

## ***Critiquing the Defence of Compulsion as it Applies to Women in Abusive Relationships***

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*The New Zealand defence of compulsion has been tightly drawn to provide a narrow release from criminal responsibility in the most exigent of circumstances. The challenge posed by the circumstances under which abused women commit offences under a threat of harm involves recognising behaviours of abused offenders not as a response to a single event but as part of a structural sequence of actions in a climate characterised by coercive control. To this end, the author demonstrates that the requirements of the statutory defence of compulsion are too rigidly construed to accommodate the legitimate claims of victims of intimate partner violence who offend under coercion. The author critiques the Law Commission's recommendations for statutory reform for failing to circumvent these obstacles.*

### I INTRODUCTION

With regard to the topic of duress and coercion, society is currently at the forefront of the most pivotal time in the history of the battered woman ... <sup>1</sup>

Since the turn of the century, intimate partner violence has been increasingly recognised as one of New Zealand's most significant social problems. A 2001 survey indicated that one in four heterosexual women sustained abuse or were threatened with violence by a partner.<sup>2</sup> Increased community awareness and a better understanding of the dynamics of intimate partner violence have led to substantial legal reform.<sup>3</sup> The most significant of these

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1 Brenda L Russell *Battered Woman Syndrome as a Legal Defense: History, Effectiveness and Implications* (McFarland & Company, Jefferson (NC), 2010) at 140.

2 Allison Morris and others *New Zealand National Survey of Crime Victims 2001* (Ministry of Justice, May 2003) at 139. This was a national survey of around 5,000 randomly selected New Zealanders aged 15 and above. Note that *reported* abuse statistics are vastly different, in part because, at the time of the survey, police did not specifically record partner abuse statistics: Morris and others at 137. See Morris and others at 67–73 for a discussion of the discrepancy between the survey results and police statistics generally.

3 Zoe Craven "Battered Woman Syndrome" (2003) Australian Domestic & Family Violence Clearinghouse <[www.adfvc.unsw.edu.au](http://www.adfvc.unsw.edu.au)> at 1.

reforms arose from claims of self-defence by abused women accused of killing or harming their abusive partners. But not all offences committed by abused offenders are against their abusers; in fact, many abused offenders are charged with offences their abusers coerced them into committing.<sup>4</sup> These women are typically involved in multiple crimes that occur over an extended period of time. Yet such women receive little attention.

At first glance, the abused offender appears the ideal candidate for a criminal defence based upon compulsion. This defence absolves from liability anyone who is coerced into committing a criminal offence under a threat of harm.<sup>5</sup> However, this defence has proven largely unsuccessful for abused offenders. The law's lack of assistance for abused women who have been compelled to commit crimes from within a "grossly abusive and battering relationship" has prompted judicial criticism.<sup>6</sup>

New Zealand's statutory defence of compulsion is tailored to one-off "standover" situations.<sup>7</sup> These are situations where a person is compelled to commit an offence by someone in his or her immediate proximity who is threatening him or her with "instant death or grievous bodily harm", for example by holding that person at gun point.<sup>8</sup> But, according to Evan Stark's model of coercive control, intimate partner violence involves an ongoing pattern of control where "repeated physical and sexual violence" is interwoven with "intimidation, sexual degradation, isolation and control".<sup>9</sup> This pattern of coercion and control has a cumulative impact, depriving abused women of their very personhood.<sup>10</sup>

New Zealand's compulsion law fails to recognise this; it envisages only discrete acts of physical violence with localised effects. The social, cultural, economic and psychological entrapment that arises from coercive control means that abused women are often unable to escape the harm or seek outside assistance. The challenge, therefore, involves recognising the behaviours of abused offenders not as a response to a single event with incident-specific effects but as part of a structural sequence of events in a climate characterised by coercive control. We should accept that such a sequence can establish a compulsion defence.

The next part of this article examines the theoretical underpinnings of the defence of compulsion. This is essential to analysing whether the strict approach taken by the courts accords with the defence's underlying rationale. The nature and scope of s 24(1) of the Crimes Act 1961 are examined, as are the defence's requirements as set out by the Court of

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4 Meredith Blake "Coerced into Crime: The Application of Battered Woman Syndrome to the Defense of Duress" (1994) 9 Wisconsin Women's Law Journal 67 at 68.

5 Martha Shaffer "Coerced into Crime: Battered Women and the Defence of Duress" (1999) 4 Can Crim L Rev 271 at 273.

6 *Accident Rehabilitation and Compensation Insurance Corporation v Tua* DC Auckland CIV-1999-480-12179, 18 February 1999 at 15.

7 *R v Teichelman* [1981] 2 NZLR 64 (CA) at 67.

8 At 67.

9 Evan Stark "Re-presenting Battered Women: Coercive Control and the Defense of Liberty" (paper prepared for Violence Against Women: Complex Realities and New Issues in a Changing World, Quebec, 2012) at 7.

10 See Evan Stark "Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control" (1995) 58 Alb L Rev 973 at 975-976.

Appeal in *R v Teichelman*.<sup>11</sup> Using Evan Stark's model of coercive control, Part III of this article demonstrates the ways in which the defence's requirements fail to accommodate the experiences of abused women who are coerced into crime. Finally, Part IV discusses the New Zealand Law Commission's recommendations for statutory reform. It concludes that the Commission's reasons for keeping the defence tightly limited are indefensible.

## II THE DEFENCE OF COMPULSION IN NEW ZEALAND

### Rationale and Theoretical Underpinnings of Compulsion

The defence of compulsion (also known as duress) emerged at common law under the title "duress *per minas*" ("duress by threats"). It concerns the constraint placed on an accused's choice of action when he or she is motivated by fear.<sup>12</sup> The defence applies where the accused is compelled to commit a crime by someone threatening death or grievous bodily harm if the accused refuses to offend.<sup>13</sup> It is an exception to the criminal law's fundamental principle that those who choose to break the law are, and should be held, responsible for their crimes. The defence's underlying rationale is that, in these situations, the accused has no real choice but to break the law. Ultimately it was not the accused's own desires or motivations that led to the unlawful act,<sup>14</sup> so the accused is not fully responsible for it.<sup>15</sup> This does not mean that compulsion operates as a "general catch-all" defence that may assist offenders who are more susceptible to pressure or the threatening behaviour of others.<sup>16</sup> Indeed.<sup>17</sup>

The model of the responsible actor is heavily inscribed on the duress defense. The defense assumes that the responsible actor is able, through an exercise of rational self-control, to resist threats and even to endure minor harms to himself rather than violate the law [or harm an innocent third party].

Unlike defences that negate a legal ingredient of a crime, compulsion applies when all elements of an offence are satisfied.<sup>18</sup> The actus reus and mens rea are still made out, even though the act was committed in order to avoid harm. The defence, therefore, operates as an excuse and does not justify the

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11 *Teichelman*, above n 7.

12 AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 396.

13 *Teichelman*, above n 7, at 67.

14 Lawrence Newman and Lawrence Weitzer "Free Will, the Doctrine of Duress, and Criminal Responsibility" (1958) 4 NYLF 123 at 123.

15 Benjamin L Berger "Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences" (2006) 51 McGill LJ 99 at 105–106.

16 Simester and Brookbanks, above n 12, at 399.

17 Anne M Coughlin "Excusing Women" (1994) 82 CLR 1 at 30.

18 Simester and Brookbanks, above n 12, at 396.

conduct of the defendant. Justification-based defences — like self-defence or defence of another — challenge the unlawful character of the accused’s actions by showing that his or her conduct was justified. In contrast, compulsion does not deny the unlawfulness of the act. Rather, it absolves blame in extreme circumstances by calling into question the “internal relationship between a *prima facie* unlawful act and the actor”.<sup>19</sup>

## Section 24 of the Crimes Act

The defence of compulsion was codified in New Zealand in 1893 and can now be found in s 24 of the Crimes Act.<sup>20</sup> The Act provides that:<sup>21</sup>

[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.

Section 24(2) qualifies this, such that the defence will not apply where the relevant offence is any one of an extensive variety of excluded crimes including murder, injuring with intent and arson.<sup>22</sup> Further, the Act repeals the common law doctrine of marital coercion, under which a married woman could be excused from crimes she committed in the presence of her husband.<sup>23</sup> Even without the restrictions on the defence in subs (2) and (3), the requirements of s 24(1) are extremely restrictive — the subsection seems only to apply to standover situations.<sup>24</sup> The Court of Appeal discussed the interpretation of s 24(1) in *Teichelman*, concluding that the legislature contemplated four necessary criteria:<sup>25</sup>

First, there must be a threat to kill or cause grievous bodily harm. Second, it must be to kill or inflict that serious harm immediately following a refusal to commit the offence. Third, the person making the threat must be present during the commission of the offence. [Finally], the accused must commit the offence in the belief that otherwise the threat will be carried out immediately.

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19 George Mousourakis “Distinguishing Between Justifications and Excuses in the Criminal Law” (1998) 9 Stellenbosch L Rev 165 at 165.

20 Criminal Code Act 1893, s 24; and see generally Warren Brookbanks “Compulsion and self-defence” (1990) 20 VUWLR 95 at 96.

21 Section 24(1).

22 Section 24(2). The excluded offences are: s 73 (Treason), s 78 (Espionage), s 79 (Sabotage), s 92 (Piracy), s 93 (Piratical acts), ss 167 and 168 (Murder), s 173 (Attempt to murder), s 188 (Wounding with intent), s 189(1) (Injuring with intent to cause grievous bodily harm), s 208 (Abduction), s 209 (Kidnapping), s 234 (Robbery), s 235 (Aggravated robbery) and s 267 (Arson).

23 Section 24(3).

24 See *R v Ruzic* 2001 SCC 24, [2001] 1 SCR 687 at [50], where the Supreme Court of Canada commented that the equivalent Canadian provision “seems tailor-made for the situation in which a person is compelled to commit an offence at gun point”.

25 *Teichelman*, above n 7, at 66–67.

These four requirements have since been recognised as the critical features of the contemporary defence of compulsion.<sup>26</sup> The Court did not include a requirement that the defendant had no reasonable opportunity to escape or seek assistance. Perhaps this is because the requirements of immediacy and presence effectively exclude any reasonable opportunities to escape or seek assistance. It is unsurprising to find that few defendants have been able to make out a successful compulsion defence given the stringent circumstances that the defence demands.

### III OBSTACLES POSED BY THE DEFENCE OF COMPULSION

#### A Specific Threat and Demand

##### *1 Threats of Death or Grievous Bodily Harm*

A successful compulsion defence requires a threat to kill or cause grievous bodily harm. The defence “does not permit any proportionality or ‘sliding scale’ analysis based on the severity of the threat compared to that of the offense”.<sup>27</sup> In other words, threats of harm not amounting to death or grievous bodily harm are insufficient, no matter how minor the offending is.

Further, a sustained pattern of abuse that does not involve death threats or threats of grievous bodily harm will not satisfy the legal threshold. This is so notwithstanding the extreme psychological and physical effects such abuse can have on a person. Thus, an abused woman who commits an offence under threat of further abuse, but who is not threatened with grievous bodily harm or death, cannot raise the defence.

For instance, in *R v Maurirere*, the defendant raised the defence of compulsion against a charge of driving with excess breath alcohol.<sup>28</sup> The defendant argued that she had been compelled to drive because her partner had hit her on the side of her face and continued to hit her while saying, “[d]rive this ... car otherwise I’ll smash you and the car up”.<sup>29</sup> The trial judge said the evidence fell short of threats of “grievous bodily harm”, which he defined as the “next most serious” harm short of death.<sup>30</sup> The Court of Appeal upheld this conviction and concluded that, while the trial judge may have “slightly overstate[d] the position”, New Zealand law “has long accepted grievous bodily harm as ‘harm which will seriously interfere for a time with health or comfort’ and is ‘really serious’”.<sup>31</sup> The Court found that, at best, the threats amounted to a “serious assault”, no more than “a possible repetition of the kind of behaviour” the defendant had been subjected to on

26 Brookbanks, above n 20, at 97.

27 Laurie Kratky Doré “Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders” (1995) 56 Ohio StLJ 665 at 700.

28 *R v Maurirere* [2001] NZAR 431 (CA).

29 At [8].

30 At [14].

31 At [14] (citations omitted).

earlier occasions.<sup>32</sup> This behaviour included severely blackening both her eyes, kicking her in the head, trampling on her with a bike and dragging her out of a car by her hair.

It is wrong that the Court downplayed the severity of the threat — a factual matter that should have been left to the jury — by drawing on previous levels of violence suffered by the defendant.<sup>33</sup> The Court's analysis ignored the reality that, when an abuse victim defies her abuser's demands, she cannot predict the intensity of the abuser's response; "she must always assume the worst may happen".<sup>34</sup> In any case, the evidence in *Maurirere* was arguably sufficient to find a threat of grievous bodily harm as the defendant was told she would be "smashed" if she did not drive the car.

Although they can involve incidents of severe violence, abusive relationships are characterised by "the frequency, relatively low-level, and cumulative effects of minor violence".<sup>35</sup> In these circumstances, threats of violence are combined with non-violent tactics so they do not need to be severe to be effective. Abusive partners use a range of coercive tactics such as intimidation, isolation and control to ensure compliance; where particular tactics produce the desired result, they are used repeatedly.<sup>36</sup> Threats involving manipulative tactics can be more frightening than threats of severe violence because of their cumulative nature, which can cause the victim to feel that she is being "smothered".<sup>37</sup>

Likewise, the defence of compulsion fails to recognise other pressures that abusive partners may place on victims. For instance, an abusive partner might threaten to leave the relationship, thereby putting enormous "psychological pressure on a woman seeking to maintain the ideals of marriage".<sup>38</sup> There may be moral and economic pressures as well; the abusive partner may threaten to take the children,<sup>39</sup> or deprive the abused woman and her children of "financial protection".<sup>40</sup> While these pressures fall more neatly under the defence of necessity or duress of circumstances, they could easily be relevant to compulsion.<sup>41</sup> Hypothetically, an abusive partner might threaten to remove the children or deprive the abused woman

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32 At [20].

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

34 Cynthia Wilcox Lischick "Divorce in the Context of Coercive Control" in Evan Stark and Eve S Buzawa (eds) *Violence against Women in Families and Relationships: Volume Two — The Family Context* (Praeger, California, 2009) 191 at 201.

35 Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, New York, 2007) at 243–244.

36 At 285.

37 At 300.

38 Stanley Yeo "Resolving Gender Bias in Criminal Defences" (1993) 19 Mon LR 104 at 107.

39 Mary Ann Dutton and Lisa A Goodman "Coercion in Intimate Partner Violence: Toward a New Conceptualization" (2005) 52 Sex Roles 743 at 747.

40 Yeo, above n 38, at 107.

41 See, for example, *R v Atofia* [1997] DCR 1053 [*Atofia* (DC)]. In that case the defendant fraudulently claimed social welfare benefits so she could meet her abusive ex-partner's demands that she pay him \$100 per fortnight. In a pre-trial ruling, the judge held that a defence of duress of circumstances could possibly be raised in New Zealand if certain grounds are established and evidence of battered woman syndrome was admissible in this case to support such a defence: at 1059–1060. See also *R v Atofia* CA 453/97, 15 December 1997 at 2–3 [*Atofia* (CA)]. In dismissing an application for leave to appeal against that ruling, the Court of Appeal thought it inappropriate to decide whether or not the defence was open but it added that "this could possibly be a case where evidence such as that in question could be received": at 2–3.

of financial support unless she commits an offence. The abused woman might reasonably perceive this as concealing a threat of physical harm.<sup>42</sup> However, currently, the law expects the abused defendant to withstand these pressures and threats. The law will only sanction the abused defendant's behaviour when she is overtly threatened with death or grievous bodily harm.

## 2 *Explicit Threats and Demands*

Section 24(1) requires an actual threat but there is nothing to suggest that the section excludes threats that are implied by words or conduct.<sup>43</sup> The Court of Appeal in *R v Raroa* held that, while the threat need not be spoken for the purposes of s 24, it must be a "particular kind of threat associated with a particular demand".<sup>44</sup>

In abusive relationships, women can be subject to implied or insinuated threats of death or grievous bodily harm. For example, an abusive partner might tell his victim that something will happen if she does not do as she is told. In one case, the abuser told his victim that he knows "not to leave marks".<sup>45</sup> In other cases, the abusive partner may simply clench his fist, twitch his eye or raise his eyebrow as a sign of disapproval.<sup>46</sup> Such threats have been found to be among the most terrifying as they contain "no specific reference" and victims feel they will be "carried out no matter what they do".<sup>47</sup> While these threats carry great weight for the recipient, they may not be apparent to others and hence not as readily caught by s 24. The victim's belief in such threats is subjective and so a court may not find them to be reasonable.<sup>48</sup>

Clearly, fear or apprehension of threats — other than as to grievous bodily harm or death — is not sufficient to establish a defence of compulsion. If an abused woman commits an offence because her partner's violent and abusive nature instils in her a general fear of harm that is unconnected with any specific threat, then the defence will be unsuccessful. However, an abusive partner need not explicitly communicate a threat to the person he abuses. Victims of long-term intimate partner violence "may respond to a demand even if it is not accompanied by a 'particular threat' because of a fear of the predictable consequences of refusal based on the pattern of past abuse".<sup>49</sup> The abused woman has spent considerable time and energy trying to read her partner's behaviour. She is on constant alert for cues in his behaviour that indicate potential violence

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42 See Janet Loveless "Domestic Violence, Coercion and Duress" [2010] Crim LR 93 at 97.

43 Simester and Brookbanks, above n 12, at 403–404.

44 *R v Raroa* [1987] 2 NZLR 486 (CA) at 493.

45 Stark, above n 35, at 250.

46 At 250; and Elisabeth McDonald "Women Offenders and Compulsion" [1997] NZLJ 402 at 404.

47 Stark, above n 35, at 250.

48 McDonald, above n 46, at 404.

49 Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000) at [174].

and responds by appeasing him to avoid harm.<sup>50</sup> In this sense, the coercion leading the abused woman to commit a crime is simply an “extension” of the same coercion that leads her to prepare her partner’s favourite meal or keep the children quiet.<sup>51</sup>

The law’s failure to recognise these circumstances in the compulsion defence is especially concerning given that abused women are often charged with crimes of omission for failing to protect or provide medical care to a child.<sup>52</sup> An abused mother understands, based on past experience, that resisting her abuser’s demands may result in harm to herself or the child — even where her abuser has not made an explicit and immediate threat.<sup>53</sup> But the link between the partner’s abuse and the woman’s failure to protect or provide medical care for her child will rarely be sufficient to establish a compulsion defence. The same outcome would arise if an abused woman committed social benefit fraud over an extended period of time.<sup>54</sup> Courts only look for individual instances of compulsion. But evidence of “an ongoing global affair”, where the defendant continues to offend in fear of what her abusive partner might do, will not be enough to allow the defence to go to the jury.<sup>55</sup>

Even with crimes of commission, abused women may act under a very real, but nevertheless general, fear of harm. For example, in *R v Runjanjic* no evidence of explicit threats existed in relation to the offending.<sup>56</sup> However, the Supreme Court of South Australia accepted that the relationships between the abuser and the defendants were marked by “habitual violence” and that the defendants were expected to attend to the abuser’s every need to avoid severe beatings.<sup>57</sup> The Court accepted that evidence of battered woman syndrome was admissible and relevant to the issue of duress. However, as the New Zealand Law Commission acknowledged, it is unlikely that the facts of *Ranjanjic* would satisfy the current strict requirements of s 24(1). This is because “there was no specific threat associated with a particular demand to commit an offence”.<sup>58</sup> So, absent an explicit threat of violence, the law will not recognise that a threat existed at all.

But where fear arises from a threatening environment like that experienced by an abused woman, the defence of duress of circumstances

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50 David R Langford “Predicting Unpredictability: A Model of Women’s Processes of Predicting Battering Men’s Violence” (1996) 10 *Scholarly Inquiry for Nursing Practice* 371 at 381. This study found that abused women monitored their partners for “cues of potential violence” such as “subtle changes in posture, eyes, tone of voice or the smell of alcohol”.

51 Susan D Appel “Beyond Self-Defense: The Use of Battered Woman Syndrome in Duress Defenses” [1994] *U Ill L Rev* 955 at 977–978.

52 See, for example, *R v Witika* [1993] 2 NZLR 424 (CA).

53 Michelle S Jacobs “Criminal Law: Requiring Battered Women Die: Murder Liability for Mothers under Failure to Protect Statutes” (1998) 88 *J Crim L & Criminology* 579 at 642.

54 See, for example, *Atofia* (DC), above n 41.

55 *Rihari v Department of Social Welfare* (1991) 7 CRNZ 586 (HC) at 588, where the High Court quoted the District Court judgment subject to appeal.

56 *R v Runjanjic* (1991) 56 SASR 114 (SC).

57 At 115.

58 Law Commission, above n 49, at [164].

should be available, even without a direct threat of harm.<sup>59</sup> In *Police v Kawiti*, the defendant was charged with driving with excess blood alcohol and driving while disqualified. She drove to the hospital and asked that the police be called because she had been assaulted by her abusive partner. The defendant had accompanied her partner to a funeral at a marae. She was not introduced to anyone there and depended on her partner. Later, after both of them had consumed large quantities of alcohol, she approached her partner because she wanted to move their car. He attacked her in a drunken rage. Her partner beat her and other members of the marae group urged further violence upon her. She suffered a dislocated shoulder and was in excruciating pain. Fearing that she “might die or suffer very severe injury”, she drove herself to the nearest hospital with her partner asleep in the vehicle.<sup>60</sup>

The defendant said she had no other choice but to drive because there was no telephone in sight, she did not know the area and there was no suggestion that people lived nearby.<sup>61</sup> Salmond J held that the defence of necessity or duress of circumstances was available as a preserved common law defence under s 20 of the Crimes Act but not where the source of the duress is another person, as this is covered by s 24.<sup>62</sup> Rather, the source of the threat must be the circumstances. When *Kawiti* returned to the District Court, the defendant successfully raised the defence of necessity.<sup>63</sup> The Judge’s reasoning was not put in writing but the only possible basis for excusing the defendant on this ground was that she was suffering agonising pain and believed her injuries would worsen if she did not receive medical attention.<sup>64</sup>

Nevertheless, without the medical emergency, *Kawiti* would not have had a defence despite her omnipresent fear of further serious harm. Although her partner seriously injured her and was in the car when the offences were committed, he did not threaten further violence upon her.<sup>65</sup> Thus, a compulsion defence would have failed. A defence of duress of circumstances would also have been unavailable because it requires a threat to arise out of circumstances as opposed to a person or people. As such, the defence of compulsion has been left in a “narrow and unforgiving state”.<sup>66</sup>

### 3 Threats Directed at Third Parties

Also not excluded by the wording of s 24 are situations in which a person other than the abused woman has been threatened. Such an interpretation is consistent with developments in Australia where it has been held that threats

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59 This defence is also called “necessity” in New Zealand: see *Police v Kawiti* [2000] 1 NZLR 117 (HC) at 121.

60 At 119.

61 At 119.

62 At 119–120.

63 *Police v Kawiti* DC Kaikohe CRN-1999-802-703705, 4 November 1999. See Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA24.23].

64 Dawkins and Briggs, above n 33, at 338.

65 At 338.

66 At 338.

made against the defendant's family are sufficient.<sup>67</sup> In a recent decision,<sup>68</sup> the New Zealand Court of Appeal accepted that threats to the defendant's children might constitute a relevant threat under s 24(1).<sup>69</sup> This development is significant for victims of intimate partner violence who act to protect their children or other family members from harm. In many abusive relationships, men hurt and control their victims by threatening to harm the victim's children.<sup>70</sup> This tactic might be used where threats against the abused mother fail to bring her under her partner's control.<sup>71</sup> An abuser might threaten the children as a response to the abused mother's attempt to leave the relationship.<sup>72</sup> While the abused mother may resist threats to herself, she may be more likely to succumb to threats made against her children; she knows better than anyone what the abuser is capable of if she disobeys any of his demands.<sup>73</sup>

Even if s 24(1) does cover threats made against a person other than the offender, such threats frequently involve a lack of immediacy because of distance.<sup>74</sup> The defendant will not be able to establish the defence if the threatener is with the child and away from her when she commits the offence. For example, an abusive partner may fail to return the child or he may remove the child from the home without legal authority to do so.<sup>75</sup> He may keep the child hostage and tell his victim that the child will be killed or seriously harmed unless she commits a specified crime within a specified time frame.<sup>76</sup> An abused mother who complies with her partner's demands cannot plead compulsion on these facts because the threatener would not have been present when she committed the offence. Moreover, the harm to her child would not have been immediate. Nevertheless, the mother's conduct would likely be morally involuntary. Short of submission, she may have had no realistic options for protecting her child, given the time it would have taken the police to formulate and execute a plan.<sup>77</sup> Such an outcome led the Supreme Court of Canada to conclude that Canada's former equivalent immediacy and presence restrictions on the defence of compulsion, under s 17 of the Canadian Criminal Code, were unconstitutional.<sup>78</sup> The Court held they contravened the principles of fundamental justice under s 7 of the Canadian Charter of Rights and Freedoms.<sup>79</sup>

67 See, for example, *R v Hurley* [1967] VR 526 (SC); and *R v Brown* [1968] SASR 467 (SC).

68 *R v Neho* [2009] NZCA 299, [2013] NZAR 464 at 469.

69 See Elisabeth McDonald "Criminal Law" [2009] NZLJ 345 at 345–346.

70 Marisa L Beeble, Deborah Bybee and Cris M Sullivan "Abusive Men's Use of Children to Control Their Partners and Ex-Partners" (2007) 12 *European Psychologist* 54 at 54–55.

71 V Pualani Enos "Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children" (1996) 19 *Harv Women's LJ* 229 at 235.

72 See Charles Patrick Ewing "Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill" (1990) 14 *Law and Human Behavior* 579 at 583.

73 Heather R Skinazi "Not Just a 'Conjured Afterthought': Using Duress as a Defense for Battered Women Who 'Fail to Protect'" (1997) 85 *CLR* 993 at 995–996.

74 McDonald, above n 69, at 345–346.

75 Tania Pocock and Fiona Cram "Children of Battered Women" (1996) 4 *Wai L Rev* 77 at 95.

76 McDonald, above n 69, at 345–346.

77 See Martha Shaffer "Scrutinizing Duress: The Constitutional Validity of Section 17 of the Criminal Code" (1998) 40 *Crim LQ* 444 at 464–466.

78 See *Criminal Code* RSC 1985 c C-46, s 17; and *Ruzic*, above n 24.

79 *Ruzic*, above n 24, at [55].

## Temporal Proximity of Threat: Immediacy

In *Teichelman*, the Court of Appeal noted that s 24(1) requires that the threat of death or grievous bodily harm be carried out “immediately following a refusal to commit the offence”.<sup>80</sup> Threats of future death or grievous bodily harm, therefore, will not suffice. Immediacy may assist in determining if a defendant has in fact been coerced and whether her degree of resistance was legally satisfactory. But adopting “an arbitrary temporal limit beyond which duress will never be recognized is to invite punishment of blameless victims of coercion”.<sup>81</sup> This is because:<sup>82</sup>

... if legal or other protection from a less than [immediate] harm is not accessible, and the coercer shows a clear ability and determination to effectuate his threat, the actor's exercise of free will might well be severely impaired. ... [T]hreats by one who shows that he has access to the defendant's home and family ... may well have a strong coercive effect upon a person, especially if the police are unwilling or unable to stop the threats.

This analysis applies in the case of abused defendants. Despite many women knowing from past experience that abuse will follow a threat “within a matter of hours or days”, most are not able to show that they were threatened with immediate harm.<sup>83</sup> Thus, the immediacy requirement impedes abused women from successfully establishing compulsion.

The coercive pressure placed on women in abusive relationships is often just as great as in cases where immediate injury is threatened. This pressure results from the “entrapment, paralyzing fear, and ongoing objectification typical of battering”.<sup>84</sup> The control that an abusive partner exercises over his victim causes her “survival self” to emerge, making free choice impossible.<sup>85</sup> Relationships involving long-term abuse leave a victim feeling that there is an immediate threat of harm at all times. The threat exists even during periods of rest and relaxation, and when the abusive partner is asleep or at work.<sup>86</sup> The victim constantly attempts to predict the abusive partner's response, never knowing when he will “go off” or how he will respond to a given situation.<sup>87</sup> She must constantly assume that “the worst may happen”.<sup>88</sup> Because of “the history of violence in the relationship”, abused women become “sensitive to cues from the batterer”

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80 *Teichelman*, above n 7, at 67.

81 Paul H Robinson *Criminal Law Defenses* (West Group, 1984) vol 2 at §177(e)(5) as cited in *Skinazi*, above n 73, at 1031.

82 Robinson, above n 81, at §177(e)(5) as cited in *Skinazi*, above n 73, at 1032.

83 Shaffer, above n 5, at 310.

84 Stark, above n 10, at 987.

85 Lischick, above n 34, at 201.

86 Stark, above n 35, at 246.

87 Lischick, above n 34, at 201.

88 At 201.

that generate feelings of immediate danger.<sup>89</sup> In addition, the abused woman's intimate knowledge of her abusive partner may allow her to predict the occurrence of a deadly or violent attack long before it is apparent to anyone else.<sup>90</sup> As Beth Boland puts it:<sup>91</sup>

A woman who views her circumstances through the eyes of one who has already suffered abuse at the hands of the coercer may see imminent danger even though some time may pass between the threat and her subsequent criminal act, and even though others may see no serious threat at all.

Janet Loveless noted that "[t]he one certainty about much domestic violence is that it will recur. Fear of violence whether immediate, imminent or future therefore determines [an abused woman's] actions."<sup>92</sup>

Another difficulty with the immediacy requirement is that abused women may attribute completely miscalculated time-frames to events because of the nature of the abusive relationship. Specifically, they may underestimate or overestimate the immediacy of a threat's execution.<sup>93</sup> Compulsion may be disallowed if the defendant believed there would be a short delay in the execution of the threat, even if that belief was incorrect and her partner had in fact intended immediate execution.<sup>94</sup> Simester and Brookbanks challenge this, viewing it as a misguided approach.<sup>95</sup>

If the real issue is the effectiveness of the threat on the accused's mind, and that is certainly the moral crux of the matter, then it cannot matter whether he or she believes it will be carried out immediately upon non-compliance or after an interval, provided he or she honestly believes it *will* be carried out and has complied because of that belief.

The immediacy requirement also presents obstacles to abused offenders who offend over a period of time. This is because it is almost impossible for them to prove that the abusive partner's threat continued throughout the entire period of offending.<sup>96</sup> This point is illustrated in the case of *Rihari v Department of Social Welfare*, where the High Court held:<sup>97</sup>

It cannot rationally be accepted that [the defendant] falsely completed application forms and dishonestly omitted to provide

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89 Roberta Thyfault, Cathy Bennett and Robert Hirschhorn "Battered women in court: jury and trial" in Daniel Sonkin (ed) *Domestic Violence on Trial* (Springer, New York, 1987) 55 at 59 as cited in Patricia Weiser *Eastal Killing the Beloved: Homicide Between Adult Sexual Intimates* (Australian Institute of Criminology, Canberra, 1993) at 138.

90 Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 Crim LJ 369 at 372.

91 Beth IZ Boland "Battered Women Who Act Under Duress" (1994) 28 New Eng L Rev 603 at 625.

92 Loveless, above n 42, at 98.

93 Simester and Brookbanks, above n 12, at 407.

94 At 407.

95 At 408 (emphasis in original).

96 Doré, above n 27, at 711.

97 *Rihari*, above n 55, at 589.

relevant information year in and year out because she feared immediate death or grievous bodily harm. She may well have been suborned in her judgment by a stronger, possibly violent, man, but the immediacy of threats ... contemplated by the Legislature was plainly not present.

The Court applied the same reasoning in *Accident Rehabilitation and Compensation Insurance Corporation v Tua* — despite strong evidence of compulsion.<sup>98</sup> The defendant had been previously hospitalised for injuries after an argument with her abusive partner about expense forms used to defraud the Accident Compensation Corporation.<sup>99</sup> This fraud was the crime with which she was subsequently charged.<sup>100</sup>

Therefore, the immediacy requirement, in its present state, wrongly separates the abused offender's behaviour from the context of coercive control to which it responds. As we will see, the immediacy requirement also means the defence of compulsion is unavailable where an abused woman commits a crime away from her abusive partner.<sup>101</sup>

### Presence of the Coercing Party

For a threat to qualify as “immediate”, the coercing party must be present with the accused when the offence is carried out. This is what the Court of Appeal in *Teichelman* referred to as a standover situation.<sup>102</sup> In recent years, it is this requirement that has been the specific subject of judicial and academic scrutiny regarding the defence of compulsion.<sup>103</sup> The provisions contained in the Criminal Code Act 1893 and the Crimes Act 1908, which required that the person making the threat be “actually” present during the commission of the offence, do not appear in s 24(1). Section 24(1) refers only to a threat from a person “who is present when the offence is committed”. The Court of Appeal in *R v Joyce* found that the deletion of the word “actually” was of no significance since the “object of the section is to provide a defence to persons who commit offences under ‘immediate’ threats of death or grievous bodily harm”.<sup>104</sup> The Court preferred to follow the similarly restrictive interpretations given to corresponding provisions under the Canadian and Queensland Criminal Codes.<sup>105</sup>

The reading of “present” as “physical presence” was affirmed by the Court of Appeal in *Teichelman*. The Court held that the threatener must be “present while the offence is being committed and so is in a position to carry out the threat or have it carried out *then and there*”.<sup>106</sup> This is despite the fact that effective presence, as opposed to actual presence, includes “not only

98 *Tua*, above n 6.

99 At 2.

100 At 6.

101 *Witiika*, above n 52, at 436; and *R v Richards* CA272/98, 15 October 1998, at 2.

102 *Teichelman*, above n 7, at 67.

103 Robertson, above n 63, at [CA24.07]; and Dawkins and Briggs, above n 33, at 346.

104 *R v Joyce* [1968] NZLR 1070 (CA) at 1077.

105 At 1078–1079.

106 *Teichelman*, above n 7, at 67 (emphasis added).

immediate physical proximity ... but also being close or near”.<sup>107</sup> However, the Court in *Joyce* added that presence will sometimes be “a matter of degree depending on the particular circumstances of the case including the means adopted in making the threat”.<sup>108</sup> This may be read as suggesting that, in exceptional cases, the real question is whether the coercing party is in a position to execute the threat.<sup>109</sup> This might apply where, for example, a firearm is aimed at the defendant from a distance,<sup>110</sup> or where an accused has a bomb strapped to his or her body capable of being detonated some distance from the scene of the crime.<sup>111</sup> Nonetheless, the Court’s usual interpretation of the section essentially involves reintroducing the word “actually”.<sup>112</sup>

The Court of Appeal’s insistence on actual presence has made the defence of compulsion unavailable to many abused defendants who claim they were coerced into committing crimes by their abusive partners. In *R v Richards*, the Court accepted that the appellant “was suffering from Battered Women’s Syndrome”<sup>113</sup> and was likely to have been beaten had she not participated in offences involving drug possession under the Misuse of Drugs Act 1975.<sup>114</sup> However, the defence of compulsion was rejected because her abusive partner was not *actually* present at the time of the offending. The Court was not prepared to accept “constructive presence” as, in the Court’s view, “the plain words of the statute ... require actual presence”.<sup>115</sup>

The defence of compulsion also foundered on the presence requirement in *Witika*.<sup>116</sup> Here, following the death of her young daughter, the defendant was charged with manslaughter. Witika failed to provide her daughter with medical care after she suffered severe physical abuse from Witika’s de facto partner, Smith. According to the Court of Appeal, this case involved “wicked child abuse”.<sup>117</sup> Witika argued that she was too frightened to get help for her daughter because of the violence she suffered at the hands of Smith.<sup>118</sup> Expert evidence revealed that the severity of the defendant’s beatings was “close to 10”.<sup>119</sup> Nevertheless, the trial judge held that:<sup>120</sup>

[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, presence at the time of commission of the offence being an essential requirement ... . Assuming ... that her failure to get medical help was capable of being excused under s 24 while

107 Dawkins and Briggs, above n 33, at 331.

108 *Joyce*, above n 104, at 1077–1078.

109 Law Commission, above n 49, at 54.

110 Gerald Orchard “The Defence of Compulsion” (1980) 9 NZULR 105 at 116.

111 Stanley Yeo “Considerations of Time and Space in Duress” (2004) 16 SAclJ 354 at 363.

112 Orchard, above n 110, at 116.

113 *Richards*, above n 101, at 2.

114 At 4.

115 At 2.

116 *Witika*, above n 52.

117 At 427.

118 At 433.

119 At 428.

120 At 435–436.

Smith was present, she lost that ground of exemption from liability when he was no longer present and she had the opportunity to get help.

The Court of Appeal agreed with this reasoning.<sup>121</sup> It added that the defendant's situation during Smith's absences "was no different from that of a person who has an opportunity to escape and avoid committing acts under threat of death or serious injury".<sup>122</sup> This finding was made despite the fact that "Smith, who demonstrated from time to time his physical superiority over his partner, was in a stronger position to bring an end to the abuse and to ensure appropriate medical treatment".<sup>123</sup>

While in some cases abused offenders are able to establish that their abusive partners stood over them while they committed offences, in many other cases, abused women commit crimes outside the presence of their abusive partner. The more coercive controlling violence present, the more likely an abused woman is to submit to demands to offend "without the need for the abuser to oversee [their] commission".<sup>124</sup> Moreover, the tactics of coercive control employed by an abusive partner can have far-reaching effects.<sup>125</sup> An abusive partner may use threats of violence to influence both the present and future behaviour of his victim. The threat of future consequences usually deters the victim from repeating a specific behaviour or ensures general compliance with all of the abuser's demands.<sup>126</sup>

The effects of a pattern of coercive control persist after the abuser is no longer present. Victims of such abuse feel trapped even when they are physically separated from their abusive partner. For example, in *Atofia*, the defendant was no longer living with her partner and he was not physically present when she committed social welfare fraud. Nonetheless, she claimed that "fear of violence was always in her mind when she filled out the [social welfare] forms".<sup>127</sup> Yet, the requirement that the coercing party be actually present meant that the defence of compulsion was unavailable.<sup>128</sup> Even after an abusive partner is dead, a victim may feel compelled to act in certain ways.<sup>129</sup> In one case, the victim continued to follow her partner's rules after his death to "reassure him, were he to return, that nothing had changed".<sup>130</sup>

The strict interpretation of presence also rules out the defence of compulsion where the abusive partner is present at the scene of the crime but not physically present with his victim during its commission. For example, the abusive partner may remain outside the room or building in which the

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121 At 436.

122 At 436.

123 At 441.

124 Shaffer, above n 77, at 466.

125 Stark, above n 35, at 12.

126 Richard B Felson and Steven F Messner "The Control Motive in Intimate Partner Violence" (2000) 63 *Social Psychology Quarterly* 86 at 86.

127 *Atofia* (DC), above n 41, at 1057. The defendant's abusive partner would make regular visits to the defendant's home demanding money.

128 At 1058.

129 See Stark, above n 35, at 337.

130 At 337.

victim commits the crime.<sup>131</sup> Following the Court of Appeal's decision in *R v Neho*, it seems that compulsion literally requires the abusive partner to stand over the shoulder of the abused victim while she commits the offence in question.<sup>132</sup>

In *Neho*, a case not involving intimate partner violence, the defence of compulsion was unavailable despite the presence of associates of the coercing party in the store where the offending occurred. The Court of Appeal dismissed the appeal and held that there was no sufficient foundation for the defence to be put to the jury.<sup>133</sup> The Court found that the evidence established, at most, that associates of the person making the threats were present outside or in the store during the offending.<sup>134</sup> Their presence did not equate to the presence of the person or persons making the threats. Thus, the appellant could not show that the threatener was "sufficiently proximate ... at the time of the offending to amount to the physical proximity or presence which must be established for the purposes of s 24(1)".<sup>135</sup>

A physical presence requirement is inappropriate in the context of many offences. The person or persons making the threat will not choose to be present if their presence would frustrate the commission of the offence.<sup>136</sup> For example, in one case, an abusive partner forced his victim to steal things from her place of work; it is absurd to expect the abuser to accompany his victim during this type of offending.<sup>137</sup>

In compulsion cases, the most important feature of a threat should be its psychological effect on the defendant. The essence of compulsion is that the defendant feels he or she has no choice but to offend. The presence requirement should be satisfied, then, by the defendant's belief that the threatener is effectively "present" and able to execute the threats "then and there". If the belief is genuinely held, it should not matter whether or not it is, in fact, correct; the effect on the defendant will be the same. This view fits with the fourth "critical feature" of compulsion; the defendant must believe that the threat will be executed.<sup>138</sup> In New Zealand, this element is tested subjectively and the defendant's belief need not be reasonable.<sup>139</sup> Thus the defendant's state of mind is clearly a crucial part of the defence. It makes sense to broaden the presence requirement to include what Simester and Brookbanks call "psychological" or "constructive" presence.<sup>140</sup>

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131 Contrast *Goddard v Osborne* (1978) 18 SASR 481 (SC) at 493 where the Court canvassed the varying approaches taken in cases with similar fact scenarios, before finding that the partner's presence outside the government office while the defendant committed social welfare fraud was sufficient.

132 *Neho*, above n 68.

133 At [20]–[21].

134 At [17].

135 At [17].

136 Shaffer, above n 5, at 310.

137 Stark, above n 35, at 247.

138 *Teichelman*, above n 7, at 66–67.

139 Simester and Brookbanks, above n 12, at 411.

140 At 410.

## Opportunity to Escape

At common law, the defence requires that the defendant had no reasonable opportunity to escape or seek protection.<sup>141</sup> Section 24(1) does not explicitly include this restriction. Nevertheless, the Supreme Court recently stated that, “if there [is] sufficient time to seek assistance from the authorities, a defence of compulsion [will not be] available”.<sup>142</sup> Before this clarification, courts often applied the restriction under the immediacy or proximity limbs. That is, an abusive partner’s threat was not “immediate” or “present” if the defendant failed to take advantage of a perceived opportunity to escape or seek help from authorities. On this basis, the defence of compulsion was rejected in *Witika*, *Richards*, *Rihari*, *Atofia* and *Tua*.<sup>143</sup> In these cases it was found that the women had opportunities to avoid offending and evade the threats because either their partners were not present or the threats were not immediate.

Using immediacy and presence as proxies for determining whether a reasonable opportunity to escape existed at the time is inconsistent with the rationale underlying the compulsion defence; that persons whose conduct is morally involuntary should not be held criminally responsible for their actions. Laskin JA, whilst criticising the Canadian equivalent — which is remarkably similar to s 24(1) — stated:<sup>144</sup>

The underlying problem with the immediacy and presence restrictions is that they do not adequately capture all morally involuntary conduct. ... [T]he essence of involuntary conduct is the absence of a realistic choice or a safe avenue of escape. ... [T]he battered spouse who cannot leave her abusive relationship [does] not have a realistic choice but to commit a criminal offence, even though the threatened harm is not immediate and the threatener is not present when the offence is committed.

That is, the immediacy and presence requirements assume that escape or seeking assistance will always be an “effective means” of evading non-immediate threats.<sup>145</sup> This assumption denies the defence to many defendants who have no realistic option but to offend. This result is especially concerning where criminal activity extends over a period of time; a court is unlikely to find that the offender could not seek assistance or had no opportunity to escape.<sup>146</sup> To succeed in such a case, an abused woman would have to show that she was a “virtual prisoner” of her abuser.<sup>147</sup> But, as explained above, an abused woman might offend because of the cumulative

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<sup>141</sup> At 412–413.

<sup>142</sup> *IA v R* [2013] NZSC 88, [2014] 1 NZLR 17 at [23].

<sup>143</sup> *Witika*, above n 52; *Richards*, above n 101; *Rihari*, above n 55; *Atofia* (CA), above n 41; and *Tua*, above n 6.

<sup>144</sup> *Ruzic*, above n 24, at [12].

<sup>145</sup> Julia Tolmie “New Zealand” in Alan Reed and Michael Bohlander (eds) *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate, Farnham, 2014) 273 at 274.

<sup>146</sup> See *Rihari*, above n 55.

<sup>147</sup> See Doré, above n 27, at 713.

traumas of her past abuse.<sup>148</sup> Furthermore, while violence may not immediately follow a refusal to comply with a threat, it may occur before a safe means of avoiding the threatened harm presents itself.<sup>149</sup>

An abused woman's vulnerability to threats results from the weakening of her "capabilities for ... resistance, escape, or to garner support" by a "combination of exploitation, structural constraints, and isolation".<sup>150</sup> These factors result in a hostage-like condition of entrapment. Many abusers impose social isolation and financial insecurity upon their victims, so that an abused woman may not be in a position to strike out on her own or go to a safe place.<sup>151</sup> In *Ruka v Department of Social Welfare*, Thomas J recognised that an abuser's coercive control often leaves the victim without any reasonable opportunity to escape.<sup>152</sup>

... the battered woman relationship is characterised by the batterer exerting excessive control over the woman. The abuser generally exerts not only physical control but financial and social control as well. Women in these relationships are frequently kept without money, are not allowed friends, and are forbidden to move outside the house without the knowledge of the dominant party. ... Women then have little control over their lives, are unable to predict the outcome of their choices, and cannot identify or take advantage of opportunities to escape the relationship.

Similarly, Linda Gordon writes that a woman becomes an abused woman because of her "socially determined inability to resist or escape".<sup>153</sup> The inability of abused women to leave abusive relationships or seek outside assistance may also be embedded in a societal or cultural framework. The difficulties faced by Māori women in abusive relationships are often compounded by economic deprivation, a high likelihood of being a crime victim,<sup>154</sup> and the impact of colonisation on Māori communities.<sup>155</sup> Moreover, in some traditional communities, "women may be beaten or even killed by their own families if they leave abusive husbands" — divorce may never be an option.<sup>156</sup> Stark states that:<sup>157</sup>

... partner assault is most effective when it can play off the convergent restrictions on women's autonomy, marriage choices, education, career options, and comportment at home or in public

148 Julia Tolmie "The 'Duty to Protect' in New Zealand Criminal Law: Making it up as we go along?" [2010] NZ L Rev 725 at 746.

149 Shaffer, above n 5, at 310.

150 Stark, above n 35, at 205.

151 Boland, above n 91, at 610.

152 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA) at 171–172.

153 Linda Gordon *Heroes of Their Own Lives: The Politics and History of Family Violence* (Penguin Books, New York, 1989) at 285.

154 See Morris, above n 2, at 82.

155 Khylee Quince "Maori and the criminal justice system in New Zealand" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 343–345.

156 Stark, above n 35, at 239.

157 At 238.

that continue to characterize many traditional and fundamentalist communities.

Thus, even where the abused woman has direct contact with family and friends, they may refuse to acknowledge the violence, let alone assist or intervene.<sup>158</sup>

Further, some abused women may act out of a fear of harm that extends beyond their abusive partner. For example, the victim of gang-perpetrated violence will often be acting in response to threats of harm, not only from her abusive partner, but other gang members.<sup>159</sup> In these situations, even if escape from the abusive partner is possible, escape from the coercive social framework may be impossible.

Moreover, leaving the abusive partner — or seeking police protection — does not guarantee that physical violence, or the threat thereof, will be eliminated or reduced. This possibility may offset the desire to escape or seek police assistance. The frequency and severity of physical violence and threats often increases if the victim attempts to leave the home or separates from her violent partner.<sup>160</sup> Homicide statistics indicate that many women who are killed by spouses are killed while leaving or soon after they have left the relationship.<sup>161</sup> The abused woman may fear retaliation not only against herself but also against her children.<sup>162</sup> An abused mother may believe that she can better protect her children from harm if she remains with her abusive partner. The alternative would be living on the run from a partner who could track them down at any time.<sup>163</sup> Compounding this problem is the fact that the partner likely has considerably better financial resources than the mother.

Abused women may also be reluctant to seek the protection of police. Some may believe that maintaining family cohesion is more important than seeking help and approaching “outsiders”.<sup>164</sup> Others may believe that police protection will result in prosecution if they have committed offences.<sup>165</sup> They may also think that their children will be taken away once the conditions that their children have lived in become known to the police or courts.<sup>166</sup> Evidence also suggests that the ability of the police and the courts to protect abused women from their violent partners is inadequate.<sup>167</sup>

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158 Enos, above n 71, at 253.

159 Pip Desmond *Trust: A True Story of Women and Gangs* (Random House, Auckland, 2009); and see also *Neha*, above n 68.

160 Enos, above n 71, at 243.

161 Sheehy, Stubbs and Tolmie, above n 90, at 385.

162 Mary Ann Dutton “Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome” (1993) 21 *Hofstra L Rev* 1191 at 1232.

163 Howard A Davidson “Child Abuse and Domestic Violence: Legal Connections and Controversies” (1995) 29 *Fam LQ* 357 at 363.

164 Dutton, above n 162, at 1237.

165 Errlee Carruthers “Prosecuting Women for Welfare Fraud in Ontario: Implications for Equality” (1995) 11 *JL & Social Pol’y* 241 at 254.

166 Sue Carswell *Family Violence and the Pro-arrest Policy: A Literature Review* (Ministry of Justice, October 2006) at 65.

167 Law Commission, above n 49, at 14.

As such, women in abusive relationships often do not have a safe or reasonable means to escape or seek outside assistance. This analysis is compelling even where a woman offends to avoid future abuse or where her partner is not present for the offending. But the presence and immediacy requirements make it impossible to even consider these dynamics. These requirements essentially deny any legal standing to an abused woman's "reality and ... experience."<sup>168</sup>

### **Lack of Honest Belief in the Threat**

The final requirement of the compulsion defence as identified in *Teichelman* is that the defendant must commit the offence with the subjective belief that the threat will otherwise be executed.<sup>169</sup> The Court of Appeal characterised the requisite belief as a "belief in the inevitability of immediate and violent retribution for failure ... to comply with the threatening demand".<sup>170</sup> There is no requirement that the belief be reasonable, provided it was genuinely held.<sup>171</sup> However, whether the belief was genuinely held is a question of fact and the belief's reasonableness will be relevant to this determination.<sup>172</sup> Ultimately, the accused is to be judged only on the basis of what she "actually believed" and what she "actually feared."<sup>173</sup>

In many cases only the abused woman will know the true likelihood of death or grievous bodily harm at a particular time, based on her personal experiences of violence within the relationship. To anyone else, the likelihood of harm may not be apparent from the immediate context.<sup>174</sup> A mere apprehension of harm, unaccompanied by an actual threat of death or grievous bodily harm, however, is not enough to raise the defence. As discussed above, the immediacy and presence requirements must also be met. This raises doubts about the subjective standard of s 24. As Simester and Brookbanks note:<sup>175</sup>

It is arguable that in refusing to allow compulsion to operate in purely subjective circumstances the New Zealand courts have determined that the defence be "shackled" by requirements that are relevant to only the most obvious, but less likely, forms of compulsion, requirements which fail to recognise that there are many subtle forces by which people are compelled to betray their own will, including their own subjective fears.

The belief requirement is also used by the courts to inquire into whether the accused appreciated a viable escape route or, conversely, whether committing the offence was the only viable way to avoid the threat. In

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<sup>168</sup> McDonald, above n 48, at 404.

<sup>169</sup> Simester and Brookbanks, above n 12, at 411.

<sup>170</sup> *Teichelman*, above n 7, at 67.

<sup>171</sup> *Raroa*, above n 44, at 492.

<sup>172</sup> At 492.

<sup>173</sup> Simester and Brookbanks, above n 12, at 411.

<sup>174</sup> McDonald, above n 48, at 404.

<sup>175</sup> Simester and Brookbanks, above n 12, at 412.

*Raroa*, the Court of Appeal held that, if an opportunity to seek help arises, then the trier of fact must consider it when determining the belief of the accused.<sup>176</sup> More recently, the appellate courts have held that the offender must hold a “belief, reasonable or otherwise, ... that assistance from the authorities would not be forthcoming if requested”.<sup>177</sup> In short, the offender “must have no realistic choice other than to break the law”.<sup>178</sup> Thus, if an abused defendant was aware of an opportunity to escape or seek protection, a court may find that she does not have a belief of “a continuing threat sufficient to qualify as compulsion”.<sup>179</sup> This reasoning applies notwithstanding the fact that she may believe she will be subject to considerable harm if she does not comply and that, in any event, no adequate assistance would be forthcoming.

This approach fails to consider the defendant’s subjective assessment of her escape options and, instead, uses an objective standard to assess the issue.<sup>180</sup> Unlike situations where the threat comes from a relative stranger in a one-off encounter, this subjective assessment is critically important in cases involving abused defendants.<sup>181</sup> This is because past abuse often determines the “strength of the defendant’s will in the face of her partner’s threats”.<sup>182</sup> Her belief in the execution of the threat, even if presented with a viable escape route, may be based on earlier unsuccessful attempts at escape or seeking assistance. This knowledge will seldom be readily apparent to anyone else. Similarly, the defendant might suffer from post-traumatic stress disorder as a result of abuse, such that she lives in constant fear of her partner and is psychologically unable to recognise the possibilities for escape.<sup>183</sup>

## IV THE LAW COMMISSION PROPOSAL FOR REFORM

### The Proposal

In its discussion paper, *Battered Defendants: Victims of Domestic Violence Who Offend*, the Law Commission asked “whether the legal defences [including compulsion] apply equitably to battered defendants”.<sup>184</sup> According to the Commission, the law would be unfair:<sup>185</sup>

... if the motivation and circumstances of the offending fall within the reasons for allowing the defence, but [abused] offenders are

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176 *Raroa*, above n 44, at 491.

177 *IA*, above n 142, at [23].

178 *Neho*, above n 68, at [13].

179 Tolmie, above n 145, at 280.

180 At 280.

181 Sheehy, Stubbs and Tolmie, above n 90, at 374.

182 Boland, above n 91, at 626.

183 See *Tua*, above n 6, at 15. See also Eastal, above n 89, at 136.

184 Law Commission, above n 49, at [7].

185 At [8].

unable to avail themselves of the defence because of the way the defence is constructed.

The Law Commission considered whether s 24 of the Crimes Act should have been replaced by cl 31 of the Crimes Bill 1989 as revised by the Crimes Consultative Committee to read:<sup>186</sup>

A person is not criminally responsible for any act done or omitted to be done because of any threat of immediate death or serious bodily harm to that person or any other person from a person who he or she believes is immediately able to carry out that threat.

Under this revised defence, there is no requirement that the threatener be present when the crime is committed. Moreover, the defence is explicitly available if the threat is made against a third party. However, the Law Commission was cognisant of the fact that the Committee's proposal still required the existence of a threat and a belief in the abusive partner's ability to carry it out. The Law Commission acknowledged that:<sup>187</sup>

... victims of long-term domestic violence may respond to a demand even if it is not accompanied by a "particular threat" [given] the predictable consequences of refusal based on ... past abuse.

The Law Commission also acknowledged that victims of domestic violence usually commit offences with the honest belief that the threatened retaliation will eventuate.<sup>188</sup> Thus, in considering whether to replace s 24 with cl 31, the Commission proposed questions for further public discussion and submission. These included whether the immediacy requirement should be replaced with an inevitability requirement and whether the definition of a threat should include non-specific threats arising from the circumstances of the abusive relationship.<sup>189</sup>

### Limitations of the Law Commission's Report

A large majority of submissions to the Law Commission supported replacing the immediacy requirement with an inevitability requirement.<sup>190</sup> It was also submitted to the Commission that, in abusive relationships, "non-specific threats tend to predominate over specific threats".<sup>191</sup> Accordingly, "a '[well-founded] fear' of immediate death or serious bodily harm" should suffice.<sup>192</sup>

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186 Law Commission, above n 49, at [172]–[177]; and see generally *Crimes Bill 1989: Report of the Crimes Consultative Committee* (April 1991) at 96.

187 Law Commission, above n 49, at [174].

188 At [175].

189 At 56.

190 Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at [188].

191 At [186].

192 At [186].

The Law Commission accepted that cl 31 should replace s 24.<sup>193</sup> However, notwithstanding this recommendation it seems that they lost sight of the fact that their reform should be tailored to the specific problems for abused women. The Law Commission rejected submissions advocating for an inevitability requirement and non-specific threats. In doing so, their recommendations opted for a situation similar to the status quo. Their recommendations were still inherently premised on male experiences of coercion: one-off, specific and identifiable threats of immediate harm. Therefore, in producing their recommendations, the Law Commission had insufficient regard to the unique considerations for abused women experiencing prolonged intimate partner violence.

The Law Commission was unconvinced that the immediacy requirement should be replaced by an inevitability requirement. They failed altogether to consider whether the common law requirement of “imminence” would be a more appropriate test than immediacy.<sup>194</sup> On the other hand, the Law Commission recommended that the self-defence provisions of the Crimes Act “be amended to make it clear that there can be fact situations in which the use of force is reasonable where the danger is not imminent but is inevitable”.<sup>195</sup> This change was to shift the focus of self-defence from the specific threat of violence the accused faced prior to his or her act of self-help, to the more general nature of the threat. As to compulsion, the Commission argued that the situation is “quite different” because the abused offender avoids harm to herself by committing a crime against an innocent third party, as opposed to retaliating against the abusive partner.<sup>196</sup> Accordingly, it is right to expect the defendant to refrain from offending until the danger is immediate, despite the “high level of risk this may incur”.<sup>197</sup>

This analysis led to an inconsistent result. The defence of self-defence was expanded to include cases where harm is inevitable, while the defence of compulsion continues to be subject to the existing immediacy requirement.<sup>198</sup> Moreover, like the present compulsion defence in s 24(1), the Law Commission’s recommendations require the existence of a threat. The Commission was not persuaded that a “reasonably based belief that a threat exists and that it will be carried out” was a standard preferable to a “specific threat of immediate harm”.<sup>199</sup>

... [a reasonable belief] test is by its nature inexact. While [the immediacy test] may expose the defendant to the risk of harm in some cases, this must be balanced against the harm that the

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193 Law Commission, above n 49, at 66.

194 Dawkins and Briggs, above n 33, at 340. At common law the test is whether the threat is imminent. The threat must be impending and hence unable to be avoided rather than immediate in the sense that it must occur without delay: see Robertson, above n 63, at [CA24.08]; and *R v Hudson* [1971] 2 QB 202 (CA) at 206–207.

195 Law Commission, above n 190, at [32]. The self-defence provisions are in s 48 of the Crimes Act. 196 At [196].

197 Law Commission, above n 190, at [196].

198 Dawkins and Briggs, above n 33, at 340.

199 Law Commission, above n 190, at [196].

defendant could potentially be causing to an innocent third party.  
... Compulsion that does not fit within the terms of the defence  
can be taken into account in mitigation of sentence.

Again, the main reason for this is that the defence should be confined to “very limited, tightly defined circumstances” given that it operates as a complete excuse for causing harm to an innocent third party.<sup>200</sup>

On the one hand, the extraordinary nature of the defence of compulsion justifies strict adherence to its statutory limitations; themselves the product of public policy.<sup>201</sup> However, expanding the defence to encompass non-specific threats and threats of inevitable harm will not open the floodgates. Third party victims will still be protected because the less restrictive defence will still often fail. A jury would still have to be satisfied that the abused defendant acted because of a well-founded fear of harm and that the fear or threat continued to overpower the will of the abused defendant at the time of the offending.<sup>202</sup> In fact, the Law Commission recommended an additional requirement that the threat be one that, in all the circumstances, the defendant cannot be reasonably expected to resist.<sup>203</sup> The rationale of this recommendation was that:<sup>204</sup>

... insofar as a defendant seeks total exoneration from the consequences of an otherwise criminal act, it is desirable to have some standard against which his or her actions can be measured.

The abused defendant would, therefore, have to convince the jury of the reasonableness of her actions and beliefs. This standard would not be any less stringent than the defence in its current form.

In sum, the Commission lost sight of their focus on abused women. As such, they failed to consider how conflicting policy concerns might be balanced given the overall objective of relieving abused offenders of criminal liability in appropriate cases. Any reform to the defence of compulsion must be tailored to the unique existence of women in abusive relationships.<sup>205</sup> This need for greater precision cannot be ignored on the basis of an errant belief that the status quo is either an acceptable or appropriate position.<sup>206</sup> In reality, the present state of the law, as has been discussed throughout this article, fundamentally ignores the realities for abused defendants in a several ways.

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200 At [195].

201 Doré, above n 27, at 751.

202 *R v Palazoff* (1986) 43 SASR 99 (SC) at 109 per Cox J.

203 Law Commission, above n 190, at [204].

204 At [204].

205 Simester and Brookbanks, above n 12, at 425.

206 At 425.

## V CONCLUSION

The defence of compulsion — as codified in s 24 of the Crimes Act — is tightly drawn. It provides a narrow release from criminal responsibility in only the most exigent of circumstances. The statutory defence's criteria are aimed at one-off standover situations. These criteria pose obstacles for abused women, especially those in coercive controlling relationships, who offend in response to ongoing patterns of harm. In such cases the abusive partner will rarely be present for the offending; nor will the partner threaten the woman at the time she commits the offence. The woman may engage in a series of criminal acts over an extended period of time and yet have no reasonable opportunity to evade the threats. The abusive partner may not threaten to inflict lethal harm upon his victim or explicitly threaten her with harm at all. But the statutory requirements mean that the defence of compulsion will not be available in such circumstances. These requirements fail to consider the social, cultural, economic and psychological imprisonment that characterises many abusive relationships and prevents abused women from escaping.

In order to excuse the legitimate claims of abusive women who are coerced into offending by their partners, the current requirements of the compulsion defence must be eliminated or reformed. Though the Law Commission purported to undertake this task, their recommendations were removed from their particular context resulting in proposals that captured the ways in which men more typically experience coercion. The Commission's conclusion that the defence should continue to be limited to tightly defined circumstances is indefensible, given that they failed to consider how policy concerns might be balanced with the legitimate objective of relieving abused offenders of criminal liability in appropriate cases.