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**Domestic Violence and Systemic Deception in the Family Legal
System:**

A Compelling Case for Truthful Reform

A thesis

submitted in fulfilment

of the requirements for the degree

of

Doctor of Philosophy in Law

at

The University of Waikato

by

JALESI NAKARAWA



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ABSTRACT

This thesis investigates the law and legal philosophy behind New Zealand's response to domestic violence. As a feature of common law reasoning, legal fiction, asserting something to be true when it is not true, persists as an important mechanism in judicial fact finding. In family law, the convenient and crucially unrecognised fiction of the "ideal family" which may never have existed continues to drive the family justice system. The failure to be aware of the fiction may undo the justifications for its existence and undermine its utility.

Treating this fiction as true rather than treating it as "if true" drives a wedge between the normative intent of the law and the behavioural issues that underlie human interpersonal relationships. The resulting gap between the realities of the family experience we live with and the "ideal family" we live by underwrites the vague and imprecise objectives of our responses to domestic violence. Apart from the uncertainty of what we are trying to achieve, the fiction assumes that deception and aggression are pathologies in human behaviour. The law's reliance on these fictions to pursue just ends requires careful considerations to avoid causing real world pathologies.

Despite New Zealand's reputation for innovative responses to domestic violence, the Family Justice System as a whole has failed to produce the anticipated result. The expansion of the continuum of conduct classified as domestic violence has criminalised instances of ordinary human aggression. This expansion under the Domestic Violence Act was intended to provide victims greater protection from domestic violence, but it has not had the intended result. While success in police management terms may be evaluated in higher rates of reported incidents, arrests and convictions, success for victims ought to be assessed regarding the reduction in incidences of violence over time. This has not happened. For this reason, the

application of statistical data to support a specific agenda often distorts our assessment of domestic violence.

The thesis proposes a holistic approach based on domestic violence as fundamentally a behavioural issue. It is important first to ascertain the nature of violence in the world and our lives and to unpack human behaviour for a better understanding of why we do the things we do. Secondly, statistical data should be properly analysed to provide an accurate picture of human behaviour and domestic violence as it is on the ground, the reality of family life we live with. This and only this can provide a sound basis for developing explicit goals to guide our legal responses or interventions, bridging the divide between the aspirational objectives of the law and the human reality we live with.

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Wilson and Anor & Roberts and Anor (No 2) [2010], FamCA 743 (Australia).

LIST OF ABBREVIATIONS

ADR	Alternative Disputes Resolution
CAN	Children Abuse and Neglect
COCA	Care of the Children Act
CTS	Control Tactic Scale
CUA	Civil Union Act
DVA	Domestic Violence Act
EEG	Electroencephalographic Evaluation of Brain Waves
IFV	Intrafamilial Family Violence
IPV	Intimate Partner Violence
KKK	Klu Klux Klan
MDMAA	Marriage (Definition of Marriage) Amendment Act
NZFVC	New Zealand Family Violence Clearing House
PSO	Police Safety Orders
PTSD	Post-Traumatic Stress Disorder
TJ	Therapeutic Jurisprudence
WHO	World Health Organisation

INTRODUCTION

1.1 Thesis Statement

It is my submission that very little has been achieved in terms of results, in changing the domestic violence landscape in New Zealand, five decades on from the establishment of the family justice system. In 1994, the then Chief Justice Ronald Davidson lamented that:¹

Recent high profile cases involving domestic violence have appalled serious thinking people and there is agitation afoot for appropriate action to be taken to curtail it.

Chief Family Court Judge, Peter Boshier echoed the same sentiment in 2011 pointing out that “despite all the work that has been done, recorded rate of violence in New Zealand have continued to rise.”² Domestic violence continues to be portrayed as a health problem of epidemic proportions in New Zealand.³ It has occupied the minds of politicians, policy makers, interest groups, service providers and family advocates for more than five decades. Numerous studies have been carried out, reviews and reforms were undertaken, reports were written, legislative changes implemented, and millions of dollars spent but statistics keep getting worse.⁴ Little has changed by 2016 as the Minister of Justice admits that “clearly something isn’t working” and government rolls out yet another review of

¹ Ronald Davidson *Report of Inquiry into Family Court Proceedings Involving Christine Madeline Marion Bristol and Robert Bristol* (Ministry of Justice, New Zealand 1994) at 40. The statement is in response to Alan Bristol killing his three children, then himself; the culmination of a bitter custody battle played out in the context of parental conflict, violence and court involvement.

² Peter Boshier “Family Law: Family Violence” [2011] 88 Fam Matters Online 27 at 28 This was in response to New Zealand Police recording 38,369 family violence incidents and 32,675 family violence related offences, making a total of 71,044 family violence related occurrences in 2008.

³ JL Fanslow and EM Robinson “Violence against Women in New Zealand: Prevalence and Health Consequences” (2004) 117 New Zealand Medical Journal; Boshier, above n 2.

⁴ The Glenn Inquiry “The People’s Report” (2014) <<https://glenninquiry.org.nz/the-peoples-report>> at 4.

the family justice system.⁵ Admittedly, the government spends billions of dollars every year without making a difference and “the problem is that we are supporting interventions that don’t work”, says the Honourable Amy Adams.⁶

It is the contention of the thesis that our family justice system is flawed, emasculated by aspirational goals which are premised on the fiction of the ideal family. Our responses to domestic violence have largely been based on assumptions that tougher policing, prosecution, and firm court action will ameliorate the problem.⁷ As a result, current policy requires police to arrest and charge offenders if evidence of an assault exists if the victim is in any danger or a breach of a court order had occurred. Overstressing the role of law enforcement to stem the tide has effectively removed any decision on arrest or prosecution from the victim. This “one-size-fits-all” strategy often captures couples who may feel remorse after an argument gets a little out of hand or for making an exaggerated allegation. Such a one-dimensional approach can often cause more harm to the family we live in than the initially alleged violence, in particular for minor sorts of aggression that do not result in any physical injuries or harm.

I hope I will not be misunderstood; this thesis is not a condemnation of past achievements that have improved the protection of domestic violence victims. Nor is it an acceptance of violence or an apologetic tolerance of men who perpetrate violence on women. Rather, it is an attempt to examine domestic violence as it is on the ground and responses or interventions that can produce a

⁵ Ministry of Justice *Strengthening New Zealand’s Legislative Response to Family Violence: A Public Discussion Document* (2015) at the introduction page. This time in response to 100,000 incidents of domestic violence incidents reported to Police in 2014, around one report every five minutes.

⁶ Amy Adams “Harnessing the Power of Information to Reduce Crime & Victim” (3 May 2016) Scoop Independent News <<https://mail>>, on 03/05/2016.

⁷ Helene Carbonatto “Dilemmas in the Criminalisation of Spousal Abuse” [1994] 2 Social Policy Journal of New Zealand at 2; Ruth Busch, Neville Robertson and Hilary Lapsley *Protection from Family Violence: A Study of Protection Orders Under the Domestic Protection Act 1982 (Abridged)* (1992).

fair and just outcome for those involved. If we are honest about the nature of human relationship and interaction, we must acknowledge the complexity and diversity of domestic violence. Interventions should allow options on a case by case basis and/or give victims a wider range of choices on the best course of action, in particular for minor aggression that does not result in harm or injury. The possibility of adopting a more graduated response needs to be examined; one that can filter out “one-off” incidents related to frustration, anger or conflict, as opposed to coercive control without inflicting greater damage than it is intended to remedy.

1.2 Objective

The overall objective of this thesis is to explore the philosophical underpinnings of the law relating to domestic violence. The exercise is undertaken with a holistic approach, to unpack assumptions that have driven our responses to domestic violence. A critical evaluation of the system is necessary to ascertain why we have been unable to stem the tide and to evaluate alternatives to the “one-size-fits-all” strategy. The analysis proceeds by the hypothesis that violence is fundamentally a behavioural issue and that the use of the legal fiction of the “ideal family” to impose unrealistic aspirational goals can be problematic. What we say about domestic violence is often dependent on our role within, or how we interact with the family justice system. As a result, the focus of assessment depends on the interpretation one places on domestic violence, which depends on where and who one is, and on their perspective based on their role within the system.

1.3 Methodology

In this thesis a multi-disciplinary approach is taken in respect of the following questions:⁸

⁸ Jane M Spinak “Reforming Family Court: Getting It Right between Rhetoric and Reality” (2006) 31 Washington University Journal of Law & Policy 11.

- How can we evaluate the accuracy of what we do or say about domestic violence, subsequent reforms and their implication on our analysis of outcomes?
- Does our place or role within the system affect our perception of the problem?
- If we are failing to reach our goals, can we acknowledge failure and learn from it?

The law through its intercourse with the social domain is the arbiter of what is conventional, normal or of an acceptable standard; either by yielding to social norms or by imposing normative legal ideals. This is the difficulty the law faces in many facets of its dealing with social life. The family, for example, exists like a pendulum that swings between the reality of family life as lived and the ideal of family life espoused by judicial determination.

In addressing the above questions, my research methodology is confined to academic investigation and analysis. In this context, the emphasis is law-in-context about domestic violence as a behavioural issue that encompasses a wide range of emotions, cultural issues and the personal characteristics of people involved. The two basic behaviours fundamental to family interaction and conflict are deception and aggression, they provide the conceptual framework for my analysis. The research is committed to ensuring that the thesis is meaningful to those who are involved in, and affected by, domestic violence in the context of personal relationships and conflict resolution between family members.

As a thesis in law, it is necessary to undertake an academic analysis of literature, family law, as well as case law about domestic violence. The research is multidisciplinary in nature given the complexity of human behaviour. It is fundamentally a jurisprudential thesis that sets out to analyse the thinking behind the law about families and domestic violence and why the law as our response to rising domestic violence, is the way it is. If the goal is to reduce domestic violence, the law has to be based on the reality of the “family we live with”. It has to have its starting point, on the ground of where we are at in terms of domestic violence

rather than starting with an idealised conception of the “family we live by”. The law may usefully help us pursue that worthy aspiration, and may also realise its status as an aspiration. The analysis will include developments in New Zealand and international trends, bearing in mind, the universal nature of the problem.

1.4 Violence in the Family

The domestic violence landscape in New Zealand is dominated by the view that domestic violence is a gender issue supported and maintained by a patriarchal social system.⁹ In this context, terms like ‘violence against women’ have become synonymous with domestic violence. This begs the question of whether ‘violence against women’ is about violence or women. There is more to domestic violence than merely framing it as a gender problem perpetuated by the male desire to dominate and coerce women. Human behaviour is a complex phenomenon encompassing the full range of human emotions and culture, in which gender, is but one of the many underlying issues that influence personal interaction

I suggest, we should start by analysing the framework we apply to domestic violence, as distinct from violence in general. Violence in everyday language predisposes towards extreme aggression, reflected in the extent of force applied or injury inflicted. The criminal jurisdiction reflects this in the way “violence against the person(s) is categorised into degrees of severity from common assault to murder.”¹⁰ “Domestic violence” on the other hand, is not an offence per se but a term defined in the family court jurisdiction, which includes physical, psychological

⁹ For example see, Denise Wilson and others “Becoming Better Helpers: Rethinking Language to Move Beyond Simplistic Responses to Women Experiencing Intimate Partner Violence” (2015) 11 Policy Q 25 at 26; citing, Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Family Violence Death Review Committee 2014).

¹⁰ Crimes Act 1961, Part 8, ss150–204.

and financial violence i.e. it ranges from mundane conflict to sexual violation and murder.¹¹

Our response to domestic violence has been driven largely by the feminist struggle, credited with propelling domestic violence into the public domain. At the forefront of the feminist campaign was the crusade for equality, highlighting the patriarchal structure of society as the major factor driving women's subjugation. From this political struggle for emancipation, emerged the control model: domestic violence as fundamentally a gendered issue, a model of dominant males who apply violence to control, subdue and abuse women.¹²

The family is an important social context, providing women, men and children with a safe environment in which to grow and to realise their full potential. Violence in this environment is not only counterproductive but violates this basic need of safety and affects everyone irrespective of gender.¹³ The link between children exposed to violence within the family and aggressive/abusive behaviour has been established by research, that men who witness or are victims of violence growing up are likely to go on and perpetrate violence against their female partners.¹⁴ The gender binary of men versus women can, therefore, be problematic, ignoring the effects of domestic violence on men and boys, in particular, when the law, policy and intervention are inclined towards only half (women) of the affected population.

A contrary theory posits that domestic violence is a behavioural issue, the possible outcome of conflict escalation. To say violence is the innate outcome of our

¹¹ Domestic Violence Act 1995, s 3.

¹² "Victims of Domestic Violence" Ministry of Justice <<http://www.justice.govt.nz/family-justice/domestic-violence>>; Shine "Introduction to Domestic Abuse" Shine.

¹³ Zeev Winstok and Zvi Eisikovits "Gender, Intimate Relationships and Violence" (2011) 16 *Aggression and Violent Behavior* 277.

¹⁴ For example see, Gayla Margolin and Elana B Gordis "Children's Exposure to Violence in the Family and Community" (2004) 13 *Current Directions in Psychological Science* 152.

evolutionary process is an oversimplification because not everyone exhibits violent behaviour. Violence inundates the world we inhabit, in all spheres of life from personal, group, national to international levels. Do we have a violent nature that erupts to the surface under the right conditions? Or do we learn violent behaviour from others? And if so, does our culture, and do our social norms, keep our violent tendencies in check or do they foster them? Clearly, we may all have the capacity to be violent, but we are likely to exercise violence only when the right conditions exist.¹⁵ It implies that we have different thresholds to the trigger that may invoke a violent reaction to external and internal stimuli.

The current approach to domestic violence locates the problem within the realm of aggression as abnormal behaviour. In the social and behavioural sciences this demands a cause. Thus, we question what causes violence. The normal state is placidity. It gets derailed by abnormal circumstances - the frustration/aggression hypothesis. It is also known as the "disease" approach: the normal or healthy state is assumed to be non-violent and we try to explain why violence occurs. On the other hand, it is suggested that aggression is inherent, it is what a living organism does in reaction to stimuli, a part of its survival routine.¹⁶ Finding a cause then would be futile, for if we examine antagonistic encounters between animals of the same species, we can predict fairly accurately when in the escalation process violence will occur.¹⁷

¹⁵ Jonathan Strickland "Nature, Nurture and Violence" [2010] HowStuffWorks at <http://science.howstuffworks.com/life/why-are-we-violent.htm>.

¹⁶ Robin Fox "SIRC - The Human Nature of Violence 1" <<http://www.sirc.org/publik/foxviolence.html>>.

¹⁷ At 2.

1.5 *A stronger Response to Domestic Violence*

Domestic violence is portrayed as a scourge spiralling out of control and which requires a stronger response to reduce the high incidence.¹⁸ Conveyed through powerful stories which capture our emotion, domestic violence stirs our attachment to a particular idea. Mass media elucidates these into graphic details that can compromise our ability for objective analysis.¹⁹ In the circumstances, the selective use of statistics can be thrown into the mix to support the notion of the escalating problem. For example, statistics cited in support of the high rate of domestic violence, refers to “more than 100, 000 incidents of abuse reported to Police – that’s around one every five minutes”.²⁰ Further analysis of the same statistical data reveals no police action required in more than fifty percent of the reports received, that is about 37,000 investigations in which at least one offence was recorded, against 64,000 investigations in which no offence was recorded.²¹

My efforts may indeed be criticised as a justification of the status quo, ignoring the obvious abuse of women, perpetuated by patriarchal society. I am clear in my position that violence of any kind, domestic or otherwise, irrespective of the perpetrator or victim, is unacceptable and should be dealt with accordingly. Feminism has made enormous progress regarding gender equality and the recognition of women’s rights. These gains, however, have failed to translate into the desired goal of stemming the tide of domestic violence. Thus, the proposition

¹⁸ Minister for Justice: Hon Judith Collins “A Stronger Response to Domestic Violence” (2014) <<http://www.justice.govt.nz/publications/global-publications/f/family-violence-cross-government-package/documents/a-stronger-response-to-domestic-violence/view>> at 1.

¹⁹ ONE News “Emotions Run High as Autistic Boy Farewelled, Stepfather Charged with His Murder” TVNZ (3 June 2015) <<http://tvnz.co.nz/national-news/emotions-run-high-autistic-boy-farewelled-stepfather-charged-his-murder-6329529>>; ONE News “Homicide Inquiry after 5-year-old Autistic Boy Dies” TVNZ (29 May 2015) <<http://tvnz.co.nz/national-news/homicide-inquiry-after-5-year-old-autistic-boy-dies-6325764>>.

²⁰ Davidson, above n 1.

²¹ NZFVC Data Summary: Violence Against Women - DS2-Violence-Against-Women-2015-0.pdf at 3; <https://nzfvc.org.nz/sites/nzfvc.org.nz/files/DS2-Violence-Against-Women-2015-0.pdf> on 07/03/2016.

to change the framework of our analysis, upon which our responses to domestic violence is configured.

1.6 Thesis Outline

There are six key areas covered in this thesis, dealt with in six chapters as discussed below.

1.6.1 Domestic Violence

In chapter one the discussion begins with domestic violence; the disconnection between reality and the normative standard of aggressive behaviour, as well as the normative imposition of law regarding domestic violence. My goal is to locate aggression in everyday life as separate from violence, both in the form of objectionable harm and as a means to the end of survival – the distribution of resources. The analysis will explore the effects of aligning our responses such as the broad definition of domestic violence and the pro-arrest policy to the gender framework. “Violence” is a loaded term and what we mean by violence is often contextual and progressive regarding the degree of harm.

The discussion in this chapter will bring together nature/nurture, and genetic/social perspectives to investigate the difference between control as a means of influencing one’s environment and control as abusive behaviour. It will also discuss the reality of assertive behaviour and conflict resolution within intimate relationships, in contrast to the ideal pursued through the normative force of law. Indeed, it appears that despite a universal proclivity of avoiding interpersonal violence at all costs, the human propensity towards violence has not changed.

1.6.2 The Family

The discussion on the family in chapter two is a determination of what the term “family” means today. The family may mean different things to different people, but its universality engenders the enduring debate about what it is. Are families’

natural domains where social and legal norms follow biology and passion? Or are they social constructions created and regulated by society or government for specific public services?

Differing views continue to drive debates on family matters. In one view they are a haven of love, care, attention and affection; in another a hell of manipulation, guilt, and oppression. This view is followed by the private/public consideration: Who decides what is a family? Who is in the family and who is out? Then there is the role of the State and the question of the extent it should regulate the family. What is the interest of the State in regulating the family? While the family has evolved both in structure and form the law is sometimes at odds with social reality; judicial pronouncements frequently support the fiction of the ideal family we live by rather than the reality of the family we live with.

1.6.3 Personal Relationships: Perception, Understanding and Interaction

The tendency to be violent is either inherent or learned behaviour. Whatever it is, history provides testimony to the fact that humans resort to violence as a means to an end. This chapter, therefore, examines how we perceive the world around us and what drives human behaviour and moral values. Our perception of who we are dictates how we interact with others. In fact, we see the world not merely through the physical organ of the eye but also through the mind as a means of perception, conditioned by culture in which its possessor is reared.²²

Why do we behave the way we behave? Are we inherently rational and emotional beings? Scholars and scientists who study behaviour struggle to answer these questions. We are complex creatures, our personalities are the products of thousands of influences, so there are no easy explanations. We hold ourselves as

²² Ruth Benedict cited in: Leonard Mlodinow *Subliminal* (Vintage Books, New York, 2013) at 30.

capable of considering our actions; we can plan and reflect upon our deeds, and we can question our motives or consider the consequences of the things we do.²³ As suggested by Lakoff and Johnson, our thoughts are governed by concepts not only as a matter of intellect but in our daily lives to the most mundane detail; concepts govern “what we perceive, how we get around in the world, and how we relate to other people.”²⁴

The chapter also covers deception as a human trait fundamental to human survival; the lubricant that keeps society running smoothly because truth can be “harsh, dangerous, and destructive...too naked, for the complexities” of life.²⁵ As a coping mechanism deception helps us deal with fear:²⁶

To tolerate stress, to gain a sense of control over the uncertain aspects of our lives and the future, to enhance our well-being, to gain and protect privacy, to help others anonymously, and so on.

The law it is noted also embraces the use of legal fiction, representing to be true what is known not to be true, sanctioned and employed through the orderly and impartial administration of justice.²⁷ It is suggested that family law itself is based on a fundamental but crucially unrecognised fiction of the “ideal family” that may never have existed and that the failure to be aware of the fiction undoes any of the justification for its existence and undermines its utility.

²³ Strickland, above n 15.

²⁴ George Lakoff and Mark Johnson *Metaphors We Live By* (University of Chicago Press, Chicago, 2003) at 3.

²⁵ Jeremy Campbell *The Liar's Tale* (W W Norton, New York; London, 2002) at 15.

²⁶ David Nyberg *The Varnished Truth : Truth Telling and Deceiving in Ordinary Life* (University of Chicago Press, Chicago, 1994) at 1.

²⁷ Allen M Sterne “Fiction” (1932) 81 University of Pennsylvania Law Review 1 at 1.

1.6.4 Power and Aggression

This chapter examines the concepts of power and aggression and how they affect our daily interaction. If the self is multidimensional, it follows that an individual in the course of interacting with others will behave or act according to role performance. A person, for example, will behave as a parent when with her children, a spouse when with her partner and either as a subordinate or manager when with colleagues at work. These roles and interactions are guided by the social construction of reality and power relations, which can be deceptive and subtle, but they infiltrate people's consciousness without awareness.²⁸ Before we proceed to examine domestic violence we need to understand how we perceive and interact with the world around us, as well as the power relation that dictates our actions.

Similarly, aggression is often considered both as a negative and positive human trait. The rationale for such behaviour remains the same; is it innate or learned behaviour? For the purpose of this research, however, aggression will be examined as distinct from violence and how it applies in everyday life. This is important in terms of domestic violence, which is defined broadly, from verbal aggression to murder and everything in between.

1.6.5 Intimate Partner Violence (IPV)

In New Zealand IPV is basically construed as a gender crime perpetrated by men on women underlined by coercive control.²⁹ The reconceptualization of IPV as a

²⁸ Yuet See Monica Owyong "Clothing Semiotics and the Social Construction of Power Relations" (2009) 19 *Social Semiotics* 191 at 191.

²⁹ New Zealand Police *Family Violence Policy and Procedures* at 11 retrieved from <http://www.ppdvp.org.nz/wp-content/media/2010/07/NZPol-Family-Violence-Policy-Procedures.pdf> on 10/06/2016.

male perpetrated act is not only misleading but can be a contributing factor to the high rate of domestic violence incidents reported to police. According to police, women also commit acts of domestic violence but they are much more likely to be victims while men are much more likely to be perpetrators.³⁰ However, controlling behaviour is not the sole domain of men even if they are predominantly perpetrators in serious domestic violence incidents.³¹ This chapter investigates IPV through the frameworks of gender and human behaviour.

1.6.6 Family Court Reforms

Finally, in chapter six I put the New Zealand family justice system under the spotlight and how these assumptions operate within it. I review the Family Court, family law and policies relating to domestic violence. The analysis will encompass the role of the Family Court in the context of various reforms undertaken since its inception. It will examine the heavy reliance on the legal system as the primary response to domestic violence and the unintended consequences for those who come into contact with the system. Concerns about the performance of the family justice system as a whole imply a failure to realise its objectives. We continue to call for reforms based on the same framework that has not yielded the desired outcomes. I question therefore the accuracy of what we say in regards to the reforms we undertake.

1.6.7 Conclusion and Recommendations

The hypothesis suggests that we as individuals and groups live our lives in two dimensions. The reality of life as we live it and the ideal life that we live by as an aspirational standard that keeps us in check. It prevents us from straying too far into the realm of confusion, moral decay, anarchy and chaos. Deception, power

³⁰ At 13.

³¹ See generally, Richard B Felson and Maureen C Outlaw "The Control Motive and Marital Violence" (2007) 22 *Violence and Victims* 387 at 400; Jan E Stets and Stacy A Hammons "Gender, Control, and Marital Commitment" (2002) 23 *Journal of Family Issues* 3 at 15.

and aggression are terminologies that evoke negativism in spite of the fact that they encompass daily activities which make our life bearable and durable. The illusion that we are in control instead of merely reacting to our environment; that we are trustworthy instead of lying almost every day; that we are altruistic and not selfish; and that we are naturally non-aggressive and thus to be aggressive is abnormal. This binary should inform a “tired” response from the law, with more flexibility being extended to conduct which has not strayed far from the legal fiction of the ideal family to which we aspire. And within the ambit of that ideal informed by better understandings of the real-world science illuminating the differences between acceptable versus unacceptable expressions of ordinary and intrinsic human aggression.

CHAPTER 1 – DOMESTIC VIOLENCE

1.7 Introduction

The term “domestic violence” (also called “family violence”), implies violence perpetrated in the domestic sphere or within family homes. It covers a wide range of abusive behaviour committed within close personal relationships or between family members. In this context, the violence exhibited covers different types of behaviour or threats including physical violence, sexual abuse, emotional abuse, verbal abuse and intimidation, economic and social deprivation, damage of personal property and abuse of power.³² Domestic violence is a human rights issue and a serious social problem in New Zealand;³³ a major health issue, contributing to injury, death and long-term health problems.³⁴

Historically, domestic violence was positioned in the private domain, where it was accepted or tolerated with a general reluctance to intervene. In recognition of the violent male enforcing a “natural” rule that men should direct and control the activities of the family, wives and children. However, women’s rights movements in the 1970s pushed domestic violence into the public domain as an important issue with high social and economic costs. Subsequently, New Zealand’s first legislative response was the *Domestic Protection Act 1982* which introduced non-

³² See the definition of domestic violence in, Domestic Violence Act 1995, s 3.

³³ Justice Minister Amy Adams referred to family violence as one of the most insidious forms of social evil facing this country, “Justice Minister Launches Review to Tackle Domestic Violence” (2015) New Zealand Law Society <<https://www.lawsociety.org.nz/news-and-communications/latest-news/news/justice-minister-launches-review-to-tackle-domestic-violence>>.

³⁴ Fanslow and Robinson, above n 3, at 1; Family Violence It’s Not OK “Statistics” It’s Not OK <<http://areyouok.org.nz/family-violence/statistics/>> on 30/09/2015.

violence and non-molestation orders. Followed in 1985 by rape within marriage becoming a criminal offence,³⁵ and by the late 1980s, police proactively arresting domestic violent offenders without a victim complaint.³⁶

Domestic violence is different from other violent behaviours because it occurs in intimate relationships within the privacy of the family home. Increasing public concerns has resulted in a plethora of research and literature focussing on specific characteristics of domestic violence. The avalanche propelled gender into the centre stage, driven by the feminist view that gender inequality is the underlying cause of domestic violence, combined with the drive to end violence against women.³⁷ However, dogmatic adherence to this viewpoint has submerged important behavioural aspects of violence as a type of behaviour that consists of diverse injurious actions, involving a variety of behaviours, injuries, motivations, agents, victims, and observers.³⁸ Domestic violence merely embodies a type of behaviour in our repertoire of violent predispositions, a subset of human violence as a whole.

1.8 Defining Domestic Violence

The term “domestic violence” embodies different forms of behaviour within the family: intimate partner violence, children abuse, sexual abuse, elder abuse, and sibling violence. In general, however, domestic violence is often debated and

³⁵ Crimes Act 1961, s128 (4).

³⁶ Nancy Swarbrick *Te Ara Encyclopaedia of New Zealand* (2015) Domestic violence; Law and Policing Changes <<http://www.teara.govt.nz/en/domestic-violence/page-4>> at <http://www.teara.govt.nz/en/domestic-violence/page-4> on 30/09/2015.

³⁷ United Nations Trust Fund to End Violence against Women *Annual Report 2010* (2010); Michael Flood “Involving Men in Efforts to End Violence Against Women” (2011) 14 *Men and Masculinities* 358; “New Zealand Family Violence Clearinghouse” <<https://nzfvc.org.nz/>>; “Family Violence: It’s Not OK” It’s Not OK <<http://areyouok.org.nz/>>; Wilson and others, above n 9.

³⁸ Mary R Jackman “Violence in Social Life” (2002) 28 *Annual Review of Sociology* 387 at 404.

reviewed through the framework of male domination over women and children. This view is reinforced by a specific provision in the Crimes Act 1961 outlining the offence of “male assaulting female” for which one is liable to incarceration for a term not exceeding two years.³⁹ In contrast, a female assaulting a male will be dealt with under “common assault” and liable to incarceration for a term not exceeding one year.

Domestic violence is defined as a protective mechanism to avoid physical, sexual or psychological abuse, including, but not limited, to intimidation, harassment, damage to property, and threats of physical, sexual or psychological abuse (which includes financial and economic abuse). In relation to children, a person psychologically abuses a child by causing or allowing the child to see or hear such abuse of a person with whom the child has a domestic relationship.⁴⁰ The protection envisaged by the broad definition of domestic violence is advanced in two distinct ways: first, the recognition of all forms of domestic violence as unacceptable and second, through the legal framework of legal protection.⁴¹ However, the statement that all forms of domestic violence are “unacceptable behaviour” is attitudinal, a statement of principle that is moral rather than legal.⁴²

It is worth noting that the wide net cast by such a broad definition of domestic violence, by implication, captures the range of conflict behaviour and conflict resolutions integral to inter-relationships. Conflict and disagreement are facts of life, in which concerned parties deploy various posturing tactics to assert some degree of control or influence over the situation. The all-embracing nature of the definition leaves little room for argument that any behaviour about escalating

³⁹ Crimes Act 1961, s 194 (b).

⁴⁰ Section 3(1)(2)(3) of the Domestic Violence Act 1995.

⁴¹ Domestic Violence Act, s 5(1)(a)(b).

⁴² Family Law Service “Domestic Violence: General” in *Family Law Service (NZ)* (online looseleaf ed, LexisNexis) at para 7603.

conflict in everyday interaction can be outside the scope of domestic violence. The only way out is to argue that a particular action does not amount to “domestic violence” as defined in the Act, which leaves little room for argument.

Given that “violence” is defined as physical, sexual, and psychological “abuse”⁴³ the initial inquiry is whether the connotation of the word “abuse” is different from the common meaning of violence. While violence would normally be perceived as involving the use of force, it now incorporates strong, passionate, angry language or other forms of postures and expressions. Violence may be reprehensible but acceptable in circumstances of self-defence, provocation or where there is legal justification. However, “abuse” is not defined in the DVA, but it has the connotation of using to bad effect or purpose, corrupt practice, improper use or misuse.⁴⁴ If this interpretation of “abuse” is correct, the use of force that does not amount to abuse can be critical in determining domestic violence. For example, a verbal tirade as a result of provocation, or a nominal push/shove in the heat of an argument, may not amount to [domestic] violence.

The confusion stems from the fact that a conflict in an intimate setting can be heated, physical and verbal but without injury or the intent to harm. In the case of *B v M* ⁴⁵ for example, the couple had lived together for two years, on and off, during which time they conceived and gave birth to two daughters. There had been violence in the relationship by both parties, but the matter before the court was the application for protection by Ms B for her and the twins. After a night of caring for the twins (who were supposedly sick), the father was tired and angry

⁴³ Domestic Violence Act 1995, s 2 (a)(b)(c).

⁴⁴ “Abuse” Oxford Dictionaries <<http://www.oxforddictionaries.com/definition/english/abuse>>; *Bragg v Hawea* [1996] NZFLR 874 at 880 Judge Whitehead said “it is not appropriate to provide too strict a definition of the term “abuse”, and I prefer to accept the definition of ‘an improper usage; a corrupt practice or improper use, perversion’. Simply, abuse is contrary to proper usage as in abuse of a drug”.

⁴⁵ *SLB v MFM* Family Court New Plymouth FAM 2008-043-0055, 15 April 2008.

during the handover. In the ensuing argument, he threw a bottle at the car (but missed) and threatened the woman verbally. Rejecting the application, the judge accepted Mr M's behaviour was domestic violence but noted, however, that not all exchanges between a couple in the throes of separation, even hot tempered ones, will necessarily fit a definition of domestic violence.⁴⁶

1.8.1 The Changing Dynamics of New Zealand's Response to Domestic Violence

The changing dynamics in our response to domestic violence is closely linked to the rise of the modern feminist movement and its work in raising public awareness of the problem. Before 1980 the New Zealand Police approach to dealing with family disputes was minimalist, arrests for domestic violence were rare, and charges were laid only when there was clear evidence of serious assault.⁴⁷ This is hardly surprising, given that female complainants were viewed as "temperamental" and "unreliable". For example, the 1964 Police General Instructions warned about the propensity of drunken wives to lodge complaints, which they would subsequently withdraw, notwithstanding that the majority of assaults in the home were minor.⁴⁸ The shifting dynamics of the response to domestic violence prompted by the women's movement triggered an appropriate legal response.

The Domestic Protection Act 1982 was a response to the rising awareness of domestic violence, followed by the police pro-arrest policy in 1987 that, except for minor incidents, all cases of assault or breach of non-violent order must incur

⁴⁶ At [18].

⁴⁷ Jenny Cross and Greg Newbold "Presumptive Arrest in Partner Assault: Use of Discretion and Problems of Compliance in the New Zealand Police" (2010) 43 *The Australian and New Zealand Journal of Criminology* 51 at 52; Stephanie Grant and Michael Rowe "Running the Risk: Police Officer Discretion and Family Violence in New Zealand" (2011) 21 *Policing and Society* 49 at 50.

⁴⁸ Susan Butterworth *More than Law and Order* (Otago University Press, Dunedin, NZ, 2005) at 163.

arrest.⁴⁹ The later indicated a major shift in policing domestic violence, notwithstanding, the caveat of discretion that: “common sense should always prevail where incidents are extremely minor or police intervention is clearly inappropriate.”⁵⁰ The momentum of this initiative was, however, impeded by the entrenched social attitude that family disputes were private matters, giving rise to the inconsistent application of the policy.⁵¹ That is, in spite of the changes in the 1980s, there remained a general police reluctance to arrest while prosecutors and judges were unenthusiastic about accepting cases where victims were unwilling to give evidence.⁵²

In 1992, police refined the pro-arrest policy that where an assault has been disclosed or evidence of an assault existed, an arrest must be made, irrespective of whether there was a complaint or the victim refused to testify in court.⁵³ Increasing awareness and concerns about domestic violence resulted in the repeal of the Domestic Protection Act 1982 and its replacement by the Domestic Violence Act 1995.⁵⁴ The latter Act strongly denounced all forms of domestic violence with the primary purpose of providing protection to victims.⁵⁵

⁴⁹ Issued via the Commissioner’s Circular 1987 instructing police to arrest where there was sufficient evidence and where physical force have occurred, cited in Maria Benschop and others “The Politics of Policing Family Violence in New Zealand: An Overview” [2012] Family Violence: School of Psychology Massey University at 4.

⁵⁰ *Commissioners Circular* (1987) at 2–3 and; The Domestic Protection Act 1982, p 10 which provided police with discretionary powers whether to arrest or not in the first instance.

⁵¹ See generally: Busch, Robertson and Lapsley, above n 7; GW Ford *A Review of the 1987 Police Policy on Domestic Violence* (1993); EF Marsh *Commissioner’s 1987 Domestic Disputes Policy Changes: National Implementation* (1989).

⁵² Benschop and others, above n 49, at 5.

⁵³ Greg Newbold and Jenny Cross “Domestic Violence and Pro-arrest Policy” (2008) 33 Social Policy Journal of New Zealand 1 at 6.

⁵⁴ Julie Leibrich, Judy Paulin and Robin Ransom *Hitting Home: Men Speak About Abuse of Women Partners* (AGB McNair (NZ) Dept of Justice, Wellington, 1995) Hitting home.

⁵⁵ Domestic Violence Act 1995, s 5(1)(b).

1.8.2 Developments under the Domestic Violence Act 1995 (DVA)

At this juncture, policies regarding domestic violence were firmly inclined towards the concept of abusive men controlling women through violence. New general prosecution guidelines introduced by the Solicitor General that came into force on 1 January 2010, as a response to the high number of cases withdrawn before trial and the number of cases failing to succeed at a defended trial.⁵⁶ The guidelines require that prosecutions are only brought where there is a reasonable prospect of conviction and where a prosecution is in the public interest. This is reflected in the police family violence policy and procedures, which outlines the evidential test as whether:⁵⁷

- there has been the commission of an offence
- there is an identifiable individual (offender)
- credible evidence exists
- that evidence will be accepted by the court
- likelihood of conviction (defence to be put forward)
- finding – beyond a reasonable doubt.

Consequently, police policy and procedures assert that:⁵⁸

If there is sufficient evidence of an offence, offenders who are responsible for family violence related offences or breaches of protection orders should, except in exceptional circumstances, be arrested.

⁵⁶ Waves Trust *Changes Impacting Referrals to Man Alive Stopping Violence Programmes Between 1 January 2009 and 30 June 2012* (2012).

⁵⁷ New Zealand Police *Family Violence Policy and Procedures* (2010) at 55.; <http://www.ppdvp.org.nz/wp-content/media/2010/07/NZPol-Family-Violence-Policy-Procedures.pdf> on 31/10/2014

⁵⁸ At 34.

This was followed by the strengthening of the pro-arrest policy via the police safety orders (PSO),⁵⁹ empowering police to issue an on-the-spot order preventing the recipient from having any contact with the alleged victim, their children and any other member of the family for up to five days.⁶⁰ The PSO may be issued if police:⁶¹

- [do] not arrest the [alleged perpetrator] of an offence involving use of violence against the person at risk (a family violence offence), but
- [have] reasonable grounds to believe (when taking specific matters into account...) that the issuing of an order is necessary to ensure the immediate safety of the person at risk.

It is implied that the pro-arrest policy led to the high arrest rates of male perpetrators. In 2013 for example, there was a total of 6749 apprehensions of male assaulting female with 85% (5754) resolved. For the same year, a total of 12490 PSOs were issued, but police statistics do not elaborate on the gender of recipients.⁶² However, it has been stated elsewhere that according to New Zealand police “males are arrested for family violence more than six times as often as females.”⁶³ The implication is that even where both parties are violent it is the male who is arrested⁶⁴ or barred from entering the family home for a specified period under the PSO.⁶⁵

⁵⁹ The police safety order provision which came into force on 1 July 2010 was enacted by s 9 of the Domestic Violence Amendment Act 2009 which inserted s 6A into the Domestic Violence Act 1995.

⁶⁰ Domestic Violence Act 1995, s 124K.

⁶¹ New Zealand Police, above n 57, at 38.

⁶² New Zealand Family Violence Clearing House *Data Summary 3: Violence Against Women* (2014) at 3–4.

⁶³ Cross and Newbold, above n 47, at 66.

⁶⁴ At 66.

⁶⁵ See discussion in section 1.2.7 under gender paradigm

1.8.3 Temporary Domestic Orders

Apart from the PSO, the power to grant temporary protection orders without notice (under s 13 of the DVA) is used widely, though it is controversial in nature.⁶⁶ To be eligible as an applicant one must be in a domestic relationship⁶⁷ with the respondent and satisfy the two tests. First, that the Respondent is using, or has used domestic violence, and an order is necessary to protect the applicant or child.⁶⁸ Second, that the delay caused by proceedings on notice would or might entail risk of harm or undue hardship on the applicant or the applicant's children.⁶⁹ The controversial nature of temporary protection orders stems from the competing interests of both parties. The applicant must be seeking urgent protection from perceived danger or violence. The respondent faces harsh sanctions if an order is made and also has a definite interest to be heard.⁷⁰

The consequences of protection orders without notice can be a severe infringement on the respondent's right to natural justice, but the court is required to consider the applicant's subjective perception of events.⁷¹ As stated by Fisher J,⁷²

Above all, it should not be overlooked that an order made *ex parte* represents a fundamental denial of the natural justice upon which our whole system of civil litigation normally rests.

It is noted, for example, that from 5,118 applications received in 2014, 76% (3,875) were for protection orders without notice, and 89% of applicants were from

⁶⁶ Domestic Violence Act, s 13.

⁶⁷ Defined in s 4 of Domestic Violence Act 1995.

⁶⁸ Domestic Violence Act 1995, s 14.

⁶⁹ Domestic Violence Act 1995, s 13.

⁷⁰ Edward Clark "Ex Parte Orders in the Family Court and the New Zealand Bill of Rights Act 1990" (2003) 4 Family Law Journal at 2.

⁷¹ Domestic Violence Act 1995, s 13(2)(a).

⁷² *Martin v Ryan*, 2 NZLR 209, 229.

females compared to 9% of males. A total of 3,124 (61%) protection orders were granted while the other 39% were either dismissed/struck out; lapsed, withdrawn, or discontinued, with a temporary order granted; or lapsed, withdrawn, or discontinued and a temporary order not granted.⁷³ These statistics show that the majority of applicants are women, and almost half of the applications do not result in the grant of protection orders.

The disparity exposed by statistics can be interpreted in a couple of ways. First, the high number of women applicant exhibits the gender paradigm of controlling men perpetrating violence upon women. Women, therefore, are more inclined to invoke legal protection while men are averse to take such safety measures. Second, the tendency to summon protection by women can be motivated by reasons other than violence, because a protection order is a powerful tool which can be used out of spite, revenge, or purely as payback for perceived indiscretions, notwithstanding the complexity of family disputes. Family Court Judge Jan Doogue for example, stated that there is no doubt in her mind:⁷⁴

That there are a good number of cases where delay means that women are the arbiters of access that men have to their children and that in some cases the Temporary Protection Order is in fact used as a ‘weapon’ against the father”.

The above view remains too unqualified for lack of empirical evidence,⁷⁵ but this can also be attributed to the lack of research towards investigating such possibilities.

⁷³ *Data summary: Violence Against Women* (2014) at 9
<https://nzfvc.org.nz/sites/nzfvc.org.nz/files/DS2-Violence-Against-Women-2015-0.pdf>.

⁷⁴ Jan Doogue “The Domestic Violence Act 1995 and the Guardianship Act 1968 - The Effects on Children’s Relationships with Non-custodial Parents” (2004) 4 BFLJ 243 quoted and discussed in; Wendy Davis and Margret Powell “Gender Bias, Fathers’ Rights, Domestic Violence and the Family Court” (2004) 4 Family Law Journal 299 at 306.

⁷⁵ Law Commission *Dispute Resolution in the Family Court* (Law Commission, Wellington, New Zealand, 2003) at 205 para 985 states that the Law Commission found “no empirical data or

1.8.4 Conceptual Frameworks

The battle against domestic violence, as a major problem worldwide is waged on two different fronts. First, the feminist position is postulated on gender inequality; women subjected to the control and domination of men.⁷⁶ Second, the concept of violence as human behaviour, advocated by “domestic violence scholars” who examine domestic violence from a gender neutral perspective, perpetrated by both men and women.⁷⁷ Preferably, the two conceptual methods should not be considered as a polarised debate on two divergent views; it is not about feminism and anti-feminism, but two theoretical frameworks applied to the same phenomenon.

Winstok suggested that feminist scholars examine domestic violence as a means to expose the subservient gendered role of women in a male-dominated society.⁷⁸ On the other hand, domestic violence scholars view partner relationship as an opportunity to study violent behaviour where gender is one of the many contributing factors.⁷⁹ Interestingly, while New Zealand legislation is draughted in gender-neutral terms, wider policies introduce a gender bias in our response to domestic violence.⁸⁰ Delineating the conceptual arguments underlining the two frameworks should clear some grey areas in our perceptions of domestic violence.

qualitative evidence to substantiate...allegations [that] women making strategic use of protection orders to prejudice father's position in custody disputes"".

⁷⁶ R Emerson Dobash and Russell Dobash *Violence against Wives* (Free Press, New York, 1979).

⁷⁷ See Murray A Straus, Richard J Gelles and Suzanne K Stenmetz *Behind Closed Doors* (Transaction Publishers, New Brunswick, NJ, 2006).

⁷⁸ Zeev Winstok *Partner Violence : A New Paradigm for Understanding Conflict Escalation* (Springer Verlag, New York ; London, 2013) at 6.

⁷⁹ At 6.

⁸⁰ Peter Boshier and Julia Spelman “What’s Gender Got to do with it in New Zealand Family Law” (2011) 7 New Zealand Family Law Journal 61 at 62.

1.8.5 Gender

Gender, as opposed to sex, refers to the cultural qualities that characterise the difference between men and women. A complex social construct or an institution that encompasses all social relations, it provides a sense of who we are and how we interact with others.⁸¹ It separates people into categories with differentiated social statuses, in the home, at work, in sports, or in public interactions; it is an organising principle that pervades all spheres of social life.⁸² Judith Butler summed up the complexity surrounding the individual acting within the social construction of gender by stating:⁸³

The “I” that I am finds itself at once constituted by norms and dependent on them but also endeavours to live in ways that maintain a critical and transformative relation to them.

Whether the individual acts by, or against gender behavioural norms, we do so consciously and unconsciously, always testing and stretching the restrictive gender boundaries that influence the way we interact with others.

1.8.6 Gender as a Social Construct

As a social structure, gender has been developed through four theoretical frameworks. The first tradition is based on the origins of sexual differences, biological or social.⁸⁴ The second tradition emerged as a reaction to the first and focuses on social structure (as opposed to biological or individual learning) and

⁸¹ Judith Lorber *Paradoxes of Gender* (reprint ed, Yale University Press, New Haven, 1995) at 3.

⁸² Cecilia L Ridgeway and Shelley J Correll “Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations” (2004) 18 *Gender and Society* 510 at 514, 521–22.

⁸³ Judith Butler *Undoing Gender* (Routledge, New York ; London, 2004).

⁸⁴ J Richard Udry “Biological Limits of Gender Construction” (2000) 65 *American Sociological Review* 443; Sandra Lipsitz Bem *The Lenses of Gender* (reissue ed, Yale University Press, New Haven, 1994).

how it creates gendered behaviour.⁸⁵ The third tradition, diverts attention away from individual learning or imposition by social structure, emphasising social interaction and accountability to others' expectations. The focus is not on who you are but what you do, "doing gender" which creates and reproduces inequality.⁸⁶ The last and most recent framework employs an integrative approach which treats gender as a socially constructed stratification system.⁸⁷ In this light, Lorber argues that gender is an institution that is embedded in all the social processes of everyday life and social organisation with the purpose "to construct women as a group to be subordinate to men as a group."⁸⁸

The life of women today is a far cry from what it was fifty years ago. In all facets of their lives, women have been able to make inroads in the struggle for equity. Huge strides have been attained in the economic front regarding the commercial and employment market, with at least formally equal opportunities in professions once dominated by men. In the political sphere, women have gained the right to vote and to participate actively in politics including the right to aspire to political leadership. Lastly, through human rights legislation as well as criminalisation of domestic violence, the law has developed tools to protect women from gender discrimination, domination and disadvantage.

In spite of such progress, gender stereotypes and gendered roles have remained entrenched and pervasive, sustaining themselves through the constant redefinition of who men and women are and what they do. At the same time, gendered differences implying that men are rightly powerful have been preserved,

⁸⁵ This is best portrayed in; Cynthia Fuchs Epstein *Deceptive Distinctions* (reprint ed, Yale University Press, New Haven, 1990).

⁸⁶ Candace West and Don H Zimmerman "Doing Gender" (1987) 1 *Gender & Society* 125.

⁸⁷ Raewyn Connell *Gender: Short Introductions* (2nd ed, Polity, Cambridge, 2009); Lorber, above n 81; Myra Marx Ferree, Judith Lorber and Beth B Hess *Revisioning Gender* (AltaMira Press, Thousand Oaks, Calif, 1998); Barbara J Risman *Gender Vertigo* (Yale University Press, New Haven; London, 1999).

⁸⁸ Lorber, above n 81, at 33.

thus perpetuating the subordination of women.⁸⁹ For example, despite women earning equal or more than their male partners, they continue to perform the major portion of housework.⁹⁰ In Australia, women who became agricultural leaders concealed their femininity by wearing dark suits and demonstrated conventional masculinity by doing dirty manual work to show their ability. On the other hand, female religious Ministers preserved their femininity by asserting a “nurturing, communicative, and empathetic behaviour.”⁹¹ As Dame Silvia Cartwright warned in 2004:⁹²

The perceived predominance of women across some of the country’s key leadership positions during recent years ... carries the risk of a double edged sword. It is all too convenient to assume that this profile accurately represents the status of all professional women.

On the domestic violence front, statistics clearly illustrate that after decades of formulating violence as a gender problem with corresponding interventions, it continues to escalate.⁹³

1.8.7 The Gender Paradigm

The gender paradigm conceptualises domestic violence as primarily perpetrated by males against females, and an extension of the patriarchal social system that

⁸⁹ Cecilia L Ridgeway and Shelley J Correll “Limiting Inequality through Interaction: The End(s) of Gender” (2000) 29 *Contemporary Sociology* 110 at 522–3.

⁹⁰ See for example; B Hallerod “Sharing Housework and Money Among Swedish Couples: Do They Behave Rationally?” (2005) 21 *European Sociological Review - EUR SOCIOLOGICAL REVIEW* 273; Barbara Heather and others “Women’s Gendered Identities and the Restructuring of Rural Alberta” (2005) 45 *Sociologia Ruralis* 86.

⁹¹ Barbara Pini “The Third Sex: Women Leaders in Australian Agriculture” (2005) 12 *Gender, Work & Organization* 73 at 82.

⁹² At a time when NZ had four women holding the following positions: Governor General Dame Sylvia Cartwright, Prime Minister Helen Clark, the Chief Justice Dame Sian Elias and the Attorney General Hon. Margaret Wilson, Judy McGregor “Gender Equality and Social Justice: Progress, Paradox and Promise” (Lincoln Efford Memorial Lecture, Christchurch, 7 November 2013).

⁹³ For details on the increase in domestic violence see; “Data summary: Violence Against Women”, above n 73.

perpetuates male dominance. As originally outlined in the work of Dobash and Dobash:⁹⁴

Men who assault their wives are merely living up to cultural expectations, the use of physical force to assert their domination and ensure the subordination of women.

The core proposition is organised around a pattern of coercive behaviour by men to maintain control over women.⁹⁵ Research continues to expand such theoretical frameworks with an emphasis on women's agency and resistance, and the interconnection between physical, structural, and emotional forces that sustain men's control over their female partners.⁹⁶

There is widespread consensus in New Zealand that while domestic violence continues to escalate, our responses are undermined by the complexity that surrounds family violence, the various issues in play, and the range of family members potentially affected or involved. In spite of this complexity, domestic violence continues to be perceived as predominantly violence perpetrated by men on women and children:⁹⁷

Its most recent report (FVDR, 2014) confirms that family violence, and in particular intimate partner violence, is a gendered problem: women and children are most likely to suffer serious harm or death.

⁹⁴ Dobash and Dobash, above n 76.

⁹⁵ For example see; Catharine A MacKinnon *Feminism Unmodified* (Harvard University Press, Cambridge, Mass, 1988); Michael P Johnson *A Typology of Domestic Violence* (Northeastern, 2008); Walter S DeKeseredy and Linda MacLeod *Woman Abuse* (Harcourt Brace, Toronto, 1997); D Alex Heckert and Edward W Gondolf "Assessing Assault Self-Reports by Batterer Program Participants and Their Partners" (2000) 15 *Journal of Family Violence* 181.

⁹⁶ Kristin L Anderson and Debra Umberson "Gendering Violence: Masculinity and Power in Men's Accounts of Domestic Violence" (2001) 15 *Gender and Society* 358.

⁹⁷ Wilson and others, above n 9, at 26; the reference is in regards to findings in the Family Violence Review Committee Fourth Annual Report from January 2013 to December 2013.

The same article citing Stark and Coates and Wade, asserted that family violence is:⁹⁸

...insidious, complex, and involves deliberate unilateral actions (abusive and violent attitudes and behaviours) by one person against another. It is a cumulative and frequently escalating pattern of harm by an abuser who uses coercive control and manipulation to maintain a woman's silence and reinforce her entrapment.

In the following discussions, the objective is to determine the accuracy or otherwise of framing domestic violence as a gender issue, mainly perpetrated by men against women and children.

1.8.8 Serious Violence versus Serious Injuries

The severity or otherwise of domestic violence considered under the CTS 2 incorporates a raft of behaviour common in conflict resolution. It is predictable therefore that such behaviour is mutual in intimate relationships. In contrast police reports cited in support of men as perpetrators of domestic violence often point to serious injuries sustained and the number of cases investigated. For example, statistics reveal that there were 139 family or family violence related death events from 2009 to 2012.⁹⁹ This statistics works out at approximately 34 deaths per year. Of the deceased victims, 63 were intimate partner violence (IPV) related deaths; 37 were child abuse and neglect deaths (CAN), and 26 were intrafamilial violence (IFV) deaths. In IPV deaths, 46 out of the 63 victims were females, 44 of which were killed by their male intimate partners.

In the context of total homicides recorded for the same period, family violence related deaths represent slightly more than half at 53% (Table 2). Taken in the totality of crime statistics, this reflects the state of violence in society as a whole.

⁹⁸ At 30 citing; Evan Stark *Coercive control* (Oxford University Press, Oxford ; New York, 2007); Linda Coates and Allan Wade "Language and Violence: Analysis of Four Discursive Operations" (2007) 22 *Journal of Family Violence* 511.

⁹⁹ Family Violence Death Review Committee, above n 9, at 39–40.

Crimes are committed by individuals or groups of individuals who belong to the most fundamental unit of society – the family. It supports the probability of the hypothesis that violence in society is merely an extension if not an embodiment of violence within the family. It should be noted that I am not advocating acceptance of the status quo but simply interpreting statistical data in the overall scheme of violent crimes.

Table 2: Homicides and family violence related deaths

<i>Homicide and related offences</i>	<i>2009</i>	<i>2010</i>	<i>2011</i>	<i>2012</i>	<i>Total</i>
<i>Family violence deaths</i>	45	29	24	28	126
<i>Other homicides related to family violence</i>	9	1	2	1	13
<i>Total all homicide</i>	97	78	66	56	267

Source: Family Violence Death Review Committee Annual Report 2013, page 35.

It is obvious that the majority of victims of IPV deaths are women, suggesting that men are likely to inflict serious injuries when physical violence escalates, or that men are more inclined to resort to physical violence compared to women. Domestic violence, however, is not limited to physical violence as demonstrated by the type of death and relationship of the offender in CAN deaths presented in Table 3. While the overall pattern of male susceptibility to causing death by fatal inflicted injury continues to manifest, women are equally prone to child abuse, though more inclined towards harm caused by neglect and lack of supervision.

Any family violence related death is unacceptable, but the problem is relative not only to other crimes but also to statistics being used to depict the magnitude of domestic violence. This is illustrated Table 4 below reflecting the number of family violence investigations conducted by police. In looking at the four years (2009-2012) covered by the homicide statistics in Table 2, we note a total of 343, 554 family violence investigations, but no case was recorded (no charges laid) in

Table 3: Association between type of death and relationship of offender in Child Abuse and Neglect (CAN) deaths

DEATH TYPE	OFFENDER					
	Number of deaths	Mother	Father	Step-father	Female caregiver	Unknown
FATAL INFLECTED INJURY	19	1	4	9	3	2
FILICIDE AND PARENTAL SUICIDE	8	5	3			
NEONATICIDE	4	4	4			
FATAL NEGLECT SUPERVISION	3	3	3			

Source: Family Violence Death Review Committee Annual Report 2013, page 53.

approximately 50% (170, 369) of these investigations. Relative to the total number of incidents (343, 554) of family violence investigated during the period, 139 deaths (0.04%) ensued. This is not to minimise the significance of family violence related deaths but places the problem in context to domestic violence as a whole.

Table 4: Family Violence Investigations

	2006	2007	2008	2009	2010	2011	2012	2013	2014
TOTAL NUMBER OF FAMILY VIOLENCE INVESTIGATIONS	61947	69729	73280	79257	86763	89884	87639	95070	101981
Investigation with at least one offence recorded	26156	31107	34785	42516	45496	44489	40682	37902	37443
Investigations with no offence recorded	35791	38622	38495	36741	41267	45396	46957	57168	64538

Source: NVFVC Data Summary June 2015, page 3.

Reviewing statistics of women hospitalised for assaults can also provide useful data relevant to serious injuries inflicted through family violence. For the period reviewed above, a total number of 1, 025 women aged 15-50 years were hospitalised as a result of assault perpetrated by a family member (see Table 5). This represents 0.3% of the total number of family violence investigations conducted by police from 2009 to 2012.

Table 5: Hospitalisations

	2005	2006	2007	2008	2009	2010	2011	2012
Total hospitalisation for assaults on women aged 15-50	344	416	417	411	455	489	461	451
Assault hospitalisation – perpetrator family member	173	229	226	227	232	287	255	251
% of total assault hospitalisations	50%	55%	54%	55%	51%	59%	55%	56%
Assault hospitalisation –perpetrator non-family member	50	64	63	64	87	99	91	83
% of total assault hospitalisation	15%	15%	15%	16%	19%	20%	20%	18%
Assault hospitalisation-relationship with perpetrator unknown	121	123	128	120	136	103	115	117
% total of assault hospitalisation	35%	30%	31%	29%	30%	21%	25%	26%

Source: NZFVC Data Summary June 2014, page 10.

1.8.9 Number of Family Violence Incidents Reported or Investigated

The sheer volume of family violence incidents being reported or investigated is often used to portray a problem reaching epidemic proportion. It follows that the high proportion of women reporting male perpetrated violence depicts widespread violence against women. For example, the following is taken from the website of an organisation dedicated to violence against women:¹⁰⁰

¹⁰⁰ “Women’s Refuge New Zealand | Statistics” <<https://womensrefuge.org.nz/WR/Domestic-violence/Statistics.htm>>, on 31/10/2015.

NZ Domestic Violence Statistics

- One in three women experiences psychological or physical abuse from their partners in the lifetime.
- Police are called to around 200 domestic violence situations a day – that's one every seven minutes on average.
- Police estimate only 18% of domestic violence incidents are reported.
- 84% of those arrested for domestic violence are men.

It is interesting to note that the above statistics specifically refer to women experiencing psychological or physical abuse in their lifetime but no statistics are recorded for men. At any rate, the statistics presented in Table 4 above shows that no charges were laid in more than half of the total number of family violence incidents investigated. This in effect reduces considerably the number of investigations where at least one offence was recorded, for example from 101,981 investigations in 2014, there were 37,443 incidents in which at least one offence was recorded.¹⁰¹ Furthermore, from that total of 37,443 family violence investigations in which at least one offence was recorded, the following eventuated (refer to Table 6 below):¹⁰²

- 7,163 cases of male assaulting female recorded
- 5,037 cases were prosecuted
- 3,411 convictions obtained
- 1,192 (35%) custodial sentences
- 1,914 (56%) community sentences
- 305 (9%) others (Includes withdrawn, dismissed, acquitted and unfit to stand trial).

Overall, from the 101,981 family violence incidents investigated, at least one offence was recorded in 42% (37,443) of the incidents. This resulted in 7,163

¹⁰¹ Calculated from the figures in table 4

¹⁰² "NZFVC Data Summary: Violence Against Women - DS2-Violence-Against-Women-2015-0.pdf", above n 21, at 3–6.

recorded cases of male assaulting female (19% of the incidents in which at least one offense was recorded); and this produced 5,037 prosecutions (approximately 5% of the total incidents investigated). When we analyse the number of convictions and outcome of sentences we note that custodial sentence eventuated in 35% of the cases prosecuted. More than half (56%) consisted of community sentences while 9% were either withdrawn, discontinued or acquitted. The high number of community sentences, it can be argued, represent minor incidents of conflict resolution behaviour which resulted in minimal, or no injuries.

This begs the question of whether these cases are examples of coercive (abusive) violence or whether they are examples of behaviour symptomatic of conflict resolution behaviour.¹⁰³ A key concern is whether such data accurately represent the gender gap in offending or merely exemplify the gender bias in reporting and arrests for domestic violence. If for this reason, the enumeration of female offenders (compared to males) remains under-reported, the reliability of such data to accurately capture the nature of domestic violence remains dubious.

The argument may appear simplistic given the complex reasons why prosecutions may not result in convictions and custodial sentences. For example, an Australian Magistrate has highlighted the problem of vulnerable victims withdrawing evidence necessary for the court to protect them, thus stalling prosecutions.¹⁰⁴ That may indeed be a contributing factor in explaining the difference between the number of cases prosecuted and the number of convictions secured. However, given that only 42% of the 101,981 police investigations resulted in charges, it renders questionable the use of such statistics to illustrate domestic violence

¹⁰³ Conflict resolution is a term used by family violence scholars to refer to “fight or flight” posturing adopted by couples in resolving a conflict.

¹⁰⁴ Kate Hill “Evidence Laws Leave Court ‘Powerless’ in Domestic Violence Cases” (16 November 1100) ABC News <<http://www.abc.net.au/news/2015-11-16/evidence-laws-leave-court-powerless-in-domestic-violence-cases/6945062>>. on 10/03/2016

getting out of control. I am merely drawing attention to the disparity, rarely discussed in our analysis of domestic violence.

Table 6: Convictions and sentence outcomes for Male assaults female

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Total Sentences	3557	3569	4081	4853	4867	4603	4307	4129	3768	3411
Number of custodial sentences	876	893	1015	1283	1230	1387	1328	1388	1262	1192
% of total sentence	25%	25%	25%	26%	25%	30%	31%	34%	33%	35%
Number of community Sentences	1849	1772	2161	2648	2766	2491	2307	2161	2062	1914
% of total sentences	52%	50%	53%	55%	57%	54%	54%	52%	55%	56%
Number of other sentences	832	904	905	922	871	725	672	580	444	305
% of total sentences	23%	25%	22%	19%	18%	16%	16%	14%	12%	9%

Source: NZFVC Data Summary June 2015, page 5.

1.8.10 Net Widening Policy Changes

The broad definition of domestic violence in addition to pro-arrest policies entail a widening of the net that is bound to capture a host of conflict behaviour integral to inter-relationships. The range of behaviour collapsed under one term can be problematic, given it encompasses minor incidents of verbal abuse, non-injurious physical action (like a nominal push or a shove), and from sexual harassment to assault causing injury, rape and homicide. In reviewing the effect of such policies, one should be mindful of the concept of gender violence, which underscores the landscape of our responses. Notwithstanding the argument that coercive control can be a pattern of behaviour consisting of minor incidents of verbal abuse and non-injurious physical action.

Research has consistently revealed that at the lower end of the severity scale, domestic violence is perpetrated proportionately by men and women.¹⁰⁵ In light of the net-widening changes in family violence policy, outcomes should arguably reveal a general upward trend in offending. Firstly, the more pro-active enforcement and the criminalisation of minor forms of violence would increase the number of recorded incidents.¹⁰⁶ The former would practically increase the risk for arrest for both sexes while the latter (expanded definition of domestic violence) would capture more women because they tend to commit the milder, less serious forms of violence. Regardless of whether these net-widening effects

¹⁰⁵ John Archer "Sex Differences in Physically Aggressive Acts Between Heterosexual Partners: A Meta-analytic Review" (2002) 7 *Aggression and Violent Behavior* 313; Laurie O Robinson "Sex Offender Management" (2003) 989 *Annals of the New York Academy of Sciences* 1; Kristin Carbone-López, Candace Kruttschnitt and Ross Macmillan "Patterns of Intimate Partner Violence and their Associations with Physical Health, Psychological Distress, and Substance Use" (2006) 121 *Public Health Rep* 382; David M Fergusson, Joseph M Boden and L John Horwood "Developmental Antecedents of Interpartner Violence in a New Zealand Birth Cohort" (2008) 23 *J Fam Viol* 737; David M Fergusson, L John Horwood and Elizabeth M Ridder "Partner Violence and Mental Health Outcomes in a New Zealand Birth Cohort" (2005) 67 *Journal of Marriage and Family* 1103.

¹⁰⁶ Jennifer Schwartz, Darrell J Steffensmeier and Ben Feldmeyer "Assessing Trends in Women's Violence via Data Triangulation: Arrests, Convictions, Incarcerations, and Victim Reports" (2009) 56 *Social Problems* 494 at 499.

resulted from an overt bias toward women, or from unintended consequences of pro-arrest policy, the effects should be the same; a narrowing of the recorded violence gender gap. It is notable therefore that while the expected increase in the number of incidents is evident, the gender gap has remained constant (see Table 7).

Secondly, legal changes in criminalising domestic violence encompass areas in which levels of female violence more closely approximate male levels.¹⁰⁷ After years of neglect and questionable police discretion, there is a shift towards pro-arrest policies as the appropriate response to “immediately defuse the ... situation and serve as a specific deterrence by reducing subsequent abusive behaviour.”¹⁰⁸ Though established mainly to protect women against abusive partners, the outcomes should gravitate towards an increased representation of female offenders in the areas where women's use of violence is proportional to men's or a closing of the gender gap. This, however, has not eventuated, and men remain over-represented as perpetrators.

A viable explanation is that in spite of pro-arrest policies and the criminalisation of minor violence, behaviour, in general, has not changed much. Men in general (upholding their masculinity) do not report violence perpetrated by their female partners. In contrast, females in line with their perceived vulnerability and the female victim/male perpetrator bias of pro-arrest policies, are more inclined to invoke the intervention of the law, even in minor incidents of conflict resolution behaviour (as discussed below) as a means of getting back at their partners.

¹⁰⁷ At 499.

¹⁰⁸ Clayton James Mosher, Terance D Miethe and Timothy C Hart *The Mismeasure of Crime* (2nd ed, SAGE Publications, Thousand Oaks, Calif, 2011) at 177.

Table 7: Offenders linked to family violence investigations

	2009	2010	2011	2012
Total number of offenders linked to FV investigations	36575	37958	35516	31423
Male	26821 73%	27363 72%	25237 71%	22666 72%
Female	6960 19%	7645 20%	7089 20%	6407 20%
Other/ Unknown	2794 8%	2950 8%	3190 9%	2350 7%

Source: NZFVC Data Summary June 2015, page 3.

Thirdly, the focus on the gender-neutral application of law advances more punitive attitudes towards women. The emphasis on gender equality, increasing visibility and the changing role of women in society, may increase the following areas: one, the willingness of people to report women perpetrators to police; and two, greater legal culpability placed on women suspects.¹⁰⁹ Consequently, a more legalistic approach of policing domestic violence will impact more on female arrest probabilities.¹¹⁰ Generally speaking, the shift in philosophy towards targeting minor domestic violence should increase the detection of female offenders.¹¹¹ However, as discussed above, such a trend did not occur in New Zealand, and the gender gap has remained constant.

¹⁰⁹ Schwartz, Steffensmeier and Feldmeyer, above n 106, at 500.

¹¹⁰ See generally; Robert M O'Brien "UCR Violent Crime Rates, 1958–2000: Recorded and Offender-Generated Trends" <<http://www.sciencedirect.com.ezproxy.waikato.ac.nz/science/article/pii/S0049089X03000206>>; Wesley G Skogan "The National Crime Survey Redesign" (1990) 54 Public Opin Q 256; Darrell J Steffensmeier and Jennifer Schwartz "Trends in Female Criminality: Is Crime Still a Man's World" in Barbara Price and Sokoloff (eds) *The Criminal Justice System and Women: Offenders, Prisoners, Victims, and Workers* (3rd ed, McGraw-Hill Humanities/Social Sciences/Languages, Boston, Mass, 2003) 95.

¹¹¹ Schwartz, Steffensmeier and Feldmeyer, above n 106, at 500.

1.8.11 Domestic Criminal Charges

Domestic violence is a crime in New Zealand,¹¹² but ambiguity arises from the fact that there is no specific offence in the Crimes Act. In relation to domestic violence, Police point out that:¹¹³

- Nobody has the right to assault another person.
- Nobody is allowed to have sexual contact with another person without permission.
- Nobody has the right to use intimidation, threats or mind games to gain power over another person.

It is evident therefore that in spite of the broad definition of domestic violence (including physical, sexual, psychological or financial) prosecution is under general criminal charges.

More often than not when police attend to a domestic violence dispute, an arrest will follow, and charges most likely are laid. The alleged perpetrator after spending a night in the cell will be charged, released or remanded in custody. The person can also be prevented from returning to the residence where the alleged incident took place via a police safety order, protection order or a no contact order. Also, there is the “no drop” policy in which prosecution proceeds even if the complainant or victim decides to withdraw the charges. When someone dials 111 and reports a domestic violence incident, whether it involves minor aggression or a fabricated allegation, it cannot be called back. The legal juggernaut rolls into action and due to both the pro-arrest and pro-prosecution policies, the onus, is effectively on the alleged perpetrator to prove his or her innocence. This disempowering of the complainant to decide the cause of action, or of the police

¹¹² “Help for Family Violence” New Zealand Police <<http://www.police.govt.nz/advice/family-violence/help>>.

¹¹³ “Help for Family Violence”, above n 112.

to use discretion can needlessly ruin the lives of those involved and destroy otherwise viable families.

Understandably the design of our legal responses and policies regarding domestic violence are grounded on the need to protect women and children from abusive partners and parents. However, the rigid approach of “one-size-fits-all” strategy can ensnare couples who are merely being human. Couples who occasionally get angry, frustrated, depressed, and argue but who are genuinely aghast and remorseful if an altercation pushes up against the boundaries of acceptable conflict resolution behaviour.¹¹⁴

1.8.12 Categorising Domestic Violence Offences

To avoid confusion regarding the criminal nature of domestic violence, it may be appropriate to create specific offences, in particular for behaviours representing a minor aggression. For example: “Relationship Mischief” where a partner damages some property during a domestic dispute; “Relationship Aggression” in regards to a nominal physical confrontation between spouses that does not result in injuries; and “Relationship Assault” for a physical confrontation that results in minor injuries.¹¹⁵ In spite of the protective thrust of our legal response to domestic violence, it should be considered that domestic criminal charges for minor transgressions can have a big impact on the family and family law matters.

¹¹⁴ Kirk Makin “The Scales of Injustice - Domestic Violence in Canada - The Failure of Zero Tolerance Policy” Canadian Children’s Rights Council
<http://canadiancrc.com/newspaper_articles/Globe_and_Mail_The_Scales_of_Injustice_11JAN03.aspx>.

¹¹⁵ This is practiced in Canada, for example see Mark Zinck “How to Get Domestic Assault, Utter Threats, and Mischief Related Criminal Charges Dropped in Toronto (GTA), Canada”
<<http://www.torontoassaultlawyer.ca/chargesdropped.htm>>; “Domestic Violence Charges In Calgary, Canada” Dunn & Associates <<http://www.dunnandassociates.ca/domestic-violence>>; Mark Zinck “Minor Domestic Criminal Charges”
<<http://www.torontoassaultlawyer.ca/minoraccusations.htm>>.

Statistics on the number of domestic violence incidents investigated by police in 2014 (see Table 4 above) indicated that no charges eventuated in about 63% of the 101,981 police investigations. For the same period, 3,411 convictions for domestic violence were recorded and 56% of which were community sentences. Given the high number of investigations in which no charges were laid, as well as the high percentage of community sentences it is suggested that a graduated response at the charging rather than at the sentencing end, would be in line to filter out minor aggressive behaviour that may not be in the category of coercive control. In support, the broad use of community sentences implies minor aggression which can be dealt with differently according to the suggested offences outlined above.

1.8.13 Limitations in our Responses

The establishment of the New Zealand Family Court in 1980 is a testimony to public awareness and concern about domestic violence as a social and health problem. The notion of domestic violence approaching epidemic proportion, (supported by cases of bruised women victims) is often the impetus for reforms and tougher measures to curtail violence against women. However, it appears that we have gone down this now well-beaten track for more than thirty years with little success. For example, according to police statistics, the total number of family violence investigations has continued to rise over the years.¹¹⁶

In spite of all the measures undertaken to stop the problem little has been achieved in desired outcomes. The above statistics indicate that the number of family violence related deaths (Table 2); hospitalisations, (Table 5); and sentences, both custodial and community-based (Table 6) have remained constant over the years. The only statistic that has increased dramatically relates to police investigations of domestic violence (Table 4). It illustrates the point that legal and

¹¹⁶ See table 4 above

policy measures being put in place effectively ensnare “ordinary” people having “ordinary” reactions to conflict situations, while serial domestic abusers continue to slip through the gaps.

The feminist movement has done wonders in highlighting the contribution of patriarchy and gender (as a system) to the subordination of women. However, as implied by Johnson, there is no single gender paradigm just as there is more than one feminist perspective on gender.¹¹⁷ But presumably, feminism as advocated today should be understood regarding male and female (masculine and feminine), male power and female subordination; and working towards improving subordinated female interests. This cannot be pursued in isolation; indeed, we can review feminine perspectives with other theories, social arrangements and other kinds of power. As suggested by Halley:¹¹⁸

If we deploy feminist theory (or any other social theory of sexuality) prescriptively – if it is itself emancipatory – then taking a break from it is to give up on emancipation. If it’s not – if it’s hypothesis formation and about seeking to “see the world” politically – taking a break from one hypothesis might expose you to others, and so to new insights into power that are different, clashing perhaps, but possibly also emancipatory. You might face a split decision about what to think and do then, but that would be a vital and engaged moment.

To do so, we should be willing step back from the concept of domestic violence as a male issue in which the motivation for violence is asserting control and domination over women. Not to deny the contribution of gender, or to abandon the feminist perspective but merely to step outside the gender paradigm and to

¹¹⁷ Michael P Johnson “Gender and Types of Intimate Partner Violence: A Response to an Anti-Feminist Literature Review” (2011) 16 *Aggression and Violent Behavior* 289.

¹¹⁸ Janet Halley *Split Decisions* (Princeton University Press, Princeton N J, 2008) at 8–9.

explore “other theories of sexuality, inhibiting realities, and imagining political goals that do not fall within its terms.”¹¹⁹

1.9 Social Violence

Violence as a human behaviour has inundated societies of all generations and epochs and continues to stimulate moral indignation and public outcry when it confronts us. It is no coincidence, therefore, that we perceive violence in the realm of crime and deviance, illegal or socially undesirable behaviours that have to be censored and controlled. Criminal violence for example, in the forms of homicide, assault, child abuse, intimate partner violence, and sexual violence is at the forefront of research literature on violence. However, other areas that have emerged include political violence, labour violence, racial or ethnic violence, school violence, youth violence, civil violence and urban violence.

Few would deny that violence is a major problem in the world today, as reflected in daily news coverage and statistics;¹²⁰ the associated social and economic costs are simply staggering.¹²¹ In 2012 an estimate of 475,000 people were victims of homicide worldwide;¹²² nearly a quarter of adults worldwide (22.6%) suffered physical abuse as a child, and a global estimate of 30% of ever-partnered women

¹¹⁹ At 10.

¹²⁰ Alexander Butchart and Christopher Mikton *Global Status Report on Violence Prevention, 2014* (World Health Organization, Geneva, Switzerland, 2014) at 2 states: More than 1.3 million people worldwide die each year as a result of violence in all its forms (self-directed, interpersonal and collective), accounting for 2.5% of global mortality. For people aged 15–44 years, violence is the fourth leading cause of death worldwide.”

¹²¹ At 18 It was estimated in 2004 that direct and indirect economic costs of violence were equivalent to 0.4% of gross domestic product (GDP) in Thailand, 1.2% of GDP in Brazil and 4% of GDP in Jamaica (49). In the United States, the total lifetime economic burden resulting from new cases of fatal and non-fatal child maltreatment is approximately US\$ 124 billion annually (in 2010 dollars).”

¹²² At 2.

have experienced physical or sexual violence by intimate partners at some point in their lives.¹²³ Given the profound effect of violence on society, it behoves us to formulate effective interventions but to do so we have to be clear on what social violence is.

1.9.1 Defining Social Violence

The various definitions of violence are affected by who is defining it and for what purpose. For example, for a criminal purpose, the definition turns on intent. In contrast, for the purpose of public health, the definition seeks to incorporate a wide range of acts that may contribute to a victims' subjective experiences and health. However, violence is a social phenomenon, and for an action to be considered violent it needs a victim or a group of victims. Thus violence is rooted in human interaction. As such, there is a predictable separation between social and political violence, as evident in the detailed definition of violence provided by Reiss & Roth in the introduction of their four-volume compendium:¹²⁴

The panel limited its consideration of violent behaviour to interpersonal violence, which it defined as behaviour by persons against persons that intentionally threatens, attempts, or actually inflicts physical harm. The behaviours included in this definition are largely included in definitions of aggression. A great deal of what we believe about violence is based on psychosocial research on aggressive behaviours ...The panel's definition deliberately excludes consideration of human behaviour that inflicts physical harm unintentionally... even when they occur as a result of corporate policies (e.g., to expose workers to toxic chemicals) that increase the risk of injury or death for some category of persons. Also excluded are certain behaviours that inflict physical harm intentionally: violence against oneself, as in suicides and attempted suicides; and the use of violence by state authorities in the course of enforcing the law, imposing capital punishment, and providing collective defence.... Our definition of violence also excludes events such as

¹²³ At 14.

¹²⁴ Albert J Reiss and Jeffrey A Roth *Understanding and Preventing Violence: Social Influences* (National Academies Press, Washington, DC, 1993) at 36–37.

verbal abuse, harassment, or humiliation, in which psychological trauma is the sole harm to the victim. However, especially in the context of violence in the family and sexual violence, we do attend to the psychological consequences of threatened physical injury.

Though detailed and precise, the definition is restrictive by limiting violence to intentional interpersonal physical harm (inflicted or threatened), thus neglecting intentional self-harm, as well as psychological and economic abuse. This restriction is ambiguous in that psychological trauma is selectively included, only in the context of family and sexual violence, but limited to harm resulting from threats of physical injury.

In contrast, consider the definition of violence applied by the US Centres for Disease Control and Prevention and the California Policy Council on Violence Prevention:¹²⁵

Violence is the threatened or actual use of physical force or power against another person, against oneself, or against a group or community that either result in, or has a high likelihood of resulting in injury, death or deprivation.

This definition does not embrace intent and is broader and more inclusive, to capture the range of violent behaviours impacting on health and social issues. Apart from injuries inflicted on another person, it includes self-inflicted injuries, as well as injuries inflicted on groups and communities (that are certain or probable). Although the physical force is emphasised, the inclusion of power as separate from physical force can be interpreted as including psychological, social and economic threats. However, the definition is less precise, and the inclusion of power (which is a contested concept) leads to ambiguities.

¹²⁵ Quoted in Jackman, above n 38, at 391.

An alternative approach advanced by Gan and Holmes proceeds from the premise of nonviolence, advocating a commitment to nonviolence through the renunciation of violence.¹²⁶

Physical violence, which is what we most often have in mind when we speak about violence, is the use of physical force to cause harm, death, or destruction, as in rape, murder, or warfare. But some forms of mental or psychological harm are so severe as to warrant being called violence as well. People can be harmed mentally and emotionally in ways that are as bad as by physical violence.... Although physical violence often attends the infliction of psychological violence, it need not do so.... [People] can also be terrorised without being harmed physically.... An unlimited commitment to nonviolence will renounce psychological as well as physical violence

In spite of the emphasis on physical coercive behaviours, this definition makes allowance for the inclusion of “some forms” of mental or emotional harm that are severe. However, there is ambiguity in how the degree of severity is established, to warrant inclusion.

The World Health Organisation (WHO) provides a useful definition that attempts to incorporate the various elements of violence and address the ambiguities in the definitions discussed above:¹²⁷

The intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either result in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.

Notably, this definition situates violence in interpersonal relationships but includes self-harm and armed conflict.¹²⁸ It encompasses a wide range of acts

¹²⁶ Barry L Gan and Robert L Holmes *Nonviolence in Theory and Practice* (2nd ed, Waveland Press, Long Grove, Ill, 2005) at ixii–ivii.

¹²⁷ Jackman, above n 38, at 4.

¹²⁸ At 4.

including threats and contains a myriad of consequences such as psychological harm, deprivation and maldevelopment that affect the wellbeing of individuals, families and communities. The purpose of this broad definition, it can be argued, is to encompass differing legal definitions of abuse in different countries around the world. The inclusion of armed conflicts, however, extends it to state-sponsored armed conflicts or political violence. Again this is understandable because the definition is designed to encompass health and legal issues about displaced people as a result of armed conflict.

1.9.2 The Range of Harmful Outcomes

Violence, identified as a universal scourge, breaks down the fabric of communities disrupting the lives, health and happiness of people around the world. More than 1.6 million people worldwide lose their lives to violence each year while much more are injured, suffering from a range of physical, sexual, reproductive and mental health problem. It is one of the main causes of death for people aged 15-44 years worldwide, “accounting for about 14% of deaths among males and 7% of deaths among females.”¹²⁹

1.9.2.1 Physical Injuries

The centrality of physical violence in our conception of social violence is often manifested in pain, physical injuries, bodily alteration, discomfort, or death as physiological links associated with the consequences of violence. Such outcomes resonate with our basic desire for self-protection and survival, to be free of physical violence, to avoid threats or pains, and to preserve bodily integrity and autonomy.¹³⁰ The significance of physical outcomes stems from the tangibility and immediacy of physical injuries, reinforced by visibility and ease of observation.

¹²⁹ World Health Organization *The World Health Report 2002* (World Health Organization, Geneva, Switzerland, 2002).

¹³⁰ Jackman, above n 38, at 393.

Indeed, pain and distress associated with acute injury, as well as related physical suffering represent recognisable consequences of physical outcomes of violence, but they hardly encapsulate the full range of consequential injuries.¹³¹ Physical outcomes are not limited to bodily injuries because they extend to the destruction, defacement or confiscation of property.

1.9.2.2 Psychological Injuries

Psychological outcomes of violence, on the other hand, are largely invisible and can go unnoticed, but feelings such as fear, anxiety, anguish, shame, or diminished self-esteem can have debilitating effects on victims. The same also applies for social outcomes such as public humiliation, stigmatisation, exclusion, or expulsion which can be highly detrimental and devastating to human welfare.¹³² Possibly, the harmful effects or personal pain caused by some of these psychological injuries can be more severe and prolonged than physical injuries. Indeed, for some, the pain caused by violent physical acts is not as traumatic as the psychological aftermaths. It is known as post-traumatic stress disorder (PTSD): the delayed onset of pain, stress or fear that were somehow controlled by adaptive means during the incident.¹³³ Medical research has demonstrated that psychological states like stress and depression contribute to negative health outcomes through their

¹³¹ Ronan A Lyons and others “The injury List Of All Deficits (LOAD) Framework – conceptualising the full range of deficits and adverse outcomes following injury and violence” (2009) 17 International Journal of Injury Control and Safety Promotion 145 at 148.

¹³² Jackman, above n 38, at 393.

¹³³ For specific examples see: Douglas F Zatzick and others “A Nationwide US Study of Post-Traumatic Stress after Hospitalization for Physical injury” (2007) 37 Psychol Med 1469; Meaghan L O’Donnell and others “Psychiatric Morbidity Following Injury” (2004) 161 Am J Psychiatry 507; Richard Mayou and Bridget Bryant “Outcome 3 Years after a Road Traffic Accident” (2002) 32 Psychol Med 671; Brett D Thombs and others “From Survival to Socialization: A Longitudinal Study of Body Image in Survivors of Severe Burn Injury” (2008) 64 J Psychosom Res 205; C Thompson “Review of 212 Individuals Attending a City Centre Genitourinary Medicine Clinic Following Acute Sexual Assault” (2006) 13 J Clin Forensic Med 186.

effects on “the automatic nervous system, the endocrine system, the immune system and poor health behaviours.”¹³⁴

1.9.2.3 Sexual Injuries

For sexual violence, the outcome is both physical and psychological. Take for example rape, apart from physical injuries inflicted by assault pre-rape; studies have documented high rates of genital injuries and moderate rates of sexually transmitted infections post-rape with the risk of pregnancy, subsequent termination, and associated complications.¹³⁵ Various studies have also established an overall pattern with a reasonable consistency that most rape victims experience fear/PTSD, depression, loss of self-esteem, social adjustment problems, sexual disorders, and other anxiety disorders for indefinite periods.¹³⁶ The relationship between sexual violence and health is labelled as the exuding impact of violent victimisation, in which violence directly impacts women’s physical and mental health.¹³⁷ Incidentally, these effects extend to social stigmatisation that affects careers, friendships, families, and whole communities.¹³⁸

1.9.3 Social and Economic Outcomes

Social harm is destructive in the sense that it obstructs our sociability and limits our ability to interact or cooperate with others. Bearing in mind that socialisation,

¹³⁴ Jackman, above n 38, at 394.

¹³⁵ See generally: LC Chu and WK Tung “The Clinical Outcome of 137 rape Victims in Hong Kong” (2005) 11 Hong Kong Med J 391, ; Heidi S Resnick, Ron Acierno and Dean G Kilpatrick “Health Impact of Interpersonal Violence: Medical and Mental Health Outcomes” (1997) 23 Behavioral Medicine 65.

¹³⁶ Patricia A Resick “The Psychological Impact of Rape” (1993) 8 J Interpers Violence 223 at 225.

¹³⁷ See; Rebecca J Macy “A Coping Theory Framework Toward Preventing Sexual Revictimization” (2007) 12 Aggress Violent Behav 177; Stephanie Riger, Sheela Raja and Jennifer Camacho “The Radiating Impact of Intimate Partner Violence” (2002) 17 J Interpers Violence 184.

¹³⁸ Laurence Miller “Rape: Sex Crime, Act of Violence, or Naturalistic Adaptation?” (2014) 19 Aggression and Violent Behavior 67 at 76.

moral stability and the ability to navigate complex social networks to the satisfaction of others, influences our social standing.¹³⁹ Springing from this is a feeling of contentment, happiness, or subjective well-being about how people feel about their lives, which comprises emotional reactions, moods, and judgements of their social existence.¹⁴⁰ It follows that social injuries such as shame, public humiliation, social isolation, or stigmatisation violate one's social status and invites despair or hopelessness, low self-esteem, stress, and anxiety.

The psychological and social outcomes of violence often translate into economic consequences, which can be divided broadly regarding direct and indirect costs. It is common therefore to focus on monetary values like the cost of medical care and legal services. Beyond these costs, however, the effects of violence can lead to low productivity, lost wages, poverty, welfare loss due to high mortality rates and poverty.¹⁴¹ Violence also curtails the development of children through cognitive and emotional disorders, lack of motivation and susceptibility to violence.¹⁴² Victims of financial abuse grapple with deprivation, limited mobility, poor standards of health and restricted access to services, and financial dependency that limits a person's ability to break out of abusive relationships. Living in such an environment leads to pressure and anxiety due to material concerns; inequality, which promotes exploitation; and stress related syndromes, substance abuse, or suicide.¹⁴³

¹³⁹ Chu and Tung, above n 135, at 395.

¹⁴⁰ See for example Michael Argyle *The Psychology of Happiness* (Routledge, New York, 2001).

¹⁴¹ Hugh Richard Waters and others "The Costs of Interpersonal Violence—An International Review" (2005) 73 *Health Policy* 303; Rodrigo R Soares "The Welfare Cost of Violence Across Countries" (2006) 25 *Journal of Health Economics* 821; "Social and Economic Costs of Violence - Workshop Summary" (2011) Institute of Medicine
<<http://iom.nationalacademies.org/Reports/2011/Social-and-Economic-Costs-of-Violence-Workshop-Summary.aspx>>.

¹⁴² Center for Relationship Abuse Awareness "Economic Abuse"
<<http://stoprelationshipabuse.org/educated/types-of-abuse/economic-abuse/>>.

¹⁴³ Olufunmilayo Fawole "Economic Violence To Women and Girls Is It Receiving the Necessary Attention?" (2008) 9 *Trauma Violence Abuse* 167 at 172.

1.9.4 Harmful Behaviours

Physical action dominates our perception of violence for obvious reasons: the discernibility of using a part of our body or an object to control a person's action. Primarily, we equate violence with physical force that causes pain, discomfort or injury and actions such as hitting, hair-pulling, strangling, burning, stabbing, punching, kicking, choking, biting, and other forms of rough treatments.¹⁴⁴ These actions invoke criminal behaviours like assaults, violent robbery, home invasion, rape, and murder. Variations to physical violence can emerge through various actions like medical abuse (e.g. withholding medication), forcible confinement, and sexual violence (e.g. forcing a person to perform degrading or painful sexual acts); as well as threatening behaviours like shaking of fists, throwing objects, or damaging property.¹⁴⁵ However, the emphasis on physical violent behaviour can be misleading because verbal actions are also capable of inflicting serious harm.

Verbal actions (including written actions) can inflict physical injuries directly or indirectly in some ways. An article in the printed media, for example, can incite others to acts of physical violence by advocating or encouraging violence against an individual or a group. Similarly, cyber-abuse or bullying can lead to health problems, alcohol and drug abuse, lower self-esteem and suicide,¹⁴⁶ as well as the over indulgence in violent media breeding violent behaviours.¹⁴⁷ A variety of nonphysical injuries can also be inflicted by verbal action. For example, verbal or written abuse that derogates defames, and humiliates an individual, or a group

¹⁴⁴ See Canadian Centre for Occupational Health and Safety Government of Canada "Violence in the Workplace: OSH Answers Fact Sheets" (6–44 2015) Canadian Centre for Occupational Health and Safety <<http://www.ccohs.ca/oshanswers/psychosocial/violence.html>> on 06/10/2015.

¹⁴⁵ Government of Canada, above n 144 on 06/10/2015.

¹⁴⁶ "What is Cyberbullying" Stop Bullying <<http://www.stopbullying.gov/cyberbullying/what-is-it/>>., on 06/10/2015

¹⁴⁷ Christopher J Ferguson and others "Violent Video Games and Aggression Causal Relationship or Byproduct of Family Violence and Intrinsic Violence Motivation?" (2008) 35 Criminal Justice and Behavior 311.

can cause substantial psychological, social, or material harm, though not as conspicuously or obviously as physical violence. Such harm is recognised in law through the defamation action for libel and slander.¹⁴⁸

Verbal abuse can also be destructive in its various forms. For example, blaming and accusing as response designed to shift the blame; judging and criticising as critical abusive comments to belittle; name calling to hurt and degrade, ordering tone to exercise domination; threats by shouting or yelling to coerce and subdue; or trivialising comments to undermine self-worth and significance of contribution.¹⁴⁹ This list is by no means exhaustive but serves to demonstrate the potent and harmful effects of verbal abuse, which in some cases can be more damaging than a trivial physical assault.¹⁵⁰

1.9.5 Social Acceptance of Violence

We like to think that humans have a general aversion to violence, a natural repugnance to such actions that disrupt the social equilibrium of life.¹⁵¹ Consequently, violence is criminalised and pathologized as unacceptable or immoral behaviour. As Keane puts it “especially for the ‘civilised’ person, violence is not a pretty subject. It is ugly enough to make the most cheerful thinker pessimistic.”¹⁵² Such a conception propels us to analyse and explain violence regarding causes rooted in social, economic, political, cultural, and physiological shortcomings and discriminations. While these are important background explanatory facts, the problem as Allen Feldman points out is that violence is

¹⁴⁸ Defamation Act (1992).

¹⁴⁹ “Verbal Abuse” Domestic Abuse Information
<http://www.hiddenhurt.co.uk/verbal_abuse.html>., on 06/10/2015

¹⁵⁰ Jackman, above n 38, at 396.

¹⁵¹ At 403; Ronaldo Munck “Introduction Deconstructing Violence: Power, Force, and Social Transformation” (2008) 35 *Latin American Perspectives* 3 at 5.

¹⁵² John Keane *Violence and Democracy* (Cambridge University Press, Cambridge, UK ; New York, 2004) at 7.

stripped of any core meaning or causal character and is treated rather as a psychological object and surface effect of the originating circumstances.¹⁵³ Thus, we neglect to examine violence as human behaviour, a means to an end, which we employ when the need arises.

The normative negativity associated with violence stands in stark contradiction to its repetitiveness in human history, written indelibly in human blood;¹⁵⁴ from the relatively benign to the repugnantly malign, from suppression to freedom-activism, from pure brutality to entertainment, or simply from acceptable to unacceptable. Violence is integral to human interaction, one of the central modalities through which humans relate to each other,¹⁵⁵ and no human society has been able to root it out. Arthur Kleinman makes the point that:¹⁵⁶

Violence...is the vector of cultural processes that work through the salient images, structures, and engagements of everyday life to shape local worlds.

Viewed in this light, from an analytical as opposed to a moral perspective, we might indeed argue that violence can be “productive” and not just “repressive”; it “works”, as both victims and perpetrators know.¹⁵⁷ According to Sigmund Freud, “the exercise of violence cannot be avoided when conflicting interests are at

¹⁵³ Allen Feldman *Formations of Violence* (1st ed, University Of Chicago Press, Chicago, 1991) at 19–20.

¹⁵⁴ Edward O Wilson *The Social Conquest of Earth* (Liveright Publishing, New York, 2012) at 62; William James “The Moral Equivalent of War” (1906) <<http://www.constitution.org/wj/meow.htm>>; Jonathan Gottschall *The Rape of Troy* (Cambridge University Press, Cambridge; New York, 2008) at 1.

¹⁵⁵ Andrea Borghini “Why Are Humans Violent?” [2014] About.com Philosophy.

¹⁵⁶ Arthur Kleinman “The Violence of Everyday Life: The Multiple Forms and Dynamics of Social Violence” in Veena Das, Mamphela Ramphele and Reynolds (eds) *Violence and Subjectivity* (University of California Press, Berkeley, 2000) at 238.

¹⁵⁷ Munck, above n 151, at 4.

stake”,¹⁵⁸ or we could simply argue that the distinctive political concept of violence refers to “a use of force to effect decisions against the desire of others.”¹⁵⁹

And as noted by some of the examples that I have discussed, some forms of violence are neither exceptional nor were renounced in the culture in which they occurred (e.g., female circumcision and foot binding). The notion that men are the heads of the family, which implied a right to use force to control and discipline women and children, was the norm until it became criminalised in most Western countries. But even then as it continues today that violence almost always happened behind closed doors, indicative of a general aversion to family violence. However, whether it is sports, video games, movies, television programmes, magazines, novels or newspapers, violence continue to be popular; to participants, spectators and consumers. It is ironic that in the entertainment industry, romance and violence are the narrative themes that sell, because arguably such fictions reveal the everyday trials of family life.

1.9.6 Historical Perspective of Violence

Contrary to the assumption of escalating violence in comparison to our peaceful past, studies indicate that the world is becoming less violent and that human warfare is on the decline.¹⁶⁰ Psychologist Steven Pinker declares that “today we may be living in the most peaceful era in our species’ existence,”¹⁶¹ though he acknowledges that the claim “may strike you as somewhere between

¹⁵⁸ Quoted in Keane, above n 152, at 89.

¹⁵⁹ Ted Honderich *Three Essays on Political Violence* (Blackwell Publishers, Oxford Eng, 1977) at 48.

¹⁶⁰ A view reinforced in CJ Werleman “Humanity Is Becoming Increasingly Less Violent, with One Exception -- Religious Violence” [2014] AlterNet; Joshua S Goldstein *Winning the War on War* (reprint ed, Plume, New York, 2012); John Mueller *Atomic Obsession* (reprint ed, Oxford University Press, New York; Oxford, 2012); Peter Spierenburg *A History of Murder* (Polity, Cambridge, 2008).

¹⁶¹ Steven Pinker *The Better Angels of Our Nature: Why Violence has Declined* (Viking, New York, 2011) at xxi.

hallucinatory and obscene.”¹⁶² Be that as it may, peace and harmony are considered preferable to war and strife across all historical epochs.

Lydian King, Croesus (c.425 BC) for example pronounced, that “...no one is so foolish as to choose war over peace. In peace, sons bury their fathers, in war fathers bury their sons.”¹⁶³ Similar sentiments voiced by one Papua New Guinea tribesman, that:¹⁶⁴

War is bad and nobody likes it. Sweet potatoes disappear, pigs disappear, fields deteriorate, and many relatives and friends get killed. But one cannot help it. A man starts a fight and no matter how much one despises him, one has to go and help because he is one’s relative and feels sorry for him.

Whether it is war, criminal acts or family disputes, violence is integral to human interaction, one of the central modalities through which humans relate to each other.¹⁶⁵ Apparently, in spite of the universal condemnation of violence no society has been able to root it out, this raises the spectre of controversy between nature and nurture – violence as inherent or socialised behaviour.

1.9.7 Are Humans Violent by Nature?

The question of whether we are genetically determined to be violent is one that is fundamental to the problem of domestic violence. This “hard-wired” view is posited on the theory that our genes shape behaviour and that humans are naturally violent. The opposite view is premised on socialisation, in which behaviour is shaped by our environment and violence is learned behaviour.¹⁶⁶ The

¹⁶² At 1.

¹⁶³ Herodotus’ Histories 1.87 quoted in: Gottschall, above n 154, at 40.

¹⁶⁴ At 40.

¹⁶⁵ Borghini, above n 155.

¹⁶⁶ Ashley Montagu “Are Human Beings Violent By Nature?” [2011] Pacifism Politics.

other alternative, which is advanced by this thesis, is termed the “flexible view”. This view embraces the notion that human behaviour is a highly complex phenomenon that assimilates genetic, environmental, cultural, and social influences in a person’s life. This complexity is covered in the following discussion on the theoretical underpinnings of violence.

1.9.8 Social Perspectives

At the micro level violence are a social phenomenon that requires a victim and a perpetrator. In spite of the contrasting views that see contemporary interpersonal relations as either significantly less violent¹⁶⁷ or substantially more violent than its pre-modern equivalents,¹⁶⁸ research covering different historical epochs ¹⁶⁹ demonstrates a consistent pattern of violent behaviour at the micro level.¹⁷⁰ It appears that in spite of the concurrent universal proclivity towards avoiding interpersonal violence at all costs, the human propensity towards violence has not changed significantly over the centuries.¹⁷¹ What has changed is the ability of social organisations to monitor, control and coercively prevent violent interpersonal episodes.¹⁷² Thus, this thesis argues that there is a tension between human emotions inclining towards aggression and a moral aversion to injuring another.

¹⁶⁷ Pinker, above n 161, at 23–30; Eric Dunning “Sociological Reflections on Sport, Violence and Civilization” (1990) 25 *International Review for the Sociology of Sport* 65 at 69.

¹⁶⁸ Dave Grossman and Loren W Christensen *On Combat* (PPCT Research Publications, 2007).

¹⁶⁹ From hunter-gatherer bands, chiefdoms, city states, agrarian empires and other pre-modern social orders.

¹⁷⁰ Warren C Brown *Violence in Medieval Europe* (1st ed, Routledge, Harlow, England ; New York, 2010); Peter S Wells *Barbarians to Angels* (reprint ed, W W Norton & Company, New York; London, 2009); Harald Kleinschmidt *Understanding the Middle Ages* (Boydell & Brewer, 2000).

¹⁷¹ Randall Collins *Violence: A Micro-Sociological Theory* (Princeton University Press, Princeton, 2008); William I Miller *The Mystery of Courage* (Harvard University Press, Cambridge, Mass; London, 2002); Joanna Bourke *An Intimate History Of Killing* (1st ed, Basic Books, New York, NY, 2000).

¹⁷² Siniša Malešević “Forms of Brutality Towards a Historical Sociology of Violence” (2013) 16 *European Journal of Social Theory* 273 at 276.

The interpersonal nature of violence implies a contextual inter-relationship that should take into account social and environmental factors. Fundamentally, human physiology is devoid of the bodily entailments for aggression that carnivorous mammals possess. We have no sharp and strong teeth to hold or kill our prey, no deadly claws, no pointed horns, and we lack strong jaws to inflict lethal bites.¹⁷³ However, we have a physiologically universal capacity for anger, rage, and aggressive posturing as a means of influencing, controlling or overcoming others.¹⁷⁴ At the same time, we remain averse to violence and harming others, where injuring or killing another human remains extremely difficult, and entails suppressing one's moral compass.¹⁷⁵

1.9.9 Sociological Theories of Violence

Social reality is built on shared experiences that make up culture and on values upon which the family or society is founded. In this sense, the basis of violence is situated in the social environ rather than within the perpetrator;¹⁷⁶ i.e. it treats violence as a function of social structures as opposed to individual pathology.¹⁷⁷ Broadly speaking, sociological theories converge and overlap under a number of conceptual models. The “strain theory” in reference to frustration produced by social structures and relationships which cause violent reactions. The “social disorganisation theory” posited on physical factors in the neighbourhood environment and social conditions that are conducive to violent behaviour. And the “benefit theory” proposing that violence occurs when benefits outweigh social

¹⁷³ At 275.

¹⁷⁴ Joshua S Goldstein *War and Gender* (Cambridge University Press, Cambridge, 2003) at 134–38; Nico H Frijda *The Emotions* (Cambridge University Press, New York, 1986) at 19.

¹⁷⁵ Siniša Malešević *The Sociology of War and Violence* (Cambridge University Press, Cambridge, 2010) at 229.

¹⁷⁶ Thomas W Blume “Social Perspectives on Violence” (1996) 2 Michigan Family Review 9 at 10.

¹⁷⁷ Jennifer Lawson “Sociological Theories of Intimate Partner Violence” (2012) 22 Journal of Human Behavior in the Social Environment 572 at 573.

costs.¹⁷⁸ On the whole, these theories focus on social rather than individual causes, thus the focus on macro-level perspectives like the role of gender, systems, ecological and exchange/social control theories.

1.9.10 Psychological Perspectives

In contrast, psychology as a discipline largely attributes the causes of violence to individual and familial dysfunction or pathology.¹⁷⁹ For the purpose of this discussion, the analysis of psychological perspectives on violence will be limited to two conceptual models:¹⁸⁰ (1) The Four Roots of Evil and (2) the Algebra of Aggression.

1.9.10.1 The Four Roots of Evil

This conceptual framework based on the proposal by Baumeister that violence is utilised in four ways.¹⁸¹ First, as “a means to an end” about instrumentalism focusing on the gratification of immediate needs like resource, power, sex or influence. Second, “threatened egotism” in response to wounded pride or violated honour, which places the image of self at risk. Third, as “misguided effort to do what is right” or idealism by which moral imperatives as perceived by the perpetrator justifies the means. Fourth, as “sadistic pleasure”, which is relatively rare but often leads to extreme forms of cruelty, where aversion or guilt is broken down by the pleasure of the experience. Lastly, Baumeister and Vohs proposed a fifth additional cause of violence as the breakdown in self-control or the capacity

¹⁷⁸ Jack Levin and Gordana Rabrenovic “The Sociology of Violence” in Clifton D Bryant and Dennis L Peck (eds) *21st Century Sociology: A Reference Handbook* (SAGE Publications, Inc, Thousand Oaks, 2007) 321.

¹⁷⁹ J Fagan and S Wexler “Crime at Home and in the Streets: The Relationship Between Family and Stranger Violence” (1987) 2 *Violence Vict* 5 at 8–9.

¹⁸⁰ Bryn King “Psychological Theories of Violence” (2012) 22 *Journal of Human Behavior in the Social Environment* 553 at 556–57.

¹⁸¹ Roy F Baumeister and Kathleen D Vohs “Four Roots of Evil” in Arthur G Miller (ed) *The Social Psychology of Good and Evil* (Guilford Press, 2004) 85 at 91.

for self-regulation that restrain impulses. Thus, failing to restrain aggressive impulses can escalate into violent action.¹⁸²

It is interesting to note that the four (or five) elements of violence can be misleading when taken individually to be roots of evil. By themselves, each is merely a trigger that determines the pathway in which violence is the means to an end. It is submitted, therefore, that Baumeister's proposal on the four (or five) ways of violence utilisation, demonstrate how violence is a contextual modality of human interaction. For example, food and water are immediate physiological needs, and where there is an immediate need, pain follows non-fulfilment. Lack of food leads to hunger and absence of water leads to thirst, which can be very painful if not life-threatening. Similarly, the need for sex, personal autonomy, shame, or a misguided moral imperative can lead to psychological pain that requires attention. Whether the need is physical, social, or psychological, there is corresponding anguish, which, if prolonged, can trigger violence in pursuit of fulfilment.

1.9.10.2 *The Algebra of Aggression*

Edwin Megargee formulated the "algebra of aggression" as a conceptual framework to unpack the elements that generate a specific aggressive act and inhibiting factors that prevent it.¹⁸³ In particular, to explain how people with undue personal inhibitions against the use of violence can overcome their inhibitions and commit brutal acts of violence.¹⁸⁴ The focus of analysis is on a single episode of violence regarding the "algebra" or the internal process of reactive and

¹⁸² At 98.

¹⁸³ Edwin I Megargee "A Life Devoted to Crime" (2009) 91 *Journal of Personality Assessment* 95 at 101.

¹⁸⁴ Edwin I Megargee "Psychological Determinants and Correlates of Criminal Violence" in Marvin E Wolfgang and Neil Alan Weiner (eds) *Criminal violence* (Sage Publications, 1986) 81 cited in; Mary M Cavanaugh "Theories of Violence: Social Science Perspectives" (2012) 22 *Journal of Human Behavior in the Social Environment* 607 at 610.

unconscious calculation of cost-benefit analysis.¹⁸⁵ The urge for maximum benefit and minimal dissatisfaction is homogenous, driven by four broad factors: instigators, habit strength, inhibitors, and stimulus. The violent act happens when the totality of motivating factors exceeds the sum of inhibitory factors.¹⁸⁶

1.9.11 Innate Violence

The literature on this general school of thought argues that the capacity to commit violence is innate, that violence is a reaction to either instinctual drives or biological vulnerabilities. Those who adhere to this thesis acknowledge, however, the impact of socialisation and environmental circumstances, which can allay the growth of aggression and develop inhibitors to violence.¹⁸⁷ By and large, theoretical constructs that support violence as innate examine psychobiological causes of violence as an instinct for survival. At the same time, they recognise that violent behaviour is strongly linked to brain dysfunction including head injury, brain tumours or delivery abnormalities.¹⁸⁸ Autonomic function about high abnormal electroencephalographic evaluation (EEG) where the violent individual displays antisocial behaviour under arousal, a low heart rate that does not increase in spite of exposure to potentially aversive or dangerous stimuli.¹⁸⁹ Hormonal influence examines the impact of testosterone and cortisol as a determinant to

¹⁸⁵ King, above n 180, at 557.

¹⁸⁶ Megargee, above n 184, at 126.

¹⁸⁷ King, above n 180, at 558.

¹⁸⁷ Megargee, above n 184 cited in; Cavanaugh, above n 184, at 610.

¹⁸⁷ King, above n 180, at 557.

¹⁸⁷ Megargee, above n 184, at 126.

¹⁸⁷ King, above n 180, at 558.

¹⁸⁸ Angela Scarpa and Andrian Raine "Biological Bases of Violence" in Daniel J Flannery, Alexander T Vazsonyi and Irwin D Waldman (eds) *The Cambridge Handbook of Violent Behavior and Aggression* (1st ed, Cambridge University Press, New York, 2007) 151; Samuel T Gotovsky "Neurobiological Bases and Neuropsychological Correlates of Aggression and Violence" in James P Morgan (ed) *Psychology of Aggression* (Nova Publishers, New York, 2005) 101.

¹⁸⁹ Scarpa and Raine, above n 188 cited in; King, above n 180, at 558.

why males engage in more aggressive behaviour than females.¹⁹⁰ Neuropsychological factors, on the other hand, focus on the functions of neurochemicals (dopamine and serotonin) where increased serotonin activity inhibits aggression while diminished levels of serotonergic activity tend to promote aggression, especially in boys and men.¹⁹¹

Attachment theory, on the other hand, is based on a behavioural system that regulates attachment, fear, and exploration, as propagated by John Bowlby.¹⁹² Infants are dependent on the care and protection of caregivers (attachment figure). Secure attachments evoke content and exploratory behaviour.¹⁹³ However, any traumatic disturbance to caregiver/child relationship invokes anxiety due to threats or feelings of insecurity (crying when the attachment figure is inaccessible), and avoidance as a response to feelings of frustration towards the attachment figure.¹⁹⁴ Thus, secure attachment in adulthood modulates emotional swings, while insecure attachment pre-empts emotional control resulting in susceptibility to violence.¹⁹⁵ The threat of abandonment by the attachment figure

¹⁹⁰ Gotovsky, above n 117, at 108.

¹⁹¹ At 114; Elizabeth Kandel Englander *Understanding Violence* (3 edition ed, Psychology Press, Mahwah, NJ, 2007) at 63.

¹⁹² See the following John Bowlby *Attachment and Loss: Vol 1 Attachment* (2nd ed, Basic Books, New York, 1982); John Bowlby *Attachment and Loss: Vol 2 Separation: Anxiety and Anger* (Basic Books, New York, 1973); John Bowlby *Attachment and Loss: Vol 3 Sadness and Depression* (Basic Books, New York, 1980).

¹⁹³ Chris R Fraley "A Brief Overview of Adult Attachment Theory and Research | R Chris Fraley" (2010) University of Illinois <<http://internal.psychology.illinois.edu/~rcfraley/attachment.htm>>; Mario Mikulincer, Omri Gillath and Phillip R Shaver "Activation of the Attachment System in Adulthood: Threat-Related Primes Increase the Accessibility of Mental Representations of Attachment Figures" (2002) 83 J Pers Soc Psychol 881 at 881.

¹⁹⁴ Phillip R Shaver, Michael Segev and Mario Mikulincer "A Behavioural Systems Perspective on Power and Aggression" in Phillip R Shaver and Mikulincer (eds) *Human Aggression and Violence: Causes, Manifestations, and Consequences* (American Psychological Association, Washington DC, 2011) 71 at 73; Mikulincer, Gillath and Shaver, above n 193, at 881; Marie E Heffernan and others "Attachment Features and Functions in Adult Romantic Relationships" (2012) 29 Journal of Social and Personal Relationships 671 at 672.

¹⁹⁵ Paul Renn "Attachment, Trauma and Violence: Understanding Destructiveness from an Attachment Theory Perspective" in Celia Harding (ed) *Aggression and Destructiveness: Psychoanalytic Perspectives* (1st ed, Routledge, Hove ; New York, 2006) at 69.

in an intimate relationship raises insecurity and triggers violence.¹⁹⁶ Equally, rejection generates shame and produces “anxiety about psychic annihilation” that utilises violence as a way of reasserting one’s existence.¹⁹⁷

1.9.12 Nature of Human Violence

If being social is the natural state of our essence, any disruption to the status quo implies an antisocial shift to behaviour considered to be inappropriate, unreasonable or abnormal. In other words, if being social is based on our interaction and inter-relationship with others, our response when it is threatened or disrupted should be a fairly predictable or an inevitable process. Unfortunately, in life, we tend only to look for the “causes” of things we dislike. Thus, we look for the causes of crime but rarely of virtue; the causes of war but rarely the causes of peace; and for the causes of violence but not for its absence.¹⁹⁸ In spite of the perpetual presence of violence in human affairs, it is treated as deviant behaviour; the disease approach in which the normal or healthy state is assumed to be nonviolent.

The disease approach to violence calls for a cause and cure but according to Robin Fox, “there is no future...in looking for its ‘causes’ since it doesn’t have any.”¹⁹⁹ The “flight or fight” behaviour sequence that we observe in antagonistic animal encounters for example is fairly predictable in the escalation process. The same is also applicable to human social interaction; the escalation process is a natural, expectable, predictable, inevitable part of the interaction, conflict or disagreement. A conflict that upsets our social equilibrium emotionally charged

¹⁹⁶ JAC Brown “Shame and Domestic Violence: Treatment Perspectives for Perpetrators From Self Psychology and Affect Theory” (2004) 19 Sexual and Relationship Therapy 39 at 43.

¹⁹⁷ James Garbarino and Robert HA Haslam “Lost Boys: Why our Sons Turn Violent and How We Can Save Them” (2005) 10 Paediatr Child Health 447 at 449.

¹⁹⁸ Robin Fox “The Human Nature of Violence” Social Issues Research Centre <<http://www.sirc.org/publik/foxviolence.html>>. at 1

¹⁹⁹ At 1.

with anxiety, anger, helplessness, humiliation, shame, guilt, low self-esteem, or hostility is likely to escalate. The sense of loss of control in such emotional turmoil makes aggression a pseudo-means of re-asserting a sense of control.²⁰⁰ When threats and defensive reactions between the interacting parties become intolerable, the question is not if but when violence will emerge?²⁰¹

1.10 Conclusion

It is evident from the preceding discussion that the Court's jurisdictional authority about domestic violence is not well-defined. It stems from the fact that the Domestic Violence Act 1995, which defines domestic violence is under the jurisdiction of the Family Court. However, its protective function is limited to the provision of protection orders under section 13 and the Care of the Children Act 2004 under section 5A about guardianship, care arrangements for the children, a variation of care arrangements (relocation) and final protection orders.²⁰² Furthermore, the criminalisation of violence within the family requires domestic violence cases to be dealt with in the Criminal Court.

As a result, it effectively contradicts the objective of providing integrated service to avoid treating family issues as a series of separate controversies.²⁰³ The

²⁰⁰ Candace Clark "Review Essay: Emotions and Social Bonds" (1993) 56 Social Psychology Quarterly 300 at 301.

²⁰¹ Zeev Winstok and Zvi Eisikovits "Motives and Control in Escalatory Conflicts in Intimate Relationships" (2008) 30 Children and Youth Services Review 287 at 288.

²⁰² Care of the Children Act (2004), section 5A(1)(1)(a)(b):

(i) a guardianship order under section 19 or 27; or (ii) a direction under section 46R in relation to a guardianship dispute, or (iii) a parenting order under section 48; or (iv) a variation of a parenting order under section 56; and (b) a final protection order made under section 14 of the Domestic Violence Act 1995 is, or at any time has been, in force against 1 or more parties to the application.

²⁰³ DS Beattie, IH Kawharu and JH Murray *Report of the Royal Commission on the Courts* (1978) at 150.

criminalisation of domestic violence with the pro-arrest policy increases the risk of arrest for perpetrators (mostly men) and prosecution in the criminal court even for minor conflict resolution behaviour (as opposed to coercive control). In contrast, the allegation of violence does not need to be proved but is required to be taken into account when considering other related matters in the Family Court.²⁰⁴ Such overlap creates confusion between the “retributive” criminal system and the “restorative” or “protective” focus of the family court system, which will be discussed later under family court reforms. It distorts the rationale that pro-arrest policy was introduced not to punish offenders but to improve the safety of victims.

In looking behind the veil of statistical data on family violence, the picture emerging questions, not only the reliability of the protective efficacy of pro-arrest policy but the bias towards women as victims/men as perpetrators. For example, it is apparent from statistical data that there is no case to answer in more than half of all investigations into family violence incidents.²⁰⁵ Similarly, well over half of conviction outcomes resulted in community service sentences,²⁰⁶ signifying the lower or even trivial end of the violence scale and begging the question of whether the conduct was abusive violence or conflict resolution behaviours. More than half of the applications for protection orders without notice were not granted.²⁰⁷ The point to consider is the huge number of respondents who have to go through such processes by allegations that are subsequently not established. It would be interesting if there were available statistics to indicate the number of these incidents that transpired on the verge of or post separation. In that vein, for

²⁰⁴ As discussed above under s 5A of the Domestic Violence Act 1995.

²⁰⁵ See table 4

²⁰⁶ See table 6

²⁰⁷ “NZFVC Data Summary: Violence Against Women - DS2-Violence-Against-Women-2015-0.pdf”, above n 21, at 9.

intimate partner homicides, about 50% of the incident happened during planned or actual separation.²⁰⁸

Given the criminalisation of nominal aggression, domestic violence should ideally be de-domesticated as well. This would necessitate transferring all family violence matters to the criminal jurisdiction, preferably creating offence for domestic violence to cater for minor incidents and the test of establishing criminal liability. Apparently collapsing domestic violence into one broad definition has been problematic, in particular when general behaviour and legal responses are premised on a gendered conception of domestic violence. This is notwithstanding the fact that males continue to be perpetrators of serious family violence just as they are over represented in other serious crimes.

²⁰⁸ Family Violence Death Review Committee, above n 9, at 40.

CHAPTER 2 – THE FAMILY

2.1 Introduction

The currently emergent diversity in family life includes partnership without marriage, parenting without co-residence and various forms of “blended”, “reconstituted”, and chosen family. The life course is relabelled, using “choice biography”, a personalised project involving strategic life planning, adaptation to changing circumstances and reflexivity.²⁰⁹

In this chapter, I will examine the “family” and “family values” in the context of social norms, as well as how they are incorporated into legal conceptions in New Zealand. The analysis that follows encompasses changing family structures, family values and assumptions (social and legal), the shifting emphasis in legal policy from moral to functional personal relationships, and individuality under the human rights regime. The underlying issue is that the concept of the family may be universal but what it means differs from people to people, culture to culture, and from epoch to epoch.

As the basic building block of human societies the ‘family’ remains a conundrum regarding what it is; its structure; its responsibilities; its functions; and the personal obligations of the individuals within it. Whether society, the State or individuals decide what constitutes a family remains a contentious issue. A classic example is the case of 14 years old Kimberly Mays, who was switched at birth in the USA, and rejected her biological parents. She was quoted stating that “the definition of dad to me is somebody that loves me, somebody who’s been there for me.”²¹⁰ One year later Kimberly requested to stay with the biological parents

²⁰⁹ Lynn Jamieson and Roona Simpson *Living Alone* (Palgrave Macmillan, Houndmills, Basingstoke, Hampshire, 2013) at 17.

²¹⁰ David Knostan “Oedippus and His Parents: The Biological Family from Sophocles to Dryden” (Student Classical Association, University of Natal, 1993) at 3.

she earlier rejected and had declared that she never wanted to see again.²¹¹ It is a reflection of the complexity underlining family relationships, the competing rights and responsibilities of the biological parents, legal parents, or social parents and the best interests and welfare of children.

Similarly, there is a protracted debate on whether the 'family' is an oasis of love, care, attention and affection or an abyss of oppression, abuse, manipulation and guilt. Life experiences attest to the reality that relationships premised on love can turn intolerable, and ties formed by biological or social connections can become futile. At the same time, family connections invoke a sense of mutual support, assistance and continuity from the past and into the future. Thus, families can be both a sanctuary from the stress of public life, as well as a private hell with no easy exit.²¹²

On a personal level, the family is where we grow up as individuals with a family identity, negotiating our need for belonging with our need for autonomy. On a social level, it is through families that we build relationships to realise our desire to be "economical, moral, emotional and political actors."²¹³ Our understanding of family alters according to the changing patterns of actual families around us and our conception of what constitutes a family is rooted in time and place.²¹⁴

Alison Diduck alluded to a conflict between "the families we live by and the families we live with", in that we often hold on to an ideal of family life (for example the traditional nuclear family), which is at odds with the reality of family

²¹¹ It was reported that Robert Mays, the only father Kimberly has ever known, approached the biological parents about taking her into their home on a temporary and informal placement. See Mike Clary "Kimberly Mays Moves in With Birth Parents" *Los Angeles Times* (10 March 1994) <http://articles.latimes.com/1994-03-10/news/mn-32324_1_kimberly-mays>.

²¹² Martha Minow *Family Matters* (1st ed., New Press : Distributed by WW Norton, New York, 1993).

²¹³ Alison Diduck *Law's Families* (LexisNexis, London ; Markham, Ont., 2003) at 1.

²¹⁴ Pauline Irit Erera *Family Diversity* (Sage, Thousand Oaks, Calif., 2002) at 2.

life we live with.²¹⁵ Mary Ann Glendon refers to official and unofficial stories as the difference between legal and social phenomena: “between the institutions imagined, described and elaborated in the law and marriage and family behaviour imagined and lived in a given society”.²¹⁶ The underlying theme is that in the face of changing family dynamics, family values and family law, there remains a chasm between the ideal family we uphold and the reality of the family we live with. Bridging this gap is the challenge that faces the family law and the family court system.

2.2 *What is Family?*

Are families natural domains where social and legal norms follow biology and passion? Or are they social constructions created and regulated by society or government for specific public services? The meaning of the term ‘family’ varies and is contextual in nature; social, biological, cultural or statistical.²¹⁷ New Zealand family law struggles with such fundamental questions overlaid with assumptions but which we seldom acknowledged in legal discussions. These general questions and “idealised” assumptions assume significance when family forms and responsibilities become the basis of legal principles like shared parental care after separation. The same applies to the assumption that parents are responsible for the medical treatment and the moral or religious upbringing of their children, adopted into law under sections 15 and 16 of COCA 2004.²¹⁸

²¹⁵ Diduck, above n 213, at 23.

²¹⁶ Mary Ann Glendon *The Transformation of Family Law* (University of Chicago Press, Chicago, 1989) at 6.

²¹⁷ Families Commission *Family-Centred Communities: The Planning Process* (1/09 2009) at 8; Veronica Jacobsen and others *Theories of the Family and Policy* (2004) at 1–2.

²¹⁸ Section 15 defines guardianship in terms of duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child. Section 16 explains guardianship as having the role of providing day-to-day care for the child and contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development.

In the case of *Moore v Moore*²¹⁹ for example, the High Court acknowledged that the children are exposed to their mother's faith at home but ordered that they do not attend church meetings or activities. The determination is contrary to the decision of the Family Court Judge, who considered that there should not be any prohibition on the children attending church meetings or be involved with the mother's faith when they are in her care.²²⁰ Likewise, a TV New Zealand news item on Sunday, September 8, 2013, reported that a "10-month-old daughter of a Jehovah's Witness couple has been put into the guardianship of the High Court for nine months so Starship Children's Hospital doctors could treat her."²²¹ The Court noted that while the assumption that parents provide for the welfare and best interest of children is incorporated into law, there is a caveat to protect threats to the life and individual integrity of children.²²²

2.2.1 Who is In, Who is Out and Who Decides?

The "family" often invokes a range of emotions and metaphors that are culturally specific. But, by and large, it's a social institution that depicts a group of people connected through some forms of intimate blood or social relationships recognised as constituting a family.²²³ While there is always a tension between the formal/official forms and informal/functional forms the underlying rationale remains the same. In day to day language household and family are interchangeable, just as home often signifies a combination of family and house. Family formation traditionally hinged on marriage which was the formal or official

²¹⁹ *Moore v Moore* [2014] 3213 (NZHC) at [167].

²²⁰ *Moore v Moore*, above n 219 para [26].

²²¹ Fairfax "Baby to be Treated after Parents Lose Court Battle" *TVNZ One News* (8 September 2013) <<http://tvnz.co.nz/national-news/baby-treated-after-parents-lose-court-battle-5575811>>; on 13/04/2015. The parents accepted the girl needed urgent chemotherapy and surgery, accepted it was in her best interests and agreed to the treatment, but could not consent to transfusion of blood or blood products "by reason of their affiliation with the Jehovah's Witness Church".

²²² *A v E* [2013] NZHC High Court 2154 at [24] and [25].

²²³ Minow, above n 212, at 19.

pathway to sex and procreation;²²⁴ thus, the rules of family formation – marriage, birth to a married couple or adoption, have been widely recognised.²²⁵ This family form may have persisted but other forms like extended family ties or groups of people who may function as a family without complying with official/legal practice, as well as single parents or single households also existed.²²⁶

In answering, “Who is family”? Mark Henaghan suggests that the likely responses from people in our society would include:²²⁷

Family, whanau, aiga, gia dinh, mum and dad, gramps, nana, the clan, uncle Bert and auntie Sue, the cuzzies, great-aunt Whina, my partner, my lover, and the guys in the gang.

These expressions of family reflect the day to day reality of family life; they are also culturally oriented (social) norms that depict the multicultural nature of New Zealand society. However, the legal focus on particular relationships recognised as family differ; there is a tension between legal forms and social relationship forms. The following definitions of family as provided by various pieces of legislation chart the evolving legal construct of the family.

- Immigrants Land Act 1873 - Members of a family for the purpose of this Act shall include wife, child, grandchild, nephew and niece of the head of the family.²²⁸

²²⁴ D Ian Pool *The New Zealand Family From 1840* (Auckland University Press, Auckland, NZ, 2007) at 21.

²²⁵ Minow, above n 212, at 19.

²²⁶ See; Jo Cribb “Focus on Families: New Zealand Families of Yesterday, Today and Tomorrow” [2009] 35 Social Policy Journal of New Zealand 1 at 6–7; Ian Pool and Rosemary Du Plessis “Families: A History” (2013) *The Encyclopaedia of New Zealand* <<http://www.teara.govt.nz/en/families-a-history>>.

²²⁷ Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (4th ed., LexisNexis, Wellington, NZ, 2013) at 1.

²²⁸ Immigrants Land Act 1873, s 2.

- Family Homes Protection Act 1895 – Family defined as including wife and children or husband and children of the shelter.²²⁹
- Government Advances Act 1906 and State Advances Act 1913 – Family is defined to include parents and other dependents of the worker.²³⁰
- Family Allowance Act 1926 – Defined family as including the applicant and his wife living together, and their children.²³¹
- War Pensions Act 1954 – Family member in relation to armed forces personnel to mean the wife, widow, husband, father or mother, or a son, daughter, stepson, stepdaughter, brother, sister, half-brother, half-sister, or mother in law of the member of the force.²³²
- Local Government Amendment Act 1979 – Family as including “one person living alone” as well as “two or more persons whether related or not living together but independently of other persons living in the same building.”²³³
- Children, Young Persons, and Their Families Act 1986 – Defines “family group” which includes biological, legal and whanau connections.²³⁴
- Domestic Violence Act 1995 – A family member as anyone related to the person by blood or by marriage, civil union, de facto relationship, adoption and including whanau or culturally recognised family group.²³⁵

²²⁹ Family Homes Protection Act 1895, s 2.

²³⁰ Government Advances to Workers Act 1906, s 2; State Advances Act 1913, s 2.

²³¹ Family Allowance Act 1913, s 2.

²³² War Pensions Act 1954.

²³³ Local Government Amendment Act 1979, s 2.

²³⁴ Children, Young Persons and Their Families Act 1989, s 2.

²³⁵ Domestic Violence Act 1995, s 2.

- Corrections Act 2004 – Family includes any person to whom that person is related, a person’s spouse, civil union or de facto partner and the person’s family group. The family group as including extended family in which there is at least one adult member with whom the person has a biological or legal relationship or significant psychological attachment.²³⁶

Apparently, the legal construct of the family depicts who is in and who is out relevant to the economic policy or monetary assistance to be implemented. The changing landscape of the ‘family’ however, is evident in its current definition provided by Statistics New Zealand.²³⁷

A family is two or more people living in the same household, who are either a couple with or without children, or one parent and their children. A child in a family is someone of any age who lives with their parent(s) and who does not have a partner or children of their own living in the same household.

Interestingly, in spite of the changing dynamics of the family, the two central themes have always been “couple” and “children”. They revolve around the socio-legal (couple) and the biological (children) constructs inherent in our perception of the family.

2.2.2 New Zealand Families

There is a tendency to compare current family structures with the ‘nuclear family’ model (mum, dad and the children) of the 1950s and 1960s. However, historical studies imply the absence of any distinctive period that may have contributed to

²³⁶ Corrections Act 2004.

²³⁷ Statistics New Zealand *2013 Census QuickStats about Families and Households* (2014) at 6.

a family construct that was the 'norm'. Indeed, family relationships have been fluid throughout history.²³⁸ The complex nature of New Zealand families reflects patterns of migration (particularly from the Asia/Pacific regions), and our multi-cultural society.²³⁹ Similarly, the changing landscape of the family can be attributed to wider social and economic changes, for example, more frequent partnering, dissolution of relationships and re-partnering at a younger age, high teen pregnancy, divorce and adoption.²⁴⁰

Other changes include delays in marriage and childbearing, rising participation of women in the workforce, an increasing dependency on hospitals and rest homes to care for older families rather than being cared for by family members. The consequent diversity in family forms: couples with or without children, single parents, separated parents who share the daily care of their children, step parents (re-partnering after separation), same-sex couples (some with children) and family members with support links across households and generations.²⁴¹

2.2.3 The Formation of a Family

How, why or when the family began is not known, but its history must acknowledge the central role of the family in social, political, and personal relationships. Often considered as a 'natural' or biological unit, the family is also very much a social construction, its meaning grounded in specific cultures and

²³⁸ Families Commission *Fact Sheet 01 – New Zealand Families Today* (2012) at 2; Pool, above n 224, at 32–3; see also: Families Commission *The Kiwi Nest: 60 Years of Change in New Zealand Families* (3/08 2008); Families Commission *Whanau Yesterday, Today, Tomorrow* (1/11 2011).

²³⁹ For example, in the 1990s the greatest increase in population was by the Asians which grew by 138%, followed by the Pacific population by about 38% and the Maori population by 27%. The European population in contrast grew by 3% Ministry of Social Development *New Zealand Families Today* (2004) at 28.

²⁴⁰ Ministry of Social Development *New Zealand Families Today* - (MSD, 2014) at 9.

²⁴¹ At 9; Families Commission, above n 238, at 4; see also Susan Morton and others *Growing Up in New Zealand: Now We Are Born* (2012).

their historical objectives.²⁴² In pre-modern Western societies, the family was grounded on economic rationale embedded in the interests of the parents, kin and the community rather than the emotional bond.²⁴³ Sociologists, however, have outlined the gradual change to affective individualism, love and personal fulfilment.²⁴⁴ As Boswell noted:²⁴⁵

In pre-modern Europe marriage usually began as a property arrangement...and ended in love. Few couples married 'for love', but many grew to love each other in time as they jointly managed their household, reared their offspring, and shared life's experience.... By contrast, in most modern West, marriage begins in love ... and ended-often-about property, by which point love is absent or a distant memory.

2.2.4 The Biological Family

The reality of sex as fundamental to procreation points to the biological element in the formation of the family. It serves as the basis for the simple conception of the family as mother, father and their joint offspring. Evolution theorists suggest that the biological family is underpinned by the genetic drive to procreate. Human babies require the prolonged investment of both parents thus sexual selection is guided by both the male's indicators of genetic fitness and his ability to provide parental investment.²⁴⁶ However, society has become more tolerant of separation

²⁴² "History of Family - Gender, Theory, Development, Social, and Press" JRank Articles <<http://family.jrank.org/pages/493/Family-History.html#ixzz3a7DVlnrP>>. On 15/05/2015

²⁴³ Lawrence Stone *Family, Sex and Marriage in England 1500-1800* (abridged ed, Harper Perennial, New York, NY, 1983) cited in; Jacobsen and others, above n 217, at 4.

²⁴⁴ Anthony Giddens *Modernity and Self-Identity* (1st ed, Stanford University Press, Stanford, Calif, 1991) at 89; Anthony Giddens *Sociology* (6th ed, Polity Press, Cambridge, 2009) at 97; See also; John R Gillis *For Better, for Worse* (Oxford University Press, London, 1985) and; Ann Swidler *Talk of Love* (The University Of Chicago Press, Chicago, Ill, 2003).

²⁴⁵ John Boswell *Same-Sex Unions in Premodern Europe* (Vintage, New York, 1995) at xxi.

²⁴⁶ James S Chisholm *Death, Hope and Sex* (1st ed, Cambridge University Press, Cambridge, 1999) cited in; Jacobsen and others, above n 671, at 59.

and re-partnering, which to some extent, leads to the abuse and sexual violation of children by step-parents.²⁴⁷

2.3 Social Construction

The social formation of the family encompasses economic, political and personal relationships. Marriage remained the only religiously or legally recognised pathway to the formation of a family for centuries, even though other types of familial relationship existed. The formal or legal status extended to marriage indirectly implies that humans are averse to monogamous unions. At the same time, however, humans are jealous animals who can hardly cope with sexual promiscuity, thus the ideal of marriage and sexual exclusivity. It is an illustration of the disjuncture between the person we live with - susceptible to lust and the person we live by - striving to preserve pure love through monogamy, the aspirational person the law assumes and supports as the norm. Apparently, the decision to start a family, and who or what is family appears to have devolved from the community, the parents, and to the individuals. The law, however, remains the arbiter of which configuration is accepted and proffered legal status and under what conditions that status can be either maintained or undone.

2.3.1 Marriage

The recognition of marriage as the traditional pathway to sex, reproduction and family in no way detracts from the social concept of family as an assortment of blood relatives, all members of a particular household, sexual partners, or even

²⁴⁷ Leslie Margolin "Child Abuse by Mothers' Boyfriends: Why the Overrepresentation?" (1992) 16 Child Abuse and Neglect 541; Grant T Harris and others "Children Killed by Genetic Parents versus Stepparents" (2007) 28 Evolution and Human Behavior 85; Alana O'Connor and Simon Boag "Do Stepparents Experience More Parental Antagonism Than Biological Parents? A Test of Evolutionary and Socialization Perspectives" (2010) 51 Journal of Divorce & Remarriage 508.

close friends.²⁴⁸ The legal construct of the ‘family’ depicted in various laws noted above, promoted specific types of relationships; predominantly, marriage between a heterosexual couple on the then assumption that such unions served the best interests of families and society as a whole. Marriage serves as the bedrock of the family, accorded legal status from which other legal rights and obligation flow. Consequently, couples that did not fit within the parameters of the heterosexual union were denied rights and benefits that flowed from marriage.

The legal status afforded to marriage was mostly derived from British traditions associated with the Marriage Act 1753, which defined a family as a male and female joined in holy matrimony.²⁴⁹ Such a definition, *prima facie*, evokes an underlying theme of morality. However, in its original form, the Clandestine Marriage Bill “was designed to prevent rich heirs and heiresses of good family from being seduced into clandestine or runaway marriages with their social and economic inferiors.”²⁵⁰ As such, this legal construction was underlain by economics and class rather than moral values; it served to protect marriage as the most important vehicle for the transfer of property.²⁵¹ In actuality, it was an exercise to suppress the reality of the family they lived with and to establish an ideal for the family they lived by through the normative force of the law.²⁵²

²⁴⁸ As alluded to by Mark Henaghan in: Henaghan and Atkin, above n 227, at 1.

²⁴⁹ The Marriage Act 1753 (England and Wales), s c 33.

²⁵⁰ Eve Tavor Bannet “The Marriage Act of 1753: ‘A Most Cruel Law for the Fair Sex’” (1997) 30 *Eighteenth-Century Studies* 233 at 233.

²⁵¹ Jacobsen and others, above n 217, at 3.

²⁵² The Act effectively outlawed the practice of marriage as a private contract on the basis of a verbal promise to live together without the involvement of a priest, see RB Outhwaite *Clandestine Marriage in England, 1500-1850* (A&C Black, 1995) at 2.

2.4 *The Family We Live With*

The above discussion indicates that in New Zealand (like other countries in the world), marriage is no longer a given. The traditional nuclear family of husband and wife with children is no longer the norm. Today's families include parents who are not married, same-sex couples, and one parent families; and among classic nuclear families the dynamics are shifting as gender roles evolve.²⁵³ The one thing that has not changed is the importance of the family in our personal lives for the achievement of the following functions:²⁵⁴

- The nurturing, rearing, socialisation and protection of children.
- Maintaining and improving the wellbeing of family members by providing them emotional and material support.
- Providing the psychological "anchorage" of adults and children by way of affection, companionship and a sense of belonging and identity.
- Passing on culture, knowledge, values, attitudes, obligations and property from one generation to the next.

2.4.1 **Different Family Forms**

The Statistics New Zealand 2013 Census QuickStats about families and households provides various topics about families as including couples with children, one parent with children, couples without children, dependent young people, grandparents in a parental role, extended families, and households. However, the two parent family or couple with children remains the most common type of

²⁵³ See for example, Law Commission *New issues in legal parenthood* (Law Commission, Wellington, 2004) at 1.

²⁵⁴ Pool and Du Plessis, above n 226, at 304; Gerard Cotterell and Martin von Randow *Measuring Changes in Family and Whānau Wellbeing Using Census Data, 1981-2006: A Preliminary Analysis* (Statistics New Zealand, Wellington, NZ, 2008) at 13.

family at 41.3%. This is followed by 'couple without children' at 34.8% and 'one parent' families at 18/1%.²⁵⁵

Regarding domestic violence, which is the focus of this thesis, the family form relating to couples with children, is the subject of interest. The emphasis is on the nature of relationships between couples – married or co-habiting. In this respect, the underlying tenets of today's two-parent families are equality and individual rights. The notion of equality captured by the Property (Relationship) Amendment Act 2001, ensured an equal share regime of relationship property between spouses or partners upon separation.²⁵⁶ The emphasis on the individual rights of family members noted in the Care of the Children Act 2004, specifies that in cases of separation mostly both parents will have joint legal guardianship of their children,²⁵⁷ and which has a broad definition of guardianship.²⁵⁸ The reality of the family we live with today, characterised by couples living together: married or re-married, partners or re-partnered, with genetic, social or legal children, as well as couples without children. A decrease in the economic dependency of mothers is also noted as an increasing number of women enter the workforce.

Notably, the central feature of changing family dynamics produces an increase in the instability of partnerships, a decline in the rate of marriage, a weakening in the link between marriage and childbearing, and a change in women's economic role in the two-parent or couple family. The characteristics of today's family systems is underlined by high levels of extramarital childbearing, general social acquiescence

²⁵⁵ Statistics New Zealand, above n 237.

²⁵⁶ Property (Relationship) Act 1976, s 11.

²⁵⁷ Care of the Children Act 2004.

²⁵⁸ Care of the Children Act 2004 Guardianship is defined in s 15(1)(a) and (b) of the Care of the Children Act 2004 to include "having the role of providing day to day care of the child" and "contributing to the child's intellectual, emotional, physical, social, cultural and other personal development."

to divorce or separation, increasing numbers of working mothers, high rates of single parenthood and less differentiation in gender roles.²⁵⁹

2.4.2 The Dance of Aggression

In spite of changes to the family, some believe that families have still got one thing in common, a strength that makes every family a part of the home; “the love that makes a home no matter how it is arranged”.²⁶⁰ Domestic violence, however, exposes the reality of the family as a domain of abuse, aggression and violence with no easy means of escape. While conflict is inevitable in intimate relationships even an overly expressed conflict is not the same as violence.²⁶¹ It is problematic therefore when all types of aggressive or conflict resolution behaviour (physical, verbal, or psychological) in an intimate relationship are equated with violent behaviour.²⁶²

A couple in an intimate relationship entails two individuals with different personalities, backgrounds, values, beliefs, education, and aspirations negotiating a compromise to forge a life together. The couples’ view of individualism and self-reliance can be fused together by the notion of romantic love. In this context, Giddens wrote that “confluent love is not necessarily monogamous...what holds that pure relationship together until further notice,”²⁶³ as long as the relationship remains beneficial to both parties. At its heart is the role of ‘negotiation’ about rights and obligations arising from the relationship. Such negotiation is often

²⁵⁹ Ministry of Social Development, above n 240, at 11.

²⁶⁰ Betty Crocker “The Families Project” (2014) [bettycrocker.com](http://www.bettycrocker.com) <<http://www.bettycrocker.com/menus-holidays-parties/mhplibrary/everyday-meals/the-families-project>>. at <http://www.bettycrocker.com/menus-holidays-parties/mhplibrary/everyday-meals/the-families-project> on 10/05/2015

²⁶¹ Collins, above n 171, at 20.

²⁶² K Daniel O’Leary “Are women really more aggressive than men in intimate relationships? Comment on Archer” (2000) 126 *Psychological Bulletin* 685 at 688.

²⁶³ Anthony Giddens *The Transformation of Intimacy* (1st ed, Stanford University Press, Stanford, Calif, 1993) at 63.

played out through verbal, nominal physical or psychological sparring, which I refer to here as the “dance of aggression”. Each partner is trying to establish some sense of control and to find a mutual compromise to their conflict positions, to have their personal autonomy achieved in an environment of co-existence.

Over time, the framework regulating the dance of aggression becomes familiar to the couple. Arguably, this is revealed in private conversations between couples which are often dismissive, critical, demeaning, and combative without eliciting a violent response. In public, however, their demeanour and tone change to a loving and respectable couple (although what happens in private may on occasion erupt into the public space). Heidi Hartmann suggested that the family is a locus of struggle where production and redistribution take place, “where people with different activities and interests in these processes often come into conflict with one another.”²⁶⁴ In this context it can be argued that the ‘dance of aggression’ is sometimes an activity in which family members compete, and negotiate, asserting their views and interests rather than always reflecting abusive domestic violence per se.

Far from condoning domestic violence, what is advanced here is the contextual nature of aggression as a means of conflict resolution, to establish the parameters of autonomy that can facilitate co-existence and a cohesive family unit. In this sense, a verbal attack, a nominal push, a light smack, a stare or a warning are moves in the daily “dance of aggression” as opposed to abusive violence. Having said that, the fact remains that any escalation in the dance of aggression can invoke violence, bearing in mind that domestic violence defined as ‘abuse’ implies a pattern of behaviour over time. In this context, domestic violence can be taken to refer to the unremitting use of aggression (physical, verbal and psychological)

²⁶⁴ Hartmann Heidi I “The Family the Locus of Gender, Class, and Political Struggle: The Example of Housework” (1981) 6 *Signs: Journal of Women in Culture & Society* 366 at 368.

as a pattern of behaviour to subdue and control rather than as a negotiation to influence a mutual compromise.

2.4.3 The Dance of Deception

The truth and nothing but the truth underlie intimate relationships, but most individuals, admit to having lied to their romantic partners.²⁶⁵ Although most of us would like to believe that trust is the foundation of the family, absolute truth and openness, “it is not uncommon for people to recognise that even in close relationships, there are likely to be situations in which honesty will not be practised”.²⁶⁶ In this context, deception is part of the negotiation regime within intimate relationships to resolve conflicting rights and obligations. I call this “the dance of deception”, a communication strategy that is purposeful, often goal-directed and which functions as a relational control device to avert conflict in the family.²⁶⁷

Parents, for example, say that honesty is the best policy, but they regularly lie to their children as a way of influencing their behaviour and emotions. Parents often use deception to influence their children:²⁶⁸

It is common for parents to try out a range of strategies, including lying, to gain compliance. When parents are juggling the demands of getting through the day, concerns about possible long-term negative consequences to children's beliefs about honesty are not necessarily at the forefront.

²⁶⁵ D Knox and others “Sexual Lies Among University Students” (1993) 27 *College Student Journal* 269 cited in; Tim Cole “Lying to the One You Love: The Use of Deception in Romantic Relationships” (2001) 18 *Journal of Social and Personal Relationships* 107 at 107.

²⁶⁶ Mark L Knapp “Lying and Deception in Close Relationships” in Anita L Vangelisti and Daniel Perlman (eds) *Cambridge Handbook of Personal Relationships* (Cambridge University Press, Cambridge, 2006) 517 at 519.

²⁶⁷ Jennifer Guthrie and Adrienne Kunkel “Tell Me Sweet (And Not-So-Sweet) Little Lies: Deception in Romantic Relationships” (2013) 64 *Communication Studies* 141 at 142.

²⁶⁸ University of Toronto “Lies My Parents Told Me: Parents Use Deception to Influence Their Children” [2009] *Science Daily*, at <http://www.sciencedaily.com/releases/2009/09/090922132844.htm> on 12/05/2015

Irritations that can lead to conflicts are inevitable in interpersonal relationships, for it is impossible to find another human being who's every quirk, habit, and preference aligns perfectly with yours. It follows that the challenge for family members is to negotiate and live with each other's irritants to avoid escalating conflicts. To this end, when the cost is high, deception offers an attractive option, as Saxe explained: "an individual obsessed with being totally honest" risks social isolation, for complete honesty, "could make relationships tedious if not conflict laden."²⁶⁹

Family members often lie on the spur of the moment (without due consideration) under 'normal' circumstances; it becomes inevitable in the adversity of family disputes. Scottish novelist Sir Walter Scott penned these words, "O, what a tangled web we weave when first we practice [deceiving]!" and J. R. Pope, added to this the lines, "but when we've practised quite a while, how vastly we improve our style."²⁷⁰ Unconscious or intentional, deception is a part of everyday existence; it wears countless faces and takes on an endless array of forms and functions.²⁷¹

2.4.4 Maintaining the Façade

"It is no secret that intimate partners keep secrets from each other";²⁷² the suggestion that families have secrets implies that "families present a specific 'face' to the world and that this appearance will not be the full story of the kinds and

²⁶⁹ Leonard Saxe "Lying: Thoughts of an Applied Social Psychologist" (1991) 46 American Psychologist 409 at 414.

²⁷⁰ Quoted in, Bill Hodges "Telling the Truth and Lying Both Have Consequences" (2008) The Observer News
<http://www.observernews.net/artman2/publish/Positive_Talk_13/Telling_the_Truth_and_Lying_Both_Have_Consequences.shtml>. on 17/03/2014

²⁷¹ Lerner G Harriet *The Dance of Deception: Pretending and Truth Telling in Women's Lives* (Harper Collins Publishers, New York, 1993) at 9.

²⁷² Beth Easterling, David Knox and Alora Brackett "Secrets in Romantic Relationships: Does Sexual Orientation Matter?" (2012) 8 Journal of GLBT Family Studies 196 at 196.

quality of relationships going on behind the façade.”²⁷³ On an individual level, we refrain from revealing negative information out of fear or shame underlined by apprehension about the response of others to the disclosure, concern about what might happen to ourselves, to the other persons, or to our relationships.²⁷⁴ In the family context then deception, lying or keeping secrets is a reflection of power relationships and the will for self and other protection²⁷⁵ or the maintenance of current relationships.²⁷⁶ Such a power relationship is both important and necessary in the function of the family; parents exercise it over their children and elder siblings over younger ones for family cohesion.²⁷⁷

In an ideal relationship, couples would not keep any secrets from each other and life would be an open book. However, the reality of the world we live in is that even the healthiest or most loving couples hide things from each other.²⁷⁸ As a rule, honesty is the best policy but people in long-term relationships know that there is room to manoeuvre because as individuals they still have a private self and knowing every minute detail of a partner’s life is not an attractive proposition.²⁷⁹ The reasons for deception may be varied but an indiscretion like an affair, for example, is sometimes kept under wraps by the perpetrator (and those who know) to safeguard the relationship.²⁸⁰ Unfortunately, the same thing is often

²⁷³ Carol Smart “Families, Secrets and Memories” (2011) 45 *Sociology* 539 at 539; Janet Finch “Displaying Families” (2007) 41 *Sociology* 65 at 73.

²⁷⁴ Tamara D Afifi, Loreen N Olson and Christine Armstrong “The Chilling Effect and Family Secrets” (2005) 31 *Hum Commun Res* 564 at 596.

²⁷⁵ At 565; Jennifer Pangyanszki “Sibling Secrets” (2005) 11(3) *Girls’ Life* 60; Harriet, above n 271, at 137.

²⁷⁶ Tamamara D Afifi and Loreen Olson “The Chilling Effect in Families and the Pressure to Conceal Secrets” (2005) 72 *Commun Monogr* 192 at 192.

²⁷⁷ At 194.

²⁷⁸ Marisa Cohen “Secrets the Couples Keep” (2007) 209(1) *Redbook* at 144.

²⁷⁹ At 147.

²⁸⁰ Harriet, above n 271, at 157–158.

true for victims of intra-familial abuse, who are reluctant to divulge information for shame or to maintain the status quo – the façade of the loving family.²⁸¹

Deception is a tool that helps us to cope with the complexities of life for few are willing to hear what they don't want to hear or to say what they cannot bear to say.²⁸² Nyberg argues that human existence built on a lifetime of relationships is inconceivable without deception. Thus, deception is in our nature.²⁸³ There is in fact scepticism about the possibility of an environment where everyone tells the whole truth all the time. Eck, for example, stated that "not to speak the truth is sometimes a duty" and "a society in which all truth [is] bluntly exposed would be more like a hell than a paradise."²⁸⁴

2.5 *The Family We Live By*

Divorce characterises today's New Zealand family, remarriage, blended families, single parenthood, joint custody, abortion, domestic partnership, and two-career households.²⁸⁵ In spite of these, the notion of "the ideal family we live by" is still premised upon the married couple with children. For example, the Royal Commission on Social Policy states in its final report that:²⁸⁶

Many speakers felt the stability provided by the traditional two-parent family unit was crucial to the upbringing of children who would become socially

²⁸¹ Easterling, Knox and Brackett, above n 272, at 197; Harriet, above n 271, at 118.

²⁸² Nyberg, above n 26, at 2.

²⁸³ At 2.

²⁸⁴ Eck Marcel *Lies and Truths* (Macmillan, New York, 1970) at 69.

²⁸⁵ For detail discussions see, Statistics New Zealand, above n 237; Ministry of Social Development, above n 239; Pool and Du Plessis, above n 226; Families Commission, above n 238.

²⁸⁶ Sir Ivor & Ballin Richardson and Ann & Bruce Marion *The April Report; New Zealand Today; Report of The Royal Commission on Social Policy; Te Komihana A Te Karauna Mo Nga Ahuatanga-A Iwi* (The Royal Commission on Policy, Wellington, N Z, 1988) vol 1 at 250–51.

well-adjusted adults and wanted government policy-making to encourage this family model.

At times, research studies with relevant statistics are used to support the argument that children do better with two parents; distilling data into a worthy formula that single parenthood is harmful to children.²⁸⁷ John Gilles observes that:²⁸⁸

We all have two families, one that we live with and another we live by. We would like the two to be the same, but they are not. Too often the families we live with exhibit the kinds of self-interested, competitive, divisive behaviour that we have come to associate with the market economy and the public sphere. Often fragmented and impermanent, they are much less reliable than the imagined families we live by. The latter is never allowed to let us down. Constituted through myth, ritual, and image, they must be forever nurturing and protective, and we will go to any lengths to ensure that they are so, even if it means mystifying the realities of family life.

2.5.1 Family Structures

Discussions on family structures often turn on the emotional and behavioural framework that enhances family cohesion. In the wake of evolving family structures with the shift in focus to relationship quality, the ideal family structure remains rooted in the two-parent family model. The quality of a relationship depends on the notion of embracing equality, individual rights, and autonomy within the family. It places both parents equally on top of the hierarchy at one level and the children at the lower level. As shown in figure 1 below, the parents, united emotionally, commit to their parenting obligations while supporting each other as a couple and putting their relationship on the front burner. The children

²⁸⁷ Zoë Krupka “The ‘Perfect Family’ Has Created an Ethical and Moral Vacuum” (2014) The Conversation <<http://theconversation.com/the-perfect-family-has-created-an-ethical-and-moral-vacuum-31339>>.

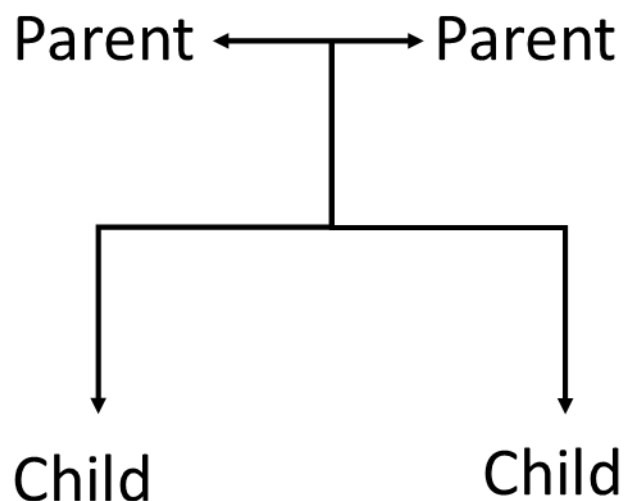
²⁸⁸ John R Gillis *A World of Their Own Making: Myth, Ritual, and the Quest for Family Values* (Harvard University Press, 1997) at xv.

on the lower level are also emotionally bonded and though they may have sibling rivalry they get along and care for each other.²⁸⁹

2.5.2 Safe Haven

The notion of the family as a haven where love, trust, loyalty, cooperation, etc. that elicit family bonding is probably true for most families, most of the time. However, as discussed above, such sentiments are intertwined with daily negotiations for control, influence, attention, and resources which can stimulate aggressive and deceptive behaviours.

Figure 1: The ideal family structure we live by



In reference to domestic violence, its definition as physical, sexual or psychological abuse (including financial and economic abuse) insinuates or promotes an ideal family environment free of conflict and aggressive or conflict resolution behaviour. As things stand, a verbal assault or minor aggression that may inflict nominal harm,

²⁸⁹ Robert Taibbi "The Ideal Family: How Do You Stack Up?" [2015] Psychology Today, at <https://www.psychologytoday.com/blog/fixing-families/201502/the-ideal-family-how-do-you-stack> on 12/05/2015

not raising to the level of criminality in the public sphere, incurs mandatory arrest if it occurs within the family environment.

Such an ideal family is a myth in the mishmash of human interaction. More so, when violence is swamping the world around us; at the individual, group, institutional, national and international levels. There is a massive contradiction in invoking the normative force of the law towards the ideal family (free of conflict and aggression) in an environment where we are bombarded daily by news of war, terrorism, violent crimes, and sexual abuse, as illegal violence. At the same time, we partake in legitimate violence through entertainment, in games, on the screens and on the sporting fields, so long as that violence stays within acceptable "boundaries" or the rules of "fair play". The notion of utilising the normative force of the law to promote and facilitate the aspiration of a violence-free family environment is highly desirable. However, this should be moderated to take into account ordinary human conflict resolution behaviours within the family environment. Those behaviours should fall outside the realm of the sorts of violent "foul play" rightly subject to penalties. Arguably many of the families caught in the current domestic violence policy may need help with maintaining such boundaries, rather than the sanction of the criminal law, which often exacerbates the situation.

2.5.3 Durability

The ideal of the family as a permanent union is reflected in the wedding vows of "until death do us part." However, tolerance by society towards divorce and the propensity to quit dysfunctional relationships has given rise to structural fluidity in the family. But in New Zealand, the clean break envisaged by divorce or separation as a healthy ending of a bad situation, has been displaced by the principle of the best interests of the child.²⁹⁰ Again, the normative force of the law

²⁹⁰ Vivienne Elizabeth, Nicola Gavey and Julia Tolmie "' He's Just Swapped His Fists for the System' The Governance of Gender through Custody Law" (2012) 26 Gender & Society 239 at 240.

is invoked to enforce shared care or co-parenting after separation as the "ideal" which closely mimics the fictional and aspirational "ideal family". The logic of "once a parent always a parent" is the mainstay of the ideal of family durability. As Smart noted, it is the joint parenting contract that has become "indelible" rather than the marriage contract.²⁹¹ In the arena of domestic violence, the law imposing an aspirational but fictional ideal of the family we live by can have devastating effects on the people in the family we live with as disucced below.

2.6 *The Family after Separation*

The fluidity of the modern family springs from changing social values on various forms of intimate relationships. But as easily as they form, they are easily broken up, susceptible to separation and re-partnering. In the aftermath of separation, the problem is often exacerbated by the presence of children. It's a painful process in which one of the parents may well at some level need to distance himself or herself physically as well as emotionally from the other. Dissension results and contested relocation emerges when the best interest of the child is paramount. But what are the child's best interests and who can determine them? This section examines the best interests of the child and its application in relocation disputes.

At the best of times family life is morally and emotionally charged, more so during divorce or separation when issues of raising children, re-partnering and freedom of movement arise. We continue to espouse the ideal of children being brought up by their biological parents while step-parenting is seen to engender stress and difficulties or even abuse.²⁹² There is an expectation that the parents will continue

²⁹¹ Carol Smart "Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy" (1997) 26 *Journal of Social Policy* 301 at 316.

²⁹² Jane Ribbens McCarthy, Rosalind Edwards and Val Gillies "Moral Tales of the Child and the Adult: Narratives of Contemporary Family Lives under Changing Circumstances" (2000) 34 *Sociology* 785 at 786.

to look after the best interests of children upon separation. Consequently, parents who re-partner or wish to relocate are morally questionable for putting their interest before their children's welfare.

They reflect the tension between the freedom of people as adults to leave a relationship and begin a new life for themselves, and the harsh reality that while relationships may be dissoluble, parenthood is not.²⁹³ Arguably, children usually benefit from a close and continuing relationship with a non-resident parent who cares about them in the absence of abuse, violence, or very high conflict.²⁹⁴ Maintaining that connection if one parent moves a long way from the other is difficult, thus the challenge of reconciling the needs of the child in having a relationship with both parents against the primary carer's desire (or need) to live where he or she chooses or where they can find the best life options.²⁹⁵ It creates a kind of situation in which a win-win solution can rarely be achieved.

2.6.1 The Reality of Separation

When parents separate, one typically cares for the child while the non-resident parent can have access, depending on their willingness to accommodate such arrangements, pending the court's intervention where required. Depending on the age of the child it is the mother who generally maintains responsibility for parenting with minimal involvement from the other.²⁹⁶ In contrast, where the parents agree to a shared care arrangement, the child effectively has two homes. Whatever the arrangement the choice is between the child residing with one

²⁹³ Patrick Parkinson, Judith Cashmore and Judi P Single "The Need for Reality Testing in Relocation Cases" (2010) 44 Family Law Quarterly 1; Patrick Parkinson "Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation" (2008) 36 Federal Law Review 145; Patrick Parkinson "Family Law and the Indissolubility of Parenthood" (2006) 40 Family Law Quarterly 237.

²⁹⁴ Parkinson, Cashmore and Single, above n 293, at 1.

²⁹⁵ Parkinson, above n 293, at 146.

²⁹⁶ Peter Boshier "Have Judges Been Missing the Point and Allowing Relocation Too Readily?" (2010) 1 J Fam Law Pract 9 at 36.

parent with reasonable access/visitation for the other, or the child splitting his or her time living in two homes, one with each parent.

The ideal of shared care or co-parenting after separation supported by research that finds both men and women expressing strong egalitarian attitudes toward parenting.²⁹⁷ Men are getting more involved, and they want to spend more time with their children, indicating as some argue that we are moving toward a social ideal of the father as a co-parent.²⁹⁸ However, women continue to spend more time with children than men do, and it appears that the time men spend with children does not equate to care in absolute terms.²⁹⁹ That is, while women spend a great proportion of their care time in physical activities, fathers are more likely to engage in recreational activities.³⁰⁰

There is a contradiction between the reality of familial relationships we live with and the ideal that we live by. The ease in which intimate relationships are established often followed by children and the termination of the relationship is a manifestation of the flexibility underling the modern family. However, in spite of the self-interest, competitive and divisive behaviours associated with separation, we continue to uphold the ideal of the permanent nurturing and protective two-

²⁹⁷ See generally Lynne M Casper and Suzanne M Bianchi *Continuity and Change in the American Family* (1st ed, SAGE Publications, Inc, Thousand Oaks, Calif, 2001); Kathleen Gerson *The Unfinished Revolution: Coming of Age in a New Era of Gender, Work, and Family* (Oxford University Press, Oxford; New York, 2011).

²⁹⁸ See, Melissa A Milkie and others "Gendered Division of Childrearing: Ideals, Realities, and the Relationship to Parental Well-Being" (2002) 47 Sex Roles 21; Marilyn Coleman and Lawrence Ganong *Handbook of Contemporary Families* (SAGE Publications, Inc, Thousand Oaks, Calif, 2003).

²⁹⁹ Janeen Baxter "Patterns of Change and Stability in the Gender Division of Household Labour in Australia, 1986–1997" (2002) 38 Journal of Sociology 399; Lyn Craig and Michael Bittman *The Effect of Children on Adult's Time Use: An Analysis of the Incremental Time Costs of Children in Australia* (Social Policy Research Centre, Sydney, 2005); Casper and Bianchi, above n 297.

³⁰⁰ See for example, Lyn Craig *Caring Differently: A Time-Use Analysis of the Type and Social Context of Child Care Performed by Fathers and by Mothers* (2002).

parent family. And we will go to any lengths that they remain so, “even if it means mystifying the realities of family life”.³⁰¹

2.6.2 Shared Parenting

The legal framework of shared care in New Zealand provided by the Care of Children Act (COCA) 2004 specifies that both parents will have joint legal guardianship of their children in most circumstances.³⁰² Guardianship is broadly defined to include “having the role of providing day-to-day care for the child” and “contributing to the child’s intellectual, emotional, physical, social, cultural, and other personal development”.³⁰³ The assumption is that the involvement of both parents in a child’s life after separation will be in that child’s best interests,³⁰⁴ even if there is no requirement for the court to consider the child is spending equal or substantial time with both parents before any other care arrangements.³⁰⁵ The court, however, is obligated to ensure that any order conferring day to day care of the child to one parent should consider contact with the other parent.³⁰⁶

Evidently, COCA is silent on how shared care is to be facilitated nor does it offer suggestions on any ideal parenting allocation. The onus is on the parents to make

³⁰¹ Gillis, above n 288, at xv.

³⁰² Section 17 of the Care of the Children Act 2004.

³⁰³ Section 15(1)(a) and (b) of the Care of the Children Act 2004. In other words, guardianship is not confined to being involved in ““big picture” decisions (s 16(1)(c) and (2)(a)–(e)). A court order can, however, limit the legal responsibility of a guardian for the child’s day-to-day care when they are not in the role of providing day-to-day care (s 16(3))”.

³⁰⁴ Section 5(a) of the Care of the Children Act 2004 elaborating on principles relevant to the child’s welfare and best interests, provides that “the child’s parents and guardians should have the primary responsibility” for the child’s “care, development and upbringing.” Section 5(b) provides that children should have continuity in arrangements for their care, development and upbringing, “and the child’s relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents)....”

³⁰⁵ Julia Tolmie, Vivienne Elizabeth and Nicola Gavey “Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand” (2010) 24 New Zealand Universities Law Review 136 at 138.

³⁰⁶ Section 52 of the Care of the Children Act 2004.

their arrangement or, failing their agreement; the court will determine an arrangement by individual circumstances. In spite of this, there have been suggestions that family court officials and family law professionals emphasise equal shared care when care and contact for children are negotiated.³⁰⁷ If this is so, mothers who are compelled to facilitate a shared care regime from the outset are indeed destined for a no win situation. Any reluctance by the mother to accept shared care would be viewed with a moral consternation that warrants legal intervention.³⁰⁸ But once contact or shared care is legally established, no matter how superficial, it triggers the continuity principles in sections 5(d) and (e),³⁰⁹ which are difficult to disrupt in relocation cases.

2.6.3 Relationship after Separation

The principle that children should have an ongoing relationship with both parents after separation is only one of some important considerations set out in COCA. The other principles set out import issues relevant to the best interests of the child, such as the need to ensure the child's safety which might override this principle on any particular set of facts.³¹⁰ Furthermore, the Act's focus is concerned with the care of children as opposed to parental rights, to promote children's welfare and best interests,³¹¹ which must be the first and paramount

³⁰⁷ This has been supported by responses from some mothers that individual family law professionals (lawyers, counsellors, mediators and judges) appear to be adopting an idealistic approach to shared day-to-day care, viewing it as the presumptively right arrangement for all children and, on this basis, one the Family Court is likely to award, see Tolmie, Elizabeth and Gavey, above n 13 at 139.

³⁰⁸ Vivienne Elizabeth, Nicola Gavey and Julia Tolmie "Between a Rock and a Hard Place: Resident Mothers and the Moral Dilemmas they Face During Custody Disputes" (2010) 18 Fem Leg Stud 253 at 254.

³⁰⁹ Care of the Children Act 2004.

³¹⁰ Section 5(d) of the Care of the Children Act 2004.

³¹¹ Section 3 (1)(a), Care of the Children Act 2004.

consideration³¹² in any proceedings involving a child's day-to-day care and contact.

The scheme of this parental relationship illustrates the disconnection between its normative ideal and the reality we live with. The desirability of shared care arrangements and their outcomes for children where agreement out of court is achieved is unquestionable. However, in high conflict cases that require the court's intervention, outstanding personal issues can effectively impede the parents' ability even to consider the interests of the children. Even more so if the separation stemmed from infidelity or violently dysfunctional relationships in which the aggrieved party prefers nothing more than a clean break. Suffice it to point out that in the no-fault family court jurisdiction, the wrongdoer is not required to account for such behaviour but is at liberty to enforce the contact or care proviso for the best interests of the child. In effect, the relationship that supposedly ends with divorce or separation is being perpetuated by the interests of the child; the idealisation of that notion of durability often attached to traditional family values.

Where separating parents choose to be involved and are in agreement with a sustainable co-parenting regime the court's determination does not arise. But in high conflict disputes, access becomes a fundamental issue. Separated couples with outstanding personal issues become easily indigent, hurt, angry, bitter and unreasonable in a no-holds-barred contest, using the child as an object of

³¹² Section 4(1)(b) Care of the Children Act 2004 Interestingly the phrase "best interests" has been added to the concept of the child's "welfare" as the paramount principle in the Care of Children Act 2004. The concept of "best interests" has been interpreted by various judges as being different and adding something to the notion of the child's "welfare". The distinction drawn is that "welfare" covers the child's immediate needs for nurture, whereas "best interests" covers their longer term developmental needs. Examples given of the latter specifically tend to include the maintenance of their relationships with both parents and their wider family. See C v W (2005) 24 FRNZ 872 (FC) at [24] per Judge O'Dwyer.

leverage.³¹³ Where access and co-parenting is ordered through court intervention, the potential hazards for the child are a valid consideration. Gault J sums it up:³¹⁴

Any arrangement by which a child spends substantial time with each parent has the potential for harm to the child arising from inconsistent activities, influences and living patterns.... I think the difficulties are likely to be less when [the] primary responsibility for care of the child rests with one parent rather than with both.

2.6.4 The Welfare and Best Interests of the Child

The court is required to take into account the mantra of the child's welfare and best interests postulated on the purposive intent of protecting children with the relevant principles.³¹⁵ Furthermore, in the application of these principles "the best interests" of the child must be paramount and "a parent's conduct may be only considered as it is relevant to the child's interest".³¹⁶

It is often argued that welfare and best interests mean the same thing,³¹⁷ however, in *Director General of Social Welfare v L*,³¹⁸ Bisson J outlined the distinction between welfare and interests. Welfare connotes the duty and care of parents to nurture the child including the provision of shelter, clothing and food with love and affection that requires close and attentive physical/emotional connection.³¹⁹ Notably, welfare is a social construct incapable of objective measurement and

³¹³ Paul Geraghty *Family Law in New Zealand* (11th ed, Butterworths, Wellington, NZ, 2003) vol 1 at 347.

³¹⁴ *B v VE*, 1988 5 NZFLR 65 CA 70

³¹⁵ Sections 4, 5 and 6 of the Care of the Children Act 2004.

³¹⁶ Section 4(1) and (3) of the Care of the Children Act 2004.

³¹⁷ For instance, in *Director General of Social Welfare v L* Richardson P felt that the word "welfare" was a broad expression and the term "and interests" found in s11 (b) of the Adoption Act 1955 were merely added words of emphasis, cited in Mark Henaghan "Going, Going...Gone - To Relocate or Not to Relocate, That is the Question" (2010) 1 Journal of Family Law and Practice 30 at 34.

³¹⁸ *Director General of Social Welfare v L*, 2 NZLR 315.

³¹⁹ Henaghan, above n 317, at 325.

involves value judgements on what is beneficial or detrimental to a child's wellbeing, ranging from physical, psychological, emotional, social, cultural, to spiritual development.³²⁰ The effect of the court's assessment of welfare remains problematic with the view that the child is an entity of adult concern. The focus is on current circumstances thus the difficulty of following a child's path into adulthood.³²¹

As an example of the "interests" of the child, Bisson J referred to the consequences of terminating the parent/child relationship for the child. He noted the potential conflict between the welfare and best interests of the child in a situation where the relationship between a child and foster parent (welfare) may be sacrificed for the long term interests of the child – to have a relationship with a natural parent.³²² Interests designate the child as an autonomous individual with rights and interests distinct from that of adult carers but with a focus on the future. Thus, in the determination of what is in the best interests of the child, all relevant factors must be weighed, and it is by necessity a predictive assessment, a decision about the future.³²³ The dilemma for Judges is to arrive at a predictive conclusion based on a child's individual qualities, current circumstances and their relationship with parents and others.

³²⁰ Richard Chisholm "The Paramount Consideration" (10th National Family Law Conference, Melbourne, March 2002) at 2 at <http://www.familycourt.gov.au>, on 03/04/2013; Robert Ludbrook and Lex de Jong *Care of Children in New Zealand: Analysis and Expert Commentary* (Brookers Ltd, Wellington, 2005) at 11.

³²¹ Ludbrook and Jong, above n 320, at 11.

³²² Cited in Henaghan, above n 317, at 325.

³²³ *D v S* [2002], NZFLR 116 NZCA 116 (CA) at [33].

2.6.5 Paramount Consideration

To be considered as “first and paramount” does not imply “sole” consideration but rather the first to be considered and this, in turn, trumps all other considerations. Lord MacDermott in a House of Lords decision observed that “first and paramount consideration” includes:³²⁴

All the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare.... That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.

The central theme of COCA is the care and protection of children and how parents (or others) can meet those interests. The guiding principles provided in sections 4, 5 and 6 which must be taken into account. In fact, former Principal Family Court Judge, Peter Boshier referring to s 5(b) that “the child should have continuing relationships with both parents” indicated that parents should not relocate if to do so would be detrimental to the child’s relationship with the other parent.³²⁵ However, as argued by Henaghan, the consideration of continuing relationship with both parents is but one of the considerations that must be taken into account; but it cannot be raised to the level of an overriding consideration.³²⁶

The paramountcy principle as outlined by legislation, though definitive, lacks the descriptive precision necessary for conceptual clarity. It fosters an ideal that we live by, contrary to the reality we live with. In that, the decision to separate is often

³²⁴ *J vs C* [1970], AC 668 UKHL 4, 710, at 820.

³²⁵ Peter Boshier “Relocation Cases; An International View from the Bench” (2005) 5 New Zealand Family Law Journal 77 cited in; Henaghan, above n 317, at 35.

³²⁶ Henaghan, above n 317, at 35.

made without due consideration of the welfare and interests of the child. Even in the aftermath of separation the child's interests to continue a relationship with both parents cannot be invoked to prevent the relocation of the non-carer parent. In contrast, the parent responsible for day-to-day care is required to facilitate contact with the other parent, to forego freedom of movement and choices that may even affect new relationships.

The reality of family life we live with is characterised by divorce, remarriage, blended families, single parenthood, joint custody, abortion, domestic partnership, two-career households, and the like but we still yearn nostalgically for the durability of familial relationships that we have lost.³²⁷ Historian John Gills aptly puts it as:³²⁸

...the anticipation and memory of family mean more to people than its immediate reality. It is through the families we live by that we achieve the transcendence that compensates for the tensions and frustrations of the families we live with.

We cling to the paramountcy mantra as more compelling with its pivotal imaginary elements that separated parents can put their personal lives on hold for the interests of the child to maintain contact with both parents. We treat as secondary the need of separated parents to move on with their lives socially and economically, particularly where job opportunities, new relationships or new families are concerned.

2.6.6 Assessing the Best Interests of the Child

In assessing the welfare and best interests of the child, three different approaches can be identified from decisions in relocation cases. The first approach considers

³²⁷ Gill Jagger and Caroline Wright *Changing Family Values: Difference, Diversity and the Decline of Male Order* (Routledge, London, 2003) at 189.

³²⁸ At 189.

the principle as contingent to the welfare of the primary caregiver and his or her ability to provide a reasonable standard of care. Thus, to restrict the movement of the caregiver and confine them to an arduous existence could be detrimental to the child. The second approach views the interests of each child as unique, which must be assessed on individual merits. It involves identifying and weighing up the relevant factors on a case by case basis in recognition of the variety of family circumstances. The third approach focuses on enabling the child to have a relationship with both parents, which effectively militates against relocation.³²⁹

To illustrate the three approaches I will discuss the leading New Zealand case on relocation: *Kacem v Bashir*,³³⁰ its progress through the entire Court hierarchy and the different judicial opinions it generated.³³¹ The case involved two young Muslim girls (aged seven and a half and nearly six at the time of the Supreme Court hearing) and the issue of where they should live. The mother wanted to relocate to Australia with the two children to be close to her family and to reduce the conflict between the father and herself. However, the father wanted the children to remain living in New Zealand because for legal reasons he cannot travel to Australia.

2.6.6.1 The Family Court Decision

In the Family Court,³³² the mother's application for relocation to Australia was denied. Judge de Jong, having identified and weighed the relevant factors, considered that the reasons against relocation outweighed those favouring a move.³³³ The judge pointed out that established face to face contact with the

³²⁹ Discussed in Boshier, above n 325.

³³⁰ *Kacem v Bashir*, [2011] 2 NZLR 1 112.

³³¹ As analysed in Mark Henaghan "Case Note: *Kacem v Bashir* Relocation in the Supreme Court of New Zealand The Best Interests of the Child?" (2010) 6 N Z Fam Law J 375.

³³² *B v K*, No FAM-2006-004-1761 (FC 5 September 2008).

³³³ At [48] Although the Australian proposal may result in continuity and stability in the children's care it is most unlikely to promote ongoing parental consultation and co-operation, or strengthen

children would be affected because the father's legal status prevents him from visiting Australia.³³⁴ Judge de Jong also raised his concern about the mother's level of insight and ability to provide future stability, given that she had disrupted the status quo by moving on several occasions.³³⁵

It is argued, however, that the judge failed to explore the possibility of the girls travelling to New Zealand for visitations rather than focusing on the father's inability to travel to Australia. Furthermore, the mother's previous moves may have been an attempt to alleviate the stressful high conflict relationship she had with the children's father. The fact that she kept returning to New Zealand indicated her ongoing concern for the welfare of the children. In any event, the decision rested on the judge's view that "it is in the children's interest and welfare for them to live in New Zealand where both parents can care for and participate in their daily lives".³³⁶

2.6.6.2 The High Court Decision

The decision was reversed on the mother's appeal to the High Court,³³⁷ which allowed her relocation to Australia with the two children. In making this decision, the judge recognised the negative effect of the relocation in limiting the children's face-to-face relationship with their father. However, Courtney J focused on the detrimental effects of the high conflict between the two parents and how this has affected, and will affect, the children in the future if they remain in New Zealand.³³⁸ Apart from the different approaches adopted by the two judges, it is

relationships between the children and paternal family in a way which allows both families to be a part of the children's lives in a real and significant way."

³³⁴ At [49].

³³⁵ At [49].

³³⁶ At [50].

³³⁷ *K v B*, 27 FRNZ 417 (HC 2009).

³³⁸ At [59] "I have reached the conclusion that remaining in New Zealand carries an unacceptable risk of damage to the children as a result of the conflict between their parents. In my judgment

interesting to observe that the male judge (de Jong) ruled for the non-relocating parent (father) while the female judge (Courtney J) empathised with the relocating parent (mother).

2.6.6.3 The Court of Appeal Decision

The father's appeal to the Court of Appeal³³⁹ focused on the approach to be adopted on an appeal from the Family Court. In particular, the application of the principles enshrined in s 5 of the Care of Children Act 2004, the role of parental conflict and whether Courtney J had given appropriate weight to all relevant factors in reaching her decision.³⁴⁰ The appeal was allowed, and the court found that it was in the children's best interests to remain living in New Zealand.³⁴¹ The decision turned on the strength of an updated psychological report about the children (that was not available to the High Court). The report suggested that while the "long-running litigation posed increased risk to the children's well-being" there was "some indication that the parents were doing better in sheltering their children from the conflict between them."³⁴² The report concluded that it was in the interests of both children to maintain meaningful relationships with both parents³⁴³ emphasising the settled shared parenting regime that was in place.³⁴⁴

moving to Australia ultimately carries less risk because the girls' attitude to their father and relationship with him are more likely to remain positive than if they remain in New Zealand and are exposed to the ongoing and damaging conflict between their parents. I accept that there will be disruption and a sense of loss, especially for [the oldest child]. But if there is provision made for regular contact and visits with [the father], the long term prospects for both children are better if they are living in a secure extended family environment free of conflict than growing up amid the kind of destructive conflict to which they are now exposed."

³³⁹ *Bashir v Kacem*, [2010] NZFLR 865 (CA 2010).

³⁴⁰ At [26].

³⁴¹ At [42].

³⁴² At [44].

³⁴³ At [44].

³⁴⁴ At [62].

The Court of Appeal acknowledged the likely adverse effects of the ongoing parental conflict on the children, as well as the difficulties that the mother would face from having to remain in New Zealand without the support of her family.³⁴⁵ However, the Court found in favour of the psychological report that a relocation would disrupt the shared parental regime in place and significantly reduce the children's relationship with their father.³⁴⁶ Thus, the Court of Appeal held that factors against relocation outweighed factors favouring relocation.³⁴⁷

The question remains: who decides what is in the best interests of the children? And on what basis is that decision made? The Court, in this case, made its decision based on the observation contained in the psychological report. This observation was given more weight than the personal feelings of the children which are required to be considered under s 6 of COCA.³⁴⁸ As such, the Court must take into account the expressed views of the children supporting the relocation to Australia.³⁴⁹ Unfortunately, the Court of Appeal dismissed those views based on the children's "cognitive and emotional maturity" and "limited ability to project

³⁴⁵ At [62].

³⁴⁶ At [62].

³⁴⁷ At [66] and [67] stating that: "In the present case, in part because of the length of the litigation, the girls have been the subject of shared parenting arrangements that appear to be working for them, and have become settled at school. Given the desirability of preserving continuity for the children and the importance of strong child/parent relationships, we do not think the risks associated with parental conflict, or the risk that the mother might become isolated to the extent that it affects her ability to be a good parent, are sufficient to justify disturbing what has become a good, working solution for the children [...] In these circumstances, we consider that it is in the best interests of the girls that they remain in New Zealand."

³⁴⁸ Section 6(2) of Care of the Children Act 2004 states: In proceedings to which subsection (1) applies: (a) a child must be given reasonable opportunities to express views on matters affecting the child; and (b) any views the child expresses (either directly or through a representative) must be taken into account.

³⁴⁹ According to Court of Appeal, the (then) six-year-old child in *Bashir v Kacem* "expressed a clear wish to reside in Australia" and the younger five-year old child appeared to be "fairly positive about relocation to Sydney".⁵⁸ Without taking account of the children's views the Court of Appeal dismissed the views based on the children's "cognitive and emotional maturity" and "limited ability to project into the future"; *Bashir v Kacem*, above n 47 para [45].

into the future”.³⁵⁰ In effect, the children’s perspective were consistent with the mother’s feelings of isolation from her family in Australia, which the Court failed to consider alongside other factors rather than merely dismissing their views as “immature.”³⁵¹

The Court, it can be argued further, placed undue emphasis on the assertion made by the psychological report that the parents were “making greater efforts to shelter their daughters from exposure to their hostility to one another.”³⁵² The efforts made in this regard do not negate the fact that the children may have been exposed to the high conflict in the past and will be at risk to psychological abuse that they will see or hear in the future. The report did not assess how the children felt about the ongoing conflict between their parents nor indeed whether the risk of psychological consequences for the girls no longer existed.

2.6.6.4 The Supreme Court Decision

In appealing to the Supreme Court,³⁵³ the mother argued that the Court of Appeal erred in holding there was some weighting or priority that favoured the principles contained in s 5(b) and (e) of COCA. However, the Supreme Court unanimously dismissed the appeal, which means the children and their mother remain living in New Zealand, without extended family support.

The majority (Blanchard, Tipping and McGrath JJ) concluded that the Court of Appeal did err in their interpretation of s 5, but held that the error was not material. The majority held that none of the principles contained in s 5 have any greater weight than the others in the abstract but rather that “individual principles

³⁵⁰ At [45].

³⁵¹ Henaghan above n 331 at 378.

³⁵² *Bashir v Kacem*, above n 339, at [44].

³⁵³ *Kacem v Bashir*, above n 330.

may have a greater or lesser significance in the decision-making process, depending on the circumstances of individual cases.”³⁵⁴

Notably, the Supreme Court focused on the interpretation and application of ss 4 and 5. Subsequently, the Court did not analyse the proper consideration in compliance of s 6 which requires the children’s views to be ascertained, taken into account and given the appropriate weight.³⁵⁵

2.6.7 Paramount or Primary Consideration

The term “first and paramount consideration” evokes a sense of finality in the choice to be made amongst competing interests, that they trump all other considerations.³⁵⁶ In the wake of a family break-up, competing legal interests are inevitable, but the rights of the father and mother are considered relevant only as they affect the welfare of the child. It implies that the child’s interests can be viewed without regard to the interests and welfare of the primary caregiver and other members of the family.³⁵⁷ It ignores the fact that children exist in families and communities where their safety and well-being is contingent on the child’s relationship with the primary caregiver and his or her ability to provide for the needs of the child. It follows, therefore, that in reality the best interests of the child is a primary consideration; the first amongst other considerations including the rights and obligations of the parents.

The New Zealand Court of Appeal noted that the Court is required to make “a decision about the future” in regards to relocation: “it is not a reward for past

³⁵⁴ At [19].

³⁵⁵ Henaghan, above n 331, at 378.

³⁵⁶ *D v S*, NZFLR 116 at para 30.]

³⁵⁷ Jonathan Herring “The Human Rights Act and the Welfare Principle in Family Law - Conflicting or Complementary?” (1999) 11 Child Fam Law Q 223 at 225.

behaviour [and] there is no room for priori assumptions.”³⁵⁸ Judges, however, do not have crystal balls to see into the future and are susceptible to the influence of personal perspectives and experience. Even more so, when rules, presumptions or burdens are rejected for a checklist of non-prioritised principles based on how individual judges see the facts.³⁵⁹ Some Family Court Judges have children of their own, and it is likely that their wider social family or their work experience in which they come into contact with a broad range of children in a variety of family and social situations, can influence their assessments.³⁶⁰

Indeed, the notion of the child’s welfare has been criticised as a “pre-scientific myth” or “the personal values and prejudices of the decision maker dressed up as objective fact.”³⁶¹ Beneath the veneer of open-ended, multi-factor, approach, “value choices are being made based on various ways families are seen after a break-up” and how issues are framed in relocation cases.³⁶² The welfare of the child pertains to benefits and detriments which require prioritising, in which some factors are given more weight over others.³⁶³ When prioritising is left to individual judges the “assessment of the facts, and...conclusion as to which alternative was best... may well be the subject of differing opinions”.³⁶⁴ This is an observation supported in *D v S*,³⁶⁵ in which the New Zealand Court of Appeal accepted that “while seeking total objectivity, we are all influenced to some extent by our own perspectives and experience”.

³⁵⁸ *D v S*, above n 846, at [33]

³⁵⁹ Mark Henaghan “Relocation Cases - The Rhetoric and the Reality of a Child’s Best Interests - A View the Bottom of the World” (2011) 23 Child Fam Law Quarterly 226 at 227.

³⁶⁰ Ludbrook and Jong, above n 320, at 11.

³⁶¹ At 11.

³⁶² Henaghan, above n 359, at 227.

³⁶³ Ludbrook and Jong, above n 320, at 11; Henaghan, above n 359, at 227.

³⁶⁴ *Standniczenko v Standniczenko*, NZFLR 493, 501.

³⁶⁵ *D v S* [2002], above n 323.

The conceptualisation of interest which is “the first and paramount consideration” projects the assumption that the child’s interest is separate from that of the parents. In reality, such determination is based on some factors related to the rights and obligation of parents and the capacity of the primary caregiver to contribute to the child’s ultimate safety and well-being.³⁶⁶ The Concise Oxford Dictionary defines welfare as the “health, happiness and fortunes of a person”. In contrast, interest is defined as the “advantage or benefit of someone”. Therefore, in determining what is in the best interests of the child, all relevant factors must be weighed, and it is by necessity a predictive assessment, a decision about the future.³⁶⁷

The future, however, is fraught with uncertainties. As Janus Korczak wrote: “to reform the world means to reform the methods of bringing up children” and “children are not the people of tomorrow they are people of today”.³⁶⁸ Preferably their current welfare or circumstances should be the starting point; the impact of the proposed change to the status quo is the fundamental question. Only then should predictive assessment be applied to support a position rather than being the locus of determination.

2.7 Conclusion

The family is a dynamic institution susceptible to change in several ways. It is more than the sum of its parts, more than the static aggregate of the individual personalities who make up its membership. The members interact in many subtle

³⁶⁶ US Department of Health & Human Services “Determining the Best Interests of the Child: Summary of State Laws” (2010)
<https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm>.

³⁶⁷ *D v S*, above n 32, at [33].

³⁶⁸ Janusz Korczak and EP Kulawiec *Janusz Korczak: The Child’s Right to Respect ; Janusz Korczak’s Legacy Lectures on Today’s Challenges for Children* (Council of Europe, Strasbourg, 2009) at 7.

ways which give a particular ‘feel’ or atmosphere to a family; they have different and changing roles which in turn change the ‘personality’ of the family as time progresses. They have their success and failures which reflect on the family; alliances form, dissolve, and reform. The family thus has its life cycle from ‘infancy’ to ‘old age’ with associated changes in size, ‘shape’ and function.³⁶⁹

In spite of changes in forms and structures the persistent ideal “family, we live by” continues to be sculpted on the model of the heterosexual couple organised around the cultural legacy of the patriarchal authority and the post-industrial division of labour. The roles of procreation and socialisation remain the centrepiece of family law, driven by the sentiments of ideal family relationships: trust, loyalty, transparency, cooperation, care and truth telling. It is the notion of the family as a source of safety, support and love in a warm enclave governed by an ethic of caring, a haven protecting its members from intrusions by third parties.³⁷⁰

In contrast the reality of “the family we live with” embraces diverse forms and structures where family secrets abound and lies or deception are the norms rather than the exception. The socialisation role is played out with the ideal of care, love, protection and cooperation simultaneously with competition and aggression, within the family as a locus of struggle for individuals with different roles, expectations and interests. The cosy image of the family as a nurturing organisation and a haven of safety is shattered more often than we care to think, especially when aggression erupts into violence. Experienced workers have made the point that people are more likely to be killed, and physically assaulted in their homes by other family members than anywhere else, or by anyone else in society.

³⁶⁹ Martin Herbert, *Psychology in Action: Working With Children and Their Families* (British Psychological Society and Routledge Ltd, Leicester, 1988) at 36–37.

³⁷⁰ Frances E Olsen “The Myth of State Intervention in the Family” (1984–1985) 18 U Mich JL Reform 835 at 839.

Three groups of people are particularly vulnerable: children, wives and the elderly.³⁷¹

In the mayhem of family disputes the Family Court is expected to provide a reconciliatory mechanism within a no-fault jurisdiction. The idea is to avoid the adversarial slant common in criminal litigation with an emphasis on its therapeutic function. Reconciliation, cooperation and healing may be commendable terms but can be an anathema to couples in the throes of separation and contact disputes. These disputes often encompass accusations of abuse and assault (physical, psychological or sexual) effectively polarising the parties further towards adversarial positions incapable of reconciliation. In such a contentious environment the notion of shared parenting, is nothing more than an attempt to preserve as much as possible the cultural myth of the family we live by through legal devices.

³⁷¹ Martin, above n 369, at 38.

CHAPTER 3 - PERSONAL RELATIONSHIPS: PERCEPTION, UNDERSTANDING AND INTERACTION

3.1 Introduction

This chapter provides the foundation for the framework of human behaviour, which is fundamental to our understanding of domestic violence. What a person does and says reflects physical and mental activity in the person's observation of the world around him or her. But the question is, why do we do what we do? Complexities underlie human existence; "people are complex and so is the world in which we live".³⁷² We cannot look at specific problems in isolation because our lives are interconnected and the environments which are also part of us, affect our lives.³⁷³ In effect, human behaviour is best understood as a system "a set of things or parts forming a whole; a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose."³⁷⁴ As John Donne puts it; "no [behaviour] is an island, entire of itself; every [behaviour] is a piece of the continent, a part of the main".³⁷⁵

The significance of domestic violence as an event is about the focus at the time of assessment and "the interpretation one places on events depends on where and who one is, and the perspective one has upon the focal system".³⁷⁶ It is important, therefore, that we discuss and investigate our comprehension of what and who

³⁷² Esther Urdang *Human Behavior in the Social Environment* (3rd ed, Routledge, London, 2015) at 3.

³⁷³ At 3.

³⁷⁴ Irl E Carter *Human Behavior in the Social Environment* (6th ed, Transaction Publishers, Piscataway, NJ, USA, 2011) at xvii.

³⁷⁵ At xvii.

³⁷⁶ At 7.

we are? Why we do the things we do? Or what drives human behaviour and moral values?

I will also consider and discuss deception, both within family relationships and within the legal system, how it is perceived and its role in the reality of daily life. The thesis is grounded on the notion that family law is based on aspirational family criterion, the “family we live by” which is often different from the reality of the “family we live with”. As the normative force of the law is brought to bear, backed by the influence of expert knowledge, the voice of the people involved in family disputes become stifled.

The discussion will also cover how people make inferences about their own and other people’s behaviour, the antecedents and consequences of deception. As individuals, the underlying theme is that we live our lives playing dual personalities: the self as known (an object) and the self as the knower (awareness), two separate things simultaneously operating within the self.³⁷⁷ There is an extension of duality to the “person we live with” and the “person we live by”. At any point, we may be portraying a configuration of the self that is synonymous with the performed role while simultaneously upholding the essence of what we think others think we are.³⁷⁸ Life is about relationships involving interaction with others on a daily basis; the “self” as a multi-dimensional individual assumes different roles separately or simultaneously according to circumstances.

³⁷⁷ George Herbert Mead *Mind, Self, and Society*, Charles W Morris (ed) (University of Chicago Press, 2009) at 137–38; Andrew J Weigert and Viktor Gecas “Self” in Larry T Reynolds and Nancy J Herman-Kinney (eds) *Handbook of Symbolic Interactionism* (Alta Mira Press, Walnut Creek, CA, 2003) 267 at 267.

³⁷⁸ Sidney J Shrauger and Thomas J Schoeneman “Symbolic Interactionist View of Self-Concept: Through the Looking Glass Darkly” (1979) 86 *Psychological Bulletin* 549 cited in; Graham M Vaughan and Michael A Hogg *Introduction to Social Psychology* (Pearson/Prentice Hall, Frenchs Forest, NSW, 2005) at 75.

3.2 *Understanding, Comprehension and Knowledge*

The eye that sees is not a mere physical organ, but a means of perception conditioned by tradition in which its possessor has been reared.³⁷⁹ However, the limited scope of this thesis cannot do justice to the extensive scholarship on this subject and the contribution of classical thinkers like Plato, Aristotle, Descartes, Locke, Berkeley or Hume. Nonetheless, I wish to undertake a brief analysis of the relationship between human knowledge, values, beliefs, and actions that underscore human behaviour and inter-relationship.

Our capacity to know flows from our ability to form an accurate representation of what we perceive; so to understand the probability and nature of knowledge is to comprehend the way in which the mind can create or fashion such representations.³⁸⁰ Indeed, Antonio Damasio lamented “what would be more difficult than to know how we know?”³⁸¹ For life is a philosophical enterprise that evokes innumerable thoughts and assumptions; presuppositions of what is real, what knowledge is, how the mind works, who we are, and how we should act.³⁸²

3.2.1 **Rational Being**

The term rational, for the purpose of this discussion, simply implies that an action is rational when it is motivated by reason and understandable by reference to that reason.³⁸³ Bearing in mind the longstanding philosophical tradition that reason is what enables the human mind to go beyond mere perception, habit and

³⁷⁹ Ruth Benedict cited in: Mlodinow, above n 22, at 30.

³⁸⁰ Richard Rorty *Philosophy and the Mirror of Nature* (Princeton University Press, Princeton, 1979) at 3.

³⁸¹ Antonio R Damasio *The Feeling of What Happens* (1st ed, Harcourt Brace, New York, 1999) at 4.

³⁸² George Lakoff and Mark Johnson *Philosophy in the Flesh* (Basic Books, New York, 1999) at 9.

³⁸³ Samuel Scheffler *Human Morality* (Oxford University Press, New York, 1992) at 52.

instinct.³⁸⁴ In legal parlance, it pertains to a moral, logical, and deductive rationality that demands much more from human behaviour than it can usually deliver.

The idea that reasoning is our most virtuous attribute supported by philosophers (from Plato to Kant to Kohlberg) asserts that a better understanding of moral philosophy and the ability to exercise reason contributes to good moral behaviour.³⁸⁵ This reasoning implies that moral philosophers who study reason and ethical principles will be more virtuous than others. Schwitzgebel however, in his survey of moral philosophers, concluded that expertise in moral reasoning does not appear to improve moral behaviour.³⁸⁶ French cognitive scientists Hugo Mercier and Dan Spencer carried out a review of the vast research literature in motivated reasoning (social psychology) and the biases/errors in reasoning (cognitive psychology). They found that reasoning was best understood in the context of arguments, for the purpose of persuasion and manipulation in discussions with other people.³⁸⁷

Cognitive research also indicates that understanding a simple utterance involves complex forms of thought, which is carried out automatically and without noticeable effort at the subconsciousness level.³⁸⁸ Similarly, the action of pulling the hand away from a hot element on a stove, performed without effort, is underpinned by complex neurological activities. The cognitive unconscious is vast

³⁸⁴ Hugo Mercier and Dan Sperber "Why Do Humans Reason? Arguments For an Argumentative theory" (2011) 34 Behav Brain Sci 57 at 57.

³⁸⁵ Jonathan Haidt *The Righteous Mind* (Vintage Books, New York, 2013) at 103; Eric Schwitzgebel and Joshua Rust "The Self-Reported Moral Behaviour of Ethics Professors" [2011] Unpublished MS, University of California at Riverside at 3–4.

³⁸⁶ Haidt, above n 385, at 104; Schwitzgebel and Rust, above n 229, at 5; Eric Schwitzgebel and others "Ethicists' Courtesy at Philosophy Conferences - Experimental Philosophy" [2011] Unpublished MS, University of California at Riverside at 15.

³⁸⁷ Hugo Mercier and Dan Sperber "Why Do Humans Reason? Arguments For an Argumentative Theory" (2011) 34 Behav Brain Sci 57 at 57; Haidt, above n 385, at 104.

³⁸⁸ Lakoff and Johnson, above n 382, at 11.

and intricately structured, comprising automatic cognitive operations and implicit knowledge.³⁸⁹ As such, we perceive the world around us regarding conceptual systems that reside mostly in our cognitive unconscious.³⁹⁰ Therefore, values and beliefs that we hold are contextual to personal experience (about those held by previous generations) with tacit reference only to the criterion of reason or rationality.

The myth of the rational being illustrated by psychological studies suggests that humans do not reason very well, failing at simple logical tasks; and being subject to irrational biases in decision making.³⁹¹ As human beings, we use reasoning or deductive logic only moderately, but we are good at recognising similar patterns: a behaviour that is obviously beneficial.³⁹² We hardly pause to reason or use deductive logic as we go about our daily lives; our subconscious direct most mundane actions like walking or driving.³⁹³ It is when we encounter something novel or different that we apply logical deduction; but even then we search for patterns to simplify the problem via temporary constructs, internal models or schemata to work with.³⁹⁴

3.2.2 Consciousness

The nature of consciousness, whether physical or mental, is far from settled but for this discussion, it is taken to denote an awareness of the self and the world around us. At this most basic level consciousness is an awareness of our thoughts,

³⁸⁹ Mlodinow, above n 22, at 15–16.

³⁹⁰ Lakoff and Johnson, above n 382, at 13.

³⁹¹ Mercier and Sperber, above n 228, at 58; JS Evans “Logic and Human Reasoning: An Assessment of the Deduction Paradigm” (2002) 128 *Psychol Bull* 978; Daniel Kahneman, Paul Slovic and Amos Tversky *Judgment under Uncertainty* (Cambridge University Press, 1982) at 190 & 198.

³⁹² W Brian Arthur “Inductive Reasoning and Bounded Rationality” (1994) 84 *Am Econ Rev* 406 at 406.

³⁹³ Philip N Johnson-Laird “Mental Models and Human Reasoning” (2010) 107 *PNAS* 18243.

³⁹⁴ Arthur, above n 392, at 406.

memories, feelings, sensations and environment.³⁹⁵ It “allows us to know sorrow or know joy, to know suffering or know pleasure, to sense embracement or pride, to grieve for lost love or a lost life.”³⁹⁶

Consciousness as the pathway to knowledge is due to the faculty of the senses that helps us see colours, hear sounds, taste flavours, smell odours “and through touch [be] aware of such qualities as heat, coldness, hardness, softness, wetness and dryness.”³⁹⁷ This can be taken a step further to denote consciousness as the key to life experience, for better and for worse, our beginner’s licence into recognising:³⁹⁸

All about the hunger, the thirst, the sex, the tears, the laughter, the kicks, the punches, the flow of images we call thought, the feelings, the words, the stories, the beliefs, the music and the poetry, the happiness and the ecstasy.

3.2.3 Social Identity

Modern society is structured into distinctly functional units where people see themselves within a hierarchy of different groups that change periodically over a lifetime.³⁹⁹ Changes in circumstances may shift group affiliation, for example, if we form a relationship, have children, separate or become mentally incapacitated the groups we belong to change by default.⁴⁰⁰ In a lifetime we occupy different positions such as a child, adolescent, parent, worker, etc. and we see ourselves mostly as being associated with multiple groups.⁴⁰¹

³⁹⁵ Kendra Cherry “What is Consciousness” About.com Psychology at <http://psychology.about.com/od/statesofconsciousness/f/consciousness.htm> on 11/02/2014.

³⁹⁶ Damasio, above n 381 at 4

³⁹⁷ Robert Bolton and Alan Code “Aristotle on Knowledge” in Stephen Hetherington (ed) *Epistemology: Key Thinkers* (Continuum, London ; New York, 2012) 50 at 50.

³⁹⁸ Damasio, above n 381, at 5.

³⁹⁹ Monica Greco and Paul Stenner *Emotions* (Routledge, London ; New York, 2008) at 3.

⁴⁰⁰ Bruce Hood *The Self Illusion* (Oxford University Press, Oxford, 2012) at 194–195.

⁴⁰¹ At 195.

Irrespective of choice we are all members of different groups. As social animals, we cannot help but hang out with others; the family, friends, co-workers, the gang, teammates and even countrymen. No one is an island, and there is a drive deep within us, compelling us to be accepted by others.⁴⁰² We are pre-occupied with what others think; as Philippe Rochat points out, “to be human is indeed to care about reputation”⁴⁰³ and to be ostracised from the group is the worst fate, which he calls “psychological death.”⁴⁰⁴ We constantly change the groups we belong to as we join, exit or swap groups that define us, and simply belonging to one influences how we feel about ourselves and others not in the group.⁴⁰⁵

3.2.4 How the Tribe Made Me

Our sense of self as generated by the mind is the product of socialisation. In being social, however, our conception of the self is profoundly influenced by the presence of others and our need to fit in with them, reflecting the theory that other people trigger our emotions reflexively.⁴⁰⁶ We become aroused in a crowd and the limbic system that controls our behaviour, responds automatically to the presence of others. When people look at us, we become aroused by the focus of their attention.⁴⁰⁷ To join or avoid others is arguably the basic function of emotions that motivate social behaviour.⁴⁰⁸ Thus the limbic system “controls how we interact with others – whether we fight them, flee from them, or fornicate with them.”⁴⁰⁹

⁴⁰² At 191.

⁴⁰³ Philippe Rochat *Others in Mind* (Cambridge University Press, Cambridge ; New York, 2009) at 17.

⁴⁰⁴ At 224.

⁴⁰⁵ Bruce Hood, above n 400, at 193.

⁴⁰⁶ Robert B Zajonc “Social Facilitation” (1965) 149 *Science* 269.

⁴⁰⁷ Gillian Porter and others “Females, But Not Males, Show Greater Pupillary Response to Direct-than Deviated-Gaze Faces” (2006) 35 *Perception* 1129.

⁴⁰⁸ Bruce Hood, above n 400, at 185.

⁴⁰⁹ At 184–185.

The downside of blending into the crowd or a group is anonymity: the loss of personal recognition or individuality. In such a situation the personal values of the individual are often overruled by group action, violence or stupidity. The image of the young female guard Private Lynndie England photographed grinning as she led a naked male prisoner around in a dog collar at Abu Ghraib prison in Iraq, shocked the world. There was nothing extraordinary about her to suggest that she was sadistic,⁴¹⁰ she was a simple “normal” young woman who when questioned described the abuse and torture as “just fun and games.”⁴¹¹ In a group an individual tends to lose some degree self-awareness and self-restraint and is liable to do things he/she would not otherwise do.

In a group setting we only try harder if the group appreciates our efforts. This need for recognition also explains why groups can become more polarised on issues that would normally generate only moderate views.⁴¹² Accountability rests on personal identity and as such anonymity among outsiders appears to be the crucial factor in greater antisocial behaviour. For example, the mob mentality of riots, lynching, and hooliganism are thought to thrive through the process of de-individuation.⁴¹³ In contrast, the more that we lose anonymity, the more we conform and behave.⁴¹⁴ The Stanford Prison Experiment,⁴¹⁵ for example, concluded that:⁴¹⁶

⁴¹⁰ At 205.

⁴¹¹ Philip G Zimbardo *The Lucifer Effect* (Random House, New York, 2008) at 19.

⁴¹² Serge Moscovici and Marisa Zavalloni “The Group as a Polarizer of Attitudes” (1969) 12 *Journal of Personality and Social Psychology* 125; Bruce Hood, above n 400, at 185.

⁴¹³ FJ Cannavale, HA Scarr and A Pepitone “Deindividuation in the Small Group: Further Evidence” (1970) 16 *Journal of Personality and Social Psychology* 141.

⁴¹⁴ Bruce Hood, above n 400, at 187.

⁴¹⁵ The Stanford experiment investigated the consequences of simulating incarceration scenario using ordinary students playing cops and robbers. The volunteers were divided into two groups; guards and prisoners. The guards wore shades and prisoners had bags around their heads whenever they came out of their cells. The experiment went out of control when guards began to torment and torture inmates even though they were not instructed to do so and explains unbelievable examples of human cruelty.

⁴¹⁶ Zimbardo, above n 411, at 301.

Anything, or any situation that makes people feel anonymous, as though no one knows who they are or cares to know reduces their sense of personal accountability, thereby creating the potential for evil action.

3.2.5 The Concepts We Live By

Inextricably linked to socialisation and self-identity is our perception of the world around us. Arguably making sense of what we see pertains to the image or knowledge stored in our sub-conscious. Not only is our intellect governed by concepts but our daily lives to the most mundane detail; “what we perceive, how we get around in the world, and how we relate to other people.”⁴¹⁷ As suggested by Lakoff and Johnson, our conceptual system is fundamentally metaphorical in nature and is pervasive throughout everyday life, in language, thought and action. In attending to daily routine matters we simply think and act more or less automatically along established lines.⁴¹⁸

Lakoff and Johnson argued by linguistic evidence that most of our ordinary conceptual system is metaphorical in nature. Their example in the concept of “argument” and the metaphor of “argument is war” clarifies this point:⁴¹⁹

ARGUMENT IS WAR

Your claims are indefensible.

He attacked every weak point in my argument.

His criticisms were right on target.

I demolished his argument.

I have never won an argument with him.

⁴¹⁷ Lakoff and Johnson, above n 24, at 3.

⁴¹⁸ At 3.

⁴¹⁹ At 4.

You disagree? Okay, shoot!

If you use that strategy, he will wipe you out.

He shot down all my arguments.

Notably, in an argument we perceive an opponent, strategies, attacking, defending, and changing positions for a new line of attack, all for winning or losing. In other words, skilled arguers are not after the truth but after arguments supporting their views or positions.⁴²⁰ This point is pertinent to the analyses of “deception” and “aggression”, both of which utilise the metaphor “argument is war.” Regarding family disputes our conception of deception and aggression as they apply in our daily lives is crucial to understanding what transpires in the family court system.

3.3 *Morality*

The traditional view of morality was best summed up by Darwin when he wrote in 1871: “I fully ...subscribe to the judgement of those writers who maintain that of all the differences between man and lower animals the moral sense of conscience is by far the most important.”⁴²¹ Serious thinkers from Aristotle to Adam Smith accepted the existence of a natural moral sense in that, aspects of our moral life are universal.⁴²² The moral sense refers to the universal disposition to evaluate some behaviour or actions as virtuous, acceptable, or morally good and others as

⁴²⁰ Mercier and Sperber, above n 384.

⁴²¹ “Immanuel Kant, Groundwork for the Metaphysics of Morals (1785)” Harvard University’s Justice with Michael Sandel <<http://www.justiceharvard.org/resources/immanuel-kant-groundwork-for-the-metaphysics-of-morals-1785/>>, quoted in; Francisco J Ayala “The Difference of Being Human: Morality” (2010) 107 Proceedings of the National Academy of Sciences of the United States of America 9015.

⁴²² James Q Wilson “What is Moral, and How Do We Know It?” (1993) 95(6) Commentary 37 at 37.

unacceptable, evil or morally bad.⁴²³ By and large, the classical underpinnings of morality pertains to judging actions as either right or wrong regarding consequences to others; and a moral action is determined by reason, not by our sensual impulses.⁴²⁴ Morality refers to the domain of “prescriptive judgements of justice, rights and welfare [about] how people ought to relate to each other.”⁴²⁵

Rather than being bogged down with definitions at this stage it is helpful first to consider how humans acquire and develop a sense of fairness, or come to know right from wrong. In other words, where does morality come from? The two main positions in this context are nature and nurture. Nature argues that morality is innate, an intrinsic property of our mind.⁴²⁶ Nurture, on the other hand, implies that we acquire morality through learned experience during childhood, in which adults prescribe what is right and wrong.⁴²⁷ A third position, however, propagated by moral psychology is “rationalism”: building on the work of Jean Piaget that morality is neither innate or learnt from adults, but that children, when their minds are ready and given the right kinds of experience, figure it out for themselves.⁴²⁸

Admittedly the three propositions have merits but for the this discussion morality it is submitted, is acquired from a combination of all factors. The moral domain varies across cultures, but people have intuitive feelings about disgust and disrespect that can drive their reasoning. Furthermore, morality cannot be entirely self-constructed by children; it entails both the innate tendency to evaluate

⁴²³ Ayala, above n 421, at 9018; Wilson, above n 422, at 37.

⁴²⁴ “Immanuel Kant, *Groundwork for the Metaphysics of Morals* (1785)”, above n 421.

⁴²⁵ Elliot Turiel *The culture of morality* (Cambridge University Press, New York, 2002) at 2; Elliot Turiel *The development of social knowledge* (Cambridge University Press, Cambridge [Cambridgeshire]; New York, 1983) at 3.

⁴²⁶ Whether it is created according to the Bible or a product of evolution according to Darwin.

⁴²⁷ The position taken by John Locke that we are born with a clean slate and whatever morals we have we learn from adults and through our own experience. John Locke *An Essay Concerning Human Understanding* (Prometheus Books, Amherst, NY, 1995) at 13.

⁴²⁸ Haidt, above n 385, at 6–7; Jean Piaget *The Moral Judgment of the Child* (Simon & Schuster, New York, 1997) at 50–65.

behaviour and cultural learning or socialisation where guidance plays a major role.⁴²⁹

3.3.1 Moral Principles

Jonathan Haidt in his research on morality identified three basic principles. First is that intuition come first, before strategic reasoning kicks in.⁴³⁰ He presented the story of a man who buys a chicken from the supermarket once a week. He has sexual intercourse with it before cooking and eating it. The response from the majority of the respondents was instant; that it was immoral. They only attempted to reason after they were asked; why was it wrong?

Second is the principle that “there’s more to morality than harm and fairness.”⁴³¹ Morality underpinned by reasoning and consequences to others is widely accepted, but it can be ambiguous, given that there is no clear demarcation between moral rules (preventing harm) and social conventions regulating behaviour not directly linked to harm:⁴³²

Consider the research scenario of a brother and sister on summer vacation from college, travelling together in France. While alone one night they decided it would be interesting and fun if they tried making love; at the very least it would be a new experience for both of them. They were both on birth control; they both enjoy it, but they decided not to do it again and agreed that it remains a secret between them, which made them even closer to each other. So was it wrong for them to have sex?

⁴²⁹ Haidt, above n 385, at 30.

⁴³⁰ At 61.

⁴³¹ At 129.

⁴³² At 46.

The incest story drew instant condemnation from respondents because it was immoral even though there was no harm or risk to anyone. While no one was able to explain why it was immoral, respondents remained adamant it was wrong.

Third is the idea that “morality binds and blinds.”⁴³³ Humans, it is often argued are selfish, driven by self-interest through genes that stimulate competition with our peers.⁴³⁴ In contrast, human nature is viewed elsewhere as altruistic, cooperation a powerful and potentially positive force conspicuous through human history.⁴³⁵ Darwin’s example of two tribes points out that “selfish and contentious people will not cohere, and without coherence, nothing can be effected.”⁴³⁶ Thus a tribe that cooperates and works together for the common good would gain a competitive edge over other tribes. As Wade puts it “people belonging to such a [cohesive] society are more likely to survive and reproduce than those in less cohesive groups.”⁴³⁷

In the presence of others, people sense group dynamics, coalesce into a cohesive band, forming an identity, and adopting practices, norms, music or songs; and become competitive with others, not in the group.⁴³⁸ On an individual level, they are bonded together by sentiments of honour, respect, affection and fear. At the same time each is bound to the group and sees themselves primarily in relationship to the group; being simply part of a whole, in which we follow the

⁴³³ At 217.

⁴³⁴ Richard Dawkins *The Selfish Gene* (2nd ed, Oxford University Press, Oxford ; New York, 1990) at 2.

⁴³⁵ Yochai Benkler *The Penguin and the Leviathan* (Crown Business, New York, 2011) at 22.

⁴³⁶ Charles Darwin *The Descent of Man, and Selection in Relation to Sex* (Penguin Classic, Princeton, NJ, 2004) at 154.

⁴³⁷ Nicholas Wade *The Faith Instinct: How Religion Evolved And Why It Endures* (Penguin Press, New York, 2009) at 107, In as far as religious groups are concerned.

⁴³⁸ Mlodinow, above n 22, at 163–164; Christopher Boehm *Moral Origins* (Basic Books, New York, 2012) at 49–50.

actions of the group, and are subject to the group's influence.⁴³⁹ As Durkheim explained,⁴⁴⁰

The very act of congregating is an exceptionally powerful stimulant. Once the individuals are gathered together, a sort of electricity is generated from their closeness and quickly launches them to an extraordinary height of exaltation.

Thus the human "groupish" tendencies can help people triumph over difficulties, but if it remains unchecked, can also generate discrimination and acts of atrocity against others or outer groups.

It is therefore submitted that whether in trade, politics, and sports, communal or social grouping; human association generates group dynamics that create norms, rules, and behaviour peculiar to a group. Such norms and behaviour foster a sense of identity binding the individual to the group; but can also blind the individual to wrong or immoral group actions.

3.3.2 What is Morality?

Before providing a working definition of morality, it is worth noting that moral rules grounded in conventions is the source of conventional morality, while the moral rules of critical morality are subject to rational screening.⁴⁴¹ However, for any moral position a person should be able to produce reasons, even if one cannot articulate the moral principle. On this basis Dworkin proposes the following four points as a screening system for moral issues:⁴⁴²

- prejudice is not a valid reason;

⁴³⁹ Karen E Fields (translator) Emile Durkheim *The Elementary Forms of Religious Life* (Free Press, New York, 1995) at 219–20; Haidt, above n 385, at 261.

⁴⁴⁰ Durkheim, above n 439, at 217.

⁴⁴¹ Jose Reinaldo De Lima Lopes "The Right to Recognition for Gays and Lesbians" (2005) 2 Sur - International Journal on Human Rights 61 at 63.

⁴⁴² At 296–99, At 65–66.

- personal feelings are inadequate grounds for moral judgement;
- rationalisation based on erroneous assumptions is not acceptable;
- moral judgement based on other people's beliefs is not justifiable.

Defining morality for what it is, regarding contents, entails a separation between moral issues and "social convention." Turiel, for example, defined morality as being about "justice, rights, and welfare"⁴⁴³ but, as discussed above, there is more to morality than harm and fairness.⁴⁴⁴ This thesis takes a functional approach and defines it as the "interlocking sets of values, virtues, norms, practices, identities and institutions; [including] psychological mechanisms that work together to suppress or regulate self-interest and make cooperative societies possible."⁴⁴⁵

3.4 *Human Nature*

Human nature is often taken to refer to internal configurations or a set of propensity that underlies human behaviour, and which separate us from other species.⁴⁴⁶ As such the nature of a being is the structure internal to the being itself, that provides it with inherent tendencies and potentialities, that distinguishes it from other types of beings, and which constrains the range of possible actions available to that being.⁴⁴⁷ The question of whether humans by nature are inherently moral or immoral, selfish or altruistic, peaceful or violent, competitive

⁴⁴³ Turiel, above n 425, at 3; Turiel, above n 425, at 1.

⁴⁴⁴ Haidt, above n 385, at 129.

⁴⁴⁵ At 314.

⁴⁴⁶ Patrick Lee "Human Nature and Moral Goodness" in Mark J Cherry (ed) *The Normativity of the Natural: Human Goods, Human Virtues, and Human Flourishing* (Springer Netherlands, 2009) 45 at 46.

⁴⁴⁷ John Danaher "Is There a Connection between Human Nature and Moral Norms?" (2011) <<http://philosophicaldisquisitions.blogspot.co.nz/2011/10/is-there-connection-between-human.html>>.

or cooperative is a moot point in the context of this thesis. Suffice it to mention that evidence from recent research points out that we are not instinctively selfish, and we are more likely to cooperate and be altruistic.⁴⁴⁸

Instead of regurgitating the position of positivists versus naturalists,⁴⁴⁹ or internalism versus externalism,⁴⁵⁰ this thesis proposes a conflated position embracing elements of both views. This reasoning is based on the human peculiarity of the mind or conscious thought which evokes the notion of a rational being.⁴⁵¹ The capacity to reason;⁴⁵² the ability to participate in collective cognition;⁴⁵³ social construction or the capacity of the mind to represent objects and affairs separate from itself.⁴⁵⁴ The intellectual faculties which allow human beings to categorise, think in the abstract and form image and realities that are not present.⁴⁵⁵ What is inherent in humans, and what this thesis proposes as “human nature”, is the perpetual struggle between the physical urge driven by physical reality and the psychic or conscious reasoning of the mind in any given

⁴⁴⁸ Michael E Price “The Resurrection of Group Selection as a Theory of Human Cooperation” (2008) 21 Social Justice Research 228 at 229; Ward Adrian F “Scientists Probe Human Nature--and Discover We Are Good, After All” (2012) Scientific American <<http://www.scientificamerican.com/article.cfm?id=scientists-probe-human-nature-and-discover-we-are-good-after-all>>; Maia Szalavitz “Is Human Nature Fundamentally Selfish or Altruistic?” [2012] Time; Kesebir Pelin “Debunking the Myth of Human Selfishness” (2011) <http://greatergood.berkeley.edu/article/item/debunking_the_myth_of_human_selfishness>; MA Nowak *Super Cooperators* (1st free press hardcover ed, Free Press, New York, 2011).

⁴⁴⁹ Inherent human nature by naturalists against free choice by positivists.

⁴⁵⁰ See for example Cua, above n 25, at 280 Typically externalism is associated with the conception of humans as in some sense bad, aggressive and destructive; while internalism is associated with the conception of humans as naturally good, compassionate and cooperative.

⁴⁵¹ A view often attributed to Aristotle see Johnson-Laird, above n 6 at 18243.

⁴⁵² Joshua D Greene “Deep Pragmatism” (2013) <<http://www.edge.org/conversation/deep-pragmatism>>.

⁴⁵³ Helene Guldberg “Only Humans Have Morality, Not Animals” (2011) Psychology Today <<http://www.psychologytoday.com/blog/reclaiming-childhood/201106/only-humans-have-morality-not-animals>>.

⁴⁵⁴ Henry Plotkin “Human Nature, Cultural Diversity and Evolutionary Theory” (2011) 366 Phil Trans R Soc B 454 at 457; John R Searle *The Construction of Social Reality* (Free Press, 1995) at 6–7.

⁴⁵⁵ Ayala, above n 421, at 9015.

situation. In this sense the question of being selfish or altruistic, competitive or cooperative; aggressive or passive is dependent on which drive proves decisive: the brain in response to the physical reality or the mind in response to reason.

3.4.1 The Self

The concept of self is important in our impression or perception of who we are. The image that we have of ourselves is underpinned by cognitive constructs of self and identity which in turn influence social interaction and perception and are themselves influenced by society.⁴⁵⁶ They evoke Images of one's physical attributes, health, possessions, tastes, goals, reputation, habits, ties to others; and all aspects of one's relations with society and the world.⁴⁵⁷ James William, the first psychologist to systematically analyse the nature of the self, referred to it as the totality of all that one can call his or her own, including body, psychic powers, clothes, partner, children, ancestors, friends, reputation, works and other properties.⁴⁵⁸ George Herbert Mead added the conception of duality, self as an object (the known) and self as awareness (the knower); two separate aspects simultaneously creating the self.⁴⁵⁹

For this discussion the "self" refers to all the components of the individual taken together: "one's identity, the internal source of the sense of one's identity and anything else purported to be involved, such as instincts."⁴⁶⁰ Notably, the self as an object, determined by one's genes is there at birth, but self-awareness (the knower) is something which develops through the process of socialisation, a result

⁴⁵⁶ Vaughan and Hogg, above n 378, at 72.

⁴⁵⁷ Barry R Schlenker *Impression Management: The Self-Concept, Social Identity, and Interpersonal Relations* (Brooks/Cole Pub Co, Monterey, Calif, 1980) at 46.

⁴⁵⁸ William James *The Principles of Psychology* (Henry Holt, New York, 1905) at 188.

⁴⁵⁹ George Herbert Mead *Mind, Self, and Society*, Charles W Morris (ed) (University of Chicago Press, 2009) at 137–38; Andrew J Weigert and Viktor Gecas "Self" in Larry T Reynolds and Nancy J Herman-Kinney (eds) *Handbook of Symbolic Interactionism* (Alta Mira Press, Walnut Creek, CA, 2003) 267 at 267.

⁴⁶⁰ Matthew Adams *Self and Social Change* (SAGE, Los Angeles ; London, 2007) at 12.

of one's relationship to that process as a whole and to other individuals within that process.⁴⁶¹At this basic level, the term is viewed as personal and private, something uniquely individual. However, in relation to personal status, statements like: "I am a New Zealand resident;" "I am a law student at Waikato University," "I live in Hamilton" are descriptions of myself which are also applicable to many other people's selves. The point is that the notion of self can also be a shared or collective ones.

The question that is far from settled is whether the self, consists of a core being or multiple beings, fixed or flexible as we go through life. Katherine Ewing for example argued that a person can experience his or her articulated self as a symbolic, timeless whole, at any moment in time but this self is displaceable by a different one based on changes in the situation.⁴⁶² However, in the everyday world of discourse, she refers to "self" as encompassing "the physical organism, all aspects of psychological functioning, and social attributes."⁴⁶³

Neuroscientists have contributed to the understanding of how the brain organises selfhood,⁴⁶⁴ and Joseph LeDoux defines the self as "the totality of what an organism is physically, biologically, psychologically, socially and culturally; but a unit that is not unitary."⁴⁶⁵ A reflection of the concept of multiple selves, emanating from multiple independent processes, both explicit and implicit as identified by

⁴⁶¹ Mead, above n 377, at 135.

⁴⁶² Katherine P Ewing "The Illusion of Wholeness: Culture, Self, and the Experience of Inconsistency" (1990) 18 *Ethos* 251 at 251.

⁴⁶³ At 254.

⁴⁶⁴ Findings that memory is the key to how we understand the self in terms of how the brain works. That is the self is encoded as memories maintained in the brain. See Joseph LeDoux "The Self" (2003) 1001 *Annals of the New York Academy of Sciences* 295 at 298; Larry R Squire and Eric R Kandel *Memory: From Mind to Molecules* (Roberts & Co, Greenwood Village, Colo, 2009).

⁴⁶⁵ Joseph E LeDoux *Synaptic Self: How Our Brains Become Who We Are* (Penguin Books, New York, 2003) at 31; Naomi Quinn "The self" (2006) 6 *Anthropological Theory* 362 at 363.

neuroscientists.⁴⁶⁶ In contrast, Kohut argued that all normally functioning, healthy individual adults have a bounded cohesive self.⁴⁶⁷

This thesis advocates the extensive definition of “self” as “the totality of what an organism is physically, biologically, psychologically, socially and culturally.”⁴⁶⁸ At the same time, it recognises the “self” as a multidimensional, unique, individual present in the brain, which retains the essence of one’s self from minute to minute, day to day and year to year.⁴⁶⁹ As opposed to the notion of multiple selves displacing each other,⁴⁷⁰ the multi-dimensional self, takes account of the different roles we play and associations between the core self and a myriad of other things, from physical appearance to behaviour, possessions, family and friends.⁴⁷¹

LeDoux asserts that synapses, (by which the brain receives, stores, and retrieves personalities) are the basis of our personality; but personality is determined by psychological, social, cultural, and other factors, including genetic ones.⁴⁷² Rather than an individual reconstituting a new self in response to internal and external stimuli,⁴⁷³ it is suggested he or she is merely projecting a configuration of the multi-dimensional self, relevant to the situation and the role in question.

⁴⁶⁶ Quinn, above n 465, at 363.

⁴⁶⁷ Ewing, above n 462, at 254; Heinz Kohut *The analysis of the self* (The University of Chicago Press, Chicago, 2009) at 14.

⁴⁶⁸ Quinn, above n 465, at 363; LeDoux, above n 465, at 31.

⁴⁶⁹ LeDoux, above n 464, at 298.

⁴⁷⁰ Ewing, above n 462, at 251.

⁴⁷¹ Schlenker, above n 457, at 48.

⁴⁷² LeDoux, above n 465, at 302.

⁴⁷³ Ewing, above n 462, at 258.

3.4.2 Mind and Self

The ability to assign individual mental states to self and others for the purpose of predicting and explaining behaviour is a requirement for social interaction.⁴⁷⁴ Thus, the recognition that the self, stems from and is shaped by social interaction: the consciousness, “I” as object of perception, “me.”⁴⁷⁵ This sense of self results from human interaction. Mead pointed out that the self “is essentially a social structure that arises in social experience” modified continually by interaction involving symbols that have mutual meaning.⁴⁷⁶

“Symbolic interactionism” offers a complex model of self-conception based on the notion that we see ourselves as others see us. However, Shrauger and Schoeneman in their empirical studies found that people did not see themselves as others saw them, but instead saw themselves as they thought others saw them.⁴⁷⁷ As Cooley argued, the internal self does not exist separately from the one created by others, because we are a product of those around us – or at least what we believe they expect from us. He summarised it as: “I am not what I think I am and I am not what you think I am; I am what I think that you think I am.”⁴⁷⁸

In the presence of others, people seek out information about individuals regarding socio-economic status, the conception of self, attitude, competence, trustworthiness, etc. The availability of such information helps express interaction, pointing others to what the person will expect of them and what they expect of

⁴⁷⁴ Francesca Happé “Theory of Mind and the Self” (2003) 1001 *Annals of the New York Academy of Sciences* 134 at 134.

⁴⁷⁵ William James cited in Vaughan and Hogg, above n 378, at 74.

⁴⁷⁶ Mead, above n 377, at 140.

⁴⁷⁷ Shrauger and Schoeneman, above n 378 cited in; Vaughan and Hogg, above n 378, at 75.

⁴⁷⁸ Michelle C Langley “Storied Landscapes Makes us (Modern) Human: Landscape Socialisation in the Palaeolithic and Consequences for the Archaeological Record” (2013) 32 *Journal of Anthropological Archaeology* 614 quoted in; Bruce Hood, above n 400, at 72.

him or her. Being informed in these ways underpins the assumption that others will figure out how best to act to call forth the desired response.⁴⁷⁹

3.4.3 The Empirical Self

William James referred to the self as “the sum total of all [things] the individual can call his,”⁴⁸⁰ consisting of four separate components.⁴⁸¹ First, the pure ego - ‘I’ the self as knower and the “empirical self” is the self as known - ‘me.’ Second, the material self (or the body): bodily adornments, family, friends, property and possessions, which makeup and reveals the person. Third, the social self, the recognition of the person by others, which is how the individual believes other people view him or her. James postulated about:⁴⁸²

[The]innate propensity to get ourselves noticed, and noticed favourably by our kind. No more fiendish punishment could be devised...than that, one should be turned loose in society and remain absolutely unnoticed by all the members thereof.

The fourth is the spiritual self or the person’s “inner or subjective being, his psychic faculties or dispositions, taken concretely.”⁴⁸³ The spiritual self refers to the faculty of consciousness that allows us to know that we know and others to know that we think, act, and can make judgements.⁴⁸⁴

⁴⁷⁹ Erving Goffman *The Presentation of Self in Everyday Life* (Doubleday, Garden City, NY, 1959) at 13.

⁴⁸⁰ James, above n 458, at 291.

⁴⁸¹ Bernard N Meltzer *Symbolic interactionism* (Routledge & K Paul, London; Boston, 1975) at 6; Schlenker, above n 457, at 48; James, above n 458, at 1.

⁴⁸² James, above n 458, at 189.

⁴⁸³ At 191.

⁴⁸⁴ Schlenker, above n 457, at 49.

3.4.4 The Conscious Self

The importance of consciousness in self-hood is not new; Descartes, for example, highlighted the ability to know oneself as the defining feature of human nature.⁴⁸⁵ John Locke made a similar argument that one's self or "personality" extends itself beyond present existence to what is past only by consciousness."⁴⁸⁶ However, the self in modern psychology is more closely entwined with consciousness, "in the sense of being self-aware, possessing agency or conscious control, having self-knowledge, a self-concept and self-esteem, of being self-critical, of feeling self-important, and striving towards self-actualisation."⁴⁸⁷ This view is reflected in an earlier definition of "the self" by Carl Rogers, as "organised, consistent conceptual gestalt composed of perceptions of the characteristics of the "I" or "me."⁴⁸⁸

The emphasis on the self as a conscious entity is underscored by the growing interest in the non-conscious aspects of the self.⁴⁸⁹ LeDoux suggests that, "the self we are aware of and strive to improve, that is, the self that we have a sense of, is too narrow a view of what the self really is."⁴⁹⁰ New waves of research in social psychology indicate that numerous aspects of social behaviour, including decision making or the way we react to others are negotiated without conscious awareness.⁴⁹¹ It can thus be surmised that the self and the brain embody both the

⁴⁸⁵ LeDoux, above n 464, at 296.

⁴⁸⁶ Daniel Dennett "Conditions of Personhood" in Amelie Oksenberg Rorty (ed) *The Identities of Persons* (1976) 175 at 176.

⁴⁸⁷ LeDoux, above n 464, at 296.

⁴⁸⁸ Calvin S Hall, Gardner Lindzey and John B Campbell *Theories of Personality* (J Wiley & Sons, New York, 1998) at 463.

⁴⁸⁹ See for example Shaun Gallagher "Philosophical Conceptions of the Self: Implications for Cognitive Science" (2000) 4 *Trends in Cognitive Sciences* 14.

⁴⁹⁰ LeDoux, above n 464, at 297.

⁴⁹¹ Timothy D Wilson *Strangers to Ourselves: Discovering the Adaptive Unconscious* (Belknap Press of Harvard University Press, Cambridge, Mass, 2002) at 10 for further reference see; John A Bargh and Tanya L Chartr "The Unbearable Automaticity of Being" [1999] *American Psychologist* 462; AG Greenwald and MR Banaji "Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes" (1995) 102 *Psychol Rev* 4; E Tory, Ruth Klein and Timothy Strauman "Self-concept

conscious and subconscious realms. In its totality, consciousness for the purposes of this discussion, is not used in reference to a particular state of consciousness, or a particular way of thinking, but the faculty of consciousness - the capacity for inner experience.⁴⁹²

The faculty of consciousness pertaining to the senses is not peculiar to human beings. Animals may or may not think or reason but have the same degree of self-awareness of sounds, colours, odours and sensations. From this purely physical proposition, consciousness is the product of the interactive processes between the material world and the nervous system. Toru Sato refers to this faculty of consciousness in humans as the “self-system,” an understanding in our minds that enables us to maintain the required balance for psychological and physical survival.⁴⁹³ Peter Russell suggests that consciousness does not arise from physical features, but is a fundamental quality of nature which is always present.⁴⁹⁴ Sato sees it as an elaborate programme which tells us how the world works and what we can do to maintain our balance or energy.⁴⁹⁵

3.4.5 The Subconscious

The paradox is that consciousness: our intellectual home, the cradle of our humanity, appears to be the most limited part of our mind. It is widely accepted in cognitive science that most of what we do or achieve takes place

Discrepancy Theory: A Psychological Model for Distinguishing Among Different Aspects of Depression and Anxiety” (1985) 3 Social Cognition 51.

⁴⁹² Peter Russell *From Science to God: The Mystery of Consciousness and the Meaning of Light* (New World Library : Distributed to the trade by Publishers Group West, Novato, Calif, 2003) at 31.

⁴⁹³ Toru Sato *The Ever-Transcending Spirit: The Psychology of Human Relationships, Consciousness, and Development* (Universe, Inc, New York, 2003) at 39.

⁴⁹⁴ Russell, above n 492, at 32–34.

⁴⁹⁵ Sato, above n 493, at 39.

unconsciously.⁴⁹⁶ Cognitive neuroscientist Bernard Baars refers to the unconscious systems that dominate our brain as huge reservoir of unconscious or automatic cognitive processes which provide the framework within which we can find meaning in experience.⁴⁹⁷ The brain processes a vast amount of information per second and if the “conscious mind was left to process all that incoming information the brain would freeze like an overtaxed computer.”⁴⁹⁸ Making a decision in the circumstances is a tough job for the brain which takes in relevant factors including the state of your inner feelings, memories, knowledge of your own skills, capacities, and your diverse sensory output. Amazingly it can compress all these parallel processes into a single output without our conscious awareness.⁴⁹⁹

3.4.6 The Illusion of Reality

The nature of “reality” or whether the world we see and experience is real or an illusion, has been the subject of debate for centuries. But modern neuroscience tells us that, in a way, all our perceptions must be considered illusions.⁵⁰⁰ The forms or shapes that we perceive in our mind consists of our personal reality which we know and experience.⁵⁰¹ But what we see as the physical reality is merely images in the mind, our unconscious processing raw data and creating a model of the world.⁵⁰²

⁴⁹⁶ Martha Morrison Dore “Family Systems Theory” in Bruce A Thyer, Catherine N Dulmus and Karen M Sowers (eds) *Human Behavior in the Social Environment: Theories for Social Work Practice* (1st ed, Wiley, Hoboken, NJ, 2012) at 25.

⁴⁹⁷ Bernard J Baars *The Cognitive Revolution in Psychology* (Guilford Press, 1986) at 169; Dore, above n 496, at 26.

⁴⁹⁸ Mlodinow, above n 22, at 33.

⁴⁹⁹ Richard E Cytowic and David M Eagleman *Wednesday Is Indigo Blue : Discovering the Brain of Synesthesia* (2nd ed, MIT Press, Cambridge, 2009) at 201.

⁵⁰⁰ Mlodinow, above n 22, at 45.

⁵⁰¹ Russell, above n 492, at 39.

⁵⁰² Mlodinow, above n 22, at 45.

Brain-imaging studies have shed light on how our brains create unconscious biases in our decision-making. They indicate that in assessing emotionally relevant data, our brains automatically include wants, dreams and desires in our internal computation, which is implicitly coloured by who we are and what we are after.⁵⁰³ Motivated reasoning, in particular, engages a network of brain regions not associated with “cold” reasoning, “including the orbitofrontal cortex and the interior cingulate cortex – parts of the limbic system – and the posterior cingulate cortex and precuneus, which are also activated when one makes emotionally laden moral judgements”.⁵⁰⁴ This physical mechanism contributes to how the brain deceives us.

Recent research on rational thinking identified that “my side bias occurs when people evaluate evidence, generate evidence, and test [the] hypothesis in a manner biassed towards their own opinions and attitude.”⁵⁰⁵ In a series of experiments, Kaczynski and colleagues⁵⁰⁶ presented subjects with flawed hypothetical experiments that led to either opinion-consistent or inconsistent conclusions. They found that while verbal ability was related to the overall quality of the reasoning, both in opinion consistent and inconsistent conditions, it did not relate to the degree of the “my side” bias effect, which is the tendency to critique

⁵⁰³ At 206; Drew Westen and others “Neural Bases of Motivated Reasoning: An FMRI Study of Emotional Constraints on Partisan Political Judgment in the 2004 US Presidential Election” (2006) 18 J Cogn Neurosci 1947.

⁵⁰⁴ Mlodinow, above n 22, at 206; also see; Westen and others, above n 503, at 1955.

⁵⁰⁵ Keith E Stanovich, Richard F West and Maggie E Toplak “Myside Bias, Rational Thinking, and Intelligence” (2013) 22 Current Directions in Psychological Science 259.

⁵⁰⁶ Paul A Kaczynski and Kristen L Lavalley “Domain-Specific Identity, Epistemic Regulation, and Intellectual Ability as Predictors of Belief-Biased Reasoning: A Dual-Process Perspective” (2005) 92 J Exp Child Psychol 1; Paul A Kaczynski and Billi Robinson “Personal Theories, Intellectual Ability, and Epistemological Beliefs: Adult Age Differences in Everyday Reasoning Biases” (2000) 15 Psychology and Aging 400; PA Kaczynski “Bias in Adolescents’ Everyday Reasoning and its Relationship With Intellectual Ability, Personal Theories, and Self-serving Motivation” (1997) 33 Dev Psychol 273.

opinion-inconsistent experimental results more harshly than opinion-consistent ones.⁵⁰⁷

3.4.7 Socialisation

Any effort to understand, predict and shape human behaviour will need to confront socialisation: the way in which human groups perpetuate themselves and transmit normative rules,⁵⁰⁸ or the process by which the individual learns to become a functioning member of society through interaction with others.⁵⁰⁹ Arguably, the self as a product of socialisation is not something that is there at birth but develops through experience and activity as a result of the individual's relationship to the process as a whole and others within the process.⁵¹⁰ It results in the unification of various elements or configurations into the multi-layered and multi-dimensional entity of the complete self, a reflection of the complete process.⁵¹¹

According to social theorists, the self can be divided into two broad categories of identity. The "social identity," defines self, regarding social group, "personal identity," based on distinctive personal relationships and traits.⁵¹² Similar to the previously discussed division proposed by Schlenker, i.e. the "material self" as one's body, bodily adornments, family, friends and possessions; and the "social self" which is the recognition a person receives from others, how the person believes other people view him or her.⁵¹³

⁵⁰⁷ Stanovich, West and Toplak, above n 505, at 259.

⁵⁰⁸ Selin Kesebir, David H Uttal and Wendi Gardner "Socialization: Insights from Social Cognition" (2010) 4 Social and Personality Psychology Compass 93 at 94.

⁵⁰⁹ Frederick Elkin "Socialization and the Presentation of Self" (1958) 20 Marriage and Family Living 320 at 322.

⁵¹⁰ Mead, above n 377, at 135.

⁵¹¹ At 144.

⁵¹² Vaughan and Hogg, above n 378, at 82.

⁵¹³ Schlenker, above n 457, at 49.

Notably, behaviour is associated with the perception of self within group and intergroup dynamics; and hinges on which self (social or personal) is the psychologically prominent basis of self-conception.⁵¹⁴ Hence, our attempt to control the 'self' we project in our interaction with other people because it determines how they react. Goffman alluded to this process as a performance to an audience; the projected self, modelled on the role played, while action is designed for the audience.⁵¹⁵

3.4.8 Emotion, Motivation and Behaviour

Evidently, self-presentation or impression management underlines human interaction, hence the use of behaviour to intentionally regulate observers' impression of oneself.⁵¹⁶ Jones and Pittman for example, identified five strategic motives: self-promotion to persuade others; ingratiation to get others to like us; intimidation to get others to think we are dangerous; exemplification to let others know that we are moral, and supplication to obtain pity from others.⁵¹⁷ This classification can be expanded to include other motives such as excuses to deny responsibility or apologise to confess responsibility for negative events that affect others.⁵¹⁸ Apart from these factors and the power of the presence of others to produce facilitative behaviour, an individual's performance is likely to be influenced by emotion or feeling.⁵¹⁹

⁵¹⁴ Vaughan and Hogg, above n 378, at 82.

⁵¹⁵ Goffman, above n 479, at 219.

⁵¹⁶ Melissa A Lewis and Clayton Neighbors "Self-Determination and the Use of Self-Presentation Strategies" (2005) 145 J Soc Psychol 469 at 470.

⁵¹⁷ Edward E Jones and Thane S Pittman "Toward a General Theory of Strategic Self-Presentation" in Jerry M Suls (ed) *Psychological Perspectives on the Self* (Lawrence Erlbaum Associates, London, 1982) 231; cited in; Vaughan and Hogg, above n 378, at 90.

⁵¹⁸ James T Tedeschi and Sverre Lindskold *Social Psychology: Interdependence, Interaction, and Influence* (Wiley, New York, 1976) at 152.

⁵¹⁹ Hazel Markus "The Effect of Mere Presence on Social Facilitation: An Unobtrusive Test" (1978) 14 Journal of Experimental Social Psychology 389 at 389.

The importance of emotion in human experience is evident in what we notice and remember, events that evoke feelings of joy, sorrow, pleasure and pain. It is the principal currency in human relationships; it brings out the best and worst in human behaviour. Even more so when “a lack of emotional equilibrium underpins most human unhappiness and is a common denominator across the entire range of mental disorder....”⁵²⁰ William James postulated:⁵²¹

If we fancy some strong emotion, and then try to abstract from our consciousness of it all the feelings of its bodily symptoms, we find we have nothing left behind, no mind-stuff out of which the emotion can be constituted, and that a cold and neutral state of intellectual perception is all that remains.

Life is simply unimaginable without emotion, feelings and motivation, which are central to the quality and range of human experience. The absence of emotion, for example, underpins the diagnosis of Antisocial Personality Disorder (ASPD) as a disease or health problem, which includes “various types of aggressive behaviours towards other people and animals, destruction of property, deceitfulness or theft and serious violations of rules.”⁵²² Emotion and motivation are often treated together because both involve rewards and punishments as the brain’s fundamental solution “for interfacing sensory systems to action selection and execution systems.”⁵²³ The selection of appropriate behaviour based on “the sensory systems and reward decoding that our genes specify to maximise benefits.”⁵²⁴ It is something worth noting, as we proceed to discuss deception in human interaction.

⁵²⁰ RJ Dolan “Emotion, Cognition, and Behavior” (2002) 298 Science 1191 at 1191.

⁵²¹ James, above n 458 cited in; Dolan, above n 520, at 1191.

⁵²² Stephane A De Brito and Sheilagh Hodgins “Antisocial Personality Disorder” in Mary McMurrin and Richard Howard (eds) *Personality, Personality Disorder and Violence: An Evidence Based Approach* (John Wiley & Sons, New York, 2009) 133 at 134.

⁵²³ Edmond T Rolls “Précis of The brain and Emotion” (2000) 23 Behav Brain Sci 177 at 177.

⁵²⁴ At 178

3.5 Deception

Lies, trickery, fraud, dishonesty, duplicity and betrayal are words often interwoven in the realm of deception. In a broad sense deception encompasses an “unlimited variety of devices by which the deceiver creates false impressions in others’ minds”.⁵²⁵ It includes actions and omissions, as well as words and strategic silences and as such, it can be simply defined as acts or conduct intended to cause or induce someone to have false beliefs. How people revere honesty and disapprove of deception while engaging in deception regularly and deftly for various reasons illustrates the complexity of human deception.⁵²⁶ Philosopher and mathematician Blaise Pascal pointed out that:⁵²⁷

Human life is but a perpetual illusion; there is nothing but mutual deception and flattery. No one talks about us in our presence as they do in our absence. Human relationships are founded only on this mutual deceit; and few friendships would survive if everyone knew what their friend said about them when they were not there even though the friend spoke sincerely and without passion. Mankind is therefore nothing but disguise, lies and hypocrisy, both as individuals and with regard to others.... And all these tendencies, so remote from justice and reason, are naturally rooted in their heart.

⁵²⁵ Larry Alexander and Emily Sherwin “Deception in Morality and Law” (2003) 22 Law and Philosophy 393 at 400.

⁵²⁶ At 393; Charles V Ford *Lies! Lies!! Lies!!!: The Psychology of Deceit* (1st ed, American Psychiatric Publishing, Inc, Washington DC, 1996) at 4–18.

⁵²⁷ Honor Levi (translator) Blaise Pascal *Pensées and other writings* (Oxford University Press, Oxford; New York, 2008) at 181; Bernard N Meltzer “Lying: Deception in human affairs” (2003) 23 The International Journal of Sociology and Social Policy 61 at 61

This thesis argues that deception, which includes lying, falsehood and masking of our inner selves exist as part of the social world we inhabit.⁵²⁸⁵²⁹ It is often accepted that lying is a form of deception by the making of a false statement, but deception does not need to involve making a false statement because true statements can also be deceptive.⁵³⁰ This distinction is often cited in the classical story of St Athanasius pursued up the Nile by persecutors sent by Roman Emperor Julian. They did not recognise him when they met him coming downstream, so they enquired: “Is Athanasius close at hand?” He replied: “He is not far from here”, thus he successfully evaded them without lying.⁵³¹

A more recent example is Bill Clinton’s statement made at a time when his relationship with Monica Lewinsky was in the past but a present topic of conversation.⁵³² His utterance that “there is no improper relationship” was mistaken by many as a denial that Clinton had ever had an improper relationship with Lewinsky. That assumption was wrong because “is” is a present tense verb, so the statement was merely a present-tense denial, thus, he did not lie, though he was misleading and deceptive.⁵³³

3.5.1 Lying

Lying is a social activity which involves other people, and constitutes a breach of trust. What ultimately renders lies most objectionable is that they occur in a

⁵²⁸ Saarni Carolyn and Lewis Michael “Deceit and Illusion in Human Affairs” in *Lying and Deception in Everyday Life* (The Guilford Press, New York, 1993) at 8.

⁵²⁹ At 8.

⁵³⁰ Thomas L Carson *Lying and Deception: Theory and Practice* (Oxford University Press, Oxford ; New York, 2010) at 4.

⁵³¹ Alasdair McIntyre “Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?” (Princeton University, 1994) at 336.

⁵³² He made the statement during an interview with Jim Lehrer of PBS, on 21 January 1998 (PBS 1998), as the scandal broke.

⁵³³ Jennifer Mather Saul *Lying, Misleading, and What is Said: An Exploration in Philosophy of Language and in Ethics* (1st ed, Oxford University Press, Oxford, 2012) at 2.

context in which one expects the truth, most obviously, in response to a direct inquiry.⁵³⁴ We are socialised to believe that lying is wrong and we teach our children that lying is immoral and reprehensible, and yet parents may lie to their children in the course of telling them not to lie.⁵³⁵ The proliferation of lies in our daily lives does not mean that we accept lies given the insidious nature of lying seems all too apparent.⁵³⁶

In everyday life lying and deception is often used interchangeably in spite of their subtle difference. While lying revolves around the notion of a deliberately false statement held to be true, deception pertains to instances or conduct that induce a false impression or belief.⁵³⁷ Strictly defined, according to Alexander and Sherwin a lie: ⁵³⁸

Is a statement, verbal or non-verbal, of a proposition that the speaker believes to be false, but that the speaker intends the audience to take as a proposition that the speaker believes to be true.

Carson, however, argues that lying does not require the intent to deceive, appealing to cases in which one can benefit by making a false statement even if they do not deceive others.⁵³⁹

For the purpose of this discussion, deception will be used in its broader sense to include lying, bearing in mind, as illustrated by Bill Clinton that we can deceive while telling the truth. Clinton's claim that he did not have sexual relations with Lewinsky was not a lie because it was true, given the definition of "sexual

⁵³⁴ Bivins H Thomas "Lying and Deception" (2008) School of Journalism, University of Oregon <<http://journalism.uoregon.edu/~tbivins/stratcomweb/notes/lying-notes.pdf>>.

⁵³⁵ Leonard Saxe "Lying: Thoughts of an Applied Social Psychologist" (1991) 46 American Psychologist 409 at 409.

⁵³⁶ At 410.

⁵³⁷ Carson, above n 530, at 3; Alexander and Sherwin, above n 525, at 393.

⁵³⁸ Alexander and Sherwin, above n 525, at 395.

⁵³⁹ Carson, above n 530, at 3.

relationship” specified in the questions he was asked by the grand jury.⁵⁴⁰ Similarly, an accused person may lie in response to questions about the case, not to deceive but to cast doubts on the prosecution or the witness. As such “lying is always deceptive but not all deception are lies.”⁵⁴¹

3.5.2 The Moral Question

Any discussions on the moral question of lying inevitably begin with the Kantian position, that under no circumstances could lying be considered ethical, as it is always immoral.⁵⁴² Kant expanded this principle by asserting that if one does tell a lie one is responsible for all the consequences that ensue, even if they were completely unforeseeable.⁵⁴³ Kant further argues that it would be a crime to lie to a would-be-murderer even to save an innocent life. He declares that in statements, truthfulness is unavoidably required, a human being’s duty to everyone, irrespective of consequences.⁵⁴⁴

In response to Kant’s view that truthfulness was a person’s unconditional obligation, Benjamin Constant countered:⁵⁴⁵

The moral principle stating it is a duty to tell the truth would make any society impossible if that principle was taken singly and unconditionally. We have proof of this in the very direct consequences which a German philosopher has drawn from this principle. This philosopher goes as far as to assert that it

⁵⁴⁰ Cited in Thomas L Carson “The Definition of Lying*” (2006) 40 *Noûs* 284 at 85.

⁵⁴¹ David A Camp *Exposing Lies: Understanding and Identifying Deception* (First Books Library, Bloomington, IN, 2003) at 6.

⁵⁴² Immanuel Kant, “Metaphysical Principles of Virtue”, cited in; Christine Korsgaard “The Right to Lie: Kant on Dealing with Evil” (1986) 15 *Philosophy and Public Affairs* 325 at 325.

⁵⁴³ From the Kant’s infamous murder at the door essay, “On a Supposed Right to Lie from Altruistic Motives” quoted in At 325.

⁵⁴⁴ Cited in, Michael Cholbi “The Murderer at the Door: What Kant Should Have Said” (2009) 79 *Philosophy and Phenomenological Research* 17 at 18.

⁵⁴⁵ Benjamin Constant “On Political Reactions” (1797) 1 *French 2 Part VI* at 123, See also; Helga Varden “Kant and Lying to the Murderer at the Door. One More Time: Kant’s Legal Philosophy and Lies to Murderers and Nazis” (2010) 14 *J Soc Philosophy* 403; Robert J Benton “Political Expediency and Lying: Kant vs Benjamin Constant” (1982) 43 *J Hist Ideas* 135.

would be a crime to tell a lie to a murderer who asked whether our friend who is being pursued by the murder had taken refuge in our house.

The debate between Kant and Constant is outside the scope of this thesis, but suffice to state that they hold opposing views. Kant's position is that lying is wrong and immoral no matter the circumstances or the consequences. The opposite view, similar to Constant's argument and as proposed by Mills' utilitarian theory is that, whether a lie is ethical or unethical depends on the consequences.⁵⁴⁶

3.5.3 Deception in Everyday Life

The morality of deception hinges on the role it plays in our daily lives. How can something be so pervasive and yet objectionable? Jeremy Campbell suggests that:

⁵⁴⁷

For better or worse, lying, untruth is not an artificial, deviant, or dispensable feature of life. Nature engages in it, sometimes with remarkable ingenuity.

The hypothesis is that falsehood is essential to life, a lubricant that makes society functional, while truth can be a hindrance, can be harsh, dangerous and disruptive, too simple and too naked for everyday interaction. ⁵⁴⁸ Nyberg takes it a step further by advocating that deception appears to be normal rather than abnormal – an attribute of practical intelligence that supports daily activities:⁵⁴⁹

While it is certainly the case that we use deception of self and of others as a means of coping with fear, we have learned to use deception for many other

⁵⁴⁶ Julia Driver "The History of Utilitarianism" in Edward N Zalta (ed) *Stanford Encyclopaedia of Philosophy* (Winter 2014 ed., 2014) at <http://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>, on 19/03/2016.

⁵⁴⁷ Campbell, above n 25, at 14.

⁵⁴⁸ At 15.

⁵⁴⁹ Nyberg, above n 26, at 1.

purposes as well: to tolerate stress, to gain a sense of control over the uncertain aspects of our lives and the future, to enhance our own well-being, to gain and protect privacy, to help others anonymously, and so on.

In contrast, Bok presents a criticism of both moral approaches by rejecting Kant's theory, which condemns all lies, but also attacking the utilitarianism approach of balancing the benefits and costs as too simplistic.⁵⁵⁰ Her views on deception are advanced on three principles: First, the "principle of veracity": Lies are not neutral because they always have harmful effects and always needs to be justified. Therefore, a lie is never acceptable if there is an adequate truthful alternative.⁵⁵¹

The second feature refers to utilitarianism: it holds that a lie for which no alternative truth exists is to be evaluated according to costs and benefits. However, this means that all the costs are to be considered, including costs to the liar, to the deceived, and to society.⁵⁵² Finally, Bok raises the "principle of publicity": A lie must be defensible from the community (of reasonable persons) to be morally justified.⁵⁵³

3.5.4 Lying and Emotional Connection

In personal relationships social psychological literature suggests that most people believe that they are good, moral and competent.⁵⁵⁴ At the same time, under certain conditions a person may cheat and lie thus contradicting their positive self-

⁵⁵⁰ Sissela Bok *Lying: Moral Choice Public and Private Life* (2nd Vintage Books ed, Vintage Books, New York, 1999) at 45.

⁵⁵¹ At 30 & 88.

⁵⁵² Editor "Review: Lying: Moral Choice and Private Life by Sissela Bok" (1979) 77 Michigan Law Review 539 at 540.

⁵⁵³ Bok, above n 550, at 92.

⁵⁵⁴ See for example, Elliot Aronson "The Return of the Repressed: Dissonance Theory Makes a Comeback" (1992) 3 Psychological Inquiry 303 at 304.

image.⁵⁵⁵ In fact, a lie may serve to disguise emotions, such as the fondness or dislike one feels towards a person, apart from the fear that the lie may be discovered.⁵⁵⁶ In most exclusive dating relationships, close friendships, and marriages, there are strong expectations of honesty.⁵⁵⁷ In this context, an uncovered deception may be interpreted as a betrayal of the relationship, disrupting the equilibrium of organised behaviour rooted in honesty.⁵⁵⁸ Thus, in romantic relationships a lie often becomes entangled with emotional involvement and self-protective motives are expected to be high.⁵⁵⁹

It is submitted that strong emotions ultimately drive deception, for invariably emotion precedes lying and even more subtle forms of deception. Shame beckons when our self-esteem wanes because our concocted view of ourselves is shattered by the reality that reveals our misconceptions or failures. We are always anxious about the prospect to be found out about a misdeed.⁵⁶⁰ Similarly, we conceal information that is likely to hurt people we care about.⁵⁶¹

3.5.5 Human Behaviour

Human behaviour as the potential and articulated capacity for physical, mental, and social activity,⁵⁶² can be characterised in multiple ways. For example, humans can be viewed as irrational animals compelled by biological drives; or rational

⁵⁵⁵ Anne K Gordon and Arthur G Miller "Perspective Differences in the Construal of Lies: Is Deception in the Eye of the Beholder?" (2000) 26 Pers Soc Psychol Bull 46.

⁵⁵⁶ At 47.

⁵⁵⁷ James B Stiff, Hyun J Kim and Closepet N Ramesh "Truth Biases and Aroused Suspicion in Relational Deception" (1992) 19 Communication Research 326.

⁵⁵⁸ Sa McCornack and Tr Levine "When Lies are Uncovered: Emotional and Relational Outcomes of Discovered Deception" (1990) 57 Communication Monographs 119.

⁵⁵⁹ Gordon and Miller, above n 555, at 47.

⁵⁶⁰ Carolyn and Michael, above n 528, at 7.

⁵⁶¹ At 7–8.

⁵⁶² Marc H Bornstein "Human Behaviour" [2013] Encyclopaedia Britannica at <http://www.britannica.com/EBchecked/topic/275332/human-behaviour> on 01/04/2014

decision makers in the struggle to understand and control the environment; or social entities as a product of society and socialisation.⁵⁶³ This multiplicity is manifested in thoughts, ideas, reasoning, foresight, imagination, deciding, choosing and numerous mental process that impinge on a person's action. Similarly, a human sensation such as feeling, emotions, moral norm and value contribute to how an individual behaves in any given situation.⁵⁶⁴

In the toils of life we evoke images of strategy and tactics, jockeying for position and status; stage-managing our image as a means to an end.⁵⁶⁵ Behaviour in this sense presents itself in the form of acts which encompasses "the total process involved in human behaviour and interaction." Viewed as such an action arises as an impulse and terminates at the achievement or otherwise of the objective.⁵⁶⁶

In between these points, the actor engages in perception of the situation and manipulation of the perceptions.

Social interaction and social existence are dependent on people knowing who they are and who others are. Everyday life is underpinned by identity and self-conception:⁵⁶⁷

Knowing who you are allows you to know what you should think and do, and knowing who others are allows you to predict what they think and what they do.

In other words, awareness of self or knowledge of identity in one's environment regulates and structures human interaction. Thus, the behaviour of deception

⁵⁶³ Barry R Schlenker *Impression Management: The Self-Concept, Social Identity, and Interpersonal Relations* (Brooks/Cole Pub Co, Monterey, Calif, 1980) at 9.

⁵⁶⁴ Bernard N Meltzer "Mind" in Larry T Reynolds and Nancy J Herman-Kinney (eds) *Handbook of Symbolic Interactionism* (Alta Mira Press, Walnut Creek, CA, 2003) 253 at 253.

⁵⁶⁵ Schlenker, above n 457, at 10.

⁵⁶⁶ Meltzer, above n 564, at 254.

⁵⁶⁷ Vaughan and Hogg, above n 378, at 73.

relates to the interaction between two or more individuals, rooted in the perception of the self as it relates to others.

3.5.6 Motivated Construal of Behaviour

Our sense of the “self”, discussed in detail in chapter three underscores its recognition as a dominant regulator of human behaviour. The self “directs perception, memory, and inferences concerning both oneself and others.”⁵⁶⁸ Possible construal of this behaviour than simply refer to how people view themselves and their relation to others, how individuals perceive, comprehend, and interpret the world around them.⁵⁶⁹ Given complex causal associations, individuals must understand underlying causal structures to establish predictability and some semblance of control over things.⁵⁷⁰ Thus, in their daily interactions people seek to understand “the causes that underlie their own as well as other people’s behaviours, their success and failures, and their motivations and desires.”⁵⁷¹

3.5.7 Multiple Construal

Social psychologists recognise that multiple construal of an event is possible,⁵⁷² yet people often fail to recognise this possibility.⁵⁷³ The literature on the subject points to the existence of two basic self-construal: the independent and

⁵⁶⁸ Susan E Cross and Laura Madson “Models of the Self: Self-Construals and Gender” (1997) 122 Psychol Bull 5 at 6.

⁵⁶⁹ Irina Cojuharenco and others “Self-Construal and Unethical Behavior” (2012) 109 Journal of Business Ethics 447 at 447.

⁵⁷⁰ Erik G Helzer and John A Edwards “Causal Uncertainty Prompts Abstract Construal of Behavior” (2012) 30 Social Cognition 519 at 519.

⁵⁷¹ At 519.

⁵⁷² Gordon and Miller, above n 555, at 46; Lee Ross, Gunter Bierbrauer and Susan Hoffman “The Role of Attribution Processes in Conformity and Dissent: Revisiting the Asch Situation” (1976) 31 American Psychologist 148.

⁵⁷³ Dale W Griffin and Lee Ross “Subjective Construal, Social Inference, and Human Misunderstanding” (1991) 24 Advances in Experimental Social Psychology 319.

interdependent selves,⁵⁷⁴ but a third self-construal has emerged, the collective self.⁵⁷⁵ First, the independent self is a representation of a self, a contained autonomous entity with unique traits, attributes and characteristics. It reflects individual behaviour organised primarily by reference to personal feelings, thoughts, and actions.⁵⁷⁶

Second, the interdependent (relational) self, defines the individual according to their psychological relationship with others. It entails seeing oneself:⁵⁷⁷

as part of an encompassing social relationship and recognising that one's behaviour is determined, contingent on, and, to a large extent organised by what the actor perceives to be the thoughts, feelings, and actions of others in the relationship.

Third, the collective self, pertains to an individual's definition of self, regarding their collective relationship with others, driven by the motive to protect and enhance one's in-group(s).⁵⁷⁸ It is an extension of interdependence but different in that the individual takes on a group identity derived from membership rather than their relationship with specific others.⁵⁷⁹

By this multiple possible construal, individual perceptions of events will differ according to one's sense of 'self', relationship to others and group dynamics that may be in operation at a particular time. Similarly, any response will be dictated

⁵⁷⁴ Cross and Madson, above n 568, at 6; Hazel R Markus and Shinobu Kitayama "Culture and the Self: Implications for Cognition, Emotion, and Motivation" (1991) 98 *Psychological Review* 224 at 225.

⁵⁷⁵ Cojuharenco and others, above n 495, at 448; Constantine Sedikides and Marilynn B Brewer *Individual Self, Relational Self, Collective Self* (Psychology Press, Philadelphia, 2001) at 11; Y Kashima and others "Culture, Gender, and Self: A Perspective From Individualism-Collectivism Research" (1995) 69 *J Pers Soc Psychol* 925 at 295.

⁵⁷⁶ Markus and Kitayama, above n 574, at 226; Cojuharenco and others, above n 569, at 448.

⁵⁷⁷ Markus and Kitayama, above n 574, at 227.

⁵⁷⁸ Cojuharenco and others, above n 569, at 449.

⁵⁷⁹ At 449; Marilynn B Brewer and Wendi Gardner "Who Is This 'We'? Levels of Collective Identity and Self Representations" (1996) 71 *Journal of Personality and Social Psychology* 83 at 83.

by such perceptions about consequences or desired outcomes. Kunda noted that individuals may arrive at desired conclusions about themselves by relying on cognitive strategies that ensure they meet their predetermined goals.⁵⁸⁰ Honesty is a highly valued character trait,⁵⁸¹ and most people consider themselves honest.⁵⁸² Most individuals can maintain the belief that they are honest by relying on hasty, partial, or otherwise biased searches for evidence of their honesty.⁵⁸³ Moreover, they can do so by relying on definitions of honesty despite their telling numerous or even serious lies.⁵⁸⁴

3.5.8 The Illusive Truth

Every historical era has produced its fair share of heroes and criminals, achievements and developments, along with its lies; be it noble or banal.⁵⁸⁵ Some believe that we live in an era of unprecedented dishonesty where the pursuit of success justifies manipulation and deception.⁵⁸⁶ People make so many compromises with personal integrity; dishonest habits are unrecognisable as they become embodied in our system of private, public and business life.⁵⁸⁷ It creates the ambiguity of why we abhor lying and deception: while the truth is given such a high value, albeit an elusive human pursuit. Consequently it contributes to the

⁵⁸⁰ Kunda Ziva "The Case of Motivated Reasoning" (1990) 108 *Psychology Bulletin* 480.

⁵⁸¹ Saxe, above n 269.

⁵⁸² Mark D Alicke and others "Personal Contact, Individuation, and the Better-Than-Average Effect" (1995) 68 *Journal of Personality and Social Psychology* 804.

⁵⁸³ Roy F Baumeister and Leonard S Newman "Self-Regulation of Cognitive Inference and Decision Processes" (1994) 20 *Pers Soc Psychol Bull* 3; Rasyid Sanitioso, Ziva Kunda and Geoffrey T Fong "Motivated Recruitment of Autobiographical Memories" (1990) 59 *Journal of Personality and Social Psychology* 229.

⁵⁸⁴ Bella M DePaulo and others "Lying in Everyday Life" (1996) 70 *Journal of Personality and Social Psychology* 979.

⁵⁸⁵ Laura Penny *Your Call is Important to Us: The Truth About Bullshit* (Three Rivers Press, New York, 2006) at 2.

⁵⁸⁶ Nicky Hager *The Hollow Men: A Study in the Politics of Deception* (Astra Print, Wellington, 2006), at 57

⁵⁸⁷ Richard W Wetherill *Right Is Might: A Basic Book on Ethical Behavior* (The Alpha Publishing House, 2010) at 6.

proclivity to be cynical about truth telling, as indeed posed by Pilate: what is truth?⁵⁸⁸

In the context of our physiological and psychological makeup, the legal order to tell “the whole truth and nothing but the truth” is questionable, based on personal perception and memory of things that we easily forget.⁵⁸⁹ But the perpetual search for truth, its reverence, its goodness, and practical usefulness makes it compelling; the will for truth that drives human interaction.⁵⁹⁰ From the ancient Egyptian guide to immortality⁵⁹¹ to modern day religion, lying or falsification represent a sin that will deny a deceased person redemption. Nyberg implied that truth represents a feeling of certainty in life that is uncertain, which leads inexorably to even more uncertainty at death. It is a product of human imagination that is unattainable because it does not exist but helps us cope with death.⁵⁹² Nonetheless, our courts are tasked with ascertaining an authoritative version of it without an adequate framework of analysis.

3.5.9 The Prevalence of Deceit

Deception is a fact of life,⁵⁹³ it is in our nature, and it is:⁵⁹⁴

[a] contradiction within human behaviour that is publicly condemned but privately practised, seen as repulsive but people do on a daily basis, the lubricant that keeps society going.

⁵⁸⁸ John 18:38 - In verse 37 Jesus responding to Pilates question of whether he was a king stated: "...For this purpose I was born, for this purpose I came into the world, that I may bear witness to the truth..."

⁵⁸⁹ Bok, above n 550, at 5.

⁵⁹⁰ Nyberg, above n 26, at 30.

⁵⁹¹ The Book of the Dead (c. 4000-1500 B.C.) referred to as the earliest written record of lying as wrong.

⁵⁹² Nyberg, above n 26, at 30–31.

⁵⁹³ Supported by findings in a research on lying in everyday life DePaulo and others, above n 584, at 991.

⁵⁹⁴ Nyberg, above n 26, at 7.

Leonard Saxe, a polygraph expert and professor, says “lying has long been part of everyday life. We could not get through the day without being deceptive.”⁵⁹⁵ In all spheres of life (private and public), “one would have to be a social isolate never to be either the perpetrator or recipient of deception.”⁵⁹⁶ Goldberg reminds us that the lexicon of lying (and other forms of deception) comprises vastly more words than that of truth and veracity.⁵⁹⁷

It is unrealistic to think that a plausible method can be devised to measure the level of deception in society. However, George Simmel alluded to the increasing role diversity in modern society, which requires the presentation of multiples or different aspects of the self to others as conducive to the prevalence of deception.⁵⁹⁸ I am not implying that humans have become more deceptive than past generations but rather that the venues for humans to express deception have grown enormously.⁵⁹⁹ Nietzsche asserted “self-preservation dictates that we be superficial, that we accept falsehood....” and we “apparently need illusions to feel good about ourselves,” in maintaining a sense of self-continuity.⁶⁰⁰ We lie to others to comfort or protect their emotional well-being, or to hide our motives or misdeeds, “which would cause anger and lead...to rejection or punishment.”⁶⁰¹

3.5.10 Deception in Close Relationships

The value associated with close relationships is underscored by the importance of talking or sharing information, disclosing and confiding, telling each other

⁵⁹⁵ Allison Kornet “The Truth About Lying” (1997) *Psychology Today*
<<http://www.psychologytoday.com/articles/199704/the-truth-about-lying>>, on 28/04/14

⁵⁹⁶ Saxe, above n 269, at 410.

⁵⁹⁷ M Hirsh Goldberg *The Book of Lies* (W Morrow, 1990) cited in; Meltzer, above n 168, at 62.

⁵⁹⁸ Cited in Meltzer, above n 527, at 62.

⁵⁹⁹ David Gates “Greed RIP (For Now)” (28 July 2002) *Newsweek*
<<http://www.newsweek.com/greed-rip-now-147377>>: on 29/04/2014

⁶⁰⁰ Quoted in Campbell, above n 25, at 169.

⁶⁰¹ Carolyn and Michael, above n 528, at 7.

everything.⁶⁰² The experience can be a rewarding one that is likely to increase intimacy and a sense of being appreciated, but the truth is not always in one's best interest.⁶⁰³ Individuals in close relationships negotiate expectations on how each should act in a given context,⁶⁰⁴ guided by relationship rules, which are prescriptions for issues such as honesty, conflict management and time allocation to provide predictability and reduce conflict,⁶⁰⁵ trusting that their confidences are safe.⁶⁰⁶ They also define authenticity, in which people can express their true feelings and be themselves, without trying to impress the other person; for "people are more self-enhancing with strangers rather than with friends."⁶⁰⁷

People value relationships, and according to Deci and Ryan the primary psychological need for relatedness "encompasses a person's strivings to relate to and care for others, [and] to feel that those others are relating authentically to one's self."⁶⁰⁸ From the attachment theory comes the proposition that "humans possess basic needs that are naturally satisfied by social relationships"⁶⁰⁹ and that the most basic need is a sense of security. The feeling of security depends largely on a perceived sense of trust in the other person to be available and responsive in

⁶⁰² Malcolm R Parks and Kory Floyd "Meanings for Closeness and Intimacy in Friendship" (1996) 13 *Journal of Social and Personal Relationships* 85 at 94.

⁶⁰³ Tim Cole "Lying to the One You Love: The Use of Deception in Romantic Relationships" (2001) 18 *Journal of Social and Personal Relationships* 107 at 111.

⁶⁰⁴ Katlyn Elise Roggensack and Alan Sillars "Agreement and Understanding about Honesty and Deception Rules in Romantic Relationships" (2014) 31 *Journal of Social and Personal Relationships* 178 at 179.

⁶⁰⁵ Alexandra E West "Relational Standards: Rules and Expectations in Romantic Relationships" (Australian Catholic, 2006) at 13; Michael E Roloff and Courtney N Wright "Social Cognition and Conflict" in John G Oetzel and Stella Ting-Toomey (eds) *Sage Handbook for Conflict Communication Integrating Theory Res Pract* (2nd ed, Sage Publications, London, 2013) 133.

⁶⁰⁶ Bella M DePaulo and Deborah A Kashy "Everyday Lies in Close and Casual Relationships" (1998) 74 *Journal of Personality and Social Psychology* 63 at 63.

⁶⁰⁷ At 63.

⁶⁰⁸ RM Ryan E L Deci "A Motivational Approach to Self: Integration in Personality" (1990) 38 *Nebraska Symposium on Motivation Nebraska Symposium on Motivation* 237 at 243.

⁶⁰⁹ Cindy Hazan and Phillip R Shaver "Attachment as an Organizational Framework for Research on Close Relationships" (1994) 5 *Psychological Inquiry* 1 at 10.

times of need.⁶¹⁰ Indeed, trustworthy people are those who can be counted on, to be honest and benevolent.⁶¹¹

However, people in relationships are not always after the truth and they can co-operate to keep each other's lies from being discovered.⁶¹² In a close relationship, people are aware of each other's sensitive and taboo topics,⁶¹³ so deception can be the lubricant that keeps it going. Avoiding conflict that disrupts a relationship may induce one to lie, a cost effective means for the maintenance of the relationship.

3.5.11 Romantic Relationships

In courtship, couples try to impress each other putting their best foot forward, an exercise fraught with deception. Concealment within romantic attachments as such involves information to which others are already privy to but motivated by concern with the partner's reaction.⁶¹⁴ In this environment, the willingness to deceive is target specific because the behaviour in question can potentially upset their partner.⁶¹⁵ Romance is built around concealing costly information while exaggerating one's virtues⁶¹⁶ and people are happy when they do not see the reality of things especially with relationship-threatening information.⁶¹⁷

⁶¹⁰ At 13.

⁶¹¹ DePaulo and Kashy, above n 606, at 64.

⁶¹² At 64.

⁶¹³ Leslie A Baxter and William W Wilmot "Taboo Topics in Close Relationships" (1985) 2 Journal of Social and Personal Relationships 253 at 254.

⁶¹⁴ Cole, above n 265, at 111.

⁶¹⁵ Karen U Millar and Abraham Tesser "Deceptive Behavior in Social Relationships: A Consequence of Violated Expectations" (1988) 122 The Journal of Psychology 263.

⁶¹⁶ Cole, above n 265, at 111.

⁶¹⁷ Jeffry A Simpson, William Ickes and Tami Blackstone "When the Head Protects the Heart: Empathic Accuracy in Dating Relationships" (1995) 69 Journal of Personality and Social Psychology 629 at 630.

Technological innovation like computer-mediated communication (CMC) and texting provide a different dimension to romantic deception. The physical and psychological distance makes social cues like facial expression and tone of voice redundant. The absence of such social cues for interpreting social stimuli makes CMC an ideal platform for deception.⁶¹⁸ Studies have estimated that approximately two-thirds to three-fourths of young adults engage in sexual texting⁶¹⁹ that is to some degree deceptive,⁶²⁰ thus, deception in intimate relationships seems endemic.

Some research has established the high prevalence of lying occurring at least one or two times a day per individual in 20-33% of interactions with others.⁶²¹ At the same time, however, others such as Lippard, report lower rates of lying of about four times a week.⁶²² Regardless of how often lies occur, research suggests that dating couples lie about past relationships or indiscretions, they lie to each other in about a third of their interactions, perhaps even more than they deceive other people.⁶²³ And most of these lies are treated as “little lies” to protect the liar, the target, or both.⁶²⁴

⁶¹⁸ Michelle Drouin, Elizabeth Tobin and Kara Wygant “‘Love the Way You Lie’: Sexting Deception in Romantic Relationships” *Computers in Human Behaviour*; John A Bargh and Katelyn YA McKenna “The Internet and Social Life” (2004) 55 *Annual Review of Psychology* 573 at 578.

⁶¹⁹ Raquel Delevi and Robert S Weisskirch “Personality Factors as Predictors of Sexting” (2013) 29 *Computers in Human Behavior* 2589; Allyson L Dir and others “Understanding Differences in Sexting Behaviours Across Gender, Relationship Status, and Sexual Identity, and the Role of Expectancies in Sexting” (2013) 16 *Cyberpsychol Behav Soc Netw* 568; Michelle Drouin and Carly Landgraff “Texting, Sexting, and Attachment in College Students’ Romantic Relationships” (2012) 28 *Computers in Human Behavior* 444.

⁶²⁰ Michelle Drouin and Elizabeth Tobin “Unwanted But Consensual Sexting Among Young Adults: Relations with Attachment and Sexual Motivations” (2014) 31 *Computers in Human Behavior* 412.

⁶²¹ DePaulo and others, above n 584, at 984.

⁶²² Paula V Lippard “‘Ask Me no Questions, I’ll Tell You no Lies’; Situational Eligencies for interpersonal Deception” (1988) 52 *Western Journal of Speech Communication* 91 at 91.

⁶²³ Kornet, above n 596.

⁶²⁴ Mark Dombeck “Introduction to Family and Relationship Issues” (2002) *Family and Relationship Issues* <http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=1223>.

3.5.12 Familial Relationships

After the emotional rollercoaster of courtship couples who move in together are soon faced with the reality of different personalities living together in the confines of the family home. Individuals have different values, needs or want, derived from genetically induced dispositions, ethos and life experiences.⁶²⁵ Inevitably irritation is a challenge for couples; individuals in a relationship have to figure out how to live with each other's irritants without alienating their partner.⁶²⁶ Arguably deception or lying is often the best strategy to avoid confrontation. It is so even where such deception, when exposed, is far more damaging than the offence it concealed because uncovered lying erodes the trust that forms the basis of successful relationships.⁶²⁷ Lying seems to be both necessary and antithetical to intimacy.

A family is a unit organised around structure, power, roles, and norms in which members negotiate their daily interaction. In such an environment partners' attachment needs may vary according to individual levels of relational discomfort and anxiety (or avoidance) is a prelude to deception.⁶²⁸ Couples use deception to keep the other at a manageable distance, providing some semblance of relational autonomy and independence.⁶²⁹ Similarly, siblings jostle for attention and influence where deception is a means to an end. By and large, deception is

⁶²⁵ Jay Dixit "You're Driving Me Crazy!" [2009] Psychology Today at <http://www.psychologytoday.com/articles/200903/youre-driving-me-crazy> on 02/05/2014

⁶²⁶ Dixit, above n 625.

⁶²⁷ Olson Loren A "My husband is having an affair with a man" (2011) Psychology Today <<http://www.psychologytoday.com/blog/finally-out/201103/my-husband-is-having-affair-man>>.

⁶²⁸ Kelly A Brennan and others "Self-Report Measurement of Adult Attachment: Do They Converge?" in *Attachment Theory and Close Relationship* (Guilford Press, New York, 1998) 46 at 49.

⁶²⁹ Cole, above n 265, at 112.

common within the family whether to harm another, protect the self or spare others; parents lie to each other, to the children and vice versa.⁶³⁰

3.5.13 Deception in Children

Children are a source of happiness, but they test our ability to provide for their needs and social orientation. In one of the earliest studies of deception in children carried out in 1928 the authors reported that:⁶³¹

One of the most interesting episodes of the history of character is the transition from this natural state of universal deception to a social order whose very foundation is its negation....

The study suggested that motives for lying in children are highly complex and specialised,⁶³² which supports the argument that a child's ability to engage or cope with deception depends on their communicative competence and appreciation of intentionality.⁶³³ These deceptive skills and attitudes indicate the child's ability to adjust to or avoid conflicts in the environment, and as long as there is conflict at home or in school, there will be deception.⁶³⁴

Some research even hints at the ability of infants to mislead their parents very early in life. There is compelling evidence, for example, that babies in the first year of life are capable of teasing, pretending, feeling self-conscious, and joking with

⁶³⁰ Michelle A Mazur and Pamela J Kalbfleisch "Lying and Deception Detection in Television Families" (2003) 20 Commun Res Rep 200 at 201.

⁶³¹ Hugh Hartshorne and Mark Arthur May *Studies in Deceit: Book one, General Methods and Results* (Arno Press, New York, 1975) Quoted in; Nyberg, above n 26, at 166.

⁶³² Nyberg, above n 26, at 168.

⁶³³ J. LaFreniere Peter "The Ontogeny of Tactical Deception in Humans" in W. Byrne and Andrew Vasek Richard (ed) *Machiavellian Intelligence: Social Expertise and the Evolution of Intellect in Monkeys, Apes, and Humans* (Oxford, Clarendon Press, 1988), at 238

⁶³⁴ Nyberg, above n 26 at 167

people.⁶³⁵ Children between the ages of three and six are quite adept in deception; they impulsively see through the sham and use it even though they learn most of this behaviour at home.⁶³⁶ Honesty as the best policy is flogged daily within homes, but parents lie to their children regularly as a means of influencing their behaviour and emotions.⁶³⁷

3.6 *Law and Practice*

In spite of the serious implications of deceptive and misleading crimes deemed to inflict unacceptable harm, there is a general legal tolerance of deception in social relationships. For example, exaggerated advertisements are aimed at catching the attention of people rather than constituting a true representation of the quality of products or services, yet they are considered legally acceptable. There are legal guidelines setting the boundaries of these tolerated deceptions, in both advertisements and determining reliance, with a statement of opinion being judged “in the light of the realities of the marketplace,” considering “the propensity of sellers and buyers to exaggerate the advantages...of the bargains they promise.”⁶³⁸ On the other hand, fiduciary rules strictly prohibit unreliable statements of opinions as assertions that justify reliance when spoken by fiduciaries (such as lawyers, doctors, brokers, and trustees).⁶³⁹

⁶³⁵ Reddy Vasudevi *How Infants Know Minds* (Harvard University Press, Cambridge, Mass., 2008), at 49

⁶³⁶ Nyberg, above n 26 at 169

⁶³⁷ University of Toronto, above n 268.

⁶³⁸ American Law Institute “Restatement (Second) of Contracts” <[http://www.lexinter.net/LOTWVers4/restatement_\(second\)_of_contracts.htm](http://www.lexinter.net/LOTWVers4/restatement_(second)_of_contracts.htm)> Quoted in; Alexander and Sherwin, above n 525, at 414.

⁶³⁹ E Allan Farnsworth *Contracts* (Aspen Publishers, New York, 2004) at 469.

In some areas, rules governing deception are under-enforced. An obvious candidate in this category is the job interview. From what clothes to wear, a cheerful outlook, to likely responses or answers to questions; the candidate prepares in terms of what the potential employer wants to hear. Negative personality traits and deficient skills are suppressed while interest in the job and the company are emphasised. All are designed to mislead, in a transaction that has real stakes for everyone, and which is not an act of benevolence on the candidate's part.⁶⁴⁰

3.6.1 Deception in the Legal System

Apart from a general acceptance of deception by private actors, our legal system itself is prone to various types of deception. Much of the lawyering work conducted for clients can also be viewed with deceptive connotation. Traditionally judges endorse legal fictions as a means of adjusting rules of law to new circumstances, limiting both rights of action and defence where justice may require or deny a remedy.⁶⁴¹ On the whole, the body of law appears at times to be designed to mislead ordinary citizens in regards to both contents of legal duties and consequences that follow from their breaches.

3.6.2 The Role of Lawyers

It is ironic that public opinion of the profession charged with the protection and defence of justice carries a degree of distrust. Kant captures the essence of this perception in his observation of lawyers' use of the sword of justice to protect the scales of right, and to promote the interests of their clients: "Since if the scale does not sink the way he wishes, he...throws his sword in it..."⁶⁴² It embodies the disjuncture between the perception of lawyers as callous, devious and indifferent

⁶⁴⁰ Alexander and Sherwin, above n 525, at 416.

⁶⁴¹ At 417; Simeon E Baldwin "A Legal Fiction with Its Wings Clipped, (1907) 41 Am L Rev 38 at 38.

⁶⁴² Immanuel Kant *Project for a Perpetual Peace* (Kessinger Publishing, LLC, 2010) at 44.

to justice and truth; and the 'official' portrayal of law as an honourable and noble calling.

This difficulty in the conceptualisation of the lawyer's role stems from the dual responsibility to the court and the client. To the client, "a lawyer must, within the bounds of the law ... protect and promote the interests of the client to the exclusion... of third parties."⁶⁴³ At the same time, the overriding duty of a lawyer in litigation is to the court with "an absolute duty of honesty ... not to mislead or deceive the court."⁶⁴⁴ Bearing in mind that the court will have to decide between the factual contentions of the parties (which one is factual, legal or both). It follows that in the context of "legal argument" strong advocacy is aimed at persuading legal decision makers, effective negotiation, and the best interest of the client rather than truth and candour.⁶⁴⁵ Thus, the lawyer, in pursuit of effectively arguing a client's position will state the law and facts favourably even if there is a less favourable but more convincing interpretation.⁶⁴⁶

The strategy of re-description or restatement of facts is an exercise in telling the right story. The underlying theme in a courtroom argument is presenting an appealing story while describing what happened. Emphasising this point Michael E Tigar states: "The jurors will find one. The advocate had better tell one."⁶⁴⁷ He recommends that lawyers "map out a closing argument in the very first stages of working on a case," to fit subsequent investigations and reflections into a coherent story. "In working the case you say its story over and over," Tigar advises.⁶⁴⁸

⁶⁴³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Chapter 6.

⁶⁴⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules Chapter 13.

⁶⁴⁵ Charles W Wolfram *Modern Legal Ethics* (student ed, West Pub Co, St Paul, Minn, 1986); Alexander and Sherwin, above n 450, at 418; Wolfram, at 639.

⁶⁴⁶ Wolfram, above n 645, at 643.

⁶⁴⁷ Michael E Tigar *Persuasion* (Section of Litigation, American Bar Association, Chicago, Ill, 1999) at 6–8.

⁶⁴⁸ Richard H Underwood "The Professional and the Liar" (1998–1999) 87 Ky LJ 919 at 15–16.

In the process, the narrative varies according to who is telling the story. As Alasdair McIntyre noted, the indeterminacy of description means:⁶⁴⁹

We cannot...characterise behaviour independently of intentions, and we cannot characterise intentions independently of the settings which make those intentions intelligible both to agents and to others.

The best description may turn on the person's primary intention, which can be revealed by counterfactual questions but it is not necessarily the clue to the best description of all actions.⁶⁵⁰

In and out of the courtroom "good lawyers intentionally attempt to convince judges, jurors, litigants and contracting parties of the truth of a proposition" that the lawyer may not believe to be true. Inducing a false belief in others amounts to deception, and when accomplished by making a misleading statement, the deception is a lie. If the claim of re-description (or re-statement) of facts as claimed by Tigar is correct⁶⁵¹ "then good lawyers are certainly serial deceivers – indeed, deception is one of the core tasks and skills of legal practice."⁶⁵² It is not surprising then that the wide variety of criticisms often levelled at lawyers, include their being.⁶⁵³

...prone to lying and cheating on behalf of clients, and also to sometimes lie to clients; hyper-aggressiveness in litigation, or clogging up the legal system with frivolous disputes....

⁶⁴⁹ Alasdair C McIntyre *After Virtue* (University of Notre Dame Press, Notre Dame, Ind, 2007) at 192.

⁶⁵⁰ Arthur Isak Applbaum *Ethics for Adversaries* (Princeton University Press, Princeton N J, 1999) at 78.

⁶⁵¹ Tigar, above n 647, at 6–8.

⁶⁵² Applbaum, above n 650, at 104.

⁶⁵³ W Bradley Wendel *Lawyers and Fidelity to Law* (Princeton University Press, Princeton, NJ, 2010) at 18.

And yet, it is through these processes that the lived truth of families is expected to be uncovered, in either the context of domestic violence proceedings or in the context of shared parenting orders. The prevalence of deception within intimate relationships as discussed above makes truth telling between separating couples doubtful. It is within such contradictory environment that lawyers for both parties are expected to argue their client's case; within the Family Court philosophy of conciliatory and non-adversarial approach. It is contradictory because couples who end up in court have progressed beyond conciliation and their respective lawyers argue their cases to win, as opposed to reconciliation. This is evident in the increasing cost of running the Family Court, despite the relatively steady number of application.⁶⁵⁴ Such contradiction raises the question of whether an adversarial approach would be more appropriate in family court proceedings.

3.7 Fiction

Fiction is embedded in human life, a world of 'make believe' in which imaginary events and people provide narrative threads that replicate actual life experiences. Though not true, fictions are anchored on human experience, relationship and socialisation.⁶⁵⁵ Whether written, sung, or acted, fiction represents a configuration of symbolic interaction in which the audience use their imagination to follow the script according to their personal sense of self and social life.⁶⁵⁶ For example, consumers of fictional narratives like readers of novels, film and theatre

⁶⁵⁴ Megan Gollop, Mark Henaghan and Nicola Taylor *Evaluation of the 2014 Family Law Reforms: Phase One* (Otago University 2015) at 3; an increase of 70 per cent in the six years from 2006 to 2012, from \$84 million to \$142 million per year.

⁶⁵⁵ Françoise Lavocat "Facts, Fiction, Cognition" (2014) 41 *Neohelicon* 359 at 366.

⁶⁵⁶ Elizabeth CJ Pike "The Role of Fiction in (mis)Representing Later Life Leisure Activities" (2012) 32 *Leis Stud* 69 at 71.

goers all feel simulations of events that imbue genuine emotions like fear, even though the threat portrayed is not real.⁶⁵⁷

Fiction relates to thoughts, the process of visualising, fashioning, shaping, imitating or inventing which Knorr defines as definitional frames, those “instruments of cultural imagination that lead the enchantment of the world.”⁶⁵⁸ As such fiction refers to the transfer of things into an alternative reality in which discussions are carried out, without interfering with the original record. Vaihinger refers to it as the fundamental contradiction between the physical world⁶⁵⁹ and the conceptual world,⁶⁶⁰ “which renders the use of concepts we know to be false essential to thought.”⁶⁶¹

Fiction, in spite of its false premise, is a pervasive phenomenon in our lives. Irrespective of its effects, whether positive or negative, people spend a huge part of their lives immersed in novels, films, TV shows, and other forms of fiction. The question is: Does fiction build the morality of individuals and societies, or is it mentally and ethically corrosive? Referring to television as not working in the public interest, Newton Minow pointed out that:⁶⁶²

Formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western bad men, western good men, private eyes, gangsters, more violence, and cartoons... [amounted to a] vast wasteland.

⁶⁵⁷ Raymond A Mar and Keith Oatley “The Function of Fiction is the Abstraction and Simulation of Social Experience” (2008) 3 Perspectives on Psychological Science 173 at 173.

⁶⁵⁸ Karina Knorr Cetina “Primitive Classification and Postmodernity” Towards a Sociological Notion of Fiction” 11 Theory, Culture & Society at 7.

⁶⁵⁹ The chaotic flux of reality as detected by sensation

⁶⁶⁰ The product of the active thought processes by which human intellect seeks to grasp, understand and manipulate the world.

⁶⁶¹ C K Ogden (translator) Hans Vaihinger *The Philosophy of “As if”: A System of the Theoretical, Practical and Religious Fictions of Mankind* (Keagan Paul, London, 1911) at xii–xvii.

⁶⁶² Newton N Minow “Television and the Public Interest” (1961)
<<http://www.americanrhetoric.com/speeches/newtonminow.htm>>.

And what Minow said of TV programming has also been said, over the centuries, of novels, theatre, comic books, and films; that they are not in the public interest.⁶⁶³ On the other hand, there are those who see positive things in fiction, arguing that made-up stories cultivate our mental and moral development.⁶⁶⁴ What is evident is that these fictional stories do change the views of consumers, as the attitude of readers shifts in correspondence with ideas or ideals expressed in the fictional narrative.⁶⁶⁵

Thus, for better or for worse, history, reveals fiction's ability to change our values at the societal level. For example, Harriet Beecher Stowe's "Uncle Tom's Cabin"⁶⁶⁶ helped bring about the Civil War by convincing huge numbers of Americans that blacks are people and that enslaving them is a mortal sin. On the other hand, the 1915 film "The Birth of a Nation"⁶⁶⁷ inflamed racist sentiments and helped resurrect an all but defunct KKK. So whether you are conservative or progressive the message in fiction is clear; it is a powerful tool that can modify the values or principles of individuals and whole societies.⁶⁶⁸ Particularly so, when we consider that an extensive analysis of narrative themes from across the world found that "the two most common are love toward another and conflict with others."⁶⁶⁹ Fundamentally, life is about relationships between or among individuals and the

⁶⁶³ Jonathan Gottschall "Why Fiction is Good for You" *The Boston Globe* (29 April 2012) <<https://www.bostonglobe.com/ideas/2012/04/28/why-fiction-good-for-you-how-fiction-changes-your-world/nubDy1P3viDj2PuwGwb3KO/story.html>>.

⁶⁶⁴ Minow, above n 662.

⁶⁶⁵ See Mar and Oatley, above n 657; Gottschall, above n 663.

⁶⁶⁶ Harriet Beecher Stowe *Uncle Tom's Cabin* (dover thrift ed, Dover Publications, New York, 2005).

⁶⁶⁷ See "The Birth of a Nation (1915)" <<http://www.filmsite.org/birt.html>>.

⁶⁶⁸ Gottschall, above n 663.

⁶⁶⁹ Patrick Colm Hogan *The Mind and its Stories* (Cambridge University Press, Cambridge, England, 2003) at 11.

navigation of conflicting desires; reflecting the fact that human experience is about coping with such issues.⁶⁷⁰

It is almost inevitable, therefore, that fiction extends to other domains of human endeavour, given its “pervasiveness and relevance...as a routine aspect of social life.”⁶⁷¹ Economic for example posits man as a rational actor,⁶⁷² the law refers to the reasonable person,⁶⁷³ and scientific inquiry often proceeds on principles acknowledged to be false.⁶⁷⁴ In a family court setting, therefore, lawyers for disputing parties commonly pursue different narratives from the same set of facts; the truth of which is to be decided by the court. Thus, in the contest to offer a more convincing argument “a well-conceived [story], stuck to, is often better than the truth.”⁶⁷⁵

3.8 *Legal Fiction*

The pursuit of truth is a perpetual human trait underpinned by logic, the desire to understand why and how things are as they are. This desire for truth is best symbolised by the blindfolded figure of Justice that adorns legal institutions worldwide.⁶⁷⁶ It is peculiar therefore to note that the law embraces the use of fiction in its lexicon of “legal fictions” representing as true what is known to be not

⁶⁷⁰ Mar and Oatley, above n 657, at 174.

⁶⁷¹ Cetina, above n 658, at 5.

⁶⁷² Vaihinger, above n 152, at 20 Discussing Adam Smith and “as if” thinking in economics; See also Lon L Fuller *Legal Fictions* (Stanford University Press, Stanford, 1967) at 106–7: The assumption that man is an “economic animal” constantly seeking his own advantage as an illustration of a fiction.

⁶⁷³ A phrase frequently used in TORT and Criminal Law to denote a hypothetical person in society who exercises care, skill, and judgement in accordance with community standards.

⁶⁷⁴ Fuller, above n 163, at 124–27; Fuller comparing fictions with science.

⁶⁷⁵ James W McElhaney “Liar!” (1994) 80 ABA Journal 74.

⁶⁷⁶ It is ironic that clear vision through blindness is meant to symbolise impartialness but could also symbolise essential blindness of truth from humanity.

true, and which are sanctioned and employed through the orderly and impartial administration of justice.⁶⁷⁷ Therefore, with all things considered one is forgiven if bewildered by the fact that the legal system tasked with uncovering truth, if not justice, is not immune from formalised internal deception. I will argue that family law itself is built on a fundamental but crucially unrecognised fiction and that the failure to be aware of the fiction undoes any of the justification for its existence and undermines its utility.

3.8.1 Definition of Legal Fiction

The classical definition of legal fiction provided by Lon Fuller “is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognised as having utility.”⁶⁷⁸ While this definition has provided the contemporary foundations of legal fiction, there are criticisms regarding its ambiguity. For example, limbs one and two imply two different meanings of legal fiction, which he unifies by the feature that the utility (referred to in limb 2) is dependent on consciousness or at least partial consciousness of the falsity (referred to in limb 1).⁶⁷⁹ What is clear from this definition though is that: (a) fictions are false statements as opposed to the truth, and (b) fictions are known to be false as opposed to errors. However, what is unclear is whose consciousness is involved as it fails to distinguish between:⁶⁸⁰

...pleading on a fiction from leading false evidence where either the party or the court knows or suspects that the evidence is false.

⁶⁷⁷ Sterne, above n 27, at 1.

⁶⁷⁸ Fuller, above n 672, at 9–10.

⁶⁷⁹ At 9.

⁶⁸⁰ Kenneth Campbell “Fuller on Legal Fictions” (1983) 2 Law and Philosophy 339 at 342.

Similarly, “recognised as having utility” lacks clarity, in particular, recognised by whom as having utility for whom?⁶⁸¹

Recognising the weakness inherent in Fuller’s definition Kenneth Campbell, building on its best elements, reconstructed the meaning of legal fictions as:⁶⁸²

Falsities contained in rules permitted by courts, known or suspected by the courts to be falsities, but not intended to deceive.

A good illustration of this definition of fiction is “constructive notice” in which we pretend (and the court accepts) there is notice when we know that there was no notice. The law provides that a public notice is a substitute for actual notice. For example, in a divorce proceeding in which the location of a spouse is unknown, service by publication can be allowed. The legal advertisement of the summons in newspapers is accepted as constructive notice representative of personal service.⁶⁸³

In contrast, Del Mar referring to the limitation in the requirement of consciousness of falsity proposed a broader general definition as:⁶⁸⁴

Any suspension of one or more of the required operative facts leading to the imposition of an associated normative consequences, whether this suspension is introduced because of (1) the absence of some required fact; or (2) the presence of proof to the contrary.

Similarly, Olivier refers to fiction as:⁶⁸⁵

⁶⁸¹ At 344.

⁶⁸² At 346.

⁶⁸³ See for example, “constructive notice” TheFreeDictionary.com <<http://legal-dictionary.thefreedictionary.com/constructive+notice>>.

⁶⁸⁴ Maksymilian Del Mar “Legal Fictions and Legal Change” (2013) 9 International Journal of Law in Context 442 at 442.

⁶⁸⁵ Pierre Johannes and Jeremia Olivier *Legal Fictions in Practice and Legal Science* (Rotterdam University Press, Rotterdam, 1975) at 81.

...an assumption of fact deliberately, lawfully and irrebuttably made contrary to the facts proven or probable in a particular case, with the object of bringing a particular legal rule into operation or explaining a legal rule, the assumption being permitted by law or employed in legal science.

While these broad definitions may be too abstract, they add a different dimension to the context provided by Campbell. The absence of proof provides a better understanding of legal fiction in practice, the “as if” philosophy often adopted by lawyers. Fictions of this nature are a lawyer’s stock in trade.⁶⁸⁶ For example, even though the defendant was not physically evicted, a lawyer can argue that the defendant had been forcibly removed by virtue the deplorable conditions that existed. In this way, analogical reasoning empowers lawyers and judges to extend the law to address unforeseen, and perhaps unintended situations.

Seen in this light, legal fiction in our legal system is a means by which the professional corps of judges and lawyers decide and argue disputes by precedents’ authoritative legal rules. And as argued by Del Mar:⁶⁸⁷

This is because the legal fiction is a device that is created out of a need - indeed, often a duty – to render one’s resolution of the dispute in a manner that respects coherence (and thus some level of predictability), while at the same time attempting to be responsive and efficient in ones dispensation of justice.

In this sense, legal fictions are created in the pit of legal change, and serves two masters; “the conservative pressure of the system and the call of the injured pleading for a remedy”.⁶⁸⁸

This thesis supports the broader definition because the absence of proof provides a better understanding of legal fiction in practice. It represents a fundamental

⁶⁸⁶ Aviam Soifer “Reviewing Legal Fictions” (1986) 20 Georgia Law Review 871 at 876.

⁶⁸⁷ Del Mar, above n 684, at 444.

⁶⁸⁸ At 444.

contradiction of the world and the reality of the senses, the product of thought processes by which we seek to understand things around us.⁶⁸⁹ It is a curious artifice of legal reasoning to discern facts and promote a just result;⁶⁹⁰ the use of a patently false statement as a necessary component of a legal rule widely practised and accepted as a mode of legal analysis.⁶⁹¹ The wide use of legal fiction is such that probably no lawyer would deny that judges and writers on legal topics frequently make statements they know to be false.⁶⁹²

Be that as it may, traditionally legal fiction is an enabler, a device used to facilitate the application of the law to novel or complex questions and circumstances.⁶⁹³ It is a lawyer's stock in trade, analogical reasoning empowering lawyers and judges to extend the law to address unforeseen and perhaps unintended situations.⁶⁹⁴ Nonetheless the persuasive power of fiction to convince and convert can be misleading and dangerous when used without acknowledging its falsity.⁶⁹⁵

3.8.2 The Legal Fiction of Family Unity

A quick review of historical legal fiction regarding the "family" is appropriate for the purpose of this thesis. The enduring notion of marital unity under the law is firmly rooted in its Christian origin in which a man and wife are considered no more two but one flesh.⁶⁹⁶ The fiction of marital unity persisted for centuries perpetuated as a convenient device symptomatic of the marriage relationship to

⁶⁸⁹ Michael Quinn "Fuller on Legal Fictions: A Benthamic Perspective" (2013) 9 International Journal of Law in Context 466 at 466.

⁶⁹⁰ Nancy J Knauer "Legal Fictions and Juristic Truth" (2010) 23(1) St Thomas Law Review 70 at 70.

⁶⁹¹ At 70.

⁶⁹² Fuller, above n 672, at 1.

⁶⁹³ At 21.

⁶⁹⁴ Knauer, above n 690, at 79.

⁶⁹⁵ Fuller, above n 672, at 10.

⁶⁹⁶ See Genesis 2: 24 and Mathew 19: 6

the outside world, to their kin, to their children and each other. It persisted in serving the legal needs of three shifting social structures:⁶⁹⁷

The kin-oriented family of the late middle ages, the patriarchal nuclear family of early capitalism, and even the more compassionate nuclear family of the late eighteenth century.

In spite of the dogmatic persistence of this legal fiction some commentators feel it was not a true reflection of legal conditions in any period of either English or American history.⁶⁹⁸ However, the practical result of marital unity for the legal system was that, in any property dispute or any dispute arising from the actions of a member of a man's household it was only necessary to sue the man as the head of the household. Norma Basch alluded to the resilience of the marital unity doctrine to withstand statutory changes, attributable in part to its ability to adapt to changes and blunt the drive for married women's rights, safety and protection within the family.⁶⁹⁹

This as some argue, was maintained by the patriarchal nature of law where jurists, legislators, and judges were predominantly male. For example, individual actors in the family court system, (including professionals like judges, lawyers, psychologists) are stakeholders in the family. They are husbands, wives, parents or siblings. As such their conception of family unity, roles, and obligation rest on their personal experience of life; it is part of what they are and not an abstract concept proclaimed by law.

⁶⁹⁷ Norma Basch "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America" (1979) 5 Feminist Studies 346 at 347.

⁶⁹⁸ Wives' contractual capacities for example were afforded some leeway in common law courts which allowed wives to act as their husband's agent. Likewise, those living in centres of trade participated in commerce as a matter of local custom or through sole trader statutes. See Mary Ritter Beard *Woman as Force in History* (Persea Books, New York, 1987); Basch, above n 177.

⁶⁹⁹ Basch, above n 623 at 347

3.9 *The Fiction of the Ideal Family*

We pride ourselves as a society that values family, supported by a survey result that places New Zealand as the world's second most desirable place for families.⁷⁰⁰ Depending on one's moral orientation we either commend our liberal inclinations towards individual freedom, equality and progress, or we denigrate the same as New Zealand society's moral decline.⁷⁰¹ At the same time, other commentators point to the embarrassing fact that New Zealand has the highest rate of family violence amongst Organisation for Economic Development and Co-operation (OECD) countries.⁷⁰² In the face of such contradiction, our family justice system continues to adhere to the template of "the ideal" family, particularly our responses to domestic violence.

Our conception of the ideal family is the same as upheld in most Western countries; the happy family of father, mother, and children thriving in the home environment where love, care, and cooperation for the common good reigns.⁷⁰³ It perpetuates the myth that all family members are compatible, have the same goals and love one another, giving rise to the fiction of the family unit that surface appearance (unity) becomes more important than personal happiness.⁷⁰⁴

⁷⁰⁰ Immigration NZ "Family Life in New Zealand" New Zealand Now
<<https://www.newzealandnow.govt.nz/why-choose-nz/family-friendly>>.

⁷⁰¹ Editorial "Our Liberal Society" *New Zealand Herald* (29 June 2004)
<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3575443>.

⁷⁰² NZPA "NZ Worst for Domestic Violence - UN Report" *Stuff.co.nz* (New Zealand, 24 July 2011)
<<http://www.stuff.co.nz/national/5332717/NZ-worst-for-domestic-violence-UN-report>>.

⁷⁰³ Antonio P Contreras "Love, Myth, and the Fiction of the Ideal Family" (2014) GMA News Online <<http://www.gmanetwork.com/news/story/348507/opinion/love-myth-and-the-fiction-of-the-ideal-family>>; Meredith Small "The Perfect Family Is a Myth" (2008) Live Science <<http://www.livescience.com/3113-perfect-family-myth.html>>; Eva Lane "Re-Defining the Victorian Ideal: The Productive Transformative Family Sensation Fiction" (McMaster, 2009).

⁷⁰⁴ Mark Sichel and Alicia L Cervini "The Family Myth" Psyber Square
<<http://www.psybersquare.com/family/myth.html>>.

However, the ideal family is a fiction that may have existed in ancient times, but it has been neither normative nor ideal in any other times in human history.⁷⁰⁵

We often romanticise family life as a loving, safe, and secure haven, but in reality, it is ridden with conflict and tension.⁷⁰⁶ Difficulties between spouses are common, conflicts and disagreements over family matters abound, and couples often struggle to sustain romantic infatuation beyond the first few years of their relationship. Parent-children conflicts, as well as sibling rivalry, are commonplace too. As parents assert their authority children try to assert their autonomy, siblings contend with each other and their parents, so strife is inevitable.⁷⁰⁷ In the real world, families consist of individuals with different interests, goals, and aspirations who endeavour to co-exist as a family unit. In such environment, stress, disagreement and conflict are common, but they can become destructive when conflicts get out of hand and escalate to violence.

Family violence often dissolves the fiction of the ideal family, the fantasies about love, support, and the caring nature of the family.⁷⁰⁸ The dissolution of the myth is often profound, leading to the public outcry that often drives legal responses, premised on aspirational objectives that perpetuate the fiction of the ideal family. However, when the disparity between the aspirational objective of the law and the reality of family life as lived becomes too wide the normative or transformative goals become unrealistic. It appears that in spite of the fact that “the ideal” family does not exist we continue to aspire to it and to use the law to enforce conformity with it in the hope that we can achieve it in the future.⁷⁰⁹

⁷⁰⁵ Parke D Ross *Future Families: Diverse Forms, Rich Possibilities* (John Wiley & Sons, 2013) at 2.

⁷⁰⁶ American Academy of Pediatrics “The ‘Perfect’ Family” (2015) HealthyChildren.org <<http://www.healthychildren.org/English/family-life/family-dynamics/Pages/The-Perfect-Family.aspx>>.

⁷⁰⁷ Sichel and Cervini, above n 704.

⁷⁰⁸ Sichel and Cervini, above n 704.

⁷⁰⁹ Lane, above n 703, at 5.

3.10 Conclusion

An individual is a complex being whose reality is determined by one's biological makeup, socialisation and environmental factors. We see, hear, feel, smell, and taste through our biological senses in our experience of life. These, however, are not mere physical organs, but a means of perception conditioned by socialisation and the environment in which one grows up.⁷¹⁰ The term "socialisation" denotes both the process of functioning within different life situations and the social end product that contributes to personal identity.⁷¹¹ Thus, it is submitted that the senses plus the mind in conjunction with socialisation and its environ, contribute to a person's awareness of the "self", which in turn produces the person's sense of reality.

A person's well-being revolves around maintaining an acceptable balance between competing interests and relationships. In this respect, deception is a survival tool, the lubricant that helps us to cope with life. On a practical level, most people are presented with good reasons to lie on a daily basis and not many pauses to consider the choices confronting them.⁷¹² We understand and interpret the world around us through our senses and our perception of the self; who we are in our relationship with others. As human beings an enduring theme in our lives is that we deceive frequently and casually. Some psychologists claim that the impulse to deceive appears to reside deep within our genes, a central feature of our common humanity.⁷¹³ Indeed, as a scholar puts it:⁷¹⁴

⁷¹⁰ Ruth Benedict cited in: Mlodinow, above n 22, at 30.

⁷¹¹ Luis F García, Anton Aluja and Victoria del Barrio "Effects of Personality, Rearing Styles and Social Values on Adolescents' Socialisation Process" (2006) 40 *Personality and Individual Differences* 1671 at 1672.

⁷¹² Bok, above n 550, at xviii.

⁷¹³ Robert S Adler "Negotiating With Liars" (2007) 48 *MIT Sloan Management Review* 69.

⁷¹⁴ David Livingstone Smith *Why We Lie* (St Martin's Griffin, New York, 2007) at 15.

Lying is not exceptional; it is normal and more often spontaneous and unconscious than cynical and coldly analytical. Our minds and bodies secrete deceit.

Given the complexity of human behaviour, it is too simplistic to attribute domestic violence any single issue. The interaction between family members pertain to exchange in love and material goods, not between an aggregate of individual members working in isolation from one another, “but as an interactive whole, in constant interaction, influencing one another”.⁷¹⁵ As a result of these interactions, families get into trouble, when the performance of roles are too rigid and unable to adapt to the changing environment, or too relaxed and vague to fulfil significant aspects of role performance.⁷¹⁶

⁷¹⁵ Dore, above n 496, at 377.

⁷¹⁶ At 377.

CHAPTER 4 – POWER AND AGGRESSION

4.1 Introduction

From perceiving the world around us on the basis of who we are, interpreting events through our sense of the “self” as covered in the last chapter, I will now proceed to discuss the concepts of power and aggression in human relationships. If power is a basic component of relationships, it follows that aggression is an outcome of our interaction, a human trait that characterises our association with others.

The concept of power is fundamental to our understanding of domestic violence. For example, the stereotypical domestic abuse situation is often configured as the more powerful abuser, dominating and often physically and emotionally controlling victims (family members) into submission.⁷¹⁷ However, the modern conceptualisation of power within intimate relationships is premised on the notion of equality. In subtle power struggles, “each partner feels dominated or controlled by the other at different times and in different ways”.⁷¹⁸ As Marano points out:⁷¹⁹

Power is not limited to leaders of organisations: It does not require outright acts of domination. It’s a basic force in every social interaction. Power defines the way we relate to each other.

⁷¹⁷ Admin “What Is The ‘Balance Of Power’ In Your Most Intimate Relationship?” (8 January 2014) Anxiety to Peace <<http://www.anxietytopeace.com/2014/01/what-is-the-balance-of-power-in-your-most-intimate-relationship/>> at on 30/05/2016; Dair L Gillespie “Who Has the Power? The Marital Struggle” (1971) 33 J Marriage Fam 445 at 446; Robert O Blood and Donald M Wolfe *Husbands & Wives: The Dynamics of Married Living* (Free Press, New York, 1960) at 29–30.

⁷¹⁸ Admin, above n 718.

⁷¹⁹ Hara E Marano “Love and Power” [2014] Psychology Today, at <http://www.anxietytopeace.com/2014/01/what-is-the-balance-of-power-in-your-most-intimate-relationship/> on 29/05/2016.

Power dynamics characterise all human relationships,⁷²⁰ impacting at all levels from dyadic, group norms to macro levels,⁷²¹ with the balance of power tipping one way and the other way at different times.⁷²²

Similarly, aggression is a human behaviour rooted in human interaction, but it is not a single trait, rather a suite of behaviours with a dynamic and complicated range of expression.⁷²³ This is evident in the different patterns of aggression noted in attacking, defending, fear or sex-related aggression. But again our conception of the self or who we think we are matters. Those who advocate our competitive nature point to conflict and violence as a by-product of competition for limited resources. In contrast, others see cooperation as a central feature of our success as a species, even though we can and do compete a lot, using aggression in the process.⁷²⁴

More importantly is the need to recognise that both power and aggression are fundamental to human interaction. As such, they are not necessarily bad, but they can generate negative outcomes with potentially harmful effects. The literature on domestic violence locates family abuse within the gender prototype of the unequal distribution of power and the use of aggressive behaviour to control and dominate women.⁷²⁵ It demands a closer examination of power dynamics within

⁷²⁰ H Amaro "Love, Sex, and Power Considering Women's Realities in HIV Prevention" (1995) 50 *Am Psychol* 437; Norah E Dunbar "Dyadic Power Theory: Constructing a Communication-Based Theory of Relational Power" (2004) 4 *Journal of Family Communication* 235; Letitia Anne Peplau "Human Sexuality: How Do Men and Women Differ?" (2003) 12 *Current Directions in Psychological Science* 37.

⁷²¹ Carter A Lennon, Andrew L Stewart and Thomas Ledermann "The Role of Power in Intimate Relationships" (2013) 30 *Journal of Social and Personal Relationships* 95.

⁷²² Gillespie, above n 717.

⁷²³ Agustine Fuentes "Bad to the Bone: Are Humans Naturally Aggressive? | Psychology Today" *Psychology Today*, at <http://www.psychologytoday.com/blog/busting-myths-about-human-nature/201204/bad-the-bone-are-humans-naturally-aggressive> on 31/12/2012.

⁷²⁴ Agustín Fuentes "The Roots of Human Aggression" *Being Human* <<http://www.beinghuman.org/article/roots-human-aggression>>.

⁷²⁵ For example see Stark, above n 98.

intimate relationships and how aggression plays out in everyday life given the complexity of human behaviour.

4.2 *Power in Relationships*

The notion of a multidimensional “self” presumes that in our interaction with others, we portray different aspects of self as circumstances demand. The sense of self in such situations includes an aspirational element woven into individual life enterprises, which evolves into a narrative of how our lives should proceed.⁷²⁶ In the process, “meaning” is crafted, enacted and communicated in different ways including the clothes we wear, what we say, and our actions and facial expressions. Within this web of social activities, power relations, although mostly invisible and intangible, are structured and enhanced through daily interaction with others, objects and events. The social construction of reality and power relations can be deceptive in the form of subtle, understated messages that infiltrate people’s consciousness without awareness.⁷²⁷

In everyday language, power is often referred to as an object one can hold and wield or a substance that can be possessed, shared and distributed. Others contend that power is an entity or attribute that is omnipresent and which agents may have and exercise.⁷²⁸ At a personal level power can be configured in three dimensions: physical power (body strength); charismatic power (personality) and institutional power vested in office, position or status. Thus, from a

⁷²⁶ Daniel Silver and Monica Lee “Self-Relations in Social Relations” (2012) 30 Sociological Theory 207.

⁷²⁷ Owyong, above n 28.

⁷²⁸ Barry Barnes *The Nature of Power* (Polity Press, Cambridge, UK, 1988) at 1.

functional/behaviourist viewpoint, power exists without necessarily being manifest, a capacity that is evident only through its effects:⁷²⁹

Power is one of those things, like gravity and electricity, which makes its existence apparent to us through its effects, and hence, it has always been found much easier to describe its consequences than to identify its nature and its basis.

A detailed examination of the various theories of power is outside the scope of this thesis and the following discussion will be limited to micro (personal relationships) and macro (institutional) permutations of power.

4.2.1 Theoretical Underpinnings of Power

The theoretical analysis of power can be undertaken at different levels and across a variety of disciplines, but historically, power has mostly been analysed at the macro or state level either as a means (not a resource) to seek strategic advantage or power as hegemony (centralised and focused on sovereignty).⁷³⁰ Building on Hobbes' notion of centralised power, Weber linked power to bureaucracy (the concept of authority) as a tool of control or domination.⁷³¹ In contrast, Robert Dahl located power within the community but with particular individuals (elites) who prevent others from doing what they prefer to do,⁷³² in other words, the power to compel obedience, or the ability to make somebody do something that he/she would not otherwise do.

⁷²⁹ At ix.

⁷³⁰ The decentralised view of power as a means rather than a resource is often attributed to Machiavelli while the centralised power is attributed to Hobbes. See Stewart Clegg *Frameworks of Power* (SAGE, London, 1989) at 5.

⁷³¹ Max Weber *The Theory Of Social And Economic Organization* (Simon and Schuster, 2009) at 51.

⁷³² Robert A Dahl and Douglas W Rae *Who Governs?* (2nd ed, Yale University Press, New Haven, CT, 2005) at 6.

In response to Dahl, “two-dimensional power” as overt (the way decisions are made) and covert (the ability to prevent decision-making by preventing issues from being discussed) was introduced by Bachrach and Baratz.⁷³³ Both conceptualisations, however, relate to decision makers or those in positions of authority. Taken a step further, Sharp suggests that people in society can be divided simply into rulers and subjects, in which rulers derive their power from the consent of subjects. Non-violent action or protest can withdraw the consent.⁷³⁴

It brings us to the “three-dimensional approach” of Lukes, who argued that the third dimension of power is latent power. The focus is on the question of who is dominating who, particularly, where those subjected to power act contrary to their interest without conscious awareness.⁷³⁵ A classic illustration of the latent dimension of power is the self-subjection practices of dieting, depilation, ornamentation and make-up practised by women. As Barky observes, “it is women themselves who practice [this]... on and against their own bodies...” a form of self-subjection or obedience to the demands of society.⁷³⁶ A reflection of the notion that control of thought and behaviour can be achieved through the control of information, for example, mass media and socialisation.

4.2.2 What is Power?

Arriving at a consensus on the definition of power is an exercise in futility for what it is, and its nature is far from settled. The difficulty in defining power is contextual in nature: where it is located, how it is distributed and the unit of analysis

⁷³³ Peter Bachrach and Morton S Baratz “Two Faces of Power” (1962) 56 American Political Science Review 947.

⁷³⁴ Brian Martin “Gene Sharp’s Theory of Power” (1989) 26 Journal of Peace Research 213 at 12, 22 and 65.

⁷³⁵ Steven Lukes *Power: A Radical View* (2nd ed, Palgrave Macmillan, New York, 2005) at 27.

⁷³⁶ Sandra Lee Bartky *Femininity and Domination: Studies in the Phenomenology of Oppression* (Routledge, New York, 1990) at 80.

(institutions, groups, or individuals).⁷³⁷ By the actor's intention, it is simply defined as "power over" or the ability to make somebody do what she would not otherwise do.⁷³⁸ A shift in focus to the target's response treats power as an influence: "power to" as the potential to influence, with influence being the exercise of power.⁷³⁹ In general terms or everyday language, power is the capacity to cause intended effects either physically or socially, and at this abstract level, it is not only bound to things as well as people but affects things as well as people.⁷⁴⁰ In this sense, a person, an institution, event or idea is deemed powerful because of its impact on society, its effect on what people do, think or the way they live.

4.2.3 Power Over

What power is, however, remains elusive? According to Lukes, the concept of power is "ineradicably evaluative [and] essentially contested",⁷⁴¹ for example, those who define power as getting someone else to do what they want them to do: the exercise of power-over. That is, one actor in a social relationship can carry out his/her will despite resistance;⁷⁴² or A getting B to do something that B would not otherwise do.⁷⁴³

⁷³⁷ Dacher Keltner, Deborah H Gruenfeld and Cameron Anderson "Power, Approach, and Inhibition" (2003) 110 *Psychol Rev* 265 at 265.

⁷³⁸ Dahl cited in Lukes, above n 735, at 16.

⁷³⁹ Susan T Fiske and Eric Dépret "Control, Interdependence and Power: Understanding Social Cognition in Its Social Context" (1996) 7 *European Review of Social Psychology* 31 at 55; John C Turner *Social Influence* (Brooks/cole Publishing Company, 1991) at 7.

⁷⁴⁰ John C Turner "Explaining the Nature of Power: A Three-Process Theory" (2005) 35 *Eur J Soc Psychol* 1 at 6; Norah E Dunbar "Theory in Progress: Dyadic Power Theory: Constructing a Communication-Based Theory of Relational Power" (2004) 4 *Journal of Family Communication* 235 at 236.

⁷⁴¹ Lukes, above n 735, at 14.

⁷⁴² Max Weber *Economy and Society*, Roth Guenther and Wittich (eds) (5th ed, University of California Press, Berkeley, 1978) at 16.

⁷⁴³ Robert A Dahl "The Concept of Power" (1957) 2 *Behaviol Science* 201 at 202–3.

As Lukes noted, Dahl's one dimension view of power; Bachrach and Baratz's two-dimensional view; and his three-dimensional view are all variations of "the same underlying conception of power, according to which A exercises power over B when A affects B in a manner contrary to B's interests."⁷⁴⁴ Similarly, Foucault's analysis presumes that power is a kind of power over; as he puts it, "if we speak of the structures or the mechanisms of power, it is only insofar as we suppose that certain persons exercise power over others."⁷⁴⁵ The two salient features of this conception of power are that power is in the environment of power-over relations, defined regarding action or actual exercise of power.

4.2.4 Power To

Slightly different is the conception of "power to" focusing on the ability to influence even if it is not exercised. The classic definition by Hobbes referred to power as a person's "present means to obtain some future apparent good,"⁷⁴⁶ or as Arendt puts it, power is "the human ability not just to act but to act in concert."⁷⁴⁷ The implication is that power enables someone to do something: "power as the capacity, potential, ability or wherewithal."⁷⁴⁸ As Lukes points out, power "is a potentiality, not an actuality - indeed a potentiality that may never be actualised."⁷⁴⁹ Whether "power-over" and "power-to" are derivatives of the same thing is arguable, but some hold that they carry different meanings, and it is a mistake to develop an account of power that integrates the two concepts.⁷⁵⁰

⁷⁴⁴ Lukes, above n 735, at 30.

⁷⁴⁵ Hubert L Dreyfus *Michel Foucault: Beyond Structuralism and Hermeneutics* (2nd ed, University of Chicago Press, Chicago, 1983) at 217.

⁷⁴⁶ Thomas Hobbes *Leviathan* (Pacific Publishing Studio, Seattle, Washington, 2011) at 50.

⁷⁴⁷ Hannah Arendt *On Violence* (Harcourt, Brace & World, New York, 1970) at 44.

⁷⁴⁸ Hanna F Pitkin *Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought* (University of California Press, Berkeley, 1973) at 276.

⁷⁴⁹ Lukes, above n 735, at 69.

⁷⁵⁰ Amy Allen "Feminist Perspectives on Power" in Edward N Zalta (ed) *The Stanford Encyclopaedia of Philosophy* (summer 2014 ed, 2014) at 4.; retrieved from <http://plato.stanford.edu/archives/sum2014/entries/feminist-power/> on 30/12/2014

The social psychology approach towards power focuses on the detail analyses of the social influence processes.⁷⁵¹ This theory configures power as the capacity to influence others, based on the control of resources. The basic idea is that power is conferred by the control of resources that are desired or valued by others, who depend on the influencing agent for the fulfilment of their needs or attainment of their goals.⁷⁵² It follows that different types of resources confer different types of power that in turn generate different kinds of influence. The conceptualisation of power as the ability or the capacity to induce action or produce intended effect means that power is not always exercised, or that when it is exercised, will not always be successful.⁷⁵³

4.3 Institutional Power

Institutions do not only exist but are powerful in the extent to which they affect the behaviours, beliefs and opportunities of individuals, groups, organisations and societies.⁷⁵⁴ Society is a network of institutions, each linked more or less tightly to others. An institution is two things: first, it is an organised pattern of roles, often enforced with positive and negative sanctions. Second, it is the patterned habits of thought learned by individuals performing those roles.⁷⁵⁵ Institutions are more

⁷⁵¹ Turner, above n 740, at 2.

⁷⁵² At 2.

⁷⁵³ Dunbar, above n 740, at 236.

⁷⁵⁴ Thomas B Lawrence "Power, Institutions and Organisations" in Royston Greenwood and others (eds) *The SAGE Handbook of Organizational Institutionalism* (reprint ed, SAGE Publications Ltd, Los Angeles; London, 2008) 170 at 170.

⁷⁵⁵ William M Dugger "Power: An Institutional Framework of Analysis" (1980) 14 *Journal of Economic Issues* 897 at 898.

than just enduring patterns of social practice; they are those patterns of practice for which,⁷⁵⁶

[d]epartures from the pattern are counteracted in a regulated fashion, by repetitively activated, socially constructed, controls – that is by some set of rewards and sanctions.

Thus, power, in the form of repetitively activated controls, is what differentiates institutions from other social constructions.⁷⁵⁷

How do individuals acquire motives, goals, ideals and means? The answer to this takes us down to the bedrock, the institutional structure in which the individual is embedded. Institutional structure is the source of power, for individuals learn motives, goals, ideals and means from their participation in society's institutions. In the family, church, school, military, corporation, and government, we learn what is expected of us, and we learn how to do it. Some of us learn how to use power, and how to back it up if the need arises.⁷⁵⁸

In an institutional setting, power refers to the ability to tell other people what to do with some degree of certainty that they will do it. When power wielders must coerce others, power is tenuous and obvious, but when coercion is unnecessary, power is secure and unnoticed. Individuals often do not even consider their behaviour as submissive; rather, they "choose" to do what is expected of them. They do not even notice power. Instead, they consider themselves as free [moral agents], exercising individual initiative.⁷⁵⁹

⁷⁵⁶ Ronald L Jepperson "Institutions, Institutional Effects and Institutionalism" in Walter W Powell and Paul J DiMaggio (eds) *The New Institutionalism in Organizational Analysis* (University Of Chicago Press, Chicago, 1991) 143 at 145.

⁷⁵⁷ Nelson Phillips, Thomas B Lawrence and Cynthia Hardy "Discourse and Institutions" (2004) 29 *The Academy of Management Review* 635 at 638.

⁷⁵⁸ Dugger, above n 755, at 897.

⁷⁵⁹ At 897–8.

4.3.1 Political Institutions

For the purpose of this discussion, political institutions refer to the state and legislature, the executive and the judiciary branches. In this sense, it is worthwhile, to begin with the definition of government as “conduct of conduct.”⁷⁶⁰ ‘To conduct’ signifies leading, directing or guiding and implies design on how this is done. In an ethical or moral sense, the reflexive verb ‘to conduct oneself’ is concerned with appropriate self-direction in specific situations like work/home, business dealings or about clients or friends.

As a noun “conduct” refers to behaviour, with some degree of self-guidance or self-regulation about standards, for example, “professional conduct” or the conduct of school children. In general, there is a presumption that rational behaviour can be controlled and regulated by agents who are responsible for ensuring that regulation occurs.⁷⁶¹ In this sense, government entails a deliberate attempt to shape behaviour according to norms or standards for different ends.⁷⁶²

Within these political institutions are individuals empowered by the office they occupy, which gives them the power to tell others what to do with some degree of certainty. Some Prime Ministers seek basic social reforms; some judges seek justice, and some legislators seek equality, liberty and fraternity. On the whole, these officials acquire habits and thoughts learned in the performance of their roles and the means to pursue institutional motives, goals and ideals. Thus, in most Western countries, including New Zealand, we see the power of the state

⁷⁶⁰ Colin Gordon “Governmental Rationality: An Introduction” in Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect: Studies in Governmentality* (University Of Chicago Press, Chicago, 1991) at 2; Dreyfus, above n 745, at 220.

⁷⁶¹ Mitchell Dean *Governmentality: Power and Rule in Modern Society* (Sage Publications, London ; Thousand Oaks, Calif, 1999) at 10.

⁷⁶² At 11.

regulate all aspects of family life once seen as representing the sanctity of the private domain.⁷⁶³

4.3.2 Professional Power

Another aspect of power attributed to Foucault is the power of knowledge. It stems from the power of discourse accumulated, consolidated and circulated as representative of particular truths.⁷⁶⁴ As such, professional discourses like law and psychology represent certain truths that become decisive in family court proceedings. Where judges are more inclined to accept professional opinions over the personal feelings or narratives, the power of these professionals stems from specialised discourse and the rules of the game (family courts) which provide them with the dispositional power to manoeuvre or the leeway to reinterpret meaning.⁷⁶⁵

4.3.3 Informal Institutional Power

Notably, power in political institutions is derived from formal authority vested in offices or positions, but power is also noticeable within informal social settings or structures. For example, in the abstract social power circuit, the course of social integration creates rules that order relations and meaning, membership and

⁷⁶³ “Family: Government Power Regulation Social Welfare” (2004) Women’s Accounts <http://www.womensaccounts.com/family_power_regulation.html>; Alison Diduck and Felicity Kaganas *Family Law, Gender and the State* (3rd ed, Bloomsbury Publishing, Oxford, 2012); Jacobsen and others, above n 217.

⁷⁶⁴ Michel Foucault *Power/Knowledge*, Colin Gordon (ed) (1st American ed, Vintage, New York, 1980) at 93.

⁷⁶⁵ See for example; *K v B* (2009) 27 FRNZ 417 (HC); *Bashir v Kacem* (2010) [2010] NZFLR 865 (CA); in the High Court granted relocation on the ground that the conflict between the parties carried unacceptable risks for the children (at [59]) but the Court of Appeal reversed the decision on the strength of the psychological report suggesting that the parents were doing better in sheltering the children from the conflict (at [44]). This was despite the children preferring to move to with the relocating parent.

belonging.⁷⁶⁶ This underpins the consequent argument of unjust distribution of benefits and burdens in familial life through the dictates of the contemporary gender-structured family. As Susan Okin puts it:⁷⁶⁷

When we look seriously at the distribution between husbands and wives of such critical goods as work (paid and unpaid), power, prestige, self-esteem, opportunities for self-development, and both physical and economic security, we find socially constructed inequalities between them, right down the list.

Similarly, in the conceptualisation of power as a relation of domination, feminist scholars often refer to “patriarchy” as an oppressive institution that perpetuates the unjust domination of women. While patriarchy (dominance by men) is an informal social creation, it is embedded in most formal institutions through culture, values and norms. Patriarchy as a means of control, domination or suppression of women is a theme central to most feminist theories of power.

4.3.4 Power at the Micro Level

The need for relationship is inherent in human sociability and as such conflicts are unavoidable in human interactions, both at the interpersonal and inter-group levels.⁷⁶⁸ In the circumstances, power dynamics embody virtually all human relationships from the micro (individual) and macro (group) levels. In the event of a conflict, each side looks at advancing its interests, sometimes, at the expense of the other party. Thus, power relations are played out through the specific tactics employed by the influencing agent to change the attitude or behaviour of the

⁷⁶⁶ Flantz (translator) Elisheva Sadan *Empowerment and Community Planning* (Hakibbutz Hameuchad Publishers, Tel Aviv, 1997) at 49 For more detail on circuits of power see; Clegg, above n 730.

⁷⁶⁷ Susan Moller Okin *Justice, Gender, And The Family* (reprint ed, Basic Books, New York, 1991) at 136.

⁷⁶⁸ See Lennon, Stewart and Ledermann, above n 721; Dunbar, above n 740.

target in a conflict situation.⁷⁶⁹ At the individual level power is manifested only in the event of interaction between two or more persons or within small groups like families and friends.

While we adhere to the principle that we are free in the exercise of individual initiatives and in control of personal choices and decisions, science suggests otherwise. As social beings, we are influenced by the world around us, and we act according to the demands of the situation, of those around us, and what is expected of us under the circumstances, but with the illusion that we are exercising individual choice and autonomy. It is also evident that both in a life-span and in our daily lives, we act or make decisions according to the dictates of the different roles we play.

4.3.5 Power in the Family

The family as the fundamental unit of society where socialisation begins. Within the family are organised patterns of roles that articulate patterned habits of thoughts absorbed by individuals performing those roles.⁷⁷⁰ The baby at birth is helpless but quickly learns that crying generates action from the mother or caregiver. The child as a boy or a girl learns to dress, play, and act according to gender roles as well as respect regarding age to older siblings and parents. In control of the family are individuals who play the role of husband/wife, mother/father or both as parents. In this context, we internalise power relations between different roles performed within the family, very early in life. Such relationships manifest themselves in patriarchal society through both covert and overt power symmetries between the role of a parent as head the household,

⁷⁶⁹ Joseph Schwarzwald, Meni Koslowsky and Efrat Ben Izhak-Nir "Gender Role Ideology as a Moderator of the Relationship between Social Power Tactics and Marital Satisfaction" (2008) 59 Sex Roles 657 at 657.

⁷⁷⁰ Dugger, above n 755, at 898.

parental authority over children, older siblings over younger ones or men over women.

4.3.6 Power in Intimate Relationships

It is evident from the above discussion that power dynamics characterise intimate relationships and impact on the quality of the marital relationship. Evidently, socially constructed gender roles in such a relationship underline the unequal distribution of resources which in part drives the feminist movement. The assumption is that male dominance, through patriarchal social systems, extrapolates a power imbalance that underlies men's abuse of women in domestic violence.⁷⁷¹ This theory posits that power relations are affected by both the normative force of gender roles and the resources possessed by the spouses.⁷⁷²

To understand the power dynamics in marital relationships, it is important to examine how day-to-day decisions are made. In this context, power is defined regarding the ability to influence the other when a conflict of interest or goals exists.⁷⁷³ In the process, power is not a personal attribute but a property of the family system, as a characteristic of social interaction between two or more people: and as such, it is difficult for one spouse to have their way all the time.⁷⁷⁴ In their study of social power, French and Raven identified six power bases as sources of social power; which are relevant to intimate relationships. These are coercive power (ability to punish); reward power (ability to offer gifts or favours); expert power (knowledge or ability); informal power (understanding of a

⁷⁷¹ Linda Kelly "Disabusing the Definition of Domestic Abuse: How Women Batter Men and the Role of the Feminist State" (2002–2003) 30 Fla St U L Rev 791 at 818.

⁷⁷² See: Hyman Rodman "Marital Power and the Theory of Resources in Cultural Context" (1972) 72 Journal of Comparative Family Studies 50.

⁷⁷³ Brian Jory and Carrie L Yondanis "Power - Family Relationships, Marital Relationships" (1 April 2015) <<http://family.jrank.org/pages/1316/Power.html>>; Boyd C Rollins and Stephen J Bahr "A Theory of Power Relationships in Marriage" (1976) 38 J Marriage Fam 619 at 620.

⁷⁷⁴ Rodman, above n 777, at 60; Jory and Yondanis, above n 778, at 1.

particular item or subject); referent power (emotional identification); and legitimate power (traditional cultural authority).⁷⁷⁵

The implication that power is not static but dynamic, and shifts in power would be by the power bases or the source of power that is in play. For example, the economic dependence of one partner on the other engenders an imbalance regarding reward and coercive powers. The partner who can reward the other with financial support can also threaten to take it away, thus exerting more power in the relationship. However, should the dependent partner attain economic parity, the power balance shifts, nullifying both the reward and coercive economic power bases?

4.3.7 Resource Hypothesis

The resource theory as presented by Blood and Wolfe argues that power between intimate partners is apportioned based on relative resource contribution.⁷⁷⁶ The main resources identified are income, occupation and education which has been supported by various research. For example, in the United States, it was found that men who earned substantially more income than their wives exerted more power in financial decision-making compared to husbands who earned the same income as their wives.⁷⁷⁷ In Mexico, it was found that wives with higher education enjoyed equal power to their husbands, were more satisfied with their influence in the family and were less likely to be victims of domestic violence.⁷⁷⁸ A study of 113

⁷⁷⁵ John RP French, Bertram Raven and D Cartwright "The Basis of Social Power" in *Studies in Social Power* (University Michigan Press, Oxford, 1959).

⁷⁷⁶ Blood and Wolfe, above n 717, at 13.

⁷⁷⁷ Philip Blumstein and Pepper Schwartz *American Couples: Money, Work, Sex* (1st ed, William Morrow & Co, New York, 1983).

⁷⁷⁸ RS Oropesa "Development and Marital Power in Mexico" (1997) 75 Social Forces 1291.

non-industrialised nations also found that the more wives contributed to food production, the more power they exerted in marriage.⁷⁷⁹

The underlying assumption is that men do not become heads of household by divine right or natural biological process but through easier access to educational, occupational and financial resources.⁷⁸⁰ It follows that equal access to such resources, as is the case in modern egalitarian Western families would result in a more balanced distribution of power. However, it provides the basis for a strong criticism that the theory ignores other sources of power like gender, norms and socialisation or the patriarchal power structure.⁷⁸¹ As Gillespie pointed out, power-granting resources are socially structured by gender, hence unevenly distributed in heterosexual relationships. The criticism is that, the theory presenting resources and power as gender-free or that a more egalitarian marital relationship will facilitate equal distribution of power, is merely “rationalising the [dominance] of the male sex.”⁷⁸²

Similarly, it can be argued that gender is but one of the many attributes of power dynamics in intimate relationships. Irrespective of gender, health and energy or the ability to cope with stressful encounters can provide power advantage. After all, a person who is sickly, frail, or debilitated has less energy to expend on coping than a healthy robust person.⁷⁸³ In the same manner, material resources like money, particularly the goods and services money can buy, greatly increases coping options.⁷⁸⁴ It provides easier access to legal, medical, financial and other

⁷⁷⁹ Gary R Lees and Larry R Patersen “Conjugal Power and Spousal Resources in Patriarchal Cultures” (1983) 14 *Journal of Comparative Family Studies* 23.

⁷⁸⁰ Jory and Yondanis, above n 778.

⁷⁸¹ Veronica Tichenor *Earning More and Getting Less* (Rutgers University Press, New Brunswick, NJ, 2005) at 3–4.

⁷⁸² Gillespie, above n 717, at 449.

⁷⁸³ Richard S Lazarus and Susan Folkman *Stress, Appraisal, and Coping* (Springer Publishing Company, New York, 1984) at 149.

⁷⁸⁴ Aaron Antonovsky *Health, Stress, and Coping* (Jossey-Bass, San Francisco, 1979) at 106–7.

professional assistance, which provides a sense of security and reduces vulnerability. Power in an intimate relationship is far from static; it is more like a pendulum that swings between health and energy resources, material resources, education, expert knowledge, beauty, intelligence, social resources (social support network) and physical strength.⁷⁸⁵

4.3.8 Investment Model

Another aspect of intimate power relations is advanced by the investment model of relationship commitment.⁷⁸⁶ This model postulates that satisfaction, poor quality alternatives and high investment in the current relationship are necessary for the maintenance of intimate relations. Satisfaction pertains to rewards outweighing costs in the relationship, which is essential to commitment. Regarding the quality of alternatives, a partner who perceives better alternatives to the current relationship will be less committed to the relationship, while the one with poor alternatives will be more committed to the current relationship. Quality alternatives can be in the form of dating partners, friends and families, children, the length of relationship or shared possessions. The hypothesis of power aligned to individual commitments to the relationship; the committed partner (with poor alternatives) has less power than the partner who is less committed (with better alternatives).

4.3.9 Couples and Power

Classical perspectives on couple power focused on resources and gender, which stimulated the simplistic view that such power relations can be understood only

⁷⁸⁵ Liat Kulik "Marital Power Relations, Resources and Gender Role Ideology: A Multivariate Model for Assessing Effects" (1999) 30 *Journal of Comparative Family Studies* 189 at 190–1.

⁷⁸⁶ Caryl E Rusbult "A Longitudinal Test of the Investment Model: The Development (and Deterioration) of Satisfaction and Commitment in Heterosexual Involvements" 45 *Journal of Personality and Social Psychology* 101; Caryl E Rusbult "Commitment and Satisfaction in Romantic Associations: A Test of the Investment Model" (1980) 16 *Journal of Experimental Social Psychology* 172.

through the framework of patriarchy. It refers to the dominant position enjoyed by men and the need for state intervention to control and punish them and conversely, the victimisation of women and their need for state protection.⁷⁸⁷ Contemporary research, however, focuses on four main issues. One, decision making – who makes the decision about everything from daily activities to major decisions like where to live or where to spend the holiday. Two, division of labour, who provides income, who does household chores or who is responsible for childcare. Three, allocation of money, whether income is pooled and who controls spending. And four, the ability to influence the other partner or the confidence to raise concerns and dissatisfaction with the relationship.⁷⁸⁸

4.4 *Power and Domestic Violence*

Domestic violence emerges in a variety of relationships and power relations. Between spouses one can attack another; adults who beat up children could be parents, step-parents, the boyfriends or girlfriends of a parent or babysitters. There is the abuse of aged parents by grown up children and similar patterns of abuse by elder-care workers. There is also, of course, violence amongst siblings as the most common form of domestic violence.⁷⁸⁹ In all these relationships, power in the ability to exert one's will over the other is not by itself detrimental, but it is the abuse of such power that propagates domestic violence.

⁷⁸⁷ Karen Woodall "The Terror of the Politically Correct; on Silence, Assumption and Overcoming Good Intentions" [2012] Supporting Children and Families Affected by Parental Alienation.; retrieved from <https://karenwoodall.wordpress.com/2012/09/13/the-terror-of-the-politically-correct-on-silence-assumption-and-overcoming-good-intentions/> on 28/01/2015.

⁷⁸⁸ Mary Ann Lamanna, Agnes Czerwinski Riedmann and Susan Stewart *Marriages, Families and Relationships: Making Choices in a Diverse Society* (12th ed, Wadsworth, Stamford, 2015) at 304.

⁷⁸⁹ Collins, above n 171, at 137 citing; JP Martin *Violence and the Family* (first ed, John Wiley & Sons Ltd, Chichester; New York, 1978).

In effect, domestic violence is defined in s3 of the Domestic Violence Act 1995 as physical, sexual and psychological abuse. The Act does not define abuse but its meaning considered in *Bragg v Hawea* refers to improper use, corrupt practice or perversion.⁷⁹⁰ As Judge Inglis puts it, abuse is:⁷⁹¹

behaviour within a domestic relationship which is characterised by [the] unjustifiable violation or defilement of the other person's physical or psychological well-being, or unjustifiable physical or psychological maltreatment or injury (especially when repeated) of that person.

In a parent-child relationship parental power in providing the necessities of life and determining what is the best interest of the child, including behaviour, religion, education, etc. is deemed justifiable. However, perceptions of what constitutes child abuse differs from culture to culture, as well as over time or epochs. For example, the exercise of parental rights or the use of appropriate force as a disciplinary measure is now considered abusive in most Western democracies. Physical force either as punishment or to compel compliance, however well-intentioned, is domestic violence.⁷⁹² Child abuse, as in neglect to provide adequate care (physical or emotional) is often rooted in the parents' economic problems or mental health issues.⁷⁹³ However, this is different from wilful neglect or failing to provide reasonable care or abuse by denial or withdrawal of available resources.⁷⁹⁴

⁷⁹⁰ *Bragg v Hawea* [1996] NZFLR 874 at 280 & 880.

⁷⁹¹ *G v G* Family Court Hastings FP020/224/99, 26 October 2000 at para 45

⁷⁹² Joel S Milner and others "Do Trauma Symptoms Mediate the Relationship between Childhood Physical Abuse and Adult Child Abuse Risk?" (2010) 34 *Child Abuse & Neglect* 332.

⁷⁹³ Janet Currie and Cathy Spatz Widom "Long-Term Consequences of Child Abuse and Neglect on Adult Economic Well-Being" (2010) 15 *Child Maltreat* 111.

⁷⁹⁴ Carolyn J Hildreth, Alison E Burke and Robert M Golub "Elder Abuse" (2011) 306 *Journal of American Medical Association* 568.

4.4.1 Power, Social Influence or Control

Power, as it refers to influence and control within a relationship, has multiple forms and sources and “its manifestation may be influenced by personal attributes, institutional roles and cultural contexts”.⁷⁹⁵ In a family, it is important to understand how families function as a unit in making decisions. Power can be understood regarding who can influence others to get their way in the family, and who can block others from getting their way but in most cases, it is almost impossible for one individual to have their way all of the time:⁷⁹⁶

Getting one’s way in the dynamic interaction of families entails an ongoing set of complex and subtle manoeuvres involving communication, commitment, bargaining and negotiation, coalition formation, conflict and conflict resolution, and parenting styles.

Within the family, individual members expect to be treated fairly with a sense of control over one’s life. This sense of personal control balanced with family control contributes to family coherence and can be a source of power and strength through guidance, support and care. However, when abuse of power occurs within the family, it can become coercive control and the damage to trust, freedom, safety and security can have long-term negative effects on everyone in the family.⁷⁹⁷

In social relationships, dominance is so intrinsic that it goes unnoticed most of the time. However, in any interaction with another person, we are affected by our

⁷⁹⁵ Diddy Antai “Controlling Behavior, Power Relations Within Intimate Relationships and Intimate Partner Physical and Sexual Violence against Women in Nigeria” (2011) 11 BMC Public Health 511 at 512; Jenkins Rae Sharon “Introduction to the Special Issue: Defining Gender, Relationships and Power” 42 Sex Roles 467.

⁷⁹⁶ Brian Jory and Carrie L Yondanis “Power - Family Relationships, Marital Relationships” Marriage and Family Encyclopedia <<http://family.jrank.org/pages/1316/Power.html>>.

⁷⁹⁷ Jory and Yondanis, above n 796.

being dominant or subordinate.⁷⁹⁸ It follows that when a conflict of interest arises and neither individual is willing to take the subordinate role a potential threat to the relationship ensues. This leads directly to human aggression as a human trait fundamental to interaction. As discussed in the next section, human aggression is a complex phenomenon, ranging from mild verbal anger to vicious murder and everything in between.⁷⁹⁹ As social beings we spend most of our time around other people, our interpersonal relationships reveal on our sense of power, whether we assume the dominant or subordinate role, and when there is conflict, confusion or resentment aggression sometimes follow.

4.5 *Aggression*

We humans spend much of our leisure time (if we can) indulging in carefully crafted fictions like novels, films, and TV dramas, which simulate actual life experiences generalised to other circumstances. In the process, we internalise thoughts and emotions depicted by the narrative, which in turn helps us comprehend complex systems in the social world we inhabit.⁸⁰⁰ The narratives in fiction also provide simulation through stories that model and abstract the human social world, allowing us to predict and explain behaviour systems.⁸⁰¹ It helps us understand individual causal processes: People who fall in love want to be united; if someone cheats on the person she or he loves, their reaction can be violent, or if someone harms another, that other will also want to retaliate.⁸⁰² It is

⁷⁹⁸ Ian H Robertson "The Power Struggle of Relationships" [2012] Psychology Today.

⁷⁹⁹ Fuentes, above n 724.

⁸⁰⁰ See generally Richard Gerrig *Experiencing Narrative Worlds: On the Psychological Activities of Reading* (Westview Press, 1999); See generally Keith Oatley "Why Fiction May be Twice as True as Fact: Fiction as Cognitive and Emotional Simulation" (1999) 3 *Review of General Psychology* 101.

⁸⁰¹ Mar and Oatley, above n 657, at 173.

⁸⁰² At 175.

predictable, therefore, that an extensive analysis of narrative themes from around the world found that the two most common are love toward another and conflict with others.⁸⁰³ It belies the fact that human life is fundamentally about relationships among individuals and the navigation of conflicting desires, and much of human experience is about coping with such issues.⁸⁰⁴

4.5.1 Aggression a Human Trait

Aggressive behaviour as a field of study is often framed in negative terms, intentional harm as an unwelcome facet of human behaviour.⁸⁰⁵ Aggression appears to be both learned as well as innate to humans; often expressed as immoral behaviour. Humans are born with a biological or genetic heritage with the ability to respond to social stimuli. Thus, socialisation determines or influences the genetic development and personal characteristics of individual personality. It is predictable, therefore, that research in aggression is fraught with controversy, ideology and hyperbole.⁸⁰⁶

In social psychology aggression is defined as “behaviour performed by one person (i.e. an aggressor) with the intent of physically or psychologically harming another person who wants to avoid the harm (i.e. the victim).”⁸⁰⁷ Anderson and Bushman view the difference between aggression and violence as a matter of degree; that is aggression as deliberate behaviour intended to harm another while violence is

⁸⁰³ Hogan, above n 669.

⁸⁰⁴ Mar and Oatley, above n 657, at 174.

⁸⁰⁵ Christopher J Ferguson and Dominic Dyck “Paradigm Change in Aggression Research: The Time Has Come to Retire the General Aggression Model” (2012) 17 *Aggression and Violent Behavior* 220 at 221; Peter K Smith “Why Has Aggression Been Thought of as Maladaptive?” in Hawley Patricia H, Little Todd D and Rodkin Phillip C (eds) *Aggression and Adaptation: The Bright Side to Bad Behavior* (Lawrence Erlbaum Associates, Mahwah NJ, 2007) 65 at 65; Patricia H Hawley and Brian E Vaughn “Aggression and Adaptive Functioning: The Bright Side to Bad Behavior” (2003) 49 *Merrill-Palmer Quarterly* 239.

⁸⁰⁶ Ferguson and Dyck, above n 805, at 221.

⁸⁰⁷ Phillip R Shaver and Mario Mikulincer *Human Aggression and Violence: Causes, Manifestations, and Consequences* (1st ed, Amer Psychological Assn, Washington DC, 2010) at 3.

an extreme form of aggression, that is cruel and destructive.⁸⁰⁸ While the difference between aggression and violence is noted, the emphasis on intent could be misleading. Aggressive behaviour can be driven by self-preservation or self-defense, not only with the intent to hurt others but as a means to an end.

4.5.2 The Biological Basis of Aggression

The view that aggression amounts to deviant behaviour is linked to the notion that conflict situations are unfavourable and stressful circumstances demanding rational control because of the negative consequences to all involved. It, however, ignores the biological roots of behaviour that arise during conflicts, because inherent in our human nature is a sense of self-preservation, of defence of individual interests and competition for vital resources. Aggressive tendencies permeate the animal kingdom but fundamental rules governing conflict minimises unbridled hostility, thus the presence of ritualised posturing (fight or flight displays) to aggression that structure interaction and conflict resolution.⁸⁰⁹

The awareness that human aggression rises from our genetic heritage portrays that it is adaptive in nature. Additionally, understanding individuals and the environment in which aggression emerges will determine whether it is adaptive or not. This point is evident in studies that focus on subtypes of aggression: verbal and physical, proactive and reactive, direct and indirect, or offensive and defensive and the social context in which they occur.⁸¹⁰ For example, reactive aggression is often undertaken in response to external environmental threats. Such action is inherent in our survival instinct but a propensity for reactive aggression when

⁸⁰⁸ Craig A Anderson and Brad J Bushman "Human Aggression" (2002) 53 Annual Review of Psychology 27 at 29.

⁸⁰⁹ See generally, Robert Huber and Patricia A Brennan "Aggression" in Robert Huber, Danika L Bannasch and Patricia A Brennan (eds) *Aggression* (Academic Press, St Louis, MO, USA, 2011) 12 at 1–2.

⁸¹⁰ At 1; Deborah South Richardson and Georgina S Hammock "Social Context of Human Aggression: Are We Paying Too Much Attention to Gender?" (2007) 12 *Aggress Violent Behav* 417 at 421.

threats are low renders the behaviour dysfunctional.⁸¹¹ Evidently, aggression is not a solitary activity for it requires interaction between two or more individuals who have some degree of interdependence. Everyday aggression occurs when people interact on a daily basis, for example, family members, co-workers, students, or friends. In such circumstances, feelings like irritation, annoyance, fear, and anger rooted in our physiology manifest aggressive responses.⁸¹²

4.5.3 Defining Aggression

Aggression carries assorted meanings encompassing a broad category of behaviour that is discernible from violence. In everyday parlance, it embodies a general aggressive impulse that drives different behavioural responses which can be but are not necessarily destructive or hostile in nature. Obviously, an unwarranted attack on another person is viewed as aggression but so is the determination to assert one's opinion.⁸¹³ Berkowitz in an earlier work referred to how the term is used to mean a variety of different actions.⁸¹⁴

When people describe someone as being aggressive, they might be saying that he frequently attempts to hurt others, or that he is often unfriendly. In a different sense, it may refer to a forceful person who tries to get his own way in his dealings with others, or may be that assertively stands up for his beliefs, or perhaps that he usually attempts to solve the problems facing him.

Arguably, the general meaning of aggression reflects human feelings and life experience: pleasure and displeasure; happiness and sadness; laughter and tears;

⁸¹¹ Huber and Brennan, above n 809, at 2.

⁸¹² Richardson and Hammock, above n 810, at 418.

⁸¹³ Leonard Berkowitz *Aggression: Its Causes, Consequences, and Control* (McGraw-Hill, New York, 1993) at 4.

⁸¹⁴ Leonard Berkowitz "The Concept of Aggression" in Brain P F and Benton D (eds) *Multidisciplinary Approaches to Aggression Research* (Elsevier/North Holland Biomedical Press, Amsterdam, 1981) 1; Robert A Baron and Deborah R Richardson *Human Aggression* (2nd ed, Plenum Press, New York, 1994) at 4.

anger, fear or contentment.⁸¹⁵ The Larousse Dictionary of Psychology considers aggression as the “tendency to attack physical or mental another living being.”⁸¹⁶ On the other hand, the Encyclopaedic Dictionary of Psychiatry defines aggression as:⁸¹⁷

A set of hostile behaviours which can occur in the conscious or, unconscious or [fantastic] plan, in order to destroy, depreciate, constrain, deny or humiliate a person, an object invested with social significance or self-oriented.

Generally speaking, aggression in everyday life, whether manifested or hidden, delivers a consequence, physical, material or psychological to self or others. For example, aggression is expressed in everyday interaction as in an aggressive salesperson trying to make a sale, a person asserting his/her rights as well as other types of forceful conducts.⁸¹⁸ As a natural phenomenon, aggression is a target specific oriented behaviour to assert influence and control over others and resources, driven by cost-benefit analysis.⁸¹⁹ Clearly, aggression, in general, is different from violence and for the purpose of this discussion “aggression” is defined broadly as assertive behaviour intended to control or influence another person or persons,⁸²⁰ with the capacity to hurt or cause physical or mental injury.

⁸¹⁵ Leonard Berkowitz *Causes and Consequences of Feelings* (Cambridge University Press, Cambridge, 2000) at 1.

⁸¹⁶ Norbert Sillamy *Dictionnaire de Psychologie* (Editura Univers Enciclopedic, Bucuresti, 1998) quoted in; Ioana Oproiu “A Study on the Relationship between Sports and Aggression” (2013) XXII Sport Science Review at 34.

⁸¹⁷ Constantin Gorgos *Dictionar Enciclopedic de Psihiatrie* (Editurs Medicala, Bucuresti, 1987) quoted in; Oproiu, above n 816, at 34.

⁸¹⁸ Berkowitz, above n 813, at 4.

⁸¹⁹ Agustín Fuentes *Race, Monogamy, and Other Lies They Told You: Busting Myths about Human Nature* (University of California Press, Berkeley, 2012) at 116.

⁸²⁰ Jeff Victoroff “Aggression, Science, and Law: The Origins Framework” (2009) 32 International Journal of Law and Psychiatry 189.

4.5.4 Intent to Harm

The proposed definition above refers to the intended effect on the target which can be harmful rather than “behaviour that is aimed at harming or injuring another person or persons.”⁸²¹ Intent to harm is problematic because it relies on the assessment of the observer to attribute such intention to the action of the perpetrator. For example, such an intent to harm or injure is difficult to attribute to a one-year-old child when he hits a peer who grabbed a toy from his hand. As for adults, anger and fear lead to uncontrolled reactions attributable to intense frustration, impulsive behaviours that are not necessarily intentional.⁸²²

4.5.5 Aggression in Everyday Life

In line with this working definition, it is essential to examine aggressive behaviour in everyday life. The extensive use of the term to depict a variety of behaviour in diverse activities illustrates the complexity of human aggression. Something so prevalent and yet problematic, in particular when it escalates into violence. The horrendous acts of physical assault, sexual abuse, and murder with associated social costs to victims and society as a whole.⁸²³ The range of definitive elements that characterise aggression is a testimony to its complex biological, genetic, cognitive and social aetiology. Whether regarded as positive (as in assertion) or negative (as in harming others); aggression is viewed by some as directed or

⁸²¹ Kenneth A Dodge, John D Coie and Donald Lynam “Aggression and Antisocial Behaviour” in William Damon and Richard M Lerner (eds) *Handbook of Child Psychology* (6th ed, John Wiley & Sons, Hoboken, NJ, 2006) 779; Ross D Parke and RG Slaby “The Development of Aggression” in Eileen Mavis Hetherington and Paul Henry Mussen (eds) *The Handbook of Child Psychology: Socialisation, Personality and Social Development* (4 ed, Wiley, New York, 1983) 547 quoted in; Richard E Tremblay “The Development of Aggressive Behaviour During Childhood: What Have We Learned in the Past Century?” (2000) 24 *Int J Behav Dev* 129 at 131.

⁸²² Tremblay, above n 821, at 131.

⁸²³ Russell G Geen *Human Aggression* (2nd ed, Open University Press, Buckingham and Philadelphia, 2001) at 2.

intentional and by others as uncontrolled and undirected.⁸²⁴ Its multifaceted nature is evident in the breadth of professions engaged in its study. A quick glance reveals anthropologists, biologists, sociologists, genetic/neuroscientists, and social workers focusing on different perspectives but connected to the total field of aggression.⁸²⁵

4.5.6 Aggressive Behaviour

In the legal world, precise definitions are important to effect the application of laws. It is imperative therefore that any discussion about aggressive behaviour should proceed on a firm articulation of what the concept of “behaviour” means. A review of the literature on the subject points to the absence of consensus on the definition of behaviour or what the concept means. However, by various definitions available, behaviour can be formulated as any observable response, verbal or physical to internal and external stimuli.⁸²⁶ One of the most fundamental concepts in psychology, behaviour, is described as any attempt by an individual or group to create a condition; either to effect a change from a condition to another or to maintain the existing one.⁸²⁷

In this analysis of aggressive behaviour, I adopt Berger’s eight parameters to explain the empirical domain of behaviour. These are: identity, want (the condition sought), knowledge (cognitive element), know-how (skill competency),

⁸²⁴ John W Renfrew *Aggression and Its Causes: A Biopsychosocial Approach* (Oxford University Press, Oxford, 1996) at 5.

⁸²⁵ At 5.

⁸²⁶ Raymond M Bergner “What is Behavior? And so what?” (2011) 29 *New Ideas in Psychology* 147 at 147; Daniel A Levitis, William Z Lidicker and Glenn Freund “Behavioural Biologists Don’t Agree on What Constitutes Behaviour” (2009) 78 *Anim Behav* 103 at 10; Laura King *The Science of Psychology: An Appreciative View* (2 edition ed, McGraw-Hill Humanities/Social Sciences/Languages, New York, 2010) at ?

⁸²⁷ Peter G Ossorio *The Behavior of Persons* (Descriptive Psychology Press, Ann Arbor, 2006) at 49.

performance (procedural), achievement (outcome), personal characteristics (individual difference), and significance (what the person is doing).⁸²⁸

Regarding aggression, for example, identity is the person (husband) whose behaviour is in question. Want refers to the state of affairs he is trying to effect – to stop the wife from going to the casino. Knowledge is the cognitive element; the distinct action he will take. Know-how, the skill set or competency to put up a convincing argument to prevent his wife from going to the casino. Performance is how he communicates his “want” which includes words, tone, postures, movements, and facial expressions. Achievement is whether the wife agrees or remains adamant on going to the casino. Personal characteristics: the husband’s dispositions (like traits, attitudes, values, interests, styles, temperament) and powers (abilities, knowledge); as expressed in the enactment of the behaviour. The significance of what the husband is doing, to influence his wife or assert control – to change the state of affairs from going to not going to the casino.

Inherent in the above assessment of aggressive behaviour between intimate partners is the reality of things not working to script. Life is about relationship and interaction, conflicts with ongoing negotiation and compromise guided by norms, values, and acceptable behaviour. When things do not work out an escalation from aggressive behaviour to coercive force and physical violence can occur. And when it happens, blaming the other as the cause of violence and turmoil often serves to conceal the shortcomings of the perpetrator.⁸²⁹

4.5.7 Aggression in Sports

By the general view of aggression proposed in this paper aggression in sports can be viewed as assertive actions intended to control or influence another person or

⁸²⁸ Bergner, above n 826, at 148.

⁸²⁹ This point is discussed in Connie Podesta *Life Would be Easy if it Weren’t for Other People* (Corwin Press, Thousand Oaks, Calif, 1999) at 1.

persons, with or without physical force for the purpose of winning. Arguably, sporting events provide a conduit for aggressive behaviour both for athletes and spectators.⁸³⁰ As noted by Russell, “outside of wartime, sport is perhaps the only setting in which acts of interpersonal aggression are not only tolerated but enthusiastically applauded by large segments of society.”⁸³¹ It is widely used as a vehicle to promote and achieve social policy objectives, such as improving health, creating active citizens, an inclusive society, building communities, fighting crime and the regeneration of society.⁸³²

Competitors in sports use “instrumental aggression”, planned aggression to achieve competitive advantage for the purpose of winning. In contrast, “hostile aggression” refers to impulsive or angry aggression, the desire or intent to harm another person as an expression of negative feelings.⁸³³ In any event, a useful framework for the analysis of aggression in sports is to focus on legitimate and illegitimate actions.⁸³⁴ The following typology developed by Smith and summarised many times is worth revisiting.⁸³⁵

- Brutal body contact tolerated in most popular sports include tackles, blocks, body checks, collisions, hits and jabs.
- Borderline aggression involves acts prohibited by the rules but occur routinely and is more or less accepted by those involved in the game. A fist fight in ice hockey, a rake, high tackle or a shove in rugby or an elbow in basketball would be examples.

⁸³⁰ Barbara Krahé *The Social Psychology of Aggression* (2nd ed, Psychology Press, London ; New York, 2013) at 174.

⁸³¹ Gordon W Russell *Aggression in the Sports World* (Oxford University Press, Oxford ; New York, 2008) at 181.

⁸³² Chris Kennett “The Evaluation of Sport and Social Inclusion Policy Programmes” in Ian Henry and Mei Ko (eds) *Routledge Handbook of Sport Policy* (Routledge, London, 2014) 253 at 255; Ian Lindsey and Andrew Adams “Sport Development and Community Development” in Ian Henry and Mei Ko, above n 867 at 264.

⁸³³ Krahé, above n 830, at 174; Russell, above n 831, at 4.

⁸³⁴ Kevin Young *Sport, Violence and Society* (Routledge, London ; New York, 2012) at 19.

⁸³⁵ MD Smith *Violence in Sport* (Butterworths, Toronto, 1983) cited in; Young, above n 60, at 19.

- Quasi-criminal aggression borders on violence, a violation of the rules, the law, or the informal norms of the players that result in serious injuries. For example, a stomp on the head or a tip tackle in rugby would elicit suspension.
- Criminal aggression includes behaviours seriously and obviously outside the boundaries of acceptability of both the sport and the wider community.

Aggression in contact sports like rugby, boxing, wrestling or hockey can be misleading. In particular, it is difficult to differentiate between being assertive and being aggressive. In boxing, for example, the intent is to win but to win you will have to hurt or beat your opponent into submission. In such a contest, an aggressive boxer is one who seeks to dominate his opponent and control the way the fight proceeds. However, because such action is legitimate it is often referred to as assertive, it is only when a boxer uses illegal tactics like head butting that it becomes aggression.⁸³⁶ The point is that in sports the objective of aggressive or assertive action is to establishing control, domination, or intimidation to subdue opponents for the purpose of winning. Arguably, aggression in contact sports like rugby or soccer may be deliberate, to harm or intimidate the opposition but ultimately the intention is not to injure but to win.⁸³⁷

By and large aggression and violence in sporting contests are considered entertaining, flourishing under the forces of supply and demand sustained by the positive and popular reaction of fans towards them. Combat in sports have been a source of mass entertainment throughout history, and ancient combat sports have evolved into modern-day professional wrestling, boxing, and mixed martial

⁸³⁶ Daniel L Wann "Aggression in Sport" (2005) 366 *The Lancet* S31; "Aggression in Sport-Theories and Examples" (2014) Hub Pages <<http://hubpages.com/education/Aggression-in-Sport-Theories-and-Examples>>; K Krishnaveni and Ahmed Shahin "Aggression and Its Influence on Sports Performance" 1 *Int J Phys Educ Sports Health* 29.

⁸³⁷ See for example Oproiu, above n 816.

arts. There is little doubt that aggression and violence are the hallmarks of the most popular spectator sports.⁸³⁸

4.5.8 Media Violence and Aggressive Behaviour

Irrespective of how much we abhor and condemn aggression, we live in a violent world. The proliferation of aggressive and violent acts in the media in the form of popular entertainment (providing big business) is indisputable.⁸³⁹ A cursory appraisal is sufficient to convince the casual observer that aggressive episodes of highly violent nature saturate television programmes, movies, comic books and video games.⁸⁴⁰ Since the advent of television, numerous studies have been carried out on whether exposure to graphic violence leads to aggressive behaviour by children and teenagers.⁸⁴¹ The debate rages on between those who advocate a correlation between exposure to violent media and aggressive behaviour,⁸⁴² and those who find a small or moderate correlation.⁸⁴³ Such considerations rest on

⁸³⁸ Mihaela R Marasescu "Athletic Morality and Aggressive Behaviour" (2012) 14 *Contemp Read Law Soc Justice* 150 at 151; R Todd Jewell *Violence and Aggression in Spectator Sports* (Springer, 2011) at 4; R Todd Jewell, Afsheen Moti and Dennis Coates "A Brief History of Violence and Aggression in Spectator Sports" in Todd R Jewell (ed) *Violence Aggress Sport Contests Econ Hist Policy* (Springer, Dordrecht, 2011) at 11–12.

⁸³⁹ For examples of statistical evidence see Daniel D McLean *Kraus' Recreation and Leisure in Modern Society* (9th ed, Jones & Bartlett Learning, Sudbury, MA, 2012) at 151; New Zealand Minister of Broadcasting *Towards Precautionary Risk Management of TV Violence* (Television Violence Project Working Group, Wellington [NZ], 2004) at 31; Lindsay A Robertson, Helena M McAnally and Robert J Hancox "Childhood and Adolescent Television Viewing and Antisocial Behavior in Early Adulthood" (2013) 131 *Pediatrics* 439 at 410.

⁸⁴⁰ Krahé, above n 830, at 119.

⁸⁴¹ For a summary of various studies see Anjana Madan, Sylvie Mrug and Rex A Wright "The Effects of Media Violence on Anxiety in Late Adolescence" 43 *J Youth Adolesc* 116.

⁸⁴² See for example John P Murray "Media Violence: The Effects Are Both Real and Strong" (2008) 51 *Am Behav Sci* 1212; Madan, Mrug and Wright, above n 47; "More evidence Ties Media Violence to Teen Violence" (2008) *Stuff.co.nz* <<http://www.stuff.co.nz/life-style/737310/More-evidence-ties-media-violence-to-teen-violence>>.

⁸⁴³ See for example Christopher J Ferguson "Does Media Violence Predict Societal Violence? It Depends on What You Look at and When" (2015) 65 *J Commun* E1; "Does Media Violence Lead to the Real Thing?" *New York Times* (New York, August 2013) <http://www.nytimes.com/2013/08/25/opinion/sunday/does-media-violence-lead-to-the-real-thing.html?_r=0>.

the fact that media violence is only one of many risk factors for later aggressive and violent behaviour.⁸⁴⁴

In the face of the entertainment value of violence, there is a general assumption that our tolerance of media violence rests on a continuum: from mild to atrocious, from acceptable to unacceptable, or from justified to unjustified. In effect, it epitomises a general theme, our preoccupation with fiction: creating a world of make-belief based on actual life experience. On this basis, love and violence are the by-lines that sell. Thus they infiltrate all forms of media and the entertainment industry, which ironically underscores the realism of family life, embroiled in love and conflict.

4.5.9 Classification of Aggression

The term “aggression”, when used in ordinary conversation is straightforward and easy to understand, but problematic when discussed in the context of violence: it assumes different meanings that are difficult to conceptualise. This diversity in forms has produced an abundance of literature in the categorisation of its different types or forms, but a lack of agreement infers poor conceptual clarity. Aggression as a behaviour operates at multiple levels, a complex phenomenon with different shades of meanings, expressed in a myriad of ways.⁸⁴⁵ It leads to the difficulty of reducing aggression to a generic term. Different forms or types of aggression have:⁸⁴⁶

distinctive determinants, and regulatory mechanisms, different functions and antecedents, and separate genetic and neural control mechanisms being instigated by different external circumstances.

⁸⁴⁴ Arline Kaplan “Violence in the Media: What Effects on Behavior?” [2012] *Psychiatric Times*.

⁸⁴⁵ Martin J Ramirez “Some Dychotomous Classifications of Aggression According to Function” (2009) 6 *Journal of Organisational Transformation and Social Change* 85 at 85.

⁸⁴⁶ Ramirez, above n 845; Albert Bandura “Human Agency: The Rhetoric and the Reality” (1991) 46 *American Psychologist* 157.

However, a detailed multi-disciplinary analysis of aggression is outside the scope of this thesis. Nonetheless, discussing human aggressive behaviour in its different manifestations, whether verbal or physical; direct or indirect; active or passive; offensive or defensive, would be helpful.⁸⁴⁷

4.5.10 Limitation of Classification

It is obvious that the persistence of current literature on aggression which stresses intentional harm is at odds with the broad definition adopted by this thesis. Combining intentional harm with aggressive behaviour makes the task of developing assessment tools to evaluate its wide range a challenging one. Numerous efforts to categorise subtypes of aggression propose categorisation along theoretical and practical values, the volume of which have become cumbersome.⁸⁴⁸ While there are common features that facilitate categorisation, the various permutations in which malicious behaviour manifests itself is awkward for precise conceptualisations. Even more so when such features like the intention to harm, and the perception of the victim that the behaviour is hurtful incorporates non-physical behaviours. Operational definitions, however, can also be problematic as neither the intention nor the perception of harm is directly observable.⁸⁴⁹

Psychiatrists Siegal and Victoroff assert that “it is empirically obvious and universally accepted that aggression is not a unitary phenomenon and that there is more than one type of aggression.”⁸⁵⁰ However, the research focus on physical

⁸⁴⁷ Richardson and Hammock, above n 810, at 421.

⁸⁴⁸ Dominic J Parrott and Peter R Giancola “Addressing ‘The Criterion Problem’ in the Assessment of Aggressive Behavior: Development of a New Taxonomic System” (2007) 12 *Aggression and Violent Behavior* 280 at 283; Marion K Underwood, Britt R Galenand and Julie A Paquette “Top Ten Challenges for Understanding Gender and Aggression in Children: Why Can’t We All Just Get Along?” (2001) 10 *Social Development* 248 at 249.

⁸⁴⁹ Underwood, Galenand and Paquette, above n 848, at 249.

⁸⁵⁰ Allan Siegel and Jeff Victoroff “Understanding Human Aggression: New Insights from Neuroscience” (2009) 32 *International Journal of Law and Psychiatry* 209 at 215.

aggression has expanded with an explosion of interest in indirect aggression, relational aggression and social aggression.⁸⁵¹ For example, the inclusion of the intention to harm as a necessary feature of aggression led researchers to categorise by whether the primary intent is distress (instrumental) or harm (hostile).⁸⁵² In psychology, hostile aggression refers to impulsive, angry behaviour that is motivated by the desire to hurt someone. Instrumental aggression, on the other hand, is premeditated, calculated behaviour motivated by some other goal such as obtaining money or a revenge motive.⁸⁵³

4.5.11 Aggression and Assertiveness

In sports, assertiveness pertains to the use of physical or verbal intimidation, within the rules of the game, to achieve one's purpose with no intention to harm the opponent. On the other hand, any deliberate act (contrary to the rules) aimed at harming an opponent, even if the intention is to win becomes aggression.⁸⁵⁴ By extension life, as in sports is characterised by competition, rivalry, conflict, disagreement, confrontation and the desire to win or to be in control. If aggression then is behaviour that involves hurting others, "it is also a complex emotional condition, a specific cognitive structure with a strong motivational base, involving the whole mental life."⁸⁵⁵ On this basis, psychologists have suggested that there is a connection between frustration and aggression. They define aggression as "an act whose goal response is [is to inflict] injury to an organism", stemming from frustration with an action that prevents a person from achieving a certain goal.⁸⁵⁶

⁸⁵¹ Underwood, Galenand and Paquette, above n 848, at 248.

⁸⁵² Ramirez, above n 845, at 87.

⁸⁵³ Brad J Bushman and Craig A Anderson "Is it Time to Pull the Plug on Hostile Versus Instrumental Aggression Dichotomy?" (2001) 108 Psychological Review 273 at 274.

⁸⁵⁴ Krishnaveni and Shahin, above n 836, at 29.

⁸⁵⁵ Oproiu, above n 816, at 34.

⁸⁵⁶ Russell G Geen, above n 828, at 2.

In other words, frustration generates or creates a readiness for aggression, but certain stimuli are required for the behaviour to occur.⁸⁵⁷

4.5.12 Aggression or Antisocial Behaviour

It is evident from research papers on the subject that the lack of attention to the definition of aggressive behaviour is a major problem in this field. Scholars have pointed to this problem over and over again, but it regularly comes back to haunt us.⁸⁵⁸ The problem of limiting research on aggressive behaviour to aggression is so obvious that the 1985 edition of the American Heritage Dictionary states:⁸⁵⁹

Though the verb aggress has a long and honourable history, it has lately come to be associated primarily with the jargon of psychology and is often objected to.

Coie and Dodge, breaking with tradition, preferred to broaden the review of aggressive behaviour to antisocial behaviour and conduct disorder because:⁸⁶⁰

The comorbidity of aggression with other antisocial behaviours suggests that an understanding of the [aetiology] and developmental course of aggression might be enhanced by including aggression into the broader class of antisocial behaviour.

A problem emerges when we consider the different types of aggressive behaviours with different forms of antisocial behaviours. Observable by examining the

⁸⁵⁷ See generally Berkowitz, above n 813.

⁸⁵⁸ Cyril Burt *The Young Delinquent* (University of London Press, London, 1925); Arnold H Buss *The Psychology of Aggression* (John Wiley & Sons Inc, Hoboken, NJ, US, 1961) x; Leonard Berkowitz *Aggression* (McGraw-Hill, 1962); Lea Pitkänen *A Descriptive Model of Aggression and Nonaggression with Applications to Children's Behaviour* (Jyväskylän Yliopisto, Jyväskylä, 1969); Robert B Cairns *Analysis of Social Interactions* (Lawrence Erlbaum, Hillsdale, NJ : New York, 1979); Parke and Slaby, above n 888; Willard W Hartup "The Development of Aggression: Where Do We Stand?" in Richard Ernest Tremblay, Willard W Hartup and John Archer (eds) *Developmental Origin of Aggression* (Guilford Press, New York, 2005) 3; See Dodge, Coie and Lynam, above n 888.

⁸⁵⁹ Quoted in Tremblay, above n 821, at 130.

⁸⁶⁰ Dodge, Coie and Lynam, above n 821, at 781.

“aggression” scales defining what is being measured. They contain a range of behaviours from physical aggression to attention seeking and disobedience.⁸⁶¹ For example, the following items are in the most frequently used “aggressive” rating scale for parents: argues, brags, demands attention, disobeys, poor peer relations, jealous, lies, shows off, sulks, loud.⁸⁶² The underlying theme in these items is annoying or irritating behaviours to the extent that “aggressive” means someone who causes discomfort to others.⁸⁶³

Similarly, the “aggression” scale for one of the few large longitudinal studies aimed specifically at understanding the development of aggressive behaviour in children. It includes the following items:⁸⁶⁴ disobeys teacher, gives dirty looks, makes up stories and lies, does things that bother others, get in trouble, starts fights, pushes and shoves.⁸⁶⁵ Clearly, only the last two in the list can be interpreted as physical aggression that would harm others. The reason behind the suggestion that researchers should adjust the definition of aggression by the problem under investigation.⁸⁶⁶

⁸⁶¹ Tremblay, above n 821, at 130.

⁸⁶² TM Achenbach and C Edelbrock *Manual for the Child Behaviour Checklist and Revised Child Behaviour Profile* (University of Vermont, Department of Psychiatry, Burlington, VT, 1983) cited in; Tremblay, above n 888, at 131.

⁸⁶³ Tremblay, above n 821, at 130.

⁸⁶⁴ L Rowell Huesmann and others “Stability of Aggression Over Time and Generations” (1984) 20 *Developmental Psychology* 1120; Tremblay, above n 821.

⁸⁶⁵ Tremblay, above n 821, at 130.

⁸⁶⁶ Willard W Hartup and J deWit “The Development of Aggression: Problems and Perspectives” in Willard W Hartup and J deWit (eds) *Determinants and Origins of Aggressive Behaviour* (Mouton, The Hague, 1974) 595 cited in; Tremblay, above n 888, at 131.

4.6 Conclusion

According to Bertrand, power is the fundamental stuff for human relationships, the same way energy is to physics.⁸⁶⁷ Whether we accept it or not, power is at the heart of relationships. It is not only the sense of having some power over another person, but he or she must also have some power over you, that makes a relationship meaningful.⁸⁶⁸ Like energy, power is manifested in many forms from different sources but to treat a form of power, for example, patriarchy, “in isolation can only be partially successful unless other forms are taken into account.”⁸⁶⁹

Similarly, we find aggressive behaviour as a stable human trait in which the age of onset becomes important. For example, research on the stability of aggressive behaviour, based on longitudinal data from 16 samples of males, concluded that aggressive behaviour was as stable as intelligence.⁸⁷⁰ A further two studies focusing towards the end of infancy also indicated that stability of physical aggression was already high in the preschool years.⁸⁷¹ However, a longitudinal study by Cairns and colleagues to describe changes in the frequency of physical aggression for boys and girls from grade 4 to grade 12 showed that the frequency of physical aggression decreased systematically with age.⁸⁷² It is important

⁸⁶⁷ Bertrand Russell *Power* (2nd ed, Routledge, London ; New York, 2004) at 3.

⁸⁶⁸ Robertson, above n 798.

⁸⁶⁹ Russell, above n 867, at 3.

⁸⁷⁰ Dan Olweus “Stability of Aggressive Reaction Patterns in Males: A Review” (1979) 86 *Psychological Bulletin* 852.

⁸⁷¹ Kate Keenan and Daniel S Shaw “The Development of Aggression in Toddlers: A Study of Low-Income Families” (1994) 22 *J Abnorm Child Psychol* 53; EM Cummings, RJ Iannotti and C Zahn-Waxler “Aggression between Peers in Early Childhood: Individual Continuity and Developmental Change” (1989) 60 *Child Dev* 887.

⁸⁷² Robert B Cairns and others “Growth and Aggression: 1 Childhood to Early Adolescence” 25 *Dev Psychology* 320.

therefore for future studies to examine the stability of all forms of aggressive behaviour other than physical aggression.

It remains, however, that we can glean the totality of different types of aggressive behaviours from examining the context of “aggression” scales which used in the past. The content of the scales defines what we are measuring, and most contain a mixture of behaviours ranging from physical aggression to attention seeking and disobedience.⁸⁷³ The problem arises when aggressive behaviour is seen as antisocial behaviour because such formulation disregards the possibility of positive and negative aggressive behaviours. It highlights the importance of clearly defining what we mean by aggressive behaviour and aggression. Most sportspersons aspire to become aggressive players; most sales managers want aggressive salespersons, and most political parties want leaders who can be aggressive when required.

On the whole, given the complexity of human behaviour, it is too simplistic to attribute domestic violence solely to a power imbalance by gender. In particular, the notion of men intent on controlling and subduing women. Certainly, gender can be a crucial piece of the parcel, but only one of the many factors considered in evaluating violent behaviour within the family system. The interaction between family members pertain to exchange in love and material goods, not between an aggregate of individual members working in isolation from one another, “but as an interactive whole, in constant interaction, influencing one another”.⁸⁷⁴ As a result of these interactions, families get into trouble, according to Nathan Ackerman, when the performance of roles are too rigid and unable to adapt to the

⁸⁷³ Tremblay, above n 821, at 130.

⁸⁷⁴ Dore, above n 496, at 377.

changing environment, or too relaxed and vague to fulfil significant aspects of role performance.⁸⁷⁵

⁸⁷⁵ At 377.

CHAPTER 5 – INTIMATE PARTNER VIOLENCE

5.1 Introduction

This chapter scrutinises intimate partner violence by applying the framework of human behaviour, bearing in mind that human behaviour is a vast subject that would seem to defy our ability to grasp clearly its varieties, nuances, forms, and dynamics. In general, human behaviour encompasses a myriad of elements of human nature and the human condition: “the sacred and profane, the mysterious and the obvious, the mundane and the magnificent, the frightening and the heartening, the destructive and the constructive”.⁸⁷⁶ As pointed out by Bacon, people feel according to their dispositions, speak and think according to their internalised opinions, but act according to culture or custom.⁸⁷⁷ However, to have a better understanding of how people behave in their social world is a complex task when it relates to the “whole” person as she or he is in a particular situation. And “the whole person includes his physical health, how he “looks” and behaves, what he thinks and feels, his attitude and beliefs”.⁸⁷⁸

As far as behaviour in an intimate relationship is concerned, it is important to consider or specify the “basic unit” of its social system. For example, a holistic approach views society as the primary focus. Therefore, the behaviour of individuals in an intimate relationship is dependent or influenced by society’s needs and goals. On the opposite side are social behaviourists who focus on the smallest unit of the system, the behaviour of the person in an intimate relationship. In this view, the behaviour of individuals create a pattern that

⁸⁷⁶ Dennis Saleebey *Foundations of Social Work Knowledge Ser : Human Behavior and Social Environments : A Biopsychosocial Approach* (Columbia University Press, New York, NY, USA, 2012) at 1.

⁸⁷⁷ Carter, above n 374, at 57.

⁸⁷⁸ Jill Ford *Human Behaviour* (Psychology Press, London, GB, 2015) at 2.

constructs the social system; the whole is the sum of its parts.⁸⁷⁹ The two views portray two seemingly contradictory conceptual frameworks: socialisation is achieved either through internalised norms of society (society inside people) or people being born into society (people inside society). This analysis, however, adopts an integrative approach, premised on the notion that individuals and society are interconnected, parts of a whole system that is the driving compulsion in intimate relationships.⁸⁸⁰

5.2 *Intimate Partner Violence (IPV)*

Human sociability is founded on relationships, our sense of what is right or wrong, acceptable or unacceptable with the ability to comprehend the thoughts or feelings of others that underscore our capacity to cooperate with a vision for the future. Intimacy is about emotional proclivity to a shared inner world of feelings, love, experience, and dreams. Relationships in this context is a dyad of individuals with different needs, expectations, and emotional memory conditioned by different life experience. It is the reality of misunderstandings, disagreements, disappointments, arguments and anger that are part and parcel of intimate relationships. In spite of this, we adhere to the ideal that intimate relationships provide both partners with a safe environment in which to grow and realise their full potential, even when things do not turn out as expected.⁸⁸¹

Humans are a pair-bonding species, suggesting that we crave intimacy, gained through close, emotionally connected relationships. We thrive in reciprocity because of our basic need to be accepted, appreciated and cared for, to love and

⁸⁷⁹ Carter, above n 374, at 4.

⁸⁸⁰ Based on the social systems theory as discussed in, At 8.

⁸⁸¹ Lori H Gordon "Intimacy: The Art of Relationships" [1969] Psychology Today at 2. <http://www.psychologytoday.com/articles/199309/intimacy-the-art-relationships>, on 24/11/2014.

to be loved.⁸⁸² In this relationship setting, emotion serve to establish intimate bonds, guide and coordinate subsequent interaction; communicating the needs of intimate partners.⁸⁸³ Furthermore, intimate relationships are characterised by close physical, cognitive, and emotional connections, thus over time, the emotional experience of intimate partners often become interconnected.⁸⁸⁴ Arguably, where emotion and emotional self-regulation are influenced by partners affective interdependence emerges. As summed up succinctly by Ekman and Davidson, who noted that "emotions are brought into play most often by the actions of others, and, once aroused, emotions influence the course of interpersonal transactions".⁸⁸⁵

If we conceptualise intimate relationships regarding the exchange of love, commitment, and material goods, we should look at couples not as "a composite of individual members operating in isolation from one another, but as an interactive whole, in constant interaction, influencing one another".⁸⁸⁶ Couples coming into an intimate relationship establish what Don Jackson called the "marital quid quo", which determines their actions, rights, and responsibilities.⁸⁸⁷ In this sense, one might be more social while the other more retiring or one might be more dominant while the other submissive in the relationship. It is argued therefore, that in looking at IPV, we should focus on understanding and interpreting the interactions between the individuals, for individuals do not

⁸⁸² RF Baumeister and MR Leary "The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation" (1995) 117 Psychol Bull 497.

⁸⁸³ Dacher Keltner and Jonathan Haidt "Social Functions of Emotions at Four Levels of Analysis" (1999) 13 Cognition and Emotion 505.

⁸⁸⁴ Dominik Schoebi and Ashley K Randall "Emotional Dynamics in Intimate Relationships" (2015) 7 Emotion Review 342.

⁸⁸⁵ Paul Ekman and Richard J Davidson *The Nature of Emotion: Fundamental Questions* (Oxford University Press, New York, 1994) at 139.

⁸⁸⁶ Dore, above n 716, at 377.

⁸⁸⁷ Don D Jackson "Family Rules: Marital Quid Pro Quo" (1965) 12 Archives of General Psychiatry 589.

respond directly to the action of others, but to the subjective interpretation of these actions.⁸⁸⁸

5.2.1 Intimacy in Relationships

An intimate relationship in the context of this discussion refers to romantic intimacy (physical and emotional) in which two persons share feelings and empathy with each other. It describes a couple supposedly in love, who can share an “inner world” of experience based on mutual trust and support, the rewarding aspect of such relationships. The notion of longevity is central to intimate relationships, involving ongoing effort and compromise by both partners. Individuals enter into relationships with different expectations, dreams, and motivations, which when conflict arises can lead to frustrations, despair and depression.

Intimate relationships, it is suggested, often begin with illusion followed by disillusion. Love is a feeling, but an intimate relationship is a contractual commitment in which each party comes with different expectations. Intimacy and the feeling of love provides the notion of being in a nice, safe, and secure love-infused environment that no one can penetrate. However, when needs are not met, couples become unhappy, depressed, and agitated as they renegotiate what each is willing to give or not to give, to compromise or persist with their individual demands.⁸⁸⁹ On the positive side, we engage in an intimate relationship with the notion that it involves undivided attention in love, in caring, in friendship, infidelity, in honesty, in trust, in respect and acceptance, even if we find their exact opposite.⁸⁹⁰ In this respect, conflict and resolving differences is a norm rather than the exception.

⁸⁸⁸ Dore, above n 716, at 373.

⁸⁸⁹ Gordon, above n 881, at 2.

⁸⁹⁰ At 4.

Acknowledging the reality of conflict in intimate relationships should not be viewed as normalising domestic violence but as a conscious effort to understand how conflict (resolution) escalates into violence. Surveys of family conflict, depending on the context in which questions about violence are placed, indicate equal rates by gender. For example, the introduction to the widely used Conflict Tactics Scale (CTS) states:⁸⁹¹

No matter how well a couple gets along, there are times when they disagree, get annoyed with the other person, or just have spats or fights because they are in a bad mood or tired or for some other reason. They also use many different ways of trying to settle their differences.

More importantly, there is a distinction between less serious incidents arising from conflicts resolution to control a situation or to influence the desired outcome and coercive control with the intent to dominate.⁸⁹² The fragile frame that holds intimate relationships together is commitment based on trust. Accordingly, the situation becomes risky in cases of indiscretions or cheating arousing hurt, anger, resentment and betrayal arise from the violation of trust. A probable explanation of the large number of serious violence perpetrated in the course of or after separation. For example, fifty percent of intimate partner violence deaths from 2009 to 2012 took place during a planned or actual separation.⁸⁹³

5.2.2 Aggressive Tendencies

Aggression is a fact of life; it permeates all aspects of human existence from social interaction, sports, entertainment, work, to competition over resources; at both individual and group levels. At the individual level, aggression is a behavioural trait

⁸⁹¹ Murray A Straus "Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scales" (1979) 41 Journal of Marriage and Family 75 at 33.

⁸⁹² Daniel G Saunders "Are Physical Assaults by Wives and Girlfriends a Major Social Problem? A Review of the Literature" (2002) 8 Violence Against Women 1424 at 1429.

⁸⁹³ Committee, Health Quality & Safety Commission "Committee Calls for Radical Change Towards Family Violence" (2014) <<http://www.hqsc.govt.nz/our-programmes/mrc/fvdrp/news-and-events/media/1604/>> on 24/02/2016.

often initiated in response to outside stimuli. In this context it is a human phenomenon, that is, irrespective of age, ethnicity, or gender we are prone to employ coercive tactics to alleviate detrimental situations or feelings. As humans, we are prone to anger, frustration, jealousy, resentfulness, and so forth, but actions/reactions are determined by our socialised moral sense of what is right or wrong, as well as personal control and tolerance.

Sexual categorisation of male/female by physiological differences originally aided the social division of roles which have served as the locus of gender distinction. Progress in gender knowledge in the last decade has provided a clearer conceptualisation of gender as an institutionalised system of social practice for two different groups – men and women.⁸⁹⁴ West and Zimmerman argued, that gender is not something we are, but something we do; socially constructed upon “normative conceptions” of men and women.⁸⁹⁵ Thus, the ongoing debate between nature and nurture in human psychology and their contribution to perceived gender differences.

The two theories of ‘sexual selection’⁸⁹⁶ and ‘social role’⁸⁹⁷ have been largely used to explain gender difference: the aggressive men and the nurturing women. To this effect, the sexual selection theory postulates gender differences by evolution. Men portrayed as fixated on social status and reproductive competition to explain

⁸⁹⁴ Ridgeway and Correll, above n 82.

⁸⁹⁵ Candace West and Don Zimmerman, Gender and Society cited in: Francine M Deutsch “Undoing Gender” (2007) 21 Gender and Society 106. at 106.

⁸⁹⁶ John Archer “Sex Differences in Social Behavior: Are the Social Role and Evolutionary Explanations Compatible?” (1996) 51 Am Psychol 909; Martin Daly and Margo Wilson *Homicide* (Transaction Publishers, New Brunswick, 1988).

⁸⁹⁷ Ann B Bettencourt and Norman Miller “Gender Differences in Aggression as a Function of Provocation: A Meta-Analysis” (1996) 119 Psychological Bulletin 422; Ann B Bettencourt and Cyndi Kernahan “A Meta-Analysis of Aggression in the Presence of Violent Cues: Effects of Gender Differences and Aversive Provocation” (1997) 23 Aggressive Behavior 447; Alice H Eagly and Wendy Wood “The Origins of Sex Differences in Human Behaviour: Evolved Dispositions Versus Social Roles” (1999) 54 American Psychologist 408.

their violent tendencies. Women, on the other hand, are seen as preoccupied with pregnancy, childbirth and nurturing within a safe and secure environment protected by men.⁸⁹⁸ In contrast, social theory considers the social division of roles over historical periods as the engine of sex-differentiated behaviour.⁸⁹⁹ Subsequently, role-based expectations defined distinct gender behaviour patterns that are transmitted through socialisation, entrenching the notion that men are more prone to violence than women.⁹⁰⁰

5.2.3 Personal and Social Control

Rightly or wrongly we advocate that a sense of personal control contributes to personal efficacy which involves the “belief that one’s intentions and behaviours can impose control over one’s environment.”⁹⁰¹ Therefore, aggressive behaviour in the context of intimate relations can be attributed to the desire to influence or to control the other.⁹⁰² Control in this sense pertains to influencing the desired outcome which is fundamental to interaction. Thus for coherence a certain degree of control is expected, not only in intimate relationships but human relationships as a whole.⁹⁰³ Conversely, the lack of personal control comprises the learned belief that one cannot control the outcome of situations due to external factors.⁹⁰⁴ Domestic violence, for example, could limit the victim’s sense of personal control

⁸⁹⁸ Winstok, above n 78 at 5.

⁸⁹⁹ Eagly and Wood, above n 195, at 409.

⁹⁰⁰ Winstok, above n 78, at 3.

⁹⁰¹ Debra Umberson “Sociodemographic Position, World Views, and Psychological Distress” (1993) 74 *Social Science Quarterly* (University of Texas Press) 575 at 578.

⁹⁰² Dunbar, above n 720, at 235.

⁹⁰³ Stets and Hammons, above n 31, at 3.

⁹⁰⁴ Blair Wheaton “The Sociogenesis of Psychological Disorder: An Attributional Theory” (1980) 21 *Journal of Health and Social Behavior* 100.

in an intimate relationship while the perpetrator might engage in aggressive behaviour to gain some sense of control over the relationship environment.⁹⁰⁵

Family ties provide meaning and obligation that underlie social control, which in turn diminishes personal propensity to deviant behaviour.⁹⁰⁶ Traditionally, social control is viewed as an influence upon the individual to engage in a conventional or non-deviant behaviour.⁹⁰⁷ It can be achieved primarily in two ways: (1) via internal influence through the internalisation of norms for conventional behaviour;⁹⁰⁸ and (2) through external influence, in the form of sanctions for behaviour defined as unconventional or deviant.⁹⁰⁹ Reflected in individual conformity to the norms of society is the special meaning of intimate relationships for deviating from such norms may threaten the existence of the relationship.⁹¹⁰ Similarly, the existence of an intimate relationship may contribute to individual efforts to regulate or sanction the behaviour of the other; this is social control as an external influence.⁹¹¹

5.2.4 Coercive Control

Some scholars view coercive control as a better representation of the experience of domestic violence victims:⁹¹²

⁹⁰⁵ Debra Umberson and others "Domestic Violence, Personal Control, and Gender" (1998) 60 *Journal of Marriage and Family* 442 at 443.

⁹⁰⁶ See generally Travis Hirschi *Causes of Delinquency* (University of California Press, Berkeley, 1969).

⁹⁰⁷ For example see Jack P Gibbs *Norms, Deviance, and Social Control* (Elsevier North Holland, 1981).

⁹⁰⁸ Hirschi, above n 906, at 18.

⁹⁰⁹ Francis Ivan Nye *Family Relationships and Delinquent Behavior* (Greenwood Press, New York, 1973); Talcott Parsons *The Social System* (Routledge, New York, 1991).

⁹¹⁰ Hirschi, above n 906, at 18.

⁹¹¹ Nye, above n 909 cited in; Debra Umberson "Family Status and Health Behaviors: Social Control as a Dimension of Social Integration" (1987) 28 *Journal of Health and Social Behavior* 306 at 310.

⁹¹² Stark, above n 98, at 15.

Coercive control entails a malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control).

Coercive control has been argued as the defining feature of the gendered nature of domestic violence in New Zealand.⁹¹³ In support of this proposition, it is often suggested that limiting IPV to physical violence detracts from the destructive behaviour of possessive and controlling partners.⁹¹⁴ This aligns the conceptualisation of the overall architecture of IPV with the idea that coercive control is achievable with:⁹¹⁵

low level violence such as pushes, slaps, hair pulling, kicks, and grabbing, events that are likely to remain invisible if the radar is set to pick up only injurious violence.

Dutton and Goodman describe coercive control as demanding one's partner to do something she does not want to do with threats of negative consequences for non-compliance.⁹¹⁶ Stark, on the other hand, distinguishes partner abuse as the:⁹¹⁷

Non-voluntary establishment of unreciprocated authority by one party over the other and the corresponding relocation of resources and opportunities that benefit the dominant party.

She also makes a distinction between the patterned subjugation and abuse of women and the widespread propensity of individuals or couples in conflict

⁹¹³ See for example Vivienne Elizabeth "From Domestic Violence to Coercive Control: Towards the Recognition of Oppressive Intimacy in the Family Court" (2015) 30 *New Zealand Sociology* 26.

⁹¹⁴ Family Violence Death Review Committee, above n 9, at 71.

⁹¹⁵ Evan Stark "Rethinking Custody Evaluation in Cases Involving Domestic Violence" (2009) 6 *Journal of Child Custody* 287 at 294.

⁹¹⁶ Mary Ann Dutton and Lisa A Goodman "Coercion in Intimate Partner Violence: Toward a New Conceptualization" (2005) 52 *Sex Roles* 743.

⁹¹⁷ Evan Stark "Do Violent Acts Equal Abuse? Resolving the Gender Parity/Asymmetry Dilemma" (2010) 62 *Sex Roles* 201 at 202.

resolution, expression of jealousy, frustration, anger or to negotiate power differences.⁹¹⁸ This conceptualisation is problematic because it limits coercive control to men; implying that similarly patterned behaviour to subjugate a male partner in a heterosexual couple (or a female partner in a same sex couple) does not amount to coercive control. In other words, violence as a result of coercive control differs from other forms of violence because it is perpetrated by men on women merely on the basis their sex or gender.⁹¹⁹

Arguably, there is a risk that low-level aggression can fall below the radar keeping the coercive element of such action invisible. In contrast, there is also a danger that a single reaction to conflict or low-level situational conflict can be misconstrued as coercive control, in which case legal sanctions would do more harm. For example, a nominal push in the heat of argument may result in an arrest, a night in the cell, a day of missing work, a charge of “male assaulting female”, a conviction and subsequent interventions. The protective thrust of family law may have been realised then but at a high cost, which may not necessarily translate into the long-term safety of the victim. Conversely, a warning and counselling can also help the couple at a much lower cost, which can, in turn, improve their relationship, contributing to long-term stability and safety for the victim. The point is to have a kind of screening process that can separate everyday conflict behaviour from coercive control for abusive purposes.

The law and law enforcement officers can play an important role in the social construction of violent events. Police strategies for handling domestic violence remains contentious but Fagan et al. found that 55% of the men who had experienced informal police mediation and separation following a conflict did not

⁹¹⁸ At 202.

⁹¹⁹ Stark, above n 920 at 1511.

re-offend.⁹²⁰ Similarly, it has been established that victims who are most likely to call the police are those in the process of separation or post-separation disputes.⁹²¹

5.2.5 The Control Motive

It appears that the only point of consensus among feminist and family violence scholars is that motivation for dominance and control is fundamental to understanding partner violence. Motivation denotes a need or desire that can be achieved by a particular action; control can as motivation (the cause and desirable outcome) and violence as the behavioural means of achieving it.⁹²² It follows that when a partner (man or woman) accepts the controlling position in an intimate relationship, he/she becomes the dominant one.⁹²³

The feminist viewpoint of the control motive in IPV is postulated on the patriarchal social structure that allows men to dominate their partners.⁹²⁴ This view implies that violence is perpetrated by a man at the individual level to maintain and sustain male dominance at a macro-structural level. Stark argues that male perpetration of violence against female victims is for the purpose of control, achieved through coercive behaviours facilitated by the unequal status of women in society.⁹²⁵ As such, feminist perspectives attribute violence by men against their

⁹²⁰ Jeffery A Fagan, Douglas K Stewart and Karen V Haneen "Violent Men or Violent Husbands? Background Factors and Situational Correlates" in David Finkelhor and others (eds) *Dark Side of Families: Current Family Violence Research* (abridged ed, SAGE Publications, Inc, Beverly Hills, 1983) 49.

⁹²¹ Richard B Felson, Eric P Baumer and Steven F Messner "Acquaintance Robbery" (2000) 37 *Journal of Research in Crime and Delinquency* 284.

⁹²² Zeev Winstok and Eila Perkis "Women's Perspective on Men's Control and Aggression in Intimate Relationships" (2009) 79 *American Journal of Orthopsychiatry* 169 at 169.

⁹²³ Winstok, above n 78, at 35–6.

⁹²⁴ Katreena Scott and Murray Straus "Denial, Minimization, Partner Blaming, and Intimate Aggression in Dating Partners" (2007) 22 *J Interpers Violence* 851 at 853.

⁹²⁵ Stark, above n 98, at 200.

female partners to a control motive; to keep women subjugated to their authority as head of the family.⁹²⁶

There is suggestion that communicating a threat is the typical control tactic⁹²⁷ but a threat to inflict physical harm is an indirect and imperfect indicator of a control motive.⁹²⁸ The use of overt threats does not always imply that the offender is trying to control the victim's behaviour as it can merely indicate a desire to harm rather than to achieve compliance.⁹²⁹ In general, the results of a study by Felson and Outlaw is consistent with Stets and Hammond in showing that wives are more controlling than husbands in their current marriages.⁹³⁰ Furthermore, a study of coercive control in same-sex IPV, found a higher rate of mutual violence in same-sex couples compared to heterosexual couples.⁹³¹ To some extent this debunks the notion that men use violence to coerce or control their partners while women primarily use violence in self-defence.⁹³²

In response, Johnson presented the concept of "motivation for control" through his typologies of violence, defined regarding control motives and identified by

⁹²⁶ Jeffery Fagan and Angela Browne "Violence Between Spouses and Intimates: Physical Aggression Between Women and Men in Intimate Relationships" in Albert J Reiss and Jeffery A Roth (eds) *Understanding and Preventing Violence: Social Influences* (National Academies Press, Washington DC, 1994) 115 at 210; John Archer "Power and Male Violence" in John Archer (ed) *Male Violence* (Routledge, London, 1994) 310 at cited in; Richard B Felson and Steven F Messner "The Control Motive in Intimate Partner Violence" (2000) 63 Soc Psychol Q 86 at 86.

⁹²⁷ Michael P Johnson "Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women" (1995) 57 Journal of Marriage and Family 283 at 284.

⁹²⁸ Felson and Messner, above n 931, at 87.

⁹²⁹ At 87–92.

⁹³⁰ Felson and Outlaw, above n 31, at 400; Stets and Hammons, above n 31, at 15.

⁹³¹ Andrew Frankland and Jac Brown "Coercive Control in Same-Sex Intimate Partner Violence" (2014) 29 J Fam Viol 15 at 21.

⁹³² Dobash and Dobash, above n 76; Ellen Pence and Michael Paymar *Education Groups for Men Who Batter* (Springer Publishing Company, New York, 1993); Russell P Dobash and others "The Myth of Sexual Symmetry in Marital Violence" (1992) 39 Social Problems 71.

patterns of controlling behaviour to exercise general control over one's partner.⁹³³ He made the distinction between two patterns of partner violence. Firstly, as part of the general strategy of power and control (intimate terrorism), mostly perpetrated by men (gender asymmetry). Secondly, as a result of partner conflicts that escalate into violence (situational couple violence), perpetrated equally by men and women (gender symmetry).⁹³⁴

Some studies have directed at examining whether control and its influence on IPV are indeed gendered.⁹³⁵ found that control seeking behaviour is not unique to men.⁹³⁶ Husbands and wives both had low and comparable rates of controlling behaviour;⁹³⁷ and controlling spouses were more likely to use violence regardless of gender. Overall control-seeking does not mediate gender differences in IPV perpetration.⁹³⁸ Arguably, control can involve coercive action to influence others, comparable to persuasion, complaints, and promises aimed at securing compliance.⁹³⁹ It is, therefore, inaccurate to simply view "motivation for dominance and control" with negative coercive connotations.

⁹³³ Michael P Johnson "Conflict and Control Gender Symmetry and Asymmetry in Domestic Violence" (2006) 12 *Violence Against Women* 1003 at 1006.

⁹³⁴ At 1005; Winstok, above n 78, at 36.

⁹³⁵ For example see: Felson and Messner, above n 926; Stets and Hammons, above n 31; Murray A Straus "Dominance and Symmetry in Partner Violence by Male and Female University Students in 32 Nations" (2008) 30 *Children and Youth Services Review* 252; Marieh Tanha and others "Sex Differences in Intimate Partner Violence and the Use of Coercive Control as a Motivational Factor for Intimate Partner Violence" (2010) 25 *Journal of Interpersonal Violence* 1836.

⁹³⁶ Stets and Hammons, above n 31, at 18.

⁹³⁷ Felson and Outlaw, above n 31, at 394.

⁹³⁸ At 396.

⁹³⁹ At 388.

5.2.6 The New Zealand IPV Landscape

The gender paradigm dominates New Zealand's response to IPV postulated on the frame of abusive men perpetrating violence on their partners as a means to control, coerce and subjugate women.⁹⁴⁰ The Family Violence Death Review Committee in its 2013 annual report took up a similar position outlined as the need to reconceptualise family violence.⁹⁴¹ They relied on Stark's suggestion that, that at least in some of the most blatant cases of IPV, coercive control rather than physical force is the defining feature of abuse.⁹⁴² In this sense, coercive control is applied through the use of abusive strategies, tailored to the specific psychology of the victim by someone who knows her intimately.⁹⁴³

The other side of the argument is that men who abuse women are versatile "bad" guys who are selfish, not sexist. As such, they assault women behind closed doors because traditional values inhibit violence against women.⁹⁴⁴ In general, men are much more likely to commit violent crimes than women and men are much more likely to be the victim. However, when the victim is a woman, the offender is more likely to be an intimate partner or a family member.⁹⁴⁵ The point of disagreement is whether women also perpetrate coercive control over their partners.⁹⁴⁶

⁹⁴⁰ See Stark, above n 98, at 14.

⁹⁴¹ Family Violence Death Review Committee, above n 9, at 71.

⁹⁴² Stark, above n 98.

⁹⁴³ Family Violence Death Review Committee, above n 9, at 71.

⁹⁴⁴ Richard B Felson "Is violence against Women about Women or about Violence?" (2006) 5(2) Contexts 21.

⁹⁴⁵ At 21.

⁹⁴⁶ See for example Stark, above n 917, at 202.

As the controversy continues, Robertson recommends that domestic violence should be treated differently from all other crimes:⁹⁴⁷

What characterises a domestic violence offender above all else is a set of beliefs that he is entitled to the domestic and sexual services of his partner, entitled to control her life, entitled to her absolute obedience, entitled to not have her show him up in public.

About IPV Robertson reiterates that:⁹⁴⁸

These are not crimes of love; these are crimes of ownership. It is relatively easy to understand the emotions of someone who loses a loved one because they just don't want to be in a relationship, but there is no notion of love if the solution is then to kill her - that is totally selfish."

Framing domestic violence purely as a gender problem rooted in male possessiveness of women, arguably is to ignore the complexity of human behaviour underpinned by multi-emotional dynamics. Interaction generates human emotion and in this context, triggers to intimate partner violence can be situational, the connection between the event and surrounding contexts.⁹⁴⁹

The high visibility of reports in the media about the number of women ending up in hospitals as a result of an assault by intimate partners, in women's refuge centres, or killed by their partners, can indeed portray an epidemic of male violence.⁹⁵⁰ However, It is suggested that crime statistics can be misleading regarding the same victims (who may also be offenders) counted again and again.

⁹⁴⁷ Quoted in Simon Collins "Psychologist Slams Offenders' Anti-Violence Programme" *New Zealand Herald* (4 July 2014) <http://www.nzherald.co.nz/domestic-violence/news/article.cfm?c_id=178&objectid=11287636>.

⁹⁴⁸ Morgan Tait "'These are not Crimes of Love, These are Crimes of Ownership'" *New Zealand Herald Online* (1 October 2015) <http://m.nzherald.co.nz/assault-and-homicide/news/article.cfm?c_id=124&objectid=11521689>.

⁹⁴⁹ Deanna L Wilkinson and Susan J Hamerschlag "Situational Determinants in Intimate Partner Violence" (2005) 10 *Aggression and Violent Behavior* 333.

⁹⁵⁰ Garth Fletcher and others *The Science of Intimate Relationships* (Wiley-Blackwell, Chichester, West Sussex ; Malden, MA, 2013) at 268.

In New Zealand, this is illustrated by a survey of criminal offending with a large random sample of adults. About 0.05% of the sample (both men and women) accounted for 68% of the total number of times that people reported physical or sexual assault.⁹⁵¹ The indication that a small number of people are repeatedly criminally assaulted, whereas most people are never or seldom assaulted. About domestic violence, the Minister for Justice, the Honourable Amy Adams stated in a recent speech: “we know that in family violence one percent of New Zealand adults suffer 62 percent of family violence”, demonstrating a high re-victimisation rate.⁹⁵²

Assuming that IPV homicides are not crimes of passion but crimes of ownership, the majority of men do not perpetrate such coercive controlling behaviour, and it would be erroneous to categorise all forms of IPV as crimes of ownership. For example, as discussed in chapter one, in a four-year period (2009-2012), 23% of the total homicide offences (267) were IPV homicides.⁹⁵³ It represents 0.02% of the total number of domestic violence investigations carried out by police for the same period. The number of women (aged 15 – 50 yrs.) hospitalised as a result of assault perpetrated by a family member represented 0.3% of the total number of family violence investigated by police, for the same period. Indeed, the majority of IPV homicides may be crimes of ownership, but to then postulate all forms of minor conflict behaviour (which makes up the majority of police investigations) as crimes of ownership can be misleading.

⁹⁵¹ Allison Morris *Women’s Safety Survey* (Victimisation Survey Committee, Wellington, NZ, 1997).

⁹⁵² Hon Amy Adams “Harnessing the Power of Information to Reduce Crime & Victimisation” (3 May 2016) Scoop Independent News
<<http://www.scoop.co.nz/stories/PA1605/S00028/harnessing-the-power-of-information-to-reduce-crime-victim.htm>>.

⁹⁵³ Family Violence Death Review Committee, above n 9, at 39–40.

5.2.7 Emotional Dynamics in IPV

Given the centrality of emotion in the development and maintenance of intimate relationships, it is important to consider how coercive control contributes to IPV. Psychologist and Nobel laureate Daniel Kahneman, for example, presents a wealth of evidence that much of human decision-making is governed by fast and automatic intuitions, rather than slow, effortful thinking.⁹⁵⁴ The action of the controlling man is meaningful to him for he defines his situation and acts in certain ways to achieve his end. In the process, he constructs a social world with an internal logic which we try to comprehend.⁹⁵⁵ However, understanding a person's subjective intentions requires an interpretation on the basis that we share this subjective meaning. But the fact remains that we cannot experience the experience of another person, and indeed, our experience may make us see what is happening in a way that distorts its meaning as perceived by the actors involved.⁹⁵⁶

Human behaviour underpinned by emotion is a complex phenomenon and considerable evidence points to common emotional, situational, individual, and structural factors in a variety of violent situations, including violence in intimate relationships.⁹⁵⁷ Many scholars argue that a separate theory of IPV is needed,⁹⁵⁸

⁹⁵⁴ Daniel Kahneman *Thinking, Fast and Slow* (reprint ed, Farrar, Straus and Giroux, New York, 2013).

⁹⁵⁵ Michael DA Freeman and Dennis Lloyd of Hampstead *Lloyd's Introduction to Jurisprudence* (8 ed, Sweet & Maxwell, London, 2008) at 8.

⁹⁵⁶ At 8.

⁹⁵⁷ Deanna L Wilkinson *Guns, Violence, And Identity Among African American And Latino Youth* (LFB Scholarly Pub LLC, New York, 2004); Felson and Messner, above n 926; Richard B Felson and Steven F Messner "Disentangling the Effects of Gender and Intimacy on Victim Precipitation in Homicide*" (1998) 36 *Criminology* 405; Felson, Baumer and Messner, above n 921; Richard B Felson "Big People Hit Little People: Sex Differences in Physical Power and Interpersonal Violence" (1996) 34 *Criminology* 433; Richard B Felson and Henry J Steadman "Situational Factors in Disputes Leading to Criminal Violence" (1983) 21 *Criminology* 59.

⁹⁵⁸ Murray A Straus "The Controversy Over Domestic Violence by Women: Theoretical, and Sociology of Science Analysis" in Ximena B Arriaga and Stuart Oskamp (eds) *Violence in Intimate Relationships* (1st ed, SAGE Publications, Inc, Thousand Oaks, Calif, 1999) 17.

but this thesis suggests that perspectives applied to violence outside the home are also applicable to IPV.⁹⁵⁹ To identify sparks of violence in intimate relationships, we must examine power relations, control dynamics, relationship problems, and communication patterns.⁹⁶⁰ For example, Dobash and Dobash reported the following frequency of sources for “typical” events among their sample:⁹⁶¹

Possessiveness and sexual jealousy (45%), expectations about domestic work (16%), money (18%), status problems (3%), sexual refusal (2%), women’s attempt to leave (0%), relatives and friends (4%), husband’s drinking behaviour (6%), children (4%), and other sources (3%).

In contrast police data indicated possessiveness and sexual jealousy at 12%, the expectation for domestic work at 37% and notably, attempts by women to leave at 17%.⁹⁶² Lloyd and Emery identified three prominent themes: threats to relationship, stressful life events, and drug/alcohol use; pointing out the different actions that led to violent outcome.⁹⁶³

...is precipitated by the woman engaging in a casual conversation with people waiting at bus stop, wearing the ‘wrong’ clothes or too much makeup, saying no to the man’s sexual advances, an argument over drinking, and the woman’s request to go home early, to name just a few.

Cross-cultural studies suggest that sexual jealousy or infidelity sparks about half of these incidents and perceived that failure in wifely duty accounts for about another quarter.⁹⁶⁴ Depending on the data source, sexual jealousy is estimated to

⁹⁵⁹ Wilkinson and Hamerschlag, above n 949, at 334.

⁹⁶⁰ Sally A Lloyd and Beth Emery *The Dark Side of Courtship: Physical and Sexual Aggression* (SAGE Publications, Inc, Thousand Oaks, Calif, 1999).

⁹⁶¹ R Emerson Dobash and Russell P Dobash “The Nature and Antecedents of Violent Events” (1984) 24 Br J Criminol 269 at 273.

⁹⁶² At 273.

⁹⁶³ Lloyd and Emery, above n 960, at 51.

⁹⁶⁴ Fagan and Browne, above n 926, at 121.

spark IPV between 7% and 41% of the time,⁹⁶⁵ and female victims often indicate that jealousy was the dominant motivational factor for an attack.⁹⁶⁶ Various studies considering jealousy from the male point of view also established that marital violent men are more jealous than their non-violent counterparts are, and jealous men attribute more negative motivations to women's behaviours.⁹⁶⁷

5.2.8 Motivation for Intimate Partner Violence

The intrigue of romance and love developing into a commitment to an intimate relationship, only to be shattered by violence, remains a perplexing human predicament. In our effort to understand the problem, the important but controversial question centres on what motivates people to perpetrate this undesirable and dangerous behaviour. Traditionally IPV has been premised on the feminist approach, that men perpetrate violence to control or coerce their female partners.⁹⁶⁸

In a literature review related to this topic Malloy et al. conducted a qualitative review of women's use of violence within their intimate relationships.⁹⁶⁹ The authors addressed the question of whether there are differences between men's and women's motivation or there is gender symmetry in IPV perpetration.⁹⁷⁰ In essence, gender differences in motivation imply that men use violence to control

⁹⁶⁵ Ola W Barnett, Tomas E Martinez and Brendon W Bluestein "Jealousy and Romantic Attachment in Maritally Violent and Nonviolent Men" (1995) 10 J Interpers Violence 473.

⁹⁶⁶ Kathleen H Hofeller *Social, Psychological, and Situational Factors in Wife Abuse* (R & E Research Associates, Palo Alto, Calif, 1982) at 117; Lloyd and Emery, above n 960, at 6.

⁹⁶⁷ Barnett, Martinez and Bluestein, above n 153; A Holtzworth-Munroe and G Hutchinson "Attributing Negative Intent to Wife Behavior: The Attributions of Maritally Violent versus Nonviolent Men" (1993) 102 J Abnorm Psychol 206; A Holtzworth-Munroe and K Anglin "The Competency of Responses Given by Maritally Violent versus Nonviolent Men to Problematic Marital Situations" (1991) 6 Violence Vict 257.

⁹⁶⁸ Dobash and others, above n 932; Pence and Paymar, above n 932; Stark, above n 98.

⁹⁶⁹ Kathleen A Malloy and others "Women's Use of Violence within Intimate Relationships" (2003) 6 J Aggress Maltreatment Trauma 37.

⁹⁷⁰ At 39.

or coerce their partner, whereas women use violence in self-defense, contrary to the notion of gender symmetry in perpetration.⁹⁷¹

Interestingly, Malloy et al. in their review relied on two empirical articles that focused on motivation. Firstly, an article by Dasgupta based on the interview of 32 women who had been court-ordered to treatment because of their perpetration of IPV.⁹⁷² Based on transcriptions from the interview, the author coded different motives for perpetrating IPV and according to her the most common reason, self-reported by the women was self-defence or using violence to end their abuse.⁹⁷³ Secondly, Malloy et al. cited a study by Cascardi and Vivian, which used a sample of married couples seeking relationship treatment.⁹⁷⁴ The study considered the perceived utility of men's and women's perpetration of both mild and severe violence. Both genders reported several functions (e.g. anger/coercion, anger, provocation, personality functions and stress) but there were no gender differences in reports of self-defence functions for mild violence. For severe violence perpetration, 20% of wives' indicated self-defence as opposed to 0% of husbands.⁹⁷⁵ By these two studies Malloy et al. concluded that there were "striking differences are found between women and men concerning the motivation for using IPV to control their intimate partners".⁹⁷⁶

Another review of the literature was conducted in 2008 by Swan et al. which also focused on summarising the literature about underlying motivations in women's

⁹⁷¹ Dobash and others, above n 932; Pence and Paymar, above n 932.

⁹⁷² Shamita Das Dasgupta "Just Like Men? A Critical View of Violence by Women" in Melanie F Shepard and Ellen Pence (eds) *Coordinating Community Responses to Domestic Violence Lessons from Duluth and Beyond* (Sage, Thousand Oaks, CA, 1999) 195.

⁹⁷³ Cited in Jennifer Langhinrichsen-Rohling, Adrienne McCullars and Tiffany A Misra "Motivations for Men and Women's Intimate Partner Violence Perpetration: A Comprehensive Review" (2012) 3 *Partner Abuse* 429 at 431.

⁹⁷⁴ Michele Cascardi and Dina Vivian "Context for Specific Episodes of Marital Violence: Gender and Severity of Violence Differences" (1995) 10 *J Fam Viol* 265.

⁹⁷⁵ Cited in Langhinrichsen-Rohling, McCullars and Misra, above n 973, at 432.

⁹⁷⁶ Malloy and others, above n 969, at 54.

violence.⁹⁷⁷ These authors first considered the prevalence of women's perpetration in six different types of violence: physical aggression, sexual coercion, stalking, psychological aggression, coercive control and the production of injury. They concluded that there was a similarity in the rates of physical and psychological violence between men and women, but men perpetrate substantially more of other types of violence.⁹⁷⁸ As a result of these differences, the authors decided to focus on what motivates women as opposed to what motivates men to perpetrate IPV. They cited evidence to support the notion that women report more fear of their partner's violence and that battered women's children are also likely to be abused.⁹⁷⁹ They used these data to infer that women are more motivated than men to perpetrate violence to protect themselves and their children,⁹⁸⁰ although neither of these factors is proximal motivation.⁹⁸¹

However, Swan et al. did acknowledge multiple studies indicating that both men and women are equally motivated to perpetrate IPV to regain or maintain control of their relationships, in self-defence, and in retaliation for real or perceived wrongdoing.⁹⁸² In spite of noting that there are inconsistencies in the literature surrounding gender differences in measured motivations, the authors conclude that there are substantive differences in the motivations between men and women perpetrated IPV. Thus, they assume that based on these differences male-derived interventions for violence may not be applicable or effective for many women.⁹⁸³

⁹⁷⁷ Suzanne C Swan and others "A Review of Research on Women's Use of Violence With Male Intimate Partners" (2008) 23 Violence Vict 301.

⁹⁷⁸ At 2–4.

⁹⁷⁹ At 7.

⁹⁸⁰ At 8.

⁹⁸¹ Langhinrichsen-Rohling, McCullars and Misra, above n 973, at 432.

⁹⁸² Swan and others, above n 977, at 8.

⁹⁸³ At 10.

The two reviews discussed above both set out to improve understanding of women's motivations for perpetrating IPV, but they concluded with the question of whether men and women have substantially different motives for perpetrating physical violence against their intimate partners. Notwithstanding that the reviews were not comprehensive in nature, they thus drew their conclusions from a limited number of studies.

5.2.9 A Comprehensive Review of Men's and Women's Motivation for IPV

In a comprehensive literature review, Langhinrichsen-Rohling et al. collected and summarised all available papers that reported empirical data relating to men's and women's motivations for IPV.⁹⁸⁴ For direct gender comparison, the authors coded the motives recorded in each obtained study into seven broad categories:

- power and control,
- self-defence
- expression of negative emotion (i.e. anger),
- communication difficulties,
- retaliation
- jealousy, and
- other

Out of the total 75 samples (located in 74 articles) that were reviewed and coded, 24 contained samples of women only (32%), six samples of men only (8%), and 46 samples used both men and women.

The review addressed two central questions: 1) What motivates partners to perpetrate IPV, and 2) Whether such motivations differ between men and women. Specific gender differences imply that if men's violence is for the purpose of "subjugating women, keeping them in a position of vulnerability and

⁹⁸⁴ Langhinrichsen-Rohling, McCullars and Misra, above n 973.

disempowerment”, then intervention for men is best addressed in the context of social inequalities. In contrast, women who perpetrate violence, purportedly act in self-defence and are not “husband batterers”. On the other hand, if both men’s and women’s violence is “motivated by anger management concerns, lack of skills to communicate successfully with intimate partners, or because of jealousy”, different types of IPV interventions may be necessary.⁹⁸⁵

A significant finding from the review is that power/control and self-defence were commonly measured motivations (76% and 61% respectively). Other commonly assessed motives included: using violence as an expression of negative emotion (63%), communication difficulties (48%), retaliation (60%) and jealousy (49%).⁹⁸⁶ Notably, among studies that reported “other” specific motivations, 16 out of the 75 study samples indicated drug and alcohol abuse as a motivating factor for IPV (22%). In eight of the studies, sexual arousal was cited as motivation for perpetrating violence against an intimate partner (11%). Personality or character issues were also generated by participants in more than one study.⁹⁸⁷

In summary, the review concluded the following points in regards to motivation for IPV in both men and women:

- Eight studies made direct comparisons between men and women for the power/control motive and subjected their findings to statistical analyses. Three reported no significant gender differences and one had mixed findings. One found that women were more motivated to perpetrate violence for power and control, and three found that men were more motivated; however, gender differences were weak.⁹⁸⁸

⁹⁸⁵ Jennifer Langhinrichsen-Rohling “Controversies Involving Gender and Intimate Partner Violence in the United States - Springer” (2010) 62 Sex Roles 179 Cited in; Langhinrichsen-Rohling, McCullars and Misra, above n 973, at 431.

⁹⁸⁶ Langhinrichsen-Rohling, McCullars and Misra, above n 973, at 429.

⁹⁸⁷ At 446.

⁹⁸⁸ At 446.

- Male and female IPV were perpetrated for similar motives, primarily for retaliation or to get back at a partner for emotionally hurting them, because of stress or jealousy, to express anger and other feelings that they could not put into words or communicate, and to get their partner's attention.⁹⁸⁹
- Out of ten papers containing gender-specific statistical analyses, five indicated that women were significantly more likely to report self-defense as a motive for perpetration than men. Four papers did not find statistically significant gender differences, and one paper reported that men were more likely to report this motive than women. The authors point out that while women facing criminal charges are likely to cite self-defense it might be difficult for masculine males to admit perpetrating violence in self-defence, as this may imply vulnerability.⁹⁹⁰
- Self-defence was endorsed in most samples by only a minority of respondents, male and female. For non-perpetrator samples, the rates of self-defence reported by men ranged from 0% to 21%, and for women, the range was 5% to 35%. The highest rates of reported self-defence motives (50% for men, 65.4% for women) came from samples of perpetrators, who may have reasons to overestimate this motive.⁹⁹¹
- None of the studies reported that anger/retaliation was significantly more of a motive for men than women's violence; instead, two papers indicated that anger was more likely to be a motive for women's violence as compared to men.⁹⁹² Jealousy/partner cheating seems to be a motive to perpetrate violence for both men and women.⁹⁹³

⁹⁸⁹ For example see Poco Kernsmith "Exerting Power or Striking Back: A Gendered Comparison of Motivations for Domestic Violence Perpetration" (2005) 20 Violence Vict 173.

⁹⁹⁰ Langhinrichsen-Rohling, McCullars and Misra, above n 973, at 447.

⁹⁹¹ At 456.

⁹⁹² At 456.

⁹⁹³ At 456.

5.2.10 The Feminist View

The most common feminist argument starts from the patriarchal social structures that favour men with positions of dominance and control over women's subordination.⁹⁹⁴ This is supported by cultural norms that men are entitled and expected to control their wives, and that violence is either condoned or treated as a private matter.⁹⁹⁵ The dominant view from this perspective is that:⁹⁹⁶

Perpetrators of domestic violence must be viewed and responded to in certain ways: they can only be male; their behaviour is not deviant but rather culturally sanctioned...rooted in patriarchy [and]...does not share etiological processes with other forms of family violence.

The function of male violence within this unequal social structure is to maintain the status quo while female violence is in response to their vulnerability (self-defence).⁹⁹⁷ Achieving gender equality is a necessity in the fight to eliminate violence against women in intimate relationships.⁹⁹⁸

⁹⁹⁴ Scott and Straus, above n 977, at 853; David Adams "Treatment Models for Men Who Batter: A Profeminist Analysis" in Kersti Yllo and Michele Bograd (eds) *Feminist Perspective of Wife Abuse* (Sage, Newbury Park, 1988) 176 at 176; Gayla Margolin and Bonnie Burman "Wife Abuse Versus Marital Violence: Different Terminologies, Explanations, and Solutions" (1993) 13 Clin Psychol Rev 59; Emerson R Dobash and Russell Dobash *Violence Against Wives* (Free Press, New York, 1983) at 24.

⁹⁹⁵ Ann D Carden "Wife Abuse and the Wife Abuser Review and Recommendations" (1994) 22 The Counseling Psychologist 539 at 542.

⁹⁹⁶ Ken Corvo and Pamela J Johnson "Vilification of the 'Batterer': How Blame Shapes Domestic Violence Policy and Interventions" (2003) 8 Aggression and Violent Behavior 259 at 263.

⁹⁹⁷ Winstok, above n 78, at 7.

⁹⁹⁸ Addressing intimate partner homicide the authors asserted that we live in "a society where almost every major institute accepts or ignores the problem of gender inequality..." and "The law and the patriarchal hierarchy have legitimised wife beating and control, resulting in unequal power relationships between men and women."; Geris Serran and Philip Firestone "Intimate Partner Homicide: A Review of the Male Proprietariness and the Self-Defence Theories" (2004) 9 Aggress Violent Behav 1 Intimate partner homicide at 12.:

Contrary to this viewpoint, empirical data demonstrate that while IPV is rampant, the reality is that both parties engage in intimate violence and/or aggression.⁹⁹⁹ Indeed, cumulative evidence implies that IPV is a common occurrence where both males and females are perpetrators and victims respectively.¹⁰⁰⁰ The same also applies in the etiological aspect, in that dominance by whichever partner (man or woman) increases the probability of violence.¹⁰⁰¹ Moreover, it appears that in only a small percentage of partner violence cases involve male dominance and female deprivation.¹⁰⁰² Equally, the assumption that female violence is associated with self-defense is not supported by empirical data, as it is found only in a small number of cases.¹⁰⁰³

⁹⁹⁹ See generally: Ronald C Kessler and others "Patterns and Mental Health Predictors of Domestic Violence in the United States: Results from the National Comorbidity Survey" (2001) 24 *International Journal of Law and Psychiatry* 487; Tonia L Nicholls and Donald G Dutton "Abuse Committed by Women against Male Intimates" (2001) 10 *Journal of Couples Therapy* 41; Jan E Stets and Murray A Straus "The Marriage License as a Hitting License" in Murray Arnold Straus and Richard J Gelles (eds) *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families* (Transaction Publishers, New Brunswick, 1990) 227; Jan E Stets and Murray A Straus "Gender Differences in Reporting Marital Violence" in Murray Arnold Straus and Richard J Gelles (eds) *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families* (Transaction Publishers, New Brunswick, 1990) 151.

¹⁰⁰⁰ Richard J Gelles and Murray A Straus *Intimate Violence* (Simon & Schuster, New York, 1988); Straus, Gelles and Stenmetz, above n 78; Kristin L Anderson "Perpetrator or Victim? Relationships between Intimate Partner Violence and Well-Being" (2002) 64 *J Marriage Fam* 851; James E McCarroll and others "Patterns of Mutual and Non-mutual Spouse Abuse in the US Army (1998-2002)" (2004) 19 *Violence Vict* 453; Stacey L Williams and Irene Hanson Frieze "Patterns of Violent Relationships, Psychological Distress, and Marital Satisfaction in a National Sample of Men and Women" (2005) 52 *Sex Roles* 771; Kessler and others, above n 1052.

¹⁰⁰¹ Jae-Yop Kim and Clifton Emery "Marital Power, Conflict, Norm Consensus, and Marital Violence in a Nationally Representative Sample of Korean Couples" (2003) 18 *J Interpers Violence* 197; Murray A Straus "Bucking the Tide in Family Violence Research" (2008) 9 *Trauma Violence Abuse* 191; Straus, above n 935; Yoko Sugihara and Judith Ann Warner "Dominance and Domestic Abuse Among Mexican Americans: Gender Differences in the Etiology of Violence in Intimate Relationships" (2002) 17 *Journal of Family Violence* 315.

¹⁰⁰² Gelles and Straus, above n 1053; GK Kantor and Murray A Straus "Response of Victims and the Police to Assaults on Wives" in Murray A Straus and Richard J Gelles (eds) *Physical Violence in American Families* (NJ: Transaction Publishers, New Brunswick, 1990) 473; Murray A Straus "Conceptualisation and Measurement of Battering: Implications for Public Policy" in Steinman (ed) *Women Batter Policy Responses* (Anderson Publishing, Cincinnati, 1991) 19.

¹⁰⁰³ Michelle Carrado and others "Aggression in British Heterosexual Relationships: A descriptive Analysis" (1996) 22 *Aggr Behav* 401; Cascardi and Vivian, above n 974; Walter S DeKeseredy and others "The Meanings and Motives for Women's Use of Violence in Canadian College Dating Relationships: Results From a National Survey" (1997) 17 *Sociological Spectrum* 199; Zvi Eisikovits

5.2.11 Typologies of Violence

Johnson¹⁰⁰⁴ argued that partner violence is not a unitary phenomenon based on different sampling strategies, which tap different types of partner violence that differ in their relationship to gender.¹⁰⁰⁵ His attempt to bridge the gender symmetry divide is articulated through four types of partner violence.¹⁰⁰⁶ Importantly, “situation couple violence” (SCV) occurs when a conflict between partners escalate to violence, but it does not involve control, it is perpetrated by either partner and is unlikely to escalate over time. SCV is captured by empirical data from studies using large general community samples.¹⁰⁰⁷ On the other hand, “intimate terrorism” (IT) is when violence in the form of control tactics like threats and intimidations, economic control, psychological abuse, isolation and the assertion of male privilege is used to establish control in the relationship. It occurs more frequently than situational violence, is more lethal, more likely to escalate over time and almost always involves the man abusing the woman.¹⁰⁰⁸ This type of male violence cannot be adequately captured from a general sample thus the

and Eli Buchbinder *Locked in A Violent Embrace* (SAGE Publications, Inc, Thousand Oaks, Calif, 2000); Richard B Felson and Steven F Messner “Disentangling the Effects of Gender and Intimacy on Victim Precipitation in Homicide*” (1998) 36 *Criminology* 405; Patricia Pearson *When She Was Bad*. (arc edition ed, Penguin Books, New York, 1998).

¹⁰⁰⁴ A feminist scholar from Penn State University.

¹⁰⁰⁵ Johnson, above n 927.

¹⁰⁰⁶ (1) Intimate terrorism – one partner is violent and controlling, the other is not; (2) violent resistance – one partner is violent but not controlling, the other is both violent and controlling; (3) situation couple violence – one partner is violent but not controlling, the other is neither violent nor controlling; and (4) mutual violent control – both partners are violent and controlling. Johnson, above n 933, at 1006.

¹⁰⁰⁷ Johnson, above n 933; Michael P Johnson and Kathleen J Ferraro “Research on Domestic Violence in the 1990s: Making Distinctions” (2000) 62 *Journal of Marriage and Family* 948; Michael P Johnson and Janel M Leone “The Differential Effects of Intimate Terrorism and Situational Couple Violence Findings From the National Violence Against Women Survey” (2005) 26 *Journal of Family Issues* 322.

¹⁰⁰⁸ Ryan G Carlson and K Dayle Jones “Continuum of Conflict and Control: A Conceptualization of Intimate Partner Violence Typologies” (2010) 18 *The Family Journal* 248 at 250.

heavy reliance on data collected from battered women in shelters, agencies or hospitals.¹⁰⁰⁹

What is interesting about Johnson's typologies is the categorisation of IPV into at least two major groups that differentiates conflict resolution behaviour from coercive control. The two distinct groups developed by Johnson are SCV or common couple violence (CCV) and IT.¹⁰¹⁰ According to Johnson et al., IT is predominantly perpetrated by men through "the use of violence as one tactic to exercise general control" over one's partner.¹⁰¹¹ On the other hand, CCV is more common, perpetrated equally by men and women, and does not involve the element of control. Situationally provoked, it refers to conflicts that sometimes escalate into violence.¹⁰¹² The typology theory lends some support to the argument propagated by this thesis, the need to categorise domestic violence. In recognition of the difference between minor relationship aggression (CCV) and serious violence (IT) a graduated legal response is recommended.

5.2.12 The Gender Symmetry Perspective

The other school of thought occupied by domestic violence scholars consider IPV as gender symmetric that both men and women perpetrate violence.¹⁰¹³ From this standpoint, partner violence is regarded as human behaviour in which gender is an influencing role but not the primary contributing factor.¹⁰¹⁴ Although it is women who primarily seek protection from family violence, research indicates

¹⁰⁰⁹ Johnson, above n 933, at 1005.

¹⁰¹⁰ Michael P Johnson, Janel M Leone and Yili Xu "Intimate Terrorism and Situational Couple Violence in General Surveys Ex-Spouses Required" (2014) 20 Violence Against Women 186.

¹⁰¹¹ At 189.

¹⁰¹² At 191.

¹⁰¹³ Straus, Gelles and Stenmetz, above n 77 cited in; Winstok, above n 78, at 6.

¹⁰¹⁴ Winstok, above n 78, at 6; RL McNeely, Philip W Cook and Jose B Torres "Is Domestic Violence a Gender Issue, or a Human Issue?" (2001) 4 Journal of Human Behavior in the Social Environment 227 at 228.

that their perpetration of IPV is proportionate to men.¹⁰¹⁵ Women are also arrested for IPV, and their violence is not solely in self-defence for some women also use violence to control their partners.¹⁰¹⁶ These researchers acknowledge the issue of gender inequality and accept the association of dominance and control with IPV. However, the analysis of reasons for the consequences of violent behaviour should include both men and women, arriving at conclusions in the role of gender based on findings rather than presumptions.¹⁰¹⁷ (check reference and reconstruct sentence)

5.2.13 The Gender Paradigm

The two conflicting viewpoints about IPV are; either it constitutes mutual violence or that it is a gendered problem, generally involving male perpetrators and female victims. The articulated distinction between “gender asymmetry”: that there is a significant difference between men’s violence (control and dominance) and women’s violence (self-defence) against their respective partners; and “gender symmetry”: that both genders perpetrate comparative violence in their intimate relationship.¹⁰¹⁸ The former is attributed to “feminist” scholars while the latter is ascribed to “family violence” scholars. Winstok argues that the debate is not an ideological dispute between feminists and antifeminists as both sides have scholars who advocate gender equality and who reject violence in any form. The difference, he points out is in the theoretical frameworks guiding their work: feminist scholars examine IPV in the context of women’s situation in a patriarchal society while family violence scholars view partner relationships as an opportunity

¹⁰¹⁵ Kessler and others, above n 999, at 491.

¹⁰¹⁶ Lisa R Muftić, Jeffrey A Bouffard and Leana Allen Bouffard “An Exploratory Study of Women Arrested for Intimate Partner Violence Violent Women or Violent Resistance?” (2007) 22 J Interpers Violence 753 at 754; Julia C Babcock and Cheryl Siard “Toward A Typology of Abusive Women: Differences Between Partner-Only And Generally Violent Women In The Use Of Violence” (2003) 27 Psychology of Women Quarterly 153 at 158.

¹⁰¹⁷ Winstok, above n 78, at 7.

¹⁰¹⁸ Winstok, above n 196, at 6; and generally see: Straus, Gelles and Stenmetz, above n 8.

to study violent behaviour.¹⁰¹⁹ Both have contributed usefully to understanding and combating domestic violence.

5.2.14 Conflict Dynamics

Conflict pervades social life; it is a form of socialisation underlined by strong reactions that can deliver both negative and positive manifestations. Individuals enter into intimate relationships with different expectations but with a sense of control that they do so on their own volition and the ability to control their behaviours and to alter the course of events in their lives.¹⁰²⁰ The realignment of expectations to the relationship reality, to stabilise differences, often entails one or both trying to change the other. A disagreement that remains unresolved challenges the parties' sense of control and is likely to escalate the conflict. In any event, there are three possible conflict dynamics throughout a relationship: stable, escalation and de-escalation.¹⁰²¹

Typically intimate relationships are fostered in three development periods: dating, cohabitation and marriage, each representing different requirements, capabilities and challenges for the couple.¹⁰²² Conflicts representing these development periods, are linked to biological, psychological, and social development; for like other deviant behaviours violence is also age related. Increasing evidence indicates that the use of interpersonal violence in different life contexts decreases

¹⁰¹⁹ Winstok, above n 78, at 6.

¹⁰²⁰ Umberson, above n 901, at 578.

¹⁰²¹ Stable – the highest level of aggression severity reached between the partners remain stable across specific periods. Escalation – the possibility of the topmost aggression severity to increase from period to period from verbal abuse to pushing, to punching. De-escalation – the possibility that from one period to another, the peak aggression severity might diminish. Winstok, above n 78, at 97–8.

¹⁰²² At 98.

from adolescence onward.¹⁰²³ Similarly, conflict escalation and aggressive severity differ between the development periods of intimate relationships.

Examining differences in the expression of violence across various periods of a couples' life, Stets and Straus¹⁰²⁴ showed that married couples living together had the lowest rates of violence. Higher rates of violence were found with dating non-cohabiting partners who were not cohabiting and unmarried cohabiting couples respectively.¹⁰²⁵ The same was also reflected in a study that examined the different rates of violence among young adults in New Zealand. They found physical violence in approximately half of the unmarried cohabiting couples, as well as, in a quarter of the non-cohabiting dating couples.¹⁰²⁶ Brown and Bulanda¹⁰²⁷ also studied partner aggression among young adults and established that unmarried women cohabiting with their partners reported the highest rates.¹⁰²⁸ Married women followed and dating women (non-cohabiting) reported the lowest. These differences can be attributed to factors like age, the transient nature of the relationship (dating), inexperience in conflict resolution (unmarried cohabiting), and improved ability to handle conflicts over time (married cohabiting).

As the conflict escalates, both parties are polarised, concerned with saving face and regaining a sense of control over their environment.¹⁰²⁹ In the process the focus shifts from resolving the initial disagreement to ending the conflict, even if

¹⁰²³ Tremblay, above n 821, at 135.

¹⁰²⁴ Stets and Straus, above n 999.

¹⁰²⁵ Cited in Winstok, above n 78, at 99.

¹⁰²⁶ Lynn Magdol and others "Hitting without a License: Testing Explanations for Differences in Partner Abuse between Young Adult Daters and Cohabitors" (1998) 60 *Journal of Marriage and Family* 41 at 49.

¹⁰²⁷ Susan L Brown and Jennifer Roebuck Bulanda "Relationship Violence in Young Adulthood: A Comparison of Daters, Cohabitors, and Marrieds" (2008) 37 *Social Science Research* 73.

¹⁰²⁸ At 85.

¹⁰²⁹ Winstok and Eisikovits, above n 201, at 288.

it takes violence to do so.¹⁰³⁰ Two comparative studies into the dynamics of escalation from the perpetrator's and victim's perspectives identified two conceptual components common to both the men as perpetrators and women as victims: the perception of the escalation process and the subsequent action taken.¹⁰³¹ The men's action model entails either reacting to the identified threat or tending to construct their action based on past events. Conversely, the women's action model entails predicting and managing the process of escalation accordingly and constructing action on the future, on what they expect to happen.¹⁰³² Thus, the consequent difference in action styles: men tend to use educational tactics to "teach his partner a lesson," while women tend to rely on attrition tactics to illustrate how her partner should behave.¹⁰³³ It is an amalgamation of cognitive, emotional and behavioural components, in which perception and meaning need to be viewed as personal and social outcomes, as do specific actions and reactions.

5.2.15 Empirical Research

A considerable body of knowledge exists regarding the violence that occurs in domestic or intimate settings. Generally, men are more aggressive than women, but this should not blind us to the important similarities between the sexes. Reaction to outside stimuli that drives aggression in one sex is the same in the other.¹⁰³⁴ For example, a New Zealand study¹⁰³⁵ that found IPV to occur in 70% of

¹⁰³⁰ At 291.

¹⁰³¹ Zeev Winstok, Zvi Eisikovits and Richard Gelles "Structure and Dynamics of Escalation from the Batterer's Perspective" (2002) 83 *Families in Society* 129; Zvi Eisikovits, Zeev Winstok and Richard Gelles "Structure and Dynamics of Escalation from the Victim's Perspective" (2002) 83 *Families in Society* 142.

¹⁰³² Eisikovits, Winstok and Gelles, above n 1031, at 149.

¹⁰³³ Winstok and Eisikovits, above n 201, at 290.

¹⁰³⁴ Anne Campbell, Steven Muncer and Daniel Bibel "Women and Crime: An Evolutionary Approach" (2001) 6 *Aggression and Violent Behavior* 481 at 481.

¹⁰³⁵ A study that examined a birth cohort of 828 young New Zealanders who had been extensively interviewed throughout their lives and were aged 25 at the time: Fergusson, Boden and Horwood, above n 105.

relationships provoked an outcry that women have more to fear from family members than from strangers.¹⁰³⁶ What this outcry did not take account of is the fact that the same study established similar rates of IPV by men and women, notwithstanding that men with their superior strength predominate in serious cases.¹⁰³⁷

Cumulative empirical evidence from research in this area supports gender symmetry of violence in intimate relationships.¹⁰³⁸ By and large, the studies demonstrate that approximately half of partner violence were mutual violence. This is also the case in the etiological aspect that dominance by either partner (man or woman) increases the probability of violence.¹⁰³⁹ It appears that male dominance and female degradation,¹⁰⁴⁰ as well as female violence associated with self-defense,¹⁰⁴¹ happened only in a small number of incidents.

The study of same-sex couples is an ideal opportunity to examine the notion that IPV is a gendered problem, that men rather than women are the main perpetrators of violence. However, a study of same-sex couples showed a violence rate for lesbians at 56% and gay men at 25%.¹⁰⁴² Similarly, a study of women in lesbian relationships with previous historical heterosexual relationships revealed 45% physical violence and 64% verbal violence in their lesbian relationships were

¹⁰³⁶ Mark Henaghan and Ruth Ballantyne "Legal Responses to Violence in the Home in New Zealand" (2010)
<<http://search.informit.com.au.ezproxy.waikato.ac.nz/documentSummary;dn=675818849148934;res=IELHSS>> at 871.

¹⁰³⁷ Fergusson, Boden and Horwood, above n 105, at 748.

¹⁰³⁸ For example, see: Anderson, above n 1005; Kessler and others, above n 1004; McCarroll and others, above n 1005; Williams and Frieze, above n 1005.

¹⁰³⁹ Kim and Emery, above n 214; Straus, above n 214; Sugihara and Warner, above n 214.

¹⁰⁴⁰ Straus, above n 1002; Kantor and Straus, above n 1002; Gelles and Straus, above n 1000.

¹⁰⁴¹ Eisikovits and Buchbinder, above n 1003; Felson and Messner, above n 1003; DeKeseredy and others, above n 1003; Cascardi and Vivian, above n 974; Carrado and others, above n 1003.

¹⁰⁴² MJ Bologna, CK Waterman and LJ Dawson "Violence in Gay Male and Lesbian Relationships: Implications for Practitioners and Policy Makers" in *Third National Conference of Family Violence Researchers* (July 1987) cited in; Winstok, above n 78, at 10.

higher than their heterosexual relationship experience at 34% physical violence and 55.1% verbal violence.¹⁰⁴³

5.2.16 Resolving the Contradiction

The competing positions occupied by feminist and family violence scholars is evident in their attribution of different meanings and concepts for the same terminology. Family violence scholars define partner violence based on conflict theories; that conflicts are inevitable in human relationships but violence is not.¹⁰⁴⁴ The focus is on conflict resolution and as such, they define physical aggression as:¹⁰⁴⁵ “...an act carried out with the intention of or perceived intention of causing physical pain or injury to another person.” By this definition a measurement instrument (CTS) was developed as a means to explore violence perpetrated by both men and women against their partners.¹⁰⁴⁶

Contrary to the above, feminist scholars DeKeseredy and McLeod formulated a definition focusing on the abuse of women in intimate relationships:¹⁰⁴⁷

Women abuse is the misuse of power by a husband, intimate partner (whether male or female), ex-husband, or ex-partner against a woman, resulting in a loss of dignity, control, and safety as well as feeling of powerlessness and entrapment experienced by the woman who is the direct

¹⁰⁴³ Gwat-Yong Lie and others “Lesbians in Currently Aggressive Relationships: How Frequently Do They Report Aggressive Past Relationships?” (1991) 6 *Violence and Victims* 121 at 126.

¹⁰⁴⁴ For example see: Bert N Adams “Coercion and Consensus Theories: Some Unresolved Issues” (1966) 71 *American Journal of Sociology* 714; Ralf Dahrendorf *Class and Class Conflict in Industrial Society* (Routledge & Kegan Paul, London, Dublin and Edinburgh, 1959); John H Scanzoni *Sexual Bargaining* (2nd ed, University of Chicago Press, Chicago, 1982); Straus, above n 891.

¹⁰⁴⁵ Cited in Winstok, above n 196, at 25.

¹⁰⁴⁶ The Conflict Tactic Scale (CTS) was widely used, becoming the most common means of measuring partner violence. Its first version (CTS-1) was presented in 1979 and an advanced version (CTS-2) was presented in 1996. The developers of the instrument were seeking to explore men’s as well as women’s violence against their partners: Straus, above n 891; Murray A Straus and others “The Revised Conflict Tactics Scales (CTS2) Development and Preliminary Psychometric Data” (1996) 17 *Journal of Family Issues* 283.

¹⁰⁴⁷ DeKeseredy and MacLeod, above n 95, at 5.

victim of ongoing or repeated physical, psychological, economic, sexual, verbal, and/or spiritual abuse.

The definition denotes abuse as the misuse (instead of illegal use) of power followed by the question of who is the aggressor and victim respectively. In gender terms, a perpetrator (husband/ex-husband or intimate partner/ex-partner) can be either a man or a woman, but only women are victims. Furthermore, the list of outcomes followed by possible expressions of abuse through a list of action implies an assumption that psychological outcomes include physical ones.

Apparently, violence is central to both paradigms, but each offers a different definitional focus. Who is the violent party and which behaviours are considered violence is central to the debate? Contrary to the family violence definition, the feminist scholars consider violence as hurtful behaviours, mostly perpetrated by men against women.¹⁰⁴⁸ While the two viewpoints may appear contradictory, they do agree in denouncing violence, even if the focus of their rejection is different.

The gender paradigm discusses violence against women as a means of suppression, control and dominance by men which require forceful removal.¹⁰⁴⁹ Hurting one's partner is judged by one's motivation thus the paradigm focus on victimisation as the guiding principle.¹⁰⁵⁰ In contrast, the paradigm of conflict in intimate relationship argues that violence is not only unnecessary; as a conflict tactic, it is not an inevitable part of the human association. Family violence scholars view partner violence as unwarranted illegal behaviour that needs to be eradicated and any deliberate aggression against one's partner is violence. The

¹⁰⁴⁸ The abuse theme is re-emphasised in WS DeKeseredy and M Dragiewicz "Woman Abuse in Canada: Sociological Reflections on the Past, Suggestions for the Future" (2014) 20 *Violence Against Women* 228. d in DeKeseredy and Dragiewicz.

¹⁰⁴⁹ DeKeseredy and Dragiewicz, above n 1048, at 9.

¹⁰⁵⁰ Johnson, above n 933, at 1006; Tanha and others, above n 935, at 1837.

paradigm focus is the act of aggression, the key element in the problem which triggers victimisation.¹⁰⁵¹

As Winstok pointed out, the two paradigms provide two different narratives of the same reality of partner violence. The gap between them may be a matter of value judgement rather than of scientific consideration. Hence, any attempt to resolve the paradox must address the value judgements on which they are based. For this reason, it is vital to delineate clearly the social reality we are addressing: that partner violence is illegitimate, regardless of gender, or power relationship.

The ongoing debate, however, does not help in alleviating public concern for those subjected to violence in their homes. Family violence is perceived as “an epidemic”¹⁰⁵² in New Zealand, an enduring social problem with disturbing public health implications. A snapshot of the New Zealand family violence landscape in 2013 reveals the following:

- There were 95,080 family violence investigations by New Zealand Police.¹⁰⁵³
- 3,803 applications were made for protection orders:
 - 2705 (91%) were made by women and 207 (7%) by men
 - 2638 (90%) of respondents were men and 252 (9%) women.¹⁰⁵⁴
- There were 6749 recorded male assaults female offences and 5025 recorded offences for breaching a protection order.
- Women’s Refuges affiliated to the National Collective of Independent Women’s Refuges received 81,720 crisis calls, 7,642 women accessed

¹⁰⁵¹ Winstok, above n 78, at 26.

¹⁰⁵² Henaghan and Ballantyne, above n 133, at 870.

¹⁰⁵³ New Zealand Police “New Zealand Recorded Crime Tables: Annual Recorded Offences for the latest Calendar Years” (2014) <<http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7405>>., on 25/11/2014

¹⁰⁵⁴ Ministry of Justice (May 2014) District Court Data: Personal Communication quoted in New Zealand Family Violence Clearing House “Data Summaries” (June 2014) <<http://www.nzfvc.org.nz/data-summaries>>.

advocacy services in the community, 2,940 women and children stayed in safe houses.¹⁰⁵⁵

A survey conducted by the School of Population Health at the University of Auckland found that 1 in 3 (35.4%) ever partnered New Zealand women report having experienced physical/or sexual IPV in their lifetime. When psychological/emotional abuse is included, 55% report having experienced IPV in their lifetime. In the 12 months before the survey, 5.2% had experienced physical and sexual IPV. When psychological/emotional abuse was included, 18.2% had experienced one or more forms of IPV.¹⁰⁵⁶ While the outcome may support the notion of violent men and women victims, there is no similar survey for men who have experienced IPV for comparative analysis.

5.2.17 Spousal Assault and the Zero Tolerance Philosophy

New Zealand policy on spousal assault is best described as a “pro-arrest” response in which police are expected to arrest and lay charges where evidence of criminal offending exists.¹⁰⁵⁷ The decision to prosecute is a Police decision based on the Solicitor General’s guidelines where there is a reasonable prospect of conviction (the evidential test) and where prosecution is in the public interest, irrespective of the victims opinion or decision not to pursue the charge.¹⁰⁵⁸ The question arises whether it is appropriate to pursue a more rigorous response based on a “zero tolerance” approach as indeed practised in some common law jurisdictions. It is

¹⁰⁵⁵ National Collective of Independent Women’s Refuges *Annual Report: 1 July 2012-30 June 2013* (2013) at 21., retrieved on 25/11/2014 from: <https://womensrefuge.org.nz/users/Image/Downloads/PDFs/Annual%20Report%202012-2013.pdf>.

¹⁰⁵⁶ Janet L Fanslow and Elizabeth M Robinson “Sticks, Stones, or Words? Counting the Prevalence of Different Types of Intimate Partner Violence Reported by New Zealand Women” (2011) 20 *Journal of Aggression, Maltreatment & Trauma* 741 at 747.

¹⁰⁵⁷ New Zealand Police, above n 29, at 8, retrieved from <http://www.ppdvp.org.nz/wp-content/media/2010/07/NZPol-Family-Violence-Policy-Procedures.pdf> on 10/06/2016.

¹⁰⁵⁸ At 55.

appropriate therefore to briefly discuss the zero tolerance philosophy as it operates in Canada.

Canada employs a zero-tolerance policy for domestic violence which means that where there are reasonable and probable grounds to believe an assault has occurred, criminal charges must be laid and once charges are laid prosecution must proceed.¹⁰⁵⁹ The rigid “one-size-fits-all” approach designed to protect women from abusive partners caused unforeseen consequences. In particular, couples who feel remorse after an argument gets a little out of hand,¹⁰⁶⁰ couples who are forced to separate through the no contact order against their will,¹⁰⁶¹ and estranged spouses claiming abuse “no matter how remote the assault may be in time or, indeed, how trivial the contact”.¹⁰⁶²

5.3 Conclusion

The underlying theme in IPV is the issue of violence when it is perpetrated by one partner on the other. For feminist scholars, the violence is a means of controlling

¹⁰⁵⁹ Department of Justice, Canada *Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation* (2015) at <http://justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/pol/toc-tdm.html>, on 10/06/2016; Manitoba Department of Justice *Guideline No 2:DOM:1 Public Prosecutions - Domestic Violence* (1999) at <http://www.ajic.mb.ca/policy.pdf>, on 10/06/2016.

¹⁰⁶⁰ Kirk Makin “The Scales of Injustice - Domestic Violence in Canada - The Failure of Zero Tolerance policy” (2003) Canadian Children’s Rights Council
<http://canadiancrc.com/newspaper_articles/Globe_and_Mail_The_Scales_of_Injustice_11JAN03.aspx> on 10/06/2016.

¹⁰⁶¹ Mike March “Is this Dead Family yet Another Victim of Ontario’s ‘Zero Tolerance’ Domestic Violence Policy” [2006] The Canadian Family Forum 1 retrieved from <http://www.canadacourtwatch.com/CanFamForumFiles/CFF-2006April05-IsAnotherFamilyTheVictimOfZeroTolerance.pdf>, on 10/06/2016.

¹⁰⁶² Susan Pigg “Domestic Abuse Law Blasted” *Toronto Star* (28 August 2009)
<https://www.thestar.com/news/ontario/2009/08/28/domestic_abuse_law_blasted.html> on 10/06/2016.

one's partner which in most cases is perpetrated by men.¹⁰⁶³ As such, motivation is the key issue. In contrast family violence scholars, focus on human behaviour in which escalation is the central issue and violence is the result.¹⁰⁶⁴ Again, motivation is also important. In sum, control is the basic motivation for IPV, but the point of disagreement is purely semantic, one is premised on gender differences while the other is based on escalation behaviour, two sides of the same coin.¹⁰⁶⁵

On one side is the notion of coercive control, men perpetrating violence to subdue and subjugate women. On the other side is the concept of conflict escalation which "arises from a clash of perceived interests, and its first part is characterised by the motivation to resolve this conflict."¹⁰⁶⁶ In the initial stage of the conflict, the need to influence/control one's partner may arise, and it increases if their partner is unwilling to comply with the request. The attempt to convince the unwilling partner can hinder self-control and the longer their need to control or influence their partner remains unfulfilled, the higher the likelihood he/she may resort to aggression and violence to achieve it.¹⁰⁶⁷

Given the complexity of human behaviour motivation in IPV becomes crucial. The notion of perpetrator and victim is often attributed by observers who are not part of the conflict. While the eventual perpetrator stands liable for the violence, it is important for the purpose of providing appropriate intervention to identify the escalation process clearly. The initial aggressor may indeed end up as the victim, thus, the importance of identifying the motives behind their actions. Motivation is

¹⁰⁶³ Johnson, above n 95; Frankland and Brown, above n 931.

¹⁰⁶⁴ Winstok, above n 78.

¹⁰⁶⁵ Winstok and Eisikovits, above n 13.

¹⁰⁶⁶ Winstok and Eisikovits, above n 201, at 294.

¹⁰⁶⁷ At 294.

important because it helps in establishing criminal liability to ensure a just outcome

CHAPTER 6 – FAMILY COURT REFORMS

6.1 *Introduction*

This chapter applies the hypothesis argued in this thesis in the context of family court reforms regarding domestic violence. I will consider the origins of the Family Court, assessing its development over time leading to the present, before proposing a way forward. The broad scope of the Family Court's jurisdiction is outside the capacity of this thesis, which limits the analysis to the court's role in domestic violence. Domestic violence is central to public concern, its impact as a social problem and health menace, as well as the enormous cost of maintaining the family justice system.

In spite of various reforms undertaken since the inception of the Family Court, domestic violence has remained a source of apprehension for the government, academics, stakeholders and the public at large. In their latest report, the Family Violence Death Review Committee devoted some effort in linking the problem to the conceptualisation of domestic violence. At its core is the notion of “coercive control” through the use of abusive strategies to overwhelm the target into submission. Only then, can we comprehend the impact and respond to family violence accordingly as a form of entrapment, the report suggests.¹⁰⁶⁸ The proposition appears theoretically sound, but as revealed in the previous chapters, deception, aggression and control are human traits irrespective of gender.

The important point to ponder is; why have we failed to achieve significant reforms in spite of enormous effort and reviews? In this respect the following questions postulated by Jane Spinak will be used to explore this subject:¹⁰⁶⁹

¹⁰⁶⁸ Family Violence Death Review Committee, above n 9, at 71–72.

¹⁰⁶⁹ Spinak, above n 8.

What do we say about the reform work we do, and to what degree is what we say accurate? How does our place or role within the system affect our perceptions of reform? What limits our willingness and ability to rigorous evaluative techniques to determine whether we are reaching our goals? And if we are failing, can we acknowledge failure and learn from it?

The answers to these questions may indeed hold the key to future reforms and more practical, as well as effective responses to the problem of domestic violence.

6.2 Background

From the inception of the Family Court as a specialised justice system, reforms are inevitable as new laws and policies are rolled out. Continuous assessment is necessary to meet changing social value, weaknesses identified in court processes, as well as to improve support services for users and assistance in the resolution of disputes out of court. Indeed, the statement made by Justice Minister, Hon. Amy Adams in regards to the recent 2014 reform is also applicable to earlier reforms:¹⁰⁷⁰

Our reforms have worked to deliver a more modern, accessible family justice system that encourages parents to reach out-of-court agreements about the arrangement for the care of children.

Ironically, just about a year later the same minister is lamenting that “clearly something is not working, we can and must do better” about the high number of

¹⁰⁷⁰Quoted in, Sasha Borissenko “The Family Court Reforms in a Nutshell” (2015) New Zealand Law Society <<https://www.lawsociety.org.nz/lawtalk/issue-861/the-family-court-reforms-in-a-nutshell>>. on 25/05/2015

domestic violence cases investigated by police in 2014; as the government rolls out yet another reform.¹⁰⁷¹

For this discussion, the family justice system will be examined regarding both legislative reforms and system reviews. We should bear in mind that reforms are limited by the way they are framed, which in regards of the family justice system translates into the goal of making the court more efficient.¹⁰⁷² Consistently, this leads to recommendations for more resource: “more judges, more lawyers, more everything.”¹⁰⁷³ The solution of providing more resource may indeed align with the conventional understanding of what is wrong, but it can also blind us to considering alternative solutions. And when resources decrease reforms become unsustainable; witness, for example, the excessive cost of running the Family Court,¹⁰⁷⁴ which was the main reason behind the 2014 review.¹⁰⁷⁵

6.3 *The Legal Evolution of New Zealand Families*

In the 1960s, the State’s primary concern was basically to support families by way of financing family homes. This was evident through legislation such as the Homes Act 1964 and the Family Benefits (Home Ownership) Act 1964, which ensured that families had secure homes.¹⁰⁷⁶ Family life then revolved around marriage and the nuclear family in which children born outside of marriage classified as illegitimate, until the Status of Children Act 1969 provided legitimacy for such children. Until

¹⁰⁷¹ Ministry of Justice, above n 5 at https://consultations.justice.govt.nz/policy/family-violence-law/user_uploads/fv-consultation-discussion-document-v2.pdf on 27/10/2015.

¹⁰⁷² Jane M Spinak *Adding Value to Families: The Potential of Model Family Courts* (Social Science Research Network 2002) at 359.

¹⁰⁷³ Spinak, above n 8, at 23.

¹⁰⁷⁴ This had increased 70% in the six years to 2012 from \$84 million to \$142 million per year, despite the overall number of applications to the court remaining relatively steady.

¹⁰⁷⁵ Gollop, Henaghan and Taylor, above n 654, at 2.

¹⁰⁷⁶ Tim Garlick *Social Developments* (Steel Roberts, Wellington, N Z, 2012) at 73 and 76.

the end of the 1960s the family emphasis remained on durability, thus the passing of the Domestic Proceedings Act 1968, focusing on reconciliation and keeping families together wherever possible.¹⁰⁷⁷

However, the 1970s ushered in a new era marked by increasing separation, divorce, and single mothers who were dependent on maintenance orders or government benefits for survival. The inflow of women under emergency benefits for domestic purpose snowballed under the Domestic Purpose Benefit (DPB) introduced by the Social Security Act 1973 to provide financial assistance for single parents.¹⁰⁷⁸ It provided the impetus for a reduction in DPB payments (for up to six months) to discourage separation through applicant referrals to marriage counselling for reconciliation.¹⁰⁷⁹

Other interesting developments in this decade included the Children and Young Persons Act 1974 which provided state protection to children in need of care. The thrust of the Act was the authority to remove children from their homes and place them under state care in foster homes. This law did not change until the Children, Young Persons and Their Families Act 1989, which recognised the wider family group and their role in caring for children.¹⁰⁸⁰ Another significant development was the movement away from fault-based divorce system implemented through the Domestic Actions Act 1975, which removed civil action for adultery and breach of promise.¹⁰⁸¹ The family became recognised as a group of individuals rather than

¹⁰⁷⁷ Bill Atkin and others "Fifty Years of New Zealand Family Law" (2013) 25 New Zealand Universities Law Review 645 at 649.

¹⁰⁷⁸ Garlick, above n 1087, at 91; Atkin and others, above n 1088, at 649.

¹⁰⁷⁹ Kay Goodger "Maintaining sole parent families in New Zealand: an historical review - Ministry of Social Development" [1988] 10 Social Policy Journal of New Zealand., at <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj10/maintaining-sole-parent-families-in-new-zealand.html> on 10/11/2015

¹⁰⁸⁰ Children, Young Persons and Their Families Act 1989, s 21.

¹⁰⁸¹ Atkin and others, above n 1082, at 650.

one legal entity, and the Matrimonial Property Act 1976 permitted a wife and a husband to sue each other in tort.¹⁰⁸² From this social upheaval and the legal evolution of New Zealand Families, the Royal Commission on the Courts emerged to address the increasingly complex relationship problems and family law jurisdiction.¹⁰⁸³

6.4 The Purpose of the Family Court

The Royal Commission on the Courts recognised the social changes taking place and emerging “complex personal and legal problems” arising from new intimate relationships not previously recognised as a family.¹⁰⁸⁴ It provided support for the threefold purpose of the Family Court: first, bringing family law under one jurisdiction;¹⁰⁸⁵ second, a conciliation focus to assist in the cooperative resolution of family disputes;¹⁰⁸⁶ and a specialist court with judges, ancillary staff/services and a dedicated Family Court Bar.¹⁰⁸⁷

Ensuing discussions and debates on the proposed Family Court reveal the sentiments of a limited role for judges. A system envisaged as a “forum and support for those involved in family conflicts to negotiate, settle and accept their own resolutions.”¹⁰⁸⁸ In parliamentary debates, MPs subscribed to the notion that the judge is to refrain from being “a distinct power figure”, and described the new Family Court judges “as people who are prepared to remove themselves from the

¹⁰⁸² Matrimonial Property Act 1976, s 21.

¹⁰⁸³ Beattie, Kawharu and Murray, above n 203.

¹⁰⁸⁴ At 146.

¹⁰⁸⁵ At 150.

¹⁰⁸⁶ At 149.

¹⁰⁸⁷ At 147.

¹⁰⁸⁸ Geoffery Palmer “The Family Court and The Future” 1 Family Court Bulletin 178 quoted in; Dame Sian Elias “Family Courts-20 Years After Reform” (2002) 40 Family Court Review 297 at 298.

traditional role of the court.”¹⁰⁸⁹ The conception appears to have been for a court of “kindly intervener”, assisting families in solving their problems. In this sense, the Family Court is regarded as a problem solver, a team of professionals led by the judge providing a range of assistance and service for the resolution of complex family disputes.¹⁰⁹⁰

6.5 *Problem-Solving Courts*

Problem-solving courts are specialised courts designed to address specific problems such as drug abuse, mental illness, and domestic violence.¹⁰⁹¹ Such courts seek to promote outcomes that are beneficial to offenders, victims, and society as a whole. The focus is on restorative justice in which the community, the victim and the offender can all be restored to a better state through treatment, restitution and community service, rather than through incarceration.¹⁰⁹² These courts differ from traditional courts in that they have specially designed court calendars or dockets dedicated to a particular type of offence or offender.¹⁰⁹³ The focus in addressing the problem rather than punishment per se requires the judge to play a supervisory role, leading a team of professionals committed to resolving

¹⁰⁸⁹ New Zealand Parliamentary Debates 2499 and 2497 (1980) quoted in Elias, above n 1131, at 298.

¹⁰⁹⁰ Spinak, above n 8, at 14.

¹⁰⁹¹ Richard L Wiener and others “A Testable Theory of Problem Solving Courts: Avoiding Past Empirical and Legal Failures” (2010) 33 International Journal of Law and Psychiatry 417; Richard C Boldt “Problem-Solving Courts and Pragmatism” (2014) 73 Maryland Law Review 1120.

¹⁰⁹² “Problem Solving Courts Resource Guide” National Centre for State Courts <<http://www.ncsc.org/Topics/Problem-Solving-Courts/Problem-Solving-Courts/Resource-Guide.aspx>> on 19/11/2015; “Specialized & Problem Solving Courts” National Institute of Justice <<https://www.crimesolutions.gov/TopicDetails.aspx?ID=49>> on 19/11/2015; Ursula Castellano “Problem-Solving Courts: Theory and Practice” (2011) 5 Sociol Compass 957; Boldt, above n 1134.

¹⁰⁹³ Castellano, above n 1097.

the problem, as well as interventions that address both the offending and the protection of the victims.¹⁰⁹⁴

Roger Warren, president emeritus of the USA National Centre for State Courts provided a succinct summary of the differences between traditional courts and problem-solving courts:¹⁰⁹⁵

A Comparison of Transformed and Traditional Court Processes

Traditional Process	Transformed Process
Dispute Resolution	Problem-solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Claim or case-oriented	People-oriented
Right-based	Interest or needs-based
Emphasis placed on adjudication	Emphasis on post-adjudication and ADR
Interpretation and application of law	Interpretation and application of social science
Judge as arbiter	Judge as coach
Backward-looking	Forward-looking

¹⁰⁹⁴ At 956.

¹⁰⁹⁵ Roger K Warren “Reengineering the Court Process” (Great Lakes Court Summit, Madison, Wisc, 24–25 September 1998) reproduced in; Victor E Flango “Families and Problem-Solving Courts: Problem-Solving Courts under a Different Lens” [2007] Future Trends in State Courts 2007 41 at 42.

Precedent-based	Planning-based
Few participants and stakeholders	Wide range of participants/stakeholders
Individualistic	Interdependent
Legalistic	Common-sensical
Formal	Informal
Efficient	Effective

There are two major theoretical paradigms in understanding how problem-solving courts work. Therapeutic Jurisprudence (TJ), based on the principle that the legal processes create both positive and negative consequences for those involved. Thus, TJ provides a framework in which the court can apply the law as a positive agent towards individuals resuming productive lives.¹⁰⁹⁶ Restorative Justice (RJ) in contrast, is less concerned with the therapeutic feature of the law and more focused on restoring the offender's relationship to the victim and society through dialogue and active problem solving.¹⁰⁹⁷ The primary goals of RJ are victim reparation, offender integration, and community restoration, based on three principles. One, to make whole those harmed by criminal activity; two, to provide victims with an opportunity to participate in the healing process; and three, to invoke the community's role in restoring peace and harmony.¹⁰⁹⁸

¹⁰⁹⁶ See generally AM Odegaard "Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System" (2007) 83 North Dakota Law Review 225; Bruce J Winick and David B Wexler *Judging in a Therapeutic Key* (Carolina Academic Press, Durham, NC, 2003).

¹⁰⁹⁷ John Braithwaite "Restorative Justice and Therapeutic Jurisdiction" (2002) 5 Crim Law Bull 244; Michael S King "Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice" (2008) 32 Melb Univ Law Rev 1096+ Legal Trac; Greg Berman, John Feinblatt and Sarah Glazer *Good Courts* (New Press, New York, 2005).

¹⁰⁹⁸ Castellano, above n 1097, at 960.

Fundamentally, problem-solving courts are defined as specialised courts “that are working to ensure not just that punishment fits the crime . . . but that the process fits the problem.”¹⁰⁹⁹ The courts address issues of disputed facts, as well as focusing on the underlying social and psychological problems at the centre of the dispute.¹¹⁰⁰ The common focus in these courts is the need to recognise and understand the social and psychological problems behind a dispute and the resolution of these problems in a way that prevents re-offending and ensures the protection of society.¹¹⁰¹

6.6 *Family Violence Courts*

In the tradition of problem-solving justice and aspects of therapeutic jurisdiction, the New Zealand Family Violence (FV) Courts were established to deal with criminal cases relating to family violence.¹¹⁰² The creation of the courts was in response to community concern about the increase in domestic violence cases and the need to provide a more holistic response, unavailable in conventional court settings.¹¹⁰³ They were built around the concept of collaboration between the Ministry of Justice and the Judiciary (judges and judicial officers), along with other agencies, working together to resolve family violence cases and help keep families safe.¹¹⁰⁴ However, the criminalisation of domestic violence and the establishment

¹⁰⁹⁹ Berman, Feinblatt and Glazer, above n 1102, at 5.

¹¹⁰⁰ Bruce J Winick “Therapeutic Jurisprudence and Problem Solving Courts” (2002) 30 Fordham Urban Law Journal 1055.

¹¹⁰¹ Berman, Feinblatt and Glazer, above n 1102, at 32.

¹¹⁰² The Waitakare FV Court was established in 2001 and the Manukau FV Court in 2005

¹¹⁰³ Trish Knaggs and others *The Waitakare and Manukau Family Violence Courts: An Evaluation Summary* (2008) at 7.

¹¹⁰⁴ “Family Violence Courts - Information for Victims” (2010) Family Justice
<<http://www.justice.govt.nz/family-justice/about-us/documents/publications/brochure-and-pamphlets/fvc-information-for-victims>> on 15/11/2015.

of the Family Violence Courts have failed to stem the tide, and the capacity of the family justice system continues to be overwhelmed by the problem.

As a problem-solving court, Family Violence Courts are unique in their focus on the court experience of the victim. Identifying the defendant as a “participant” is a low priority, the goal is victim safety ensuring that the defendant accepts responsibility for his action.¹¹⁰⁵ The legal basis for the protection of victims of family violence is the Domestic Violence Act 1995, with the main object of reducing and preventing violence in domestic relationships by:¹¹⁰⁶

- Recognising that domestic violence, in all its forms, is unacceptable behaviour; and
- Ensuring that, where domestic violence occurs, there is effective legal protection for its victims.

This protective object makes a strong policy statement, and the Ministry of Justice observed that:¹¹⁰⁷

The all-embracing nature of the proposition leaves no room to argue that any form of domestic violence is morally defensible and the scope to argue mitigating factors must likewise be reduced.

In pursuit of the above objectives, the Act empowers the Court to issue certain orders for the protection of victims. It also seeks to ensure speedy, inexpensive access to court; to provide accountability for offenders by attending relevant programmes to prevent re-offending; to provide effective sanctions and

¹¹⁰⁵ Rachel Porter, Michael Rempel and Adam Mansky *What Makes a Court Problem-Solving: Universal Performance Indicators for Problem-Solving Justice* (Centre for Court Innovation 2010) at 18.

¹¹⁰⁶ Domestic Violence Act 1995, s 5

¹¹⁰⁷ Helena Barwick, Alison Gray and Roger Macky *Domestic Violence Act 1995: Process Evaluation* (Ministry of Justice, Wellington, 20000) at 1.

enforcement of protection orders.¹¹⁰⁸ To this end the Courts, Police and community agencies share common goals:¹¹⁰⁹

To reduce the prevalence of domestic violence in the community; to improve the speed and efficiency of detection, prosecution and sentencing of perpetrators of domestic violence; to help families recover following the process, and to provide a sense of safety to victims of domestic violence.

6.6.1 Offender Accountability

Holding offenders to account for their action is often linked to a prompt, effective and comprehensive response underlined by the pro-arrest policy and criminal charges where evidence exist.¹¹¹⁰ The pursuit of accountability through the family violence court is pursued through expediting the process to ensure swift resolution of disputes through plea or trial after the initial appearance. So while accountability is an element of all problem-solving courts it is a central outcome for domestic violence courts; measured by the rate of domestic violence arrests, prosecutions, convictions, and recidivism.¹¹¹¹ Achievement is by increasing the rate of convictions through effective evidence gathering, minimising victim retractions and encouraging early guilty pleas.¹¹¹² The goal of accountability according to Porter et al. has five objectives:¹¹¹³

- a) to monitor participant progress,
- b) to maintain practical incentives for participants to comply,
- c) to ensure that participants understand and expect specific court penalties and incentives,

¹¹⁰⁸ See the Domestic Violence Act 1975, s 5(2).

¹¹⁰⁹ Russell Johnson "The Evolution of Family Violence Courts in New Zealand" (Police Executive Conference, Nelson, NZ, 8 November 2005) at 3.

¹¹¹⁰ *NZPol-Family-Violence-Policy-Procedures.pdf* at 8, <http://www.ppdvp.org.nz/wp-content/media/2010/07/NZPol-Family-Violence-Policy-Procedures.pdf> on 05/05/2016.

¹¹¹¹ Porter, Rempel and Mansky, above n 1110, at 18.

¹¹¹² Alice Mills and others *Family Violence Courts: A Review of the Literature* (2013) at 10.

¹¹¹³ Porter, Rempel and Mansky, above n 1110, at 42.

- d) to ensure that participants expect the court to impose a promised sentence,
- e) to ensure that participants expect sanctions and incentives to match behaviour.

Notably, the broad definition of “domestic violence” in the Domestic Violence Act 1995¹¹¹⁴ leaves no room for argument regarding minor everyday conflict resolution behaviour, which for men represents a charge/conviction of “male assaulting female”. The implementation of the pro-arrest policy under this definition and the gender framework of domestic violence underlined by male control can be problematic. It provokes questions about the authenticity of male offenders accepting accountability for their action. Those convicted undertake court-mandated intervention programmes, supposedly, to facilitate behavioural change and stop the violence. There is scepticism however in the efficacy of such interventions based on research literature that indicates no significant reduction in domestic violence.¹¹¹⁵ It is also noted that courts impose intervention programmes to keep the offender occupied and to monitor behaviour, but behavioural change is rarely achieved.¹¹¹⁶

In fact, to prevent victims from going through a defended trial process, it is often suggested to offenders that an early guilty plea will invoke a more lenient sentence than would otherwise be the case.¹¹¹⁷ It is no coincidence then that since their introduction, specialist family violence courts have been relatively successful in

¹¹¹⁴ See s 3 of the Domestic Violence Act 1995.

¹¹¹⁵ See Julia C Babcock, Charles E Green and Chet Robie “Does Batterers’ Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment” (2004) 23 Clin Psychol Rev 1023; Lynette Feder and David B Wilson “A Meta-Analytic Review of Court-Mandated Batterer Intervention Programs: Can Courts affect Abusers’ Behavior?” (2005) 1 J Exp Criminol 239.

¹¹¹⁶ See Robyn Mazur and Liberty Aldrich “What Makes a Domestic Violence Court Work? Key Issues” (2003) 42 Judges Journal 5; Lisa Newmark and others *Specialized Felony Domestic Violence Courts: Lessons on Implementation and Impact from the Kings County Experience* (2001).

¹¹¹⁷ Mills and others, above n 1117, at 10.

increasing the proportion of early guilty pleas.¹¹¹⁸ For example, between July 2005 and 30 June 2007, 82 percent of cases in the Waitakare Family Violence Court involved an early guilty plea. Between February 2005 and November 2006, 89 percent of the cases in the Manukau Family Violence Court involved an early guilty plea; for all other courts, early guilty pleas were 71 percent for the same period.¹¹¹⁹

Pegging offender accountability with the rate of convictions or early guilty pleas can be misleading. Firstly, given the broad definition of domestic violence, there is little opportunity of arguing that the alleged act was merely a conflict resolution behaviour rather than abusive control.¹¹²⁰ Thus, while an offender may admit behaving as alleged, he may not see it as amounting to domestic violence. Secondly, where the offender feels coerced into pleading guilty, accepting accountability remains debatable. To avoid incarceration most offenders, attend mandated intervention programmes without active engagement and commitment.¹¹²¹

6.6.2 Intervention Programmes

Another aspect of encouraging offenders to take responsibility for their action and reduce the risk of reoffending is through court-mandated intervention programmes, either as a condition of probation supervision or in return for escaping a criminal conviction.¹¹²² These programme's focus is on changing the

¹¹¹⁸ See Leslie Tutty and others *Evaluation of the Calgary Specialized Domestic Violence Trial Court & Monitoring the First Appearance Court: Final Report to National Crime Prevention and the Alberta Law Foundation* (2011); Katherine Wilkinson and Joanna Davidson *They've been My Lifeline* (Hallam Centre for Community Justice, Sheffield, 2008).

¹¹¹⁹ Knaggs and others, above n 1108, at 25.

¹¹²⁰ Barwick, Gray and Macky, above n 1112, at 1.

¹¹²¹ Mandy Morgan and others *Responding Together: An Integrated Report Evaluating the Aims of the Waitakere Family Violence Court* (2008) at 60.

¹¹²² Sentencing Act 2002, s 106. - A discharge without conviction where you don't receive a conviction despite pleading guilty or being found guilty after trial.

attitudes and behaviour of perpetrators, based on the Duluth Curriculum ¹¹²³ with the cognitive behavioural approach.¹¹²⁴ However, in New Zealand, limited funding for such programmes may limit effectiveness and completion rates because funding is provided only where offenders are required to complete a programme as a condition for probation supervision. Where offenders “self-refer” in pursuit of leniency at sentencing, the cost of attending the programme falls to the offender themselves.¹¹²⁵ The financial burden often results in offenders not completing the programme and the rescheduling of extra court days to facilitate returning such cases to court.

Given the central focus on offender accountability through intervention programmes the question of efficacy in reducing recidivism arises. The principle concern remains with the programme rather than post programme events. Thus, responses to non-compliance are designed to send a clear message that domestic violence is unacceptable. Tutty et al. suggest “that domestic violence researchers agree that batterer intervention programmes have at least a small effect on reducing re-abuse” but there is a lack of conclusive research evidence in support of this.¹¹²⁶ For example, a study carried out on a sample of 1000 men participating

¹¹²³ Mills and others, above n 45, at 12: The Duluth model seeks to hold offenders accountable and keep victim safe. Programmes using this model will place accountability for the abuse on the offender, believe that family violence is a pattern of action used to intentionally control or dominate an intimate partner and seeks to change societal conditions that support men’s use of tactics of power and control over women; Domestic Abuse Intervention Programmes “What is the Duluth Model?” (2011) <<http://www.theduluthmodel.org/about/index.html>>, on 01/02/2016: The Duluth model seeks to hold offenders accountable and keep victim safe. Programmes using this model will place accountability for the abuse on the offender, believe that family violence is a pattern of action used to intentionally control or dominate an intimate partner and seeks to change societal conditions that support men’s use of tactics of power and control over women

¹¹²⁴ Tutty and others, above n 1123, at 127.

¹¹²⁵ Mills and others, above n 1117, at 12.

¹¹²⁶ Tutty and others, above n 1123, at 31.

in batterer programmes found “no statistical association at all between programmes and an offender’s likelihood of re-offense.”¹¹²⁷

On the other hand, some studies have found that men who completed intervention programmes had lower reoffending rates than those who did not.¹¹²⁸ However, there are indications (suggested by victims), that offenders were motivated into attending intervention programmes to obtain a lighter sentence but were not motivated to change their behaviour.¹¹²⁹ Similarly, interviews with offenders about mandated programmes they have completed indicated many felt positive changes in their behaviour;¹¹³⁰ learning new skills and a better understanding of anger, stress and depression.¹¹³¹ However, most offenders felt victimised by a criminal justice system biased against men, and most did not accept accountability for their actions after completing the programmes.¹¹³²

6.6.3 The Problem-Solving Concept

The problem-solving framework in law revolves around the notion of resolving the dispute in a way that helps rehabilitate offenders and bring about healing for their victims. The focus is on solving the underlying problems which should be identified, defined and accepted by the litigants, victims or communities. It often implies an interest in individual rehabilitation (therapeutic) and the needs of the

¹¹²⁷ Dag MacLeod and others *Batterer Intervention Systems in California: An Evaluation* (2009) at vi.

¹¹²⁸ For example see L Coombes, M Morgan and S McGray *Counting on Protection: A Statistical Description of the Waitakare Family Violence Court* (2007); Irene Hoffart and Michelle Clarke *Homefront Evaluation; Final Report* (2004).

¹¹²⁹ Morgan and others, above n 1133, at 60.

¹¹³⁰ See Reid Howie Associates *Evaluation of the Pilot Domestic Abuse Court* (2007).

¹¹³¹ Tutty and others, above n 1123.

¹¹³² At 11.

victims and legitimacy of the justice system (restorative).¹¹³³ Overall, the problem-solving concept is part of the broader “non-adversarial justice” movement.

Family violence courts, on the other hand, proceed from a punishment-oriented position and are therefore adversarial by nature. The centrality of offender accountability denies litigants the opportunity to identify the underlying problems nor contribute to defining behavioural issues that may have contributed to the offending. In the circumstances, offenders who feel compelled to plead guilty and undergo mandated intervention programmes, do so without accepting responsibility.¹¹³⁴ It would probably help if the court pursues a more inquisitive role to help litigants identify the problem, to discern whether it is one of conflict resolution behaviour or one of domestic violence, and if appropriate to accept responsibility before embarking on intervention programmes. This proposal addresses the negligible actions that imply conflict resolution rather than abusive control or where the escalation of conflict into serious violence is minimal.

6.7 The Domestic Violence Protection Act 1982

The long title states that it is “An Act to mitigate the effects of domestic violence and to confer protection from molestation in the domestic sphere.” It was, according to Geoffrey Palmer “an experimental measure...based on the principle that the ordinary criminal law is not sufficient to ameliorate the effects of domestic violence.”¹¹³⁵ The dogma behind the Act situates family violence as a

¹¹³³ Boldt, above n 1091, at 1122.

¹¹³⁴ Tutty and others, above n 1123, at 11.

¹¹³⁵ New Zealand Parliamentary Debates, Hansard 448, p 4839, 19 November 1982 quoted in, Pauline Tapp and Nicola Taylor “Protecting the Family” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) 81 at 140.

personal relationship problem which can be resolved through counselling to strengthen and preserve the family unit.¹¹³⁶

This emphasis on maintaining the family unit led to dissatisfaction with court practice under the Act. As a result, the National Collective of Independent Women's Refuges in a submission to the Family in 1991 expressed the belief that the Family Court system under the Act revealed a lack of understanding of the dynamics and effects of domestic violence.¹¹³⁷ It did not come to grips with the reality of family life as lived and the aspirations for an idealised the family projected by the feminist and other interest groups.

6.8 *The Domestic Violence Act 1995*

Apart from numerous conferences and inquiries into domestic violence,¹¹³⁸ the work of Busch, Robertson, and Lapsley has been cited as the dominant influence on the philosophy and content of the Domestic Violence Act 1995.¹¹³⁹ Subsequently, the Act (with associated amendments to the Guardianship Act 1995)¹¹⁴⁰ marked the dominance of the "power and control model" in domestic violence, the controlling man as the perpetrator and the woman (and children) as

¹¹³⁶ BD Inglis *Practice and Procedure in the Family Court* (University of Auckland, Auckland, 1984) at 8.

¹¹³⁷ Cited in Tapp and Taylor, above n 1140, at 143–144.

¹¹³⁸ For example: National Conference on Domestic Violence 1985 held at the Royal Police College, Wellington; Report of the Ministerial Committee of Inquiry into Violence 1987; Breaking the Cycle of Violence: Submission to the Family Court 1991 by the National Collective of Independent of Women's Refuges; Protection from Family Violence: A Study of Protection Orders under the Domestic Protection Act 1982, in 1992 by Ruth Busch, Neville Robertson and Hilary Lapsley; etc. see Tapp and Taylor, above n 1146, at 145–149 for details.

¹¹³⁹ In particular, Busch, Robertson and Lapsley, above n 7.

¹¹⁴⁰ Guardianship Act, ss 16A–16C and 15(2B), the result of, RK Davison *Report of Inquiry into Family Court Proceedings Involving Christine Madeline Marion Bristol and Alan Robert Bristol* (s.n, Wellington, 1994), in which Alan Bristol and his three children were found dead (believed to have been killed by Alan) after complaints of abuse and violence had been dealt with in the Family Court.

victim(s). The underlying focus shifted from counselling/mediation to protection through the punishment and removal of the abuser, “with little regard being given in determining the system’s response to the origins of the violence and the dynamics within the particular family.”¹¹⁴¹ The Act thus designed was a direct response to male violence, the male batterer who initiates power and control tactics to coerce and subdue the woman.¹¹⁴²

It can be argued, however, that the obsession with the power and control model ignores the spectrum of violence that underpins relationship conflict. For example, the broad definition of domestic violence in the Act¹¹⁴³ encompasses any aggressive reaction to relationship conflict. A nominal push or a verbal tirade (to convey personal feeling) construed as an exercise of power to coerce, subdue and control, becomes domestic violence that warrants arrest and proceedings in the criminal jurisdiction. The anomaly, creates the wide gap between the reality of the family we live with (in which conflict and aggression are part of daily life) and the ideal of the family we live by (in which life is free of all forms of aggression in spite of relationship conflicts).

6.9 Review by the Principal Family Court Judge

The first system review was undertaken by a committee appointed in December 1992 by the Principal Family Court Judge, chaired by Peter Boshier.¹¹⁴⁴ The committee was tasked with revising “the philosophy upon which the Court was

¹¹⁴¹ Tapp and Taylor, above n 1140, at 153.

¹¹⁴² Often referred to as patriarchal terrorism or intimate partner terrorism, Michael P Johnson “Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women” (1995) 57 J Marriage Fam 283 at 284.

¹¹⁴³ Domestic Violence Act 1995, s 3.

¹¹⁴⁴ The Principal Family Court Judge was Judge Mahony and the chairperson was his successor, Judge Boshier.

created, and by examining how the Court was presently functioning, to report on whether the balance seemed right.”¹¹⁴⁵ The review was completed in 1993 and made some recommendations for improvements to service delivery.

Conspicuous among these was the proposal for the establishment of a separate Family Conciliation Service¹¹⁴⁶ utilising mediation as the primary method of dispute resolution.¹¹⁴⁷ The role of the Family Court was to become distinct from the role of the Family Conciliation Service,¹¹⁴⁸ with the former to be only utilised when a decision on a family law issue was required.¹¹⁴⁹ The Family Conciliation Service would be made accessible to users without the assistance of lawyers.

Apparently, the reform was framed regarding efficiency, whether the performance of the Family Court is achieving the desired balance between protection and conciliation. The dual thrust of the philosophy behind the family justice system remained fixed while the review focused on the operational capability of the Court in fulfilling the philosophy. It is not surprising, therefore, that the Report’s recommendations revolved around the allocation of more resources. Equally predictable, the government response in acting upon the Report’s case management recommendations to increase the efficiency of the court, while it did not endorse the Family Conciliation Service.¹¹⁵⁰

¹¹⁴⁵ Peter Boshier and others *A Review of the Family Court: A Report for the Principal Family Court Judge* (1993) at 22.

¹¹⁴⁶ Recommendation 5.7.1 At 6.

¹¹⁴⁷ Recommendation 5.7.3 At 6.

¹¹⁴⁸ Recommendation 6.5.1 At 7.

¹¹⁴⁹ Recommendation 6.5.4 At 8.

¹¹⁵⁰ Gollop, Henaghan and Taylor, above n 654, at 1.

6.10 The Law Commission Review

The second review of the Family Court conducted by the Law Commission in 2001 were given the term of reference to:¹¹⁵¹

...undertake a review to consider what changes, if any, are necessary and desirable in the administration, management and procedure of the Family Court in order to facilitate the early resolution of disputes.

Initial discussion papers revealed the inadequacy of the dispute resolution system to deliver timely responses to family in transitions.¹¹⁵² After reviewing 126 written submissions, the Law Commission's final report:¹¹⁵³

Strongly recommended better resourcing of the present system to reduce the delays caused by insufficient Court time, the shortage of report writers and lack of assistance from the Department of Child, Youth and Family Services.

The Law Commission made a total of 135 specific recommendations grouped according to identified issues as follows:¹¹⁵⁴

- The need for comprehensive public information about Family Court services (11 recommendations);
- The need for expansion of conciliation services provided by the Family Court (53 recommendations);
- Training, remuneration and staffing levels in the Family Court (16 recommendations);
- Delays and other management issues in Family Court processes (12 recommendations);

¹¹⁵¹ Law Commission *Family Court Dispute Resolution: A Discussion Paper* (47 2002) at 1.

¹¹⁵² A scoping paper in 2001 was followed by Law Commission, above n 1151.

¹¹⁵³ Law Commission, above n 1156.

¹¹⁵⁴ "Government Response to Law Commission Report on 'Dispute Resolution in the Family Court'" (2003) Ministry of Justice <<http://www.justice.govt.nz/publications/publications-archived/2003/government-response-to-law-commission-report-on-dispute-resolution-in-the-family-court>>. on 26/05/2015

- Lack of mechanisms for the views of children to be appropriately heard and represented (3 recommendations);
- Accessibility to services for migrants, refugees and people with disabilities (9 recommendations); and
- The need to increase Maori participation in Family Court processes and services (7 recommendations).

The Government's response to the Commission's recommendations centred on three immediate initiatives:¹¹⁵⁵

- i. Extending a public information strategy for the Family Court to heighten awareness of the principles upon which decisions are made in cases so as to bring greater balance to the public perception of the Family Court;
- ii. Developing a pilot of non-Judge led mediation using qualified mediators to provide another opportunity for dispute resolution without judicial intervention; and
- iii. Preparing an integrated training package for Family Court staff to enhance their skills, efficiency and client responsiveness.

Like the earlier review, the Law Commission proposals were also framed regarding efficiency and resources. While the philosophy and functions of the Family Court persisted the focus shifted to desirable changes in the administration, management and procedures of the Court to facilitate the early resolution of disputes.¹¹⁵⁶ Thus, the allocation of more resources to meet the ever burgeoning needs of the system paralleled escalating costs. The gender conceptualisation of domestic violence remained embedded in the philosophy of the Family Court. Unfortunately, it discounts personal relationship dynamics, aggressive behaviour in asserting personal autonomy or the proclivity to use violence as a means to an end in all levels of society.

¹¹⁵⁵ Family Violence Death Review Committee, above n 9 cited in; Gollop, Henaghan and Taylor, above n 654, at 2.

¹¹⁵⁶ Law Commission, above n 1156, at 1.

6.11 The Ministry of Justice Review

In 2011, Cabinet agreed to a third review of the Family Court, to be carried out by the Ministry of Justice. After earlier reforms, the main issues confronting the Family Court persisted: sustainability and effectiveness. According to the Ministry of Justice: “The purpose of this Review is to go back to first principles and to look across the whole Family Court system. To improve the efficiency and effectiveness of the Family Court we need to reconsider what is the best configuration of services.”¹¹⁵⁷ In support of the review, the Families Commission saw it “as an opportunity to ensure that the Family Court process is enhanced, to put the needs of children at the centre and to help couples maintain their parenting relationship during and following separation.”¹¹⁵⁸ Apparently, the objective of the reform was not to review the first principles but to evaluate the entire operational capability of the system in line with the first principles.

Submissions were received in response to a consultation paper released for public comment in September 2011. From the 209 submissions received, the review identified the following:¹¹⁵⁹

- Current court processes were complex, uncertain, and too slow;
- There was a lack of focus on children and vulnerable people; and
- There was insufficient support for resolving parenting issues out-of-court.

¹¹⁵⁷ Ministry of Justice “Family Court Review: Summary” (2011)
<<http://www.justice.govt.nz/publications/global-publications/f/family-court-review-summary/publication>> on 08/08/2013.

¹¹⁵⁸ Families Commission “Family Court Review” (1 June 2012)
<<http://www.superu.govt.nz/family-court-review>>.

¹¹⁵⁹ Gollop, Henaghan and Taylor, above n 655 at 2-3; a sample of 173 Care of the Children Act cases and 88 Property Relationship Act case files were also analysed, and an External Reference Group established to assist the Ministry of Justice with the review.

The considerable concern in the cost of running the Family Court was noted to have increased 70% in six years from 2012 at \$84 million to \$142 million despite no significant increases in the overall number of applications.

6.12 Strengthening New Zealand's Legislative Response to Family Violence

In August 2015 the Minister for Justice, the Honourable Amy Adams launched a public discussion document for a comprehensive review of the way:¹¹⁶⁰

Our system of law deals with family violence to ensure the legal framework supports and guides best practices in preventing and responding to family violence, keeping victims safe, and holding perpetrators to account.

The document discussed key elements of current family violence law, raising ideas for change to generate discussion and submissions. The major areas for discussion are: understanding family violence, victim safety, prosecuting family violence, better services for victims, perpetrators and whanau.¹¹⁶¹ These issues reflect weaknesses in the law's current responses to family violence identified through discussions between government and non-government agencies.¹¹⁶²

The summary of submissions was released early this year, 2016, and contains interesting points of discussions.¹¹⁶³ Notably, it supports another change to the legal definition of family violence to ensure that it covers all relevant behaviours and situations, in particular, the concept of coercive control to be clearly explained in the definition. Additionally, the guiding principles of decision making should

¹¹⁶⁰ Ministry of Justice, above n 5.

¹¹⁶¹ At 5.

¹¹⁶² At 5.

¹¹⁶³ Ministry of Justice, *New Zealand Strengthening New Zealand's Legislative Response to Family Violence: Summary of submissions* (2016) at 5.

reflect the right to safety, with a clear message that family violence will not be tolerated.¹¹⁶⁴ On victim safety, a consensus on strengthening protection orders, property orders, police safety orders and parental arrangements. There is a strong support to allow third parties to apply for protection orders on a victim's behalf, as well as mandatory arrests for all breaches of protection orders.¹¹⁶⁵

In the prosecution of family violent perpetrators, most submissions supported the idea of "a stand-alone offence or a class of family violence offences", and the creation of new offences for psychological violence, coercive control and repeat family violence.¹¹⁶⁶ Views on Police responses supported the idea of the law to include specific options available to Police when responding to family violence. These options should include Police making referrals to funded services for assessment.¹¹⁶⁷

On the last theme of "better services for victims, perpetrators, and whanau", submissions highlighted the importance of information sharing between agencies, in particular, Police and other justice sector agencies to provide more information to judges.¹¹⁶⁸ There is also recognition of the need to improve information sharing between the courts. This included judges in the Family Court considering applications under the Domestic Violence Act 1995 and the Care of Children Act 2004, for the records of family violence offences from the criminal courts to be made available to them.¹¹⁶⁹

¹¹⁶⁴ Ministry of Justice, above n 5, at 5.

¹¹⁶⁵ At 5.

¹¹⁶⁶ Ministry of Justice, New Zealand, above n 95, at 5.

¹¹⁶⁷ At 7.

¹¹⁶⁸ At 7.

¹¹⁶⁹ At 7.

6.13 Multi-Agency Family Violence Pilot

In recognition of the complexity surrounding family violence, the government recently announced its commitment to a more integrated and more effective response to family violence. This Integrated Safety Response pilot brings together a multi-disciplinary approach including Police, Child Youth and Family (CYF), Corrections, Health, specialist family violence agencies and Maori service providers, and will be rolled out at Christchurch on 1 July 2016. As the Minister for Justice says:¹¹⁷⁰

A better way of handling reported family violence, including daily assessment meetings involving all relevant agencies, is a critical part of improving our response to family violence. This pilot has the potential to transform the way we respond as a system, manage perpetrators and keep victims safe. It incorporates the Intensive Case Management system that provides an independent victim specialist to work closely with high-risk victims to keep them safe.

The Minister for Social Development, Hon. Anne Tolley added:¹¹⁷¹

No single agency can see the complete picture of the victim's experience. This pilot is about ensuring all organisations have access to the same information so that they can assess and support the family based on all relevant information. This includes the children who may have witnessed the violence and the perpetrators who commit violence.

According to Police Minister, the Honourable Judith Collins, "during the pilot phase, each report of family violence reported to New Zealand Police and high-risk prison releases in Christchurch" would be coordinated daily and a safety plan

¹¹⁷⁰ Amy Adams, Anne Tolley and Judith Collins "Government Launches Multi-Agency Family Violence Pilot" *Scoop Independent News* (13 April 2016) <<http://www.scoop.co.nz/stories/PA1604/S00211/govt-launches-multi-agency-family-violence-pilot.htm>>; Amy Adams, Anne Tolley and Judith Collins "Government Launches Multi-Agency Family Violence Pilot" (2016) The Beehive <<http://www.beehive.govt.nz/release/govt-launches-multi-agency-family-violence-pilot>>.

¹¹⁷¹ Adams, Tolley and Collins, above n 1175.

developed to address risks and the needs of the family.¹¹⁷² The pilot based on international best practice but tailored to New Zealand circumstances will be evaluated, and progress reports with recommendations will be submitted to the government at the end of 2016.

6.14 Social Investment

People embroiled in domestic violence respond differently to the same intervention or service, for what may work for one person may be inappropriate or ineffective for another. However, the family justice system tends to package those involved into homogeneous groups of victims, perpetrators, men, women, fathers, mothers, and children. As such, interventions are not tailored to individual needs, and disillusioned clients choose not to invoke legal responses after their first interaction with the system.¹¹⁷³ Resulting in billions of dollars being spent annually, on interventions that do not yield the desired outcomes.¹¹⁷⁴ A report by the Productivity Commission highlighted some issues about social services, in particular:¹¹⁷⁵

- Departments often don't have good information about at-risk people, their individual circumstances, and their underlying problem.
- Departments can know too little about what services are effective at improving outcomes.
- Although considerable effort goes into coordination across departments, siloing is still a major problem.
- Government system and accountabilities can be hard for service delivery providers to deal with.

¹¹⁷² Adams, Tolley and Collins, above n 1175.

¹¹⁷³ New Zealand Productivity Commission *More Effective Social Services* (2015) at 57.

¹¹⁷⁴ Adams, above n 952.

¹¹⁷⁵ New Zealand Productivity Commission, above n 1184, at 6.

It has thus been established that “often the social service system itself impedes our ability to make meaningful improvements in the lives of New Zealand’s most disadvantaged people.”¹¹⁷⁶

In response to this anomaly, the government is promoting the social investment approach through the application of rigorous and evidence-based investment practices to social services. This entails a shift from social spending to social investment, “less money on paying benefits or locking up people [and] more money to invest in social services which improve people’s lives in the long-term”.¹¹⁷⁷ In terms of domestic violence, for example, from the \$1.4 billion spent annually, only ten percent of that is spent on prevention.¹¹⁷⁸ The social investment approach is holistic in the sense that it hopes to identify high-risk groups (both perpetrators and victims) and what can be done to disrupt the vicious cycle inter-generational offending.¹¹⁷⁹ In other words, building the capability to understand how funded interventions are changing outcomes for the people we are trying to help.

6.15 The Rhetoric of Reforms

The various reforms already undertaken and discussed above have not been effective in fully realising the 1980 founding principles of the Family Court. In spite of various legislative and policy changes to strengthen government oversight, the efficiency touted by previous reforms remain unrealised. The philosophy of a protective and conciliatory approach evolved into a “model court” where a team

¹¹⁷⁶ Hon Bill English “Speech to the Treasury Guest Lecture Series on Social Investment” (2015) The Beehive <<http://www.beehive.govt.nz/speech/speech-treasury-guest-lecture-series-social-investment>>.

¹¹⁷⁷ English, above n 1181.

¹¹⁷⁸ Adams, above n 952.

¹¹⁷⁹ Adams, above n 952.

of professionals led by the judge provides a problem-solving system for complex familial needs.¹¹⁸⁰ Families come to the court for help or for a legally binding decision, but a system clogged with protracted disputes is likely to provide neither.¹¹⁸¹ Whether projected reforms will make a difference remains to be seen but it is encouraging to note the admission by the Minister of Justice that the system is not working.

6.16 What do People say about Reforms?

In spite of the reforms, improving the efficiency of the system remains unachieved with rising cost a continuous concern. Domestic violence continues to be perceived as a spiralling problem of epidemic proportion.¹¹⁸² It raises the question of the accuracy of what we say in regards to the reform we do. “How does the way in which we talk about Family Court reform implicate our analysis of what we are achieving? How does our place or role within the system affect our perceptions of reform?”¹¹⁸³ Surely we should be questioning why we are not reaching our goal and if we are failing, can we acknowledge failure and learn from it?

With this in mind, let us review the 2011 Public Consultation Paper by the Ministry of Justice and 209 submissions it generated, dominated by professionals and academics:¹¹⁸⁴

¹¹⁸⁰ Spinak, above n 1072, at 352–3.

¹¹⁸¹ See for example the concerns regarding the length of time it takes for disputes to be resolved in, Law Commission, above n 50, at 1.

¹¹⁸² For example see, Clare Murphy and others *Understanding Connections and Relationships: Child Maltreatment, Intimate Partner Violence and Parenting* (Issues Paper 3 2013) at 9.

¹¹⁸³ Spinak, above n 28 at 11.

¹¹⁸⁴ Ministry of Justice *Changes to Family Justice System* (2012) at 3
<http://www.justice.govt.nz/policy/justice-system-improvements/family-court-review/family-court-review-1>.

Academics 8	Lawyers 19
Counsellors 38	Mediators 3
Court staff 1	Non-government organisations 25
Court users 76	Psychologists 7
Social workers 19	Government 4
Judiciary 4	Other 3

A few examples of submissions received from professionals will illustrate the point. A counsellor in reference to pressures faced by the court stated:¹¹⁸⁵

The intention behind the Family Court is good but currently some lawyers and Judges are acting poorly causing greater delays, increased costs and destroying children's lives and destroying families.

The Children's Commissioner in reference to parties in dispute referred to "...the rights, interests and welfare of children, [which] should not be compromised in the name of efficiency and cost-effectiveness."¹¹⁸⁶ The Auckland Law Society on the other hand focusing on costs pointed out that:¹¹⁸⁷

By their very nature self-represented litigants drive up costs by taking up the time of Registry officers and Judges . . . The fact they do not pay lawyers' costs also takes away a settlement motivator.

In relation to the role of the lawyer for the child, a lawyer submitted:¹¹⁸⁸

¹¹⁸⁵ At 5.

¹¹⁸⁶ At 5.

¹¹⁸⁷ At 7.

¹¹⁸⁸ At 13–14.

If children want the parents to stop fighting and listen to what they have to say the lawyer can talk with both parents and try to persuade them to put aside their personal antagonisms and reach an early consent arrangement for the child's care and upbringing. Counsellors do not usually have this advantage and while court appointed psychologists do, it is not their role to attempt to engineer an agreement, and they cannot engage in shuttle diplomacy aimed at reaching agreement.

And from mediators in regards to parties resolving their disputes note that:¹¹⁸⁹

The State has a role in enabling and encouraging families to resolve their private disputes. It is our belief, underpinned by research, that early self-resolution, out of court, achieves better outcomes for children and their families.

The accuracy of what professionals say about reforms implicate their analysis, in particular, their perspectives corresponding to their roles and positions in the system.

6.17 Reductive Story Telling

This thesis argues that reforms to the family justice system should focus on links between outcomes and implemented changes. Measures such as legislative changes, professional services, and policy guidelines are not enough; it is imperative for reformers to find out and understand what is going on, about actual outcomes. This deficit is often masked by the rhetoric of persuasive stories, which according to Spinak can be reductive if they are relied upon to convey factual analysis rather than conceptual ideas.¹¹⁹⁰

¹¹⁸⁹ At 6.

¹¹⁹⁰ Spinak, above n 8, at 19.

The report on Family Violence and the Justice System by Busch, Robertson, and Lapsley, focused on the stories of women victims and the failure of the system to protect women.¹¹⁹¹ It influenced the criminalisation of all forms of domestic violence and the police pro-arrest policy. Furthermore, the analysis of “the gap” between the victim’s (women’s) experience and the court’s response to focus on the act and the result upon the victim without regards to reasons for or circumstances in which the violence occurs.¹¹⁹² The report is credited as the origin of the provision for the application for protection orders without notice in the Domestic Violence Act 1995.¹¹⁹³ Similarly, stories advanced by the National Collective of Independent Women’s Refuge highlighted the “power and control model” that domestic violence is a gendered phenomenon which includes nonphysical forms of abuse.¹¹⁹⁴

Sociologist, Charles Tilly said stories make the world intelligible and simplify experience but warned that stories mask complex webs of cause and effect that help us dispense credit and blame to determine responsibility.¹¹⁹⁵ Similarly the story of success embedded in statistics, available professional services, amendments to existing laws, pro-active policy guidelines or intervention programmes in support of the problem-solving progress in the family justice systems.

These stories can divert attention away from the analysis of what is happening about actual outcomes. For example, the definition of domestic violence continues to be expanded to incorporate, not only non-violent aggressive

¹¹⁹¹ Busch, Robertson and Lapsley, above n 7.

¹¹⁹² Tapp and Taylor, above n 1135, at 150.

¹¹⁹³ Domestic Violence Act 1995, ss 13 and 14.

¹¹⁹⁴ Breaking the Cycle of Violence : Submission to the Family Court cited in Tapp and Taylor, above n 1135, at 147.

¹¹⁹⁵ Charles H Tilly *Credit and Blame* (Princeton University Press, Princeton, NJ, 2008) at 20–21 & 9.

behaviour but also non-physical actions which are psychological or economic in nature. Such a broad definition may have served its purpose, in revealing minor aggressive behaviour that can easily fall below the radar but which can also be part of patterned psychologically coercive behaviour. At the same time, the danger of labelling all minor relationship aggression as coercive control can be detrimental with tremendous consequences and injustice to the families involved.

6.18 Front-End Responses

Our responses to domestic violence consists of front-end and back-end responses. On the front-end we have developed legislative and policy responses which revolve around the broad definition of domestic violence, the criminalization of minor relationship aggression, protection orders, police safety orders, as well as the pro-arrest and no drop policies. These, in addition to pro-active campaigns by stakeholders and interest groups, have driven the spectre of domestic violence into the public limelight. Apart from a better understanding of what constitutes domestic violence, people are also more willing to report.

The success of our front-end responses is open to interpretation depending on what purpose it is designed to serve. The dramatic increase in the number of reports investigated by police (see table in chapter one) can be viewed as a success regarding public awareness and encourage people to report domestic violence. In contrast, the same statistic is being used to infer the deteriorating state of domestic violence in the country. The police estimate that only 18% of domestic violence incidents are reported portrays a grim picture.¹¹⁹⁶

The main problem is not the dramatic increase in police investigations or the increase in the number of minor aggression perpetrators appearing before the

¹¹⁹⁶ “Women’s Refuge New Zealand | Statistics”, above n 100.

courts. The main problem in New Zealand is that there are still 24 to 29 domestic violence homicides a year, and as also noted in Table 7 below, the number of hospitalisation from domestic violence remains at 450 to 480 a year. It suggests that while our front-end responses have been successful in capturing minor aggressors, we have been unable to reduce serious violence.

Table 8: Comparative Domestic Violence Statistic

	2009	2010	2011	2012
Domestic Violence Homicides	45	29	24	28
Hospitalisation from domestic violence	455	489	461	451
Total convictions for domestic violence	4867	4603	4307	4129
Custodial sentences	1230	1387	1328	1388
Community Sentences	2648	2766	2491	2307
Domestic Violence Investigations	79257	86736	89884	87639
Investigation in which one offence is recorded	42516	45496	44489	40682
Investigation in which no offence is recorded	36741	41267	45396	46957

Source: This table is created from statistics provided in Tables 2,4,5, and 6 in chapter one.

The difficulty of drawing the line between minor and serious violence, regarding injury or one-off incidents and repetitious behaviour or coercive control, remains contentious. Observers can easily assign coercive control to an incident, to imply a recanting victim covered by a repressive husband, to assign aggressor and victim status on face value regarding injury or the words of the complainant, and to imply that victims are simply too helpless to be believed and can't speak for themselves. However, reducing the complexity of crime and punishment to a one-size-fits-all

philosophy groups serious and small-time offenders together, thus, increasing the potential for injustice. Once the legal machinery is in motion, what the victim wants or says does not make a difference. In Canada for example, lawyers compare the zero tolerance philosophy to pressing the nuclear button, in that, “you cannot call the missile back”.¹¹⁹⁷

To ensure justice for those involved; our front-end responses should allow for a filtering process to separate minor or isolated aggression from serious violence and coercive controlling behaviour. The New Zealand experience indicates that the over-use or over-dependence on criminal law, at the expense of other programmes to reduce domestic violence has not provided the desired result. Alternative approaches should be available at the front-end of our response system that can provide assistance to victims and perpetrators of minor aggression rather than going through criminal prosecution. Victims should also be empowered to decide or contribute to the best intervention required for minor aggression.

6.19 The Powerful Idea of the Family Court

The Family Court has become a powerful idea which is part of our legal consciousness and is integral to the family justice system. Such emotional attachment can be central to resistance to change or divert change to peripheral issues. Harvard psychologist, Howard Gardiner points out that this emotional attachment, compounded by the public commitment to a particular idea, is among key elements that may disjoint reform focus.¹¹⁹⁸ More so, if the institutionalised element is entrenched in a powerful story, which enhances the survival of the idea

¹¹⁹⁷ Makin, above n 1060.

¹¹⁹⁸ Howard Gardner *Changing Minds* (first trade paper ed, Harvard Business Review Press, Boston, Mass, 2006) at 57.

in our consciousness.¹¹⁹⁹ A court that protects the weak and vulnerable, a court that is informal and conciliatory, and a court that does not rely on litigation to destroy but provides assistance to restore, is a powerful story.¹²⁰⁰

The protective philosophy overlaps into two jurisdictions: physical violence through the pro-arrest policy and proceedings in the criminal jurisdiction and psychological and economic violence as they impact on related issues like care of children remain in the Family Court. The apparent failure of the system to protect plus the desire to make the system more effective thus generating physical savings has forced us to reformulate the idea through reforms. However, the manoeuvre towards a problem-solving system, judicial leadership, and team efforts are not new or modern reform concepts, “but familiar and thus comfortable reincarnations of the powerful idea of a family court.”¹²⁰¹

On the question of re-assigning domestic violence to the criminal jurisdiction, the Community Law Centre responded:¹²⁰²

The role of attending to Domestic Violence proceedings is central to the Family Court role of protecting children and familial members. The [submitter] does not believe it would be appropriate for this role to be dealt with in any other court.

The comfort derived from a familiar system allows us to settle for an outcome that falls within an acceptable zone rather than maximising our options.¹²⁰³ This inclination to hold on to a powerful idea even as we pursue reform is referred to

¹¹⁹⁹ At 72–73.

¹²⁰⁰ Spinak, above n 8, at 22.

¹²⁰¹ At 22.

¹²⁰² Ministry of Justice, above n 1184, at 8.

¹²⁰³ Herbert A Simon *Administrative Behavior* (4th ed, Simon and Schuster, New York, 1997) at 119.

by sociologists as change occurring at the edges of familiar patterns.¹²⁰⁴ Thus, our general reluctance to consider the abolition of the Family Court or changing the philosophy behind it.

Reforms gravitate according to the way they are framed. Consider Erving Goffman's definition of framing:¹²⁰⁵

...basic frameworks of understanding available in our society for making sense of events and to analyse the special vulnerabilities to which these frames of reference are subject.... While one thing may momentarily appear to be what is really going on, in fact what is actually happening is plainly [something else] My phrase "frame analyses" is a slogan to refer to the examination of these terms of the organisational experience.

As discussed above, in Family Court reforms we invariably begin with the goal of making the court more efficient: the frame of resources.¹²⁰⁶ Creating a multi-disciplinary team to oversee the system can mask deeper practical problems. The availability of counsellors, mediators, psychologists, and lawyer for the child may make representations easier, but the outcome may not improve, or that the reform fails to consider the impact on the court system as a whole.¹²⁰⁷ Indeed, an alternative framework for reform would be to focus on litigants: what they seek to obtain from the Family Court.¹²⁰⁸ Similarly, our responses to domestic violence should be formulated on a clear objectives or goals, what we want to achieve.

¹²⁰⁴ Charles Tilly and Arthur L Stinchcombe *Roads from Past to Future* (Rowman & Littlefield, Boston, 1997) at 45.

¹²⁰⁵ Erving Goffman *Frame Analysis* (Northeastern University Press, Boston, 2010) at 10–11.

¹²⁰⁶ Spinak, above n 8, at 23.

¹²⁰⁷ See generally, Jane M Spinak "Role of Strategic Management Planning in Improving the Representation of Clients: A Child Advocacy Example, *The New Perspectives on Child Protection*" (2000–2001) 34 Fam LQ 497.

¹²⁰⁸ See for example Denise Wilson and Melinda Webber *The people's report* (Glenn Inquiry, 2014) The People's Report represents the voice of those most affected by family violence. Their experiences, often harrowing in the extreme and their views on the things that need to change are the keystones of the Report."

6.20 Conclusion

The frequency of reviews and reforms to the family justice system since the creation of the Family Court imply that we are not achieving the desired goals. As noted in the discussions above, past reforms have focused mainly on resources and effectiveness. This thesis argues that it is time for a change in focus; a time for reformers to critically evaluate whether their views on reforms are biased towards their positions and roles within the system. The limitations of “our willingness and ability to apply rigorous evaluative techniques to determine whether we are reaching our goals? And if we are failing, can we acknowledge failure and learn from it?”¹²⁰⁹

If the Family Court has not worked as expected, the frame for future reforms needs to change. The family and family values are not what they used to be; they have continued to evolve. And it may be time to consider a “Relationship Court” where the protection of individuals rather than familial relationships is addressed. Future reforms can be framed regarding how the philosophy of the Family Court has contributed to outcomes. Similarly, there is a need to reconsider the contribution of the gender paradigm to the high rate of domestic violence investigation when an offence is recorded only in approximately 50% of reported incidents.¹²¹⁰ The focus on women as victims may even hide the reality of women as perpetrators and the reluctance of males to report. Preferably, the focus should be on violence as a behavioural problem. Thus, the legal response should be gender neutral, irrespective of who is the perpetrator.

¹²⁰⁹ Spinak, above n 28, at 11.

¹²¹⁰ See New Zealand Police, above n 1053.

Domestic violence continues to rise in spite of legal reforms that criminalised all forms of domestic violence, supported by a wide-ranging definition and pro-arrest policies.¹²¹¹ Literature and support services continue to be dominated by the coercive control model despite the fact that we live in a world inundated with violence at all levels and spheres of life.¹²¹² It remains that men dominate violent crimes as perpetrators, so is war and violent sports but not all men in intimate relationships are abusive of their partners. It is argued, therefore, that it may be time to change tack, to realign gender as a contributing factor rather than the underlying feature, and that trying to control or influence your environment is a daily pursuit, different from abusive, coercive control to subdue and subjugate.

¹²¹¹ Domestic Violence Act 1995, s 3.

¹²¹² For example, see Murphy and others, above n 1205., retrieved at <https://nzfvc.org.nz/sites/nzfvc.org.nz/files/issues-paper-3-2013.pdf> on 17/11/2014

CONCLUSION AND RECOMMENDATIONS

Conclusion

The legal philosophy behind New Zealand family law premised on the legal fiction of the “ideal family”, has effectively separated the normative objective of the law from the reality of family life as lived. The law treats this fiction as true, rather than treating it “as if” true for the purpose of justice. Two issues emerge from the ensuing divide. Firstly, it is difficult to reconcile the normative position the law treats as fact with behavioural issues that underlie human relationships. Secondly, the result is a set of imprecise objectives in our legal responses to domestic violence. What we are trying to achieve has not been clearly articulated to ensure correlation to the family we live with as opposed to the idealised family we live by. Reliance on the ideal family as a haven providing a protective cocoon of love, loyalty, trust, and happiness, is an enduring human pursuit even though it is at odds with the conflictual and competitive nature of the family life that we live with. Thus, the ideal family that is the foundation of the normative approach to understanding and dealing with domestic violence has resulted in law that has not worked. It does not take account of the full picture of human behaviour.

Nonetheless, the ideal family remains a powerful fiction exerting a strong normative influence in our conception of family life. The notion of the family home as a sanctuary contemplates aggression and deception as pathologies in human behaviour underscoring our assessment of domestic violence. In response, legal intervention proceeds from the need to protect vulnerable women from domineering and abusive men. It provided the impetus for the criminalisation of aggressive behaviour within family relationships which would not incur criminal sanction outside of the home. Enforcement of this through the “one-size-fits-all” approach, dependent on an assumed veracity of domestic violence allegations, may conceal injustice that can unravel both the protective thrust and normative force of the law. The ideal family standard with its normative approach needs

careful reconsideration given the proclivity of aggressive and deceptive behaviour in family relationships.

Similarly, the law continues to impose the fiction of the ideal family post-separation that the two-parent family is best for the child long term, regardless of how much disadvantage maintaining the fiction inflicts on parent and child in the present. The legislative emphasis on post-separation contact and shared responsibilities for the parent not living with the child is also problematic. In particular, this occurs when it prevents the caretaker parent but not the non-caretaker parent from relocating to pursue a better life. Either both parents should be so bound in pursuit of the two-parent ideal or neither parent should be so bound at the termination of the relationship through divorce or separation. The law perpetuates the myth through the important legal status afforded to parenthood. The notion of the durability of the family relationship shifts to parenthood which continues post-separation even after both parents have started new families, enforcing continued contact between belligerent ex-partners.

Our understanding and responses to domestic violence in New Zealand have progressed mainly through the gender paradigm, the protection of vulnerable women and children from violent and controlling men.¹²¹³ From the outset, there appears to be an inference of a guilty gender and an innocent gender, but extensive research in the field both at the national and international level indicates

¹²¹³ Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Family Violence Death Review Committee 2014); Denise Wilson and others "Becoming Better Helpers: Rethinking Language to Move beyond Simplistic Responses to Women Experiencing Intimate Partner Violence" (2015) 11 Policy Q 25; Denise Wilson and Melinda Webber *The people's blue-print* (Glenn Inquiry, [Auckland, NZ], 2014); Sue Carswell *Family violence and the pro-arrest policy* (Ministry of Justice, Wellington, NZ, 2006); Ministry of Social Development *Te rito* (Ministry of Social Development, Wellington [NZ], 2002); Ministry for Women's Affairs *Current Thinking on Primary Prevention of Violence against Women* (2013); Garth Baker "Effectively Involving Men in Preventing Violence against Women |" (2013) New Zealand Family Violence Clearinghouse <<https://nzfvc.org.nz/issues-papers-5>>.

that this is not true.¹²¹⁴ Domestic violence is perpetrated proportionately by both genders, but men perpetrate more serious physical violence compared to women.¹²¹⁵ We also know from experience that our attempts to address domestic violence through the gender paradigm analysis have failed.¹²¹⁶

Legal remedies such as police safety orders, pro-arrest policies, prosecution and court sanctioned intervention for offenders are pursued with the central aim of protecting the victims from further violence. Our pursuit of criminal justice intervention is postulated on the deterrence theory, getting the message across that domestic violence is unacceptable and will not be tolerated.¹²¹⁷ The deterrence theory relies on the fear of future sanctions as the causal mechanism of changing future behaviour. However, sanctions can also affect future behaviour through mechanisms other than fear of future sanctions.¹²¹⁸ The imposition of a sanction, for example, may communicate to the offender that domestic violence

¹²¹⁴ "Domestic Violence Research Group" Partner Abuse State of Knowledge <<http://www.domesticviolenceresearch.org/>>; Eva Solberg "Leading Swedish Feminist Admits: Domestic Violence is not a Gender Issue" (24 June 2015) A Voice for Men <<http://www.avoicemen.com/mens-rights/domestic-violence-industry/leading-swedish-feminist-admits-domestic-violence-is-not-a-gender-issue/>>.

¹²¹⁵ John Archer "Sex Differences in Physically Aggressive Acts Between Heterosexual Partners: A Meta-analytic Review" (2002) 7 *Aggress Violent Behav* 313; Laurie O Robinson "Sex Offender Management" (2003) 989 *Ann N Y Acad Sci* 1; Kristin Carbone-López, Candace Kruttschnitt and Ross Macmillan "Patterns of Intimate Partner Violence and their Associations with Physical Health, Psychological Distress, and Substance Use" (2006) 121 *Public Health Rep* 382; David M Fergusson, Joseph M Boden and L John Horwood "Developmental Antecedents of Interpartner Violence in a New Zealand Birth Cohort" (2008) 23 *J Fam Violence* 737; David M Fergusson, L John Horwood and Elizabeth M Ridder "Partner Violence and Mental Health Outcomes in a New Zealand Birth Cohort" (2005) 67 *J Marriage Fam* 1103.

¹²¹⁶ Ministry of Justice *Strengthening New Zealand's Legislative Response to Family Violence: A Public Discussion Document* (2015); Amy Adams "Harnessing the Power of Information to Reduce Crime & Victim" (3 May 2016) Scoop Independent News <<https://mail-attachment.googleusercontent.com/attachment/u/0/?>>

¹²¹⁷ Ministry of Justice, New Zealand "Including Principles in the Law" (2015) <<http://www.justice.govt.nz/consultations/previous-consultations/better-family-violence-law/discussion-document/1-understanding-family-violence/including-principles-in-the-law>>.

¹²¹⁸ Kirk R Williams "Arrest and Intimate Partner Violence: Toward a More Complete Application of Deterrence Theory" (2005) 10 *Aggress Violent Behav* 660.

violates a social norm, and such understanding leads to a change in behaviour.¹²¹⁹ It can also empower victims to invoke or not to invoke criminal intervention. Unfortunately, research on the effectiveness of criminal sanctions in domestic violence does not specifically address the underlying causal mechanisms and does not collect information “which would permit distinguishing the effects of fear, norms empowerment or other potential mechanisms by which sanctions affect future behaviour.”¹²²⁰ Thus, the effectiveness of the criminal intervention in controlling domestic violence remains ambiguous.

A central feature of our criminal justice intervention is the criminalisation of all forms of relationship aggression under the broad definition of domestic violence. It effectively entangles minor offenders for aggressive behaviour that are not criminal outside of the home. People are by nature susceptible to emotional changes as modulated by external and internal stimuli. We get angry, frustrated, confused, jealous, depressed, etc. and such mental states transform our physical disposition, actions and speech. In a conflict or confrontation, we go through these posturing routines in what is known as the “fight or flight” response. Outside of the home, such behaviour appears in various forms such as verbal warning, threatening postures, verbal threats, physical threats, swearing, pushing and shoving which do not incur criminal sanction. For this reason, a graduated response through the categorisation of domestic violence is recommended in recognition of the need to differentiate conflict resolution behaviour from coercive control.

Preferably, the criminalisation of all forms of aggression should proceed in line with the de-domestication of domestic violence. First, it requires divorcing the Family Court which deals with separation, relationship property, care of the

¹²¹⁹ Christopher D Maxwell and Joel H Garner “The Crime Control Effects of Criminal Sanctions for Intimate Partner Violence” (2012) 3 Partn Abuse 469 at 472.

¹²²⁰ At 472.

children and relocation from the behavioural court which addresses misbehaviour in close interpersonal relationships. Second, all criminalised aggressive behaviour which includes but not limited to familial or domestic relationships are transferred to the criminal jurisdiction. In the process, the Family Court should primarily focus on its problem-solving role and discard the conciliatory approach. Reconciliation is available through the compulsory use of the family disputes resolution process before parties can apply to the court. Arguably people who go to court have advanced beyond the conciliatory process. They need a decision regarding separation, such as division of property or care for the children but not to be taught how to behave in a relationship.

The criminalisation of all forms of aggressive behaviour demands the realignment of some current offences and the creation of new ones to mediate the broad definition of domestic violence. For example, "Assault on a child" remains but "male assaults female" to be abolished. Aggressive behaviour can include offences such as Mischief" where a person damages a property during an interpersonal dispute; "Aggression", in regards to nontrivial physical confrontations between individuals that does not result in any injuries; and "Common Assault" for a physical assault that results in minor injuries. Furthermore, a new offence of "Coercive Control Assault" can apply to aggressive behaviour that falls into a pattern of behaviour symptomatic of coercive control.

In this thesis, I have attempted to link the pervasiveness of fiction as a human phenomenon to our legal responses to domestic violence. The fiction of the happy family with children, a haven of love, care protection and cooperation, individuals living and working together for the common good dominates our responses. However, we have been unable to achieve the desired outcomes due to the contrasting reality of family life which constitutes conflict, differences, disagreements, tension, and aggression as individuals attempt to co-exist as a unit.

Violence in the life of most living organisms represents a means to an end, indelibly imprinted in the very ecosystem they inhabit. We may be at the top of the

evolutionary chain with our ability to harness resources and use knowledge to our advantage, but human history is riddled with violence. Bertrand Russel stated that the “right to ownership was ultimately based on violence or if you like legitimate violence”.¹²²¹ We may abhor violence, but it is always an option that we employ when there is justification or whenever necessary. Domestic violence, however, is differentiated by the fact that it is perpetrated by people who live together in familial or intimate relationships. At the same time, we should take note that “violence” is a loaded term which in the domestic context covers a wide range of behaviour from verbal aggression to murder, and everything in between.

By any standard, domestic violence must be recognised as a serious social and legal problem in New Zealand. This thesis has endeavoured to analyse statistical data in an attempt to ascertain the reality of the problem as it is, rather than what we think it is. According to a recent estimate, there is a police investigation into a domestic violence incident every five minutes which is estimated to represent only about 18% of domestic violence incidents in the country.¹²²² The grim picture portrayed by statistics requires further investigation.

Through the analysis of statistical data, it is established that the rate of serious domestic violence has remained constant in spite of legislative reforms aimed at alleviating the problem. The number-one problem in New Zealand suggested by this thesis is not the dramatic increase in the number of police investigations per year but that there are still 24 to 29 domestic violence deaths per year (see Table 7), as well as, 450 to 480 hospitalisations from domestic violence per year.

On the whole, our response to domestic violence should be based on the reality of human behaviour as it relates to family or intimate relationships. The goals we

¹²²¹ Bertrand Russell *Power* (2nd ed, Routledge, London; New York, 2004) at xii.

¹²²² “Women’s Refuge New Zealand | Statistics” <<https://womensrefuge.org.nz/WR/Domestic-violence/Statistics.htm>>.

are trying to achieve should be clearly articulated to ensure that the aspirational objective of the law and its normative force are not only realistic but achievable regarding everyday life. People in relationships are susceptible to a wide range of emotions that can generate anger, frustration, jealousy, and depression in everyday interaction. Thus, to punish people merely for being human can generate resistance and undermine our effort to confront and control domestic violence.

Recommendations

This thesis has provided a critical analysis of our current responses to domestic violence highlighting various weaknesses and ambiguities. While I have not offered detailed solutions, the discussion provides the basis for some broad recommendation for future research and reforms.

1. Our front-end response to domestic violence should be reviewed to provide alternative intervention programmes with a graduated response before the criminal law response is invoked for minor relationship assault offences. Conflict resolution behaviours which would not be considered criminal in other contexts ought not to be included in the ambit of domestic violence unless they are an integral part of an insidious pattern of forced domination.
2. The creation of new criminal offences to incorporate aggressive behaviour:
 - The offence of “male assaulting female” to be abolished.
 - Mischief: a person damages property in an interpersonal dispute.
 - Aggression: a physical confrontation between two individuals that does not result in injuries.
 - Common Assault: physical confrontation that results in minor injuries

- Coercive Control Assault: aggressive behaviour that falls into an insidious pattern of behaviour symptomatic of forced domination.
3. The Family Court should have a clear problem-solving focus as opposed to the conciliatory philosophy. A dysfunctional relationship involving children that continues after separation need finality rather than prolonging the dispute through the shared care principle and the best interest of the child. Both parents should be free to move on in pursuit of a better life after separation.
 4. Future research on the effectiveness of criminal justice intervention should focus on the link between the imposition of a criminal sanction and behavioural change. To establish whether deterrence stems from the arrest, the decision to charge, prosecution or the severity of the court sanction serves as a deterrent.
 5. The provision of a front end advisory service which can be accessed by individuals in the process of separation. This will provide them with information on what to do and what to expect and to minimise the pitfalls of violence before or after separation.
 6. If the law is gender neutral, then its application should also be gender neutral. Preferably, future research in domestic violence can include the views of male perpetrators and victims to provide a clearer picture of underlying issues.
 7. The incorporation of the biological foundations of human behaviour into the teaching of law, given emerging theories, that as human beings, our perceptions and memories are flawed, and as a result, lawyers work with distorted information that influences our thinking.¹²²³ Unconscious dimensions to human behaviour, and brain function affects the conscious

¹²²³ Beryl Blaustone "Improving Clinical Judgment in Lawyering with Multidisciplinary Knowledge about Brain Function and Human Behavior: What Should Law Students Learn about Human Behavior for Effective Lawyering" (2010) 40 Univ Baltim Law Rev 607 at 609.

decisions and actions of parties to family disputes as well as police, lawyers and judges. These sorts of knowledge, as well as newer knowledge about how the brain works, pointing to a biological basis underlying human behaviour should be essential components of the training of those in the legal profession.¹²²⁴

¹²²⁴ Blaustone, above n 1226.

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