INAUGURAL PROFESSORIAL ADDRESS

Thinking differently in order to see accurately: Explaining why we are convicting women we might otherwise be burying

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Whakataka te hau ki te uru
Whakataka te hau ki te tonga
Kia mākinakina ki uta
Kia mātaratara ki tai
E hī ake ana te atakura
He tio
He huka
He hau hū
Tīhei mauri ora!
Ko te mihi tuatahi ki te atua.
Kia Ann Tolmie, Gaius Tolmie, Uiki Elia, Jim Vivieaere ratou ko Terry Firkin, moe mai ra ki roto i te ringa tapu o te atua.
Hoki mai kia tatou nga kanohi ora, tena tatou katoa.
Ki te whare e tu nei, ki te papa e takoto mai ra, tena korua.
No reira, tena koutou, tena koutou, tena koutou katoa.[1]

I want to start by thanking everyone for taking time out of their busy lives to be here tonight. Some of you, I know, have travelled to be here and I am incredibly honoured by your presence. I want to thank my beautiful family, my talented students and colleagues, particularly members of the Family Violence Death Review Committee (FVDRC) who are here tonight and on whose work my talk tonight is largely based.[2] It is egregious to name names

* Professor, Faculty of Law, University of Auckland. This is a transcription (with minor edits) of Julia Tolmie's inaugural professorial address, delivered in June 2019. A recording can be found on the website of the Faculty of Law, the University of Auckland: <www.auckland.ac.nz>.

1 Mihi by Maukau Firkin.

2 It has most immediately arisen out of work conducted with Associate Professor Stella Tarrant, the University of Western Australia, and George Guidice, Barrister: Stella Tarrant, Julia Tolmie and George Guidice *Transforming Legal Understandings of Intimate Partner Violence* (Australia's National

when I have worked with so many brilliant people over the course of three decades, but I do particularly want to mention Rachel Smith, previously from the FVDRC, Elizabeth Sheehy from the University of Ottawa, Julie Stubbs from the University of New South Wales, and Nicola Gavey and Vivienne Elizabeth from the University of Auckland as people I have been particularly inspired and extended by. And I want to thank my colleagues Associate Professors Khylee Quince and Scott Optican for their generosity on my behalf tonight — I am incredibly proud of my association with each of them.

Tonight I am returning to a subject that I wrote my first academic piece on many years ago as a young lecturer at the University of Sydney.[3] It was not then, but it is now widely acknowledged that the criminal defences are not well adapted to the kinds of circumstances that victims of intimate partner violence (IPV) find themselves in.[4] There have been law reforms in most Australian jurisdictions to try and address that issue[5] and the New Zealand Law Commission has also recommended reforms.[6]

But my thinking on this subject has changed since I wrote that book chapter all those years ago. At that time I naively thought that if the law was operating unjustly then we should change the law. But I do not think that anymore. I now think the problem is in how we think about the facts that we apply the law to.[7]

So what I am going to do in this talk is describe and contrast two different models for understanding facts involving IPV. These are the "bad relationship with incidents of violence" model and the "social entrapment" model.[8] I am going to use a recent murder trial that took place in Western Australia (*The*

Research Organisation for Women's Safety, Research Report 03/2019, June 2019).

3 Julia Tolmie "Provocation or Self-defence for Battered Women Who Kill?" in Stanley Yeo (ed) *Partial Excuses to Murder* (Federation Press, Sydney, 1991) 61 at 61–79.

4 See also Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004) at 60–92; and Tasmanian Law Reform Institute *Review of the Law Relating to Self-Defence* (TLRI R20, 2015) at 54–71.

5 See Crimes Act 1958 (Vic), ss 322J–K; Criminal Code Act Compilation Act 1913 (WA), s 248(4); Criminal Code Act 1899 (Qld), s 304B; and *R v Runjanjic* (1991) 56 SASR 114.

6 New Zealand Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016).

7 For a discussion of this process in relation to sexual violence see Julia Quilter "Reframing the Rape Trial: Insights from Critical Theory About the Limitations of Law Reform" (2011) 35 Australian Feminist Law Journal 23.

8 See Julia Tolmie, Rachel Smith, Jacqueline Short, Denise Wilson and Julie Sach "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" [2018] 2 NZ L Rev 181.

State of Western Australia v Liyanage)[9] to show how using a social entrapment paradigm to understand the facts allows us to see a larger and more accurate picture of facts involving IPV.

In doing so I am going to focus on how the law of self-defence operates in relation to women who have been abused and who use lethal force against the person abusing them. For those who are not lawyers in the room, self-defence provides a complete acquittal in respect of a person's use of violence. Basically we (in other words, society) say that if someone is attacking you and you are cornered then you are justified in fighting back to protect yourself. You are not obliged to simply allow yourself to be hurt or killed.

Now of course intimate partner homicides where women who have been abused by their partner kill him are relatively rare. Where women are being abused by their partners they are almost three times more likely to be killed by him as they are to kill him.[10] Hence the title of this talk — when there is an intimate partner homicide most women are being buried, they have not survived in order to be tried in a court of law.[11]

I THE "BAD RELATIONSHIP WITH INCIDENTS OF VIOLENCE" PARADIGM

So what is the main paradigm that we use in the criminal justice system to think about IPV and to understand facts involving IPV? This is what I would call a "bad relationship with incidents of violence" paradigm. I would suggest that it is the theory people use to understand IPV when they are not aware that they are using a theory. They think they are using common sense. It is an amalgam of two things that we do know about or think we know about: dysfunctional adult relationships and crimes of interpersonal violence (which are generally defined as acts of physical violence).

This paradigm has the following features:

i) The parties are in a dysfunctional relationship and both have to take some responsibility for that.

9 *The State of Western Australia v Liyanage* [2016] WASC 12; and *Liyanage v Western Australia* [2017] WASCA 112, 51 WAR 359 [*Liyanage*].

10 Family Violence Death Review Committee [FVDRC] *Fifth Report Data: January 2009 to December 2015* (Health Quality & Safety Commission New Zealand, June 2017) at 27–60.

11 This is a misquote of Elizabeth A Sheehy *Defending Battered Women on Trial: Lessons from the Transcripts* (UBC Press, Vancouver, 2014) at 241.

ii) One party (sometimes both) has engaged in acts of physical violence.

iii) In between those acts the victim is not being abused.

iv) The victim has a number of effective safety options — they could get a protection order, leave the relationship or call the police.

v) The victim is free to exercise these safety options when they are not being abused.

vi) The victim has chosen not to seek safety and instead to tolerate the abuse because they love their partner.

A Why is it a problem to think this way?

Every time we apply the criminal law we have to judge the accused's actions in the context of their circumstances. And that is because behaviour (such as the use of violence) which is unacceptable in most circumstances may be appropriate in some. It follows that if the paradigm we use to understand circumstances involving IPV is wrong then that will affect the criminal justice response to both people using violence and victims of that violence. I would suggest that a "bad relationship with incidents of violence" paradigm is producing a number of injustices in our criminal justice system currently. Some of these include the following:

i) Victims of IPV do not commonly access self-defence even when acting defensively toward the person who is abusing them.[12]

ii) Victims of IPV rarely access the defences of duress and necessity even when under compulsion from their violent partner.[13]

iii) Victims of IPV are convicted for failing to meet their children's needs when their ability to do so is affected by their own experiences of IPV.[14]

12 See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?" (2012) 45(3) Australian & New Zealand Journal of Criminology 383 at 388.

13 See Shevan (Jennifer) Nouri "Critiquing the Defence of Compulsion as it Applies to Battered Defendants" (2015) 21 Auckland U L Rev.

14 See *R v DK* [2015] NZHC 2137; and Julia Tolmie, Fleur Te Aho and Katherine Doolin with Sylvie Arnerich and Natanahira Herewini "Criminalising Parental Failures to Act: Documenting Bias in the Criminal Justice System" [2019] NZWLJ 136.

iv) A predominant aggressor's use of violence against a victim can be misread.[15]

v) We are sentencing offending by people using violence and offending by victims of violence as though their culpability is broadly similar.[16]

vi) Victim safety is not a mandatory and prioritised sentencing consideration when sentencing IPV offenders.[17]

Of course, these are bold claims which some might dispute, and I do not have time to defend my position on all of them tonight. I am focusing on the first — but I do want you to understand that the point I am making here has broader ramifications.

B A "bad relationship with incidents of violence" and self-defence

The test for self-defence in New Zealand is contained in s 48 of the Crimes Act 1961 and is a fairly generous legal test. Section 48 provides:

> Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

Every legal jurisdiction formulates the test slightly differently but, however you formulate the legal test, the underlying normative judgement is the same. The question you are asking is whether what the defendant did was reasonable in self-defence in these circumstances. And, in answering that question, there are two crucial factual issues:

i) what was the nature of the threat that she faced?; and

ii) what other means did she have to deal with that threat?

If you use a "bad relationship with incidents of violence" paradigm to understand the IPV that a victim is responding to, then you cannot understand

15 See *R v Bevan* [2012] NZHC 2969.

16 Contrast *R v Bevan* above and *R v Paton* [2013] NZHC 21; see also *R v DK*, above n 14; and *M (SC 31/2016) v R* [2016] NZSC 72.

17 Julia Tolmie "Considering Victim Safety When Sentencing Intimate Partner Violence Offenders" in Kate Fitz-Gibbon, Sandra Walklate, JaneMaree Maher and Jude McCulloch (eds) *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, London, 2018) at 199–215.

her defensive actions as being reasonable unless she is being or about to be physically attacked at the time she uses defensive force. And the reason why is that unless she is under attack the paradigm presupposes that she has effective safety options that she can choose to exercise.

This means that women who are victims of IPV can only argue self-defence if they have taken their violent male partner on in hand-to-hand combat. This is what Justice Bertha Wilson in the Supreme Court of Canada said 29 years ago was tantamount to sentencing abused women to "murder by instalment".[18]

But even if a woman attempts to defend herself when she is under attack, if you are using this paradigm to understand her circumstances then it is really difficult not to see her as partially responsible for choosing to allow things to get to that point. In other words, holding her partially responsible for choosing not to exercise her effective safety options before she is attacked.

What we have been doing for the last few decades is introducing expert psychological or psychiatric testimony on battered woman syndrome (BWS) in support of victims' self-defence cases.[19] We initially started introducing this testimony in order to challenge the idea that it was necessarily reasonable to expect women who are victims of serious IPV to leave the relationship. The BWS paradigm has the following features:

i) The violence has three stages that it cycles through: the tension building stage; the acute battering incident (physical violence); and then the loving/contrite stage (what some people call the "honeymoon stage", where the predominant aggressor apologises and promises it is not going to happen again).[20]

ii) Having survived the abuse through several cycles the victim develops trauma. Some people say she develops "learned helplessness", others say the trauma causes the victim to "psychologically bond" with the abuser or that she has a "trauma bonding".[21] In all cases these are ways

18 *R v Lavallee* [1990] 1 SCR 852 at 883.

19 See Elizabeth Schneider *Battered Women and Feminist Lawmaking* (Yale University Press, New Haven, 2000) at 112.

20 Lenore Walker *Terrifying Love: Why Battered Women Kill and How Society Responds* (Harper & Row, New York, 1989) at 42–45.

21 Don Dutton and Susan Lee Painter "Traumatic Bonding: the development of emotional attachments in battered women and other relationships in intermittent abuse" (1981) 6 Victimology: An International Journal at 139; and Dee LR Graham and Edna I Rawlings "Bonding with abusive dating partners: Dynamics of Stockholm Syndrome" in Barrie Levy (ed) *Dating violence: young women in danger* (Seal Press, Seattle, 1991) at 119.

> of understanding how her response to the trauma means that she becomes unable to leave him despite the abuse.

When you think about it, this paradigm is basically a "bad relationship with incidents of violence" paradigm with the victim's mental health issues added in. This approach still involves understanding the abuse in terms of the incidents of physical violence in between which the victim has effective safety options that she illogically chooses not to exercise but only because she has developed mental health issues as a result of being abused.

It follows that the key difference between a "bad relationship with incidents of violence" paradigm and a BWS framework is that the BWS framework excuses rather than blames the victim for failing to exercise her safety options in response to the abuse. In other words, a jury that relies on this testimony would be unlikely to acquit her on the basis that she acted in reasonable self-defence but it might want to excuse her or ameliorate the criminal justice consequences of her actions in recognition of her mental health issues. The result of such evidence is that if she is charged with murder she is likely to be convicted of manslaughter instead. And that is what happens in the overwhelming majority of these cases. It is still happening in New Zealand despite the fact that we have abolished all our partial defences to murder.[22]

So what is my point here? My point is that if we use these theories to frame the facts of these cases then they automatically provide readings of those facts that pre-package the victim's actions as unreasonable defensive force.

They do so despite the fact that neither paradigm has support in the recent research into the nature of IPV, certainly in respect of those cases that escalate to intimate partner homicide.[23]

And they do so despite the fact that when we apply the law on self-defence we are supposed to be judging the circumstances that the defendant was in from how things looked to her at the time. In some jurisdictions, like Western Australia, a defendant has to have reasonable grounds for her beliefs about

22 Julia Tolmie "Defending Battered Defendants on Homicide Charges in New Zealand: The Impact of Abolishing the Partial Defences to Murder" [2015] NZ L Rev 649.

23 For a critique of battered woman syndrome see: Ian Leader-Elliott "Battered but not Beaten: Women who Kill in Self-Defence" (1993) 15(4) Syd LR 403; Isabella Lin-Roark, A Church and Laurie McCubbin "Battered Women's Evaluations of their Intimate Partners as a Possible Mediator Between Abuse and Self-Esteem" (2015) 30 J Fam Viol 201; and Paige Sweet "'Every bone of my body': Domestic violence and the diagnostic body" (2014) 122 Social Science & Medicine 44 at 46. A "bad relationship with incidents of violence paradigm" is not critiqued in the research literature, it simply does not feature as a theory of IPV in this literature: see Appendix One of Tarrant, Tolmie and Guidice, above n 2.

her circumstances.[24] In New Zealand the question is simply what the victim honestly thought about the nature of the threat she was facing and her options for dealing with it.[25]

And finally, it is up to the prosecution to disprove self-defence beyond reasonable doubt. It is not up to the defendant to prove that she was acting reasonably — it is up to the prosecution to prove beyond reasonable doubt that she was acting unreasonably.[26] In other words, if there is any plausible case for self-defence then the defendant is entitled to the benefit of the defence. It is not up to her to prove self-defence because she is assumed to be innocent until the prosecution proves she is guilty. This is basic Criminal Law 101.

C Here is a story to illustrate what we are doing wrong, how we can do it better, and why it matters

I am going to turn now to look at *The State of Western Australia v Liyanage (Liyanage)*[27] to illustrate what I mean. In this case in June 2014 Dr Chamari Liyanage used a heavy object to inflict several blows on her husband, Dinendra Athukorala, whilst he was lying in their bed. Those blows killed him and she was charged with his murder. The jury rejected her self-defence case and she was convicted of manslaughter and sentenced to four years in prison.

Why use *Liyanage* as a test case? Aside from the fact that the case is fairly typical in the seriousness of violence, the abuse strategies, the stories told in the criminal justice process about the facts and the outcome, it has the advantage for me in talking to a New Zealand audience that I cannot be taken to be critical of any particular professional either in the room or known to people in the room. And that is a good thing because my point is not about individual professionals getting it wrong. My point is about the paradigms of thought that we are all inculcated in and have to challenge in ourselves.

I do not have time tonight to run you through the stories told about the facts by all of the professionals in the case. They are all variations of a "bad relationship with incidents of violence" or BWS paradigm. I am going to focus on the case as presented by the prosecution.

24 Criminal Code Act Compilation Act (WA), s 248(4).

25 Crimes Act 1961, s 48.

26 *Woolmington v DPP* [1935] AC 462; and Andrew P Simester and Warren Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at 45–53.

27 *Liyanage*, above n 9.

The story of the abuse and the offending, as narrated by the prosecution, is as follows:

i) The marriage between Chamari and Dinendra was "unhappy".[28]

ii) There were some acts of violence by Dinendra (although perhaps Chamari had exaggerated these).[29]

iii) There had not been any physical violence for at least two weeks prior to the killing because Dinendra "was getting his own way". This meant "the physical levels of violence weren't escalating at all".[30]

iv) If Chamari was afraid of Dinendra she had "other options". She could have left him or called the police.[31]

v) Instead she chose to stay with him and return to him — in other words, to tolerate the abuse — because she loved him.[32]

vi) Having told that story about the facts, the prosecution had to explain why Chamari used force against Dinendra. The explanation was that she killed him because of frustration and jealousy because he was going to leave her to "pursue a relationship" with a 17-year-old.[33] That is a story made familiar to us because it is a scenario that we see in homicides involving men who are using violence against their female partners and whom they end up killing.[34]

If you think you have recognised a "bad relationship with incidents of violence" analysis then you are right.

I want to say a bit more about the two central factual issues: what was the nature of the threat she faced and what means did she have to address it?

1 Chamari exaggerated the physical violence

One of the things that should be apparent is that when you use "a bad relationship with incidents of violence" paradigm it limits a consideration of the nature of the threat that the victim was facing to any acts of physical

28 *The State of Western Australia v Liyanage* Transcript SC/CRI/GN/INS 27/2015, 1 February 2016 at 226–227; 231; 234; 1130; 1139; 1334 and 1352 [*Liyanage* Transcript].

29 At 1353–1354 and 1357.

30 At 1357–1358.

31 At 231; 1353–1354 and 1361–1362.

32 At 1086; 1102–1104; 1109–1110 and 1120.

33 At 227–228; 233; 1077; 1084; 1102; 1120–1122 and 1358.

34 FVDRC, above n 10, at 37–38 and 44–51.

violence and only for so long as they are actually happening. What this means is that if, for example, Chamari is complying with her husband's demands in order to avoid being attacked, then on this analysis she is not being abused in that moment.

But there is something else that happened in this case that I think is also very interesting. As well as confining the nature of the threat to the physical abuse that she experienced, the prosecution also suggested that Chamari was exaggerating the physical violence. The prosecutor did this by saying that the evidence Chamari provided about the violence in the relationship was "scant" and "lacked detail".[35]

What is interesting about that is that one of the unusual features of this case is that Chamari gave very detailed evidence about Dinendra's sexual abuse. This is generally a very hidden part of IPV. We do not often hear about it because it is extremely traumatic and deeply shameful.

Chamari described being used as an exchange commodity on the internet as a swap for pornography that Dinendra wanted to access[36] — this meant that he would rape her on camera in front of complete strangers.[37] She also described being raped whilst being forced to watch videos of women and children being violated, and being hit on the breasts and arms and legs if she tried to turn her face away.[38] She described being anally raped as "punishment".[39] She described this as "sexual torture":[40]

> … it is one of the most unpleasant things in my life … because I did not wanted to look at people having sex with children ... I don't have any interest in sex any more, when I hear ... girls crying and screaming.[41]
>
> So I really couldn't actively participate in sexual acts. So he would get very angry and very very sexually abusive. He would be very powerful and forceful and its gets really really painful ...[42]

35 *Liyanage* Transcript, above n 28, at 1353–1354 and 1357.
36 At 950.
37 At 951–952.
38 At 976 and 1017.
39 At 976.
40 At 976; 1024 and 1115.
41 At 976.
42 At 1116.

> … he would really punish me by having anal sex, … it was very painful and I really, really hate that. …[43]
>
> It became kind of a nightmare ... I just did whatever he wanted to do ... because I just wanted to get it done and over with.[44]

I do not mean to conflate consent with sexual arousal, but I do want to make the point that through the process of sexual arousal, women's bodies physically prepare for penetrative vaginal sexual intercourse as much as men's do. Which means that forcible vaginal penetration without arousal is not "sex" in the absence of a kind of contractual consent. It is an assault on a very sensitive part of the body.

But let us look at the prosecution's account of what occurred:

i) She "engaged" in "sexual practices" that were "unusual" and which "she did not like". She "went along" because she "wanted to keep her marriage together".[45]

ii) Dinendra "clearly had sexual interests that ran contrary to her values. But she was prepared to put up with ... those actions, because of this bonding".[46]

iii) "… sexual intercourse occurred and Dr Liyanage wasn't happy about that or hadn't — may not have consented".[47]

When you look at his languaging the impression that you get is that this is more in the nature of "bad sex" rather than violence. At worst, it is sex minus some kind of contractual consent but still essentially sex. And I think that is why the prosecution was able to say with a straight face that Chamari's testimony about Dinendra's violence was "scant" and "lacked detail".

This is a much larger problem in terms of how we think and talk about sexual violence, as demonstrated by the fact that the experts in the case and the judges did the same thing.

43 At 976
44 At 1024.
45 At 226–228 and 1348.
46 At 1353.
47 At 1337.

The expert psychiatrist used the following language to describe the offending:

i) "[S]exual behaviour" that Chamari found "unpalatable" and "so distressing".[48]

ii) "[I]ncreasingly unconventional and impersonal sexual behaviours".[49]

iii) Compliance by Chamari with "all manner of … acts".[50]

The trial Judge described Dinendra's offending as making Chamari "have sex against her will".[51]

The Court of Appeal described Dinendra's offending as follows:

i) "The deceased forced the appellant to watch child pornography, sometimes while having sex with him."[52]

ii) "[S]exual activity on skype".[53]

In the first of these comments, the Court of Appeal is referring to Chamari being forced to watch highly distressed children being raped whilst she herself is being raped and hit if she turned her head away.

2 Chamari had effective safety options available to her

Secondly, I want to turn to the issue of what her other safety options were — remembering that it was up to the prosecution to prove beyond reasonable doubt that she was not acting in self-defence. This means that the prosecution had to prove that she had other lawful means of achieving safety. That was essential to prove that Chamari was not acting in self-defence, and it was the prosecution's job to disprove self-defence.

The prosecution devoted days of testimony, including a bevy of experts and professionals, to a minute analysis of the crime scene. There was evidence about the position of the body, the configuration of blood spatter, DNA and fingerprint analysis, every professional's impression of the scene when they attended it, and a forensic IT examination of what was on the computers.

48 At 1290.
49 At 1291.
50 At 1293.
51 At 1397.
52 *Liyanage*, above n 9, at [32].
53 At [40].

However, the prosecution did not call a single piece of testimony to establish that calling the police or leaving the relationship could have provided Chamari with safety in her particular circumstances, as well as her family in Sri Lanka who were also under threat from Dinendra. Not one single piece of evidence was provided to support the prosecutor's simple assertion that these were ways that she and her family could be safe.[54] The prosecution could have called police officers who were experienced in responding to IPV to testify as to what they could realistically have provided Chamari and her family in Sri Lanka by way of safety if she had engaged with their services, but that was not done.

I think this demonstrates that a "bad relationship with incidents of violence" paradigm has a kind of truth power in its very assertion. Not only did the prosecution call no evidence to support its simple assertion that the victim had effective safety options, but no other professional in the case commented on their failure to do so.

One of the difficulties with trying to challenge a paradigm like this at trial is that you have to challenge the paradigm by speaking to people who are hearing what you are saying through the paradigm. And so that makes it very difficult for decision-makers to even hear that you are challenging the paradigm.

So what do I think we should be doing instead?

II THE SOCIAL ENTRAPMENT PARADIGM

In New Zealand, the FVDRC has suggested that we should be analysing IPV as a form of "social entrapment".[55] This requires that when we are approaching situations involving IPV we analyse three dimensions of the facts:

i) The first tier focuses on the specific raft of abuse tactics used by the predominant aggressor. We understand these as far broader and different in nature from just the acts of physical violence. We also look at the impact on the victim over time.

54 *Liyanage* Transcript, above n 28, at 231; 1353–1354 and 1361–1362.

55 Family Violence Death Review Committee [FVDRC] *Fifth Report: January 2014 to December 2015* (Health Quality & Safety Commission New Zealand, February 2016); and Tolmie, Smith, Short, Wilson and Sach, above n 8. James Ptacek *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, Boston, 1999) at 10 originally provided this definition as an articulation of the three elements in the operation of IPV that are common to the thinking of key scholars in the area.

ii) The second tier asks us to realistically look at, rather than simply assume, the safety options that were available to the victim.

iii) The final tier is not really a third tier as it folds into the other two. It is asking us to look at the manner in which structural inequities exacerbate the predominant aggressor's ability to coercively control the victim and weaken the safety responses of those who might otherwise be in a position to help. For example, if she has no money, no car, no credit on her phone, dependent children and is living in a rural area where she is surrounded by his family who all have status in the community then that is really significant in understanding her circumstances. In Chamari's case what was significant are the Sri Lankan cultural norms around marriage and gender roles, the experience of immigration and the experience of being a racialised woman living in white rural Western Australia.

I am going to turn now to analyse the facts of *Liyanage* from a social entrapment perspective. I will focus on the first two dimensions for reasons of time.

A Dinendra's coercive and controlling tactics and their impact on Chamari

This first tier of entrapment draws on Professor Evan Stark who published his ground-breaking book in 2007.[56] In this book, which drew on years of research and around 25 years of clinical experience, he suggested that IPV is not an assault crime. In other words it is not about the physical violence per se. Stark describes it as an attack on the victim's personhood.[57] It is a raft of abuse strategies, developed by trial and error over time, for this particular woman by the person who knows her most intimately.[58] And these strategies are directed at undermining her independence and closing down her "space for action".[59]

When we look at the particular facts of *Liyanage* we can see that over time Chamari began to restrict her own behaviour — she began to put aside

56 Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, Oxford, 2007).

57 This is an argument developed throughout his book, but see 367: "[e]xcept for the use of violence, coercive control bears almost no resemblance to assault: its aim is dominance rather than physical harm; it targets autonomy, liberty, and personhood; and the tactics deployed are far broader and more insidious".

58 At 241.

59 See also Nicola Sharp-Jeffs, Liz Kelly and Renate Klein "Long Journeys Toward Freedom: The relationship between Coercive Control and Space for Action – Measurement and Emerging Evidence" (2017) 24 Violence Against Women 2.

her own personhood on a moment-by-moment basis — to try and manage Dinendra's behaviour because she became exhausted by and terrified of it.[60] This is captured in this quote from her testimony: [61]

> When he is ready to eat, it's ready. When he wants to go out, I'm ready. When he wants to watch movies, I'm doing. When he talks, I'm listening. I minimise expressing my feelings and be a listener to him.

Of course that does not mean she is not still resisting the abuse. It just means that she is no longer at the point where she can afford the high costs of overt resistance.

On this understanding, the nature of the abuse is strategic and retaliatory. This is important to understand because it makes it possible to see that the threat posed by the predominant aggressor is bound up with the options the victim has for dealing with it because the abuse is directed at closing down those options. It is directed at punishing and thwarting any resistance on the victim's part, including seeking help.

When we take this approach we also have to acknowledge the victim's resistance. This is because acknowledging the victim's resistance exposes the nature of the abuse — because it renders visible what the abuse is responding to and attempting to foreclose, so it exposes the nature and extent of the violence used.[62] But it also gives the victim some dignity. We are not presenting her as someone who just passively accepted what was happening to her.

So in this particular case Chamari resisted the abuse right from the beginning of her relationship with Dinendra — although, as already said, her resistance became more and more covert because she could not afford the costs of obviously resisting as time went on. Her acts of resistance included:

i) fighting back until physically subdued;[63]

ii) refusing to have sex with other men;[64]

60 *Liyanage* Transcript, above n 28, at 964 and 966.

61 At 461.

62 Nick Todd and Allan Wade with Marine Renoux "Coming to Terms with Violence and Resistance: From a Language of Effects to a Language of Responses" in Thomas Strong and David Pare (eds) *Further Talk: Advances in Discursive Therapies* (Springer Science & Business Media, New York, 2004) 145 at 159.

63 *Liyanage* Transcript, above n 28, at 457 and 959.

64 At 1045–1046.

iii) disobeying Dinendra's instructions by stopping and speaking to a client on the way home;[65]

iv) refusing to invite vulnerable young women and girls into the relationship with them;[66]

v) privately warning K, a 17-year-old, that she could not protect her from Dinendra;[67]

vi) asking to be rostered on evening shifts at work to avoid Dinendra's internet activities;[68] and

vii) delaying booking study leave by pretending she had been too busy (Dinendra wanted to take K on a holiday with them in order to have "sex" with her).[69]

We can compare this to the previous paradigms where the violence, understood solely in terms of the physical violence, is seen as occurring independent of anything that the victim does. For example, under a BWS framework the violence is taking place in a cycle, like the weather or the seasons. On the psychiatric experts' accounts in *Liyanage,* for example, Chamari's resistance is completely invisible — it is not relevant to the story of what is happening. She is described as:

i) "pleasant, eager to please";[70]

ii) "overprotected and over sheltered";[71]

iii) having "dependency needs",[72] while Dinendra had "dominance needs";[73]

iv) having a pre-existing tendency to "submit to the direction and advice and control of a dominant male";[74]

65 At 456–457; 958–960 and 1068–1069.
66 At 1013–1014.
67 At 1031.
68 At 1017.
69 At 1056–1057.
70 At 1175.
71 At 1284.
72 At 1290.
73 At 1304 it is stated that "for everyone that has dependency needs, there's someone that has dominance needs". In other words, it is implied rather than expressly stated that Dinendra has dominance needs.
74 At 1290.

v) having a "submissiveness and tendency to comply and placate a dominant male figure";[75] and

vi) having a "cult like mentality".[76]

Another important thing to notice is that this analysis highlights the manner in which the abuse tactics utilise the norms of heterosexual sexual intimacy, including the norms of love, sexual desire, marriage and gender roles.[77] To begin with the abuse strategies may even look like expressions of romantic love. For example, Chamari was under Dinendra's surveillance and obliged to account for all her movements — she was obliged to call Dinendra when she left work and stay on the phone on the way home. This was initially presented as being about her safety — in other words it was an expression of protective concern by her male partner. On this analysis, it follows that proving the victim loved the person using violence against her is not the equivalent of proving that she was not being abused. This is because the norms of marriage and heterosexual intimacy are the vehicle for the abuse.

We can contrast such an understanding with the approach taken by the prosecution, who asked Chamari repeatedly if she loved Dinendra. It was as though if she said "yes", which she repeatedly did, the prosecutor was proving that she was not being abused. His questions to Chamari included the following:

i) "The problem was you did love him, wasn't it?"[78]

ii) "You did still love him at the time didn't you?"[79]

iii) "You did still love Dinendra at the time didn't you?"[80]

iv) "And so you loved him, and you went to Kununurra?"[81]

v) "And loved him at the same time. That's why you went, isn't it?"[82]

75 At 1291.
76 At 1293.
77 Stark, above n 56, at 5.
78 *Liyanage* Transcript, above n 28, at 1109.
79 At 1109.
80 At 1110.
81 At 1110.
82 At 1110.

I want to turn now to say a little more about the particular abuse strategies. Understanding them is of particular significance in New Zealand now because we have just enacted a new definition of family violence, which specifically includes coercive or controlling behaviour — directly drawing on the work of Professor Stark.[83]

Stark divides the abuse strategies typically used by predominant aggressors into two categories.[84] First, tactics of control — which he describes as indirect strategies. These are about undermining the victim's independence and fostering a dependence on the person using violence. Indirect control tactics include isolation of the victim and the use of exploitation, deprivation and micro-regulation. Secondly, direct tactics of coercion, which are about forcing compliance — these include violence and intimidation.

1 Control Tactics

I apologise for not making these facts palatable. I think if we are trying to judge someone's behaviour in the context of their circumstances then it is important that we talk about those circumstances truthfully.

(a) Isolation

Chamari met Dinendra in 2009 in Sri Lanka. She was 29 and they were both training to be doctors. Over the next five years he severed Chamari's connections with those around her so that the only close intimate relationship she had left was with him.

He did this in multiple ways:

i) He persuaded her to have sex prior to marriage — in Sri Lanka that meant she was unavailable for arranged marriage to another.[85]

ii) He conducted "loyalty tests" — insisting that she drop friends who warned her about him.[86]

iii) He dominated her time so she had no time for relationships with others.[87]

83 Family Violence Act 2018, s 9(3).

84 See the explanation of the points made in this paragraph in Evan Stark "Coercive Control" in Nancy Lombard and Lesley McMillan (eds) *Violence Against Women: Current Theory and Practise in Domestic Abuse, Sexual Violence and Exploitation* (Jessica Kingsley Publishers, London, 2013) 17 at 21–22 and 27.

85 *Liyanage* Transcript, above n 28, at 927 and 1474.

86 At 917–920 and 1153.

87 At 453.

iv) He threatened her family so she distanced herself from her family to protect them.[88]

v) He persuaded her to immigrate to Australia where she knew no one but him.[89]

vi) Once she was in Australia he refused to allow her to socialise without him.[90]

vii) He degraded her so that even when she reached out for help she was too ashamed to disclose what was really happening to her.[91]

Probably one of the really key events was persuading her to immigrate to Australia — separating her from her original family and community who were the people most invested in her — and then insisting that she only socialise with him.

The point of isolating the victim is to remove anyone who would provide her with an alternative reality check, anyone whom she could reach out to for help and support in her situation, and anyone who might put boundaries around his behaviour.[92] The person using violence becomes her main source of reality.

(b) Deprivation, exploitation, micro-regulation

This consists of depriving her of basic survival resources, exploiting her and regulating her behaviours to conform to stereotypical gender roles in the minutiae of everyday living.[93] Dinendra's control really became extreme once Chamari was isolated in Australia.

Dinendra determined:

i) what she spent her money on and how much;[94]

ii) when she slept;[95]

iii) when she rang in sick for work;[96]

88 At 408 and 450.
89 At 452 and 454.
90 At 459–460 and 656–658.
91 At 1047–1048.
92 Stark, above n 56, at 27.
93 Stark, above n 84, at 29–30.
94 *Liyanage* Transcript, above n 28, at 464 and 978.
95 At 1018–1019.
96 At 1016 and 1158–1159.

iv) her career directions;[97]

v) what she cooked and what she ate (monitoring her weight so she was "good for skyping");[98]

vi) who she socialised with;[99]

vii) what she thought;[100]

viii) whether she wore jewellery;[101] and

ix) whether she was on contraception and what kind.[102]

The point of these tactics, as Stark suggests, is not to achieve a particular outcome — such as a clean house — but rather to root out a woman's independence and condition her to obey his authority without regard to its substance.[103] The way it works is that compliance with his rules may mean physical safety for her, but since the rules are being constantly revised and reinterpreted it is impossible for her to satisfy him. This leaves her in a state of chronic anxiety:[104]

> He gets angry about the way I cook, the way I walk, talk to other people, the way I do things, way I study, way I plan things. I didn't know what to do, how to behave. …

2 Coercion tactics

(a) Violence

According to Stark, abusers resort to violence in order to establish the high costs of resistance and create a level of fear that disables the victim's will to resist.[105]

Stark points out that most physical violence in coercive relationships is chronic low-level violence that has a cumulative intensity for the victim. He states that the "single most important characteristic of women battering" is

97 At 389; 931 and 1114.
98 At 961 and 996.
99 At 657–658.
100 At 966 and 986.
101 At 657.
102 At 1114.
103 Stark, above n 84, at 30–31.
104 *Liyanage* Transcript, above n 28, at 460–461.
105 Evan Stark *Forensic Assessment for the Purpose of Mitigation* (Forensic Assessment of Jennifer Molyneaux, May 2017) at 10.

that the victim is bearing the "weight of multiple harms".[106] And, of course, every event today is interpreted by the victim in light of what she knows about what the perpetrator is capable of, based on what has happened in the past.

In this case it was not until Chamari was isolated from her family and her culture in Australia that Dinendra began to use physical violence. From the beginning his violence was instrumental — it was directed at getting her to do what he wanted or "punish" her for resisting or trying to be independent. He used violence:

i) to force her to be a "swap" for pornography he wanted;[107]

ii) to force her to assist him in "grooming"[108] teenagers and vulnerable young women; [109] and

iii) because she was "not learning" to do as he required.[110]

Dinendra first used violence in Australia to force Chamari to dress up and sit in front of the camera as a swap so he could access pornography that other people had. Once he found someone who had something he wanted she would be forced to masturbate, use sex toys or he would rape her on camera, with the camera positioned in such a way that she could be seen but he could not. He used physical violence to force her to do this, or to do it whilst looking happy.[111]

He also used violence against Chamari when she refused to assist him in making contact with vulnerable young women and girls whom he wished to have "sex" with, including manipulating their families and the young women/girls over time so he could make that happen.[112] The violence included:

i) Hitting her and hitting her head on the wall.[113]

ii) Driving at excessive speeds — whilst threatening to have a car accident and hitting her.[114]

106 Stark, above n 56, at 94.
107 *Liyanage* Transcript, above n 28, at 975.
108 I have used speech marks here because of the inappropriate nature of the word "grooming" to accurately describe what the activity actually entails.
109 At 460 and 978–979.
110 At 1000.
111 At 950–952; 954; 1017 and 1107.
112 At 460 and 978–979.
113 At 951; 960 and 1108.
114 At 460 and 979.

iii) Using weapons such as a rolling pin, wooden spoons, plates, chairs, boots and a catapult that threw tiny metal balls.[115]

iv) Vaginal and anal rape (whilst tied up, on camera in front of strangers, or whilst forcing her to watch women and children being sexually violated).[116]

There was one terrifying incident of violence in 2012.[117] Chamari was on the phone to Dinendra walking home from work when she stopped to talk to a female client in the street in breach of his instructions not to talk to anyone. He came to meet her and physically felled her from behind. When they got home he attacked her again. She screamed for help and fought back but he overpowered her and hit her so often and so hard that she was winded and left unable to breathe. This experience communicated to her that there was no point in trying to physically resist him and that it would make things worse.

From mid-2013 Dinendra's beatings became frequent.[118] He was using weapons, such as wooden spoons, plates, chairs and boots. He kept the rolling pin in the bedroom in case it was needed. He ordered a catapult that threw tiny metal balls and she would have to stand naked while he used it on her. He told her the violence was because she was "not learning" to do as he required. I have already described the "sexual torture" Chamari was subject to.

By 2014 she described the violence as "constant" and herself as "exhausted".[119] It reached the point where it was enough for him to give her a "look" and she would do as he wanted.[120]

(b) Intimidation

Three types of intimidation tactics complement the use of physical violence.[121] First, threats, which are made credible by what the person using violence has done in the past or what his partner believes he can or will do if she upsets or disobeys him. Second, surveillance tactics, which according to Stark, "aim ... to convey the abuser's omnipotence and omnipresence, letting his partner

115 At 755; 758; 999–1000 and 1067.
116 At 976 and 1115–1116.
117 At 456–457; 958–960 and 1068–1069.
118 At 999.
119 At 976.
120 At 1026.
121 Stark, above n 84, at 23.

know she is being watched or overheard".[122] Third, degradation establishes the abuser's moral superiority to the victim by denying her self-respect. The shame is also an isolating factor.

Dinendra's threats included:

i) To destroy her family if she left him (including by suicide).[123]

ii) To have acid thrown into the face of her sister and two young nephews.[124]

Dinendra's surveillance included:

i) Setting up and monitoring her email, social media, phone and bank accounts.[125]

ii) Forcing her to text or phone her movements when she was away from him.[126]

iii) Making plans to sell her car and being rostered onto her ward and shifts.[127]

Dinendra's degradation of Chamari included:

i) "Sexual torture".[128]

ii) Forcing her to participate in acts (for example, the grooming of teenagers for sex) that violated her deeply held values.[129]

The threats that were most salient to Chamari were the threats to her family. Dinendra had the capacity to use retaliatory violence, money (their combined medical salaries) and connections through his brothers and friends in Sri Lanka. He threatened her that if she left him (even by killing herself) or disclosed the abuse to anyone (including by seeking counselling), he would get acid thrown in the face of her sister and her two nephews in Sri Lanka.

122 At 26.
123 *Liyanage* Transcript, above n 28, at 1051.
124 At 987–988.
125 At 930–931.
126 At 926–927.
127 At 1054; 1292 and 1313.
128 At 1115.
129 At 460 and 978–979.

B The limitations of the systemic safety response to IPV

So here is a woman in a very frightening situation. She is subject to sexual torture and living in constant expectation of painful physical punishment if she does not manage to please her partner. This has gone on for years and she is exhausted and overwhelmed. She knows she cannot physically defend herself against him. He is in the process of manipulating a 17-year-old and that girl's family so he can have "sex" with her, and Chamari's options are to be complicit in the child's violation or experience violent retaliation if she does not assist. She is under his constant surveillance. He is now moving into her workspace (this has always been her safety zone — she is a competent and well-regarded doctor — and he is now on her shifts and in her ward) and removing her independent means of transport (by selling her car so she will be reliant on him for transport).

What were those around her able to do for her? This is the second tier of a social entrapment analysis.

1 Community responses

People in Chamari's community did know what was happening. Chamari made disclosures to three people in Sri Lanka but on each occasion Dinendra's authority to use violence against her if she displeased him was validated.[130] In fact, when Dinendra attacked Chamari in 2012, his family saw the incident as arising from Chamari angering Dinendra to the point that he used violence against her. The fact Chamari screamed as she was attacked was seen as inappropriate on her part because of the potential to get her husband into trouble with the police.

A number of people in Chamari's professional community had noticed that something was amiss — and Chamari made partial disclosures to three people (partial because she was too ashamed to disclose the full horror of what she was suffering) — but these people uniformly failed to take any action in response.[131] One of these witnesses testified that it was up to Chamari what she wanted to do with her private relationship.[132]

2 Agency responses

Obviously Dinendra had committed serious crimes under the Criminal

130 At 457; 765; 767; 960; 1004–1005; 1011 and 1032.
131 At 419; 658–659; 661–662; 898; 1037 and 1163–1165.
132 At 1164.

Code Compilation Act (WA) against Chamari (aggravated sexual penetration without consent and threats to cause grievous bodily harm).[133] However, she testified that if she reported these events to authorities she and her family would be in more danger.

Chamari said that if she contacted the police, Dinendra would be interviewed — that would be the first thing the police would do. He would simply deny the allegations. Most people were under the impression they were a happy couple (there was certainly significant testimony supporting that at trial),[134] so she was unlikely to be believed.[135] Prosecutions were unlikely to take place and, having alerted Dinendra to the fact that she had disclosed the abuse to authorities, she would then be sent home alone to deal with his retaliation (and his family who would consider Chamari's report to police to be unacceptable behaviour on her part).

Even if Chamari survived the immediate fall out from reporting Dinendra's behaviour to the police, and even if there was some kind of criminal justice response (she testified that she thought Dinendra might get a fine or, if there was prison time, he would eventually be released), she said she would be in fear for the rest of her life about what he would do to her or her family because "he would chase me".[136]

Now you might say, "well okay — I accept that she honestly thought that — but it is not reasonable, she should have contacted the police". We can put aside the fact that as a matter of New Zealand law, she does not have to be reasonable — the issue is whether she honestly thought that. This was Western Australia, so at law she had to have reasonable grounds for her perception of her circumstances.[137]

But here is the thing — her assessments of what might happen to her are supported by reports from numerous government authorities. For example, the Law Reform Commission of Western Australia and the Western Australian Ombudsman's Office have documented the limitations of the police response to IPV in Western Australia — police neglecting to provide victims with information on how to access support services, being generally unsupportive or

133 Criminal Code Act Compilation Act (WA), ss 326 and 338A.
134 *Liyanage* Transcript, above n 28, at 421; 480; 572; 577; 579; 652; 666–667 and 683–684.
135 At 1037.
136 At 1037 and 1050–1051.
137 See Criminal Code Act Compilation Act (WA), s 248(4).

unwilling to take action and failing to investigate offences that have occurred on the basis that "it's your word against his".[138]

But even if agency responses to victims seeking help are exactly as they should be, our current repertoire of responses may not be effective for women who are dealing with a dangerous IPV offender. In New Zealand, the FVDRC has mapped the family violence safety system and states that it is not really a safety system — other than by default.[139] It is a fragmented collection of responses that are part of systems designed to deal with things other than IPV, with some underfunded IPV initiatives plonked in. The safety options that are currently available (and I do acknowledge that we are piloting and attempting to develop better ones)[140] — getting a protection order, contacting the police in order to initiate criminal proceedings or going into refuge accommodation — require victim initiation (in other words, we are placing responsibility for achieving safety on someone who is a repeat victim of criminal offending and likely to be in a state of considerable trauma) and generate a one-off reaction to an event that has taken place, which may not address the ongoing danger the victim is facing.

The FVDRC is not alone in saying that we need transformational change in respect of our family violence safety response. The Victorian Royal Commission into Family Violence produced an eight-volume report with 227 recommendations designed to transform that system in 2016 (and we all thought Victoria's system was more advanced than our own).[141]

It is important to remember when a victim is dealing with a dangerous IPV offender, that inadequate responses do not simply fail to provide safety. Such responses can significantly escalate the danger the victim is in because they put the offender on notice that he needs to close down further help-seeking or any enforcement process.

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138 See *Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities* (Ombudsman Western Australia, November 2015) at 21; Community Development and Justice Standing Committee *A measure of trust: How WA Police evaluates the effectiveness of its response to family and domestic violence* (Legislative Assembly, Parliament of Western Australia, Report No 10, October 2015) at 50–2; and Law Reform Commission of Western Australia *Enhancing Family and Domestic Violence Laws* (Final Report, Project No 104, June 2014) at 62.

139 See FVDRC, above n 55, at 23–33.

140 Elaine Mossman *Evaluation of the Family Violence Integrated Safety Response Pilot Phase II* (Joint Business Unit, Final Report, September 2019).

141 Marcia Neave, Patricia Faulkner and Tony Nicholson *Royal Commission into Family Violence Summary and Recommendations* (March 2016).

3 Separation

We often think of separation from the predominant aggressor as the means by which primary victims can keep themselves safe.[142] And we carry on doing that despite the fact that we know that separation is a risk factor for intimate partner homicide when women are dealing with dangerous offenders. This is what Dobash and Dobash have described as the moment in which he "changes the project" from trying to keep her in the relationship and control her, to destroying her for leaving it.[143] The FVDRC has noted that two-thirds of female primary victims (or sometimes their new partners) who were killed by their partners were killed in the time leading up to or following separation.[144]

In this case Chamari left Dinendra twice — once in July 2013 and once in June 2014. On both occasions she did so only after begging him to let her leave. In other words, it is clear that she knew that there was no safety in separation unless he chose to relinquish her.[145] On both occasions, it is clear from the terms that he imposed on his agreement that he had no intention of allowing her to separate. Chamari explained multiple times in court that you have not left your abuser if they have granted you permission, set conditions on your departure that mean that you will be under their surveillance for the rest of your life and they will be accessing your income for the rest of your life.[146]

Whilst that seems obvious to me, she was understood by the prosecution and courts as having left, having achieved safety and *choosing* to return.[147] That only makes sense when you consider that under a "bad relationship with incidents of violence" paradigm so long as she is not being physically attacked, she is not understood as being abused and leaving the relationship is assumed to be synonymous with safety.

III CONCLUSION

Tonight I hope to have demonstrated that the theory of IPV that we use influences the meaning that we give to facts involving IPV. My point in relation to *Liyanage* is that a jury could not fairly conclude beyond reasonable doubt that her actions were unreasonable in self-defence without a proper understanding

142 See Sheehy, above n 11, at 79–80.
143 R Emerson Dobash and Russell P Dobash *When Men Murder Women* (Oxford University Press, Oxford, 2015) at 39.
144 FVDRC, above n 10, at 35–37.
145 *Liyanage* Transcript, above n 28, at 466.
146 At 463 and 994.
147 At 1102–1104.

of the circumstances that she was in — the nature of the threat she faced and the means she had of dealing with it. Further, that a social entrapment framing provides a more complete and accurate picture of those circumstances.

The challenge here is shifting the way we think about intimate partner violence. And this is my challenge to those in the audience who are part of the New Zealand criminal justice system. My challenge to prosecutors is to ask whether we always have to prosecute these women. If we analyse the facts and find a cognisable case for self-defence, is it appropriate not to lay charges?

My challenge to defence counsel is to understand and run defences based on social entrapment[148] and to hold the prosecution to their burden of proof in respect of all the elements of their self-defence case.[149]

My challenge to judges is to let in expertise on "social entrapment" and develop criminal justice responses in ways that better reflect the operation and harm of IPV.[150]

My challenge to everyone else in the audience is to think differently and to convert that into different ways of acting in response to IPV, whatever it is that you do. Thank you.

148 For a list of questions to explore and evidentiary sources see: FVDRC "Appendix to article titled 'Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence'" (Health Quality & Safety Commission New Zealand, August 2018).

149 See *R v Barrett* 2019 SKCA 6 where the Crown *was* put to proof.

150 Since this lecture was delivered, see *R v Ruddelle* [2020] NZHC 1983.