

Defences available for women defendants who are victims/survivors of domestic abuse

Briefing note prepared for the summit held by the Prison Reform Trust in London on  
Tuesday 17<sup>th</sup> October 2017

## 1. Overview

The Criminal Bar Association provides this paper in order to explain why the current law fails defendants whose offending is linked to their experience of domestic violence and coercion, including those who have been compelled to offend and those who use reactive violence against a primary aggressor.

## 2. Developing understanding of the dynamics of domestic abuse

The UK Government's revised definition of domestic abuse, incorporated within the CPS Guidelines on domestic abuse,<sup>1</sup> recognises that it can include psychological, sexual, financial or emotional abuse as well as physical violence. The introduction of a new offence of 'coercive and controlling behaviour' also reflects this broadened understanding of domestic abuse.

Section 76 of the Serious Crime Act 2015 provides that a person (A) commits an offence if:

- A repeatedly or continually engages in behaviour towards another person B that is controlling or coercive,
- At the time of the behaviour, A and B are personally connected,
- The behaviour has a serious effect on B, and
- A knows or ought to know that the behaviour will have a serious effect on B.

The definition of intimate personal relationship includes if A and B live together, or if they have previously been in an intimate personal relationship with each other for example.

The definition of serious effect is given as:

- It causes B to fear, on at least two occasions, that violence will be used against B, or
- It causes B serious alarm or distress which has a substantial adverse effect on B's usual day to day activities.

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<sup>1</sup> [http://www.cps.gov.uk/legal/d\\_to\\_g/domestic\\_abuse\\_guidelines\\_for\\_prosecutors/](http://www.cps.gov.uk/legal/d_to_g/domestic_abuse_guidelines_for_prosecutors/)

At present however if an individual has been charged with an offence that they have committed directly as a result of the controlling and coercive act, there is no parallel statutory defence available to them. Their only avenues are to plead duress, or to make written representations asking the CPS not to prosecute.

### 3. What is 'duress'?

Duress has been described as a 'vague and elusive juristic concept' which exists at common law (in other words, is not defined by statute). If an offence is committed under duress, then the defendant is excused criminal liability. The exceptions are murder and attempted murder, for which the defence is not available.

For the defence of duress to succeed, the defendant must have been forced or compelled to commit the offence by circumstances, or by the threats of another person. It is for the defence to raise the presence of duress and, once raised, for the prosecution to disprove.

#### Example 1

NR takes contraband into a prison, a package containing SIM cards and cannabis, which she passes to her boyfriend. The items are found post a search of the boyfriend. NR sets out that she had been threatened and pressured into committing the offences by her boyfriend, and was fearful of reprisals against herself and her younger brother.

A psychological report sets out a history of physical and emotional abuse in the context of intimate relationships, leading NR to develop 'battered woman syndrome.' She is assessed as having 'learned helplessness' and features akin to post traumatic stress disorder. This history meant NR was more vulnerable in giving into and complying with her partner's request to bring in the items than an individual of normal resilience.<sup>2</sup>

### 4. Establishing the defence of duress by threats

The following elements must be established in order to succeed with the defence of duress by threats:<sup>3</sup>

- a) The defendant (D) reasonably believed that threats of death or serious injury had been made against him or herself or a member of his or her immediate family or someone

<sup>2</sup> Taken from factual matrix within R v NR [2017] 1 Cr App R 42

<sup>3</sup> These elements were identified in R v Hasan [2005] UKHL 22 and are set out in the Crown Court compendium February 2017 at 18-3. The Crown Court compendium is the guideline given to Crown Court Judges and provides sample directions to give to a jury as to how to apply defences and legal principles. See <https://www.judiciary.gov.uk/wp-content/uploads/2016/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-feb2017.pdf>

for whom the defendant might reasonably feel responsible. False imprisonment or threat of serious psychological injury is insufficient.

- b) D reasonably believed that the threats would be carried out immediately or almost immediately, and the threat was effective in the sense that there was no reasonable avenue of escape open to D to avoid the perceived threat.<sup>4</sup>
- c) The threat (or belief in the threat) of death or serious violence was the direct cause of D committing the offence; it does not have to be the sole cause.
- d) A sober person of reasonable firmness of D's age, sex and character would have been driven to act as D did. The relevant characteristics for this purpose are set out in R v Bowen and listed below. The reasonable person will not share any vulnerability D may have to pressure, nor any timidity, nor emotional instability. Characteristics attributable to substance dependency are also irrelevant. This provision is key to the challenges of establishing duress as an effective defence for women who are victims/survivors of domestic abuse.
- e) The defence is not available to a person who becomes voluntarily involved in a criminal activity where D knew or might reasonably have been expected to know he or she might be compelled to commit the act now charged.

#### **Historical development of duress**

The following extracts from past cases show how the legal concept of duress has developed over time:

Lord Simon of Glaisdale – Lynch [1975] AC 653

*'Before turning to examine these considerations, it is convenient to have a working definition of duress - even though it is actually an extremely vague and elusive juristic concept. I take it for present purposes to denote such [well grounded] fear, produced by threats, of death or grievous bodily harm [or unjustified imprisonment] if a certain act is not done, as overbears the actor's wish not to perform the act, and is effective, at the time of the act, in constraining him to perform it.'*

Lord Hailsham – R v Howe (HL) 1987 430E

*'This brings me back to the question of principle. I begin by affirming that, while there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and always proved to be, doomed to failure, and, in the present case, the overriding objects of the criminal law must be to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.'*

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<sup>4</sup> Without a threat of immediate or almost immediate retribution on failure to carry out the act, there could be little room to doubt that the defendant could have taken evasive action, whether by going to the police or in some other way avoid committing crime (R v Z [2005] UKHL 22 at paragraph 28).

Lord Bridge of Harwich considered (436C) that the '*defence of duress, as a general defence available at common law which is sufficient to negative the criminal liability of a defendant against whom every ingredient of an offence has otherwise been proved, is difficult to rationalize or explain by reference to any coherent principle of jurisprudence.*'

## 5. Applying duress to instances of domestic abuse and coercion

Given the broad potential application of the defence of duress, and the strict requirements for the defence to succeed, it is perhaps not surprising that it is ill fitting to the prism of domestic abuse. This is not only relevant to how a case is defended, but is arguably intrinsic to the consideration of a decision to prosecute in the first place, as well as decisions on diversion and indeed in relation to public interest considerations.

Government policy recognises that domestic abuse is an incremental offence, following many different methods and usually being exhibited through a pattern of behaviour over time, rather than individual incidents of violence. Yet, as Janet Loveless points out, in its emphasis on death and serious injury, the defence of duress fails to take account of the complex dynamics and effect of domestic abuse.<sup>5</sup>

Loveless makes the point that '*domestic violence is typically entrenched, unpredictable and random...to a woman whose self esteem has been demolished by past violence, the fear of violence may be ever present and overpowering.*' Yet the defence of duress will only succeed where the threat is of immediate or almost immediate physical harm, thus ignoring the true and complete mechanisms of compulsion.

Looking back at Example 1, NR did not even raise a defence of duress, but pleaded guilty. The difficulty for her lay in establishing the immediacy of the threat, and the fact that the opportunity was notionally available to her of disclosing to the prison authorities that she had the drugs. Due to the limitations of the law of duress, NR – like many other defendants - was limited to putting forward the impact of domestic violence and coercion merely by way of mitigation in relation to sentencing.

In Hasan [2005] UKHL 22, Baroness Hale foresaw the conceptual difficulties of applying duress to instances of domestic violence and coercion (*obiter* at paragraph 77 and 78), when she set out:

*'77... The battered wife knows that she is exposing herself to a risk of unlawful violence if she stays, but she may have no reason to believe that her husband will eventually use her broken will to force her to commit crimes of some sort. I have no*

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<sup>5</sup> 2010 Criminal Law Review 93

*difficulties envisaging circumstances in which a person may be coerced to act unlawfully. The battered wife knows very well that she may be compelled to cook the dinner, wash the dishes, iron the shirts and submit to sexual intercourse. That should not deprive her of the defence of duress if she is obliged by the same threats to herself or her children to commit perjury or shoplift food.*

*'78. But this brings me to a concern which I have had throughout this case. It is one thing to deny the defence (of duress) to people who choose to become members of illegal organizations, join criminal gangs, or engage with others in drug related criminality. It is another thing to deny it to someone who has quite a different reason for becoming associated with the duressor and then finds it difficult to escape. I do not believe that this limitation on the defence is aimed at battered wives at all, or at others in close personal or family relationships with their duressors and their associates, such as their mothers, brothers and sisters.'*

## **6. Relevant characteristics for establishing duress**

The relevant characteristics for establishing duress are set out in R v Bowen 1996 2 Cr App R 157 (our emphasis added):

*'(1) The mere fact that the accused is more pliable, vulnerable, timid or susceptible to threats than a normal person are not characteristics with which it is legitimate to invest the reasonable/ordinary person for the purpose of considering the objective test.*

*'(2) The defendant may be in a category of persons who the jury may think less able to resist pressure than people not within that category. Obvious examples are age, where a young person may well not be so robust as a mature one; possibly sex, though many woman would doubtless consider they had as much moral courage to resist pressure as men; pregnancy, where there is added fear for the unborn child; serious physical disability, which may inhibit self protection; recognised mental illness or psychiatric condition, such as post traumatic stress disorder leading to **learned helplessness**.*

*'(3) Characteristics which may be relevant in considering provocation, because they relate to the nature of the provocation, itself will not necessarily be relevant in cases of duress. Thus homosexuality may be relevant to provocation if the provocative words or conduct are related to this characteristic; it cannot be relevant in duress, since there is no reason to*

*think that homosexuals are less robust in resisting threats of the kind that are relevant in duress cases.*

*'(4) Characteristics due to self-induced abuse, such as alcohol, drugs or glue-sniffing, cannot be relevant.*

*'(5) **Psychiatric evidence may be admissible** to show that the accused is suffering from some mental illness, mental impairment or recognised psychiatric condition provided persons generally suffering from such condition may be more susceptible to pressure and threats, and thus to assist the jury in deciding whether a reasonable person suffering from such a condition might have been impelled to act as the defendant did. It is not admissible simply to show that in the doctor's opinion, an accused, who is not suffering from such illness or condition, is especially timid, suggestible or vulnerable to pressure and threats. Nor is medical opinion admissible to bolster or support the credibility of the accused.*

*'(6) **Where counsel wishes to submit that the accused has some characteristic which falls within (2) above, this must be made plain to the judge.** The question may arise in relation to the admissibility of medical evidence of the nature set out in (5). If so, the judge will have to rule at that stage. There may however, be no medical evidence, or, as in this case, medical evidence may have been introduced for some other purpose, e.g. to challenge the admissibility or weight of a confession. In such a case counsel must raise the question before speeches in the absence of the jury, so that the judge can rule whether the alleged characteristic is capable of being relevant. If he rules that it is, then he must leave it to the jury.*

*'(7) In the absence of some direction from the judge as to what characteristics are capable of being regarded as relevant, we think that the direction approved in Graham without more will not be as helpful as it might be, since the jury may be tempted, especially if there is evidence, as there was in this case, relating to suggestibility and vulnerability, to think that these are relevant. In most cases it is probably only the age and sex of the accused that is capable of being relevant. If so, the judge should, as he did in this case, confine the characteristics in question to these.'*

## **Example 2**

YS is charged with driving whilst disqualified, driving with excess alcohol, driving without insurance and dangerous driving. An officer noticed a vehicle with its brake lights permanently illuminated and swerving from side to side. He activated the siren, indicating

for the vehicle to stop. The vehicle did not stop, and a chase continued for five minutes. In the driving seat was a woman, YS.<sup>6</sup>

YS explained she had been dragged from her home partially dressed by her partner, forced to drive, and that he threatened to kill her if she did not drive on. The partner was screaming at her throughout, punching her in the ribs and trying to grab the steering wheel.

The following findings of fact were made by the Magistrates' Court:

*'There is no doubt that [YS] has been involved in an abusive relationship with R who has a history of violent offences in the domestic setting. We believe that [YS] drove dangerously to escape the Police at the behest of R, although, as the driver of the car, she could have halted the vehicle. **We are prepared to believe that the reason she drove at speed was because [YS] believed if she did not R might kill or seriously injure her.'***

Despite these findings, the Magistrates' Court concluded that the defence of duress failed on the following grounds:

*'We do not find that a reasonable person with the defendant's beliefs, history of domestic violence, and of her age, in her situation, would have done what she did. She admits to having consumed alcohol before driving.'*

YS' conviction was upheld on appeal to the High Court, with Mrs Justice McGowan ruling that the Magistrates' Court had in fact used an overly favourable application of the Bowen test. In her judgment she set out that:

*'A strict application of the principles in R v Bowen would have meant that they only considered the Appellant's age and sex. In fact, they adopted a test more favourable to the Appellant and also considered her personal history of domestic abuse. Even taking that background into account they found that a reasonable person having experienced violence and threats which, on occasion, had not always been carried out would not have acted as the Appellant did. A modified form of the test was applied adding a subjective element to the objective test...*

*'A proper application of the test in Bowen should have caused the Justices to ask themselves the following questions, 1. Did the Appellant behave in the way she did on the night because she believed her partner would seriously assault or kill her because he had behaved in that way in the past? 2. Would a reasonable woman of her age have responded to those threats in that way?*

*'Accordingly, in so far as the Justices misdirected themselves it was in the Appellant's favour.'*

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<sup>6</sup> Taken from factual matrix within R v YS [2017] EWHC 2839

## **7. Syndromization of women, rather than presenting an effective defence suitable for the actual circumstances?<sup>7</sup>**

The language used when considering the defence of duress for women offenders who are victims/survivors of domestic abuse has not evolved in line with the understanding of how to prosecute offences of domestic violence and coercion, and is somewhat stale. Instead of being able to present a complete contextual image to a jury or magistrates court, advocates are forced to present a case of duress within the outdated classifications of 'learned helplessness' or 'battered woman syndrome' within the context of a rigid objective test.

In R v GAC [2013] EWCA Crim 1472, the court considered that 'battered woman syndrome', a strand of Post-Traumatic Stress Disorder, and aspects of the syndrome such as 'learned helplessness' could in some instances be regarded as relevant characteristics to be considered in the application of duress. At paragraph 26, Lady Justice Hallett set out that:

*'Learned helplessness would be of particular relevance to a possible defence of duress. The term is used to describe the reaction of a victim to chronic and repeated abuse, whereby they feel that whatever they do nothing will change. They have no way of physically or emotionally breaking free from their abuser and the abuse. They cannot extricate themselves from the violent situation no matter how many cries for help they may make. They become increasingly passive.'*

## **8. Duress and minor offending**

In order to successfully establish a defence of duress the above would then be highly suggestive that a woman victim/survivor of domestic abuse would have to rely on outdated clinical concepts such as 'battered woman syndrome' and 'learned helplessness,' when in fact the real issue is the failure to understand the incremental nature of domestic violence and abuse.

Rather than the court understanding and taking into account the full background and impact that domestic violence and abuse has, it instead places emphasis on 'over-syndromization.'

In most magistrate court cases it will result in further pressure in the context of legal aid funding provisions and timetabling to ensure that psychological and psychiatric reports are obtained, rather than simply at trial ensuring the court understand the true context of domestic violence and abuse. Of further concern is what would result for unrepresented defendants, where it would be highly unlikely they would be aware of how duress could apply to their case.

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<sup>7</sup> For further considerations of syndromization, particularly in reference to the decision in R v GAC please see Loveless article Criminal Law Review 2014, page 9.

## 9. Reactive violence against a primary aggressor

College of Policing guidance directs the Police to ensure they accurately identify primary aggressors and avoid arresting victims of abuse who are engaging in reactive violence. However prosecutions continue to occur and, in those circumstances, limited defences are available.

Arguments about the context of abuse can be included as part of a self defence argument, but the question arises, 'Is it an excessive use of force?' This depends on what the defendant feared in their mind. It is possible here to bring in the background circumstances. Self defence directions highlight where this is not appropriate.<sup>8</sup>

### Example 3

MM had been subjected to prolonged violence by her partner and she carried a knife for self protection. She was charged with carrying an offensive weapon.

MM and her partner had been outside their house and involved in a loud altercation. Some neighbours had gathered and called the police, fearing for MM's safety. The police attended the scene. MM's knife fell out of her bag. She was arrested and charged with carrying an offensive weapon. Her partner was not arrested or charged with any offence.

Following argument by counsel, written representations had to be made to the CPS asking them to consider this in the context of their domestic violence policy. The CPS then dropped the case because it did not fall within the policy.

Example 3 above illustrates the kind of case which should not be prosecuted. However, without a concrete defence which forces the Police and prosecutors to look at the underlying reasons behind an offence, prosecutions will continue to occur.

## 10. Ways forward – Does section 45 of the Modern Slavery Act 2015 offer the right model for a statutory defence?

The Modern Slavery Act brought into force a statutory defence for slavery or trafficking victims who are compelled to commit an offence. This was introduced within the specific context of a European directive requiring non-prosecution measures to be implemented. Article 8 of Directive 2011/36 made it an obligation for member states to '*take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking...for their involvement in criminal activities which they have been COMPELLED to commit as a DIRECT consequence of being subjected to trafficking.*' There is currently no similar non-prosecution principle in favour of victims/survivors of domestic violence and coercion.

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<sup>8</sup> See the Crown Court Compendium at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-feb2017.pdf>

Section 45 of the Modern Slavery Act 2015 sets out that a person is not guilty (if over 18) if:

- The person does the act because the person is compelled to do it.
- The compulsion is attributable to slavery or to relevant exploitation, and
- A reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.
- A person may be compelled to do something by another person or by the person's circumstances.
- In relation to relevant characteristics, these mean age, sex and any physical or mental illness or disability.

The difficulties in merely transposing such a statutory defence to domestic violence and coercion are as follows:

- There is no similar jurisprudence or legislative backdrop currently tailored towards the principle of non-prosecution for victims/survivors of domestic abuse and coercion.
- There is no CPS policy document currently in place concerning non-prosecution of defendants whose offending is linked to their experiences of domestic abuse. If any legislative change were envisaged bringing about a specialist statutory defence, then a policy would also arguably be needed.
- The Modern Slavery Act defence retains the component of 'relevant characteristics', therefore bringing with it the cumbersome definitions in the common law of duress which are problematic in the context of domestic abuse.
- A large number of offences are excluded from the Modern Slavery Act defence (see Schedule 4). What offences should be excluded, if any, from a statutory defence for victims/survivors of domestic abuse who are compelled to offend?
- The mechanism of the National Referral Mechanism and the identification of individuals as victims of trafficking and modern slavery is at the heart of the Modern Slavery Act defence working in practice in the courts. Is there scope for an equivalent framework for the treatment of victims/survivors of domestic abuse?
- In the case of trafficking victims, the reality is that if there is a positive reasonable grounds decision, the CPS are likely to review matters and consider the public interest test. In many cases it is through this route that victims are successfully protected from conviction for offences they have been compelled to commit, and not through the operation of the Modern Slavery Act defence.

## 11. Conclusions

The defence of duress is ill fitting and ineffective for victims/survivors of domestic abuse who are compelled to offend, and there are limited defences available for those who use reactive violence against a primary aggressor.

A new statutory defence would offer vital protection to victims/survivors of domestic abuse who have been compelled to offend and those who use reactive violence. The framing of the defence itself is key, in order to avoid retaining the problematic aspects of the common law of duress and to bring the law in this area into line with developing law, policy and practice in relation to the prosecution of domestic abuse offences, which recognises the complex dynamics of domestic abuse as a pattern of behaviour over time. Careful consideration must be given to what, if any, offences should be excluded from application of the defence.

In order to succeed, the new statutory defence would need to operate within a consistent framework of policy and guidance. Judicial directions already consider the ‘dangers of assumptions’ about victims of abuse, and can be very helpful in cases where women who have suffered domestic abuse are victims in the proceedings.<sup>9</sup> Equivalent guidance should be applicable where the victim/survivor of domestic abuse is the defendant.

In the absence of such guidance, arguments fall back onto ‘learned helplessness’ or ‘battered woman syndrome’, outdated concepts which have faced much clinical criticism.

The ‘syndromisation’ of women requires expert reports for which there is no time and a lack of funding in Magistrates’ court proceedings, when in reality the issue is full understanding of the nature of domestic abuse contextually and how its incremental impact differs.

New judicial directions should be introduced concerning the treatment of women defendants who are victims/survivors of domestic abuse.

Judges can at present give appropriate directions to counter the risk of stereotypes and assumptions about how individuals react towards sexual trauma, and reasons why there might be delay in reporting an offence, and indeed the feelings which may arise when the individual is in a relationship with the perpetrator.

In a parallel fashion, perhaps there should be such direction in like terms of the above for Defendants who have suffered domestic violence and abuses – so that there is a better and more sensitive understanding to the prism of domestic abuse.

In addition the CPS should develop a policy on domestic violence and abuse in relation to defendants who have suffered this, and in particular may go on to commit criminal offences

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<sup>9</sup> Chapter 20, Crown Court Compendium: <https://www.judiciary.gov.uk/wp-content/uploads/2016/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-feb2017.pdf>

as a result or linked into the violence and abuse committed against them, so that cases are not prosecuted where this is not in the public interest.

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**For more details please contact Criminal Bar Association**

**Note:** The Criminal Bar Association has a working group on domestic abuse. The group is planning a training event in 2018 about women defendants and domestic abuse, and is developing an advocates' toolkit on the subject.