

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, JAGOT AND BEECH-JONES JJ

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THE KING

APPELLANT

AND

ANNA ROWAN – A PSEUDONYM

RESPONDENT

*The King v Anna Rowan – A Pseudonym*

[2024] HCA 9

*Date of Hearing: 14 November 2023*

*Date of Judgment: 13 March 2024*

M47/2023

## ORDER

*Appeal dismissed.*

On appeal from the Supreme Court of Victoria

### Representation

C B Boyce KC with S C Clancy for the appellant (instructed by Solicitor for Public Prosecutions (Vic))

P J Morrissey SC with C Mylonas for the respondent (instructed by Brown McComish Solicitors)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **The King v Anna Rowan – A Pseudonym**

Criminal law – Defences – Defence of duress – Where respondent charged with sexual offences committed against two of her daughters in presence of respondent's partner "JR" – Where, prior to trial, respondent sought to raise defence of duress – Where supporting evidence on voir-dire included daughters' evidence, forensic psychologist's report and tendency evidence concerning JR's threatening, violent and controlling behaviour – Where trial judge ruled no factual basis for duress – Where trial proceeded without duress being put to jury and respondent convicted – Where Court of Appeal of Supreme Court of Victoria found duress should have been put to jury – Whether Court of Appeal implicitly adopted doctrine of "duress of circumstances" instead of requirement there be threat to inflict harm if accused failed to commit acts charged – Whether Court of Appeal erred in concluding evidence was sufficient to raise defence of duress at common law and under s 322O of *Crimes Act 1958* (Vic).

Words and phrases – "defence of duress", "duress at common law", "duress of circumstances", "ongoing threat", "operative threat", "threat to inflict harm", "unstated demand".

*Crimes Act 1958* (Vic), s 322O.



1 GAGELER CJ, GORDON, JAGOT AND BEECH-JONES JJ. The principal issue in this appeal is whether the Court of Appeal of the Victorian Supreme Court erred in concluding that the evidence adduced before a trial judge on a voir-dire was sufficient to raise a "defence" of duress both at common law and under s 322O of the *Crimes Act 1958* (Vic).<sup>1</sup>

2 It was common ground that one of the elements of the defence of duress is that, when the accused committed the acts that constitute the offence charged, they were subject to a threat of the relevant form of harm (such as death or grievous bodily harm) if they failed to undertake those acts.<sup>2</sup> The appellant contended that the Court of Appeal ignored or misapplied this element and instead implicitly adopted the doctrine developed in England and Wales known as "duress of circumstances". Under that doctrine, duress can be established by objective circumstances that caused an accused to commit the acts that constituted a crime in order to avoid death or serious injury, provided their response was reasonable and proportionate.<sup>3</sup> The doctrine does not require evidence of any threat to inflict the relevant form of harm if the accused failed to undertake those acts.

3 For the reasons that follow, the Court of Appeal did not adopt or apply the doctrine of "duress of circumstances", but instead applied the accepted understanding in this country of the form of threat necessary to establish duress at common law. This understanding derives from the dissenting judgment of Smith J in *R v Hurley*.<sup>4</sup> In those circumstances, the occasion does not arise for this Court to consider whether the common law of Australia concerning duress as a defence to a criminal charge should be extended in the manner that has occurred in England and Wales or in any other respect. Accordingly, the appeal should be dismissed.

## Background

4 The respondent was born in 1974. According to the report of a forensic psychologist, Ms Pamela Matthews, tendered on the voir-dire, the respondent has a full-scale IQ of 70 and a mild intellectual disability, with her abstract reasoning, vocabulary and general knowledge in the bottom 0.5% of the population.

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1 As in force from 1 November 2014.

2 See *R v Hurley* [1967] VR 526 at 543 per Smith J.

3 *R v Martin* [1989] 1 All ER 652 at 653 per Simon Brown J; *R v Abdul-Hussain* [1998] EWCA Crim 3528 at 12-13 per Rose LJ.

4 [1967] VR 526.

2.

5 The respondent's partner, JR, was born in 1971.<sup>5</sup> The respondent and JR commenced a relationship in 1992. Throughout their relationship, the respondent lived with JR on a farm in rural Victoria. Their first child, Paige, was born in November 1999 and their second child, Alicia, was born in June 2001. They had two more children. The evidence at the trial reveals extreme family dysfunction. JR was violent and controlling toward the respondent and their children. The respondent was financially and socially dependent on JR.<sup>6</sup>

6 In November 2015, JR was arrested and charged with committing sexual offences against Paige and Alicia. In September 2016, the respondent was arrested and charged. JR and the respondent were initially arraigned on a single indictment that contained 13 joint counts and numerous separate counts against JR.

7 After a joint trial in the County Court of Victoria in early 2019, JR was found guilty on 26 separate counts on the indictment. However, the jury was unable to return verdicts on the 13 joint counts and was discharged. The voir-dire was conducted just prior to the date fixed for the retrial of JR and the respondent on the joint counts. The trial judge ruled that there was no factual basis for the respondent to rely on duress. JR then applied for and obtained a separate trial on the joint counts, after which the appellant decided not to prosecute him further. He was later sentenced to a lengthy term of imprisonment for the 26 offences of which he was convicted.<sup>7</sup>

8 In June 2021, the respondent stood trial on the 13 joint counts. Consistent with the trial judge's ruling, the jury was not instructed on duress. On 30 June 2021, the jury found the respondent guilty of counts 1 and 3 to 13, and not guilty of count 2. On 13 August 2021, the respondent was sentenced to terms of imprisonment for each count. The effective term of imprisonment imposed was seven years and five months with a non-parole period of four years and 11 months.<sup>8</sup>

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5 All of the names in this judgment are pseudonyms. The initials of the respondent's partner are not "JR".

6 *Anna Rowan (a pseudonym) v The King* [2022] VSCA 236 ("*Rowan*") at [10] per Kyrou and Niall JJA.

7 *DPP v Rowan (a pseudonym)* [2020] VCC 360 at [32]-[33] per Judge Lyon.

8 *DPP v Rowan (a pseudonym)* [2021] VCC 1135 at [68] per Judge Lyon.

3.

- 9 The respondent sought leave to appeal against her convictions and sentence. The respondent maintained one ground of appeal against her convictions, namely, that the trial judge erred in ruling that the defence of duress was not available, which thereby occasioned a substantial miscarriage of justice.<sup>9</sup> On 28 October 2022, the Court of Appeal (Kyrou, McLeish and Niall JJA) upheld this ground, set aside the trial judge's ruling and the respondent's convictions, and ordered a retrial in respect of counts 1 and 3 to 13.<sup>10</sup> On 16 June 2023, Kiefel CJ and Jagot J granted the appellant special leave to appeal that decision.

### The prosecution and defence cases

- 10 Count 1 of the indictment charged the respondent and JR with having committed an act of indecency with or in the presence of Paige.<sup>11</sup> Counts 2 to 12 charged the respondent and JR with having committed incest upon Paige (ie, taking part in an act of sexual penetration with Paige knowing her to be their child).<sup>12</sup> Count 13 charged the respondent and JR with having committed incest upon Alicia.<sup>13</sup> The indictment averred that the offences were committed during various periods between 27 November 2009 and 26 November 2015. Paige was aged between 10 and 15 and Alicia was 13 at the time the offences against each of them were committed. It was common ground that s 322O of the *Crimes Act* only had potential application to count 13 and the potential availability of duress as a defence to the other counts was governed by the common law. With all the incest counts, other than counts 2 and 11, the prosecution alleged that it was JR who penetrated either Paige or Alicia and the respondent was present and either encouraging or assisting JR.

- 11 The prosecution principally relied on the evidence of Paige and Alicia. Their evidence was adduced in a pre-recorded format.<sup>14</sup> The following precis of

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9 *Criminal Procedure Act 2009* (Vic) ("CPA"), s 276(1)(b).

10 *Rowan* [2022] VSCA 236.

11 *Crimes Act 1958* (Vic), s 47(1).

12 *Crimes Act*, s 44(1).

13 *Crimes Act*, s 44(1).

14 This Court was informed that the evidence of Paige and Alicia that was adduced in the voir-dire was materially the same as that adduced at both the trial at which the jury could not agree (in early 2019) and the trial that resulted in the respondent being convicted (in June 2021).

that evidence is taken from the trial judge's summing up and the Court of Appeal's description of their evidence.<sup>15</sup> Their evidence was confronting. They described many uncharged acts of sexual abuse and violence.

*Paige's evidence*

12         Paige said that the acts that constituted counts 1, 3 and 4 occurred on the same occasion in the bedroom of the respondent and JR.<sup>16</sup> Those counts respectively involved JR and the respondent having sexual intercourse in the presence of Paige, JR digitally penetrating Paige and JR penetrating Paige with his penis. Paige described various uncharged acts, such as JR licking the respondent's vagina in Paige's presence, JR wanting Paige to put her fingers in her vagina, the respondent touching and playing with Paige's breasts, and the respondent touching her own vagina while JR penetrated Paige. Paige said that JR told her that he "talked [the respondent] into showing [Paige] what to do".

13         Counts 5 and 6 were committed in the bedroom of the respondent and JR on a different occasion to counts 1, 3 and 4 and respectively involved JR penetrating Paige's vagina with his penis and then with a sex toy. Both immediately prior to and after the commission of count 5, JR and the respondent had sexual intercourse. During the commission of count 6, the respondent rubbed Paige's breasts. Paige said that she complained about pain, but that JR dismissed her complaint before the respondent said something to JR and he stopped.

14         Counts 7 to 10 were committed on a different occasion to the other counts in a cabin that was located behind the farmhouse. Those offences involved JR penetrating Paige twice with his penis and twice with a sex toy. The first act of penetration occurred while JR and the respondent were having sexual intercourse. During one of the other acts of penetration, the respondent penetrated herself with a sex toy.

15         With these counts, Paige said that at one point she resisted JR's attempts to make her have an orgasm and protested that she was in pain. JR said something to the respondent, and the respondent put her breast in Paige's mouth. Paige resisted. Paige described JR as "really angry" and said that he told her to "stop it, just take it and get past the pain, it won't be as bad and stop fighting". Paige began crying

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15     See *Rowan* [2022] VSCA 236 at [13], [39]-[52] per Kyrou and Niall JJA.

16     Count 2 was also said to have occurred on the same occasion.

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and the respondent told JR to stop, which he did. JR and the respondent then argued.

16 Counts 11 and 12 were also committed in the cabin behind the farmhouse, but on a different occasion to counts 7 to 10. With count 11, JR grabbed Paige and placed her close to the respondent, who was sitting naked on a bed with her legs open. The respondent then inserted a sex toy into Paige's vagina. With count 12, JR interrupted sexual intercourse with the respondent to penetrate Paige's vagina with his penis.

17 Paige gave evidence of violent acts committed against both her and Alicia by JR without the involvement of the respondent. Paige described JR as "hot-tempered" and said he would "just lose it". On one occasion he smashed a baseball bat against the wall, causing Alicia's hand to scar. Paige said that JR kept a belt hanging over his bedroom door which he would use to hit the children, making them cry and leaving marks on them. She said that JR threatened to kill her if she disclosed the sexual abuse.

18 Paige described various acts of extreme depravity committed by JR against her accompanied by threats of violence that did not involve the respondent, including making Paige watch pornography that depicted bestiality and making her allow the family dog to lick her vagina under threat that, if she moved, he would hit her. On one occasion, he urinated on Paige. Paige said that JR made her use "dildos and vibrators", which she did because she believed JR would hit her if she refused. On another occasion when JR sexually assaulted Paige, JR hit her and held his hand over her mouth to stop her from yelling.

19 Paige's evidence included observations about the respondent's willingness to participate in the sexual abuse. Paige made notes of her recollection of her abuse to assist her memory, which included the statement that "to [her] knowledge [JR] made [the respondent] do those things". In cross-examination, Paige confirmed that, to her knowledge, JR made the respondent "do stuff". In re-examination, Paige said that "at times, it did not look like the [respondent's] involvement in the sexual abuse was voluntary because they were not making decisions together, she was very quiet and she would even argue with JR". Paige described the respondent as "easily pushed around by everyone in the family, including the children".

#### *Alicia's evidence*

20 It is necessary to describe Alicia's evidence in relation to count 13 in some detail. Alicia stated that, on one occasion when she and JR were alone in the cabin, JR left and returned with the respondent. Alicia said the respondent did not do anything but just stood and looked at Alicia. JR told the respondent that he wanted

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to shave Alicia and the respondent said, "Why do I need to be in here?" Alicia said that JR said that he wanted the respondent's help. Alicia said her eyes were closed but she believed that JR then shaved her pubic region and the respondent held Alicia's legs open while JR inserted a sex toy into Alicia's vagina (count 13). Alicia screamed in pain and the respondent released her grip on Alicia's legs. Alicia closed her legs to try to stop JR inserting the sex toy into her vagina again. JR covered her mouth and she bit his hand. JR again pushed the sex toy into Alicia's vagina and then let go of her and walked out.

21 Alicia said that, shortly afterwards, JR told her that it was the respondent's idea to "put it in [Alicia]". Alicia relayed this to the respondent, who replied that it was JR's idea and that "he wanted her to take the blame because [Alicia] blamed him for so many other things".

22 In his closing address to the jury, the Crown Prosecutor referred to an answer given by Alicia in her recorded interview by the police to the effect that: "I don't understand why [the respondent] would have been involved ... unless [JR] forced her to and told her that if she didn't do it, he'd [do] something to her".

#### *The defence case*

23 The respondent did not give evidence at any of her trials. The defence case did not dispute that JR offended against Paige or Alicia, but contended that the respondent was not present and did not do any of the acts for which she was charged. Alternatively, the respondent contended that she could not remember committing any of the offences because of difficulties with her memory.

#### **The voir-dire and the trial judge's ruling**

24 On the voir-dire, the respondent contended that Paige and Alicia's evidence, Ms Matthews' report and the evidence the subject of a tendency notice concerning JR were a sufficient evidentiary basis for duress to be put to the jury. Paige and Alicia's evidence has already been described.

25 Some aspects of Ms Matthews' assessment of the respondent's intellectual functioning have already been noted. Ms Matthews also opined that the respondent's "social deficits", which were associated with her intellectual disability, made it more difficult for the respondent to "withstand persuasion and manipulation". Ms Matthews' report includes verbatim extracts of her discussion with the respondent concerning her relationship with JR. These extracts supported Ms Matthews' conclusion that the respondent was subject to JR's financial and social control, was unable to leave the farm without his permission and suffered emotional abuse, intimidation and sexual abuse at his whim. The report recounts

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the respondent stating that JR would hit her every time during sex and that he displayed extreme anger towards her which made her afraid.

26        Parts of Ms Matthews' report recount the respondent's response to Paige and Alicia's allegations against her. The respondent admitted having sexual intercourse with JR in the presence of Paige and Alicia but denied so much of the allegations that suggested she took any active step beyond that to sexually abuse Paige or Alicia. The report recounts the respondent repeatedly stating that she had sexual intercourse with JR in Paige's presence because JR made her ("I tried to say no, but he made me"; "I only knew what I was told"). The report also recounts that the respondent explained that she did not stop JR from abusing Paige and Alicia because she felt "afraid" and that if she ran away from him, he "would take the kids off me". When she was pressed as to why she did not stop having sex with JR in the presence of Paige and Alicia, the respondent stated "[JR's] short fuse would come out, and [I was] afraid of [what] might happen, [JR got] angry on those occasions when he would hit, I would get afraid for the girls, afraid [he would] hit the girls ... hit me".

27        Under the heading "Opinion", Ms Matthews concluded that the respondent was intellectually disabled and that her circumstances were suggestive of her having experienced "Battered Woman Syndrome". This syndrome was described as a "learned helplessness process" in which women who have been repeatedly abused within a relationship believe they cannot escape. Ms Matthews described this syndrome as a form of Post-Traumatic Stress Disorder.

28        On the voir-dire, the Crown Prosecutor objected to the tender of Ms Matthews' report. The trial judge did not address that objection, but instead made a ruling on the assumption that the report and the statements of the respondent it contained were admissible. The appellant maintained its objection in the Court of Appeal. However, in this Court, the appellant accepted that the appeal is to be decided on an evidentiary basis that includes Ms Matthew's report.

29        The respondent's tendency notice<sup>17</sup> described a tendency of JR to display "towards all family members ... threats, intimidation, psychological violence, physical violence and family violence including economic for the purpose of control, coercion and domination of all family members".

30        The tendency notice identified 19 passages from the evidence of Paige and Alicia as supporting the alleged tendency, which included the violent and sadistic acts of JR described above. The tendency notice also identified nine statements

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17    *Evidence Act 2008* (Vic), s 97.

made by the respondent set out in Ms Matthews' report concerning violent and controlling conduct of JR. It suffices to state that the evidence identified in the tendency notice was capable of establishing the asserted tendency on the part of JR during the period covered by the indictment.

31 In the trial judge's ruling rejecting the respondent's reliance on duress, his Honour concluded that there was no evidence that the respondent was acting under any form of threat which had constrained her to commit the offence nominated by the person making the threats (ie, JR).

32 As noted, the respondent sought leave to appeal against her convictions and her appeal was allowed. Before considering the appellant's complaints about the Court of Appeal's reasoning and conclusion, it is necessary to address so much of the common law concerning duress that requires that the accused be subject to a threat of the relevant form of harm if the accused fails to do the acts that constitute the offence charged.

### **Duress and "element (i)" in *Hurley***

33 Subject to any statutory provision to the contrary,<sup>18</sup> the accused bears an evidential burden to raise a defence of duress and, if discharged, the prosecution bears the legal burden of proving beyond reasonable doubt that the accused did not act under duress.<sup>19</sup> It follows from *Braysich v The Queen*<sup>20</sup> that the accused's evidential burden is satisfied if there is "evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to have a reasonable doubt that each of the elements of the defence had been negated". This test can be expressed in positive terms as requiring that the accused identify some basis in the evidence that raises a reasonable possibility that each of the elements of the defence exists.<sup>21</sup> It is only if a trial judge is satisfied that threshold has *not* been reached that they may decline to put duress to the jury. In terms of the *Jury Directions Act 2015* (Vic), unless the trial judge was so satisfied, there

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18 See, eg, *R v Daher* [1981] 2 NSWLR 669.

19 *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 ("Lynch") at 668 per Lord Morris; *Zaharias* (2001) 122 A Crim R 586 at 599 [79] per O'Bryan A-JA, Winneke P and Vincent JA agreeing.

20 (2011) 243 CLR 434 at 454 [36(1)] per French CJ, Crennan and Kiefel JJ.

21 *Taiapa v The Queen* (2009) 240 CLR 95 at 109 [39] per French CJ, Heydon, Crennan, Kiefel and Bell JJ.

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would not be a "good reason" to decline to give a requested direction to the jury in respect of duress.<sup>22</sup>

34 Reference has already been made to the judgment of Smith J in *Hurley* and the so-called "elements" of the defence of duress. The relevant passage in *Hurley* specifying those elements is as follows:<sup>23</sup>

"Where the accused has been *required to do the act charged against him (i) under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act* and (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did and (iii) the threat was present and continuing, imminent and impending (as previously described) and (iv) the accused reasonably apprehended that the threat would be carried out and (v) he was induced thereby to commit the crime charged and (vi) that crime was not murder, nor any other crime so heinous as to be excepted from the doctrine and (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application and (viii) he had no means, with safety to himself, of preventing the execution of the threat, then the accused, in such circumstances at least, has a defence of duress." (emphasis added)

35 In *Taiapa v The Queen*,<sup>24</sup> this Court observed that the above statement of the elements has been frequently cited as authoritative<sup>25</sup> and cited decisions of intermediate courts of appeal in non-code jurisdictions, namely, Victoria,<sup>26</sup> New

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22 *Jury Directions Act 2015* (Vic), s 14(1).

23 [1967] VR 526 at 543 per Smith J.

24 (2009) 240 CLR 95.

25 *Taiapa* (2009) 240 CLR 95 at 105 [28] fn 46 per French CJ, Heydon, Crennan, Kiefel and Bell JJ.

26 *R v Dawson* [1978] VR 536.

South Wales<sup>27</sup> and South Australia.<sup>28</sup> To those references there can be added first instance decisions in the Australian Capital Territory.<sup>29</sup>

36 Although the above statement from *Hurley* has been treated as "authoritative", it has not been treated as prescribing any particular form of jury direction, much less one that has eight components.<sup>30</sup>

*Express and implied threats*

37 The necessity for the accused to be subject to a threat of infliction of the relevant form of harm if the accused fails to commit the acts that constitute the offence charged has been a consistent feature of the consideration of the common law of duress by intermediate courts of appeal in the common law jurisdictions in this country.<sup>31</sup>

38 The nature of the requisite threat is illustrated by the facts of *R v Dawson*<sup>32</sup> and *R v Lorenz*.<sup>33</sup> In *Dawson*, the accused escaped from prison but led evidence that he did so because he feared for his life after receiving threats from other

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27 *R v Abusafiah* (1991) 24 NSWLR 531 at 537 per Hunt J, Gleeson CJ and Mahoney JA agreeing.

28 *R v Brown* (1986) 43 SASR 33 at 38 per King CJ.

29 *R v Lorenz* (1998) 146 FLR 369.

30 See *Abusafiah* (1991) 24 NSWLR 531 at 544-545 per Hunt J, Gleeson CJ and Mahoney JA agreeing.

31 *Hurley* [1967] VR 526; *Dawson* [1978] VR 536; *Brown* (1986) 43 SASR 33; *Abusafiah* (1991) 24 NSWLR 531; *Clarkson v The Queen* (2007) 209 FLR 387 at 402 [86] per Beazley JA. Even though only some of the statutory definitions of duress include that element: *Criminal Code* (Cth), s 10.2(2)(a); *Crimes Act 1958* (Vic), s 322O(2)(a)(i) and former s 9AG(2)(a); *Criminal Law Consolidation Act 1935* (SA), s 15D(1)(a)(i); *Criminal Code* (WA), s 32(2)(a); *Criminal Code* (ACT), s 40(2)(a). The other provisions require a threat but not one that necessarily involves a threat to inflict the relevant form of harm if the accused fails to commit an offence: *Criminal Code* (Qld), s 31(1)(c); *Criminal Code* (Tas), s 20(1); *Criminal Code* (NT), s 40.

32 [1978] VR 536.

33 (1998) 146 FLR 369.

prisoners. The Full Court held that duress was not open because the threats were not made on the basis that, if he did not escape, he would be subject to violence.<sup>34</sup> In *Lorenz*, the accused robbed a supermarket employee with a knife after her de facto partner threatened to kill her if she did not obtain enough money to re-register his car. The accused was pregnant at the time.<sup>35</sup> After noting *Hurley* and *Dawson*, Crispin J held that the defence of duress was not available as the accused's de facto partner did not direct her to commit the robbery.<sup>36</sup>

39           However, neither *Dawson* nor *Lorenz* suggests that a threat to inflict the relevant form of harm if the accused fails to commit the acts constituting the charge cannot be implied. In *Hurley*, Smith J postulated the scenario of armed men taking possession of a house at gunpoint and sending the accused to commit a crime on their behalf while retaining a hostage such that "the threat to the hostage's life, *whether it is formulated in words or left unsaid*, may be held to be, during the execution of the commission, sufficiently present and continuing, imminent and impending to found the defence of duress" (emphasis added).<sup>37</sup>

40           The references in *Hurley* to the threat being "present and continuing, imminent and impending" do not require that all the conduct relied upon as giving rise to the threat be engaged in immediately prior to the crime being committed. Instead, those statements should be taken as conveying a requirement that the threat conform with the description of the equivalent aspect of duress noted in other cases, namely that the threat be "operative"<sup>38</sup> or "effective"<sup>39</sup> at the time the accused committed the acts that constitute the offence charged. The relevant threat does not have to immediately precede the accused's criminal act if there was no reasonable

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34   *Dawson* [1978] VR 536 at 538 per Anderson J, 542 per Harris J.

35   *Lorenz* (1998) 146 FLR 369 at 371 per Crispin J.

36   *Lorenz* (1998) 146 FLR 369 at 377.

37   *Hurley* [1967] VR 526 at 543.

38   *Attorney-General v Whelan* [1934] IR 518 at 526 per Murnaghan J.

39   *Abusafiah* (1991) 24 NSWLR 531 at 545 per Hunt J, Gleeson CJ and Mahoney JA agreeing.

opportunity to avoid committing the offence in the meantime (that being the issue raised by element (viii) in *Hurley*).<sup>40</sup>

41 The significance of antecedent conduct of the maker of the threat and what is known about their character in determining whether there is a threat to inflict violence unless the accused commits the acts that constitute the offence can be illustrated by the facts in *Director of Public Prosecutions for Northern Ireland v Lynch*,<sup>41</sup> which was decided before the developments in the law of duress in England and Wales discussed below. In *Lynch*, the appellant drove a motor car containing a group of gunmen, who shot and killed a police officer.<sup>42</sup> The appellant said that he acted under a threat that, if he did not co-operate, he would be shot.<sup>43</sup> The debate at trial and at two levels of appeal concerned the availability of duress as a defence to murder, a matter that is not of present significance in this case.<sup>44</sup>

42 What is of present significance is the facts that were found to be sufficient to raise the defence of duress in *Lynch*. The appellant was summoned to meet Meehan, a known "member of the IRA and a ruthless gunman", and was told to drive Meehan and two other gunmen to the scene of the killing.<sup>45</sup> Lord Edmund-Davies described the balance of the evidence that was adduced in support of duress as follows:<sup>46</sup>

"It was ... proved that, before the date of the shooting, six policemen had already been murdered in the Ardoyne area, which was a stronghold of the Provisional IRA, and where the appellant lived, and that Sean Meehan was a well-known and ruthless gunman, and the appellant and Bates gave evidence that Meehan was the kind of person whom it would be perilous to defy or disobey and who, on the occasion in question, gave his instructions

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40 See *Taiapa* (2009) 240 CLR 95 at 107-108 [35] per French CJ, Heydon, Crennan, Kiefel and Bell JJ.

41 [1975] AC 653.

42 *Lynch* [1975] AC 653 at 655-656.

43 *Lynch* [1975] AC 653 at 655.

44 See also *R v Howe* [1987] AC 417 at 437 per Lord Bridge.

45 *Lynch* [1975] AC 653 at 655-656.

46 *Lynch* [1975] AC 653 at 704-705, quoting *R v Lynch* [1975] NI 35 at 39 per Lowry LCJ.

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in a manner which indicated to them that he would tolerate no disobedience. *There was no evidence of a direct threat by Meehan or any other person against the life or personal safety of the appellant or any member of his family*, but both the appellant and Bates testified to their fear of Meehan and their clear view that their disobedience of his instructions would cause them to be shot." (emphasis added)

43 In the Court of Criminal Appeal of Northern Ireland, it was accepted that this evidence "raised a question for the jury whether Meehan impliedly threatened the appellant with death or serious personal injury".<sup>47</sup> The implication that Meehan threatened the appellant with serious violence or death unless he committed the acts charged arose from Meehan's violent character, antecedent conduct and direction to the appellant on the day of the crime that he assist Meehan in the murder of the police officer.

#### *Section 322O*

44 With effect from 1 November 2014, the defence at common law of duress was abolished in Victoria and replaced by s 322O of the *Crimes Act*.<sup>48</sup> As noted, it was common ground that s 322O was potentially applicable to count 13 only. Section 322O provides:

#### **"Duress**

- (1) A person is not guilty of an offence in respect of conduct carried out by the person under duress.
- (2) A person carries out conduct under duress if –
  - (a) the person reasonably believes that –

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47 *Lynch* [1975] AC 653 at 705 per Lord Edmund-Davies, quoting *Lynch* [1975] NI 35 at 52 per Lowry LCJ.

48 The legislation which enacted this provision repealed, inter alia, former s 9AG of the *Crimes Act*, which was in similar terms but only applicable to murder, manslaughter and defensive homicide: *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic), s 3(3). Under the former s 9AG, the requirement that the conduct of the accused be a reasonable response to the threat was expressed in wholly objective terms and to be a matter for the accused's reasonable belief.

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- (i) subject to subsection (3), a threat of harm has been made that will be carried out unless an offence is committed; and
  - (ii) carrying out the conduct is the only reasonable way that the threatened harm can be avoided; and
- (b) the conduct is a reasonable response to the threat.
- (3) A person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.
- (4) This section only applies in the case of murder if the person believes that the threat is to inflict death or really serious injury."

45 Section 322P provides that in circumstances where duress in the context of family violence is in issue, evidence of that violence may be relevant in determining whether a person has carried out conduct under duress. The Victorian Court of Appeal reached the same conclusion in relation to the common law.<sup>49</sup>

46 The submissions in this Court and the Court of Appeal did not address s 322O in any detail. Leaving aside the reference to reasonable belief, both parties treated s 322O(2)(a)(i) as specifying a similar element to element (i) in *Hurley* and excluding the application of the doctrine of duress of circumstances. It suffices to state that, in this case, if the evidence adduced on the voir-dire was sufficient to raise a defence of duress at common law, then it was sufficient to raise a defence under s 322O.

### *Duress of circumstances*

47 As noted, the appellant's concern is that the Court of Appeal's judgment in this case reflected the adoption of a relatively recent doctrinal development in England and Wales known as duress of circumstances. In *In re A (Children) (Conjoined Twins: Surgical Separation)* ("*Re A*"),<sup>50</sup> Brooke LJ traced the development of this doctrine through a series of cases in which the accused was said to be compelled by circumstances to drive unlawfully, such as driving on a

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49 See *Director of Public Prosecutions (Vic) v Parker* (2016) 258 A Crim R 527 at 535-536 [27] per Redlich, Osborn and Priest JJA.

50 [2001] Fam 147 at 232-236.

pavement to escape a violent gang.<sup>51</sup> The doctrine was described by Simon Brown J in *R v Martin* as follows:<sup>52</sup>

"The principles may be summarised thus: first, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure on the accused's will from the wrongful threats or violence of another. Equally however it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'.

Second, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury."

48 This passage subsumes two forms of "duress", being duress from threats and "duress of circumstances", into a single defence of necessity that is conditioned upon the need for the accused's response to be reasonable and proportionate. In *R v Howe*, Lord Hailsham described duress arising from wrongful threats as a "species of the genus of necessity".<sup>53</sup> However, in *Re A*, Brooke LJ distinguished between the form of "necessity" discussed in the above extract from *Martin*, and "pure necessity" as discussed in Stephen's *Digest*,<sup>54</sup> and which has been developed in this country.<sup>55</sup> Brooke LJ noted that with "pure necessity the [accused's] mind is not irresistibly overborne by external pressures" as is the case with duress by threats or circumstances.<sup>56</sup> Instead, the accused's "conduct [is] not harmful because on a choice of two evils the choice of avoiding the greater harm was justified".<sup>57</sup>

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51 *Willer* (1986) 83 Cr App R 225. See also *R v Conway* [1989] QB 290; *Martin* [1989] 1 All ER 652; *R v Shayler* [2001] 1 WLR 2206.

52 [1989] 1 All ER 652 at 653.

53 [1987] AC 417 at 429.

54 See *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 ("Re A") at 224-225.

55 See *R v Loughnan* [1981] VR 443; *Rogers* (1996) 86 A Crim R 542.

56 *Re A* [2001] Fam 147 at 236.

57 *Re A* [2001] Fam 147 at 236 per Brooke LJ.

Whether there is a distinction in England and Wales between necessity and duress of circumstances has not been finally determined.<sup>58</sup>

49 It is not necessary to explore this doctrinal development further given neither party contended that the common law of this country should adopt duress of circumstances as an aspect of either necessity, duress or any other defence. Both parties accepted that it is an element of duress that there be a threat to impose the relevant form of harm unless the accused commits the acts that constitute the offence charged.

### **The Court of Appeal did not err**

50 The appellant's sole ground of appeal in this Court was that the Court of Appeal erred in finding that the trial judge had erred in ruling that the respondent could not avail herself of the defence of duress. The focus of this ground was that the Court of Appeal erred in its approach to element (i) in *Hurley*.

51 In the Court of Appeal, Kyrou and Niall JJA addressed the respondent's application for leave to appeal her convictions on the basis that Ms Matthews' report was available to be deployed to support the defence of duress.<sup>59</sup> McLeish JA considered whether the evidence was sufficient to raise duress solely on the basis of Paige and Alicia's evidence and without reference to Ms Matthews' report.<sup>60</sup>

52 Relevantly, Kyrou and Niall JJA concluded that the trial judge had erred in implicitly accepting that element (i) specified in *Hurley* "requires a specific, overt threat in close temporal proximity to the offending and that a continuing or ever present threat is not sufficient".<sup>61</sup> Their Honours added that "a continuing or ever present threat which is subsisting at the time an accused committed the charged offence can suffice if, *in all other respects*, the defence of duress can be made out" (emphasis added).<sup>62</sup> This aspect of their Honours' reasons and the passages noted below were the basis for the appellant's concern that the Court of Appeal had

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58 *R v S (C)* [2012] 1 WLR 3081 at 3086 [15] per Sir John Thomas P, Dobbs and Underhill JJ.

59 *Rowan* [2022] VSCA 236 at [165], [167].

60 *Rowan* [2022] VSCA 236 at [205].

61 *Rowan* [2022] VSCA 236 at [154].

62 *Rowan* [2022] VSCA 236 at [156].

extended duress to accommodate duress of circumstances, or at least had drifted towards its adoption.

53 To the extent that Kyrou and Niall JJA can be taken as accepting that at least part of the origin of a threat that addresses element (i) in *Hurley* can be the antecedent conduct of the maker of the threat and that what is necessary is that the threat be "subsisting" (ie, operative), then, for the reasons outlined above, their Honours' approach was in accordance with accepted principle. However, if their Honours are to be understood as suggesting that a "continuing or ever present threat" of *serious violence per se* is a sufficient form of threat to raise a defence of duress, then their statement would not be in accordance with accepted principle, as such a threat would not constitute a threat to inflict the relevant form of harm if the accused failed to commit the acts that constitute the offence. Ultimately, having regard to another finding made by their Honours noted below, it is apparent that is not what their Honours were intending to convey. Instead, their Honours' statement was focussed on the temporal proximity of the threat to the commission of the acts that constitute the offence. The necessity to demonstrate that the threat included a requirement or demand for the accused to avoid the violence by committing the acts that constitute the offence was encompassed by the phrase "in all other respects".

54 Having identified this error on the part of the trial judge, Kyrou and Niall JJA then considered whether this and other errors resulted in a "substantial miscarriage of justice".<sup>63</sup> Their Honours considered that question would be answered in the affirmative if there was "any possibility the jury might not unreasonably discover in the material before them enough to enable them to find a case of duress".<sup>64</sup> This formulation seems to have been intended to correspond with an inquiry into whether an accused has discharged their evidentiary burden in seeking to raise duress. The proper formulation of that test by reference to *Braysich* is set out above.

55 After reviewing the evidence, their Honours made the following critical findings:<sup>65</sup>

"In our opinion, the combined psychological, physical and sexual abuse (including rape) that we have found could be inferred to be the subject

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63 CPA, s 276(1)(b).

64 *Rowan* [2022] VSCA 236 at [164].

65 *Rowan* [2022] VSCA 236 at [173]-[176].

*of a continuing or ever present threat in the present case was a sufficient form of harm for the purposes of element (i) of the defence of duress.*

We are also of the opinion that it is not fatal in this case that there is no direct evidence that JR told the [respondent] shortly prior to each offence that, unless she performed the acts that constitute each of the charged offences, he would physically and sexually abuse her. That is because it would be open to the jury to infer that this was a reasonable possibility based upon the history of the relationship between JR and the [respondent] as set out in the Matthews 2019 report and, in particular, the complainants' evidence. It must be borne in mind that the offending conduct of the [respondent] for all but charges 1, 11 and 13 constituted being present during JR's offending. *For all of the offences, it would be open to the jury to conclude that there was a reasonable possibility that the [respondent] would not have been present or undertaken the specific acts that constituted the offending had it not been for an unstated demand from JR that she do so, otherwise he would physically and sexually abuse her.* In relation to the offending the subject of charge 1, the existence of such a reasonable possibility is supported by the [respondent's] statement to Ms Matthews that she 'tried to say no, but [JR] made [her]'.

For the above reasons, we are of the opinion that it would have been open to the jury to conclude that there was a reasonable possibility that the [respondent] committed the offences against the complainants as a result of her will being overborne by the continuing or ever present threat *of JR* to which we have referred.

In relation to element (iii), the jury could find that there was a reasonable possibility that, as the threat was ongoing throughout the period of the offending, it was present and continuing, imminent and impending at the time each offence was committed." (emphasis added; footnotes omitted)

56 The appellant pointed to the two references to the "continuing or ever present threat", as well as to the reference to the threat "of" JR, as opposed to threats "by" JR, in this passage as indicative of Kyrou and Niall JJA treating evidence of an ongoing threat of violence as sufficient to raise the defence of duress without the necessity for evidence of a threat to inflict the relevant form of harm if an accused failed to commit the acts the subject of the charge. Thus, the appellant submitted that their Honours implicitly treated duress of circumstances as sufficient to raise duress.

57 These submissions ignore the emphasised finding in the second paragraph of the above extract, which specifically addresses element (i) in *Hurley*. A footnote

to that finding refers to Smith J's reference in *Hurley* to a threat being "formulated in words or left unsaid".<sup>66</sup> Given that finding, Kyrou and Niall JJA did not err in the manner alleged by the appellant. Overall, their Honours' approach was consistent with the accepted understanding of the nature of the threat required for the defence of duress at common law.

58 As noted, McLeish JA's consideration was confined to the evidence given by Paige and Alicia without reference to Ms Matthews' report. Even so, his Honour concluded as follows:<sup>67</sup>

"In my opinion this evidence raises the possibility that a jury acting reasonably, and in the light of the tendency evidence, might not be satisfied beyond reasonable doubt that the [respondent's] involvement in these events was not procured by threats of serious physical harm. The whole event could be seen as one orchestrated by JR for his sexual pleasure. He is said to have talked the [respondent] into taking part, and an inference that he had done so using threats of the kind mentioned in the tendency evidence would not be wholly unreasonable. *As indicated, it is not necessary to infer an explicit threat. It might be inferred that the general conduct of JR as revealed by the other evidence meant that when he talked the [respondent] into acceding to his desires there was an implicit threat of serious physical harm if she refused.*" (emphasis added)

59 The emphasised finding accords with element (i) in *Hurley*. His Honour's approach was consistent with the accepted understanding of the nature of the threat required for the defence of duress at common law.

60 The remaining issue is whether Kyrou and Niall JJA erred in holding that the evidence adduced before the trial judge on the voir-dire, including Ms Matthews' report, supported the above finding. In the terms posed by *Braysich*: was the evidence, taken at its highest in favour of the respondent, such that it could lead a reasonable jury, properly instructed, to have a reasonable doubt that the prosecution negatived the existence of a threat to inflict the relevant form of harm if the respondent failed to commit the acts that constituted the offence charged?

61 One difference between this case and cases such as *Dawson* or *Lorenz* is that here the maker of the threats (JR) was a participant in the acts said to constitute the offences. The prisoners in *Dawson* who threatened the accused were not

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66 *Hurley* [1967] VR 526 at 543.

67 *Rowan* [2022] VSCA 236 at [218].

escaping and the de facto partner in *Lorenz* did not participate in the robbery of the supermarket employee. In neither of those cases could it be said that any conduct of the maker of the threats amounted to an express or implied request that the relevant accused assist them in committing a crime. By contrast, in *Lynch*, Meehan told the appellant to drive him and the other gunmen to the scene of the execution. The threat of serious violence if the appellant did not do so may have been implied (or "unstated"), but it was nevertheless real.

62 In this case, the evidence of pervasive violence, intimidation, control and sexual abuse perpetrated by JR on the respondent and their children over a sustained period raised a reasonable possibility that any express or implicit demand JR may have placed on the respondent to join in the sexual abuse of Paige and Alicia carried with it the implication that serious violence and more severe sexual abuse would be inflicted on the respondent or their children if she refused. The evidence also raised a reasonable possibility that it was JR who initiated the sexual abuse of Paige and Alicia on the occasion of the offences and that he insisted, by words or conduct, on the respondent participating. Similar to the circumstances described above in *Lynch*, the evidence raised a reasonable possibility that there was an express or implied (or "unstated") requirement that the respondent participate in the sexual abuse, with an implied (or "unstated") threat of serious violence or more severe sexual assaults being committed on the respondent or their children if she did not comply.

63 The evidence adduced on the voir-dire was sufficient to raise a reasonable possibility that there was an operative threat to inflict the relevant form of harm unless the respondent committed the acts the subject of the charges against her (as well as a threat that satisfied s 322O(2)(a)(i) of the *Crimes Act*). Kyrou and Niall JJA were correct to so hold. In light of the evidentiary basis on which this appeal was conducted, it is not necessary to consider whether McLeish JA was also correct to so hold on the evidence his Honour considered.

64 It was not disputed that, if the effect of the trial judge's ruling was that an available defence was not put to the jury, then a substantial miscarriage of justice was occasioned. Accordingly, the appeal should be dismissed.

EDELMAN J.

**Introduction**

65 Free will, or individual choice, is a fundamental assumption of the common law. So long as that assumption holds, the common law will excuse people from criminal liability where their ability to choose, and the like ability of others in their position, is deeply impaired. This appeal requires consideration of when duress, either at common law or under s 322O of the *Crimes Act 1958* (Vic), will sufficiently impair a person's ability to choose so as to excuse the commission of an offence. This deceptively simple question has caused enormous difficulties in the authorities. The difficulty is compounded by errors in understanding the underlying principle and errors in the language used to describe the defence of duress.

66 The short point of principle upon which this appeal should be resolved is this. In general, a common law defence of duress should be left to the jury to assess whether the Crown has disproved the defence beyond reasonable doubt, in circumstances which include those where there is an evidentiary foundation upon which the jury might conclude that: (i) there was an express or implied human threat to the accused of serious physical harm or death (to which threat the accused had not voluntarily left himself open<sup>68</sup>); (ii) the threat caused the accused to commit the charged acts; (iii) the threat would have left a reasonable person in the position of, and with the general attributes of, the accused with no reasonable alternative expected of them other than to commit acts in the general nature of the charged acts.<sup>69</sup> A matter that is highly relevant to (iii) is whether the threat was accompanied by a demand or direction for the accused to perform an act in the general nature of the charged act.

67 There was an evidentiary foundation for this sufficient set of circumstances to raise duress at common law on the facts of this appeal. So too, there was an evidentiary foundation for the defence of duress in relation to one count relevant to this appeal under s 322O of the *Crimes Act*. The trial judge erred in failing to leave the defence of duress to the jury. The appeal was properly allowed by the Court of Appeal of the Supreme Court of Victoria. The appeal to this Court should be dismissed.

**The circumstances of this appeal**

68 This appeal, with all names pseudonymised, concerns the principles of duress in the context of shocking acts of abuse by JR upon two of his children,

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68 *R v Z* [2005] 2 AC 467 at 491 [21(7)]. See also *R v Sharp* [1987] QB 853 at 861.

69 See *R v Runjanjic* (1991) 56 SASR 114 at 119-120.

Paige and Alicia. JR was charged with 40 sole counts as well as 13 joint counts with his partner, Ms Rowan (the respondent in this appeal). JR was convicted of 26 of the sole counts but the jury were unable to reach a verdict on any of the joint counts. Ms Rowan was subsequently tried alone for the 13 joint counts. These offences involved Ms Rowan and JR's wilful commission of an indecent act in the presence of a child under the age of 16 years,<sup>70</sup> and Ms Rowan taking part in an act of sexual penetration of a person known to be the child of her and JR.<sup>71</sup> At a voir dire prior to the trial, the trial judge held that there was no factual basis upon which the defence of duress could be properly raised by Ms Rowan before the jury. Ms Rowan was subsequently convicted of 12 of the 13 counts.

69 In the Court of Appeal, Ms Rowan sought leave to appeal on the ground that a substantial miscarriage of justice occurred because the trial judge failed to leave the defence of duress to the jury. The focus of the Court of Appeal was upon the recorded evidence of Paige and Alicia which had been played at trial, including aspects of their evidence that had been relied upon by Ms Rowan for the purposes of proving a tendency by JR "[t]o display towards all members of the family threats, intimidation, psychological violence, physical violence and family violence including economic" and "[f]or the purpose of control, coercion and domination of all family members".<sup>72</sup>

70 The evidence of Paige and Alicia upon which Ms Rowan relied, as described by the Court of Appeal, included: JR having "talked [Ms Rowan] into showing Paige what to do"; JR becoming "really angry" at Paige on an occasion when she resisted abuse, following which JR and Ms Rowan got in a fight; incidents of JR's physical abuse and hot temper including JR smashing a baseball bat against a wall, causing Alicia's hand to scar, and hitting the children with his hands and with a belt; JR threatening to kill Paige and incidents of extreme abuse of Paige by JR; Paige's evidence of JR "ma[king]" Ms Rowan "do those things" and "do stuff" and that "[a]t times, it did not look like [Ms Rowan's] involvement in the sexual abuse was voluntary because they were not making decisions together, [Ms Rowan] was very quiet and [Ms Rowan] would even argue with JR"; Ms Rowan being easily pushed around by everyone in the family, including the children; Alicia's evidence that during the incident giving rise to count 13, Ms Rowan "was just standing in the room and looking at Alicia"; Alicia's evidence, at one point, of Ms Rowan asking JR why she (Ms Rowan) needed to be there and Alicia saying that she did not know why Ms Rowan would have been involved in the incident unless JR forced her.

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70 *Crimes Act 1958* (Vic), s 47(1) (as then in force).

71 *Crimes Act 1958* (Vic), s 44(1) (as then in force).

72 *Anna Rowan (a pseudonym) v The King* [2022] VSCA 236 at [38] fn 19, [118].

71 Before the Court of Appeal, Ms Rowan also relied upon a 2019 report from a forensic psychologist, Ms Matthews, who had previously assessed Ms Rowan and concluded that she was not fit to plead. After a special hearing, a jury nevertheless found that Ms Rowan was fit to stand trial.

72 In her 2019 report, Ms Matthews observed that Ms Rowan had an IQ of 70 and that her overall intellectual ability fell within the "mildly intellectually disabled" category. Ms Matthews' report contained observations about factual incidents of which Ms Rowan had informed her and Ms Matthews' opinions about Ms Rowan's state of mind based on those incidents. She also observed that the behaviour of Ms Rowan was consistent with battered woman syndrome, which Ms Matthews described as "a learned helplessness process in which women who have been abused repeatedly within a relationship [that] they believe they cannot escape from, learn 'good coping skills as a trade-off for escape'".

73 There are difficulties with relying upon the evidence of Ms Matthews. As McLeish JA observed, there is force in the argument of the Crown that the expert opinion of Ms Matthews could not be admissible without independently admissible evidence sufficient to provide a foundation for that opinion.<sup>73</sup> Moreover, for the evidence of Ms Matthews to be part of the record on the appeal in this Court, her evidence would need to have been admitted as evidence at trial or as evidence before the Court of Appeal.<sup>74</sup> Her evidence was not evidence at trial but evidence at the voir dire. The appeal was an appeal from the conviction at trial, not an appeal from the decision given on the voir dire.<sup>75</sup> And there is uncertainty about whether Ms Matthews' report was separately admitted as evidence on the appeal rather than merely being relied upon as part of the record of the voir dire ruling.<sup>76</sup>

74 Since there was little argument in this Court about the basis for the admissibility of Ms Matthews' evidence, and since (for the reasons explained below) the appeal should be dismissed without reliance upon the evidence of Ms Matthews, the better approach is to put aside the evidence of Ms Matthews, as McLeish JA did in the Court of Appeal.<sup>77</sup> The only evidence that need be considered for the defence of duress was the evidence that was led at trial,

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73 *Anna Rowan (a pseudonym) v The King* [2022] VSCA 236 at [202]. See also *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743-744 [85].

74 *Constitution*, s 73. See *Mickelberg v The Queen* (1989) 167 CLR 259 at 264, 271, 297-299; *Eastman v The Queen* (2000) 203 CLR 1 at 32-33 [104].

75 Compare *Lang v The Queen* (2023) 97 ALJR 758 at 789 [192].

76 See *Anna Rowan (a pseudonym) v The King* [2022] VSCA 236 at [87], [200]-[203].

77 *Anna Rowan (a pseudonym) v The King* [2022] VSCA 236 at [205].

including the pre-recorded evidence of Paige and Alicia. The tendency notice filed by the Crown is not itself evidence, although it relies upon evidence given at the trial.

### **Problems of underlying principle and language**

#### *Justifications and excuses*

75        The criminal law recognises a hierarchy of claims by which an accused person can deny liability for punishment.<sup>78</sup> First, the accused might deny that any crime has been committed because some element of the offence was not satisfied. Secondly, the accused might claim that although all elements of the offence were satisfied, their conduct was justified with the effect that no offence was committed. Thirdly, the accused might accept that an offence was committed but claim that the offence was excused so that the accused can be relieved of liability for punishment by a finding of not guilty.

76        Although very difficult questions can arise at the margins, particularly when questions of statutory interpretation involving the relation between statutory offences and common law defences are involved, there is a fundamental distinction of principle between the second and third of these claims. A justification, whether for criminal or civil wrongs, provides a privilege to engage in an act that would otherwise be wrongful.<sup>79</sup> In general, justified conduct is rightful in the sense that the balance of reasons demonstrates the propriety of the action.<sup>80</sup> An excuse (or immunity from liability), whether for criminal or civil wrongs, affords no privilege to engage in the conduct; it "concedes the wrongfulness of the action".<sup>81</sup> In criminal law, in general terms, an excuse relieves the offender of consequences including

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78    See Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) at 133.

79    *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 74. See also Virgo, "Justifying Necessity as a Defence in Tort Law", in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Tort* (2015) 135 at 151, referring to *Ploof v Putnam* (1908) 71 A 188 and the privilege (subject to a condition subsequent to pay for damage caused) in *Vincent v Lake Erie Transportation Co* (1910) 124 NW 221.

80    See *Perka v The Queen* [1984] 2 SCR 232 at 246-247; Fletcher, *Rethinking Criminal Law* (1978) at 759, §10.1; Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (2008) at 13.

81    *Perka v The Queen* [1984] 2 SCR 232 at 246.

liability for punishment for their wrongful conduct because the offender cannot reasonably be expected to have acted otherwise.<sup>82</sup>

77 H L A Hart described the distinction between justifications and excuses as one "of great moral importance".<sup>83</sup> The distinction is "of fundamental theoretical and practical value",<sup>84</sup> and was important to the development of the common law of crimes against the person, particularly homicide.<sup>85</sup> Subject to the terms of legislation, it remains of practical importance in areas such as derivative liability (where the justified act of a principal precludes derivative liability for punishment but the excused act of a principal does not)<sup>86</sup> and, at least in some cases, the legality of using force to resist another.<sup>87</sup> Any treatment of justification and excuse as synonymous has rightly been described as a "serious mistake".<sup>88</sup>

78 The distinction between justifications and excuses is important for this appeal because much of the oral argument in this Court focused on the relationship between the defences of duress and necessity. "Necessity" is a label that can be, and sometimes is, used to describe different defences. Relevantly to this appeal, when necessity is seen as a justification there are significant differences between the defence of necessity and the defence of duress. But, when the defence of necessity is seen as an excuse, the differences between the defences of necessity

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82 Simester, "On Justifications and Excuses", in Zedner and Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012) 95 at 100.

83 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (2008) at 13.

84 Fletcher, "The Right and the Reasonable" (1985) 98 *Harvard Law Review* 949 at 955.

85 *Pickett v Western Australia* (2020) 270 CLR 323 at 364-365 [98]. See also *Zecevic v Director of Public Prosecutions (Vict)* (1987) 162 CLR 645 at 657-658.

86 See *Pickett v Western Australia* (2020) 270 CLR 323 at 366 [102]; *O'Dea v Western Australia* (2022) 273 CLR 315 at 339-340 [65].

87 See *Pickett v Western Australia* (2020) 270 CLR 323 at 366 [100], referring to Smith, *Justification and Excuse in the Criminal Law* (1989) at 19, 27-28.

88 Goudkamp, *Tort Law Defences* (2013) at 85.

and duress are, at best, slight. In short, there is a need "to distinguish clearly between necessity as an excuse and necessity as a justification".<sup>89</sup>

79 In England, the defence of necessity has sometimes been treated as a justification, occasionally described as "pure necessity", with the propriety of the action assessed in utilitarian terms: "on a choice of two evils the choice of avoiding the greater harm was justified".<sup>90</sup> In Australia, necessity has sometimes been recognised as a justification by analogy with self-defence at common law although in terms that muddle the distinction between justifications and excuses.<sup>91</sup> Self-defence at common law was traditionally regarded as "a ground of justification based upon the necessity of repelling force with force".<sup>92</sup>

80 There are, however, other instances in which a defence of necessity is recognised independently of the propriety of the conduct, where the accused could not reasonably have been expected to act otherwise. In those cases, necessity is not relied upon as providing a privilege to act (which it might not) but is relied upon only as an excuse for wrongful conduct.<sup>93</sup> Arguably one difficulty with the much-debated case of *R v Dudley and Stephens*<sup>94</sup> is that the Divisional Court conceived only of the possibility of necessity as a justification and neglected the possibility that necessity might function as an excuse.<sup>95</sup>

81 Insofar as necessity is conceived of as a justification, on the facts of *R v Dudley and Stephens* the Court was undoubtedly correct to hold that the defence of necessity failed. This is because even the extreme circumstances of that case did not create a privilege to kill the emaciated cabin boy, who posed no threat. The balance of reasons did *not* favour the killing as proper or rightful conduct. But it is a different question whether necessity could have excused the wrongful act of killing in that case. Referring to the "somewhat similar position" of a person who

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89 Fletcher, *Rethinking Criminal Law* (1978) at 818, §10.4.1. See also Stark, "Necessity and Nicklinson" [2013] *The Criminal Law Review* 949 at 950; Virgo, "Justifying Necessity as a Defence in Tort Law", in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Tort* (2015) 135 at 141.

90 *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 at 236. See also *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 74.

91 See *R v Loughnan* [1981] VR 443; *Rogers* (1996) 86 A Crim R 542.

92 *Packett v The King* (1937) 58 CLR 190 at 217.

93 *Perka v The Queen* [1984] 2 SCR 232 at 248-249. Compare at 276.

94 (1884) 14 QBD 273.

95 See especially (1884) 14 QBD 273 at 286-288.

has a defence of duress due to a threat of death, Simpson observed that the judges failed "to separate clearly and analyze the different bases on which the claim to a defence of necessity can in principle be advanced".<sup>96</sup> On the assumption that an excuse could arise even for murder, where extreme pressure left no other reasonable alternative expected of the accused, it has also been suggested that the case "is a textbook example of the wrongful killing of an innocent person that might properly be excused on grounds of necessity".<sup>97</sup>

*The excuses of duress and necessity*

82 Duress has been said to be "a paradigmatic example of an excuse".<sup>98</sup> Whether or not it involves conduct that might be separately justified,<sup>99</sup> the defence is not shaped by whether the balance of reasons favoured the action taken as proper or rightful conduct. It is, instead, an excuse that is based upon a "merciful concession to human frailty".<sup>100</sup> As will be seen, the various formulations of the defence of duress have in common the central concern that the pressure on the accused caused the charged act and that the extent of that pressure left no other action that would reasonably be taken by a person in the position of, and with the general attributes of, the accused.

83 There is a contextual difference between what has traditionally been described as the common law excuse of duress and what has sometimes been described as a common law excuse of "necessity". That contextual difference is that the impairment of free choice in cases of duress arises from a threat made by a person whilst the impairment of choice in cases of necessity arises from other circumstances, including natural forces. That difference of context, rather than principle, led Glanville Williams to describe duress as "a species of necessity, in that it is necessity created by the illegal conduct of another, and not by natural forces".<sup>101</sup> Later English cases described the defence of "duress of

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96 Simpson, *Cannibalism and the Common Law* (1984) at 230-231.

97 Fletcher, *Rethinking Criminal Law* (1978) at 823, §10.4.1, citing Simonson, "Der 'Mignonette'-fall in England" (1885) 5 *Zeitschrift für die gesamte Strafrechtswissenschaft* 367.

98 Fletcher, *Rethinking Criminal Law* (1978) at 830, §10.4.2. See also *R v Z* [2005] 2 AC 467 at 489 [18].

99 See Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) at 256-257.

100 *R v Howe* [1987] AC 417 at 443. See also at 432-433.

101 Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 757.

circumstances"<sup>102</sup> as a "species of the genus of necessity".<sup>103</sup> On that view, necessity is the genus and the species of that genus are duress by human threats and duress by circumstances.

84 Whether or not the excuses of duress by human threat and duress by circumstances are seen as species of the genus of necessity, there is no principled basis for distinguishing between different sources of extreme pressure. As Sir Rupert Cross said, it would be the "apotheosis of absurdity" to allow a defence of duress by threats but to disallow a defence where exactly the same compulsion arises from the circumstances without a human threat.<sup>104</sup> Similarly, in *R v Howe*,<sup>105</sup> the Lord Chancellor observed that the excuses of duress and necessity involved "a distinction without a relevant difference, since on this view duress is only that species of the genus of necessity which is caused by wrongful threats". The point was also colourfully put by Lord Simon when he said:<sup>106</sup>

"It would be a travesty of justice and an invitation to anarchy to declare that an innocent life may be taken with impunity if the threat to one's own life is from a terrorist but not when from a natural disaster like ship- or plane-wreck."

85 There may also be cases at the margins, of which this case might be an example, where the pressure on an accused derives from *both* human threats and circumstances. In the commentary upon the model defence of duress formulated by the American Law Institute in §2.09 of the Model Penal Code, the following example is given:<sup>107</sup>

"[S]uppose that by the continued use of unlawful force, persons effectively break down the personality of the actor, rendering him submissive to

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102 See *R v Martin* [1989] 1 All ER 652 at 653; *Pommell* [1995] 2 Cr App R 607 at 609-610, 614-615; *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 at 232-236; *R v Shayler* [2001] 1 WLR 2206 at 2222 [42].

103 *R v Howe* [1987] AC 417 at 429. See also *R v Conway* [1989] QB 290 at 297.

104 Cross, "Murder under Duress" (1978) 28 *University of Toronto Law Journal* 369 at 377. See also *Moss v Howdle* 1997 JC 123 at 128.

105 [1987] AC 417 at 429. See also *R v Martin* [1989] 1 All ER 652 at 653-654; *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 at 253.

106 *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 at 692-693. See also Smith, *Justification and Excuse in the Criminal Law* (1989) at 85.

107 American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)* (1985), Pt 1, §2.09, comment 3 at 376.

whatever suggestions they make. They then, using neither force nor threat of force on that occasion, suggest that he perform a criminal act; and the actor does what they suggest. The 'brainwashed' actor would not be barred from claiming the defense of duress, since he may assert that he was 'coerced' to perform the act by the use of unlawful force on his person."

It may be possible, in such cases, to see the earlier threats (which formed part of the breaking down of the personality of the accused) as only part of the operative pressure, which may depend also upon multifarious psychological influences. A focus exclusively upon threats may be an unjust, unprincipled and unreasonable approach to human psychology.

86 The common law of Australia has not yet embraced any unification of the excuses of duress and necessity, nor has it yet recognised duress of circumstances as a species of necessity alongside duress by human threat. Duress as a defence has remained confined to pressure arising from human threats. Necessity has been left as a shadowy, uncertain defence often treated as though it were only a justification but sometimes also recognised as an excuse. Ultimately, however, from the perspective of justice generally, Woolf LJ was correct to say that "[w]hether 'duress of circumstances' is called 'duress' or 'necessity' does not matter. What is important is that, whatever it is called, it is subject to the same limitations as to 'do this or else' species of duress."<sup>108</sup> Hence, with a keen eye to justice, when the Victorian Parliament abolished the common law defences of duress and necessity,<sup>109</sup> it created statutory excuses of duress and necessity, with nearly identical elements.<sup>110</sup>

### **The issues on this appeal**

87 The availability of a "do this or else" defence, whether described as duress, duress of circumstances, or necessity, was at the forefront of this appeal. Neither party made submissions in favour of formally unifying the excuses of duress by human threats and duress of circumstances as species of necessity. The Crown submitted that the common law of this country should not accept the existence of a defence of "duress of circumstances" to excuse conduct that would otherwise satisfy the defence of duress but where the pressure arose from circumstances other than exclusively a human threat. Ms Rowan submitted that an excuse of duress should have been left to the jury on the existing state of Australian law, based on pressure arising from a human threat. But she argued that if the Court of Appeal had extended Australian law to embrace "duress of circumstances" then the matter

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<sup>108</sup> *R v Conway* [1989] QB 290 at 297.

<sup>109</sup> *Crimes Act 1958* (Vic), ss 322Q, 322S.

<sup>110</sup> *Crimes Act 1958* (Vic), ss 322O, 322R.

should be remitted to the Court of Appeal to consider the defence of necessity (as "duress of circumstances").

88 It is convenient to begin the analysis with the traditional Australian view that a human threat is necessary for the defence of duress, putting to one side the operation of any functionally identical defence where the human threat is replaced by pressure of circumstances that are equally grave. As I explain later in these reasons, the functional identity of the two defences informs the understanding of the elements of duress in relation to any purported requirement of demand or direction to perform the charged act.

89 The dispute between the parties to this appeal was not merely over whether the Court of Appeal had expanded the defence of duress in Australia by extending it beyond instances of human threats. The Crown also argued that the Court of Appeal erroneously removed a purported requirement that the threat be accompanied by a demand or direction to perform the charged act.

90 It was assumed by the parties that the defence of duress required that implied threats by JR be accompanied by an express or implied demand or direction by JR that Ms Rowan commit the conduct involved in the charged acts. As explained below, however, a demand or direction is not always a necessary element of duress. Nor, in cases where it is a necessary element, will there always be the same degree of clarity required in the communication of the demand or direction. In order to appreciate the extent to which a demand or direction might be required in any case it is necessary to appreciate the purpose that a demand or direction might serve in establishing the defence of duress. A demand or direction is only ever a factual basis from which it could be established that the threat would have left a reasonable person in the position of, and with the general attributes of, the accused with no reasonable alternative expected of them other than to commit acts in the general nature of the charged acts.

91 The Crown's submissions should not be accepted. The Court of Appeal required an evidentiary foundation for threats of serious bodily harm by JR and it accepted, at least to the extent that such acceptance was required, the existence of an evidentiary foundation (assessed across all counts generally) for a conclusion that implied threats by JR were accompanied by an implied demand or direction to Ms Rowan that the charged acts be performed.

**The Court of Appeal required an evidentiary foundation for a threat and a demand or direction**

92 In the Court of Appeal, the joint judgment of Kyrou and Niall JJA identified errors in the reasoning of the trial judge in failing to leave the defence of duress to the jury. Relevantly to this appeal, the trial judge had considered that it was necessary for Ms Rowan to identify a specific threat operating and continuing on

each occasion of offending, and that the existence of an underlying general threat was insufficient. The joint judgment held that this was an error:<sup>111</sup>

"We accept that no previous case has expressly accepted the proposition that a continuing or ever present threat—whether overt or tacit—as distinct from a specific, overt threat, is sufficient ...

In our opinion, a continuing or ever present threat which is subsisting at the time an accused committed the charged offence can suffice if, in all other respects, the defence of duress can be made out. We cannot think of any reason in principle or policy that requires exclusion of a continuing or ever present threat where, due to the threat, the accused has lost his or her freedom to choose to refrain from committing the charged offence. In this context, it is relevant to note the additional limiting factors ... that the threat be present and continuing, imminent and impending at the time each offence is committed."

93 In this part of their Honours' reasons, Kyrou and Niall JJA plainly required the existence of a threat but did not specifically advert to any requirement that the threat be accompanied by a demand or direction that the accused perform the charged act or acts in the general nature of the charged acts. Indeed, their Honours did not specify any of the other requirements of duress in the circumstances of the case other than the need for a continuing or ever-present threat. But they were conscious of other requirements, describing the need for the defence of duress to be made out "in all other respects".<sup>112</sup> Later in their Honours' reasons they referred to a requirement for an evidentiary basis for an implied demand or direction by JR for Ms Rowan to be present or to undertake the specific acts:<sup>113</sup>

"For all of the offences, it would be open to the jury to conclude that there was a reasonable possibility that [Ms Rowan] would not have been present or undertaken the specific acts that constituted the offending had it not been for an unstated demand from JR that she do so, otherwise he would physically and sexually abuse her."

94 Similarly, McLeish JA, who relied only on the evidence of Paige and Alicia, concluded that:<sup>114</sup>

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**111** *Anna Rowan (a pseudonym) v The King* [2022] VSCA 236 at [154]-[156] (footnote omitted).

**112** *Anna Rowan (a pseudonym) v The King* [2022] VSCA 236 at [156].

**113** *Anna Rowan (a pseudonym) v The King* [2022] VSCA 236 at [174].

**114** *Anna Rowan (a pseudonym) v The King* [2022] VSCA 236 at [218].

"It might be inferred that the general conduct of JR as revealed by the other evidence meant that when he talked [Ms Rowan] into acceding to his desires there was an implicit threat of serious physical harm if she refused."

95 In relation to some of the counts, the reasoning of Kyrou and Niall JJA about an "unstated demand" is plainly correct. An evidentiary basis for such an unstated demand exists (in relation to some counts) in the evidence of Paige and Alicia as described in the trial judge's summing up to the jury and in the reasons of the Court of Appeal. For instance, Paige's evidence relating to counts 1 to 4 was described as including evidence that JR had told her that he "had talked [Ms Rowan] into" her action that was the subject of those counts.

96 By contrast, it does not appear that there was any direct evidence in relation to some of the other counts, such as count 11, that supported an express or implied demand or direction by JR for Ms Rowan to engage in the specific conduct that was the subject of the charge. In such cases, it appears from the reasons of the Court of Appeal that the highest that the evidence comes to establishing an evidentiary foundation for a demand or direction is the evidence of Paige and Alicia to the general effect that JR compelled Ms Rowan to "do stuff". Nevertheless, that evidence alone was sufficient for the defence to be put to the jury.

97 For the reasons explained below, it is not necessary to establish that a demand or direction by JR was present in relation to each and every count. Such a demand or direction is not generally a requirement to establish the defence of duress. The only reason that a demand or direction, express or implied, may be needed for a defence of duress in some cases is because it demonstrates that a reasonable person in the position of, and with the general attributes of, the accused would have had no reasonable alternative expected of them other than to commit acts in the general nature of the charged acts.<sup>115</sup> Despite the potential lack of any express or implied demand or direction by JR in relation to some specific counts, the evidence of JR's conduct, including evidence supporting implied demands concerning some counts, was a sufficient foundation for the possibility that the threats made by JR left Ms Rowan with no reasonable alternative expected of her other than to commit acts in the general nature of the charged acts. This required the Crown to establish that Ms Rowan did in fact have reasonable alternatives expected of her.

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115 See also *R v Runjanjic* (1991) 56 SASR 114 at 119-120.

**A demand or direction to perform the charged act is not always necessary for the defence of duress**

*A demand or direction is unnecessary at common law*

98        The parties to this appeal assumed that for the defence of duress the common law of Australia requires the presence of (and therefore an accused to establish an evidentiary foundation for) a demand or direction that the charged act be performed. That assumption was based upon the dissenting judgment of Smith J in *R v Hurley*.<sup>116</sup> That decision does not support the assumption. Nor, for the most part, is the assumption supported by the manner in which the judgment of Smith J has been understood or applied. Nor is the assumption supported by basic principle.

(1) The lack of support in *Hurley* for a requirement of a demand or direction

99        In *Hurley*, Smith J set out eight elements of the defence of duress. The first of those elements, which was the focus of this appeal, was that the accused was required to do the act charged against them "under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act".<sup>117</sup>

100       Smith J purported to set out this element only as part of a set of sufficient requirements, described as an "affirmative proposition", for when duress would be established.<sup>118</sup> The set of sufficient requirements set out by Smith J has become authoritative: subsequent decisions recognise those requirements as at least sufficient for the defence of duress.<sup>119</sup> But his Honour did not suggest that all elements were *necessary*. Nor did he suggest that the first element was a necessary requirement of the defence of duress in every case. To the contrary, after setting out the eight elements that would be sufficient for the defence of duress, Smith J carefully said that an accused, "in such circumstances *at least*, has a defence of duress".<sup>120</sup>

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116 [1967] VR 526.

117 [1967] VR 526 at 543.

118 [1967] VR 526 at 543.

119 See *Taiapa v The Queen* (2009) 240 CLR 95 at 105 [28] fn 46.

120 [1967] VR 526 at 543 (emphasis added).

(2) *Hurley* has not always been understood as requiring a demand or direction

101        Whilst the cases after *Hurley* can be understood as treating the eight elements set out by Smith J as an "authoritative" test for circumstances that are sufficient for duress,<sup>121</sup> most of the cases do not need to be understood as having misunderstood, and misapplied, the basic point being made by Smith J that these elements established a sufficient test for duress but not a necessary one.

102        Nevertheless, a basic misunderstanding, in the reasoning but not the result, occurred in *R v Dawson*,<sup>122</sup> where a demand or direction to perform the charged act was treated as a necessary element of duress. In *Dawson*, the question for the Full Court of the Supreme Court of Victoria was whether the trial judge should have left a defence of duress to the jury in circumstances where the applicant gave evidence that his offence of escaping from prison was committed because he feared for his life due to threats made against him in prison.

103        The Full Court correctly dismissed the application for leave to appeal. There was no foundation for the assertion that escape was the only reasonable alternative expected of the applicant to avoid a threat to the applicant's life. There "was no immediate threat, nothing imminent or impending, which left no alternative" to the applicant, and he could have reported the threat to the authorities.<sup>123</sup> There was no suggestion that, like the situation in *People v Harmon*,<sup>124</sup> where a defence of duress was held to be available, "the conditions of [the relevant] penal institutions have reached the point where the only recourse to free one's self from unwanted personal attacks is to flee".<sup>125</sup> There was no "history of futile complaints to the authorities which made the results of any belated complaint illusory".<sup>126</sup> Nor was it suggested that the circumstances were akin to those of "a prisoner with his back to the wall, facing a gang of fellow-inmates approaching him with drawn knives, who are making it very clear that they intend to kill him", in which case it has been said that the prisoner "might be expected to go over the wall rather than remain and be a martyr to the principle of prison discipline".<sup>127</sup>

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121 See *Taiapa v The Queen* (2009) 240 CLR 95 at 105 [28] fn 46.

122 [1978] VR 536.

123 *R v Dawson* [1978] VR 536 at 538.

124 (1974) 220 NW 2d 212.

125 *People v Harmon* (1974) 220 NW 2d 212 at 215.

126 *People v Lovercamp* (1974) 118 Cal Rptr 110 at 115.

127 *People v Lovercamp* (1974) 118 Cal Rptr 110 at 112.

104 Despite correctly dismissing the application for leave to appeal in *Dawson*, the reasons of each of Anderson J (with whom Starke J agreed) and Harris J appeared to treat the first element in *Hurley* as necessary for a defence of duress: without a demand or direction to perform the charged act, the defence could not be left to the jury.<sup>128</sup> The misunderstanding by their Honours was ameliorated in part by Anderson J's recognition, under the description of "necessity", of an arguable defence where a threat by another left no reasonable alternative expected of the accused than for the accused to commit the charged act.<sup>129</sup> Perhaps for this reason, decisions subsequent to *Dawson* have focused upon developing the defence of necessity in the absence of a demand or direction to perform the charged act, albeit with some confusion in those cases concerning the separate conceptions of necessity as a justification and as an excuse.<sup>130</sup>

105 It would be more conducive to clear thinking if all instances where an excuse was based upon human threats were described as "duress". Ultimately, however, it may be no more than semantics if, in circumstances where it is open to conclude that a reasonable person in the position of, and with the general attributes of, the accused would have had no reasonable alternative expected of them other than to commit acts in the general nature of the charged acts: (i) one excuse of duress is left to the jury based upon human threats but not requiring a demand or direction to perform the charged act, or (ii) two excuses are left to the jury, with one described as duress and based upon human threats with a demand or direction to perform the charged act and another described as necessity with the same constraints as the excuse of duress and based upon the same human threats but without a demand or direction to perform the charged act. In this respect, I agree with the joint reasons<sup>131</sup> that the "authoritative" nature of *Hurley* does not prescribe any form of jury direction.

(3) A requirement for a demand or direction is contrary to basic principle

106 It would be contrary to basic principle for the common law to insist upon a demand or direction that the accused perform the particular act charged. Where an accused person is subjected to a human threat of serious physical harm or death, and the only reasonable option to avoid the threat is the commission of an act in the nature of the charged act, there is no principled basis for insisting that the threat be accompanied by a demand or direction that the particular act be performed. The

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128 [1978] VR 536 at 538-539, 542-543.

129 *R v Dawson* [1978] VR 536 at 539-540.

130 See *R v Loughnan* [1981] VR 443; *Rogers* (1996) 86 A Crim R 542.

131 Joint reasons at [36].

absurdity of such a requirement might be illustrated by the following example given by Fairall and Barrett:<sup>132</sup>

"Case 1: T tells D1, a prisoner, that unless D1 kills another prisoner he will be killed.

Case 2: T tells D2, a prisoner, that unless D2 joins in a prison escape he will be killed."

If it is assumed that the only reasonable alternative expected of both D1 and D2 is to escape from prison (an assumption which might often be factually questionable), then a requirement in every case for the existence of a demand or direction to perform acts in the general nature of the charged acts would mean that an excuse would be available to D2, who escaped to avoid death to himself, but not D1, who escaped to avoid death to himself or to another prisoner. This would be a surprising result. As will be seen below, the Victorian Parliament may have been aware of this potential absurdity when s 322O of the *Crimes Act* was drafted.

107 The example above demonstrates the grave difficulties with a requirement that the human threat must be accompanied by a demand or direction that the particular charged act be committed. It is also difficult to see the rationale for a requirement of a demand or direction that *any* act be committed. A person who drives a car recklessly in order to escape from a gang of 20 to 30 people "who were obviously bent upon doing further violence" should have a defence of duress without the need for a demand or direction that the person drive away recklessly.<sup>133</sup> There is no difference in principle between a threat of immediate death to the driver which can only be avoided by driving away and the same threat of immediate death that is accompanied by the words "unless you drive away".

108 It is therefore unsurprising that the model defence of duress, formulated by the American Law Institute in §2.09 of the Model Penal Code, contains no requirement of a demand or direction. It is also unsurprising that it has been said that "[t]he requirement of a direction is merely a guideline to demonstrate how free will can be affected. Insistence upon this element is, therefore, without logical basis."<sup>134</sup>

109 It is, however, necessary to reiterate that, as Smith J contemplated in *Hurley*, in the usual case there will need to be a demand or direction. A threat of

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132 Fairall and Barrett, *Criminal Defences in Australia*, 5th ed (2017) at 233.

133 Willer (1986) 83 Cr App R 225 at 226.

134 Olson, "Escape: The Defenses of Duress and Necessity" (1972) 6 *University of San Francisco Law Review* 430 at 448.

serious physical harm or death to a person will usually present a number of alternatives to avoid the threat, some of which may involve lawful conduct. Therefore, without a demand or direction to engage in conduct in the general nature of the offence charged, it may be difficult to establish that there was no reasonable alternative action. An evidentiary foundation for a demand or direction will thus usually be highly relevant to establishing the evidentiary foundation for the requirement for duress that a reasonable person in the position of, and with the general attributes of, the accused would have had no reasonable alternative expected of them other than to commit acts in the general nature of the charged acts.

*A demand or direction is unnecessary under s 322O of the Crimes Act*

110 From 1 November 2014, and therefore relevant only to count 13 in this case, concerning Ms Rowan's alleged offence against Alicia, s 322Q of the *Crimes Act* abolished the common law defence of duress in Victoria. The common law defence of duress was replaced with s 322O, which provides as follows:

**"Duress**

- (1) A person is not guilty of an offence in respect of conduct carried out by the person under duress.
- (2) A person carries out conduct under duress if—
  - (a) the person reasonably believes that—
    - (i) subject to subsection (3), a threat of harm has been made that will be carried out unless an offence is committed; and
    - (ii) carrying out the conduct is the only reasonable way that the threatened harm can be avoided; and
  - (b) the conduct is a reasonable response to the threat.
- (3) A person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.
- (4) This section only applies in the case of murder if the person believes that the threat is to inflict death or really serious injury."

111 Perhaps with an eye to the potential absurdities in insisting upon a requirement that a human threat be accompanied by a demand or direction to perform the particular charged act, s 322O(2) requires a human threat of harm but contains no requirement of any express or implied demand or direction that the

charged act must be committed in order to avoid the harm. The offender must reasonably believe that the threat of harm "will be carried out unless an offence is committed" but nothing in the text or purpose of s 322O(2) requires that the threat itself must be accompanied by a demand or direction to carry out the offence. For instance, if driving a car recklessly is the only reasonable way to avoid another's threat to kill the driver then s 322O(2) will be satisfied if the driver reasonably believes that they will be killed unless they drive recklessly. Neither the text nor the purpose of s 322O(2) supports any implication of an anomalous requirement in those circumstances that the threat of death be accompanied by a demand or direction to drive recklessly.

## Conclusion

112 At common law, an accused bears the evidentiary onus of establishing a foundation upon which it would be open for the jury to accept an excuse of duress, following which the Crown must negate that excuse beyond reasonable doubt.<sup>135</sup> The same is true for the excuse of duress under s 322O of the *Crimes Act*.<sup>136</sup>

113 There was a foundation in the evidence of Paige and Alicia that was sufficient for the excuse of duress to be left to the jury as a common law defence and, in relation to count 13, as a defence under s 322O. In particular, there was an evidentiary foundation of threats by JR of serious bodily harm. It can be accepted that there was no clear evidentiary foundation in respect of some counts for an implied demand or direction by JR that Ms Rowan commit the acts with which she was charged. But when the role of a demand or direction is understood, there was a sufficient evidentiary foundation for the jury to be required to consider whether the Crown had established that Ms Rowan had a reasonable alternative that was expected of her or whether, in the language of s 322O, carrying out the charged acts was not the only reasonable way for Ms Rowan to avoid the threats.

114 For these reasons, having regard to the evidence raised at the trial and the manner in which the Crown and Ms Rowan conducted their cases, there were no "good reasons" for the trial judge not to give a direction to the jury concerning the excuse of duress.<sup>137</sup>

115 The appeal should be dismissed.

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135 *Taiapa v The Queen* (2009) 240 CLR 95 at 109 [39]. See also *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 at 668; *R v Z* [2005] 2 AC 467 at 489 [20].

136 See *Crimes Act 1958* (Vic), s 322I.

137 *Jury Directions Act 2015* (Vic), s 14(2).

