Antonia Porter: What might 'successful' coercive control prosecutions look like?

The Public Prosecution Service in Northern Ireland is committed to driving up the rates of coercive control convictions. This chapter considers what can be learned from prosecutors in England and Wales concerning the particular challenges presented by these cases. When set against the criminal trial's usual focus on discrete, incident-specific or 'transactional' events, offences concerning ongoing patterns and systems of power seem ill-fitted and consequently present unique obstacles. Whilst the evidential (realistic prospect of conviction) hurdles are known (Bettinson and Bishop, 2015), this chapter identifies a number of further issues facing the pre-charge and trial prosecutor; these include pre-charge disclosure, offence date considerations and trial advocate speeches and examination of witnesses. The chapter locates its analysis in the wider context of the managerial demands now imbued in the prosecutorial role and reflects on prosecutorial strategies that might assist attrition rates. However, the chapter also counsels caution. Prosecutors are reminded that what constitutes a 'successful' outcome for a survivor may lie outside of committed and strategic implementation of the substantive criminal law. Ultimately, taking domestic abuse 'extremely seriously' (Public Prosecution Service, 2022) for survivors may not align with prosecution performance measurements, requiring a cultural shift away from the criminal justice paradigm.

Criminalising coercive control

Using the criminal law as a central means of redressing the harms suffered by abused women could be considered limited and myopic (Tuerkheimer, 2004, p. 962; Walklate, Fitz-Gibbon, McCulloch, 2018, p. 127; Douglas, 2008; Goodmark, 2019). Yet, despite those who have expressed reservations about whether 'more law is the answer' (Walklate, Fitz-Gibbon, McCulloch, 2018), engaging in coercive or controlling behaviour towards a person with whom you are personally connected became a criminal offence in England and Wales in 2015.[1] The 2021 Northern Irish offence,[2] just as the English and Welsh one, aims to address the prior disconnect that existed between the experience of living with an abuser on the one hand and abuse as it was being pursued in the criminal courts on the other. Intending to plug a lacuna in the law (Home Office 2015; Wiener, 2020, p. 159), the coercive control offences in both jurisdictions acknowledge the physical and also the psychological harms - the pervasive fear, the victim's loss of autonomy and her entrapment within the relationship - that had hitherto not been captured by existing criminal offences.

Since the English and Welsh offence was introduced in 2015, the numbers of coercive or controlling behaviour cases reported and prosecuted have increased markedly. In the year ending March 2017, only 4,246 such offences were recorded by the police but that number rose to 33,954 in the year ending 2021 (ONS, 2021), reflecting, undoubtedly, not only the impact of the pandemic on both the prevalence and the intensity of the behaviour but also promulgation and growing awareness of the offence. Greater recognition of the offence is still needed amongst the general public (Home Office, 2021), the police (Barlow, 2019) and criminal justice professionals (Crossman and Hardesty, 2018). Indeed, prevalence rates from the Crime Survey of England and Wales indicate that only a fraction of all coercive control comes to the attention of police or is recorded as such (Home Office, 2021, 1.2). As for report-to-charge conversion rates, following the first six months of the offence, the CPS charged a mere 62 offences. Most recent figures from the year ending 2019 show a rise to 1,112 prosecutions (ONS, 2021). Prosecutors in Northern Ireland may initially therefore expect a

mirroring of these low numbers coming through the system because the offence will be unfamiliar and also due to its non-retrospective nature. However, the ongoing paltry figures in England and Wales also reflect, as this chapter explores, the particular challenges of prosecuting this offence.

Overwhelmingly, defendants in England and Wales convicted of coercive or controlling behaviour have been male.[3] For that reason, coercive control sits as part of the CPS Violence Against Women and Girls' Strategy which recognises that such offences are 'committed primarily, but not exclusively by men against women within a context of power and control' (CPS, 2017). The CPS VAWG strategy accordingly aims to improve the prosecution rates, to support victims and to bring perpetrators to justice (CPS, 2016). The Public Prosecution Service in Northern Ireland does not have a strategy specifically dedicated to addressing gender-based violence, though the PPS express the view that they take domestic abuse 'extremely seriously' (PPS, 2022). It follows that as part of such commitments, successful convictions will be paramount and it is to that aim that the chapter speaks. Yet, at the same time, there will be instances when a conviction does not represent the best outcome for the victim-survivor or serve her best interests. So, as part of prosecutors' ongoing duty to review cases on evidential or public interest grounds, when a woman expresses her withdrawal from the prosecution, prosecutors will need to carefully weigh up whether exercising their discretion to discontinue the case is merited. For, even where evidential and procedural challenges can be overcome, if achieving a conviction does not carry clear advantages for the victim-survivor, prosecutors might relinquish institutional expectations to pursue the case to finality. 'Effective' implementation of the new law must therefore proceed with that caveat in mind.

Unique and novel barriers exist to prosecuting coercive control and prosecutors will need to identify and anticipate problem areas. First, the chapter assists prosecutors in understanding the new offence with reference to the work of Evan Stark. Ordinarily, prosecutors will approach criminal transgressions with a reductive focus on the facts of the incident. This chapter, however, invites prosecutors to consider the offence in its fullest context. Yet such an expansive instinct as to the facts, is likely to jar with prosecutors' increasingly managerial role and quest for efficiency (Hodgson, 2020, p142). As part of this 'opening up' to the context of the offence, prosecutors are encouraged to consider the part they can play in reorienting the criminal justice system to the victim's experience. Second, the chapter considers pre-charge matters such as meeting ongoing disclosure obligations and selecting charge dates that capture the extent of the offence without overloading the triers of fact. And finally, the chapter turns to the contested hearing; assuring prosecuting advocates that loosening the reins when the victim gives evidence in chief may pay dividends and that being expert in the range of tactics and manipulations pursued by perpetrators will assist in the clear presentation and preparation of the case, particularly during speeches.

From 'violent incident' to narrating context

Criminal offences typically focus attention on a single one-off incident or a number of discrete and identifiable transgressions. The trial itself then comprises of an evidential enquiry into the isolated event 'without reference to or a contextualisation of the … history' (Rollinson, 2000, pp. 108- 9). Witnesses are often told, whilst giving evidence, to answer the question

put and not to digress into irrelevant satellite concerns, particularly when – as discussed in more detail below – a witness threatens to disclose another's past 'bad character' without leave of the court.[4] As such, courts hear only part of victims' stories and their account – taken out of context – 'may resemble something other than the truth' (Tolmie, 2018, p. 52). In the context of domestic abuse, the transactional nature of the criminal offence has typically been reflected in date and time stamped charges under, inter alia, the offences against the person regime.

Stark has called the criminal law's equation of *abuse* with incident-specific *assault* the 'violent incident model' and explains that such a focus infers that the severity of abuse can be calculated by assessment of the degree of injury inflicted or threatened during the spotlighted episode of violence (2012, p.200). Yet, of course, the 'violent incident model' ignores the *non-violent harms* that may be inflicted by the perpetrator in the course of a controlling and coercive dynamic and it was precisely this gap in the law that the 2015 offence endeavoured to address (Wiener, 2020, p. 165; Barlow and Walklate, 2022, p.11).

The criminal trial's focus on the identifiable act(s) or violent episode(s), reflects an understanding of domestic abuse that parallels Johnson's 'situational couple violence' typology or what Madden-Dempsey has called 'domestic violence in its weak sense' (Johnson, 2010, pp. 11-12; Madden-Dempsey, 2009, p. 126). Both these models describe so-called 'one off' incidents of violence sparked by a particular situation, a trigger argument or set of circumstances that give rise to frustration, anger and, ultimately, violence being used. For Madden-Dempsey, domestic violence in its weak sense refers to violence that is not undertaken to assert or sustain patriarchal power dynamics (Ibid, p. 126); meaning for the purpose of the male asserting his dominant status. These isolated instances of 'situational couple violence' may or may not repeat, and aside from the assault itself, couples are said to enjoy relatively harmonious relationships where violence is not used to 'reign terror' or as a 'relationship-wide attempt to control' (Johnson 2010, 11-12). Otherwise put, the 'violent incident' models appear to describe 'assault minus coercive control' (Wiener, 2017, p.501). When certain domestic abuse is understood in this way, the traditional incident focus of the criminal law might not seem so ill-suited.

Yet Johnson and Madden-Dempsey's analysis - that situational couple violence describes a distinct phenomenon from coercive control - is not beyond criticism. For, when 'situational couple violence' repeats and especially when it escalates into a chronic problem with increased brutality, to suggest that such abuse is merely episodic and a number of discrete occurrences seems disingenuous and belies how aspects of power and control may play out in between events. Walker's three phases of 'repetitious' or 'cyclical violence' - the tension building phase; the violent incident; and the honeymoon phase – at least acknowledge that during the tension building (but violence-free) phase, physiological strain and negative emotional and mental health harms can be experienced by the victim in anticipation of the violence (Walker, 2017, p. 97). Some women have even reported taking action to provoke the awaited violence due to the unbearable anticipation of it (Ibid).

However, Walker's cyclical model has also been criticised (Goodmark, 2009, p.44; Wilson, 2019). For it, too, implies that parties in the 'honeymoon phase' are reconciled and that, to

some extent, the violent episode was inevitable and predictable (Shrager, 2012, pp.26- 27); unhelpfully prompting the question, why did she simply not leave during the honeymoon phase? The limitations of both Johnson's (repeated) 'situational couple violence' model and Walker's 'cycle of violence' are highlighted when considered against Stark's exposé of coercive control as a multidimensional oppression of personal life (2007, p.10) and Pence and Paymar's uncovering of an array of abusive tactics designed to control and assert power (1995, p.2).

That coercive control is widely acknowledged as an ongoing or omnipresent 'strategy of domination' (Stark 2012, p. 210; Stark, 2007) signals the theoretical evolution in understanding domestic abuse (Goodmark, 2009, p.44). More recently, Walker's revised and updated model acknowledges the range of non-violent yet controlling behaviours perpetrators can inflict even in the 'reconciliation' phase of the cycle; 'sometimes what seemed so loving in one context actually seemed a continuation of the controlling and over possessive behaviour of the batterer' (Walker, 2017, p. 107). Similarly, one survivor explained to Pence that the violence in her relationship was not cyclical, because 'even when he is being nice to you, it's a part of the violence' (Pence, 2009).

'Emotional abuse' is at its most unambiguous when it is characterised by humiliating or degrading 'put-downs' and gendered criticisms which are objectively cruel. But the revelation that prosecutors might have to convey to a court that ostensibly kind gestures - moments of flattery, of attentiveness and even of loyalty - might also be characterised as *part* of the controlling or coercive behaviour is more nuanced and challenging. If prosecutors fail to expose that these behaviours can also be a component of the perpetrator's power and control, the alternative is that the defence team will point to these prima facie considerate and devoted actions to indicate that the relationship was healthy and without coercion or control.

The trial prosecutor will accordingly need to navigate and guide the triers of fact through the 'blurred boundaries' that exist between caring behaviours embodied within 'normal relationships' and the attentive, romantic and possessive behaviours manifest in coercive and controlling ones (Barlow and Walklate, 2022, p.11). Once a relationship is established, a perpetrator might punctuate the abusive relationship with momentary flashbacks to the intense, seemingly romantic, courtship – or grooming - so many survivors describe at the outset of the relationship (Wiener, 2017, 507). In this context, gestures of 'kindness' might be better understood as a tool that keeps the victim-survivor close and which facilitates her obedience, the perpetrator's micromanagement of her behaviour and the deployment of '"rules" for everyday living' (Stark, 2012, p.210). Her fear is often a key indicator of when this slippage has taken place (Barlow and Walklate, 2022, p.11; Herring, 2020, p.27). Through careful questioning, prosecutors will need to draw out why a victim-survivor believes that certain ostensibly considerate behaviours feel sinister or controlling and why once non-problematic conduct has become part of the problem (Ibid).

With an awareness of this continuum of abuse in mind, the chapter now considers how the CPS prosecutor can evidence the requisite level of harm to the victim-survivor as set out in section 76 Serious Crime Act and how, in Northern Ireland, the PPS prosecutor can satisfy 'the reasonable person' to consider the course of behaviour likely to cause the victim-survivor physical or psychological harm, per section 1(2) of the legislation.

Pre-charge considerations:

Selecting charges and dates

Whilst, as suggested above, there is scope to argue that repeated situational couple violence, absent other more overt coercive control strategies, may give rise to emotional tension and anticipatory anxiety for the victim, these responses may not meet the threshold for proving a criminal offence has occurred. To provide a 'realistic prospect of conviction' (CPS, 2018), a CPS prosecutor must be satisfied at the pre-charge stage that the prescribed level of harm is met (England and Wales). Specifically, section 76 Serious Crime Act 2015 requires that the behaviour had a 'serious effect' on the victim (namely that it caused her to fear, on at least two occasions, that violence would be used against her, or that it caused her serious alarm or distress which had a substantial adverse effect on her usual day-to-day activities). Conversely, to provide a 'reasonable prospect of conviction' (PPS, 2016), section 3(1) of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 establishes that the offence can be committed whether or not the behaviour in question actually caused the victim to suffer harm; section 1 requiring that the behaviour must be such that a reasonable person would consider the course of behaviour *likely* to cause physical or psychological harm. Yet whilst it may appear that the Northern Irish offence avoids some of the difficulties that have arisen in England and Wales as regards to establishing the *existential* impact on the victim-survivor, prosecutors in Northern Ireland would still benefit from approaching the case by establishing that harm has, in fact, been caused (where possible). For, if PPS prosecutors can evidence the actual harm caused, it facilitates establishing that a reasonable person would consider the course of behaviour likely to cause physical or psychological harm.

In England and Wales, if, at the pre-charge stage the statement taker has not explored how and to what extent the perpetrator's behaviour has harmed the victim, then the prosecutor will need to require the police to obtain a further statement requesting the complainant describe the impact of the abuse on her. The harm element that *must* be proved in s.76 coercive control cases is likely to mirror the contents of a 'victim personal statement' (VPS). This statement is routinely taken in all criminal cases where there is an identifiable victim and is usually referred to by the prosecutor as part of the sentencing hearing.[5] Police are familiar with taking VPS statements which describe the physical, emotional, financial or other impacts the offence has had on the victim. In s.76 coercive control cases, the complainant's written statement *needs* to include the same information so that the prosecutor can assess the harm element of the offence. Northern Irish prosecutors would be well advised to obtain the same information to assist the triers of fact in determining whether the perpetrator's behaviour was *likely* to cause harm.

Once a prosecutor has satisfied themselves that behaviour on the requisite number of occasions[6] caused harm (or, in Northern Ireland, was likely to do so), a prosecutor should consider whether there are any particular events – such as a serious assault with use of a weapon - that merit a separate charge in addition to relying on it as part of the ongoing coercive control offence. A

conviction for a stand-alone offence relating to a specific serious incident will have the effect of 'marking the card' of the offender's record of previous convictions. This may prove advantageous for both the sentencing exercise and also in the event that future partners should seek details of the offender's previous convictions under the Disclosure Schemes (Domestic Violence Disclosure Scheme, 2014; Domestic Violence and Abuse Disclosure Scheme, 2016). If prosecutors prefer a separate date specific charge, they will need to be satisfied that there is a realistic prospect of conviction in respect of coercive control with *or without* it (Jones v DPP [2011] 1 WLR 833).

A prosecutor will also need to select charge dates. No behaviours that took place prior to 29 December 2015 in England and Wales or 21 February 2022 in Northern Ireland may be included. Aside from that caveat, charges should 'facilitate the clear presentation of the case at court and accurately reflect the extent of the accused's involvement and responsibility, allowing the court appropriate sentencing powers' (CPS, 2017, at 6). Over the course of a relationship that may have spanned years, facilitating a straightforward presentation of the case for the purpose of trial at the same time as reflecting the extent of abuse experienced by the victim so that sentence can properly reflect the seriousness of the offence, may seem antithetical.

The strained ambitions of capturing the full (or sufficient) criminality of the behaviour on the one hand whilst ensuring a straightforward and comprehensible delivery of the case on the other is compounded by the added dimension of the managerial pressures brought to bear on prosecutors specifically (Hodgson, 2020, p. 142) and the justice system more generally (Ibid, p. 13). Criminal courts are imbued with the lexicon of efficiency, particularly in the summary criminal courts with voluminous caseloads where demands for expediency have only increased since the 1980s (Welsh and Howard, 2019, p.796). Summary justice must be speedy and hearings 'simple' and 'accessible' (LJ Auld, 2001: 271). With assorted directives asserting the efficiency priority, prosecutors will not be able to escape the expectation that cases should be expeditiously processed (Criminal Procedure Rules 2020, 1.1(2)e; Ministry of Justice, 2003; Leveson, 2015). However, despite the context of expediency, prosecutors must be discouraged from cutting corners by restricting the charge period. Justice should not be compromised by prosecutors limiting the particulars of the offence or the scope of the facts merely to avoid lengthy contested hearings and the inevitable additional preparation work that comes with that.

Choosing which charge dates to prefer and which behaviours to include in the charge will naturally depend on the particular case. Overall, the charge dates should include sufficient scope to reflect the extent, duration, methods deployed and impact of the abuse and this ultimately will be a matter of judgement for the charging prosecutor. Whilst the sentencing guidelines issued by the Sentencing Council (Sentencing Council, 2018) are not applicable in Northern Ireland, the principles contained in them might act as a prompt when selecting charge dates and could be advantageous to the PPS. For example, for the offence, and consequently the sentence to reflect the highest culpability, prosecutors will need to select dates that capture that the behaviours were persistent, prolonged and deployed the use of multiple methods designed to humiliate and degrade the victim (Sentencing Council, 2018). To demonstrate the highest level of harm for sentencing purposes, the behaviour within the charge dates must have caused the victim to fear violence on 'many occasions'

and caused her 'very serious alarm or distress which has a substantial adverse effect on the victim' (ibid).

Pre-charge Disclosure

Despite the CPS only being responsible for the charging decision in 28% of cases, the police must always obtain prosecution pre-charge advice in coercive control cases in England and Wales (CPS, 2018). There is no parallel requirement in Northern Ireland. When consulted by police officers, the decision to charge or to request further investigation in anticipation of charge will be made by the prosecutor on the basis of written statements and other documentary or real evidence provided by the police. How to ensure the competence of the police statement taker to capture the extent and nuance of coercive control is beyond the scope of this paper, but, clearly, adequate training in respect of coercive control for those undertaking this aspect of the investigation is key for successful prosecutions. Particularly where a not guilty plea is anticipated, even where the evidential threshold is met at the pre-trial stage, prosecutors need to ensure that the police have pursued all reasonable lines of enquiry that point both towards or away from the suspect (CPIA Codes of Practice, 2020, p. 10-12; A-G Guidelines on Disclosure, 2022; PPS Code for Prosecutors, 2016 p. 24).[7] Such an approach would signal an occupational and cultural shift away from adversarial approaches to disclosure that some have argued have traditionally plagued investigators (Johnston, 2021, p. 18).

In anticipated contested cases, all material – including unused material - that will assist the defence with the early preparation of their defence or for the purposes of applying for bail ought to be available at the first court hearing in any event (MoJ, CPIA Codes of Practice, 2020, p.10). Yet particularly in coercive control cases, prosecutors should anticipate that there will be relevant material contained on digital devices – for example mobile phones or laptops - that may reveal, for example, the perpetrator's technological surveillance of the victim-survivor or the tenor of communication between parties (Harvard and Lefevre, 2020). Digital material may either form part of the prosecution evidence or, conversely, it may serve to undermine it or assist the defence case (triggering its disclosure under s3 CPIA 1996). Either way, the likely presence of digital material in a contested coercive control trial needs to be considered from the outset, pre-charge.

The prosecutor's disclosure obligations, however, do not give a carte blanche to the police to seize and interrogate a complainant's personal devices. Guidance from the Court of Appeal in R v Bater-James and R v Mohammed (Sultan) [2021] makes clear that this will only be necessary in pursuit of a *reasonable* line of inquiry. Regard will be needed for the *prospect* of obtaining relevant material and the perceived *relevance* of that material in the context of the individual case (A-G Guidelines on Disclosure, 2022, p.5). Should review of a witness's digital communications be necessary in light of the prosecution case or the defence forwarded in the police interview, then investigators should use the least intrusive means possible and adopt what the Court of Appeal has called an 'incremental approach' to obtaining the material (R v Bater-James). This means that investigators should be sure that recourse to the witness's device is the only option; that the device should be interrogated in limited part where possible; that the witness is minimally inconvenienced; and that appropriate redactions are made to the downloaded material (Ibid).

This approach to unused digital material is intended to minimise the incursion into witness privacy, as balanced against the defendant's right to a fair trial (A-G Guidelines on disclosure, 2022, p. 5-7). The balance to be struck is a delicate one as failure to adequately interrogate digital devices may prompt the defence to argue that the defendant can no longer enjoy a fair trial and that proceedings should be stayed as an abuse of process (R (Ebrahim) v Feltham Magistrates' Court [2001]). This is why obtaining unused material in a timely fashion is vital (though the court noted in Bater-James that a fair trial may still be possible if the trial process can compensate for the absence of such material through careful cross examination of the complainant and judicial directions).

The trial: Examining the survivor in chief

The coercive control offences criminalise the 'underlying architecture' of an abusive intimate relationship (Tolmie, 2018, p.52). Prosecuting advocates are tasked with teasing out from the complainant how the perpetrator's behaviours constricted her freedoms, limited her options and made her feel trapped (Stark, 2007). The types of behaviours that underpin the abusive relationship will be 'culturally and contextually prescribed' (Velonis, 2016, p.1036) and, accordingly, the prosecutor's role at trial will be to facilitate the factfinders 'to reorient themselves to the reality of victims' (Walklate, Fitz-Gibbon and McCulloch, 2018, p. 122). Coercive control will be proved via a narrative account of the relationship and it is to the ways in which prosecutors might help survivors to convey their lived experience at trial that this chapter now turns.

In contested criminal proceedings, the complainant must provide a detailed account of her experience at two key moments; first to the police employee who writes her statement and second to the court when giving oral evidence at trial. The trial prosecutor relies on the content of the written statement to know the facts and details of the offence and to formulate the case narrative in advance. When the witness gives evidence in chief, ordinarily, and particularly if a statement is scant, the trial prosecutor will be reluctant to ask questions that might encourage recitation of information not contained in the statement. A primary rule of adversarial advocacy is to never ask a question to which you do not already know the answer (Morley, 2015, p.238; McPeake, 2014, p.150) lest the answer undermines your case or results in irrelevant digression. Perhaps most importantly, when a witness travels 'off script', the defence will likely put it to her in cross examination and assert during the defence closing speech that the latest account aired in court has been fabricated in the moment and/ or is evidence of witness unreliability.

Yet, over the course of an abusive relationship, illustrations of how the relationship was coercive or controlling are likely to be numerous and myriad. One remedy to avoid the witness revealing unanticipated facts in the witness box is to ensure police statement takers avoid taking incomplete statements; being fully trained and conversant with the tactics of perpetrators means that they will ask the victim appropriate yet discerning questions to extract the information. However, in practice where police statements remain sparse or inadequate, it is entirely possible that survivors will evidence further events, examples and explanations not included in their written account during the course of their testimony. This

will happen despite the complainant being given the opportunity to read and consult their written statement prior to trial and being asked questions designed to elicit the statement's contents (CPS, 2018, 3.C).

For this reason, prosecutors in coercive control cases might be advised to anticipate the surfacing of new revelations 'in chief'. These revelations are likely not only because of the frequency, duration and totality of the abuse the victim-survivor has experienced over the course of the relationship, but also bearing in mind the effect that trauma and depression can have on memory recall. Depression, situational disorder and psychosis are common effects of being a victim of coercive control (Stark, 2007, p. 122; Kemp, Rawlings and Green, 1991, p. 137). When a witness suffers mental ill-health and trauma, memories can be fragmented and dominated by sensorial, perceptual and emotional detail (Crespo and Fernández-Lansac, 2016). When a prosecutor probes into those details at trial, it is possible that the survivor will be triggered or prompted to recall additional behaviours not previously disclosed.

Whilst, typically, the prosecutor will want to avert novel revelations from a witness 'in chief' due to concerns they will have about the inevitable defence assertions that the witness is unreliable, exaggerating or biased, in coercive control cases prosecutors might instead choose to anticipate novel revelations and to work with the complainant to furnish the court with further details. Though it runs counter to common practice, coercive control trials may merit the prosecutor 'loosening the reins' when the complainant is giving evidence. Prosecutors can address in their closing speech any attacks the defence make on the victim-survivor's credibility by suggesting that such revelations are to be entirely expected in these cases for the reasons outlined above. The approach may also carry advantages for the complainant as the court will hear evidence that is unrehearsed and may be persuasive and compelling as a result.

Prosecutors in England and Wales and also in Northern Ireland should be mindful that when evidencing coercive control, 'context is everything' (Stark, 2007, p. 309) and in the criminal courts more often than not the complainant will carry the burden of narrating that context. Prosecutors will need to help the witness paint a picture of the relationship and the atmosphere in which she was living. Context will explain why certain objectively and ostensibly innocuous perpetrator actions were, for that complainant, coercive or controlling. By illustration, Wiener's work recounts how one perpetrator strangled his wife with a bathroom towel, after which he never used violence in the relationship again. For that couple, simple production of a towel at 'pinch points' in the relationship became laden with symbolism and menace (Wiener, 2017, p.507). For a lay bystander, absent the context, the gesture would have appeared harmless and, without context, the risk for a woman recounting an incident in which the perpetrator placed a towel on a table is that she presents as irrational and overstating his coercion of her. With context, her logical and explicable fear can be conveyed to the court.

To ensure that full context is exposed and explained to the court, a simple strategy a trial prosecutor might adopt is to simply ask the complainant not only to describe what happened

and how it made her feel, but also *why* it made her feel scared, anxious, angry or trapped. This additional question may prompt an explanation that has hitherto been hidden or merely implied; it may prompt the complainant to explain (possibly for the first time) why his leaving a towel on the table was significant and probative of the offence. Allowing the complainant to articulate why the behaviour made her feel a certain way helps to 'sure up' the requirement of proving that the offence had a 'serious effect' (s.76 Serious Crime Act 2015) or would cause a reasonable person to conclude the behaviour likely to cause physical or psychological harm (s.1(2) Domestic Abuse and Criminal Proceedings Act (Northern Ireland) 2021).

Problems may also arise for the trial prosecutor should the complainant, whilst giving evidence, refer to the defendant's 'bad character' that occurred outside of the chosen charge dates. 'Bad character' refers to any 'evidence of or disposition towards misconduct [the commission of an offence or other reprehensible behaviour] other than which has to do with the alleged facts or the offence with which the defendant is charged' (s.98 Criminal Justice Act 2003; art 3 Criminal Justice (Evidence) (Northern Ireland) Order 2004). Ordinarily, defence objections to assertions that amount to 'bad character' would rightly result in a prosecutor advising the witness to answer the question that has specifically been put (so as to avoid the witness attacking the defendant's character). However, if the revelations further example the defendant's coercive control and are consequently probative and relevant, and the risk of the complainant's own character being introduced is considered in the balance, there is scope for a prosecutor to do two things. Either, the prosecutor could argue that the revelations fall outside of the 'bad character' regime as they have 'to do with the alleged facts' ie the defendant's coercive control of the complainant and should therefore be permitted (and it is suggested here that this argument is likely to be stronger in coercive control cases given the 'ongoing' nature of the relationship). Or, alternatively, the prosecutor could apply for the bad character to be adduced (s.101(1)d Criminal Justice Act 2003 or art 6(1)d Criminal Justice (Evidence)(Northern Ireland) Order 2004) to show that the defendant has a propensity to behave in the way alleged in the charge. The fact that the previous behaviour has not resulted in a conviction is not a bar to it being adduced; mere allegations of criminal offences can be adduced (R v Z [2000] 2 AC 483; R v Terry [2005]) or other reprehensible behaviour that falls short of a criminal offence (R v M [2014]; R v Donnelley [2006]).

In proceeding on a basis that enables the complainant's 'expansive' oral testimony, the prosecuting advocate might be reminded of two overriding concepts. First, as the complainant is the principal prosecution witness and the prosecuting authority has made the decision to pursue the case, prosecutors ought to feel comfortable treating her as a 'witness of truth' rather than as someone whose account needs to be constrained and limited. Second, the prosecutor's role is as an independent officer of the court. Their job is to assist the triers of fact to convict the guilty and to acquit the innocent; their role differs from the partisan defence barrister who is instructed to advance zealously their client's case. The prosecutor in that context merely offers the opportunity for the complainant to assist the court.

The trial: The prosecutor as expert

Relevant expert evidence may be relied upon by a party to proceedings on any matter calling for expertise that is *necessarily* outside of the everyday knowledge and understanding of the

triers of fact (R v Turner [1975]). Whether a subject area falls within the common experience and awareness of the triers of fact is not something that will always carry a clear answer. It may be that an 'educative judicial direction' could render expert evidence nugatory (Keane, 2022, p. 652) or that a successful argument could be made that juries are able to evaluate for themselves whether, for example, a relationship dynamic is healthy and, conversely then, which behaviours fall outside of those parameters and cause the victim harm. The guidance for Crown Prosecutors (CPS, 2017; PPS, 2022) remains silent about whether prosecutors should consider instructing an expert in coercive control cases.

The question of *who* demonstrates sufficient competence to act as an expert in the field of coercive control is ultimately for the trial judge to determine. Where experts are without formal professional qualifications, courts have typically been generous in their interpretation of who has the requisite skills and experience (R v Silverlock [1894]; R v Dallagher [2003]). In practice, those regularly working with survivors and perpetrators would likely be eligible, as would policy makers and researchers working in the field. Overall, the criminal courts are known to have a liberal approach to the admissibility of expert evidence (Roberts, 2008) and have correspondingly shown themselves to be amenable to hearing from coercive control experts in cases where survivors have killed their abusive partners (even if the expert's impact in securing positive outcomes for the abused woman who kills has thus far been negligible) (Bettinson, 2019; Barlow and Walklate, 2022, p. 67).[8]

A coercive control expert could assist the court in determining when a relationship stops being 'normal' and 'abuse' begins (Tolmie, 2018, p.56). Coercive control experts would have the role of explaining the social phenomena; of outlining the victim's experience; of explaining that victim responses are varied; and would be able to differentiate the victim's response to the abusive behaviour as distinct from any pre-existing pathological conditions (Henaghan, 2022). By drawing on a framework that takes into account the entire relationship history, coercive control experts would be able to 'widen the legal lens, bringing context into view' and explain what might otherwise have appeared irrational victim behaviour (Tuerkheimer, 2003, p. 999-1000).

Expert evidence about the contours and forces at work within coercive relationships would likely assist the triers of fact in noticing the perpetrator's strategies and understanding how the abuse impacted the victim-survivor. Experts would be able to direct the court to consider not just specific events or moments of tension described by the complainant but could also invite the court to notice the interim dynamic. We know that coercive and controlling abuse can be difficult to recognise for both the survivor and the bystander as behaviours that amount to an offence may appear innocuous (Wiener, 2017, p. 509). The micro-regulations of daily activities (Stark, 2007) are made even more invisible within the context of 'traditional' gendered roles and perpetrators' exploitation of prevailing gender norms such as women's role as mothers, homemakers and wives. If the perpetrator's micro-management of the victim may have been imperceptible to the victim and third party witnesses it may also appear 'inoffensive' to the triers of fact who will likely be scrutinising the evidence through the lens of society's prevalent unequal power relations. An expert witness may help to re-frame the narrative, call out misogyny, explain why a woman reacted to certain behaviours in the way she did and explain to a lay jury why she felt unable to leave (Hanna, 2009, p.1470).

Yet, trial prosecutors will always be left with the pragmatic reality that such experts are rarely if ever instructed, funded or available. Absent an expert, trial lawyers might instead choose to act as experts by proxy; in opening, in examination of witnesses and in closing. Throughout the trial, prosecutors might seek out opportunities to present the case and the defendant's behaviours through the lens of Stark's work. In opening, the prosecutor has the opportunity to explain the case theory and to focus minds on how the evidence will prove the perpetrator's coercion of the victim. Through a non-contentious summary of the facts, prosecutors can frame the case 'issue' and tackle head on anticipated and unfavourable narratives the defence will rely on. For example, 'attentive' text messages can be suggested as tools of control, opportunities permitted to the victim to socialise with family become the perpetrator's means of keeping her family in the dark and the perpetrator permitting the victim to work a means of his controlling her whereabouts. When examining the defendant, prosecutors might seek to expose his misogyny, his gendered role expectations and his various techniques of and motives for control. Finally, in closing, through inference, suggestion and proposition, prosecutors can show how the perpetrator drew the victim in close and how he used confounding means to keep it that way.

Conclusion

An expansive inquiry into the modus operandi of the perpetrator is more likely to capture the extent and duration of his coercive control than a reductive exercise into two or more specific incidents. Prosecutors, however, find themselves working within a justice process that demands expedience and a subsequent fact-finding procedure – the criminal trial – that is typically de-contextualised in focus. Pushing against the resulting cultural inclination to confine the facts-in-issue to specific (albeit maybe repeated) violent incidents is required. Any predisposition to condense the woman's experience out of professional habit is further compounded by managerial demands. Prosecutors will be conditioned to adopt practices that facilitate proficient case preparation and presentation (Porter, 2020), within a system that must process voluminous caseloads within tightly constrained budgets (Auld, 2001; MoJ, 2013; Leveson, 2015; Hodgson, 2020). As such, expansive examination of the abusive relationship that contextualises the victim's experience will contrast, even conflict, with the cultural grain.

To assist in achieving the convictions that both the CPS and PPS are committed to, the chapter has urged prosecutors to become experts in the forms of oppression and domination that characterise coercive control. Never reducible to physical violence, both charging and trial prosecutors ought to be familiar with the ways that coercive control 'constrains victims' autonomy, offends dignity, abrogates rights to sociability, free speech and movement and quashes self-determination, including economic and sexual self-determination' (Stark, 2020, p. 46). Conversance with the impact on victims is also required so that cases can be presented with an unambiguous narrative capable of proving the harm, or likely harm, elements of the offence (McGorrery and McMahon, 2019, p. 957). The chapter has outlined that the need for a coherent case strategy begins pre-charge; ensuring timely disclosure of material, especially digital material, that may or may not remain unused. Moreover, charge dates ought to reflect the extent of the problem and offer sufficient scope for sentencers. The chapter has also suggested ways that the trial prosecutor – during speeches and examination of witnesses -

can shift attention from the specific incident(s) to facilitating the victim to narrate the context and her reality.

This chapter has explored some of the ways that prosecutors might, whilst working within the confines of the criminal justice system, assist women survivors to access justice. Yet the chapter concludes by reiterating its opening caveat; that 'justice' might not mean achieving a conviction wherever possible, despite institutional performance monitoring that might signal to prosecutors otherwise. Whilst the new coercive control laws might be considered progressive in, inter alia, their potential to offer recognition and affirmation for many controlled women, the laws only represent an advance for women to the extent that they are responsive to their needs (Schneider, 2000). If cases proceed absent a woman's support, there is a danger that the law overrides and defines women's subjectivities in ways that do not serve them individually or collectively (Smart, 1989, p.25; Porter, 2020, p.19). Whilst prosecutors should ensure that they expertly prepare and present the case in the manner contemplated here, they must only proceed absent the survivor's support where her safety, material and emotional needs are not compromised. Moreover, even where survivors are committed to the prosecution, if, by having criminalised coercive control, the state in any way reneges on addressing gender-based abuse through means other than the criminal law, then any advances in the criminal law will not have been worth the price paid.

[1] S.76 Serious Crime Act 2015. Following s.68 Domestic Abuse Act 2021, A and B are now "personally connected" if they are, *or have been*, married/ in a civil partnership or agreement/ engaged/ in an intimate relationship/ relatives or have had parental relationship with regards to the same child.

[2] S.1 Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021.

[3] Between 97 and 99% of perpetrators were male 2016-2019 (MoJ, 2019).

[4] Admission of previous bad character is subject to admission under s.98- 103 Criminal Justice Act 2003; art 3 Criminal Justice (Evidence) (Northern Ireland) Order 2004

[5] Victim Personal Statements were first announced in the Victim's Charter 1996 and were introduced in England and Wales in October 2001 in 'Practice Direction- Crime Victim Personal Statements' (2001) 4 All ER 640: III 28. In Northern Ireland victim personal statements were put on a statutory footing in sections 33-35 of the Justice Act (Northern Ireland) 2015, and are included in section 3 of the NI Victim Charter, available at <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/victim-charter.pdf> accessed 9 September 2022.

[6] In England and Wales s.76 details the behaviour must be 'repeated or continuous' and in Northern Ireland s1 requires there must be 'two or more occasions' of coercive or controlling behaviour.

[7] Exceptionally, when a decision is made for reasons of expediency where the suspect's remand into custody is sought, prosecutors may make the decision to charge on the 'threshold test', in which case further lines of enquiry may still need to be pursued at the behest of the prosecutor and kept under continuous review (A-G Guidelines on Disclosure 2022, p.17).

[8] Notably, Professor Evan Stark was permitted to give evidence in Sally Challen's appeal to explain the part that the deceased's control over the appellant throughout their relationship might have played in his killing.

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