

**Compulsion and the decision in *Akulue v R*:  
Has New Zealand got it right?**

Michelle Bowie

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws  
(Honours) at the University of Otago, Dunedin, New Zealand

10 October 2014

## **Acknowledgements**

To my supervisor, Margaret Briggs, for being generous with her time, always encouraging, and genuinely interested in my work.

To my friends and flatmates, for numerous coffee dates, chats and laughter.

And finally to my family, for their love and support throughout my entire time at University.

## Table of Contents

<b>Introduction</b>	<b>5</b>
<b>I The Current Legal Position in New Zealand</b>	<b>7</b>
<i>A Akulue v R</i>	7
<i>B Legal Framework and Legislative History</i>	7
1 Section 24 Crimes Act 1961	7
2 Presence	10
3 The harm threatened to be immediate	13
4 Summary of the judiciary's approach	15
<i>C Theoretical Foundation for the Defence</i>	16
1 Moral involuntariness	17
2 Reasonable response to extreme pressure	17
3 The theoretical basis in New Zealand	19
4 Practical operation of s 24	19
<i>D The Relationship with Common Law Necessity</i>	20
1 Common law necessity	20
2 Compulsion as a subset of necessity	21
3 New Zealand position	21
<b>II A Comparative Analysis</b>	<b>24</b>
<i>A England and Wales</i>	24
1 Duress by threats	24
<i>B Canada</i>	32
1 <i>R v Ruzic</i>	32
2 Applicability of <i>Ruzic</i> to New Zealand	34
3 The significance of <i>Ruzic</i>	35
<b>III Proposals for Reform and Other Possible Formulations</b>	<b>37</b>
<i>A The Crimes Bill 1989</i>	37
<i>B Report of the Crimes Consultative Committee</i>	38
1 Benefits and detriments of Clauses 30 and 31	39
<i>C Law Commission Report</i>	41
1 Battered defendants	42

	4
2 Relevance to a defence of compulsion	42
3 Recommendations of the Law Commission	44
4 Conclusion on the Law Commission's proposals	45
<i>D Treating the Rationale as the Rule</i>	46
<i>E The Common Law Approach</i>	48
<i>F Mitigation of Sentence</i>	48
<i>G Recommendations for Reform</i>	50
1 Akulue	50
2 Neho	51
3 Hypothetical scenario 1	51
4 Hypothetical scenario 2	51
5 Hypothetical scenario 3	52
6 Summary	53
<b>Conclusion</b>	<b>54</b>
<b>Bibliography</b>	<b>56</b>

## *Introduction*

In constructing criminal defences, legislatures and courts must strike a fine balance. On the one hand, there is a need to ensure defendants are treated in accordance with justice. This must be weighed up against the needs of society, to prevent the opening of floodgates to defendants who should be held responsible for their actions. Defences that are too strictly limited will not protect the justified defendants, and defences that are too broad will ultimately undermine the legitimacy of the criminal law. The defence of compulsion in New Zealand no longer strikes this balance. Instead, the statutory requirements are too precise and under-inclusive, leaving compulsion unable to fulfil its purpose.

The defence of compulsion, found in s 24 of the Crimes Act 1961, purports to protect those who have committed a criminal offence under the influence of a ‘highly coercive threat’ of either death or grievous bodily harm, from another person. The general theoretical consensus is that the law does not wish to hold such people responsible for actions where their autonomy was limited by another’s threat, or when society would view their conduct as reasonable in the extreme circumstances. The legislation remains substantially unchanged since 1893. Furthermore, New Zealand courts have consistently taken a strict approach towards the defence. The result is that the defence is overly restrictive, and only the paradigm cases of compulsion, so-called “standover situations”<sup>1</sup> are covered. The quintessential example is the gun in the back coupled with a threat of ‘offend or else’. These are the kinds of cases that the Stephens Commission, the drafters of the original legislation, would have envisioned when constructing the defence in 1879.<sup>2</sup>

The case of *Akulue v R* gave the Supreme Court the opportunity to examine s 24 for the first time.<sup>3</sup> The case did not follow the paradigm example, and therefore gave the Supreme Court the chance to re-evaluate the defence under modern conditions. Yet the

---

<sup>1</sup> *R v Teichelman* [1981] 2 NZLR 64, at 67.

<sup>2</sup> The New Zealand legislation is based on the provision in the English Draft Code, presented by the Stephens Commission. See Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (George Edward Eyre and William Spottiswoode, London, 1879) [Draft Code], s 23.

<sup>3</sup> *Akulue v R* [2013] NZSC 88.

Court declined to question the construction of the defence. This effectively shuts down any further judicial intervention with compulsion.

But change is needed. The purpose of the defence is frustrated by its strict requirements, as they do not provide for modern conditions. Advancements in technology and globalisation mean that highly coercive threats can be delivered without satisfying the legislative criteria of the threat maker being present. Take, for example, the defendant who offends whilst having a bomb strapped to him. The threatener is not present with the defendant, but is able to electronically monitor him. The threatener therefore has the ability to carry out the threat the moment the defendant indicates they may refuse to offend. The threat is no less coercive than if the threatener was standing right next to them. Yet under the current statutory provision, the defendant would remain criminally responsible. Another illuminating example is the offender whose family is held hostage by the threat maker. The defendant is remotely monitored, so at the first sign of deviation from the plan, the threat would be carried out on the family. The threat is highly coercive, and there was no practical alternative open to the defendant without risking harm to his or her family. Yet again the threatener was not present, and thus, the defendant would be held criminally responsible.

The central thesis of this dissertation is to analyse the current legislative regime, and argue that it no longer adequately protects those who offend in response to highly coercive threats from another. Chapter I will discuss the decision in *Akulue*, and the current statutory provision. It will argue that the objective presence requirement is difficult to apply, and is overly restrictive. The theoretical underpinnings of the defence will also be addressed. Chapter II will provide a comparative analysis of the defence in both England and Wales, and Canada. It will show that the development of the defence in these jurisdictions is different to New Zealand, and it will analyse the benefits and detriments of the various approaches. Chapter III will examine previous proposals made in New Zealand to amend the defence, as well as alternative solutions. It will conclude that legislative change to remove the presence requirement will best ensure that the defence protects deserving defendants, without excessively broadening the scope of compulsion.

## *I The Current Legal Position in New Zealand*

### *A Akulue v R*

In *Akulue*, the Supreme Court was presented with an opportunity to analyse the defence of compulsion in unusual circumstances. The appellant, Akulue, had been convicted in the Court of Appeal of both importing and conspiring to supply methamphetamine. He had been arrested whilst contacting the courier who had brought the drugs into New Zealand and admitted that he knew the courier had imported the drugs when he contacted her. His purpose was to obtain the drugs, and then to pass them onto another person.

Akulue claimed he was coerced into the offending by his cousin, Zuby, who lived in Nigeria. He maintained that Zuby had threatened to kidnap and kill members of his family in Nigeria if Akulue failed to help import the drugs. Evidence was presented that Akulue's uncle had been kidnapped in Nigeria in 2009, and that approximately \$20,000 had been paid to secure his freedom.

The evidence was presented on the basis that it supported a statutory defence of compulsion under s 24. The Supreme Court analysed the section, and concluded that the evidence did not support a defence. It upheld the requirements of the defence that had developed in New Zealand, and determined that s 24 must be applied in accordance with its terms. This approach effectively ruled out any judicial intervention with the defence, and indicates that any changes would need to be made by Parliament. The Court also held that Akulue could not rely on a common law defence of necessity.

### *B Legal Framework and Legislative History*

#### *1 Section 24 Crimes Act 1961*

Section 24 provides for a defence of compulsion in certain circumstances:

- (1) Subject to the provisions of this section, 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.

(2) Nothing in subsection (1) shall apply where the offence committed is an offence specified in any of the following provisions of this Act, namely:

- (a) section 73 (Treason) or section 78 (Espionage):
- (b) section 79 (Sabotage):
- (c) section 92 (Piracy):
- (d) section 93 (Piratical acts):
- (e) section 167 and 168 (murder):
- (f) section 173 (Attempt to murder):
- (g) section 188 (Wounding with intent):
- (h) subsection (1) of section 189 (injuring with intent to cause grievous bodily harm):
- (i) section 208 (abduction):
- (j) section 209 (Kidnapping):
- (k) section 234 (Robbery):
- (ka) *[Repealed]*
- (l) section 235 (Aggravated robbery):
- (m) section 267 (Arson).

(3) Where a woman who is married or in a civil union commits an offence, the fact that her spouse or civil union partner was present at the commission of the offence does not of itself raise a presumption of compulsion.

#### (a) Legislative history

The defence of compulsion was first introduced into New Zealand law in 1893. It was based on the English Draft Criminal Code that was presented by the Stephens Commission.<sup>4</sup> Since its adoption over 100 years ago, the defence has remained largely unchanged. Furthermore, little case law arose on the defence until very recently. There were no reported decisions on compulsion between 1896 and 1967.<sup>5</sup>

---

<sup>4</sup> Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (George Edward Eyre and William Spottiswoode, London, 1879) [Draft Code], s 23.

<sup>5</sup> Warren Brookbanks “Compulsion and self-defence” in Neil Cameron and Simon France (eds) *Essays on Criminal Law in New Zealand: Towards Reform?* (Victoria University of Wellington Law Review in conjunction with Victoria University Press, Wellington, 1990) 95, at 96.



## (b) Judicial treatment

The judicial trend in New Zealand courts has been to apply s 24 strictly “in accordance with its terms.”<sup>6</sup> Brookbanks notes that there has been some “judicial reticence in allowing any expansion of the scope of compulsion in New Zealand.”<sup>7</sup> He argues that this is probably attributable to the views of Sir James Fitzjames Stephen, one of the drafters of the 1879 Draft Criminal Code, who believed that compulsion should only be a matter to go to mitigation of sentence.<sup>8</sup> Therefore, not only has there been no significant legislative change to compulsion, there has also been little judicial modification.

Prior to *Akulue*, the leading decision in New Zealand on compulsion was *R v Teichelman*.<sup>9</sup> In *Teichelman*, the Court of Appeal noted that the defence of compulsion provides “a narrow release from criminal responsibility where its strict requirements are met.”<sup>10</sup> The Court believed it should be kept clearly within statutory limits. The decision identified four critical elements of s 24:<sup>11</sup>

- (1) The existence of a threat to kill or cause grievous bodily harm;
- (2) The threat must be to kill or inflict the serious harm immediately following a refusal to commit the offence;
- (3) The threat-maker to be present during the commission of the offence;
- (4) The defendant must commit the offence in the belief that otherwise the threat will be carried out immediately.

The courts have also recognized that s 24(1) excludes the defence if the defendant was voluntarily a party to an organization or a conspiracy that is the source of the compulsion.<sup>12</sup> The court in *Akulue* affirmed the existing judicial formulation of the defence.<sup>13</sup> This dissertation will focus on the elements of presence and immediacy. It will be argued these are the two most problematic requirements.

---

<sup>6</sup> *Akulue v R*, above n 3, at [22].

<sup>7</sup> Brookbanks, above n 5, at 96.

<sup>8</sup> Brookbanks, above n 5, at 96.

<sup>9</sup> *R v Teichelman*, above n 1.

<sup>10</sup> *R v Teichelman*, above n 1, at 66.

<sup>11</sup> At 66-67.

<sup>12</sup> *R v Joyce* [1968] NZLR 1070 (CA).

<sup>13</sup> *Akulue v R*, above n 3, at [22], [23].

## 2 Presence

Section 24 requires that the person making the threat must be present “when the offence is committed.”<sup>14</sup> This element has caused the most controversy in New Zealand. First, it is unclear what “present” actually means. The section does not expressly state where the threat maker must be. It is possible that “present” could be interpreted to mean ‘constructively present’, in that the threat maker would need to be close enough to influence the offender into committing the offence.<sup>15</sup> However, New Zealand case law suggests that the threat maker must be present “when and where” the offence is committed.<sup>16</sup> For example, in *R v Joyce*, the defendant gave evidence that he was compelled to act as a lookout outside a service station whilst the threat-maker committed an offence inside.<sup>17</sup> The court ruled that the defence of compulsion could not succeed, because the threatener needed to be “actually present.”<sup>18</sup> This is the approach the Commissioners would have contemplated when drafting the section. However, under modern conditions this requirement does not seem appropriate.

The Court in *Akulue* suggested that the presence requirement (along with the immediacy requirement) reflects a legislative purpose that if the defendant has the time or opportunity to escape from the threat and seek assistance from authorities, the defence will be unavailable.<sup>19</sup> Requiring the threatener’s presence aims to ensure that there was no such opportunity when the defendant committed the offence. *R v Witika* supports this rationale.<sup>20</sup> In *Witika*, the appellant had been convicted of failing to provide her daughter with the necessities of life (amongst other charges). She appealed on the basis that a defence of compulsion should have been allowed to go to the jury, as she claimed that her partner had threatened her. However, her partner had been absent for periods of time when Witika could have taken the child to a doctor. The Court ruled that the defence ceases to be available if there is a time during the offence where the threatener ceases to

---

<sup>14</sup> Crimes Act 1961, s 24(1).

<sup>15</sup> This approach was taken in Australia in *Goddard v Osborne* (1978) 18 SASR 481 FC, where a wife, acting under duress from her husband, attempted to obtain a welfare benefit by presenting false documents while her husband remained outside in the street. It was held that the wife was entitled to be acquitted on the basis of the common law defence of duress and the statutory defence of marital coercion.

<sup>16</sup> Kevin Dawkins “The Defence of Duress of Circumstances in New Zealand” in J. Bruce Robertston (ed) *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (Brookers, Wellington, 2004) 96 at 103.

<sup>17</sup> *R v Joyce*, above n 12.

<sup>18</sup> *R v Joyce*, above n 12 at 1077-1078.

<sup>19</sup> *Akulue v R* above n 3, at [23].

<sup>20</sup> *R v Witika* [1993] 2 NZLR 424

be present.<sup>21</sup> It held that her situation was no different “from that of a person who has the opportunity to escape.”<sup>22</sup>

However, the Court of Appeal has recognised that what is required to satisfy the presence element may be a “matter of degree depending on the particular circumstances of the case including the means adopted in making the threat.”<sup>23</sup> The Supreme Court in *Akulue* supported this idea, noting that there is “elasticity” inherent in the presence requirement.<sup>24</sup> This seems inconsistent with the strict approach that has been applied, yet may reflect a willingness to relax the requirement in cogent factual scenarios. The difficulty is identifying how far this flexibility extends. Robertson suggests that a person may be “present” even if not physically close to the defendant, if they were “in a position to carry out the threat or have it carried out then and there”.<sup>25</sup> Yet to relax the requirement this way would be inconsistent with past applications, and would subsume the presence requirement within immediacy.

(a) Threats directed at people other than the defendant

Providing the strict approach to presence is applied, a difficulty arises in cases of threats directed at people other than the defendant. Although the section seems to imply threats to the defendant him or herself, the Court of Appeal in *R v Noho* assumed that “a threat of serious injury to her children could amount to a threat to herself for the purposes of s 24.”<sup>26</sup> In *Akulue*, the Supreme Court accepted that s 24 does not require that the threat of harm be directed to the defendant.<sup>27</sup> The threats of harm to unspecified members of *Akulue*’s family would be sufficient provided the other elements were established. Yet this result causes ambiguity regarding the presence requirement. If the threat must be able to be carried out then and there, then the logical conclusion is that the threatener must be with the victims of the threat to be in a position to carry out the threat immediately. The Court in *Noho* stated that it would be open to the court to find that presence was satisfied

---

<sup>21</sup> *R v Witika*, above n 20, at 435-436.

<sup>22</sup> *R v Witika*, above n 20 at 436.

<sup>23</sup> *R v Joyce*, above n 12, at 1077-1078.

<sup>24</sup> *Akulue v R*, above n 3, at [22], per William Young J.

<sup>25</sup> Bruce Robertson (ed) *Adams on Criminal Law — Offences and Defences* (online looseleaf ed, Brookers) [CA24.09], citing *R v Teichelman*, above n 1, at 67, that the person must be able to carry out the threat or have it carried out “then and there.”

<sup>26</sup> *R v Noho* [2009] NZCA 299 at [18].

<sup>27</sup> *Akulue v R*, above n 3, at [22].

if the threatener was present with the victim.<sup>28</sup> However, does that satisfy the presence requirement completely? Or must the threatener also be present with the defendant to ensure that the defendant has no reasonable opportunity to escape?

If the proposed rationale for the presence requirement (to ensure the defendant has no opportunity to escape) is accepted, then the threatener must still remain “present” with the defendant. However if the victim of the threat is not physically at the scene of the crime, then the implication is that the threatener must have an agent with the defendant.

#### (b) Presence of an agent of the threatener

In *Neho*, the appellant was convicted of both dishonestly obtaining and using credit card to obtain good on finance. She told the police that members of the Mongrel Mob had threatened serious harm to herself and her children if she did not comply. However, during the offending, she was only accompanied by ‘prospects’ associated with the mob. One prospect waited outside the stores for her, and another was inside the store somewhere with her. The Court accepted that “a threat originally made by one person might be reinforced by others who are physically present when the offence is committed”, however, it held that the evidence of the prospects was not sufficient to establish the physical proximity required.<sup>29</sup> The Court did not clarify whether the presence requirement was not satisfied because the prospects did not amount to a person who made the threat, or whether the prospects were not sufficiently close to the appellant when she completed the illegal transactions.

It is arguable that if another party were to be present with the defendant, other than the original threatener, this party would have had to ‘adopt’ the threat. They would need to have taken it upon themselves to carry out the threat, or enable the threatener to carry it out if they were present with a victim in a different location. It is likely in this situation presence would be satisfied. If the agent did not adopt the threat, they would only be acting as a messenger for the threatener. This would not suffice, as the threat would not be able to be “immediately carried out”. Furthermore, the Court in *Teichelman* held that being notified of an apparent threat through a third party did not satisfy the presence requirement.<sup>30</sup>

---

<sup>28</sup> *R v Neho*, above n 26, at [18].

<sup>29</sup> *R v Neho*, above n 26, at [17].

<sup>30</sup> *R v Teichelman*, above n 1, at 67.

The presence requirement is therefore somewhat unclear. The cases suggest that what will amount to presence is determined by whether the threat can be immediately carried out. The underlying rationale for the presence requirement also does not stand up to modern conditions. Ensuring that the threatener is physically present with the defendant is unnecessarily restrictive. It only provides for cases contemplated in 1893, in which the threat maker would need to be physically proximate to carry out the threat. Under modern conditions, however, cases arise where a defendant is still subject to an overwhelming threat, even if the threatener is not physically proximate to the defendant. Consequently, the presence requirement no longer achieves its purpose.

### 3 *The harm threatened to be immediate*

The second element that tightly constrains the defence of compulsion is that the threat must be of “immediate death or grievous bodily harm.”<sup>31</sup> Read literally, the section does not allow for any time lapse between a defendant’s refusal to offend, and the inflicting of the harm. In *Teichelman*, the Court explained that immediacy required “instant” retribution that could be carried out “then and there”, following a refusal to commit the offence.<sup>32</sup> The Court did note that the threat could be made sometime before the commission of the offence, as long as the threat of immediate violence continued at the time of the offence.<sup>33</sup> However, this proposition was made in the context of supplying drugs, where it was unnecessary that the threat maker be present from the making of the threat throughout the preparation of the offence, until completion.<sup>34</sup> The threat of harm must do more than operate at the time of the offence; it must be a threat that harm will follow immediately on the defendant’s refusal to comply.<sup>35</sup>

This approach is incredibly stringent. Yet it is important to note that although the defendant must believe that the threat will be carried out immediately, they must not necessarily believe the threat is inevitable.<sup>36</sup> It is instead a question of fact and degree.<sup>37</sup>

---

<sup>31</sup> Crimes Act 1961, s 24.

<sup>32</sup> *R v Teichelman*, above n 1 at 67.

<sup>33</sup> *R v Teichelman*, above n 1 at 66, as cited in Bruce Robertson (ed) *Adams on Criminal Law – Offences and Defences* at [CA24.07].

<sup>34</sup> *R v Teichelman*, above n 1 at 66.

<sup>35</sup> Gerald Orchard “The defence of compulsion” (1980) 9 NZULR 105 at 113.

<sup>36</sup> AP Simester and WJ Brookbanks *Principles of Criminal Law*, (4<sup>th</sup> ed, Brookers, Wellington, 2012) at 406.

<sup>37</sup> Simester and Brookbanks *Principles of Criminal Law* above n 36 at 406.

A defendant must solely believe that “the threats were imminent, and that they were compelling.”<sup>38</sup> Similarly to the presence requirement, the requirement that the harm threatened must be of immediate death or grievous bodily harm ensures that the defendant had no other course of action open to him or her. There is considerable overlap between the two elements, and the inability to satisfy the presence requirement will often mean that the immediacy requirement will also be unsatisfied.<sup>39</sup> However, modern scenarios arise where the harm may be inflicted immediately, regardless of the threatener’s presence or otherwise.

#### (a) Literal reading of immediacy

The immediacy requirement has been subject to some criticism. Cameron identifies two problems with it. First, he argues that a literal reading of the clause would exclude cases where the threat of harm was not “immediate”, but was still able to be carried out before the defendant could take an alternative course of action.<sup>40</sup> To interpret “immediate” in the literal sense would therefore be inconsistent with the original purpose of ensuring that the defence protected only those who were unable to take evasive action. The courts could apply a non-literal approach, yet they have refrained from doing so. *Joyce* illustrates this in particular. Because the defendant was outside, the Court held that the evidence did not amount to threats of “immediate” death or grievous bodily harm.<sup>41</sup> Simester and Brookbanks argue that although the lack of “presence” may be ground for distinguishing *Joyce*, the “tenor of the decision essentially precludes that possibility”.<sup>42</sup>

#### (b) Future threats

Cameron’s second criticism is that the immediacy requirement simply rules out all future threats regardless of the circumstances, and “thus removes the defence even where there was no way the defendant could avoid the threat.”<sup>43</sup> He provides the examples of a witness, prisoner or kidnap victim who is faced with a future threat and “who knows perfectly well that there is no way in which either they or the authorities can provide

---

<sup>38</sup> Simester and Brookbanks *Principles of Criminal Law* above n 36 at 407.

<sup>39</sup> *R v Akulue* [2013] NZCA 84 at [23].

<sup>40</sup> Neil Cameron “Defences and the Crimes Bill” in Neil Cameron and Simon France (eds) *Essays on Criminal Law in New Zealand: Towards Reform?* (Victoria University of Wellington Law Review in conjunction with Victoria University Press, Wellington, 1990) 57 at 76.

<sup>41</sup> *R v Joyce*, above n 12, at 1077-1079.

<sup>42</sup> Simester and Brookbanks, *Principles of Criminal Law*, above n 36, at 408, n 86.

<sup>43</sup> Cameron, above n 40, at 76.

protection for themselves or their loved ones in the long run.”<sup>44</sup> The immediacy requirement purports to ensure that people under a future threat seek assistance from the authorities, but difficulties arise where the authorities may be unable to protect the defendant from the threat, or where the defendant has a genuine belief that assistance would not be forthcoming. In *Akulue*, the Supreme Court ruled evidence of such a situation or belief irrelevant.<sup>45</sup> This approach can lead to unjust outcomes, particularly if the defendant had previously sought assistance from the authorities, and it either had not been forthcoming, or it had not been sufficient to protect the defendant. One context where this may occur are victims of domestic violence, who have had not had ongoing protection from the authorities. Another context is the defendant who is charged with importing drugs, where the threat was made in a country where law and order had broken down. If the defendant was arrested immediately upon arrival into New Zealand they would not have had the opportunity to seek assistance from authorities that may be able to help. Orchard also discusses the example of a witness under compulsion. He argues that if this strict immediacy is applied, then compulsion could never be a defence to oral perjury, even though it is not an excluded offence in s 24(2).<sup>46</sup>

Simester and Brookbanks suggest that strict immediacy may not comply with the rationale of the defence.<sup>47</sup> They argue that the legislative purpose is to prevent people being held criminally responsible when their free will is ‘neutralised’ at the relevant time.<sup>48</sup> If the relevant issue is how the threat has acted on the defendant’s mind, then it is therefore irrelevant whether he or she believes it will be carried out immediately, so long as he or she believes it will be carried out and has complied in response to the threat.<sup>49</sup> This would support a rationale of moral involuntariness, as discussed below.

#### 4 *Summary of the judiciary’s approach*

The courts have clearly followed a strict approach when applying the defence. This reflects a judicial concern that if they are more lenient, they may open the floodgates to claims of compulsion. Lord Bingham articulates this concern in *R v Hasan*.<sup>50</sup>

---

<sup>44</sup> At 76.

<sup>45</sup> *Akulue v R*, above n 3, at [23].

<sup>46</sup> Orchard, above n 35 at 114.

<sup>47</sup> Simester and Brookbanks *Principles of Criminal Law*, above n 36, at 408.

<sup>48</sup> At 408.

<sup>49</sup> Simester and Brookbanks *Principles of Criminal Law*, above n 36, at 408.

<sup>50</sup> *R v Hasan* [2005] UKHL 22 at [22].

I must acknowledge that the features of duress to which I have referred ...incline me, where policy choices are to be made, towards tightening rather than relaxing the conditions to be met before duress may be successfully relied on.

The three features of concern noted were that the victim of a crime committed under compulsion will usually be morally innocent, that allowing compulsion may enable criminals to “set up a countervailing system of sanctions”, effectively conferring immunity for crimes committed by their associates, and that it is a difficult defence for the Crown to disprove.<sup>51</sup> Lord Bingham also recognised that coercion that did not satisfy the criteria for the defence could be addressed by mitigation of sentence.<sup>52</sup> These reasons are valid. However, the balance should be struck between ensuring that deserving defendants are exculpated, and excluding those defendants that claim on a defence of compulsion in circumstances where their free will was unaffected. The legislation in New Zealand and the consequent approach of the courts does not effectively protect those deserving defendants. Under modern conditions the strict approach to the defence may cause anomalies, and therefore the defence should be re-evaluated to ensure it achieves the legislative purpose.

### *C Theoretical Foundation for the Defence*

Compulsion has been described as an “extremely vague and elusive juristic concept”.<sup>53</sup> There has been considerable analysis surrounding the theories and rationales behind the defence of compulsion, yet contention remains. Simester and Brookbanks describe compulsion as having developed on “an insecure theoretical footing.”<sup>54</sup> The general basis is that compulsion provides relief from criminal responsibility in certain circumstances where an offender has been “forced” to offend by overwhelming threats from another person.<sup>55</sup> Yet the underlying reason why we excuse the conduct is contentious. Ashworth identifies two possible rationales; the theory of moral involuntariness, and the theory that capitulating to the threat is a reasonable response to extreme pressure.<sup>56</sup>

---

<sup>51</sup> *DPP for Northern Ireland v Lynch* [1975] AC 653 at 688, 696 per Lord Simon, as cited in *R v Hasan*, above n 50, at [19], [22].

<sup>52</sup> *R v Hasan*, above n 50, at [22].

<sup>53</sup> *DPP for Northern Ireland v Lynch*, above n 51, at 686 per Lord Simon.

<sup>54</sup> Simester and Brookbanks, above n 36, at 393.

<sup>55</sup> Simester and Brookbanks above n 36, at 394.

<sup>56</sup> Andrew Ashworth *Principles of Criminal Law* (5<sup>th</sup> ed, Oxford: Oxford University Press, 2006) at 224.



## 1 *Moral involuntariness*

Cameron argues that the rationale of the defence is that the defendant is forced to offend because there is “no effective choice in the face of normal human drives and instincts.”<sup>57</sup> The defendant’s will or freedom of choice is “overborne” by the threats.<sup>58</sup> Ashworth explains that when a defendant acts because of duress (or compulsion in New Zealand), his or her actions are not involuntary, but they are ‘non-voluntary’ in the sense that free will or choice is limited.<sup>59</sup> Fletcher calls this ‘moral or normative involuntariness’<sup>60</sup>. He believes that threats resulting in moral involuntariness may not be significantly less compelling than physical compulsion, as in both cases the defendant has no real control over their actions.<sup>61</sup> In *Perka v R*, the Canadian Supreme Court recognised that it is the importance of autonomy in attributing criminal liability that underpins this concept of involuntariness.<sup>62</sup> If the defendant’s free will is constrained, then their act was not autonomous, and so should not attract punishment. This is because a major justification for the criminal law is that the wrongdoing must be culpable in order for the punishment to be deserved.<sup>63</sup> Therefore in Canada at least it is clear that the courts see the theoretical underpinnings of duress as resting on moral involuntariness.

## 2 *Reasonable response to extreme pressure*

An alternative rationale is that the defence of compulsion recognises that the defendant’s actions were reasonable considering the extreme pressure they were subject to. This is a concession to human frailty, and acknowledges that any other person may have reacted in the same way. The Supreme Court in *Akulue* seems to have proceeded on this theory. The Court explains that any formulation of the defence should address proportionality between the harm that is threatened and the harm caused by the commission of the

---

<sup>57</sup> Cameron, above n 40, at 77.

<sup>58</sup> Simester and Brookbanks, above n 36, at 395.

<sup>59</sup> Ashworth, above n 56, at 224.

<sup>60</sup> G. P. Fletcher *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978) at 803.

<sup>61</sup> Fletcher, above n 60, at 803.

<sup>62</sup> *Perka v R* [1984] 2 SCR 232 at 250-251. This case was in the context of necessity, however in *R v Hibbert* [1995] 2 SCR 973 the principle was extended to duress.

<sup>63</sup> Ashworth, above n 56, at 17.

offence.<sup>64</sup> The joint judgment stated, “Those who are put under pressure to offend should show firmness of character.”<sup>65</sup> This indicates a position that any person subject to threats of death or grievous bodily harm must respond in a way consistent with the standard expected of a reasonable person in the circumstances. If they do not, the defence of compulsion will not be open to them, as their response was not reasonable. This formulation has some similarity with self-defence, where the defendant’s response to the threat must be proportional to the harm threatened.<sup>66</sup> The approach of England and Wales follows this rationale, as it judges the defendant on the standard of the reasonable person.

A defence of compulsion that was entirely consistent with this rationale would test whether the defendant’s compliance with the threat was objectively reasonable. New Zealand’s test is not formulated this way, although the requirements of immediacy and presence are objective tests. The difficulty with this rationale is that self-sacrifice is required in lesser situations where committing the offence would not be a reasonable response.<sup>67</sup> Furthermore, it does not consider the defendant’s subjective perception of the circumstances. If the defendant believed that the response was reasonable, and committed the offence, he or she would not be protected if the response was deemed objectively unreasonable. It also leaves those citizens that cannot attain the standard of a reasonable firmness without a defence.<sup>68</sup> In *R v Bowen*, the English Court of Appeal evaluated what characteristics may be cause to modify the standard of a sober person of reasonable firmness, in the circumstances of the defendant.<sup>69</sup> It held that age, sex, pregnancy, physical health and/or disability, and psychiatric condition may be relevant.<sup>70</sup> However, it is irrelevant that the accused may be more pliable and therefore susceptible to threats than other people. *Bowen* demonstrates the difficulty of defining the standard of a reasonable person in the circumstances, and therefore the problem with a test entirely framed around the rationale of a reasonable response to extreme pressure. Chapter II further discusses this issue.

---

<sup>64</sup> At [11].

<sup>65</sup> *Akulue v R*, above n 3, at [11].

<sup>66</sup> Crimes Act 1961, s 48 provides that “Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.”

<sup>67</sup> Ashworth, above n 56, at 225.

<sup>68</sup> Ashworth, above n 56, at 225.

<sup>69</sup> *R v Bowen* [1996] 2 Cr App R 157.

<sup>70</sup> At 166-167.

### 3 *The theoretical basis in New Zealand*

In New Zealand law, the defendant's response is evaluated by the objective elements of immediacy and presence. These standards do not support the rationale of 'moral involuntariness'. This is because if the real issue is the effect of the threat on the mind of the defendant, then it should not matter if he or she believes it will be carried out immediately, as long as he or she believes that it will be executed.<sup>71</sup> Therefore, according to Ashworth's categorization, the test should support the rationale of a 'reasonable response to extreme pressure'. The Supreme Court supports this formulation when it indicates that the harm must be proportionate.<sup>72</sup> The Court goes on to explain that the list of excluded offences ensures that the harm caused is proportionate to the harm threatened.<sup>73</sup>

The list of excluded offences in New Zealand reflects a very strict approach towards what is proportionate. To exclude a defence to a charge of robbery<sup>74</sup> when the defendant was threatened with immediate death reflects a policy choice that the availability of the defence should be severely limited.

### 4 *Practical operation of s 24*

In practice, the defence of compulsion operates as an excuse. It does not negative any ingredient of the crime. Nor does it act as a justification. This means that the defendant is only protected from criminal responsibility, and could still be subject to a civil proceeding. The actions are still viewed as wrongful under the law, but the conduct is excused because of the circumstances under which it was performed. Procedurally, the defence on compulsion becomes a live issue once the defendant has shown an evidential foundation for it.<sup>75</sup> It is then for the prosecution to disprove it beyond a reasonable doubt.<sup>76</sup>

---

<sup>71</sup> Simester and Brookbanks, above n 36, at 408.

<sup>72</sup> *Akulue v R*, above n 3 at [11].

<sup>73</sup> At [12].

<sup>74</sup> Crimes Act 1961, s 234.

<sup>75</sup> *R v Teichelman*, above n 1, at 66.

<sup>76</sup> *Salaca v R* [1967] NZLR 421 (CA), at 422.

## D *The Relationship with Common Law Necessity*

In *Akulue*, the appellant argued in the alternative that if the statutory defence of compulsion was unavailable, he could rely on a common law defence of necessity. The Supreme Court unanimously rejected this argument. The Court reasoned that recognising a defence of necessity would be inconsistent with the legislative purpose of s 24. This follows the restrictive approach courts have taken towards both the statutory defence and common law necessity.

### 1 *Common law necessity*

The doctrine of necessity has been in existence for over one hundred years, but it remains confused and contentious.<sup>77</sup> In *R v Woolnough*, Richmond P noted the “extreme vagueness” of the law governing any general defence of necessity.<sup>78</sup> “Necessity” has referred to the principle behind a variety of specific defences, such as compulsion, self-defence and defence of property.<sup>79</sup> However, a pure claim of necessity is different from compulsion, as it does not refer to capitulation to an immediate threat.<sup>80</sup> Instead, necessity refers to a choice between two evils; a balancing of the harm caused against the harm avoided.<sup>81</sup> This is similar to the rationale of a ‘reasonable response to extreme pressure.’

At common law, the doctrine of necessity supports two instances of duress; duress by threat (similar to New Zealand’s compulsion), and duress of circumstances. Duress of circumstances at common law has developed to provide a defence in situations of apprehension of imminent death or serious bodily harm either by a human threat or other danger. New Zealand courts have also recognised the defence of duress of circumstances, although in some cases it has been confused with a claim of necessity.<sup>82</sup>

---

<sup>77</sup> See for example, *R v Dudley* (1884) 14 QBD 273 (QB) for an early discussion of the concept.

<sup>78</sup> *R v Woolnough* [1977] 2 NZLR 508 (CA), at 516.

<sup>79</sup> Robertson, above n 25, at [CA24.17].

<sup>80</sup> Dawkins, above n 16, at 98.

<sup>81</sup> Dawkins, above n 16, at 98.

<sup>82</sup> See *Kapi v Ministry of Transport* (1991) 8 CRNZ 49 (CA). In *R v Hutchinson* [2004] NZAR 303 (CA) at [32], Heath J explains that when “referring to ‘’a defence of necessity’”, Gault J was, in fact, referring to the species of necessity also referred to as duress of circumstances.” Venning J in *Mash v Police* [2014] NZHC 1223 also equates necessity and duress of circumstances. For a recent discussion of the defences of necessity and duress of circumstances, see *Leason v Attorney-General* [2013] NZCA 509 at [65]-[82].

## 2 *Compulsion as a subset of necessity*

The statutory defence of compulsion is derived from the broader doctrine of necessity.<sup>83</sup> Brookbanks argues that it is an example of ‘hypothetical necessity’; when the proscribed conduct is determined “by the defendant’s own choice where the ability to make a freely-willed choice is severely limited.”<sup>84</sup> Compulsion is characterized by yielding to a threat, when a defendant’s free choice is constrained. The defendant does not lack intention, and they are still acting with some ‘deliberation’, yet compulsion is deemed to override responsibility for the actus reus and mens rea of the crime.<sup>85</sup>

## 3 *New Zealand position*

In New Zealand, all common law defences are preserved except where they are altered by or are inconsistent with any enactment.<sup>86</sup> However, New Zealand courts do not recognise a common law defence of necessity from threats sourced in other persons, because the courts have argued that to do so would be inconsistent with s 24.<sup>87</sup> In *Kapi v Ministry of Transport*, Gault J reasoned, “it must be seen as probable that in New Zealand the scope of the defence was considered by the legislature and that s 24 of the Crimes Act reflects the extent to which it was adopted in this country.”<sup>88</sup> This is because when the Commissioners formulated the Draft Criminal Code, they deliberately chose not to codify a defence of necessity. The Commissioners stated “...compulsion is only one instance of a justification on the ground that the act, otherwise criminal, was necessary to preserve life.”<sup>89</sup> Codifying “one instance” reflects that the Commissioners intended to define the limits of a defence for a certain range of circumstances. The Supreme Court reasoned that this shows an intention to “codify exclusively the circumstances in which compulsion by threats of harm from another person provides a defence, leaving only other circumstances of necessity to the common law.”<sup>90</sup>

---

<sup>83</sup> Brookbanks, above n 5, at 97.

<sup>84</sup> Brookbanks, above n 5, at 98.

<sup>85</sup> Brookbanks, above n 5, at 98.

<sup>86</sup> Crimes Act 1961, s 20.

<sup>87</sup> *Kapi v Ministry of Transport*, above n 82, *R v Noho*, above n 26, *Akulue v R*, above n 3.

<sup>88</sup> At 9.

<sup>89</sup> Draft Code, above n 4, at 43.

<sup>90</sup> *Akulue v R*, above n 3, at [29].

This reasoning is logical. If the courts applied a defence of common law necessity in circumstances that were analogous to those that s 24 provides for, but that fell short of the requirements, it would defeat the purpose of the section. Furthermore, it would usurp Parliament's function in legislating. *Akulue* provides a clear illustration of this idea. The threats made to Akulue were for the purpose of forcing him to commit an offence, and they were sourced in another. Yet he clearly fell short on the immediacy and presence requirements. To allow him a defence in necessity would set a precedent that would make s 24 subsumed in many respects by the common law defence.

The consequent difficulty is defining what circumstances are sufficiently analogous that they are excluded from the residual defence. The appellant in *Akulue* contended that the circumstances fit s 24, yet if they fell outside, common law necessity would apply. This indicates that the circumstances were sufficiently analogous to s 24. Yet there is a question regarding what range of circumstances s 24 aims to cover. Dawkins identifies a distinction between 'instrumental' threats; threats directed at forcing the victim to commit a particular offence, and 'non-instrumental' threats, which are not directed at a particular purpose.<sup>91</sup> At common law, threats sourced in another person, which are not directed at the commission of an offence fall outside 'duress by threat' and are instead dealt with under 'duress of circumstances'.

Section 24 does not expressly require that the threat made be instrumental. However, the Court in *Teichelman* stated that the section "is directed essentially at what are colloquially called standover situations where the accused fears that instant death or grievous bodily harm will ensue if he does not do what he is told."<sup>92</sup> The Court therefore envisioned a situation of an instrumental threat. Furthermore, it has been held that the person making the threats must make them in order that the offence be committed.<sup>93</sup> Orchard calls this an "arbitrary restriction" on duress, as he argues that the particular motives of the threatener do not affect the degree of pressure on the defendant.<sup>94</sup> Yet more recent cases have not preserved this distinction. In *Kapi* and *R v Hutchinson*,<sup>95</sup> the Court of Appeal held that a defence of threats sourced in other people is inconsistent with s 24. The decision in *R v Lamont*<sup>96</sup> goes further as the Court clearly indicates their belief

---

<sup>91</sup> Dawkins, above n 16 at 104-105.

<sup>92</sup> *R v Teichelman*, above n 1, at 67.

<sup>93</sup> *R v Dawson* [1978] VR 536 (12 May 1978), as cited in Orchard, above n 35, at 110-111.

<sup>94</sup> At 111.

<sup>95</sup> *R v Hutchinson* [2004] NZAR 303 (CA).

<sup>96</sup> *R v Lamont* 27/4/92, CA442/91.

that a defence for a non-instrumental threat would still be inconsistent with s 24. When combined with the position in *Akulue* that s 24 codifies the common law in respect of all threats sourced in other people, a gap in the defences arises. Dawkins and Briggs explain that when applying the defence of compulsion, the courts insist that the requirements of s 24 are precise, and require a specific threat as opposed to mere apprehension of harm.<sup>97</sup> However when applying any common law defence of duress, s 24 is construed broadly to cover any apprehension of harm from another person, even if it is not in the form of a threat. Consequently, if a person is to be protected from criminal responsibility by reason of a threat from another person, it can only be under s 24, and no resort is available to the common law through s 20.<sup>98</sup>

The resulting position is that a common law defence of necessity is only preserved in New Zealand if the source of the threat of death or serious harm is a non-human danger, animate or inanimate.<sup>99</sup> This position is out of step with the common law, and potentially may exclude defendants in deserving situations. Yet it reflects the restrictive approach that New Zealand courts have taken towards both the statutory defence and the common law defence. Consequently the relationship of these defences needs reform to ensure that justified claims do not fall through the gaps.

---

<sup>97</sup> Kevin Dawkins and Margaret Briggs “Criminal Law” [2001] NZ Law Rev 317 at 336.

<sup>98</sup> Dawkins and Briggs, above n 97, at 336.

<sup>99</sup> Dawkins, above n 16, at 107.

## *II A Comparative Analysis*

The defence of compulsion in New Zealand has developed under a statutory framework, and has been interpreted strictly by the courts. However, other jurisdictions have taken quite a different approach towards the development of the defence. This section analyses how it has been addressed in England and Wales, and Canada.

### *A England and Wales*

In England and Wales, the law recognises both duress by threats, and duress of circumstances. Neither one is codified in statute, so they have developed solely in the courts. Duress by threats covers similar situations as the New Zealand defence of compulsion. The common law defence of duress of circumstances has provided the basis for the New Zealand defence, and the requirements are essentially the same. However, England and Wales take a much less restrictive approach towards what situations duress of circumstances may cover.<sup>100</sup>

#### *1 Duress by threats*

The common law has recognised a defence of duress by threats for centuries, and the New Zealand legislation originally drew on the common law principles. However, the common law defence has developed quite differently. The availability of the defence is not determined by the requirements of immediacy and presence, unlike in New Zealand.

##### *(a) The elements of duress*

In *Hasan*, the leading House of Lords authority on duress, Lord Bingham summarized the elements of the common law defence:<sup>101</sup>

---

<sup>100</sup> Dawkins explains that in England and Wales, duress of circumstances covers a non-instrumental threat whether it be from a human or non-human source. In New Zealand, however, the cases suggest that a common law defence will only be open if the source of the threat is a non-human actor, as the courts have taken the approach that to recognise a defence of duress of circumstances from a human actor would be inconsistent with s 24. See Dawkins, above n 16, at 98, 103-107.

<sup>101</sup> At [21].



- (1) There must be a threat to cause death or serious injury;
- (2) The threat must be directed against the defendant or his immediate family or someone close to him, or someone for whom he would reasonably regard himself as responsible;
- (3) The defendant's perception of the threat, and his conduct, are to be tested objectively – so that both his belief in the existence of the threat and the way he responds to it must be reasonable;
- (4) The conduct the defendant seeks to have excused must have been directly caused by the threats relied upon;
- (5) There must have been no evasive action the defendant could reasonably take;
- (6) The defendant may not rely on duress to which he has voluntarily laid himself open;
- (7) The defence is not available to murder, attempted murder or treason.

The common law defence is therefore less restrictive than New Zealand on the one hand, as it does not require the elements of immediacy and presence. There are also far fewer excluded offences. Instead, the common law defence ensures that the response to the threat is proportional by requiring that the defendant's response conform to the standard of a reasonable person. This is more restrictive than the New Zealand defence. The common law test is also drastically more restrictive regarding the defendant's belief, as it is judged by the standard of a reasonable person.

(b) How are the defendant's belief and response evaluated?

Difficult issues arise in evaluating the reasonableness of the defendant's perception and response to the threat. One area of contention is whether it is sufficient that the particular defendant believed his response was reasonable to the threat that he believed he faced, or whether the defendant is to be judged on whether the reasonable person would have responded in the same way if faced with the threat as the defendant believed it to be.<sup>102</sup>

In *R v Howe*,<sup>103</sup> and later, *Hasan*,<sup>104</sup> the House of Lords approved the formulation propounded by the English Court of Appeal in *R v Graham*.<sup>105</sup>

---

<sup>102</sup> David Ormerod *Smith and Hogan: Criminal Law* (12<sup>th</sup> ed, Oxford University Press, Oxford, 2008) at 330.

<sup>103</sup> *R v Howe* [1987] AC 417, at 436, 438, 446, 458-459.

<sup>104</sup> At [23].

<sup>105</sup> *R v Graham* [1982] 1 All ER 801 at 806 per Lane LCJ.

- (1) Was the defendant, or may he have been, impelled to act as he did because, as a result of what he reasonably believed (the threat maker) had said or done, he had good cause to fear that if he did not do so act (the threat maker) would kill him or...cause him serious physical injury? (2) if so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the same characteristics of the defendant, would not have responded to whatever he reasonably believed (the threat maker) said or did by taking part in (the crime)?

(c) 'Reasonable' belief

Ormerod argues that this formulation is too strict an approach.<sup>106</sup> He submits that determining whether the defendant reasonably believed in the circumstances of the threat, and whether the belief amounted to good cause to fear is not a fair test.<sup>107</sup> Instead, it is argued that the defendant should be “judged on the basis of what he honestly believed, and what he genuinely feared.”<sup>108</sup> Many commentators have contended that the objective view of the defendant’s state of mind, as formulated in *Graham*, is not consistent with general principles of excuse as stated in *DPP v Morgan*.<sup>109</sup> Ashworth also argues that Lord Lane in *Graham* offered “no convincing reasons for departing from the subjective orthodoxy of the time.”<sup>110</sup> There has also been some contention in the courts. The Court of Appeal in *R v Safi* made some comments in support of a subjective approach.<sup>111</sup> It drew analogies to provocation and self-defence, which both allow the defendant’s conduct to be judged on the facts as he believed them to be.<sup>112</sup> Furthermore, in *R v Martin*, the English Court of Appeal held that the defendant’s characteristics, in this case a schizoid affective disorder, would be relevant in determining his or her belief.<sup>113</sup> It argued that the *Graham* test should be read as applying a subjective test, because of the comparison that Lord Lane in *Graham* drew with self-defence.<sup>114</sup> However, in the wake

---

<sup>106</sup> Ormerod, above n 102, at 331.

<sup>107</sup> At 331.

<sup>108</sup> Ormerod, above n 102, at 331. He notes that courts occasionally lapse into such a formula, see *Mullally v DPP* [2006] EWHC 3448 (Admin).

<sup>109</sup> Andrew Ashworth and Tom Rees “Duress: belief in imminent threat of death or serious injury” [2003] Crim LR 721, citing *DPP v Morgan* [1975] UKHL 3.

<sup>110</sup> Ashworth, above n 56, at 222-223.

<sup>111</sup> *R v Safi* [2004] 1 Cr App R 14.

<sup>112</sup> At 25.

<sup>113</sup> *R v Martin* [2000] 2 Cr App R 42 at 49.

<sup>114</sup> At 49. The Court concluded that because self-defence takes a subjective approach when assessing the defendant’s state of mind, duress should also.

of the decision of *Hasan*, it is clear that currently, the common law requires that the defendant's belief in the threat must be reasonable. Therefore, the approach on the first limb of the test is clearly objective.

(d) 'Reasonable' response

There is also contention over how the defendant's response to the threat should be judged. In *Hasan*, the Court accepted the trial judge's direction that the standard is "a reasonable person of the defendant's age and background."<sup>115</sup> Yet determining what characteristics form part of the defendant's 'background' presents problems. As discussed above, the English Court of Appeal in *Bowen* held that age, sex, pregnancy, physical health and/or disability, and psychiatric condition may be relevant.<sup>116</sup> The appellant in *Bowen* adduced evidence that he had a significantly low I.Q. score of 68. The psychologist found him to be "abnormally suggestible" and "vulnerable."<sup>117</sup> The Court held that the evidence of his low I.Q. was irrelevant for the defence of duress; it did not cause him to be less courageous or less able to withstand threats than anyone else.<sup>118</sup> In other contexts, courts have held that expert evidence directed to establishing that the defendant was "emotionally unstable" or in a "grossly elevated neurotic state", falling short of a recognised mental illness is inadmissible.<sup>119</sup> It is also irrelevant that the defendant's will to resist has been eroded by the voluntary consumption of drink or drugs.<sup>120</sup>

The resulting difficulty is that the defence may rest on psychological analysis of the defendant's state of mind. Courts will also need to draw distinctions between what is solely an unusual vulnerability, and what amounts to a recognised physical or psychological disorder. In *R v Antar*, there was contention over whether a psychologist's evidence was admissible.<sup>121</sup> The appellant sought to adduce evidence that he had a very low I.Q., functioned cognitively at a significantly impaired level, had a moderate learning disability, and had a level of suggestibility significantly higher than that of the general population.<sup>122</sup> This appears very similar to the evidence ruled irrelevant in *Bowen*. Yet it

---

<sup>115</sup> At [23]-[24].

<sup>116</sup> At 166.

<sup>117</sup> At 160.

<sup>118</sup> At 167.

<sup>119</sup> *R v Hegarty* [1994] Crim LR 353.

<sup>120</sup> *R v Graham*, above n 105, at 806.

<sup>121</sup> *R v Antar* [2004] EWCA Crim 2708.

<sup>122</sup> At [46].

was ruled admissible. The Court drew on the ruling in *R v Masih* that if evidence of a low I.Q. supported a claim that the appellant had a lack of mental capacity, then it could be relevant.<sup>123</sup> *Bowen* and *Antar* reflect the problems that courts are likely to encounter when determining what particular characteristics of the defendant may be cause to adjust the standard of the reasonable person.

The common law defence therefore rests on a qualified objective standard. This is interesting, as when recklessness was judged objectively in the United Kingdom, the House of Lords explicitly rejected a qualified objective standard.<sup>124</sup> The defendant was liable if the reasonable person would have seen the risk but the defendant did not, even when the defendant was unable to see the risk because of a personal limitation in his or her capacity.<sup>125</sup> The House of Lords revisited the test for recklessness in *R v G* and considered creating a capacity-based exception to the objective test.<sup>126</sup> The test would ask whether the defendant him or herself, having regard to his or her capacity to see risk, ought to have foreseen the risk of the proscribed harm. The Court rejected this approach, reasoning that it would be cause difficulties in defining the relevant exceptions, and it would still impose liability on those who caused harm inadvertently. Lord Bingham noted that it is a “much more speculative task to decide whether the risk would have been obvious to him if the thought had crossed his mind.”<sup>127</sup> Instead, the Court overruled the objective test entirely, and reinstated a subjective test for recklessness.<sup>128</sup>

---

<sup>123</sup> *R v Masih* [1986] Crim LR 395.

<sup>124</sup> The House of Lords rejected the qualified objective standard in *R v G* [2003] UKHL 50 at [37]-[38]. Although in the United Kingdom the test for recklessness was originally subjective; the defendant could only be liable if it was proved that he or she was aware of an unreasonable risk and ran it, in *R v Caldwell* [1982] AC 341 and *R v Lawrence* [1982] AC 510, the House of Lords overruled this and applied an objective test.

<sup>125</sup> This test caused unjust results. For example, in *Elliott v C* [1983] 1 WLR 939, the defendant was a 14-year-old girl of low intelligence. She had poured spirits on the floor of a shed and set it alight, with the intention of keeping warm. The fire flared up and destroyed the shed. On appeal, the court upheld the argument, at 945, that “it is not a defence that because of limited intelligence or exhaustion she would not have appreciated the risk even if she had thought about it.”

<sup>126</sup> *R v G* [2003] UKHL 50. The defendants were two boys aged 11 and 12, who had lit fire to newspapers and thrown them under a bin. The fire ultimately caused extensive damage to a shop. The defence case was that neither boy appreciated the risk of the fire spreading.

<sup>127</sup> At [38].

<sup>128</sup> The resulting test was that for a defendant to be found liable, he or she must have foreseen the risk and yet gone on to take it.

These statements are applicable to an objective test for duress. Those who fail to act as the reasonable person would be held liable if they fall short of having a recognised condition. The court must also determine what particular characteristics will adjust the standard of the reasonable person. Finally, if the standard of the reasonable person is adjusted, the jury will still need to perform the “speculative task” of determining how a reasonable person with the defendant’s particular characteristics would have reacted to the situation.

Furthermore, accepting that specific characteristics will adjust the standard of the reasonable person suggests that the objective test has broken down.<sup>129</sup> With the increase in acceptance of particular conditions as good cause to adjust the standard, the test becomes increasingly subjective. This is inconsistent with the strict objective standard applied when judging the defendant’s perception of the situation. Ormerod argues that this reflects the incoherence of the defence, and creates a need for legislative change.<sup>130</sup> It is also clearly out of step with other common law defences, such as self-defence and provocation.

#### (e) Evasive action

For a defence to be available, there must have been no evasive action that the defendant could reasonably take. This aims to achieve the same purpose as New Zealand’s requirements of immediacy and presence, as it excludes those who could legitimately avoid the threat. However, those that were not in the presence of the threatener would not be unnecessarily excluded. The down side is the consequent lack of regularity. The New Zealand approach lays down clear standards, whereas recent English cases demonstrate that determining what evasive action is reasonable requires evaluation, and results in inconsistency.

In *DPP for Northern Ireland v Lynch*, Lord Morris of Borth-y-Gest explained that duress “must never be allowed to be the easy answer of those...who readily could have avoided the dominance of threats.”<sup>131</sup> However, the judiciary’s approach to this element has significantly differed. In *R v Hudson*, two teenage girls had committed perjury at an earlier trial by failing to identify the defendant.<sup>132</sup> They claimed duress, on the basis that

---

<sup>129</sup> Ormerod, above n 102, at 333.

<sup>130</sup> At 333.

<sup>131</sup> *DPP for Northern Ireland v Lynch*, above n 51, at 670.

<sup>132</sup> *R v Hudson* [1971] 2 Q.B. 202.

they had been threatened with being “cut up” if they identified the defendant. The author of the threat was in the public gallery of the trial. The Court of Appeal held that although the threats could not be executed in the courtroom, they could be carried out on the streets that night.<sup>133</sup> The defence was available even though the threatened injury may not follow instantly, but after an interval. The Crown contended that the appellants should have neutralized the threat by seeking police protection,<sup>134</sup> but the Court criticized this argument as failing to distinguish between cases in which the police would be able to provide effective protection and those when they would not. It reasoned that disallowing the defence to those who had the opportunity to ask protection from the police would in effect restrict duress to those people who had either been kept in custody by the maker of the threat, or when the time interval between the threats and the offending made recourse to the police impossible. The Court refused to accept “so severe a restriction on it.”<sup>135</sup> The decision in *Hudson* was later followed in *R v Abdul-Hussain*, where it was held that a defence could be available even if the execution of the threat was not immediately in prospect.<sup>136</sup> The applicable test was whether the defendant’s response to the ‘imminent’ threat was proportionate and reasonable.<sup>137</sup>

The House of Lords in *Hasan* took a much stricter approach. Lord Bingham criticised the decision in *Hudson*, stating it:<sup>138</sup>

...had the unfortunate effect of weakening the requirement that execution of the threat must be reasonably believed to be imminent and immediate if it is to support a plea of duress.

The House of Lords held that the correct statement of the law was:<sup>139</sup>

...if the retribution threatened against the defendant...is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action.

---

<sup>133</sup> At 207.

<sup>134</sup> At 207.

<sup>135</sup> At 207.

<sup>136</sup> *R v Abdul-Hussain* [1999] Crim LR 570. In this case, a group of Iraqis had hijacked an airplane. They feared that they would be killed if they were returned to Iraq, as they had all offended against the regime of Saddam Hussein.

<sup>137</sup> *R v Abdul-Hussain*, above n 136.

<sup>138</sup> *R v Hasan*, above n 50, at [27].

<sup>139</sup> At [28].

This test excludes threats of future harm, and is essentially the same as the New Zealand requirement of immediacy. It does not consider whether the alternative action would be effective to prevent the potential harm. Ormerod contends that this is not a just test, and asks whether a defendant who fears he will be shot tomorrow after perjuring himself today should be denied a defence. He submits that the real question should be whether the defendant could take action that would negate the threat itself. This approach would focus on whether the threat had in fact overborne the will of the defendant, and is consistent with the rationale of moral involuntariness.

Whether the defendant could and should have taken evasive action is judged by a qualified objective standard. The defence will fail if the reasonable person with the characteristics of the defendant would have taken an opportunity to escape. It is submitted that this qualified objective standard is unjust in similar ways to when evaluating the reaction of the defendant. If the defendant him or herself was so affected by the threat that he or she failed to identify an opportunity to take evasive action, the defendant should not be denied a defence because of their short-sightedness.

The current English position therefore supports the rationale of a reasonable response to extreme pressure. It does not consider the effect that the threat had on the mind of the particular defendant, as the defendant is judged by the standard of a reasonable person in his or her position. This formulation of the defence is unjust, as it does not provide for people that perceive circumstances differently to others. Furthermore, the current judicial trend means that the defence is severely confined by the strict application of 'imminence' as well. Overall, the common law test is tougher than the New Zealand test on those people that do not perceive circumstances as the reasonable person would, or on those people that were particularly affected by fear. However, because the common law defence excludes only three offences, those defendants compelled to commit offences excluded by s 24(2) in New Zealand would be in a better position under the common law defence.

## *B Canada*

The Canadian defence of duress is governed by statute. Its terms are very similar to New Zealand, because it also drew on the English Draft Criminal Code,<sup>140</sup> and was adopted in 1892. The section provides:<sup>141</sup>

### Compulsion by threats

**17.** A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

The elements are almost identical to the New Zealand section, save that the Canadian section does not require “grievous” bodily harm, and the excluded offences are different. However, Canadian case law suggests that the statutory regime is no longer entirely applicable.

### *1 R v Ruzic*<sup>142</sup>

The facts of *Ruzic* are similar to those in *Akulue*. The respondent, Ruzic, was a 21-year-old female living in Serbia. She was charged with possession and use of a false passport and unlawful importation of heroin into Canada. Ms Ruzic claimed that she was acting under compulsion. She gave evidence that two months before she arrived in Canada, she became subject to ongoing threats from a man, Mirkovic. She encountered him in the street, he phoned her at home, and he told her he knew her every move. She claimed his

---

<sup>140</sup> Draft Code, above n 4, s 23.

<sup>141</sup> Criminal Code, RSC 1985, c C-46, s 17.

<sup>142</sup> *R v Ruzic* [2001] 1 SCR 687.



behaviour became increasingly menacing, including threats, physical violence, sexual harassment and threats against her mother. On one occasion he forcibly injected her with a syringe containing an unknown substance. On April 25, 1994, Mirkovic phoned Ruzic and told her to meet him at a hotel. Once there, she claimed he strapped heroin packages to her body and instructed her to take them to a restaurant in Toronto. He threatened that if she failed to comply, he would harm her mother. She was unaccompanied by Mirkovic on her trip, and was apprehended by the authorities in Toronto.

The statutory defence was unavailable to Ms Ruzic as she did not satisfy the requirements of immediacy and presence. Yet the Supreme Court went on to examine the statutory defence. The Court held that the language of s 17 precluded the Court from applying a more flexible approach to immediacy and presence consistent with common law developments. It stated that these requirements were under-inclusive, as they clearly precluded a defence based on threats of future harm.<sup>143</sup> The requirements impose both temporal and spatial limits on the defence, as the threat of harm must be contemporaneous with the commission of the offence, and must take place in the same location.<sup>144</sup>

The Court held that it was a fundamental principle of criminal law that to attract liability, an act must be voluntary.<sup>145</sup> It recognised that punishing a person whose actions are morally involuntary is unjust, because his acts cannot be realistically attributed to him.<sup>146</sup> His will was constrained by an external force. Consequently, the Court held that the principle that morally involuntary conduct should not be punished should be protected by s 7 of the Canadian Charter of Rights and Freedoms.<sup>147</sup> It concluded that the current s 17 of the Criminal Code infringed this principle, as the strict requirements meant that individuals could be found guilty of morally involuntary conduct. Thus the Court struck down the immediacy and presence requirements as unconstitutional. It invoked the residual common law defence,<sup>148</sup> which had never been fully superseded by s 17.<sup>149</sup> The

---

<sup>143</sup> At [53].

<sup>144</sup> At [52].

<sup>145</sup> At [42].

<sup>146</sup> At [46].

<sup>147</sup> Constitution Act 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 7. Section 7 of the Charter reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

<sup>148</sup> The Canadian Criminal Code, above n 141, s 8(3), provides that common law defences remain available except in so far as they are altered by or are inconsistent with the Criminal Code or any other Act of Parliament.

Court ruled that it was therefore appropriate for the trial judge to have put the common law defence to the jury, and it upheld the judge's finding.

The decision to apply the common law defence in its entirety is difficult to reconcile with the Court's decision that s 17 was only partially struck down.<sup>150</sup> The resulting Canadian position is instead that s 17 is still to be applied to those who claim duress, but that the common law test will be used instead of immediacy and presence.<sup>151</sup> The Supreme Court in *Ruzic* identified three key elements of the common law test that operate alongside the remaining statutory requirements; no safe avenue of escape, a close temporal connection, and proportionality. This approach was recently upheld in *R v Ryan*.<sup>152</sup>

## 2 *Applicability of Ruzic to New Zealand*

The reasoning in *Ruzic* is not directly applicable in New Zealand. Unlike in Canada, New Zealand courts cannot invalidate legislation on constitutional grounds. The Supreme Court does, however, have the power to declare s 24 inconsistent with the New Zealand Bill of Rights Act 1990. Yet in *Akulue*, the Supreme Court noted that s 8 of the New Zealand Bill of Rights Act most closely corresponds to s 7 of the Charter, but its terms are more limited. Section 8 provides:<sup>153</sup>

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

The Court in *Ruzic* ruled s 17 unconstitutional because it could result in someone being deprived of liberty when his or her actions were not morally voluntary. The New Zealand Supreme Court would have to go further and argue that s 24 was inconsistent with the Bill of Rights Act because it had the potential to deprive someone "of life." This clearly distorts the purpose of the section.

---

<sup>149</sup> Dawkins, above n 16, at 114, n 103. Dawkins explains in his footnote that the Canadian Supreme Court in *Paquette v R* [1977] 2 SCR 189 and *R v Hibbert* [1995] 2 SCR 973 held that s 17 only applies to principal parties, leaving the common law defence open to secondary parties. New Zealand, in contrast, rejected the distinction between principal and secondary parties in *R v Witika* [1993] 2 NZLR 424 at 433.

<sup>150</sup> Stephen G Coughlan "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2002) 7 Can Crim LR 147 at 160-161.

<sup>151</sup> Stephen G Coughlan, above n 150, at 160.

<sup>152</sup> *R v Ryan* [2013] 1 SCR 14 at [46].

<sup>153</sup> New Zealand Bill of Rights Act 1990, s 8.

### 3 *The significance of Ruzic*

Although the approach in *Ruzic* is not possible in New Zealand, the reasoning remains important because the Canadian Supreme Court rejected the strict formulation of the defence that New Zealand and Canada share. The Court concluded that the requirements violated the principle that only morally voluntary conduct should be punished, and this principle is equally applicable in New Zealand. The lesson for New Zealand is not that the Supreme Court recognised voluntariness as a principle of fundamental justice, but why it did so.<sup>154</sup> It is a principle that underpins a number of our statutory defences, such as insanity, and is supported by the idea that the criminal law presupposes individual autonomy and free choice. Yet s 24 does not reflect this principle, as it is too restrictive. It allows people that act involuntarily to be subject to criminal liability. We accept that physically involuntary acts are not subject to criminal punishment; therefore those acts that are morally involuntary should have a defence in s 24.

The Supreme Court expressly refused to recognise moral involuntariness as a principle of fundamental justice.<sup>155</sup> William Young J reasoned “involuntariness involves questions of degree and is not easily susceptible to a binary analysis under which actions are either voluntary (and punishable) or involuntary (and not punishable).”<sup>156</sup> His reasoning is somewhat persuasive. Truly involuntary conduct should not attract liability; however determining whether the conduct was involuntary requires evaluation. Often there will be a variety of factors that influence the decision of the offender to choose to commit the offence, and it will not always be clear how to determine whether their will was overborne or not. In that sense, the objective criteria such as whether the threat could have been carried out immediately does have a role to play. However, the current formulation of s 24 is so restrictive that it does not allow for a true evaluation of whether the defendant did act involuntarily. The decision is instead made on the very strict criteria of immediacy and presence, which do not uphold the principle that morally involuntary conduct should not attract liability. The decision in *Ruzic*, combined with the practical considerations that the Supreme Court discuss in *Akulue*, reflect that a balance needs to be struck between a defence that is broad enough to protect those that did not act

---

<sup>154</sup> Dawkins, above n 16 at 116.

<sup>155</sup> *Akulue v R*, above n 3, at [20].

<sup>156</sup> At [20].

voluntarily, and one that is sufficiently confined to prevent it being claimed by all defendants as a means to avoid punishment.

### *III Proposals for Reform and Other Possible Formulations*

The defence of compulsion has remained largely unchanged since 1893. Yet technological and societal advancements mean that the paradigm case of compulsion, as envisioned by the legislature in 1893, is no longer the norm. *Akulue* is an example that challenges the traditional formulation of the defence. Under modern circumstances, the current formulation of the defence does not achieve the purpose of protecting those offenders that were subject to compulsion. The defence needs to be reevaluated and updated by Parliament.

There have been proposals to reform the defence. The most significant of these was the Crimes Bill 1989,<sup>157</sup> and the following reforms suggested by the Crimes Consultative Committee.<sup>158</sup> The Law Commission later examined the current defence, called for submissions,<sup>159</sup> and produced a report on the defence in the context of battered defendants.<sup>160</sup> This section will examine the merits and problems with these proposed reforms. It will also analyse other possible changes to the defence. It will conclude that the most effective solution is to reform the defence in line with the draft clause proposed by the Crimes Consultative Committee.

#### *A The Crimes Bill 1989*

The Crimes Bill 1989 was introduced into Parliament on 2 May 1989.<sup>161</sup> It represented “the first comprehensive review of the substantive criminal law since the preparation of the Crimes Act 1961.”<sup>162</sup> The Crimes Bill proposed two related defences; necessity and duress. Clause 30, necessity, was new to New Zealand law. It would be available in

---

<sup>157</sup> Crimes Bill 1989 (152-1), cl 30.

<sup>158</sup> Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (Department of Justice, Wellington, 1991).

<sup>159</sup> The Law Commission formulated a practice paper that called for submissions to the public; Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000).

<sup>160</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001).

<sup>161</sup> (2 May 1989) 497 NZPD 10285.

<sup>162</sup> (2 May 1989) 497 NZPD 10285, as per the Minister of Justice, Geoffrey Palmer. He explained that the objectives of the review were to continue the process of codification of the criminal law, and to closely examine each provision of the Crimes Act 1961.

“circumstances of such sudden or extraordinary emergency that a person of ordinary common sense and prudence could not reasonably be expected to act otherwise.”<sup>163</sup> It was similar to the English draft provision called “duress of circumstances”,<sup>164</sup> and was to have no excluded offences. The Court of Appeal in *Akulue* noted that this defence could apply to threats sourced in a person,<sup>165</sup> as the language was sufficiently broad to encompass any emergency scenario.

Clause 31, duress, corresponded to compulsion. The proposed defence removed the presence requirement, but retained the requirement that the person threatened must believe the threat could be carried out immediately. It expressly included threats against the defendant “or any other person”. There were no excluded offences, but the defence remained unavailable when the person subject to the threats was a party to any association or conspiracy, and knew when joining that he or she could become subject to such threats.

### *B Report of the Crimes Consultative Committee*

The Crimes Bill was referred to the Crimes Consultative Committee, appointed on 28 November 1989. The Committee advised that the two defences (clauses 30 and 31) should be more closely aligned.<sup>166</sup> It identified an observation made by the English Law Commission that there is a significant analogy between compulsion and necessity.<sup>167</sup> The Committee further expressed concern that clause 30 was not sufficiently confined, as the defence was intended to be available only on rare occasions.<sup>168</sup>

The Crimes Consultative Committee proposed a redraft of both clauses 30 and 31. Clause 30 now read:

#### **Necessity –**

- (1) A person is not criminally responsible for any act done or omitted to be done under circumstances of emergency in which –

---

<sup>163</sup> Crimes Bill 1989 (152-1), cl 30.

<sup>164</sup> Law Commission for England and Wales *A Draft Criminal Code for England and Wales* (Law Com. No 177, 1989), cl 43.

<sup>165</sup> *R v Akulue*, above n 39, at [30].

<sup>166</sup> Crimes Consultative Committee, above n 158, at 20.

<sup>167</sup> At 20.

<sup>168</sup> At 20.

- (a) The person believes that it is immediately necessary to avoid death or serious bodily harm to that person or any other person; and
  - (b) A person of ordinary common sense and prudence could not be expected to act otherwise.
- (2) Subclause (1) does not apply where the person who does or omits the act has knowingly and without reasonable cause placed himself in, or remained in, a situation where there was a risk of such an emergency.
  - (3) Subclause (1) does not apply to the offences of murder or attempted murder.

Clause 31 was redrafted to read:

**Duress –**

- (1) 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.
- (2) Subclause (1) does not apply where the person who does or omits the act has knowingly and without reasonable cause placed himself in, or remained in, a situation where there was a risk of such an emergency.
- (3) Subclause (1) does not apply to the offences of murder or attempted murder.

The Commission imposed some of the limitations to which clause 31 was subject, on clause 30, such as requiring that the defendant believed the offending was “immediately necessary” to avoid death or serious bodily harm. This reflects a legislative purpose to confine the proposed defence of necessity and more closely align the defences. One change made to clause 31 was the addition of the words “he or she believes” to clarify that the defendant’s belief is to be tested subjectively. This emphasises the importance of the perception of the person under threat. The other notable change to both defences was to exclude the offences of murder and attempted murder. Enacting a defence of necessity was an effort to clarify the relationship between the two defences, and may have resulted in rectifying the gap between situations covered by duress of circumstances, and compulsion. However, this legislation was never enacted.

*1 Benefits and detriments of Clause 31*

Commentators have argued that the proposal was a clear improvement on the existing s 24, and have generally supported the expansion of the defence.<sup>169</sup> The most significant change to s 24 by draft clause 31 is the removal of the presence requirement. Some debate arose as to whether the change made any practical difference. Brookbanks argued that the presence requirement essentially requires that the threatener be in a position to carry out the threat, or to have it carried out then and there.<sup>170</sup> He states that this ‘radical immediacy’ “appears to be constitutive in the new clause 31.”<sup>171</sup> Furthermore, he draws an inference that the requirement of “immediate ability to carry out the threat” logically means that physical presence is also required.<sup>172</sup> The Crimes Consultative Committee, in contrast, applauded the removal of the presence requirement in the original Bill, and did not reinstate it in their draft clause.<sup>173</sup> It recognised that situations exist where a threat of serious harm could be made and executed without physical presence of the threatener. The Committee identified that modern technology was one reason for this.<sup>174</sup>

Removing the presence requirement would have had significant benefits, and this legislative change should have been enacted. As established in Chapter I, the presence requirement has caused confusion, as it only expressly requires the presence of the threat maker “when” the offence is committed. Yet New Zealand courts have taken a strict approach and in practice, have required the threat maker to be present “when and where” the offence is committed.<sup>175</sup> A significant problem with this approach is the difficulty it causes in situations where the victim of the threat is not the defendant, such as in *Akulue*. The threat maker is clearly not “present” with the defendant, yet may still be able to immediately make good on the threat if the defendant refuses to commit the offence. Recent cases suggest that the courts may be realizing this problem, and have recognised some latitude in the presence requirement.<sup>176</sup> Yet to construe presence as ‘present with the victim of the threat’ would not only be inconsistent with previous case law, but it

---

<sup>169</sup> See Dawkins and Briggs, above n 97, at 339. Brookbanks, above n 5, at 116 and Cameron, above n 40, at 75.

<sup>170</sup> Brookbanks, above n 5, at 103.

<sup>171</sup> At 103.

<sup>172</sup> At 103.

<sup>173</sup> Crimes Consultative Committee, above n 158, at 21.

<sup>174</sup> At 21.

<sup>175</sup> Dawkins, above n 16, at 103.

<sup>176</sup> For example, in *Akulue v R*, above n 3, at [22], William Young J noted the “elasticity” inherent in the presence requirement.



would also essentially construe “presence” as “absence”.<sup>177</sup> Both the legislative purpose and practical efficacy are better served by the removal of the presence requirement.

The legislative purpose is to provide a defence to those under such extreme pressure that there was no reasonable alternative but compliance. It is clear that there are situations in which the threat maker may not be physically present, yet can still exert compulsion over the defendant. An obvious example is that of a remotely operated time bomb. To require presence of the threat maker would subvert the legislative purpose. The requirement that the defendant believed the threat maker was in a position to carry out the threat is sufficient to achieve the legislative purpose and confine the defence.

Practical efficacy is also better achieved with the removal of the presence requirement. It is clear from the case law that the requirement has caused difficulties in application for judges. Removing the presence requirement not only streamlines the test by removing the overlap between immediacy and presence, it also removes confusion in situations where the victim of the threat is somewhere else. The courts would not need to stretch the presence requirement by recognising its “elasticity”.

A further significant benefit is the express inclusion of threats to “any other person”. This affirms the statement in *Neho* that a threat to others could be sufficient for the defence. It also complements the removal of the presence requirement, as it recognises that scenarios exist where the victim of the threat is in a different location to the defendant.

### *C Law Commission Report*

The Law Commission examined the Crimes Consultative Committee’s proposed reforms in the context of battered defendants. It conducted a review of compulsion amongst other defences, as a response to criticism that the existing legal defences were failing to provide adequate protection to those who commit offences in response to domestic violence.<sup>178</sup>

---

<sup>177</sup> The Canadian Supreme Court in *R v Ruzic*, above n 142, upheld the respondent’s argument at [49] that to relax the statutory defence would be “construing presence as absence and immediate as sometime later.” The respondent argued that the statutory requirement couldn’t be read any way other than present “then and there”. Hence, the Court decided to declare the statutory requirements of immediacy and presence unconstitutional, rather than distort the wording of the legislation. This suggests that similarly, the New Zealand legislation should not be stretched.

<sup>178</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 160, at ix.

This section will analyse the findings in their report, and examine whether the current s 24 adequately protects victims of battering relationships.

### *1 Battered defendants*

The Domestic Violence Act 1995 defines domestic violence as physical, sexual and psychological abuse.<sup>179</sup> In the Report, “battering” is used to refer to physical violence at the higher end of the scale, such as using a gun or knife, which typically occurs in conjunction with psychological abuse.<sup>180</sup> A battered defendant has therefore committed an offence whilst a victim of a relationship in which the abuser has power and control.<sup>181</sup> In some relationships, battering may induce a psychological state, known as ‘battered woman syndrome’, which may cause victims of battering to “have beliefs and exhibit behaviour different from those of the ordinary non-battered person.”<sup>182</sup> The dominance and pressure on the victim may cause them to act unreasonably. This is because, as Dr V Elizabeth wrote, violent behaviours are “instrumental acts that coerce the actions of others.”<sup>183</sup> She explained:<sup>184</sup>

The outcome of being coerced through exposure to repeated acts of violence is inevitably the diminishment of possibilities for action: because one fears the repercussions that will follow from taking such actions...This constriction on possibilities for action sets the battering context apart from most other contexts in which people commit crimes against those they know.

### *2 Relevance to a defence of compulsion*

---

<sup>179</sup> Domestic Violence Act 1995, s 3. Section 3(2) also provides an inclusive definition of psychological abuse as intimidation, harassment, damage to property, threats of violence, economic abuse, and committing acts of violence in front of the children.

<sup>180</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 160, at ix-x.

<sup>181</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 160, at x.

<sup>182</sup> Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend*, above n 159, at [3].

<sup>183</sup> Dr V Elizabeth “Submission to the Law Commission on *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000)”.

<sup>184</sup> Dr V Elizabeth, above n 183.

Evidence showing the coercive nature of the relationship may support a claim of compulsion, as it may verify a defendant's belief that he or she had no alternative open to him or her. Expert psychological evidence regarding the effects of a battering relationship on the victim may also be relevant in determining the veracity of the defendant's belief that the threat could be carried out immediately, and that if they refused to commit the crime, it would be carried out.<sup>185</sup> It would therefore support the claim that the defendant offended in response to this threat.<sup>186</sup> Evidence that the defendant had been psychologically affected by ongoing violence may support a belief in the threat in less reasonable circumstances.

*R v Richards*<sup>187</sup> provides an example of a battered defendant who claimed a defence of compulsion. The appellant, Richards, had been convicted of selling cannabis and possession of cannabis for sale. The Court of Appeal held that she was "incontestably suffering from Battered Women's Syndrome",<sup>188</sup> and that "if she had not held for sale, or sold, it seems likely that she would have been beaten."<sup>189</sup> However, the defence was unavailable, as her abusive partner had not been physically present on the occasions when she sold the drugs. Counsel for the appellant argued that a form of "constructive presence" should be applied, due to the effects of the Battered Woman Syndrome. The Court rejected this argument, holding that the statute required actual presence. The Court instead treated the effects of Battered Women's Syndrome as a mitigating factor. It held that it played "some role, hard to quantify, but not insignificant".<sup>190</sup> Other courts have followed this approach, and considered the effects of a battering relationship to mitigate the sentence.<sup>191</sup> They have not used it to support a defence in itself, nor to relax the requirements of compulsion.

---

<sup>185</sup> *Rihari v Department of Social Welfare* (1991) 7 CRNZ 586 (HC).

<sup>186</sup> *Rihari v Department of Social Welfare*, above n 185.

<sup>187</sup> *R v Richards* CA272/98, 15 October 1998.

<sup>188</sup> *R v Richards*, above n 187, at 2.

<sup>189</sup> At 4.

<sup>190</sup> At 4.

<sup>191</sup> One example is *R v Howard* CA315/99, 2 December 1999 at [11], where the Court identified that the appellant had been "under the domination of her partner, a gang member, and that it is because of his influence, and fear of what he might do if she refused" that she participated in the offending. This was one factor in leading the court to reduce her sentence. See also *R v Thompson* CA435/03 19 May 2004 and *R v Hetherington* CA426/03 29 June 2004.

The approach overseas has been similar. In *Coats v R*<sup>192</sup> the English Court of Appeal rejected a claim of duress because the evidence did not establish that the appellant “may have been subjected to serious violence so bad that she had lost her free will.”<sup>193</sup> Instead, her ability to take evasive action was unaffected.<sup>194</sup> However, the experts called by both the Crown and the appellant agreed that if the evidence had established that she was suffering from Battered Woman Syndrome, it would be a significant factor in assessing whether she was acting under duress. This case demonstrates that courts are unwilling to relax the requirements of duress solely for battered defendants, but that they are willing to take evidence of its effects into account.

### 3 *Recommendations of the Law Commission*

The Law Commission recommended that s 24 should be replaced by clause 31, as drafted by the Crimes Consultative Committee. The Commission identified that victims of battering relationships may fall short of the requirements of s 24, such as in *Richards*.<sup>195</sup> These defendants may be coerced into the offending without a specific threat, nor the presence of the offender.<sup>196</sup> The Commission argued that the coercive force of the fear inherent in the relationship “is not any less because the abuser is not actually present, if his or her ability to mete out punishment is certain.”<sup>197</sup> Therefore, clause 31 would be more appropriate, as the defendant must believe that the threat can be immediately carried out. This formulation would still provide a defence to those in situations where the lack of physical presence of the threat maker is no assurance of the victim’s safety. The submissions strongly supported the change from s 24 to clause 31.

The Commission also recommended a change to subclause (1) of clause 31, so that it would read:

---

<sup>192</sup> *Coats v R* [2013] EWCA Crim 1472.

<sup>193</sup> *Coats v R*, above n 192, at [51].

<sup>194</sup> *Coats v R*, above n 192, at [58].

<sup>195</sup> Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend*, above n 159, at [164], [167]-[171].

<sup>196</sup> Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend*, above n 159, at [164], [167]-[171].

<sup>197</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 160, at [180].

A person is not criminally responsible for any act done or omitted to be done *under compulsion* of any threat of immediate death or serious bodily harm to the person or any other person from a person who he or she believes *can and will* carry out the threat.

The first change, from “because” to “under compulsion”, was recommended to ensure that the defence is only available where the commission of an offence has been demanded of the defendant.<sup>198</sup> The second change, replacing “is immediately able to” with “can and will” was proposed to expressly state that the defendant must believe not only that the threatener could carry out the threat, but will actually do so.<sup>199</sup> The Commission supported the retention of the “specific threat” requirement.<sup>200</sup> It also rejected the possibility of amending the immediacy requirement to be an “inevitability” requirement, despite a majority of support for this in the submissions. The Commissioners believed it was appropriate to tightly confine the circumstances in which the defence was available, and to expect people to refrain from offending until the danger is immediate.<sup>201</sup>

The Commission also supported a requirement that the threat be “one in which all circumstances, including any of the defendant’s personal circumstances that affect its gravity, the defendant cannot reasonably be expected to resist.”<sup>202</sup> This brings in a qualified objective standard, which is inconsistent with New Zealand’s subjective approach to defences. Furthermore, it is broadly phrased, as it considers “all circumstances”. The subsequent reference to the defendant’s “personal circumstances” is therefore unnecessary, as they are all already included. This change should not be supported. It would cause practical difficulties in application.

#### 4 Conclusion on the Law Commission’s proposals

---

<sup>198</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 160, at [199].

<sup>199</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 160, at [200].

<sup>200</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 160, at [196].

<sup>201</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 160, at [195]-[196].

<sup>202</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 160, at [204].

The Law Commission's support for adopting clause 31 is well founded, for the reasons discussed above. The Commission's refusal to relax the requirements of a specific threat of immediate harm should also be supported. Clause 31 was not drafted with battered defendants in mind, and is not confined to them.<sup>203</sup> They are only one subset of people claiming the defence. The defence should not be distorted to provide solely for battered defendants. To do so would cause biased results.

#### *D Treating the Rationale as the Rule*

An alternative way of framing the defence is to treat the rationale as the rule. The test would therefore be to determine if the circumstances were so coercive that the defendant had no practical alternative to compliance. The Supreme Court recognised that s 24 could be seen as under-inclusive because there are situations that may not meet the criteria, yet would still be highly coercive. The Court explained that if the rationale was to be the rule, and the defence was available where the circumstances were so coercive that the defendant had no other alternative, it would be more likely that the rule would be "just right."<sup>204</sup> This approach would give greater consideration to the defendant's particular state of mind and analyse the extent to which their will was overborne. It would be consistent with the rationale of moral involuntariness, as it would only have reference to the effect on the particular defendant, rather than evaluating their response by objective standards.

This generally expressed test would be the most just approach for defendants, as it would analyse the psychological effect of the threat on their mind. It would be particularly appropriate in cases of ongoing threats and violence, where victims may have developed psychological consequences to the violence, such as post-traumatic stress disorder. In contrast, a defence that hinges on an objective concept, such as the presence of the threatener, may not adequately protect these people. Using the presence requirement to ensure the defendant could not take evasive action does not provide for the state of mind of these defendants, as there is evidence that in some circumstances they may be unable to perceive or act on these opportunities to escape.<sup>205</sup> Instead, a defence that tests the

---

<sup>203</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 160, at [193].

<sup>204</sup> *Akulue v R*, above n 3, at [13].

<sup>205</sup> Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* above n 160, at [5].

effect of the coercion on the mind of the victim would better protect defendants that had been subject to psychological trauma.

To frame the defence with reference to the rationale would address concerns surrounding the strict criteria of immediacy and presence. Those in situations where the harm was not “immediate”, yet there was not sufficient time to take evasive action, may still be able to rely on the defence, thus alleviating Cameron’s first concern with the immediacy requirement.<sup>206</sup> Furthermore, those subject to future threats that cannot be avoided may also rely on the defence, alleviating the second concern.<sup>207</sup>

The difficulty with this approach is that it would sacrifice certainty for flexibility. It would lead to more arbitrary outcomes, as the rule would be left to “evaluative and subjective assessments”.<sup>208</sup> Juries would be asked to determine whether the circumstances are sufficiently coercive so that the defendant had no opportunity to escape. Yet they would have no standard by which to determine what “sufficiently coercive” is. It would likely lead to considerations of sympathy for the particular defendant. Furthermore, a defence that focused on the coercive effect on the mind would be determined heavily by expert evidence, and could result in ‘expert shopping’. This occurred in *Coats*, in which both the prosecution and the defence enlisted an expert witness to assess the defendant’s state of mind. The experts gave conflicting assessments on whether the defendant was affected by battered woman’s syndrome, and whether her judgment was consequently impaired. A defence that asked whether the circumstances were so coercive that the defendant had no choice but to offend would create difficulties in assessing the defendant’s mental state at the time.

A broadly framed defence could lead to an increasing number of claims of compulsion. Furthermore, the defence would not be applied consistently across the board, sacrificing the principle of predictability and consistency. The Law Commission and the courts both support the position that a defence with a clear statutory definition, within strict limits is more appropriate. This is because the success of the defence results in a complete acquittal for wrongful conduct.<sup>209</sup> Retaining the objective standard of immediacy is therefore an appropriate way to confine the defence.

---

<sup>206</sup> Cameron, above n 40, at 76.

<sup>207</sup> Cameron, above n 40, at 76.

<sup>208</sup> *Akulue v R*, above n 3, at [13].

<sup>209</sup> See for example, Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 160, at [195].

### *E The Common Law Approach*

As discussed in Chapter II, the common law takes an objective approach towards the defendant's belief, and a qualified objective approach towards evaluating the defendant's response. Adopting the common law approach in New Zealand would involve a drastic overhaul of the section. The result would be inconsistent with other defences, as generally in New Zealand the defendant is entitled to be judged on the facts as he or she believed them to be. Otherwise, a defence would be unavailable to those people that genuinely believed that a threat could and would immediately be carried out. The effect of the threat on the defendant would be unaffected by its reasonableness. Furthermore, practical difficulties arise in determining if the defendant's reaction was reasonable in the circumstances.<sup>210</sup> Therefore, the common law test should not be adopted in New Zealand.

### *F Mitigation of Sentence*

Where the circumstances fall short of fulfilling the requirements of compulsion, yet there is still evidence that the defendant's state of mind was affected by another person's threats, a concession to the defendant can be made by mitigation of sentence. Lord Bingham in *Hasan* stated "in circumstances where the strict requirements of duress were not satisfied, it is always open to the sentencing judge to adjust his sentence to reflect his assessment of the defendant's true culpability."<sup>211</sup>

There has also been some historical support for abolishing the defence altogether, and relegating compulsion to a sentencing matter. Sir James Fitzjames Stephen, one of the Commissioners of the English Draft Code believed that compulsion should only be addressed at sentencing. He believed it should not operate as a complete defence, because it would undermine the law's object of deterrence.<sup>212</sup> He thought that if the law did not maintain its threat of punishment even when human threats cause an extreme temptation to offend, it would encourage criminal associations and the fabrication of defences.<sup>213</sup> Lord Simon also objected to the existence of the defence, because the basis of

---

<sup>210</sup> See Chapter II for the discussion of practical difficulties that arise with an objective test.

<sup>211</sup> At [22].

<sup>212</sup> J F Stephen *History of the Criminal Law of England* (Macmillan and Co, London, 1883) vol 2 at 106-108, as cited in Orchard, above n 35, at 119.

<sup>213</sup> Stephen, above n 212, as cited in Orchard, above n 35, at 119.



compulsion is the motives leading to the offending: fear and a desire to avoid harm. The defence of compulsion creates an exception to the rule that motive is irrelevant to criminal responsibility. He believed that these motives could be dealt with in sentencing.<sup>214</sup>

The difficulty with addressing compulsion during sentencing is that there are not sufficient controls at this level to ensure that the coercive nature of the threat will be adequately recognised. Some offences are subject to sentencing guidelines, which may limit the judge's discretion to take compulsion into account. For other offences, sentencing judges have a very wide discretion, resulting in inconsistent outcomes across the board. Furthermore, evidence that would be uncovered in a full trial is unlikely to be raised at sentencing level because of practical constraints. This may result in defendants being unable to show the complete circumstances of their offending. Orchard also notes that at sentencing level, the burden of proof may shift to the defendant to show that he or she was subject to coercion, rather than just raising an evidential foundation.<sup>215</sup> This approach does not provide adequate protection to the defendant. Lastly, the defendant will remain subject to a conviction and the consequences for his or her reputation. Addressing compulsion at sentencing is therefore problematic.<sup>216</sup>

Furthermore, there are still compelling reasons for retaining the defence as a complete excuse. An underlying principle of the criminal law is that only culpable offending should be punished. Therefore it is unjust to convict and punish those whose will was truly overborne by a compelling threat, as their conduct was out of their true control, and not blameworthy. Additionally, an identified purpose of sentencing is deterrence.<sup>217</sup> This purpose is not achieved when punishing someone who offended under compulsion, as

---

<sup>214</sup> *DPP for Northern Ireland v Lynch*, above n 51, at 686.

<sup>215</sup> At 119.

<sup>216</sup> The partial defence of provocation was repealed in 2009 and relegated to sentencing level. Defendants continue to try to argue the defence at this level, however it is constrained by sentencing considerations. *Hamidzadeh v R* [2012] NZCA 550 provides a guideline of how provocation should now be approached at sentencing level. Provocation was only ever a partial defence to murder, and sentencing for murder is specified in Sentencing Act 2002, ss 102-104. These sections now strictly confine the relevance of provocation. Consequently, it will often be unable to play a role, as it will not displace the presumption of life sentence in s 102 on the grounds of manifest injustice other than in exceptional circumstances. See the discussion in *Hamidzadeh*, at [72]. These problems would also arise for compulsion if it was to be dealt with at sentencing, as it would no longer be subject to excluded offences.

<sup>217</sup> Sentencing Act 2002, s 7(f).

most people would prefer to avoid the immediate threat of death or grievous bodily harm and instead take the chance of what punishment will be given.<sup>218</sup>

### *G Recommendations for Reform*

The defence should be maintained as a complete excuse, but it requires reform. Clause 31 as drafted by the Crimes Consultative Committee should replace the existing s 24. This change removes the presence requirement, thereby minimising the risk of a deserving situation being excluded from the defence due to modern technology. It also removes the confusion surrounding the presence requirement, and the need for the courts to construe the language as anything other than presence with the defendant. Immediacy should be retained in line with Clause 31, as it is an important practical constraint, preventing the defence from becoming too broad. This balance is reflected by putting clause 31 to the test against previous and hypothetical cases of compulsion.

#### *1 Akulue*

The Supreme Court rejected the appellant's application on the grounds that the threats made did not have an immediate character, and that the threat maker was not present with the appellant. If this case was heard under the alternative defence of clause 31, the application would again be rejected. The threat was not of immediate death or grievous bodily harm, as there was no possible way that the threat against Akulue's family could be immediately carried out. There was no evidence to show that Zuby (the threat maker) had any immediate way of knowing if Akulue had not complied with his instructions.

This reflects that under clause 31 the defence would still be sufficiently confined to prevent spurious claims being upheld. Akulue's predicament was not one in which he had no options, nor had his will been overborne. He may have been extremely concerned about his family in Nigeria, but it would be clear to him that they were not in any immediate danger, as he provided no evidence that Zuby was in a position to immediately carry out the threat. This is an appropriate outcome. Had the language of the section been sufficiently broad as to allow Akulue a defence, the floodgates would be open to claims from defendants in a wide variety of situations. It is important to remember that many pressures can cause someone to commit a crime, and that the defence should not be

---

<sup>218</sup> See generally the majority speeches in *DPP for Northern Ireland v Lynch*, above n 51.

framed in such a way as to allow any defendant to try and frame the pressure that he or she was under as compulsion.

## 2 *Neho*

In *Neho*, the appellant offended whilst accompanied by prospective gang members. One prospective gang member was inside the store with her, and the other waited outside. Her claim to a defence of compulsion failed under s 24, as the Court of Appeal held that first, the prospective gang members were not sufficiently proximate to the appellant to establish the presence requirement. The Court also noted that the threat would not be able to be carried out “immediately”, as a physical assault was not likely to occur in the store, or even in the car park. Nor had any evidence been presented that the appellant would be immediately taken to another location where an assault would be committed. The final factor precluding the defence was that the offending occurred on repeated occasions over three months. This meant that notifying the police was a reasonably available option to the appellant.

Had the same facts been presented to support a defence under clause 31, the defence would again be rejected. Even if evidence did establish that had the defendant refused, she would be immediately taken to another location and assaulted; the defence would fail because the offending occurred over three months. The appellant had all reasonable opportunity to take evasive action, and so the threat did not have an “immediate” character.

## 3 *Hypothetical scenario 1*

An alternative scenario to *Akulue*, is if evidence was presented that Zuby (the threatener) was with the appellant’s family when the offending occurred. The defence would still fail under both s 24 and clause 31. The threat would remain unable to be immediately carried out, as Zuby would have no way of knowing if Akulue had complied with his instructions or otherwise.

## 4 *Hypothetical scenario 2*

A slightly different scenario is if Zuby had a contact, or a technological device to notify him of Akulue's whereabouts. If Akulue had been demanded to pick up the drugs at a specific time, and Zuby was in direct contact with the courier who was to pass the drugs to Akulue, Zuby may be able to immediately carry out the threat on Akulue's family. Yet a defence under s 24 would remain unavailable. Akulue would still be unable to satisfy the presence requirement, on the strict reading that it has been given.

However, he may have a defence under clause 31. Akulue would not need to be accompanied by an agent of the threat maker, as long as there were means by which the threat could be immediately carried out. If Akulue believed that Zuby was in contact with the courier, and that if he did not arrive on time to pick up the drugs, his family would be killed, he may be able to satisfy the requirements under clause 31. This would seem in accordance with justice, provided that the time between the making of the threat, and the offending was sufficiently short as to prevent Akulue from being able to take evasive action, such as informing the authorities. For example, if the threat had been made two weeks prior to the offending, a defence should not, and would not be available as, similar to *Neho*, there was a reasonable opportunity for him to take evasive action.

### 5 *Hypothetical scenario 3*

An example reflecting how technology challenges the defence is the defendant who offended with a bomb attached to him or her. The threatener is watching the location of their offending on CCTV, and can remotely detonate the bomb. The threat maker is not present with the offender, but can carry out the threat the moment the defendant indicates they may refuse to offend. The threat remains coercive as it can be immediately carried out. This scenario seems far-fetched, but technology is advancing rapidly and becoming widely available. The threat is no less coercive than if the threat maker was standing right next to them. Under s 24, the defendant would remain criminally liable. However, under clause 31, the defendant would be protected, as the threat could be immediately carried out. Scenarios such as these are increasingly possible with the spread of technology, and the ability for others to monitor people's actions. The legislature needs to frame the defence in order to keep up with these societal changes.

## 6 *Summary*

The proposed scenarios reflect that the defence is still adequately confined when the presence requirement is removed. The defence remains unavailable to those in situations analogous to Akulue's. However, the scenarios that draw on the challenges that technology presents to the defence, such as scenario 5, show that the presence requirement was enacted in a different time, and is overly restrictive under modern conditions. The retention of the immediacy requirement ensures that the defence of compulsion is only available to those who did not have any other practical option to committing the offence. Furthermore, the resulting test is straightforward to apply, and does not ask the jury to determine what response was 'reasonable' in the circumstances.

## *Conclusion*

Constructing the defence of compulsion to protect those truly affected by a coercive threat, whilst excluding defendants who were able to avoid the threat is an uphill battle. There is no perfect solution. To define the defence in terms of the rationale itself may achieve the most just outcomes, but would sacrifice consistency and predictability. On the other hand, a defence defined by clear and strict limits would sacrifice flexibility, and could exclude defendants in deserving, although atypical situations. The balance must be struck to achieve both principle and practicality.

New Zealand's current defence of compulsion no longer achieves the balance. The requirements of the defence are too precise, and do not adequately deal with modern challenges. The case of *Akulue* highlights one potential problem area for compulsion. Although it does not provide an entirely convincing factual scenario, it raises the issue of when the defendant is physically separated from the victim of the threat. Other modern challenges include the use of technology to make good on the threat.

Both the common law and the Canadian approach also fail to strike the correct balance. The common law approach is flawed, as it does not judge the defendant on the facts as he or she perceives them. This approach should not be taken in New Zealand as it would be inconsistent with other statutory defences, and presents practical difficulties in determining who the 'reasonable' person is. The Canadian approach, following *Ruzic*, is too broad. A defendant is judged on the facts as he or she believed them to be, and in line with the common law, the defence is unavailable if there was no evasive action the defendant could reasonably take. This approach should not be adopted in New Zealand, as it would result in the opening of floodgates to undeserving defendants.

The most practical and principled option is to reform s 24 in line with the draft clause 31 proposed by the Crimes Consultative Committee. This would remove the presence element, but retain the requirement that the threat be immediate. The presence requirement is impractical to apply, and excessively restricts the defence. This problem has been exacerbated with the advancements in modern technology. The removal of the presence requirement would shift the New Zealand approach back into balance. The retention of the immediacy requirement ensures the defence does not become too widely available.

Reforming the defence in this way will not achieve perfection, as anomalies will continue to exist. Yet to treat the rationale as the rule would compromise practicality, and leave the application of the defence down to subjective considerations. Furthermore, in anomalous cases, if the defence was unsuccessful at trial, the evidence that the defendant was influenced by a threat may be cause to mitigate the sentence. To approach the defence in this way will most often achieve justice for the individual, whilst recognising the needs of society to have offenders held to account.

## Bibliography

### *Cases*

#### **New Zealand**

*Akulue v R* [2013] NZSC 88.

*Hamidzadeh v R* [2012] NZCA 550.

*Kapi v Ministry of Transport* (1991) 8 CRNZ 49 (CA).

*Leason v Attorney-General* [2013] NZCA 509.

*Mash v Police* [2014] NZHC 1223.

*R v Akulue* [2013] NZCA 84.

*R v Hetherington* CA426/03 29 June 2004.

*R v Howard* CA315/99, 2 December 1999.

*R v Hutchinson* [2004] NZAR 303 (CA).

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

*R v Lamont* CA442/91, 27 April 1992.

*R v Neho* [2009] NZCA 299.

*R v Raroa* [1987] 2 NZLR 486.

*R v Richards* CA272/98, 15 October 1998.

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



*R v Thompson* CA435/03 19 May 2004.

*R v Witika* [1993] 2 NZLR 424.

*R v Woolnough* [1977] 2 NZLR 508 (CA).

*Rihari v Department of Social Welfare* (1991) 7 CRNZ 586 (HC).

*Salaca v R* [1967] NZLR 421 (CA).

### **Australia**

*Goddard v Osborne* (1978) 18 SASR 481 FC.

*R v Dawson* [1978] VR 536 (12 May 1978).

### **Canada**

*Paquette v R* [1977] 2 SCR 189.

*Perka v R* [1984] 2 SCR 232.

*R v Hibbert* [1995] 2 SCR 973.

*R v Ruzic* [2001] 1 SCR 687.

*R v Ryan* [2013] 1 SCR 14.

### **England and Wales**

*Coats v R* [2013] EWCA Crim 1472.

*DPP for Northern Ireland v Lynch* [1975] AC 653.

*DPP v Morgan* [1975] UKHL 3.

*Elliott v C* [1983] 1 WLR 939.

*Mullally v DPP* [2006] EWHC 3448 (Admin).

*R v Abdul-Hussain* [1999] Crim LR 570.

*R v Antar* [2004] EWCA Crim 2708.

*R v Bowen* [1996] 2 Cr App R 157.

*R v Caldwell* [1982] AC 341.

*R v Dudley* (1884) 14 QBD 273 (QB).

*R v G* [2003] UKHL 50.

*R v Graham* [1982] 1 All ER 801.

*R v Hasan* [2005] UKHL 22.

*R v Hegarty* [1994] Crim LR 353.

*R v Howe* [1987] AC 417.

*R v Hudson* [1971] 2 QB 202.

*R v Lawrence* [1982] AC 510.

*R v Martin* [2000] 2 Cr App R 42.

*R v Masih* [1986] Crim LR 395.

*R v Safi* [2004] 1 Cr App R 14.

## ***Legislation***

### **New Zealand**

Crimes Act 1961.

Domestic Violence Act 1995.

New Zealand Bill of Rights Act 1990.

Sentencing Act 2002.

### **International**

Criminal Code, RSC 1985, c C-46 (CAN).

The Constitution Act 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (CAN).

## ***Bills***

Crimes Bill 1989 (152-1).

## ***Books***

Ashworth, Andrew *Principles of Criminal Law* (5<sup>th</sup> ed, Oxford University Press, Oxford, 2006).

Brookbanks, Warren J. *The Defence of Compulsion: An Overview* (Legal Research Foundation Inc, Auckland, 1981).

Fletcher, GP *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978).

Ormerod, David *Smith and Hogan: Criminal Law* (12<sup>th</sup> ed, Oxford University Press, Oxford, 2008).

Simester, AP, and Brookbanks, WJ *Principles of Criminal Law* (4<sup>th</sup> ed, Brookers, Wellington, 2012).

Simester, AP and others *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4<sup>th</sup> ed, Hart Publishing, Oxford, 2010).

Stephen, J F *History of the Criminal Law of England* (Macmillan and Co, London, 1883) vol 2.

Stuart, Don *Canadian Criminal Law: A treatise* (4<sup>th</sup> ed, Carswell, Ontario, 2001).

### ***Essays in edited books***

Brookbanks, Warren “Compulsion and self-defence” in Neil Cameron and Simon France (eds) *Essays on Criminal Law in New Zealand: Towards Reform?* (Victoria University of Wellington Law Review in conjunction with Victoria University Press, Wellington, 1990) 95.

Cameron, Neil “Defences and the Crimes Bill” in Neil Cameron and Simon France (eds) *Essays on Criminal Law in New Zealand: Towards Reform?* (Victoria University of Wellington Law Review in conjunction with Victoria University Press, Wellington, 1990) 57.

Dawkins, Kevin “The Defence of Duress of Circumstances in New Zealand” in J. Bruce Robertston (ed) *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (Brookers, Wellington, 2004) 96.

Palmer, GWR “The Reform of the Crimes Act 1961” in Neil Cameron and Simon France (eds) *Essays on Criminal Law in New Zealand: Towards Reform?* (Victoria University of Wellington Law Review in conjunction with Victoria University Press, Wellington, 1990) 9.

### ***Journal Articles***

Ashworth, Andrew and Rees, Tom “Duress: belief in imminent threat of death or serious injury” [2003] Crim LR 721.

Coughlan, Stephen G "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2002) 7 Can Crim LR 147.

Dawkins, Kevin and Briggs, Margaret “Criminal Law” [2001] NZ Law Rev 317.

Elliott, DW "Necessity, Duress and Self-defence" [1989] Crim LR 611.

Orchard, Gerald “The defence of compulsion” (1980) 9 NZULR 105.

Paciocco, D M "No-one Wants to Be Eaten: The Logic and Experience of the Law of Necessity and Duress" (2010) 56 Crim LQ 240.

Smith, KJM “Must Heroes Behave Heroically?” [1989] Crim LR 622.

Wilson, William "The Structure of Criminal Defences" [2005] Crim LR 108.

### ***Government Publications***

(2 May 1989) 497 NZPD.

### ***Reports***

#### **New Zealand**

Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (Department of Justice, Wellington, 1991).

Family Violence Death Review Committee 2014 *Fourth Annual Report: Jan 2013 to Dec 2013* (Health Quality and Safety Commission, Wellington, June 2014).

Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000).

Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001).

### **International**

Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (George Edward Eyre and William Spottiswoode, London, 1879).

Law Commission for England and Wales *A Draft Criminal Code for England and Wales* (Law Com. No. 177, 1989).

Law Commission for England and Wales (No. 218), *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com. No. 218, 1993).

### ***Submissions***

Elizabeth, Dr V “Submission to the Law Commission on *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000)”.

### ***Online Looseleaf***

Bruce Robertson (ed) *Adams on Criminal Law — Offences and Defences* (online looseleaf ed, Brookers).