

# Domestic Abuse Act 2021 Webinar

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# Presenters

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Mark Has recently transferred from being a Solicitor and Higher Courts Advocate for over 20 years, and joined 33 Bedford Row North on the 1<sup>st</sup> February 2022.

Having been a senior partner in his practise in Essex, and now resettled in the North with his family, Mark has extensive experience in defending serious frauds, murder, Grievous Bodily Harm, rape, historic sex abuse cases, drugs cases, burglaries, robberies, firearms cases. Mark also practises in childcare and domestic abuse cases. There is a cross-pollination between criminal domestic abuse cases, and childcare cases. The purpose of this lecture is to draw the comparisons and differences in the way in which the law is interpreted, and recent changes.

# Agenda

- Welcome and Introduction

This lecture is intended to give an overview of the Domestic Abuse Act, its relevance to criminal proceedings, but a cross reference to Family Law, where it will be more common. However, times are changing, and this important piece of legislation needs a little examination.

I hope that the different approaches by different courts will advise as to the difficulties to come.

I am happy to answer questions, but I would be grateful if the questions could be sent to [teamadmin@dglegal.co.uk](mailto:teamadmin@dglegal.co.uk), and I will provide written answers after this lecture.

# Domestic Abuse Act

Section 63 Of the Domestic Abuse Act came into force on the 1<sup>st</sup> October 2021, and the definition of what is abuse has been modified and expanded upon since then.

This is a topic which is becoming increasingly contentious, and trying to establish whether there is a defence requires a rethink as to what is coercive and controlling behaviour. To do this means trying to establish a satisfactory definition as to what is meant by coercive and controlling behaviour.

## Definition

“Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality.

“Repeated or continuous engagement in behaviour towards another person that is controlling or coercive. At the time of the behaviour, the offender is personally connected to that person. Their behaviour has a serious effect on the victim and he/she knows or ought to know that the behaviour will have a serious effect upon the victim.

In my opinion, the Crown Prosecution Services will need to prove that the behaviour was coercive, and that there was some intent by the defendant to cause harm to the victim.

Section 63 of the Domestic Abuse Act has to an extent modified and expanded upon this definition, but what does it mean?

There is a requirement that the people concerned have to be personally connected, husband and wife, father and child, partners. If there is no connection, there can be no offence.

What is meant by behaviour? What is abuse?

Behaviour is abusive if it consists of the following:-

1. Physical or sexual abuse
2. Coercive or controlling behaviour
3. Violence, or threats of violence
4. Psychological or emotional harm
5. Economic Abuse

However, the Domestic Abuse Act falls short of a proper definition of coercive and controlling behaviour. The Serious Crime Act, Section 76, provides an unsatisfactory definition. The reason that this is unsatisfactory is that there is no offence if the perpetrator has responsibility of a child under the age of 16, who makes an allegation, and the behaviour makes the aggrieved fear that on at least 2 occasions, violence will be used against the aggrieved, and the perpetrator ought to know that his or her behaviour would have a serious affect upon the aggrieved.



What does there have to be to satisfy the criteria?

1. There has to be more than one incident
2. It must have a “Serious” impact upon the aggrieved.
3. The Defendant ought to know that his or her behaviour will have a serious impact upon the aggrieved.

It is for the Prosecution to prove, to the normal criminal standard that the defendants conduct was not reasonable in all of the circumstances. An interesting example that I would ask you to consider is this, if the defendant knew that his or her partner was abusing drugs or alcohol, and therefore refused to provide the aggrieved money to pay for the drugs or alcohol to prevent illness, then his or her approach is reasonable.

This would be the case even though the aggrieved may, with some justification argue that there is economic abuse.

The defence does not arise where the defendant has caused the aggrieved to be put in fear.

There is a level of cross-pollination between the Family Court, and the Criminal Courts regarding interpretations, and the way forward.

Practise Direction 12 in the Family Courts indicates that there is no need to show intent. In Family Law cases, very often, subject to the relevant criteria being followed, there are what are known as finding of fact hearings. The finding of fact hearings can have a substantial impact upon the person who has the findings made against them, and the finding merely has to be on a balance of probabilities, ie, “more likely than not”.

This can transform litigation, and often litigation migrates from the family courts into the criminal courts, often with devastating consequences.

Why is this important?

The case of R (Children) [2018] EWCA Civ 198.

This case identified the role of the Family Court, and was reaffirmed by the Court of Appeal. To paraphrase the findings, “The purpose of a finding of fact investigation in the context of a case concerning the future welfare of children in the family court are wholly different...before a criminal court...

Where facts fall to be determined in the course of ordinary civil litigation, the purpose of the exercise, which is to ESTABLISH LIABILITY operates in a wholly different context to a fact finding process in family proceedings”

Practise Direction 12 does not fall easily into this. It seems, in my view, to adopt criminality into domestic abuse within the Family Courts by adopting parts of the Domestic Abuse Act. So coercive controlling behaviour as defined in the criminal courts must be the same as that in the Family Courts?

That is an incorrect assumption. In the Family Courts, there is no need to prove intent, the issue is the impact of the behaviour of the “Perpetrator”. In criminal proceedings, there is a need to prove intent.

Finding of fact hearings can have a huge impact upon rape allegations.

The case of F v M. This case involved an appeal concerning an allegation of rape. The focus had been on the criminal definition of rape, and of consent.

Re R revisited, “There is a risk in a case such as this where the alleged conduct of the fact finding enquiry is, or could be of a criminal nature, for the family court to become too distracted by criminal law concepts”

Matters hear are still unsatisfactory.

The case of JH v MF, the Court of Appeal, “The point made in Re R, and now in the judgement is different; it is the Family Court who avoid analysing evidence of behaviour by the direct application of the criminal law to determine whether an allegation is proved or not proved”

The result, the Family Court may therefore, on a balance of probabilities, do not need to consider whether a criminal offence has been proved to the criminal standard.

The Family Court is concerned with the effects and the impact of the behaviour, the criminal court is concerned with the defendants intent. Risk to the Family, to the aggrieved is the balancing factor in the Family Court. Proof of criminality in the Criminal Courts.

The cumulative effect of behaviour can be compelling both in the Family Court, and the Criminal Courts. (Bad Character etc). What may appear to be banal or trivial at first, may overlook the cumulative effect and its importance on the alleged victim, both by the perpetrator, and the victim.

The case of H –N implies a focus on the alleged impact at the time of the behaviour, and upon the aggrieved, this will determine whether a finding of fact hearing will be required.



However, contradict this case with Re L [2017] EWCA Civ 2121 “Not all directive, assertive, stubborn or selfish behaviour will be abuse in the context of the proceedings concerning the welfare of a child; much will depend upon the intention of the perpetrator of the alleged abuse and upon the harmful impact of the behaviour”.

The return of the circle, coercive or controlling behaviour that is not intended to cause fear of violence etc can amount to a criminal offence even if it is unintentional as long as the perpetrator ought to have known it would have a serious effect.

Why does this matter?

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