SLIPPING THROUGH THE CRACKS: HOW THE DISTINCTION BETWEEN COMPULSION AND DURESS OF CIRCUMSTANCES FAILS VICTIMS OF INTIMATE PARTNER VIOLENCE WHO OFFEND

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Feminist critique of criminal defences has largely focused on the inaccessibility of self-defence for victims of intimate partner violence (IPV) who go on to offend. Yet these victims ("IPV 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. In this article, it is argued that the inaccessibility of these defences for IPV defendants stems from two key issues. First, applying a "social entrapment" understanding of intimate partner violence, it is argued that the defence of compulsion is overly restrictive. Secondly, this article finds that the human versus non-human distinction between compulsion and duress of circumstances is divorced from the defences' jurisprudential basis of moral involuntariness. These issues have created a crack between the defences, through which IPV defendants are slipping. Where the threat is human-sourced, it is "compulsion or nothing". Canadian and Australian law, while also flawed for IPV defendants, have made progress in recognising their lived experiences. These jurisdictions illustrate two possible approaches for reform in New Zealand. This article finds New Zealand should adopt a statutory solution to the gap and, having analysed key considerations for reform, offers draft wording for a proposed new defence of coercion which, it is envisaged, will better encompass the lived experience of IPV defendants.

* Submitted for the LLB (Honours) Degree, Faculty of Law, Victoria University of Wellington | Te Herenga Waka, 2022. I am incredibly grateful to my supervisor, Dr Zoë Prebble, for her invaluable wisdom and encouragement, and to the wonderful barristers of Kate Sheppard Chambers for their support of my research. I must also thank Sarah Burton for her support, constructive discussions and proofreading.

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, offences for 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 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

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

8 At 119.

circumstances, to choose between two morally unacceptable options.[9] If this is so, Ms Kāwiti was clearly a candidate for such a defence: she could have continued 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 intimate partner violence (IPV) – bolsters this argument.[10] IPV relationships are characterised by coercion; victims of IPV do what they can to placate the perpetrator "to avoid becoming the target of his violence".[11] 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".[12] 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".[13] Thus, IPV defendants seem to be "most able to rely on" these types of defences.[14]

Ms Kāwiti's situation illustrates a significant disharmony between the jurisprudential basis for these defences and how the law has been formulated. This has caused a crack between the defences, which Ms Kāwiti slipped through. She could not access compulsion, which is often too restrictive to be accessible for IPV defendants. This is further evidenced by defendants like Ms Maurirere, who could not access compulsion because the threat of being "smashed up", accompanied by a backhanded hit to the face and a history of quite serious violence, failed to meet the standard of a threat of death or grievous bodily harm;[15] or Ms Witika, who could not access the defence because of breaks in the physical presence of her abusive partner, despite the environment of ongoing coercive control which

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 The term "victim" is used in this article to describe the person primarily suffering from the violence in an IPV relationship, and is not intended in a stigmatising way: see discussion in Julia Tolmie and others "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" [2018] NZ L Rev 181 at 184. There are varying opinions on the term, some preferring "survivor": see for example Jan van Dijk "Free the Victim: A Critique of the Western Conception of Victimhood" (2009) 16 IRV 1. See also Liz Kelly, Sheila Burton and Linda Regan "Beyond Victim or Survivor: Sexual Violence, Identity and Feminist Theory and Practice" in Lisa Adkins and Vicki Merchant (eds) *Sexualizing the Social: Power and the Organization of Sexuality* (Palgrave Macmillan, London, 1996) 77.

11 Susan D Appel "Beyond Self-defense: The Use of Battered Woman Syndrome in Duress Defenses" [1994] U Ill L Rev 955 at 977–978 as cited in Elisabeth McDonald "Women Offenders and Compulsion" [1997] NZLJ 402 at 403.

12 Appel, above n 11, at 977–978.

13 At 978.

14 McDonald, above n 11, at 403.

15 See *R v Maurirere* [2001] NZAR 431 (CA) at [8]–[9]. See generally Quince, above n 4, at 189–191.

her partner had created.[16] Yet where the threat is human-sourced – which it predominantly will be in an IPV 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 IPV defendants. It is this failure that forms the basis for this article.

Part II of this article outlines the background to IPV, 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 has led to IPV defendants slipping through the cracks. Part V compares other jurisdictions' approaches to duress. Finally, Part VI proposes reform to recognise the experiences of IPV defendants in law.

II UNDERSTANDING INTIMATE PARTNER VIOLENCE

Ms Kāwiti's experience as a victim of IPV is one that is sadly commonplace in New Zealand.[17] In the 2021/2022 financial year alone, police investigated over 175,000 family violence incidents.[18] This equates to approximately one incident every three minutes.[19] Callouts increased during the COVID-19 lockdowns.[20] In these incidents, there is a clear gender bias: the victims are overwhelmingly women, and perpetrators disproportionately men. According to the New Zealand Police, approximately 85 per cent of victims who report to the police are women.[21] In the period from 2009–2018, there were 125 intimate partner deaths in New Zealand.[22] Of these, 76 per cent of offenders were men and 70 per cent of those who died were women, with violence perpetrated by women showing "strong defensive features".[23] A 2013 report found that, of the 55 IPV-related deaths where there was an abusive history in the relationship, 93 per cent of women had been abused while 96 per cent of men had been the abusers.[24]

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16 *R v Witika* [1993] 2 NZLR 424 (CA).

17 Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at 23.

18 New Zealand Police *Annual Report 2021/22* (November 2022) at 16.

19 At 16.

20 Eleisha Foon "Domestic violence calls to police increase in lockdown" *Radio New Zealand* (online ed, New Zealand, 1 May 2020).

21 New Zealand Police "Family violence" <www.police.govt.nz>.

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

23 At 1.

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

It is unsurprising, therefore, that the defences do not work well to accommodate IPV, 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.[25] The fact that the majority of defendants coming before the courts are male further contributes to "this male-gendered definition of criminal defences".[26] 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 their pleading of them fails.[27]

The defences' inaccessibility is compounded by the fact that IPV remains a commonly misunderstood social issue. Common misconceptions include: that IPV is simply a "relationship issue" or "marital conflict"; that it is a decontextualised series of discrete incidents; that 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 not real.[28] These misconceptions provide a significant obstacle to IPV victims getting help to escape abuse by perpetuating both inaccurate and invalidating stereotypes, as well as minimising the abusive dynamic.

To counter these widespread misconceptions, analytical frameworks have been developed to attempt to understand and explain IPV.

A Battered Woman Syndrome

One of the early ways theorists and psychologists tried to grapple with widespread misconceptions of IPV, with measures of success, was Battered Woman Syndrome (BWS). BWS uses theories of a cycle of violence and learned helplessness to explain the IPV dynamic and its effect on victims.[29] A cycle of violence theory holds that there are three stages to a "battering" relationship that repeat cyclically: the "tension building" stage, the severe battering stage, and the loving contrition stage.[30]

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25 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], n 7. See also Stanley Yeo "Resolving Gender Bias in Criminal Defences" (1993) 19 Mon LR 104 at 104–105.

26 Findlay, Odgers and Yeo, above n 25, at 278.

27 At 278.

28 Law Commission, above n 17, at 26, 29–30 and 32.

29 Meredith Blake "Coerced into Crime: The Application of Battered Woman Syndrome to the Defense of Duress" (1994) 9 Wis Women's LJ 67 at 71.

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

As a result of this cycle, a victim develops "learned helplessness": a belief in their powerlessness to escape or change their situation.[31]

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.[32] The theory's focus on the victim rather than the coercive circumstances reinforces misconceptions of IPV.[33] It also lacks scientific support.[34] Variations on the theory that shift the focus to the coercive circumstances and accommodate intersectionality now have more currency in the literature. Social entrapment theory is an example.

B Social Entrapment Theory

According to social entrapment theory, particularly drawing on the work of legal academic Julia Tolmie, IPV operates as a three-dimensional form of social entrapment. The elements are:[35]

(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.[36] These tactics have led to characterisations of IPV as "an attack on the victim's personhood", rather than an assault crime.[37]

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31 Blake, above n 29, at 71.

32 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, n 22; and Evan Stark "Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control" (1995) 58 Alb L Rev 973 at 1019.

33 Tolmie and others, above n 10, at 205.

34 At 205.

35 At 185.

36 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.

37 At 332. See generally Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, New York, 2007) at 380–382.

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 the police only to be rebuffed or receive ineffectual assistance.[38] Other support networks like family and friends may also passively respond to calls for assistance.[39] The dismissal of the victim leads them to conclude that any further requests for assistance will be unhelpful and, dangerously, may also vindicate the abuser's actions, encouraging them to continue.[40] The convergence of the abuse and institutional ignorance of that abuse thus "entraps" the victim in the IPV relationship.[41]

This theory takes an intersectional approach by emphasising the role of other power structures in entrapping the victim.[42] Victims may experience multiple inequities at once, including sexism, racism, disability, colonisation and poverty, which can exacerbate the other two entrapment elements.[43] For example, coercive controlling tactics can exploit gender roles by "targeting women's default roles as mothers, home-makers and sexual partners".[44] 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.[45] 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".[46] Other complicating inequities include immigration status and access to housing and benefits.[47] The more of these inequities a victim experiences, the

38 Tolmie and others, above n 10, at 193.

39 Douglas, Tarrant and Tolmie, above n 36, at 338.

40 Tolmie and others, above n 10, at 193.

41 Stark, above n 32, at 1010 and 1023.

42 On intersectionality, see generally Kimberle 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 buzzword: A sociology of science perspective on what makes a feminist theory successful" (2008) 9 Feminist Theory 67.

43 Tolmie and others, above n 10, at 197.

44 At 189.

45 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.

46 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, 28 November 2019).

47 Douglas, Tarrant and Tolmie, above n 36, at 341.

greater the scope the abuser has to coerce, isolate and control the victim and, significantly, "the less likely [the victim] to be able to access help and safety".[48]

C Language

Importantly, the dynamics within IPV relationships are not always male/female as perpetrator/victim, although this has historically been the focus.[49] IPV also occurs within non-heterosexual relationships, with some research suggesting its prevalence in non-heterosexual relationships may be similar to that within heterosexual relationships.[50] This broadens the scope of victims to include transgender, non-binary and 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.[51] To encompass the lived experience of all victims of IPV, this article will use the non-gendered term "IPV defendants" to describe victims of IPV who offend, except when talking about particular defendants for whom gendered language is accurate.

III THE DEFENCES: THE LAW

Victims of IPV 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.[52]

A Compulsion

Compulsion is found in s 24(1) of the Crimes Act 1961:

> … 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 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, for fear of immediate death or grievous bodily harm.[53] Section 24(2) further limits

48 Tolmie and others, above n 10, at 197.

49 Law Commission, above n 17, at [2.6].

50 At [2.7].

51 Law Commission, above n 25, at [72].

52 *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.

53 *R v Teichelman*, above n 52, at 66–67; and *R v Raroa* [1987] 2 NZLR 486 (CA) at 491.

the defence, making it unavailable for several offences including murder, kidnapping and aggravated robbery.

B Duress of Circumstances

Duress of circumstances is a common law defence retained by s 20 of the Crimes Act. This section allows for any common law defences to remain "except so far as they are altered by or are inconsistent with" the Crimes Act or any other Act. The courts have interpreted this to mean that duress of circumstances is altered by the statutory defence of compulsion, in that s 24 "covers the field" for human-sourced threats. This interpretation means 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 that the elements are:[55]

(a) A … belief, formed on reasonable grounds, of imminent peril of death or serious injury.

(b) Circumstances in which the accused has no realistic choice but 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 choice to respond to the threat by unlawful means".[56]

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] Secondly, 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 recognised "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

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54 *Police v Kawiti*, above n 1, at 91 and 120; and AP Simester and WJ Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at 522.

55 *R v Hutchinson* [2004] NZAR 303 (CA) at [34], citing *Kapi v Ministry of Transport* (1991) 8 CRNZ 49 (CA) at 57.

56 *R v Hutchinson*, above n 55, at [34].

57 *R v Perka*, above n 52, at 246 per Dickson J; *Kapi v Ministry of Transport*, above n 52, at 230; and *R v Teichelman*, above n 52, at 66.

58 *R v Perka*, above n 52, at 246 per Dickson J; and *R v Teichelman*, above n 52, at 66.

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 IPV 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 IPV DEFENDANTS SLIPPING THROUGH THE CRACKS?

The current distinction between compulsion and duress of circumstances leaves IPV 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; she thus failed 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, at the hands of her partner.

In this way, there are two facets to the issue of IPV 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 that there are several aspects which make the defence inaccessible for IPV defendants: in particular, the type of threat required, and the requirements of immediacy and presence.[63]

1 Type of threat

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

A threat of death or grievous bodily harm means a threat either of death or of "harm which will seriously interfere for a time 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-

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59 *R v Perka*, above n 52, at 248 per Dickson J.

60 At 248.

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

62 At 123.

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 *R v Maurirere*, above n 15, at [14], citing *Director of Public Prosecutions v Smith* [1961] AC 290 (HL).

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 IPV defendants for a few reasons.

Firstly, the high threshold for the severity of the threat fails to consider the coercive effect of other forms of abuse such as psychological manipulation and lower-level assaults.[67] This approach to the threshold for severity of the threat therefore assumes that the level of constraint on someone's choices "can be assessed by applying a calculus of physical and psychological harms to a particular assault",[68] rather than recognising that the coercive power of IPV 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 IPV 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 "[d]rive this fucking bloody car otherwise I'll smash you and the car up".[71] This was accompanied by a backhanded hit to the side of her face. Ms Maurirere 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 crushed 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 that the level of severity of the threat ought to have been left

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.

68 Stark, above n 67, at 3.

69 Law Commission, above n 17, at [18] and [2.37]–[2.40].

70 Stark, above n 67, at 3.

71 *R v Maurirere*, above n 15, at [8].

72 At [9].

73 At [20].

for the jury to decide.[74] 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 be 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 threat associated with a particular demand", rather than a generalised fear.[76] The difficulty here is that victims of IPV 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 IPV may respond to demands even if unaccompanied "by a 'particular threat' because of a fear of the predictable consequences of refusal based on the pattern of past abuse".[77] Thus, where an IPV 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 be able to be carried out "immediately following a refusal to commit the offence" by a threatener who is physically present at the time of offending.[79] These requirements are the yardsticks that measure 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 that they are operating under duress.

However, the immediacy element "invite[s] punishment of blameless victims of coercion" by imposing "an arbitrary temporal limit" that separates the IPV defendant's behaviour "from the context of coercive control to which it responds".[81] This is because "[t]he one certainty about much domestic violence is that it will recur", meaning "[f]ear of violence whether immediate, imminent or future therefore determines [an IPV victim's] actions".[82] Therefore, immediacy is an irrelevant factor for the

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

75 At 332.

76 *R v Raroa*, above n 53, at 493.

77 Law Commission, above n 25, at [174].

78 Nouri, above n 63, at 175.

79 *R v Teichelman*, above n 52, at 67.

80 Nouri, above n 63, at 178.

81 Paul H Robinson *Criminal Law Defenses* (West Publishing, Saint Paul (Minn), 1984) vol 2 at § 177(e)(2).

82 Janet Loveless "Domestic Violence, Coercion and Duress" [2010] Crim LR 93 at 98 as cited in Nouri, above n 63, at 179, n 92.

coercion inquiry in the IPV 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 IPV. 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 requests for help, the victim will feel that any further engagement with such institutions will be useless, further entrapping the victim in the abuse.

The presence element compounds the difficulties facing IPV defendants. Presence has been read strictly as physical presence.[83] This disregards the effects of coercive control in IPV relationships, which "persist 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, with 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",[87] but Parliament omitted that requirement when enacting s 24.[88] 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 that "the plain words of the statute … require actual presence".[89]

Breaks in presence have been fatal to IPV defendants' attempts to use compulsion as a defence. In *R v Witika*, the trial Judge held – and the Court of Appeal affirmed – that "s 24 ceased to be available when there was a failure or omission at a time when … the alleged maker of the threats was not present", as the Court considered these were times when "[the defendant] had the opportunity to get help".[90] Such analysis ignores the nature of coercive control and the power the abuser has over the victim, regardless of whether they are physically present or not.

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83 *R v Teichelman*, above n 52, at 67.

84 Nouri, above n 63, at 182.

85 Stark, above n 37, at 337. See also Nouri, above n 63, at 182.

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

87 Crimes Act 1908, s 44(1).

88 See Dawkins and Briggs, above n 74, at 330.

89 *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.

90 *R v Witika*, above n 16, at 331.

B The Distinction is Divorced from First Principles

There is a line of authority, beginning with the decision in *Kapi v Ministry of Transport* and later affirmed in *Police v Kawiti*, that compulsion and duress of circumstances are to be distinguished on the basis of the source of the threat.[91] 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",[92] or by Dawkins and Briggs as "normatively involuntary conduct".[93] 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.[94] This makes the individual's decision "unwilling" but "not unwilled".[95]

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-type scenario, or as a result of coercive environmental factors that force the individual to offend.

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[96] and Simester and Brookbanks,[97] as well as by the New Zealand Law Commission. The latter has noted that "there appears no reason based in policy" to delineate the defences in this fashion and has labelled the

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91 Tolmie and Quince, above n 1, at 484. See *Kapi v Ministry of Transport*, above n 52; and *Police v Kawiti*, above n 1.

92 *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.

93 Dawkins and Briggs, above n 74, at 328.

94 Chapman and Lemieux, above n 9, at 44.

95 At 45.

96 Dawkins and Briggs, above n 74, at 336.

97 Simester and Brookbanks, above n 54, at 581.

distinction "unfortunate".[98] Such a delineation has particular repercussions for IPV defendants but is also overwhelmingly out of touch in multiple contexts.[99]

That being said, New Zealand has much case law affirming the human versus non-human distinction, meaning that, in the case of human-sourced threats, a defendant has access to compulsion or no defence at all.[100] The remainder of this article investigates how the law can fill the gap that this distinction has created in order to ensure that people whose morally voluntary conduct has been overborne by non-specific threats can access a defence to better represent their lack of 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 IPV defendants could lead to an application of the common law that better recognises the coercive context of IPV relationships. In Canada the case of *R v Ryan* provides a useful case study.[101] The second is Australia's statutory approach, with specific directions to consider the context of IPV 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 considered unavailable on the facts and partially struck down for unconstitutionality.[102] The elements of the statutory defence are very similar to the New Zealand formulation, since both are

98 Law Commission, above n 25, at [197]–[198].

99 See the example given by Simester and Brookbanks, above n 54, at 581, where a driver, D, is driving in the correct lane and is suddenly confronted with another driver, A, coming from the other direction in the same lane. D violently swerves to avoid a collision with A, but narrowly avoids colliding with another driver, V. If D was later charged with dangerous driving because they nearly collided with V, they would be unable to access duress of circumstances as a defence because the danger – driver A – was human-sourced, but they would also be unable to access compulsion as it was not a standover situation.

100 See *Police v Kawiti*, above n 1, at 123; and *Kapi v Ministry of Transport*, above n 52.

101 *Ryan* SCC, above n 92.

102 *R v Ruzic*, above n 92; 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.

based on the English Draft Criminal Code, although Canada does not require "grievous" bodily harm.[103] The elements of the common law defence were clarified in *R v Ryan*:[104]

> … an explicit or implicit threat of death or bodily harm … against the accused or a third person … ; the accused reasonably believed that the threat would be carried out; the non-existence of a safe avenue of escape, evaluated on a modified objective standard; a close temporal connection between the threat and the harm threatened; proportionality between the harm threatened and the harm inflicted by the accused … [and] the accused is not a party to a conspiracy or association whereby the accused is [knowingly] subject to compulsion …

R v Ryan is a useful case study on the efficacy of relying on judicial sensitivity in order to recognise coercive dynamics in IPV 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 hitmen about killing him and to pay one CAD 25,000.[105] She was caught in a police sting operation and charged with counselling the commission of an offence not committed.[106]

The first example of increased judicial sensitivity to the lived experiences of IPV defendants was the fact that the judges accepted 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".[107] 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".[108] At all instances, the courts accepted Ms Doucet's account of a "reign of terror" by Mr Ryan, which had made her "legitimately [fear] … for her life".[109]

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' recognition of IPV defendants' lived realities. For example,

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103 Bowie, above n 102, at 32. See Criminal Code (Indictable Offences) Bill 1878 (178), cl 22. See generally *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (HM Stationery Office, 1879) at 18.

104 *Ryan* SCC, above n 92, at [55]. See also Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "When Self Defence Fails" in Kate Fitz-Gibbon and Arie Freiberg (eds) *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, Annandale, 2015) 110 at 121–123.

105 *Ryan* SCC, above n 92, at [4]–[5].

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

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

108 At 461–462.

109 At 462.

MacDonald CJNS considered the analysis "should focus less on who did what to whom in [whose] presence and more on the accused's predicament and whether or not her actions were truly *involuntary*",[110] 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".[111] Furthermore, the Judge considered that case law and commentary expressing concerns for IPV defendants' access to duress was "instructive" and highlighted two needs: first, the need for a full understanding of the coercive circumstances in which IPV defendants find themselves; and secondly, the need for sufficient flexibility in the defence "to, when appropriate, accommodate the dark reality of spousal abuse".[112] This analysis led to an acquittal on appeal, upholding the trial Judge's finding.[113]

However, the Supreme Court's reversal of this finding illustrates the limitations of relying on judicial sensitivity. The Court took a restrictive and overly legalistic approach to Ms Doucet's case, holding duress was available only "when a person commits an offence while under compulsion of a threat made *for the purpose of compelling* him or her to commit it".[114] This excluded Ms Doucet because although Mr Ryan had threatened her, he had not specifically demanded she hire a hit-man to kill 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.[115] This was despite the fact that it 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.[116]

Furthermore, the two lower courts' first-principles, "moral involuntariness"-based approach is unlikely to be adopted in New Zealand due to the different constitutional contexts.[117] New Zealand courts are unable to strike down provisions, making them hesitant to take a first-principles approach that could stretch the defences beyond what legislators have set out.[118]

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110 *R v Ryan* 2011 NSCA 30, (2011) 301 NSR (2d) 255 [*Ryan* NSCA] at [75].

111 At [74].

112 At [91].

113 At [130].

114 *Ryan* SCC, above n 92, at [2].

115 Crosbie, above n 107, at 474. See also Ronagh JA McQuigg "The Canadian Supreme Court and Domestic Violence: *R v Ryan*, 2013 SCC 3" (2013) 21 Fem LS 185 at 186.

116 Crosbie, above n 107, at 474. See also McQuigg, above n 115, at 186.

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

118 At [20].

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 IPV defendants.[119] 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, considering the heavy criticism these elements have received for their failure to accommodate the coercive dynamics of IPV relationships.[120] An objective test has instead been adopted to constrain the defence, replacing the previous subjective test.[121]

The Western Australian duress defence requires a person to 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".[122] The offending also needs to be "a reasonable response to the threat in the circumstances as the person believes them to be", provided "there are reasonable grounds for those beliefs".[123]

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", and 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".[124]

What sets Victoria's law apart is the explicit recognition of the importance of evidence relating to IPV in duress cases:[125]

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

The fact that New Zealand lacks an explicit legislative direction that ensures the broader context of an IPV relationship is considered, where alleged by a defendant, makes this approach of particular

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119 Law Reform Commission of Western Australia *Final Report: Review of the Law of Homicide* (September 2007) at 187.

120 See Part IV(A)(2) above.

121 Sheehy, Stubbs and Tolmie, above n 104, at 121–123.

122 Criminal Code Act Compilation Act 1913 (WA), s 32.

123 Section 32.

124 Crimes Act 1958 (Vic), s 322O.

125 Section 322P.

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 that there is a wide range of evidence of abuse, such as psychological abuse, social and economic factors, harassment and intimidation, that could be relevant beyond the physical and sexual abuse that many consider to be the sole symptoms of IPV.[126] 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, may appear trivial to an observer who has not experienced IPV, as well as single acts of violence.[127] Other points of note include the provision's reference to "the history of the relationship" between the defendant and the abuser, "social, cultural or economic factors" that impact on victims of IPV, and its psychological effects.[128]

In the 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 recognise the experiences of IPV defendants appropriately, 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 IPV defendants, including the 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. Having canvassed these issues, I will offer wording for a possible new s 24A ("Coercion") for the Crimes Act that sits in parallel with the other duress-based defences.

A Types of Threats

Three aspects of the threat that the law should recognise are the severity, specificity and the subject of the threat.

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.[129] Requiring this level of

126 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.

127 Sheehy, Stubbs and Tolmie, above n 126, at 484; and Crimes Act 1958 (Vic), s 322J(b).

128 Section 322J(a), (c) and (e).

129 Crimes Act 1961, s 24; and *Kapi v Ministry of Transport*, above n 52, at 230.

severity reinforces misconceptions about IPV by focusing the duress inquiry on discrete assaults and the degree of injury inflicted, rather than on the broader coercive circumstances, ie beyond physical harm.[130] Non-violent tactics are also used to create the coercive controlling environment, including deprivation of basic necessities or a victim's financial independence, isolation from the outside world, and making rules about everyday behaviour such as how the victim should "dress, cook, or clean".[131]

The difficulty inherent in this consideration is where the line should be drawn between IPV 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 should it 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 all-or-nothing for IPV defendants.[132]

Canadian law uses "death or bodily harm".[133] This is a lower standard than what New Zealand requires, which is death or *grievous* bodily harm. Victoria has a lower standard again, only requiring "harm".[134] The lower standard adopted by Victoria may better accommodate the violence threatened and suffered by IPV 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.[135]

On the one hand, requiring a more severe threat may be useful to measure the severity of the coercion – the more dire the consequences threatened, the greater the fear instilled in the defendant, and 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.[136] Lowering the severity required and consequently expanding the types of harm the defence recognises would better

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130 Stark, above n 67, at 3. See Part IV(A)(1) above.

131 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, above n 67, at 3.

132 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.

133 Criminal Code RSC 1985 c C-46, s 17.

134 Crimes Act 1958 (Vic), s 322O.

135 See above n 71–75 and associated text.

136 See above n 67–70 and associated text.

encompass IPV 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 threshold for the severity of the threat, alongside an objective test to constrain the defence, would better recognise the range of harms which may coerce a defendant to offend.

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 IPV defendants to access compulsion.[137] Instead, broader coercive circumstances created by a variety of forms of abuse may compel the defendant to offend.[138] 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 fact-finders may address this issue. The obstacle may remain, 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.[139] While this restrictive interpretation may appropriately limit the defence, it fails to recognise the coercive nature of situations that fall outside the patriarchal standover situation that compulsion is formulated to recognise.

The "threat" wording is probably 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 IPV, courts would 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, while self-defence allows for the defendant to be defending themselves or a third party, such as children.[140] IPV perpetrators may cause harm to the defendant's children as part of the coercive control tactics of IPV, meaning it is crucial to recognise the potential coercive impact a threat of harm against a child or other family member may have.[141] Allowing for these threats would be consistent

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137 See above n 76–77 and associated text.

138 See above n 76–78 and associated text.

139 See above n 76 and associated text.

140 Crimes Act 1961, s 48.

141 Law Commission, above n 25, at [17]. See also Nouri, above n 63, at 176–177.

with developments in other jurisdictions such as Victoria, where a threat to the defendant's de facto partner has been considered sufficient.[142]

B Subjective or Objective Tests

There is an ongoing debate over the merits of subjective versus objective tests in criminal defences.[143] 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.[144] On the one hand, objective tests compare defendants against "an imaginary person who encompasses the moral fortitude that we expect as a society" and therefore may appropriately limit the defence.[145] 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 that [the] threat will be carried out",[146] and that the conduct is "a reasonable response to" and the only "reasonable way" to avoid the threat.[147] Because New Zealand uses a subjective test for compulsion, other elements which are deeply problematic for IPV defendants, like immediacy and presence, need to be applied strictly to confine the defence.[148] Thus, for a new defence, in place of the immediacy and presence requirements, New Zealand should adopt an objective test to determine whether the coercion that the defendant was under is legally sufficient to excuse them from liability.

However, objective tests are not a panacea for IPV defendants. The coercive effect of a defendant's genuine but unreasonable belief in a threat may be just as strong as a reasonable belief.[149] That said, an objective approach may still be preferable to restrict the defence's application because it completely excuses the defendant from liability.[150] 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 IPV 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

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142 *R v Hurley* [1967] VR 526 (SC).

143 Alafair S Burke "Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman" (2002) 81 NC L Rev 211 at 286.

144 Crimes Act 1961, s 24.

145 Burke, above n 143, at 309.

146 *Ryan* SCC, above n 92, at [64].

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

148 See Part IV(A)(2) above.

149 Law Commission, above n 25, at [176].

150 At [176].

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.

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 IPV defendant in the reasonableness inquiry, considering "what a reasonable person in the defendant's situation would have believed".[151] 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.[152] Jurors would also be assisted by expert evidence.[153]

Ultimately, however, regardless of the subjectivity or objectivity of the legal test, fact-finders' misconceptions of IPV defendants will persist. 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 on the analysis. Adopting a contextualised 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 of an IPV defendant's offending. The impact of misconceptions remains an issue which may be addressed through the leading of appropriate evidence.

C Evidence

One way to address the limitations of objective tests, and to educate the fact-finder on the IPV defendant's lived experience, is to explicitly direct the courts to consider expert evidence of IPV and its effect on the defendant as part of the coercion inquiry. Victoria's legislation provides a useful model.[154]

"Law's knowledge is limited by the rules of evidence", making what evidence can and cannot be admitted crucial.[155] 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

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151 Burke, above n 143, at 291–292.

152 At 291.

153 At 292–293.

154 See Part V(B)(2) above; and Crimes Act 1958 (Vic), s 322J.

155 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.

consequence" in determining the case.[156] Thus, the defendant must provide a factual basis that links the expert evidence of IPV to the particular circumstances of their case.[157]

Admitting expert evidence may help to dispel commonly held misconceptions about IPV relationships and defendants who experience abuse in those relationships. Victims' responses are deeply contextual and often counterintuitive to an observer who has not experienced IPV; this makes expert evidence crucial in this context.[158] Without explanation of the various social entrapment facets to IPV relationships, fact-finders (who lack IPV experience) may turn to stereotypes of IPV victims or their own 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 IPV operates would also support the defendant's credibility.[159]

However, expert evidence has its limitations. It may dispel misconceptions held by fact-finders, but it also may fall on deaf ears. Expert evidence can challenge the (incorrect) conceptual frameworks that fact-finders often use to understand an issue like IPV. Where these fact-finders "do not realise that their conceptual frameworks are incorrect", they listen to and interpret that expert evidence through those incorrect frameworks, which means "they may fail to understand the testimony or grasp why it is necessary in the first place".[160] Thus, regardless of how compelling the evidence is, its efficacy relies on the receptiveness of fact-finders. Receptiveness will vary greatly from judge to judge and from jury member to jury member. Such evidence also relies on a lawyer's abilities to recognise the signs of coercive relationship dynamics in order to push for IPV to be alleged so that evidence can be admitted. This, once again, will vary from lawyer to lawyer.

Further, expert evidence may be interpreted by fact-finders "as explaining the woman's subjective state of mind but not the state of mind of a reasonable person in her position".[161] 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.[162] Expert evidence can also affirm the idea that the experience of IPV and how it ought to be understood is a contestable issue between the parties at trial.[163] The issue with this contestability is that the burden

156 Evidence Act 2006, s 25.

157 Law Commission, above n 25, at [29].

158 At [28].

159 At [28].

160 Douglas, Tarrant and Tolmie, above n 36, at 331.

161 Sheehy, Stubbs and Tolmie, above n 126, at 468.

162 At 468.

163 Douglas, Tarrant and Tolmie, above n 36, at 331.

of proof is on the prosecution to disprove defences beyond reasonable doubt.[164] However, because misconceptions of IPV 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, thereby compromising the burden of proof.[165]

Wider education on the entrapping dynamics of IPV 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".[166] An evidentiary direction is therefore crucial to the new defence.

D Draft Wording for Proposed New Defence

Based on the analysis above, the proposed new defence lowers the level of severity required for the threat, replaces the immediacy and presence requirements with a contextualised objective test, and explicitly directs the court to consider evidence of IPV where it is alleged. The square bracketed text draws attention to specific points raised in this article:

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, in the circumstances they found themselves in, that—

  (a) [*Reduced severity of threat, threat can be made against third party*] A threat of harm was made against them or a close family or whānau 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*] Where coercion is an issue in the context of intimate partner violence, evidence of that violence must be considered 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;

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164 At 331.

165 At 331.

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

(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 intimate partner 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 exacerbate a defendant's experiences of abuse, with particular reference to the experiences of Māori where relevant.

VII CONCLUSION

New Zealand's current law on the distinction between compulsion and duress of circumstances fails IPV defendants. Both the human- versus non-human-sourced distinction and the restrictive compulsion defence – inaccessible for many IPV defendants – ignore the impact of human-sourced coercive circumstances within the IPV context and more broadly. This has left a significant crack between the defences that IPV defendants are slipping through, which statutory reform must address. Reform should expand the types of threats included in a 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 IPV defendants' coercive circumstances, an evidentiary direction to consider IPV evidence, where such circumstances are alleged, is crucial. Such evidence can begin education to dispel the myths and misconceptions of IPV currently held by large portions of society. The draft of a new s 24A ("Coercion") encompasses all these elements. Through this approach, the law can endeavour to avoid the injustice of cases like that of Ms Kāwiti in future.