestic violence, also called family violence or intimate partner violence (IPV), is an experience that is sadly commonplace in New Zealand. In 2017 alone police investigated over 121,000 family violence incidents, which equate to approximately one incident every four minutes.[16] Callouts increased during the Covid-19 lockdowns.[17] Of these incidents, there is a clear gender bias: the victims are overwhelmingly women, and perpetrators disproportionately men. According to the New

[14] See *R v Maurirere* [2001] NZAR 431 (CA) at [8]-[9]. See generally Quince, above n 4, at 189–191.
[15] *R v Witika* [1993] 2 NZLR 424 (CA).
[16] Cabinet Social Wellbeing Committee "Family Violence Legislation – A modern Act with a greater focus on victims" at [5].
[17] Eleisha Foon "Domestic violence calls to police increase in lockdown" *Radio New Zealand* (online ed, New Zealand, 1 May 2020).

Zealand Police approximately 85 per cent of victims who report to the Police are women.[18] In the period from 2009-2018, "there were 125 intimate partner deaths" in New Zealand, and of these, "76% of offenders were men and 70% of those who died were women", with women's violence showing "strong defensive features".[19] A 2013 report found that of the 55 IPV-related deaths where there was an abusive history in the relationship, "93 percent of women had been abused" while "96 percent of men had been the abusers".[20]

It is unsurprising, therefore, that the defences do not work well to accommodate domestic violence, given it is predominantly experienced by women. Historically the defences have been "developed on the basis of male experiences and definitions" as men have predominantly been the lawmakers.[21] The fact the majority of defendants coming before the courts are male further contributes to "this male gendered-definition of criminal defences".[22] Courts will feel "perfectly comfortable in pronouncing the law to meet the experiences of these defendants" while women are forced "to distort their experiences in an effort to fit them into the defences" or fail to successfully plead them.[23]

The defences' inaccessibility is compounded by the fact domestic violence remains a commonly misunderstood social issue. Common misconceptions include that domestic violence is simply a "relationship issue" or "marital conflict"; it is a decontextualised series of discrete incidents; it is only, or predominantly, physical abuse; that a victim's fear of future violence is irrational and unreasonable; that they could avoid future violence by simply leaving the relationship; and that if a victim retaliates with violence, their fear was

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[18] New Zealand Police "Family violence" <www.police.govt.nz>.

[19] Family Violence Death Review Committee *Intimate partner violence deaths in Aotearoa New Zealand* (Health Quality & Safety Commission New Zealand, 27 January 2022) at 1.

[20] Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission, June 2014) at 16.

[21] Mark Findlay, Stephen Odgers and Stanley Yeo *Australian Criminal Justice* (1st ed, Oxford University Press, Melbourne, 1994) at 278 as cited in Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000) at [4]. See also Stanley Yeo "Resolving Gender Bias in Criminal Defences" (1993) 19 Mon LR 104 at 104–105.

[22] Findlay, Odgers and Yeo, above n 21, at 278.

[23] At 278.

not real.[24] These misconceptions provide a significant obstacle to battered victims getting help to escape the abuse by perpetuating both inaccurate and invalidating stereotypes, and the abusive dynamic.

To combat these widespread misconceptions, analytical frameworks have been developed to attempt to understand and explain domestic violence.

A Battered Woman's Syndrome

One of the early ways theorists and psychologists tried to grapple with widespread misconceptions of domestic violence, with measures of success, was Battered Woman's Syndrome (BWS). BWS uses theories of a cycle of violence and learned helplessness to explain the battering dynamic and its effect on victims.[25] A cycle of violence theory holds there are three stages to a battering relationship that repeat cyclically: the 'tension building' stage, the severe battering stage, and the loving contrition stage.[26] As a result of this cycle a battered victim develops "learned helplessness": a belief in their powerlessness to escape or change their situation.[27]

However, the theory has been significantly critiqued. It interacts with stereotypes in a way that means victims must fit within "an 'abused woman' straightjacket" which corresponds to "a stereotype of a white, middle-class woman and stresses passivity, docility and helplessness", making it less applicable to victims whose race, class, gender or sexual orientation differs from this.[28] The theory's focus on the victim rather than the coercive

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[24] Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at 26, 29–30, 32.

[25] Meredith Blake "Coerced into Crime" (1994) 9 Wis Women's LJ 67 at 71.

[26] At 71; and Lenore Walker *The Battered Woman Syndrome* (4th ed, Springer Publishing Company, New York, 2016) at 94, 97–98.

[27] Blake, above n 25, at 71.

[28] Suzanne Beri "Justice for Women Who Kill: A New Way?" (1997) 8 A Fem LJ 113 at 123 as cited in Elisabeth McDonald "Defending Abused Women: Beginning a Critique of New Zealand Criminal Law" (1997) 27 VUWLR 673 at 677; and Evan Stark "From Battered Women to Coercive Control" (1995) 58 Alb L Rev 973 at 1019.

circumstances reinforces misconceptions of domestic violence.[29] It also lacks scientific support.[30] Variations on the theory, like social entrapment theory, which shift the focus to the coercive circumstances and accommodate intersectionality, now have more currency in the literature.

B Social Entrapment Theory

According to social entrapment theory, particularly drawing on the work of legal academic Julia Tolmie, domestic violence operates as a three-dimensional form of social entrapment. The elements are:[31]

(a) The social isolation, fear and coercion that the predominant aggressor's coercive and controlling behaviour creates in the victim's life;
(b) The indifference of powerful institutions to the victim's suffering; and
(c) The exacerbation of coercive control by the structural inequities associated with gender, class, race and disability.

The first dimension focuses on the violent and non-violent tactics the abuser has used to create the coercive environment for the victim. Tactics include social isolation, removing their financial independence, incurring debts in their name, and micro-regulating the victim by controlling various details of their life, such as how they dress, what they say, and who they see.[32] These tactics have led to characterisations of domestic violence as "an attack on the victim's personhood", rather than an assault crime.[33]

Institutional and societal responses to both the victim and the abuser play an important role in the entrapment dynamic. Victims may reach out to institutions such as police only to be rebuffed or receive ineffectual assistance.[34] Other support networks like family and friends

[29] Julia Tolmie and others "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" [2018] NZLR 181 at 205.
[30] At 205.
[31] At 185.
[32] Heather Douglas, Stella Tarrant and Julia Tolmie "Social Entrapment Evidence: Understanding its Role in Self-Defence Cases Involving Intimate Partner Violence" (2021) 44 UNSWLJ 326 at 334.
[33] At 332. See generally Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, Oxford, 2009) at 380–2.
[34] Tolmie and others, above n 29, at 193.

may also passively respond to calls for assistance.[35] The dismissal of the victim leads to them concluding that any further requests for assistance will be unhelpful, and, dangerously, may also vindicate the abuser's actions, encouraging them to continue.[36] The convergence of the abuse and institutional ignorance of that abuse thus "entraps" the victim in the battering relationship.[37]

This theory takes an intersectional approach by emphasising the role of other power structures in entrapping the victim.[38] Victims may experience multiple inequities at once, including sexism, racism, disability, colonisation and poverty, which can exacerbate the other two entrapment elements.[39] For example, coercive controlling tactics can exploit gender roles by "targeting women's default roles as mothers, home-makers and sexual partners".[40] Racism shapes and compounds non-white victims' experiences. This includes facing institutional racism in the form of stereotypes or cultural biases when attempting to seek help from services, or language barriers for non-white immigrants. The victim's cultural context may also contribute to entrapment.[41] In New Zealand, the experiences of Māori are particularly important to consider, as "Māori are more than twice as likely to be a victim of a violent interpersonal offence by an intimate partner" or "experience coercive or controlling behaviours from a current partner".[42] Other complicating inequities include immigration status and access to housing and benefits.[43] The more of these inequities a

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[35] Douglas, Tarrant and Tolmie, above n 32, at 338.

[36] Tolmie and others, above n 29, at 193.

[37] Stark, above n 28, at 1010, 1023.

[38] On intersectionality, see generally Kimberlé Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] U Chi Legal F 139; and Kathy Davis "Intersectionality as a buzzword: A sociology of science perspective on what makes a feminist theory successful" 9 Feminist Theory 67.

[39] Tolmie and others, above n 29, at 197.

[40] At 189.

[41] See for example *R v Wang* [1990] 2 NZLR 529 (CA) and commentary from Hannah Patterson "The Circumstances as She Believed Them to Be: Asian Migrant Women and the Importance of Context in the Courtroom" (2020) 10 VUWLRP 7/2020.

[42] Te Puni Kōkiri *Understanding family violence: Māori in Aotearoa New Zealand* (June 2017). See also Denise Wilson and others *Wāhine Māori: keeping safe in unsafe relationships* (Taupua Wairoa Māori Research Centre, Auckland, 2019).

[43] Douglas, Tarrant and Tolmie, above n 32, at 341.

victim experiences thus increases the scope the abuser has to coerce, isolate and control the victim, and significantly, "the less likely [they are] to be able to access help and safety".[44]

C Language

Importantly, the dynamics within battering relationships are not always male/female as perpetrator/victim, although this has historically been the focus.[45] Domestic violence also occurs within non-heterosexual relationships, with some research suggesting its prevalence in non-heterosexual relationships may be similar to that within heterosexual relationships.[46] This broadens the gender scope of victims to include transgender, non-binary, or intersex individuals, making the LGBTQI+ dimension an important consideration within the social entrapment framework where relevant. Children may also experience this abuse in a family context.[47] Thus, to encompass the lived experience of all victims of domestic violence, this essay will use the non-gendered term "battered defendants", except when talking about particular defendants for whom gendered language is accurate.

III The Defences: The Law

Victims of battering relationships who offend in circumstances that look like duress have two options to defend themselves: compulsion or duress of circumstances. Both are excuse-based defences.[48]

A Compulsion

Compulsion is found in s 24 of the Crimes Act 1961:[49]

> … a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he or she believes that the threats will be

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[44] Tolmie and others, above n 29, at 197.

[45] Law Commission *Understanding Family Violence*, above n 24, at [2.6].

[46] At [2.7].

[47] Law Commission *Battered Defendants*, above n 21, at [72].

[48] *R v Perka* [1984] 2 SCR 232 at 246; *Kapi v Ministry of Transport* [1992] 1 NZLR 227 (HC) at 230; and *R v Teichelman* [1981] 2 NZLR 64 (CA) at 66–67.

[49] Section 24.

> carried out and if he or she is not a party to any association or conspiracy whereby he or she is subject to compulsion.

The requirements of this defence make access to it highly restricted. It is designed only to excuse a defendant from liability in a narrow set of circumstances described as "standover situations", such as a gun-to-the-head scenario, where the defendant offends in a specific way, due to the specific demands of the threatener, in fear of immediate death or grievous bodily harm.[50] Section 24(2) further limits the defence, making it unavailable for several offences including murder, kidnapping and aggravated robbery.[51]

B Duress of Circumstances

Duress of circumstances is a common law defence retained by s 20 of the Crimes Act.[52] This section allows for any common law defence to remain "except so far as they are altered by or inconsistent with" the Crimes Act or any other Act.[53] The courts have interpreted this to mean duress of circumstances is altered by the statutory defence of compulsion in that s 24 "covers the field" for human-sourced threats, meaning duress of circumstances is only available to the extent that the threat on which the duress claim is based does not come from a human.[54]

Kapi v Ministry of Transport and *R v Hutchinson* established the elements are:[55]

> (a) A… belief, formed on reasonable grounds, of imminent death or serious injury.
> (b) Circumstances in which the accused has no realistic choice to break the law.
> (c) A breach of the law proportionate to the peril involved.

Additionally, there is "the need to establish a nexus between the imminent peril of death or serious injury and the chance to respond to the threat by unlawful means."[56]

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[50] *R v Teichelman*, above n 48, at 66–67; and *R v Raroa* [1987] 2 NZLR 486 (CA) at 491.

[51] Section 24(2).

[52] *Kapi v Ministry of Transport*, above n 48, at 229.

[53] Section 20.

[54] *Police v Kawiti*, above n 1, at 91, 120; and Andrew P Simester, Warren Brookbanks and Neil Boister *Principles of Criminal Law* (Thomson Reuters, Wellington, 2019) at 522.

[55] *R v Hutchinson* [2004] NZAR 303 (CA) at [34] citing *Kapi v Ministry of Transport*, above n 48, at 57.

[56] At [34].

C Policy Basis

Compulsion and duress of circumstances are kept narrowly constrained for two main reasons. First, they are both excuse-based defences rather than justifications.[57] This means the defendant's actions are still considered wrong, but the circumstances are such that they ought to be excused from liability, because they have chosen the lesser evil of committing the offence.[58] Furthermore, concerns have been expressed that if duress-based defences were too widely available, it would effectively license defendants to conduct a utilitarian balancing of their options. If the law "recognise[d] any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value", thereby validating "ostensibly illegal acts… on the basis of their expediency", it "would import an undue subjectivity into the criminal law".[59] Such an approach "could well become the last resort of scoundrels".[60]

However, since battered defendants, who are subject to coercion in nearly every aspect of their lives, struggle to access duress-based defences, there is clearly an issue that needs to be addressed with reform.

IV Why are Battered Defendants Slipping Through the Cracks?

The current distinction between compulsion and duress of circumstances leaves battered defendants between a rock and a hard place. Ms Kāwiti was unable to raise compulsion because she was in no further danger from her partner during her offending, thus failing on the immediacy element.[61] Nor was she able to raise duress of circumstances, because the duress she was under came from a human agent rather than a depersonified state of affairs.[62] Yet, in human and moral terms, her choices were substantially constrained by the coercive control she had suffered, and was still suffering from, at the hands of her partner.

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[57] *R v Perka*, above n 48, at 246 per Dickson J; *Kapi v Ministry of Transport*, above n 48, at 230; and *R v Teichelman*, above n 48, at 66.

[58] *R v Perka*, above n 48, at 246 per Dickson J; and *R v Teichelman*, above n 48, at 66.

[59] *R v Perka*, above n 48, at 248 per Dickson J.

[60] At 248.

[61] *Police v Kawiti*, above n 1, at 119.

[62] At 123.

In this way, there are two facets to the issue of battered defendants slipping through the cracks: an overly restrictive defence of compulsion; and a distinction between the defences that is divorced from first principles.

A The Defence of Compulsion is Overly Restrictive

Shevan Nouri, in a legal analysis of compulsion, argues there are several aspects which make it inaccessible for battered defendants, the type of threat required and the requirements of immediacy and presence in particular.[63]

1 Type of Threat

Section 24 requires that the threat is of death or grievous bodily harm, and that it is specific.

A threat of death or grievous bodily harm means a threat either of death or "harm which will seriously interfere with health or comfort" and is "really serious".[64] Thus compulsion is only available in the most dire of immediately threatening, standover situations, no matter how low-level the offending a defendant is compelled to undertake.[65] There is no room for a 'sliding scale' whereby a lower level of threat alongside an offence of equivalently lower seriousness is acceptable.[66] This presents a significant obstacle for battered defendants for a few reasons.

Firstly, the high level of severity fails to consider the coercive effect of other forms of abuse such as psychological manipulation and lower-level assaults.[67] This approach to severity therefore assumes the level of constraint on someone's choices "can be assessed

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[63] See Shevan (Jennifer) Nouri "Critiquing the Defence of Compulsion as it Applies to Women in Abusive Relationships" (2015) 21 Auckland U L Rev 168.

[64] *Director of Public Prosecutions v Smith* [1961] AC 290 (HL) at 171 as cited in *R v Maurirere*, above n 14, at [14].

[65] Nouri, above n 63, at 172.

[66] At 172.

[67] Evan Stark "Re-presenting Battered Women: Coercive Control and the Defense of Liberty" (paper presented to Violence Against Women: Complex Realities and New Issues in a Changing World, Montreal, May-June 2012) at 3.

by applying a calculus of physical and psychological harms to a particular assault",[68] rather than recognising that the coercive power of domestic violence is constructed through the cumulative effects of non-physical abuse alongside lower-level assaults.[69] The construction of compulsion therefore reflects Stark's "violence model" of coercion, which reinforces misconceptions about domestic violence by focusing the duress inquiry on discrete assaults and the degree of injury inflicted, rather than the broader coercive circumstances.[70]

R v Maurirere illustrates this obstacle. Ms Maurirere was threatened by her partner to "drive this fucking bloody car otherwise I'll smash you and the car up", accompanied by a backhanded hit to the side of her face.[71] She provided evidence of previous serious assaults by her partner, including having both of her eyes severely blackened, being dragged out of the car by her hair, thrown down a bank and kicked in the head, and being trampled by her partner using one of her children's bikes.[72] The Court of Appeal chose to apply the context of these previous assaults to read down the seriousness of the threat at issue, considering they implied "no more than a possible repetition" of those assaults which, according to the Court, amounted to "undoubtedly an assault, perhaps a serious assault" at the highest, but not grievous bodily harm.[73] Critiques of this decision include that this approach was "unjustifiably narrow" and the level of severity of the threat ought to have been left for the jury to decide.[74] Legal academics Kevin Dawkins and Margaret Briggs considered the threat of being "smashed up… clearly conveyed an intent to inflict greater violence".[75]

The requirement that the threat is an 'actual' threat presents another difficulty. The threat can be explicit or implied through words or conduct, but it must be "a particular kind of

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[68] Stark "Re-presenting Battered Women", above n 67, at 3.

[69] Law Commission *Understanding Family Violence*, above n 24, at [18], [2.37]–[2.40].

[70] Stark "Re-presenting Battered Women", above n 67, at 3.

[71] *R v Maurirere*, above n 14, at [8].

[72] At [9].

[73] At [20].

[74] Kevin Dawkins and Margaret Briggs "Criminal Law" [2001] NZ Law Review 317 at 332.

[75] At 332.

threat associated with a particular demand", rather than a generalised fear.[76] The difficulty here is that victims of domestic violence are often in a constant state of generalised fear, because the deliberate construction of an environment of control and compliance is a feature of that violence. For example, for extended periods, victims of domestic violence may respond to demands even if unaccompanied "by a 'particular threat' because of the fear of the predictable consequences of refusal based on the pattern of past abuse".[77] Thus, where a battered defendant offends, they will often do so under "a very real, but nevertheless general, fear of harm".[78] However, the generalised nature of their fear makes it more difficult to establish a causal nexus between that fear and the offence they committed, meaning they cannot have recourse to compulsion.

2 Immediacy and Presence

Compulsion requires that the threat is able to be carried out "immediately following a refusal to commit the offence" by an offender who is physically present at the time of offending.[79] These requirements are the yardstick that measures whether the defendant's ability to resist a threat was constrained in a way that is legally sufficient.[80] This is because if a threatener is present, and able to carry out a threat immediately, the law considers a defendant's options so severely constrained for them to be operating under duress.

However, the immediacy element "invite[s] punishment of blameless victims of coercion" by imposing "an arbitrary temporal limit" that decontextualizes the battered defendant's behaviour "from the context of coercive control to which it responds".[81] This is because "[t]he one certainty about domestic violence is that it will recur" meaning "fear of violence, whether immediate, imminent or future therefore determines [a battered victim's]

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[76] *R v Raroa*, above n 50, at 493.

[77] Law Commission *Battered Defendants*, above n 21, at [174].

[78] Nouri, above n 63, at 175.

[79] *R v Teichelman*, above n 48, at 67.

[80] Nouri, above n 63, at 178.

[81] Paul H Robinson *Criminal Law Defenses* (West Publishing, St Paul Minnesota, 1984) vol 2 at s 177(e)(2); and Nouri, above n 63, at 180.

actions".[82] Therefore, immediacy is an irrelevant factor for the coercion inquiry in the domestic violence context, as whether a threat could be carried out immediately or inevitably can have the same coercive effect. The language of immediacy may also contribute to the entrapment dynamic of domestic violence. If a victim approaches institutions for help while their partner is away, or when they have left a relationship, the threats on their life and limb *seem* less immediate, despite the fact that the fear the abuser has instilled in the victim remains. If the police dismiss such requests for help, the victim will feel as though any further engagement with such institutions will be useless, further entrapping the victim in the abuse.

The presence element compounds the difficulties facing battered defendants. Presence has been read as strictly physical presence.[83] This entirely disregards the effects of coercive control in battering relationships, which "persist[s] after the abuser is no longer present".[84] Stark, for example, has observed that victims "may feel compelled to act in certain ways" even after the abuser's death, one victim continuing to adhere to the rules set by her abusive partner even after he died to "reassure him, were he to return, that nothing had changed".[85]

Further, legal academics including Dawkins and Briggs have questioned whether a proper interpretation of the statute actually requires presence.[86] The previous law read "actually present", while Parliament omitted the requirement when enacting s 24.[87] Despite this, the Court of Appeal in *R v Joyce* considered the omission of no consequence, a point upheld in *R v Richards* where the Court said "the plain words of the statute… require actual presence".[88]

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[82] Janet Loveless "Domestic Violence, Coercion and Duress" [2010] Crim L R 93 at 98 as cited in Nouri, above n 63, at 179.

[83] *R v Teichelman*, above n 48, at 67.

[84] Nouri, above n 63, at 182.

[85] At 182; and Stark *Coercive Control*, above n 33, at 337.

[86] Dawkins and Briggs, above n 74, at 330.

[87] Crimes Act 1908 (repealed), s 44(1); and Dawkins and Briggs, above n 74, at 330.

[88] *R v Joyce* [1968] NZLR 1070 (CA) at 1077; and *R v Richards* CA272/98, 15 October 1998 as cited in Dawkins and Briggs, above n 74, at 331.

Breaks in presence have been fatal to battered defendants' attempts to access compulsion. In *R v Witika*, the trial judge held – and the Court of Appeal affirmed – that "[section] 24 ceased to be available when there was a failure or omission at a time when Smith as the alleged maker of the threats was not present" as the Court considered these were times when "she had the opportunity to get help".[89] Such analysis completely ignores the nature of coercive control and the power the abuser has over their victim, *regardless* of whether they are physically present or not.

B The Distinction is Divorced from First Principles

A line of authority began with the decision in *Kapi*, later affirmed in *Kawiti*, that compulsion and duress of circumstances are to be distinguished on the basis of the source of the threat.[90] This is an unhelpful typology that is divorced from first principles.

The basis for these defences is impairment of choice, framed in Canadian jurisprudence as "moral involuntariness"[91] or by Dawkins and Briggs as "normatively involuntary conduct".[92] This is the idea that it is an individual's *moral* will that is overborne; they are making a conscious choice, but in deeply constrained circumstances, between two normatively unacceptable options.[93] This makes the individual's decision "unwilling" but "not unwilled".[94]

Thus, the *source* of the threat is beside the point; whether the constraint on choice is sourced from a human, or from depersonified emergency circumstances, the effect on the individual is the same. The two defences of compulsion and duress of circumstances recognise that there are different types of scenarios in which an individual's moral will might be overborne – respectively, as a result of specific threats during an in-the-moment, "gun to the head"

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[89] *R v Witika*, above n 15, at 331.

[90] Tolmie and Quince, above n 1, at 484.

[91] *R v Ryan* 2013 SCC 3, [2013] 1 SCR 14 at [23] [*Ryan* SCC]. See also *R v Ruzic* 2001 SCC 24, [2001] 1 SCR 687.

[92] Dawkins and Briggs, above n 74, at 328.

[93] Chapman and Lemieux, above n 9, at 44.

[94] At 45.

type scenario, or as a result of coercive environmental factors that force the individual into offending.

Therefore, by shearing off compulsion in the way it is currently defined in New Zealand, and to say it is "compulsion or nothing" where the threat is human-sourced, a significant gap is left where a human has created a coercive environment that leads a defendant to engage in "normatively involuntary conduct", but does not include specific threats of the kind required by s 24. This view is supported extensively by legal academics including Dawkins and Briggs[95] and Simester and Brookbanks,[96] as well as the New Zealand Law Commission, the latter noting that "there appears no reason based in policy" to delineate the defences in this fashion, considering the distinction "unfortunate".[97] Such a delineation has particular repercussions for battered defendants but is also overwhelmingly out of touch in multiple contexts.[98]

This being said, New Zealand has much case law affirming the human versus non-human distinction, meaning in the case of human-sourced threats, a defendant has access to compulsion or no defence at all.[99] This paper investigates how the law can fill the gap this distinction has created, to ensure people whose morally voluntary conduct has been overborne by non-specific threats can access a defence to better represent their criminal culpability.

V Other Jurisdictions' Approaches to Duress

Two general pathways for reform emerge from surveying other jurisdictions' approaches to duress. The first focuses on whether an increased judicial awareness of and sensitivity to the lived experience of battered defendants could lead to an application of the common law in a way that better recognises the coercive context of battering relationships. Canada, particularly the case of *R v Ryan*, provides a useful case study. The second is Australia's

[95] Dawkins and Briggs, above n 74, at 336.

[96] Simester, Brookbanks and Boister, above n 54, at 581.

[97] Law Commission *Battered Defendants*, above n 21, at [197]–[198].

[98] See the example given by Simester, Brookbanks and Boister, above n 54, at 581.

[99] See *Police v Kawiti*, above n 1, at 123; and *Kapi v Ministry of Transport*, above n 48.

statutory approach, with specific directions to consider the context of battering relationships in the duress analysis.

A Canada

Canadian duress law is partially codified, partly common law. The Canadian Supreme Court in *R v Ruzic* recognised and applied the residual common law defence of duress after the statutory defence was unavailable on the facts and partially struck down for unconstitutionality.[100] The elements of the statutory defence are very similar to the New Zealand formulation since both are based on the English Draft Criminal Code, although Canada does not require "grievous" bodily harm.[101] The elements of the common law defence were clarified in *R v Ryan*:[102]

> … duress requires a threat to cause bodily harm or death to the accused or another; a reasonable belief the threat will be carried out; no reasonable escape from the dilemma; that the crime committed is proportionate to that threatened; and that the accused is not party to a conspiracy whereby they have knowingly subjected themselves to compulsion.

R v Ryan is a useful case study to analyse the efficacy of relying on judicial sensitivity to recognise coercive dynamics in battering relationships in relation to duress defences. Ms Doucet was "the victim of a violent, abusive and controlling husband", whose abuse drove her to speak to three hit men about killing him and pay one CAD 25,000.[103] She was caught in a police sting operation and charged with counselling the commission of an offence not committed.[104]

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[100] *R v Ruzic*, above n 91; and Michelle Bowie "Compulsion and the decision in *Akulue v R*: Has New Zealand got it right?" (LLB (Hons) Dissertation, University of Otago, 2014), at 32.

[101] Bowie, above n 100, at 32. See Criminal Code (Indictable Offences) Bill 1878 (178), s 22. See generally Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (George Edward Eyre and William Spottiswoode, 1879), at 18.

[102] Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "When Self Defence Fails" in K Fitz-Gibbon and A Freiberg (eds) *Homicide Law Reform in Victoria: Prospects and Retrospect* (Federation Press, Annandale, 2015) 110 at 121–123. See also *Ryan* SCC, above n 91, at [55].

[103] *Ryan* SCC, above n 91, at [4]-[5].

[104] At [5]; and Criminal Code RSC 1985 c C-46, s 464(a).

The first example of increased judicial sensitivity to the lived experiences of battered defendants was the judges accepting the victim, Ms Doucet's, account of the facts. The prosecution attempted to characterise her as "a woman who had no good reason for wanting Mr Ryan killed", her actions arising out of a desire for revenge "for the difficulties encountered during the civil proceedings relating to their separation".[105] The defence, on the other hand, told Ms Doucet's story of years and years of physical, emotional and sexual abuse suffered at the hands of Mr Ryan, emphasising that she "was still in the grips of a reasonable and deeply held fear that her ex-partner would kill her and their young daughter".[106] At all instances, the courts accepted Ms Doucet's account of a "reign of terror" by Mr Ryan, that made her "legitimately fear… for her life".[107]

The flexible, first-principles approach taken by the trial and Court of Appeal judges to the duress analysis is a further example of the judges recognising battered defendants' lived realities. For example, MacDonald CJNS considered the analysis "should focus less on who did what to whom in who's presence and more on the accused's predicament and whether or not her actions were truly involuntary", because "if Ms Doucet truly had 'no way out'", it would not "be just to deny her a defence simply because her circumstances did not fit neatly into the traditional parameters of one of our enumerated defences".[108] Furthermore, the judge considered case law and commentary expressing concerns for battered defendant accessing duress "instructive", highlighting two needs: the need for a full understanding of the coercive circumstances battered defendants find themselves in, and the need for sufficient flexibility in the defence "to, when appropriate, accommodate the dark reality of spousal abuse".[109] This analysis led to an acquittal on appeal, upholding the trial judge's finding.[110]

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[105] Kimberley Crosbie "R v Ryan and the Principle of Moral Involuntariness" (2014) 67 SCLR (2d) 459 at 461.

[106] At 461–462.

[107] At 462.

[108] *R v Ryan* 2011 NSCA 30 at [74] [*Ryan* NSCA].

[109] At [91].

[110] At [130].

However, the Supreme Court's reversal of this finding illustrates the limitations in relying on judicial sensitivity. The Court took a restrictive and overly legalistic approach to Ms Doucet's case, holding duress was only available "when a person commits an offence while under compulsion of a threat made *for the purpose of compelling* him or her to commit it".[111] This excludes Ms Doucet because although Mr Ryan had threatened her, he had not specifically demanded she take out a hit on him. Lawyer Kimberley Crosbie, among others, has critiqued the decision, saying the Court appeared to care "more about conceptual stability than about the evolution of the common law" to adapt to lived experience, despite the fact they could have achieved conceptual stability *and* accommodated the coercive context to Ms Doucet's offending, as evidenced by the thorough and compassionate first-principles analysis undertaken by the Court of Appeal.[112]

Furthermore, the two lower courts' first-principles, moral involuntariness approach is unlikely to be adopted in New Zealand due to the different constitutional contexts.[113] New Zealand courts are unable to strike down provisions, making them hesitant to take a first-principles approach that may stretch the defences beyond what legislators have set out, to avoid constitutional overreach.[114]

B Australia

1 Western Australia

Statutory reform of duress law was undertaken in Western Australia after a 2007 report explicitly recognised the disadvantage in the law for battered defendants.[115] Under the current Western Australian formulation of duress, physical presence is no longer required, nor is it necessary for the threat to be directed at the defendant or that the threat meet a threshold of death or grievous bodily harm. This is a path New Zealand could well follow,

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[111] *Ryan* SCC, above n 91, at [2].

[112] Crosbie, above n 105, at 474. See also Ronagh JA McQuigg "The Canadian Supreme Court and Domestic Violence: *R v Ryan*, 2013 SCC 3" (2013) 21 Fem L S 185 at 186.

[113] *Akulue v R* [2013] NZSC 88, [2014] 1 NZLR 17 at [20].

[114] At [20].

[115] Law Reform Commission of Western Australia *Review of the Law of Homicide* (Final Report, September 2007) at 187.

considering the heavy criticism these elements have received for their failure to accommodate coercive dynamics of battering relationships.[116] An objective test has instead been adopted to constrain the defence, replacing the previous subjective test.[117]

The Western Australia duress defence requires a person believe that "a threat has been made" which "will be carried out unless an offence is committed", and that offending "is necessary to prevent the threat from being carried out" and "is a reasonable response to the threat in the circumstances as the person believes them to be" provided "there are reasonable grounds for those beliefs".[118]

2 Victoria

The Victorian duress defence requires that a person reasonably believe "a threat of harm has been made that will be carried out unless an offence is committed", that carrying out that offence "is the only reasonable way that the threatened harm can be avoided", provided that the "conduct is a reasonable response to the threat".[119]

What sets Victorian law apart is the explicit recognition of the importance of evidence relating to domestic violence in duress cases:[120]

> … in circumstances where duress in the context of family violence is an issue, evidence of family violence may be relevant in determining whether a person has carried out conduct under duress.

The fact New Zealand lacks an explicit legislative direction that ensures the broader context of a battering relationship is considered, where alleged by a defendant, makes this approach of particular note. This is bolstered by the fact that the relevant family violence evidence outlined in s 322J of the Crimes Act 1958 (Vic) exemplifies a social entrapment approach. The section clarifies there is a wide range of evidence of abuse that could be relevant beyond physical and sexual abuse that many consider to be the sole symptoms of domestic

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[116] See above at Immediacy and Presence.

[117] Sheehy, Stubbs and Tolmie "When Self-Defence Fails", above n 102, at 121–123.

[118] Criminal Code Act Compilation Act 1913 (WA), s 32.

[119] Crimes Act 1958 (Vic), s 322O.

[120] Crimes Act 1958 (Vic), s 322P.

violence, such as psychological abuse, social and economic factors, harassment and intimidation.[121] Furthermore, it specifically references "the cumulative effect, including psychological effect, on the person or a family member of that violence", allowing for evidence of behavioural patterns comprised of acts which, viewed in isolation from one another, may appear trivial to a non-battered observer, as well as single acts of violence.[122] Other points of note include "the history of the relationship" between the defendant and the abuser, "social, cultural or economic factors" that impact on victims of domestic violence, and its psychological effects.[123]

In light of the above analysis, a statutory approach is more appropriate for New Zealand. In addition to the significant case law affirming the human versus non-human distinction between the defences, a statutory approach mitigates the risk of relying solely on judicial discretion to appropriately recognise the experiences of battered defendants, as illustrated by *R v Ryan*.

VI Considerations for Reform in New Zealand

There are a number of issues that plague the development of a nuanced defence that serves battered defendants, including what type of threats the law should recognise, whether to use a subjective or objective test, and evidentiary considerations. All of these should be factored into creating a bespoke defence to fill the current gap between the duress-based defences. Upon canvassing these issues, I will offer wording for a possible new section 24A Coercion of the Crimes Act that sits in parallel with the other duress-based defences.

A Types of Threats

There are three dimensions to the type of threat that the law should recognise: the severity, specificity, and the subject of the threat.

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[121] Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand" (2012) 34 Syd LR 467 at 484; and Crimes Act 1958 (Vic), s 322J.

[122] At 484; and Crimes Act 1958 (Vic), s 322J(b).

[123] Section 322J(a), (c), (e).

1 Severity

Currently, the law of compulsion requires a threat of death or grievous bodily harm, while duress of circumstances requires a threat of imminent death or serious injury.[124] Requiring this level of severity reinforces misconceptions about domestic violence by focusing the duress inquiry on discrete assaults and the degree of injury inflicted, rather than on the broader coercive circumstances, i.e. beyond physical harm.[125] Non-violent tactics are also used to create the coercive controlling environment, including deprivation of basic necessities or their financial independence, isolation from the outside world, and making rules about everyday behaviour such as how the victim should "dress, cook, or clean".[126]

The difficulty inherent in this consideration is where the line should be drawn between domestic violence that does and does not qualify for the new defence. Should the defence remain solely available to excuse individuals who offend in standover situations with threats of bodily harm, despite the roots of such a characterisation being patriarchal understandings of coercive circumstances, or expand to capture different, more insidious, forms of abuse which create an environment of coercion for the defendant? Can the two be reconciled? If so, what constraints should the law attach to the availability of the defence for forms of abuse beyond bodily harm? These difficulties are compounded by the lack of partial defences in New Zealand, making the current defences an all-or-nothing equation for battered defendants.[127]

Canadian law uses "death or bodily harm", a lower standard than what New Zealand requires, which is death or *grievous* bodily harm.[128] Victoria has a lower standard again, only requiring "harm".[129] The lower standard adopted by Victoria may better accommodate

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[124] Crimes Act 1961, s 24; and *Kapi v Ministry of Transport*, above n 48, at 230.

[125] Stark "Re-presenting Battered Women", above n 67, at 3; and see above, under Type of Threat.

[126] Evan Stark "Coercive Control" in Nancy Lombard and Lesley McMillan (eds) *Violence Against Women: Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation* (Jessica Kingsley Publishers, London, 2013) 17 at 18; and Stark "Re-presenting Battered Women", above n 67, at 3.

[127] On partial defences, see Anna McTaggart "Considering New Zealand's Lack of Partial Defences in Relation to Battered Women Who Kill Their Abusers" (2020) 10 VUWLRP 6/2020.

[128] Criminal Code RSC 1985 c C-46, s 17.

[129] Crimes Act 1958 (Vic), s 322O.

the violence threatened and suffered by battered defendants and the coercive effect it has. It would capture, for example, the harm threatened to Ms Maurirere, which had such a coercive effect on her but failed to meet compulsion's high threshold of grievous bodily harm.[130]

On the one hand, requiring a more severe threat may be useful to measure of severity of the coercion – the more dire the consequences the threatened faces, the greater the fear instilled in the defendant, thus the greater the constraint on their decision-making. It also reflects the policy basis that duress-based defences excuse defendants where they have chosen the lesser of two evils by offending, rather than subjecting themselves to death or grievous bodily harm. On the other hand, focusing solely on severe physical forms of abuse ignores the coercive power of other modes of abuse.[131] Lowering the severity required and consequently expanding the types of harm the defence recognises would better encompass battered defendants' experiences, provided their offending is proportionate and a reasonable response to the severity of the threat, to reflect the defence's policy basis.

Ultimately, a lower level of severity of threat, alongside an objective test to constrain the defence, would better recognise the range of harms which may coerce a defendant into offending.

2 Specificity

A further issue is the specificity of the threat. The dynamic of an abusive relationship may not include specific "do-this-or-else" threats, presenting an obstacle for battered defendants to access compulsion.[132] Instead, broader coercive circumstances created by a variety of forms of abuse may compel the defendant to offend.[133] The difficulty in this consideration is how these broader coercive circumstances can be captured by a duress-based defence. Admitting appropriate evidence in order to construct a narrative of the coercive environment for decision-makers may address this issue. The obstacle may remain,

[130] See footnotes 71–75 and associated text.

[131] See footnotes 67–70 and associated text.

[132] See footnotes 76–77 and associated text.

[133] See footnotes 76–78 and associated text.

however, if the word 'threat' is used and cannot be interpreted more broadly to encompass coercive circumstances, since 'threat' is interpreted in the context of compulsion to mean a specific, actual threat.[134] While this restrictive interpretation may appropriately limit the defence, it fails to recognise coercive nature of situations that fall outside of the patriarchal standover situation that compulsion is formulated to recognise.

The 'threat' wording is likely appropriate to describe the situations the defence ought to capture, though whether it can be interpreted broadly will be an issue for the courts to decide. It is hoped that coupled with a direction to consider evidence of domestic violence, courts feel empowered to expand the interpretation of 'threat' beyond the restrictive and patriarchal interpretation, to encompass coercive circumstances.

3 Subject

Compulsion and duress of circumstances currently require the threat to be against the defendant themselves, while self-defence allows for the defendant to be defending themselves or another third party, such as children.[135] Battering partners may cause harm to the defendant's children as part of the coercive control tactics of domestic violence, meaning it is crucial to recognise the potential coercive impact a threat of harm against a child or other family member may have.[136] Allowing for these threats would be consistent with developments in other jurisdictions such as Victoria, where a threat to the defendant's de facto partner has been considered sufficient.[137]

B Subjective or Objective Tests

There is an ongoing debate over the merits of subjective versus objective tests in criminal defences.[138] This debate has currency in the duress context since under New Zealand law, compulsion is subjective; the defendant's belief in the threat need not be reasonable.[139] On

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[134] See footnote 76 and associated text.

[135] Crimes Act 1961, s 48.

[136] Law Commission *Battered Defendants*, above n 21, at [17]. See also Nouri, above n 63, at 176–177.

[137] *R v Hurley and Murray* [1967] VR 526 (SC).

[138] Alafair S Burke *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman* (2002) 81 N C L Rev 211 at 286.

[139] Crimes Act 1961, s 24.

the one hand, objective tests compare defendants against "an imaginary person who encompasses the moral fortitude we expect as a society" and therefore may appropriately limit the defence.[140] On the other hand, subjective tests allow for a defendant's particular characteristics and circumstances to be considered, which may provide a better picture of the defendant's moral culpability.

Canada, Victoria and Western Australia all use objective tests. Phrasing includes "a reasonable belief the threat will be carried out"[141] and that the conduct is "a reasonable response to" and the only "reasonable way" to avoid the threat.[142] Because New Zealand uses a subjective test for compulsion, other elements like immediacy and presence need to be applied strictly to confine the defence, which are deeply problematic for battered defendants.[143] Thus, for the new defence, New Zealand should instead adopt an objective test to determine whether the coercion the defendant was under is legally sufficient to excuse them from liability, in place of the immediacy and presence requirements.

However, objective tests are not a panacea for battered defendants. The coercive effect of a defendant's genuine but unreasonable belief in a threat may be just as strong as a reasonable belief.[144] Although, an objective approach may still be preferable to restrict the defence's application because it completely excuses the defendant from liability.[145] Furthermore, while reasonableness standards purport to be objective, fact-finders are only human and will draw on their own perspectives in conducting the analysis. This poses a risk in the domestic violence context, because fact-finders may rely upon widely-held misconceptions about how a victim of that violence should behave when they are asked to consider the reasonableness of the defendant's conduct. This reliance on misconceptions will lead to an inaccurate conclusion about the true nature of the coercion the defendant was experiencing, which serves to further entrap them in the abuse.

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[140] Burke, above n 138, at 309.

[141] *Ryan* SCC, above n 91, at [64].

[142] Crimes Act 1958 (Vic), s 322O(2)(a)(ii) and (b).

[143] See above, under Immediacy and Presence.

[144] Law Commission *Battered Defendants*, above n 21, at [176].

[145] At [176].

A contextualised reasonableness standard as put forward by legal academic Alafair Burke may address some of these concerns. Jurors should be instructed "to consider the objective factual circumstances surrounding the battered" defendant in the reasonableness inquiry, considering "what a reasonable person in the defendant's situation would have believed".[146] This expands the inquiry to include what the defendant knew about their abuser and the history of violence within the relationship, including any escape attempts by the defendant and the abuser's response.[147] Jurors would also be assisted by expert evidence.[148]

Ultimately, however, regardless of the subjectivity or objectivity of the legal test, fact-finders' misconceptions of battered defendants will rear their heads. A purely subjective test without the immediacy and presence elements widens the defence too much, and a purely objective test would significantly exacerbate the risk of fact-finders' misconceptions impacting the analysis. Adopting a contextualized reasonableness standard where the fact-finder must consider what is reasonable in the circumstances the defendant was in, would likely best balance the important policy considerations in retaining a narrow defence, and recognise the crucial coercive context to a battered defendant's offending. The impact of misconceptions remains an issue which may be addressed through appropriate evidence being led.

C Evidence

One way to ameliorate the limitations of objective tests, and educate the fact-finder on the battered defendant's lived experience, is to explicitly direct the courts to consider expert evidence of domestic violence and its effect on the defendant as part of the coercion inquiry. Victorian legislation provides a useful model.[149]

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[146] Burke, above n 138, at 291–292.

[147] At 291.

[148] At 292–293.

[149] See above, under Victoria; and Crimes Act 1958 (Vic), s 322J.

"Law's knowledge is limited by the rules of evidence" making what evidence can and cannot be admitted crucial in any case.[150] Expert evidence is admissible where "the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence… or in ascertaining any fact that is of consequence" in determining the case.[151] Thus the defendant must provide a factual basis that links the expert evidence of domestic violence to the particular circumstances of their case.[152]

Admitting expert evidence may help to dispel commonly held misconceptions about battering relationships and defendants who experience abuse in those dynamics. Victims' responses are deeply contextual and often counterintuitive to a non-battered observer, making expert evidence crucial in this context.[153] Without explanation of the various social entrapment facets to battering relationships, decision-makers may turn to stereotypes of battered victims or their own non-battered perceptions of the situation to attempt to understand the defendant's responses, which will likely lead them to a conclusion that the defendant's behaviour was irrational. A full explanation to a fact-finder of how domestic violence operates would also support the defendant's credibility.[154]

However, expert evidence has its limitations. Yes, it may dispel misconceptions held by fact finders, but it also may fall on deaf ears. Where expert evidence challenges the conceptual frameworks decision-makers use to understand an issue, and they "do not realise that their conceptual frameworks are incorrect" so "they are therefore listening to that expert testimony through their existing frameworks, they may fail to understand the testimony or grasp why it is necessary in the first place".[155] Thus, regardless of how compelling the evidence is, its efficacy relies on the receptiveness of decision-makers. Receptiveness will vary greatly from judge to judge and from jury member to jury member.

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[150] Katherine O'Donovan "Law's Knowledge: The Judge, The Expert, the Battered Woman, and Her Syndrome" (1993) 20 Journal of Law and Society 427 at 428.

[151] Evidence Act 2006, s 25.

[152] Law Commission *Battered Defendants*, above n 21, at [29].

[153] At [28].

[154] At [28].

[155] Douglas, Tarrant and Tolmie, above n 32, at 331.

Such evidence also relies on lawyers' abilities to recognise the signs of coercive relationship dynamics to push for domestic violence to be alleged so that evidence can be admitted, which, once again, will vary from lawyer to lawyer.

Further, expert evidence may be interpreted by decision-makers "as explaining the woman's subjective state of mind but not the state of mind of a reasonable person in her position".[156] Thus, rather than the expert illuminating for decision-makers that the defendant's reaction was normal or reasonable based on the coercive circumstances they found themselves in, it may instead be interpreted as explaining why the defendant's reaction was understandable, but still unreasonable and disproportionate.[157] Expert evidence can also affirm the idea that the experience of domestic violence and how it ought to be understood is a contestable issue between the parties at trial.[158] The issue with this contestability is that the burden of proof is on the prosecution to disprove defences beyond reasonable doubt.[159] However, because misconceptions of domestic violence are so common, this contestability may place a responsibility on the defence "to do more than raise a reasonable doubt" that a defence is available.[160] This contestability therefore compromises the burden of proof and serves to further entrench the entrapment processes of domestic violence.

Wider education on the entrapping dynamics of domestic violence is evidently needed. Adopting an evidentiary direction may begin this process by educating decision-makers in the courtroom, with the reform process acting as "a form of public education that shapes public perceptions and social attitudes".[161] An evidentiary direction is therefore crucial to the new defence.

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[156] Sheehy, Stubbs and Tolmie "Defences to Homicide for Battered Women", above n 121, at 468.

[157] At 468.

[158] Douglas, Tarrant and Tolmie, above n 32, at 331.

[159] At 331.

[160] At 331.

[161] Elizabeth M Schneider *Battered Women and Feminist Lawmaking* (Yale University Press, New Haven, 2000) at 199.

D Draft Wording for Proposed New Defence

Based on the analysis given, the proposed new defence lowers the level of severity required for the threat, replaces immediacy and presence with a contextualised objective test, and explicitly directs the courts to consider evidence of domestic violence where this is alleged. The square bracketed text draws attention to specific points this essay raised above.

Section 24A Coercion

(1) A defendant will be excused from criminal liability where their conduct was carried out under coercion.

(2) [*Contextualised objective test*]: A person carries out conduct under coercion if the person reasonably believes that, in the circumstances they found themselves in –

  (a) [*Reduced severity of threat, threat can be made against third party*]: A threat of harm was made against them or a close family member;

  (b) That threat would be carried out unless the offence is committed;

  (c) Carrying out the conduct is the only reasonable way to avoid the threatened harm;

  (d) [*Proportionality*]: The conduct is a reasonable response to the threat.

(3) [*Evidentiary direction*]: In circumstances where coercion is an issue in the context of domestic violence, evidence of that violence may be relevant in determining whether a person has carried out conduct under coercion.

  (a) Such evidence may include, but is not limited to:

    (i) The history of the relationship between the defendant and the threatener, including any violence towards the defendant or others;

    (ii) Non-physical forms of abuse that may have been used to exert coercive control over the defendant;

    (iii) The cumulative effect, including the psychological effects, of the coercive control on the defendant;

    (iv) The general nature and dynamics of relationships affected by domestic violence, including the possible consequences of separation from the threatener;

    (v) Institutional responses to a defendant's requests for help;

(vi) Social, cultural or economic factors that may compound a defendant's experiences of abuse, with particular reference to the experiences of Māori where relevant.

VII Conclusion

New Zealand's current legal position on the distinction between compulsion and duress of circumstances fails battered defendants. The human versus non-human sourced distinction, alongside the restrictiveness of compulsion that makes the defence inaccessible for many battered defendants, ignores the impact of human-sourced coercive circumstances within the domestic violence context and more broadly. This has left a significant crack between the defences that battered defendants are slipping through, which statutory reform ought to address. Such reform ought to expand the types of threats included in the new defence to encompass the coercive power of a wide range of insidious, non-violent tactics. A contextualised objective test would offer a better constraint on the applicability of duress-based defences than the current immediacy and presence requirements. However, because the efficacy of these tests depends in part on the courts admitting appropriate evidence of the battered defendant's coercive circumstances, an evidentiary direction to consider domestic violence evidence, where such circumstances are alleged, is crucial. This evidence can begin education to dispel the myths and misconceptions of domestic violence currently held by large portions of society. The draft proposal of a new section 24A Coercion encompasses all these elements. Through this approach, the law can endeavour to avoid the injustice of Ms Kāwiti's case in future.

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