Family Violence – domestic measures for a global problem

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Family violence (sometimes referred to as domestic violence) is a pervasive problem worldwide. While ending family violence must be the ultimate aim, suggesting solutions for such a long-term goal in a short paper is too ambitious. This paper therefore concentrates on measures that can be taken by the courts to make victims of family violence safe, minimise harm, predict future harm and deal with offenders appropriately to reduce recidivism.

Background

But first some background.

Statistics

According to a report released by the World Health Organisation in 2013, over one-third of women worldwide have experienced either physical or sexual domestic violence, or non-domestic sexual violence.[2]

While the human cost of family violence is staggering, so too is the economic cost. For example in the United States, the Centres for Disease Control and Prevention estimated that the cost of violence by an intimate partner alone exceeds 5.8 billion dollars annually (with 4.1 billion dollars spent on direct medical and health care services costs and the rest in

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[2] World Health Organisation "Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence" (2013). A recent report by the European Union Agency for Fundamental Human Rights surveyed 42,000 women across the EU and found that just over one in five women had experienced physical and/or sexual violence from either a current or previous partner: European Union Agency for Fundamental Rights "Violence against women: an EU-wide survey" (2014).

productivity losses). This estimate was exclusive of social services and criminal justice services.[3]

This section would not be complete without mentioning some particular types of extreme domestic abuse, including: honour killings where a women is killed by her family for bringing 'dishonour' upon them; bride burning, whereby a women is set alight – often for an inadequate dowry; and genital mutilation whereby a female's genitals are altered, often without anaesthesia.[4]

New Zealand

New Zealand is not immune; in fact, New Zealand has one of the highest rates of child abuse[5] and violence against women in the developed world.[6] The following statistics provide a partial glimpse as to the issue. It is a partial glimpse because family violence, for the most part, is a hidden crime in that it happens privately with no witnesses other than the victim(s) and the perpetrator. The New Zealand Police estimate that they see only 18 per cent of all family violence.[7]

In 2012 there were over 95,000 family violence investigations conducted in New Zealand; close to 40 per cent of these investigations resulted in at least one criminal offence being

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3 See National Center for Injury Prevention and Control "Costs of Intimate Partner Violence Against Women in the United States" (Centers for Disease Control and Prevention, Atlanta, 2003).

4 The forms of female genital mutilation can range from removal of the clitoris, all the way to infibulation which involves the removal of the clitoris, labia minora, labia majoria and then the vulva is sutured together, leaving only a small opening for the passage of urine and menstrual fluid. Female genital mutilation is considered a violation of human rights due to the severe pain and permanent physical harm caused: United Nations High Commissioner for Refugees *Memorandum: Female Genital Mutilation* SUS/HCR/011 (1994) at [7]. The issue of female genital mutilation is prevalent in the United Kingdom; it is thought that over 137,000 women in the United Kingdom are living with the consequences of female genital mutilation and the first prosecution for female genital mutilation began in January 2015: see Alexandra Topping, Sandra Laville and Rowena Mason "Parents who allow female genital mutilation will be prosecuted" (22 July 2014) The Guardian <www.theguardian.com> and BBC "First female genital mutilation prosecution in UK starts" (20 January 2015) <www.bbc.com>. In early 2015, the first person prosecuted for female genital mutilation in the United Kingdom was acquitted: see BBC "Doctor found not guilty of performing FGM" (4 February 2014) <www.bbc.com>.

5 New Zealand has the fifth highest rate of child abuse out of 31 OECD countries: see Child Matters "Facts about Child Abuse" <www.childmatters.org.nz>.

6 For example, see UN Women "2011–2012 Progress of the World's Women: In Pursuit of Justice" (2011) at 134 which indicates that, out of 14 developed countries, New Zealand had the highest percentage of women reporting to have experienced physical violence from intimate partners for the period of 2000–2010.

7 New Zealand Family Violence Clearing House "Family Violence Statistics Fact Sheet" (December 2009).

recorded.[8] As to the presence of children in these investigations, over 50 per cent of the investigations were linked to at least one child (under the age of 16). While family violence is primarily perpetrated by men, there is still significant representation of women; for example, in 2012, 72 per cent of the offenders linked to family violence investigations were male and 20 per cent were female.[9]

Family violence is also a significant cause of New Zealand's homicides. For example, for the four years from 2009 to 2013, 47 per cent of all homicides were family violence related deaths and totalled 139 people, or on average, 35 people per year.[10] Again, children that survived the homicides were not immune from these effects: 77 children were present when an adult or other child was killed.[11]

Close to 87 per cent of the homicides stemming from intimate relationships (intimate partner violence) had an apparent history of abuse in the relationship. This statistic illustrates that family violence causing homicide is not usually random or an isolated incidence of violence.[12]

Child Maltreatment

In 2006, the United Nations Secretary-General's Study on Violence against Children highlighted the prevalent nature of child abuse in family homes worldwide. Children are exposed to various forms of maltreatment and this can include acts of physical violence, sexual violation, psychological violence and neglect.[13]

As to physical violence, while reliable data in most countries is sparse, based on countries with reliable data the United Nations noted some trends. For example, children below the age of 10 are at a significantly greater risk than children aged 10 to 19 of severe violence perpetrated by family members. Like physical violence, statistics as to child neglect can be

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8 New Zealand Family Violence Clearing House "Data Summary: Violence Against Women" (June 2014) at 3.

9 At 3. The remainder was "other/unknown".

10 Family Violence Death Review Committee "Fourth Annual Report: January 2013 to December 2013" (Wellington, 2014) at 16. This included 63 victims of intimate partner violence and 37 victims of child abuse and neglect.

11 At 32.

12 In 2014, the Family Violence Death Review Committee in New Zealand examined all the family violence homicides in New Zealand and identified many risk factors for lethal family violence. These risk factors included specific threats to kill, non-fatal strangulation and extremely jealous and controlling partners: Family Violence Death Review Committee, above n 10, at 18.

13 Paulo Sergio Pinheiro "World Report on Violence Against Children" (United Nations, 2006) at 51–52.

hard to assess, especially in circumstances of poor public health and under-nutrition. However, research has shown that children with disabilities and, in some countries girls, are particularly vulnerable to neglect.[14] As to sexual violence, the World Health Organisation estimates that 150 million girls and 73 million boys under the age of 18 have experienced sexual violence and the United Nations has said that much of this is inflicted by family members or others visiting a child's home.[15]

As with family violence, New Zealand's child maltreatment statistics do not make for pleasant reading. For example, between 2011 and 2012 there were 6,750 substantiated cases of child abuse of children aged zero to four.[16] For the period of 2012 to 2013, there were 21,778 substantiated child abuse claims for children of all ages.[17] The maltreatment rate for Māori children is disproportionately high; for example, studies have shown that Māori children suffer rates of child abuse close to 3 times higher than the rate for other children.[18]

Indirect Effects of Family Violence on Children

Even if the children are not the "direct" victims of domestic abuse, they still suffer significantly. Worldwide it is estimated that as many as 275 million children are exposed to violence in the home.

In its report on the impact of family violence on children, UNICEF identified three key findings as to the effect that family violence can have on a child.[19]

First, in homes where there is family violence, there is an increased chance that any children in the home will be subject to child abuse.[20]

Secondly, witnessing family violence has been found to have a significant impact on a child's physical, emotional and social development. It has been found, for example, that

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14 At 54.

15 At 54. According to the UN, based on surveys from those who suffered sexual abuse as children, between 14 per cent and 56 per cent of the sexual abuse of girls and up to 25 per cent of the sexual abuse of boys, was perpetrated by relatives or step-parents: Pinheiro, above n 13, at 54.

16 New Zealand Government "United Nations Convention Against Torture: New Zealand draft periodic report 6" (2013) available at <www.justice.govt.nz> at [62].

17 Ben Heather "Child abuse is rising in [New Zealand]" (23 October 2013) Stuff <www.stuff.co.nz>.

18 See for example, Dannette Marie and David M Fergusson "Ethnic Identity and Exposure to Maltreatment in Childhood: Evidence from a New Zealand Birth Cohort" (2009) 36 Social Policy Journal of New Zealand 154 at 166.

19 UNICEF "Behind Closed Doors: The Impact of Domestic Violence on Children" (2006).

20 At 7.

young children who are exposed to violence experience so much stress that it can hinder the development of their brains and impair cognitive sensory growth.[21] As to behavioural changes, problems can include excessive irritability, sleep problems, emotional distress, fear of being alone, immature behaviour problems with toilet training, and language development.[22] It has also been found that children who are exposed to family violence are at a greater risk of substance abuse, juvenile pregnancy and criminal behaviour later in life.[23] As to the effects on social development, research has identified that exposure to family violence can, among other things, lead to more aggressive behaviour, bullying and a lack of empathy for others.[24]

Thirdly, there is a strong link between exposure to family violence early in life and becoming a part of the family violence cycle as an adult. As UNICEF states, the "single best predictor of children becoming either perpetrators or victims of domestic violence later in life is whether or not they grew up in a home where there is domestic violence".[25]

Thus the above findings indicate, even if a child does not suffer the visible scars of abuse or violence themselves, being exposed to family violence can significantly alter a child's development. These latent scars are just as, if not more, damaging.

Risk Assessment

Serious injury or death caused by family violence is rarely a freak accident or "random"; instead, there are often numerous signs and indicators of an unhealthy or abusive relationship. While humans are never wholly predictable, risk assessment tools can provide a relatively simple mechanism that allow officials to categorise and assess the risk an individual may pose.

Risk assessments are important; this is because, whether the official is a front-line police officer or a judicial officer, it is often necessary to make quick judgments in sometimes life-or-death situations. These can include whether the police should arrest the individual; whether the police should grant a police safety order;[26] whether the judge should grant bail

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21 At 7.
22 At 7.
23 At 7.
24 At 7.
25 At 7.
26 Police safety orders in New Zealand are discussed below at 8–9.

(and if so, on what terms); whether the judge should grant a protection order; and what sentencing options are optimal. Having tried and tested risk assessments enables officials to make the most of the information at hand and decide on the appropriate course of action.

There are three general types of family violence risk assessments. First, actuarial methods where risk is calculated based on weighted ratings of a set of risk factors. Secondly, structured professional judgment risk assessments, which use a set of guidelines to structure an assessment by an assessor who will also apply his or her expertise to make a final assessment of risk. Thirdly, unstructured professional judgment which, as its name suggests, relies solely on the assessor's own professional judgment.[27]

Generally a structured approach properly validated for the jurisdiction is the best. The dangers of an unstructured professional judgment are that the fallibilities of the decision-maker and the possibility of being manipulated by a perpetrator may creep into risk assessments.

Even if a risk assessment tool is not available, decision-makers should have access to all the relevant information to enable them to use their professional judgment to assess risk. In the family violence context, this would include criminal history (including warning signs such as attempted strangulation and controlling/stalking behaviour),[28] police history (such as call outs to the home) and whether there are any underlying substance abuse or mental health issues.

Protection Orders

Ideally, risk assessments would assess who is in need of immediate protection, protection orders would be issued accordingly, and those who are the subject of the orders would obey their terms. Unfortunately, for a multitude of reasons, this does not always happen. In this section, I discuss the issuing of "protection orders" and "police safety orders" and the limits on their ability to protect the victims of family violence.[29]

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27 Melanie Brown "Family Violence Risk Assessment: Review of International Research" (New Zealand Police, August 2011) available at <www.police.govt.nz> at 7.

28 See above at n 12.

29 Also relevant is supervised contact under the Care of Children Act 2004 (see ss 58–60). Under s 58, a court, when making or varying a parenting order (also known in other parts of the world as a custody arrangement) may make an order for supervised contact where it is satisfied that a child will not be safe with a particular person.

Protection Orders

In New Zealand, the granting of protection orders is administered pursuant to the Domestic Violence Act 1995. Any person who is or has been in a "domestic relationship"[30] with another person may apply for a protection order in respect of that person.

A court may make a protection order if it is satisfied of two things: first, that the respondent is using, or has used, domestic violence against the applicant, or a child of the applicant's family, or both; and secondly, the making of an order is necessary for the protection of the applicant, or a child of the applicant's family, or both.[31] Without notice applications can be made to provide urgent temporary protection but they do not come into effect until served.

The Domestic Violence Act states that the standard orders of every protection order include, among other things, orders that the respondent must not physically or sexually abuse the protected person, engage in psychological abuse, follow the protected person, or make contact with the protected person (with exceptions, such as in emergencies).[32] In New Zealand, any person in breach of a protection order is liable to imprisonment for a term not exceeding three years.[33]

While in theory, protection orders are an appropriate mechanism by which victims can seek the protection of the courts, many researchers have identified barriers (both actual and perceived) to women seeking protection orders. For example, an empirical study identified two central types of barriers to women seeking protection orders: accessibility and acceptability.[34]

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30 The term "domestic relationship" is defined in s 4 of the Domestic Violence Act 1995 and includes spouses, partners and family members.

31 See Domestic Violence Act, s 14.

32 See s 19(1) and (2).

33 Section 49. Additionally, under s 51D(1), the Court must, on the making of a protection order, direct the respondent to undertake an assessment and attend a non-violence programme. "Assessment" is defined under s 51A as "an assessment of the respondent undertaken by a service provider to determine – (a) the extent to which the respondent poses a safety risk to any person or the public; and (b) what, if any, non-violence programme is the most appropriate for the respondent to attend".

34 See T K Logan and others "Protective Orders: Questions and Conundrums" (2006) 7(3) Trauma, Violence & Abuse 175.

Accessibility factors include meeting the statutory criteria for the provision of protection orders, bureaucracy, repeated court hearings, limited access to the courts, difficulty serving the protection orders and the criticism that protective orders are not often enforced.[35]

Acceptability factors include fears that the perpetrator will retaliate. For example, in a study of women who did not obtain a protective order, 35 per cent of women were talked out of seeking one by the perpetrator, 11 per cent did not seek the order out of fear of retaliation, six per cent reported that the perpetrator threatened them and four per cent said the perpetrator had forced his way back into the home.[36] Other acceptability factors include perceived lack of efficacy (in other words, an order "is just a piece of paper"), embarrassment of airing domestic disputes in a public forum, negative perception of the justice system, and a lack of resources (for example, the victim may rely on the perpetrator for financial support).[37]

Protection orders, for their efficacy, also depend on the orders being obeyed and this is not always the case. For example, in New Zealand, between 2006 and 2010 over 10,000 people were charged with over 21,000 incidents of breaching a protection order. [38]

Police Safety Orders

The Domestic Violence Amendment Act 2009 introduced, among other things, provision for police-issued on-the-spot protection orders in New Zealand. Police Safety Orders may be issued where a qualified constable[39] does not arrest a perpetrator but has reasonable grounds to believe that the issue of an order is necessary to ensure the safety of the victim. When considering reasonable grounds, the constable is required to have regard to whether the perpetrator has used, or is using domestic violence against the victim, whether there is a likelihood that this will continue, the welfare of any children residing with the victim, any hardship that may be caused if the order is issued and any other matters the constable considers relevant.[40]

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35 See 183–184.

36 At 185. The study cited is: A Harrell, B Smith, and L Newmark "Court processing and the effects of restraining orders for domestic violence victims" (Urban Institute, Washington DC, 1993).

37 See Logan and others, above n 34, at 185–186.

38 Jan Logie "Protection Orders" (Green Party, 15 May 2013).

39 "Qualified constable" is defined in s 124 of the Domestic Violence Act as a "constable who is of or above the level of position of sergeant".

40 See Domestic Violence Act, s 124B.

Once a Police Safety Order is granted, the person against whom an order is issued must surrender any weapons in their control and vacate any land or building occupied by the victim(s) (whether or not the victim has a legal or equitable interest in the land or building).[41] Additionally, like Protection Orders, a Police Safety Order limits what the perpetrator can do (for example, he or she cannot abuse or contact the victim).[42] Police Safety Orders can last up to a maximum of five days.

While there have been benefits in introducing Police Safety Orders, in a recent evaluative study by the New Zealand Police, the use of Police Safety Orders has led to numerous unintended outcomes. In some circumstances, they have, for example, increased the financial hardship of the person at risk by removing the "bread winner", placed hardship on the bound individuals to find temporary accommodation, deterred victims from making future police contact due to the punitive outcome of removing an individual from their residence and increased the burden on community agencies such as Women's Refuge.[43]

Trial process

During the oral presentation of this paper, I used a fictional example. The first part of that example dealt with issues that can arise when deciding whether or not a defendant should be bailed. The second part dealt with issues that may arise when a victim recants before trial. The example and the associated discussion points are set out in the Appendix. I now turn to the trial process more generally and issues with complainants giving evidence.

Vulnerable Witnesses

Family violence victims are likely to be stressed. They are also giving evidence on private and often very sensitive subjects. This can affect their ability to give evidence. For example, studies have found that distressed children have more difficulty answering questions and provide less detailed and less coherent answers.[44]

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41 See s 124E(1).

42 See s 124E(2).

43 See V Kingi, M Roguski and E Mossman "Police Safety Orders Formative Evaluation: Summary Report" (Crime and Justice Research Centre report prepared for the New Zealand Police, 2011) at 37–38. Agencies such as the Women's Refuge provide support for those women and children who are the victims of violence. See more at <www.womensrefuge.org.nz>.

44 See Alison Cleland "Hearing and understanding? Child witnesses and the Evidence Act" [2008] NZLJ 425 at 426. See also Kirsten Hanna and others "Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy" (Institute of Public Policy, 2010).

In New Zealand, under the Evidence Act 2006, there are provisions which allow witnesses to give evidence by alternative means.[45] One of the considerations that a judge must have regard to when considering whether to give a direction for an alternative means of giving evidence, is "the need to minimise the stress on the witness".[46] These alternative means include giving evidence: while in the courtroom but unable to see the defendant (ie from behind a screen); from an appropriate place outside the courtroom; and by a video recording made before the hearing of the proceeding.[47]

Dr Emily Henderson, a former prosecutor with a strong academic interest in cross-examination, has conducted extensive research into the cross-examination of vulnerable witnesses, such as child witnesses and victims of sexual violence. Dr Henderson has proposed many changes for New Zealand. Based on overseas developments, particularly England, she does not think that legislative change is required to better the system – instead, she argues, the system can be changed from within. Some of her suggested initiatives include: judges taking a firmer stance on unacceptable cross-examination of witnesses; and using expert intermediaries who, among other things, advise counsel on how to modify questions, assist judges in monitoring questioning in court, and in extreme cases, can take over questioning.[48]

Sexual evidence

Family violence can include sexual violence. Many laws around the world have been passed to protect complainants in sexual cases from being cross-examined, or the defendant introducing evidence, as to the complainant's sexual history.

In New Zealand, this "rape shield" is codified in s 44 of the Evidence Act. Unless the judge gives permission, evidence on the sexual experience of a complainant cannot be led. As to the sexual reputation of a complainant, there is a complete prohibition. As the majority of the New Zealand Supreme Court stated in *B (SC12/2013) v R*, the provisions are "intended

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45 Evidence Act 2006, ss 103–106.

46 Section 103(4)(b)(i).

47 Section 105(1)(a). If it is to be given by video record, the judge is required to give a direction as to the manner in which cross-examination and re-examination of the witness is to be conducted (s 105(2)).

48 Emily Henderson "Fixing cross-examination from within" *Law Talk* (online ed, Wellington, 21 November 2014) available at <www.lawsociety.org.nz>. Dr Henderson's research on this topic will be published in international journals this year. In the United Kingdom, the Ministry of Justice has just produced a report on reducing stress for victims in this context: see Ministry of Justice "Report on review of ways to reduce distress of victims in trials of sexual violence" (March 2014).

to reduce the humiliation and embarrassment faced by complainants and to prevent the use of reasoning based on erroneous assumptions arising from a complainant's previous sexual history".[49]

The same alternative methods discussed above with regards to child witnesses are available in cases involving complaints of sexual assault.[50] With regards to victims of sexual violence, there is a right to give evidence in court without the general public.[51] In addition, publication restrictions and suppression orders prevent complainants being identified in cases of sexual violence.[52]

Global Court Initiatives

There have been numerous initiatives across the world taken so that the courts can better respond to the systemic issue of family violence.

These responses and initiatives have been in part due to the fact that the traditional criminal justice system has been criticised as lacking in terms of its ability to deal with and respond to the unique circumstances that family violence presents.[53] Family violence is different from other types of violent crime because: first, the complainant and defendant are often in an ongoing relationship; secondly, if the parties are living apart at the time, there is a high statistical probability that they will reconcile in the future; thirdly, pressure and coercion by some defendants distort victims' views at various stages of the court process; fourthly, the interests of children will often need to be considered; fifthly, there may be concurrent civil proceedings relating to matrimonial property or care of children; sixthly, the family context

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49 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at 53 per McGrath, Glazebrook and Arnold JJ.

50 See further Elisabeth McDonald and Yvette Tinsley "Evidence Issues" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279 at 280–308.

51 In cases of a sexual nature, no person may be present in the courtroom while the complainant gives oral evidence, except for the judge and jury, the prosecutor, the defendant, any lawyer engaged in the proceedings, any officer of the court, the police employee in charge of the case, any member of the media as defined by the Act, any person whose presence is required by the complainant and any person expressly permitted by the judge.

52 In New Zealand, see for example s 139 of the Criminal Justice Act 1985 and s 203 of the Criminal Procedure Act 2011.

53 Alice Mills and others "Family Violence courts: A Review of the Literature" (Auckland Centre for Mental Health Research, 2013) at 5.

often prevents victims and defendants from being objective and there are likely to be other agendas.[54]

The court initiatives provide due recognition that family violence is a serious criminal matter; compared to the old beliefs that family violence was "just a domestic" or where the victim was blamed. However, while this shift is positive, we need to make sure that court proceedings enhance the short-term and long-term safety of victims by providing appropriate protection, responses and treatment to both defendants and victims.

New Zealand

In 2001, New Zealand established its first Family Violence Court (FVC) in Waitakere, Auckland. Since then numerous others have been implemented in high-need areas to deal with family violence. These FVCs were a judicial initiative and they have numerous aims including to provide a more holistic response to family violence, to provide more timely responses to family violence, to enhance safety for victims and families experiencing family violence, to encourage accountability among offenders and to provide specialist services to victims, offenders and those involved in the operation of FVCs.[55]

Some have seen FVCs as a "problem solving court" and an aspect of therapeutic jurisprudence. Therapeutic jurisprudence is premised on the idea that the law and its process and actors can have an impact on the well-being of those who interact with the legal system.[56] In problem solving courts, "judges seek to actively and holistically resolve both the judicial case and the problem that produced it".[57] Such a therapeutic approach to the criminal law underlies various other courts in New Zealand including the Youth Court,[58] the Alcohol

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54 Judge David Maher "Domestic Violence Offences: Sentencing, Family Violence Courts" (Paper presented to the Lexis Nexis Criminal Law Forum, October 2005) at 1, cited in Judge Russell Johnson "The Evolution of Family Violence Criminal Courts in New Zealand" (Police Executive Conference, Nelson, 8 November 2005) at 1.

55 Trish Knaggs and others "The Waitakere and Manukau Family Violence Courts: An evaluation summary" (Research report by the Ministry of Justice, August 2008) at 7.

56 Astrid Birgden "Therapeutic Jurisprudence and Sex Offenders: A Psycho-legal Approach to Protection" (2004) 16 Sexual Abuse: A Journal of Research and Treatment 351 at 354. See also Bruce Winick "Therapeutic Jurisprudence and Problem Solving Courts" (2002) 30 Fordham Urban Law Journal 1055 at 1062–1066.

57 Winick, above n 56, at 1061.

58 For more information about the Youth Court, see A J Becroft "Time to teach the old dog new tricks? What the adult Courts can learn about sentencing and imprisonment from New Zealand's Youth Court" (Speech given at the CMJA Triennial Conference, Toronto, Canada, 12 September 2006) available at <www.justice.govt.nz>.

and other Drug Treatment Courts (Te Whare Whakapiki Wairua),[59] and the "New Beginnings Court" (Te Kooti o Timatanga Hou) which deals with homeless defendants.[60]

The unique mechanisms that FVCs use in treating the underlying problem are of great importance. The FVC attempts to dispose of cases as quickly as possible to enhance victims' safety.[61] The FVC judges and those involved are required to adopt a less formal and a more cooperative approach than that used in the traditional court setting.[62] The judges that sit in the FVC also have specialist training to assist in dealing with the complexities of family violence. Additionally, a FVC often has various tools and assisting stakeholders; for example, at the Waitakere District Court there are often victims advisors, representatives from three different stopping violence programmes (including Kaupapa Maori and Pasifika run programmes), a specialised police family violence prosecutor, and sometimes a Salvation Army representative. Similarly, the Porirua FVC often has an alcohol and drug clinician on hand and a representative from a local community network, Wesley Community Action.

Additionally, victim advocacy is a major part of the FVCs; at the Waitakere FVC, Community Victim Advocates support and advocate for victims and can speak on their behalf in court hearings.[63] As well, the FVCs seek to enhance accountability by encouraging defendants to accept responsibility though attending voluntary or compulsory programmes. In all, these various tools and the more collaborative and problem-solving nature of the courts attempts to reduce recidivism and deal with the underlying factors in a person's life which may be contributing to their offending.[64]

Australia

In 2005, the Magistrates Court of Victoria introduced a Family Violence Court Division at Ballarat and Heidelberg. The aims of the division are to make access to the court easier,

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59 For more information about the Alcohol and Drug Treatment Courts in New Zealand, see Lisa Gregg and Alison Chetwin "Formative Evaluation for the Alcohol and other Drug Treatment Court Pilot" (Ministry of Justice, 31 March 2014) available at <www.justice.govt.nz>.

60 See generally, K Thom and others "Evaluating problem-solving courts in New Zealand: a synopsis report" (Centre for Mental Health Research, 2013).

61 Timelines are specified in the Domestic Violence Prosecutions Practice Note issued by the Chief District Court Judge in 2004.

62 Knaggs and others, above n 55, at 19.

63 At 20.

64 At 48. To achieve these goals, a key approach of the FVCs is to defer sentencing so that offenders can undertake courses and programmes during which time they are monitored (and victims' views are ascertained where possible throughout that process).

promote the safety of those affected by violence, increase accountability of offenders and encourage changes in their behaviour, and increase the protection of children exposed to family violence.[65] These specialist divisions have specific characteristics that enable them better to combat family violence and these include:[66]

- Special support services located at the Court to help people with their case and this includes services such as advocacy, referral, increased legal services, and family violence organisations;
- Specially assigned magistrates, trained applicant and respondent support workers, family violence outreach workers, additional legal support services from various legal aid centres, dedicated prosecutors, extra security officers, and a dedicated Family Violence Court Division Registrar who manages the cases and coordinates the services at the Court. All of the aforementioned persons have specialist training;
- There is an increased focus on dealing with the needs of applicants from ethnically diverse communities, indigenous applicants, applicants with a disability, and children affected by family violence;
- Importantly, a magistrate can hear other related matters at the same time as hearing intervention order cases arising from family violence and this includes bail applications, pleas in criminal cases, and family law parenting order matters; and
- Under the Family Violence Protection Act 2008, a magistrate can order offenders to attend behaviour change counselling programmes to combat their abusive tendencies.

The Family Violence Court Division of the Magistrates' Court of Victoria is another example of a problem-solving court that attempts to solve the underlying problem, and not just the issue at hand.

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65 Magistrates' Court of Victoria "Family Violence Court Programs" <www.magistratescourts.vic.gov.au>. For a more thorough analysis and explanation of the approach of the various Australian States, see Centre for Innovative Justice "Opportunities for Early Intervention: Bringing perpetrators of family violence into view" (RMIT University, March 2015).

66 Magistrates' Court of Victoria, above n 65.

United States

Across the United States there are over 200 specialist domestic violence courts across more than 30 States.[67] Close to the majority of these courts are located in California and New York.[68]

One particular example is in the State of New York where the government have introduced "Integrated Domestic Violence" courts (IDVs). These courts are based on a "one family - one judge" model to bring multiple criminal, family and matrimonial disputes before a single judge where domestic violence is an underlying issue.[69] These courts were introduced in response to the fragmented nature of the court system that left "those affected by domestic violence ... to navigate a complicated court structure" that "cost them time and money, led to confusion and jeopardised their safety".[70]

The IDV court structure involves a single judge presiding across multiple cases to ensure consistency in judicial orders and better enable the court to understand and respond to particulars of a family's situation.[71] Additionally, as a problem-solving court, IDV courts are staffed with judges trained in multiple areas of law and the dynamics of domestic violence, there is ongoing judicial monitoring, and there is a network of victim advocates and outside service agencies.

Conclusion

This brief overview of various jurisdictions' attempts to deal with family violence shows that, while the particulars of each initiative vary, a unifying theme is that the traditional criminal court processes are not adequate in responding to the issues of family violence. These courts are aimed at fixing the underlying personal and relationship risk factors that lead to family violence. While the judicial role is generally as an arbitrator in an adversarial system, these problem solving courts show an increased role for judges in understanding and responding to the underlying needs of the victims and offenders who appear before them.

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67 Melissa Labriola and others "A National Portrait of Domestic Violence Courts" (Report submitted to the National Institute of Justice, February 2010).

68 At xi.

69 New York Courts "Integrated Domestic Violence Courts (IDV)" <www.nycourts.gov>.

70 New York Courts, above n 69.

71 New York Courts, above n 69.

Treatment

Just as the individual and relationship factors that lead to family violence are varied,[72] so too are the treatment methods employed to try and reduce recidivism of family violence. One size does not fit all.

In the past, family violence perpetrators have in many jurisdictions all been required to attend a particular type of treatment, often referred to as "batterer treatment programmes".[73] While these programmes are popular worldwide, international research has suggested that they are marginally effective and that between 50 per cent to 75 per cent of those who enrol in the programmes fail to complete them, and even more concerning, those who do complete programmes do not have better outcomes or show reduced recidivism compared to those who do not attend at all.[74]

While there have been some positive studies in New Zealand as to the effectiveness of family violence programmes, as Judge Peter Boshier, a former Principal Family Court Judge in New Zealand, has pointed out, there are many reasons to treat these studies and evaluations with caution. For example, the studies ignored men who dropped out, relied on self-reporting, arrests and partner reports, focused on anger and jealously levels, measured physical violence but not threats, and only utilised a short-term follow up period.[75]

Instead, as one would expect, there may be underlying factors that need to be remedied before any programme can be effective. Research has indicated that, in terms of post-treatment recidivism, factors such as substance abuse, psychopathology and criminal history,

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72 As to the causes and factors influencing family violence, see for example: J Archer "Cross-Cultural Differences in Physical Aggression Between Partners: A Social-Role Analysis" (2006) 10 Personality and Social Psychology Review 1331; World Health Organisation "Preventing Intimate partner and sexual violence against women: taking action and generating evidence" (2010); T E Moffitt and A Caspi "Findings About Partner Violence From the Dunedin Multidisciplinary Health and Development Study" (National Institute of Justice, July 1999); and Etienne G Krug and others (eds) "World report on violence and health" (World Health Organisation, 2002) at 97–99.

73 D R Tollefson and others "A Mind-Body Approach to Domestic Violence Perpetrator Treatment: Program Overview and Preliminary Outcomes" (2009) 18 Journal of Aggression, Maltreatment and Trauma 17 at 18.

74 At 18. See for example, J Babcock, C Green and C Robie "Does batterers' treatment work?: A meta-analytic review of domestic violence treatment (2004) 23(8) Clinical Psychology Review 1023; and J Daly and S Pelowski "Predictors of Dropout Among Men Who Batter: A Review of Studies With Implications for Research and Practice" (2000) 15 Violence and Victims 137.

75 Peter Boshier and Jennifer Wademan "Are stopping violence programmes worthwhile" (2009) 6(5) NZFLJ 119 at 121.

and referral source (for example, individuals who voluntary attend courses are more likely to reoffend) are associated with re-offending.[76]

Given that there are a myriad of factors behind family violence, any treatment efforts must got to the root(s) of the problem.[77] As a result, screening offenders so as to determine the causes, nature and type of the family violence is imperative for selecting the appropriate treatment.[78] An example of a tested and validated screening instrument is DOVE (Domestic Violence Evaluation) which groups significant predictors of male partner violence into seven categories: past abuse, past violence, mental health problems, relationship problems, emotional dependence, control and substance abuse.[79] As Judge Boshier concludes, such screening mechanisms allow for better understanding of the central dynamics of the family violence, its context, and consequences which in turn leads "to better decision making, appropriate sanctions and more effective treatment programmes tailored to the different characteristics of partner violence".[80] In essence, in terms of family violence programmes, "one size does not fit all".[81]

Similarly, treatment programmes need to ensure they are culturally appropriate. In New Zealand, for example, Māori are overrepresented in family violence statistics as both victims and perpetrators.[82] Given that the central unit in Māori culture is the whanau (family) or hapu (wider family) rather than the individual, some commentators have proposed frameworks that address the issue of family violence by strengthening "whanau rather than those based solely on individuals or couple-based approaches".[83] This change in approach is based on the idea that in some cases, "the attitudes and expressions of violence and its

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76 Tollefson and others, above n 73, 19. See also D Tollefson and E Gross "Predicting Recidivism Following Participation in a Treatment Program for Batterers" (2006) 32 Journal of Social Service Research 39.

77 Boshier and Wademan, above n 75, at 121.

78 At 121.

79 At 121.

80 At 121. See also J Kelly and M Johnson "Differentiation among types of intimate partner violence: research update and implications for interventions" (2008) 46(4) Family Courts Review 457; and L Mackness "Improving treatment paradigms for multi-abuse domestic violence clients" (2008) 6(2) Te Awatea Review 4.

81 An interesting new programme in New Zealand is weekend retreats for repeat family violence families. At these retreats, the families work alongside a number of agencies such as the Police, Child Youth and Family, local churches, the Probation Service, Women's Refuge and other service providers. The families also have access to relationship, budgeting and drug and alcohol counsellors: see New Zealand Police "Families tackle violence issues" *Ten One – The New Zealand Police Online Magazine* (online ed, June 2007) available at <www.police.govt.nz>.

82 Terry Dobbs and Moana Eruera "Kaupapa Maori wellbeing framework: The basis for whanau violence prevention and intervention" (Issue Paper 6 for the New Zealand Family Violence Clearing House, April 2014) at 1.

83 At 41.

dynamic variables are embedded in learned, trans-generational, cultural values rather than evidence of individual pathology".[84]

Given that the causes of family violence are varied, the need for tailored treatment programmes is extremely important.[85] However, to ensure that we are improving victim safety and properly allocating state resources, it is imperative that research is conducted continually as to the effectiveness of treatment programmes.

A real example

I would now like to turn to a real example of what can go wrong if warning signs are missed and the approach to a case is not coordinated.[86]

In this case the father, Edward, was a prison officer. The mother, Katharine, was a public servant. The couple had two children, Bradley and Ellen. In May 2013, Edward and Katharine had separated and a protection order was issued against Edward under the Domestic Violence Act.

Fast forward to 15 January 2014. On that day, Edward had a supervised visit with his children at the local Barnardos centre. It was a good visit apparently and nothing unusual was noticed. The person supervising the visit said that Edward seemed pleased, and that, before he left, he gave the children a kiss and a cuddle, and that he had asked about future visits.

Before visiting the children earlier that day he had gone to the supermarket to purchase beer and cigarettes and he had filled a prescription for his antidepressants at a pharmacy. After his

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84 At 3. See also H Blagg and others "Working with Adolescents to Prevent Domestic Violence: Indigenous Rural Model" (National Crime Prevention, Canberra, 1998).

85 On this point, I note that, since October 2014, there have been changes to the delivery of non-violence programmes for offenders and safety programmes for victims (see Domestic Violence Amendment Act 2013). The changes to non-violence programmes are designed to assess and address the nature, type and causes of violence and any underlying factors. Pursuant to the changes, each participant undertakes a comprehensive assessment to identify the nature of the violence, any criminal history, and other factors (such as substance abuse or mental health difficulties). The programmes that follow the assessment are now more flexible and, for example, can be comprised of a mixture of individual and group work. Additionally, victims may be involved (with their consent) in the process. For more information on non-violence programmes and safety programmes, see Ministry of Justice "Changes to Domestic Violence Programmes" (2014) available at <www.nzfvc.org.nz> and Ministry of Justice "Domestic Violence Service Provider Update: Transitioning to the New Framework" (2014) available at <www.nzfvc.org.nz>.

86 The following facts are taken from the Coroner's findings: see *An Inquiry into the deaths of Ellen Mary Daisy Livingstone, Bradley Victor Livingstone, and Edward Hamilton Livingstone* CC Dun CSU-2014-DUN-16, Dun CSU-2014-DUN-17, Dun CSU-2014-DUN-18, 16 June 2015.

visit with the children, Edward went to the local petrol station to fill up his car. He filled up a previously purchased fuel container with petrol.

That evening Edward went to the park where he sat on a bench drinking beer and watching the sunset. While in the park he texted his old neighbour complaining about child support and the legal system; his last text to the neighbour stated "Look after yourself, karma will get K[atherine]. Look after your family, number one!!!".

At around 10pm, Edward arrived at his former family home in a quiet sea-side suburb of Dunedin where Katharine and the children still lived. He was carrying a shotgun, ammunition and the red plastic fuel container of petrol. He entered through a door not often used by the family.

Edward was below the legal alcohol limit for driving and the dosage of antidepressant in his blood was below the therapeutic level. When he entered the house the children were in bed asleep. Katharine was confronted by Edward in her room and, when he went to pull the curtains, (presumably so the neighbours could not see what was happening), she fled the bedroom and ran next door to the neighbours for help screaming.

Her neighbour went to the house, heard several shots, and was confronted by Edward at the front door. Edward fired but due to the gun's recoil, the bullet hit the top of the door frame. The neighbour ran back home to put on boots to break down the door. At the same time, the neighbour's wife was calling emergency services.

But they were too late. Edward had already shot the children in their beds. He had shot his son Bradley three times and his daughter Ellen, once. Both of the children were killed while lying under their duvets. A further gunshot was heard – that gunshot was Edward taking his own life in the bedroom he had previously shared with Katharine.

So why have I told you this story? Well naturally there were investigations into the tragedy. There has been an internal police review of the case and a coronial inquest. So let's rewind time a bit and see what mistakes were made and what lessons can be learnt.[87]

[87] This is my analysis of the failings and not those of the Coroner.

First Failing

Remember I said at the beginning that Katharine had a protection order against Edward from May 2013. Well the background to that was a serious incident while Katharine and Edward were still living together, although their relationship had been deteriorating for some time. On the day in question in May 2013 Edward had trapped Katharine in their bedroom and raped her over a period of three hours, even as their daughter banged repeatedly on the door. Edward allowed Katharine to put Ellen to bed but then told her it was time to go back into the bedroom. The attack continued.

Later in May, Katharine attempted to leave Edward. However, Edward would not let Katharine and the children leave. The police were called and made aware of the sexual violence incident a few weeks previously. However, Katharine told police she did not want to pursue the rape complaint and that her main priority was getting herself and her children away from Edward.

Despite Katharine informing the police about the rape incident, and despite the Family Violence File stating that the rape allegation would be forwarded to the Criminal Investigation branch, this never occurred. Instead, the Police Family Violence Co-ordinator received the file, and due to Katharine's reluctance to pursue the charges, the police made a decision not to take any further action about the rape allegation.

There was an internal police review, which has acknowledged that this incident was not properly handled and that it should have been dealt with as a case of adult sexual assault and that there should have been a thorough investigation/assessment of the risk Edward posed to Katharine in light of these serious allegations.

Second Failing

In August 2013, Edward breached the protection order by contacting Katharine via email, telephoning her at work, going on to her property when she was not there and loitering outside her address in his vehicle.

He admitted the charge. On the basis that it was his first offence, Edward was granted police diversion. Diversion is a discretionary New Zealand out-of-court process where charges are withdrawn by the police for non-serious offences, usually for first time offenders.

A superintendent conceded at the inquest that granting Edward diversion was a mistake. Police policy provided that diversion could not be considered for breaches of Court orders – which include protection orders.[88] I also highlight the rape allegation (which surely should have raised red flags) and the serious nature of the breach of the protection order (effectively stalker behaviour) although Edward was later to trivialise it.

I also note evidence at the inquest that, at a meeting of Dunedin's Family Violence Inter-Agency Response System in August 2013, Edward had been deemed a high risk to his family.

Third Failing

In July 2013, Edward had given bullet casings to his children as gifts; for obvious reasons, Katharine felt it was a message to her and she was frightened to know that Edward had access to firearms. Upon visiting Katharine's house after the first breach of the protection order, Ellen provided the police with the shells and told them that she had been given them by her father. The police disposed of the shells but did not file any report or take any further action in respect of the shells.

The Coroner found that this "represents a missed opportunity. The cartridge cases could have been viewed as a clear threat to Katharine and further investigation by police may have led to the assessment of the suitability of [Edward's flatmate's] address as a bail address (given the presence of firearms)".

Fourth Failing

In September 2013, Edward again breached the protection order by contacting Katharine. Despite police opposition, and the police informing the Court that Edward had mistakenly been given diversion for the first breach, he was granted a discharge without conviction. This sentence was despite Katharine's victim impact statement saying that she was "constantly harassed" and feared for the safety of her and her children.

The Judge had been told by Edward that he risked losing his job if convicted and this in turn would affect his ability to pay child support.

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[88] Indeed, it is my understanding that the policy does not allow diversion for any family violence matters.

What the Judge did not know, however, and the police did, was that Edward had previous convictions in Australia and also one for common assault in 1993 in New Zealand. About a month after the discharge without conviction, the police received a criminal conviction history from Australia showing that Edward had convictions on nine counts of breaking and entering (1976), illegally using a motor vehicle (1978), maliciously setting fire to a dwelling house (1985) and common assault in (1986).[89]

Katharine gave evidence at the inquest that there were other breaches of the protection order that she did not make complainants about as she thought the "breaches weren't serious enough".

Lessons

So what does this case show and what lessons can we learn?

The first is the importance of risk assessment. It was said at the inquest that Edward exhibited 10 out of 18 of the warning signs for the risk of homicide.[90]

The second is the importance of record keeping so that full information is available at all stages to all who might be involved, and also the need for proper coordination among agencies.[91]

The third is the need for appropriate action to be taken. A rape allegation is just that: a serious criminal matter to be investigated as such.

The fourth is the need to follow up all previous convictions – even those offshore. (And the lesson for us as judges is not to assume we have all the information – ask and check and do not leave any loose ends and make sure you have full details behind those convictions through a summary of facts.)

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89 According to media reports of the coronial hearing, Katharine stated that the arson conviction related to Edward setting fire to an ex-partner's house in Australia: see Blair Ensor and Martin van Beynen "Coroner's probe: Why did Dunedin father Edward Livingstone kill his children" (21 April 2015) Stuff <www.stuff.co.nz>.

90 Mark Hathaway "Clinicians in dark about Edward Livingstone's overseas convictions" (23 April 2015) Television New Zealand <www.tvnz.co.nz>.

91 One of the Coroner's recommendations dealing with this issue was that "Police should review how incidents of family violence are recorded to ensure that there is a central repository of such information that can be accessed by any officer attending a family violence incident and by Family Violence Coordinators attending interagency meetings".

The fifth is never to ignore warning signs.[92]

The sixth is to remember that the most charming and plausible people (as apparently Edward was) can be the most dangerous. It was suggested at the inquest that Edward was adept at what one witness called "impression management"[93] and that he had deceived his treating psychiatrist in a number of ways.[94]

Of course, even if everything had been done correctly, there is no guarantee that Ellen and Bradley would have been saved but they would have stood a better chance and everyone deserves that.

Dedication

It seems appropriate to finish this talk with a dedication to Bradley and Ellen. Bradley, 10, who was passionate about food and cooking. Ellen, 6, who called herself an artist-girl.

And their mother's tribute at the funeral:

> My beautiful children who were caring, loving. They were my life and still are.
> I loved them and love them like no other and they will be in my heart forever,
> and ever.

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92 One of the Coroner's recommendations was that "police should institute training of all front line officers and family violence specialists to reinforce the message that any incident of Family Violence must be treated as a serious incident as it may be part of a series of incidents that, taken together, will enable a proper risk assessment to be made".

93 "Livingstone inquest: Former flatmate feels 'manipulated'" *Otago Daily Times* (online ed, Dunedin, 23 April 2015).

94 It was one of the Coroner's comments under s 57(3) of the Coroner's Act 2006 that there was "a need for health professionals to take care when providing reports to a court. Health professionals should ensure that they are aware of the purpose for which the report is sought. They should advise the court of the information relied on and its sources and set out any limitations to the report".

Appendix

At the conference, in order to illustrate some of the points made, a hypothetical example was used to stimulate discussion.

Pre-trial issues

John and Jane

Imagine a couple called John and Jane. One evening, the next door neighbours phone the police after hearing screams coming from John and Jane's house. Upon arrival, but before the ambulance arrives, Jane gives her statement to the police while sitting in the privacy of the police car. She tells the police that it is her birthday and that they do not go out socialising often but that John had taken her to the local bar for a drink and nibbles. While at the bar, John got the wrong impression when she joked with the bartender. He accused her of flirting. So, before they had even finished their first drinks, John dragged her by the arm out of the bar and back home.

When they got back inside Jane received a text – it was from her sister and she told John that. However, John did not believe her and grabbed her hand, wrestling her for the phone and, in the process, breaking three of her fingers. While John was checking the phone, he pushed Jane up against the wall with one hand against her neck so that she had difficulty breathing. Despite realising that it had been a text from her sister, John slammed the phone against Jane's face. And then he threw it to the ground, stamped on it and destroyed it.

John was taken into custody and has been charged with assault. He has applied for bail. So the questions to discuss are:

- Would you release him on bail?
- Does anything in particular strike you about the incident?
- What other information would you want before you before making a decision?
- What if Jane supported bail?
- What conditions might you impose?

Suggested considerations:

- The best predictor of repeated violence is past violence. So you would want to know whether this was an isolated event
- This means that you would want John's previous criminal history, including any acquittals. You would be particularly interested in any earlier family violence charges and it would be worth having a summary of facts for these previous incidents.
- But this would not be enough. You would also want a record of police call outs to the house, even if they did not result in charges.
- You would also wish to inquire about substance abuse issues.
- Some of the facts may suggest a jealous controlling nature. And that can be a danger sign for further abuse. Remember that Jane says that they do not go out much, his concern about the barman, that he wanted to check her phone and that he smashed it, even though the text was from her sister. Is John attempting to isolate Jane, even from her sister?
- Are there any mental health issues that need addressing?
- Remember that John had his hand on Jane's neck and she had difficulty breathing. Attempted strangulation is one of the major warning signs for further abuse and even later homicide.[95]
- Is Jane's support of bail forced? Has she been directly threatened by John? Does she fear reprisals if she does not support bail? Is she concerned about her financial position?
- Conditions? Consider whether John should be required to live elsewhere and have no contact with Jane, especially if she is a police witness – ie if he is going to contest the charge. Also consider whether electronically monitored bail should be required.
- Compliance with court orders in the past?

Towards the trial

I returned to my fictional example again to illustrate some of the points that can arise when the courts are dealing with family violence cases.

[95] See above at n 12.

John and Jane again

The week before John's trial was set down at the local courthouse, John and Jane go together to the police station to make a formal statement. Jane says that she lied to the police when making the initial complaint. Jane says that they were just fooling around and play fighting and that she tripped, banged her head, and accidently smashed her phone. She says that the fall was the cause of the cut to the side of her head. She says she lied because she was annoyed with John for making her come home early from the bar but admits she had been behaving inappropriately there because she had drunk too much.

The following questions arise:

- Is the earlier police statement admissible?
- How would you assess which version is correct?
- Why might she recant (even if the earlier version was true)?

Admissibility: In many common law jurisdictions there were (and in some cases still are) major problems with retractions of allegations. This is because earlier statements are deemed hearsay and often police would not proceed with prosecutions, even with physical evidence of injuries, where a victim had recanted.

Now in New Zealand, prior inconsistent statements are admissible as to the truth of their contents.[96] Spousal immunity from giving evidence has also been abolished.[97] Even if they come to court, however, for self-preservation reasons victims may still try to recant (falsely) their earlier statements.

If this occurs, in fairness, the prior inconsistent statement should be put to the victim in the witness box for comment.[98] The majority of the Supreme Court in *Hannigan v R* held that merely putting an inconsistent statement to a witness does not amount to cross-examination.[99]

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96 See *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [118] per McGrath, William Young, Chambers and Glazebrook JJ.

97 Historically, a wife and husband were treated as a single entity. Under the common law, spouses were incompetent to testify against each other. This spousal immunity was limited via ss 4 and 5 of the Evidence Act 1908 and s 29 of the Evidence Amendment Act (No 2) 1980 which stated that a person was competent to testify against his or her spouse but could not be compelled to do so: see New Zealand Law Commission *The Privilege Against Self-Incrimination: A discussion paper* (NZLC PP25, 1996) at [241].

98 *Hannigan v R,* above n 96, at [104] per McGrath, William Young, Chambers and Glazebrook JJ.

99 See [92]–[107]. The majority of the Supreme Court (McGrath, William Young, Chambers and Glazebrook JJ) held that the prosecutor's questions in *Hannigan* did not amount to cross-examination. In drawing the

The compellability provisions, in ss 71–75 of the Evidence Act 2006, mean that family violence victims who are unwilling to testify can potentially be subject to prosecution for contempt of court. As a result of this, some commentators argue that judges should have the residual discretion not to compel victims of family violence to give evidence where it is likely to further endanger women.[100]

Assessment: As to assessing which version is correct, factors to consider include that John accompanied Jane to the police station for the retraction (and could have been influencing her), assessing whether she could have sustained the injuries she did in the manner she now says and the likelihood of the phone being smashed in the course of a play fight.

Why recant?: As to why Jane might recant, even if the earlier version were true, the same factors as applied in relation to her support of bail may apply.

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line between permissive questioning under s 89(1)(c) and cross-examination, the majority of the Court characterised the latter as "primarily addressed to the breaking down (or impeachment) of the evidence of a witness": at [107]. If a prosecutor does wish to cross-examine his or her own witness, a declaration of hostility under s 94 will be required. In most instances, however, a declaration of hostility and cross-examination would not be necessary as a fact finder would have the witness' inconsistent statements and the witness' explanation before them in reaching their decision.

100 See Judith Buckingham "Patterns of Violence in Intimate Relationships: A Critical Examination of Legal Responses" (PhD Thesis, University of Canterbury, 2006) at 326.