

Killing for preservation in an abusive domestic relationship: s 304B

A provision of our law concerning killing in an abusive domestic relationship provides that if a person unlawfully kills another under circumstances that would constitute murder, and if:

the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and

the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that cause the death; and

the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case

then that person is guilty of manslaughter only.¹

The defence therefore operates as a partial defence, not a complete defence, because if it applies its effect is to reduce what would otherwise be a verdict of murder to one of manslaughter. You only need to consider this defence if you provisionally reach the view that the defendant had the necessary intent to kill, or cause grievous bodily harm, and that the killing was unlawful (but for this defence) so that the defendant would be guilty of murder.

A matter for your consideration in considering this defence is whether the deceased committed acts of serious domestic violence against the defendant in the course of an abusive domestic relationship.² An abusive domestic relationship is a domestic relationship existing between two persons in which there is a history of acts of serious domestic violence³ committed by either person

¹ See s 304B(1).

² See s 304B(1)(a). This requirement may be satisfied even if the defendant has sometimes committed acts of domestic violence in the relationship: see s 304B(6).

³ By s 304B(7) "domestic violence" means domestic violence as defined under s 11 of the *Domestic and Family Violence Protection Act 1989*, which defines domestic violence as "any of the following acts that a person commits against another person if a domestic relationship exists between the 2 persons—

- (a) wilful injury;
- (b) wilful damage to the other person's property;
- (c) intimidation or harassment of the other person;
- (d) indecent behaviour to the other person without consent;
- (e) a threat to commit an act mentioned in paragraphs (a) to (d)."

Section 11(2) provides that the person committing the domestic violence need not personally commit the act or threaten to commit it.

against the other.⁴ A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.⁵

As mentioned, a further matter for consideration is the requirement that “the person believes that it is necessary for the person’s preservation from death or grievous bodily harm to do the act or make the omission that causes the death”.⁶ This concerns the defendant’s actual belief (not that of some hypothetical person) as to whether the act or omission was necessary to preserve the defendant from death or grievous bodily harm.

In considering the additional issue of whether the defendant had reasonable grounds for that belief, you should have regard to the evidence as you find it of an abusive domestic relationship and all the circumstances of the case, including acts of the deceased that were not acts of domestic violence.⁷

The defence may apply even if the act or omission causing the death of the deceased (the *response*) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response.⁸

It is not for a defendant to prove that this partial defence applies, rather the onus is on the prosecution to exclude the defence. The defence is excluded if the prosecution satisfies you beyond reasonable doubt that:

1. the deceased did not commit acts of serious domestic violence against the defendant in the course of an abusive domestic relationship; or
2. the defendant did not believe it was necessary for the defendant’s preservation from death or grievous bodily harm to do the act or make the omission that caused the death of the deceased; or
3. if the defendant had such a belief, the defendant did not have reasonable grounds for the belief, having regard to the abusive domestic relationship and all the circumstances of the case.

⁴ See s 304B(2)

⁵ See s 304B(3).

⁶ See s 304B(1)(b).

⁷ See s 304B(6).

⁸ See s 304B(4).

If you come to consider this defence, because you provisionally reach the view that the defendant unlawfully killed the deceased such that the defendant would be guilty of murder, but the prosecution does not satisfy you beyond reasonable doubt that this defence is excluded, then the defendant would be not guilty of murder, but guilty of manslaughter.