Battered woman syndrome

The concept of 'battered woman syndrome' (BWS) was first raised in Australian case law in the early 1990s. Throughout the 1990s BWS was discussed in many subsequent cases and academic articles. This aspect of the project maps cases, academic analysis and law reform to consider the role of feminist academic critique on the development and disappearance of 'battered woman syndrome' in judicial decision-making. We provide a summary of relevant cases and consider feminist academic commentary of the cases where available, noting whether this commentary is neutral, positive or negative. Since about 2000 there has been significant law reform and we also identify relevant law reform activity. Where the information is available we have also identified women judicial officers in red text. This text is up to date to September 2014.

1979 - 1989

In the 1970s and 1980s family violence began to be considered as a social phenomenon and many feminist activists in Australia and overseas engaged in efforts to ensure its legal recognition. By the end of the 1980s most Australian states had introduced civil domestic violence protection order legislation and family violence was on the agenda. During this period Australian courts did not consider evidence of Battered Woman Syndrome; however they began to hear expert evidence, usually from psychiatrists and psychologists, about how women were affected by years of domestic abuse and how this information may be relevant in understanding the operation of defences and excuses, especially in homicide cases.

- ***R v Whiting*** (unreported 27 September 1979)
  NSW Court of Criminal Appeal
  Homicide, sentence mitigation

  Summary:

  Maxwell J considered the case of *R v Whiting* in his judgment in *R v Bogunovich* (1985) 16 A Crim R 456, 46-461, he quoted directly from *R v Whiting*:

  " 'The circumstances inevitably attract a very considerable degree of sympathy towards the appellant but she has taken a human life and this is one of the most dreadful crimes known to the law. Whilst one can understand the circumstances and the trauma which led up to her committing this crime, it would nevertheless be a failure on the part of the criminal law to take too lenient a view of the matter. The learned sentencing judge quite understandably found himself bound to mark the seriousness of the crime of taking a human life. His Honour was properly concerned to ensure that there could be no impression gained from what had taken place that matrimonial

discord, even extreme matrimonial discord such as one sees in this case can ever be an excuse for the victimised party to take the life of the aggressor. It has always been the policy of the criminal law to emphasise that a victimised person cannot be permitted, even in such circumstances as the present, to take the law into his or her own hands by killing the aggressor ... It is necessary to ensure that there be an adequate element of deterrence for the community at large against crimes such as the present.'"

- ***R v R*** (1981) 28 SASR 321
  South Australian Supreme Court: King CJ, Jacobs, Zelling JJ.
  Homicide, provocation.

  Summary:

  From Tarrant, S 1990 at 592:
  'In *R*, a woman had been the victim of serious domestic violence throughout a twenty-five year marriage. Several days before she killed her husband she discovered that he had been committing incest for many years with their daughters. On the night of the killing he had not been physically violent towards his wife but when in bed had put his arm across her telling her he loved her and that they would from now on be 'one big happy family'. It was this conduct and these words which constituted the provocative incident. R killed her husband about half an hour later.' (Tarrant 1990, p.592)

  Feminist Commentary:

  Neutral

  "There is a further effect of the model of provocation remaining that of immediate response ... The evidence of previous violence functions in law as background information, necessary to interpret a loss of control which may otherwise be unequivocally unreasonable (in the *R* case: he told her he loved her so she killed him with an axe). To raise provocation, R was obliged to present herself as having 'snapped' because her husband spoke those words. Past history of victimisation had *no direct independent meaning.***"** (Tarrant 1990, p.594)

  "This decision has ameliorated considerably the difficulties faced by women offenders who respond to a history of domestic violence and undoubtedly accounts for the increased use of provocation by women noted earlier. However, the primary model for the defence has not changed. A provocative incident must induce an immediate response. This means that where there is no perceivable provocative incident the defence will be precluded. Or where a woman has, in fact, been provoked by a history of violence, her defence counsel may select an incident strategically in order to rely on the defence." (Tarrant 1990, p.592)

Positive

"The scope of provocation was extended however in the case of *R* in 1981. As a result of that case a jury is now permitted to consider the immediate provocative incident in the light of previous conduct by the victim, including domestic violence. That is, the provocative incident may be the 'straw that breaks the camel's back'." (Tarrant 1990, p.592)

"Fortunately, there exists a trend amongst Australian courts to acknowledge this common response pattern of women who kill, especially in the context of domestic violence settings. Thus, in *R v R* the South Australian Court of Criminal Appeal held that the defence of provocation was open to the female defendant even though the victim had been asleep for over twenty minutes before he was killed." (Yeo 1996, p.313)

- ***R v Hill*** (1981) 3 A Crim R 397
  NSW Court of Criminal Appeal: Street CJ, Nagle, Lee JJ.
  Manslaughter, provocation.

  Summary:

  The appellant was convicted of the murder of her de facto husband by shooting. She appealed her conviction. Evidence at the trial showed the shooting to have been a crisis – a sudden and final stage in which the provocative and intolerable conduct of the deceased towards the appellant over lengthy period of time had brought her to breaking point. On the day of the shooting the deceased had threatened to 'bash' the appellant before leaving to go drinking at the pub. The appellant found and loaded the gun whilst he was out. She then shot him (4 shots fired) when he returned after he started to abuse her again.

  The case was defended at the trial primarily upon the ground of self-defence and provocation was not relied upon although it was put before the jury by the trial judge. On appeal, it was argued that the conviction of murder should be found to be unsafe and unsatisfactory in light of the history of violence by the deceased towards the appellant.

  The Court of Appeal held:

  1. In light of the undisputed history of the relationship between the appellant and the deceased and the undisputed evidence of the events on the day in question, the conclusion of the jury necessarily attracts critical appraisal by this Court in the exercise of its supervisory jurisdiction to intervene in circumstances in which it considers that a miscarriage of justice has occurred.

2. The unsafe and unsatisfactory overtones of the verdict are manifest in the strong case of provocation which can be perceived from the objective statement of the undisputed facts.
3. The verdict was unsafe and unsatisfactory and the jurisdiction of the court in a supervisory sense to ensure that miscarriages of justice resulting from verdicts that can fairly be regarded as unsafe and unsatisfactory should be exercised in this case. The verdict of guilty of murder quashed and a verdict of guilty of manslaughter substituted.
4. It is clear that provocation, using that word either in its ordinary sense or in the technical and legal sense, on any view was a substantial element in the crime committed and the jury's attention was so closely directed to the matter of self-defence that the aspect of provocation may have not received the attention it deserved – the cogent evidence of provocation may have not been given its proper place by the jury in arriving at its verdict. If that may have happened, then that is a real ground for uneasiness and it would be unsafe and dangerous to allow this conviction to stand.

Conviction for murder substituted by conviction for manslaughter and sentenced to 4.5 years and 1 year non-parole period.

Street CJ commentary

"This was a case in which, from the human point of view, the appellant can receive a significant measure of understanding in having ultimately lost her self-control after a prolonged period of intense emotional strain. It is difficult to accept that she should be regarded as a murderess to be called upon in consequence to suffer the mandatory sentence of life imprisonment." (p.401)

Lee J commentary

"[t]he verdict of murder leaves me with an uneasy feeling that the cogent evidence of provocation, which appeared from the facts, may not have been given its proper place by the jury in arriving at that verdict." (p.402)

Feminist Commentary:

Neutral

"As Wilson J explained, women who kill their abusers frequently do not do so in circumstances which fit into the "paradigmatic" case. Many women take action to protect themselves in advance by a surprise attack, arm themselves before being attacked [footnote referring to *R v Hill* here], or kill during a lull in violence in the course of a battering incident. A woman may kill her abuser as he turns to leave a room, while he sleeps, or by poisoning him. The traditional interpretation of what is "imminent" is suited to one-off encounters between people of roughly equivalent size and strength. Some adjustment is needed if

this requirement is to be an appropriate standard to assess the conduct of battered women." (Robertson 1997-2000, p.279)

- ***R v Bradshaw*** (unreported, 16 April 1985)
  Western Australian Supreme Court
  Murder, provocation

  Summary:

  "In that case the assault and the argument relied on as the provocative incident had ended before the woman killed her de-facto husband. Evidence of previous violence against her was admitted including repeated beatings which resulted in permanent scarring and threats of death which she had reported to the police. Part of the prosecution case was that the woman was 'merely angry', but not out of control and that she had seized upon an opportunity to vent the anger she felt as a result of treatment she had suffered at the hands of her spouse in the past. That is, she had not been provoked by the relevant assault, but was acting in 'revenge'. The woman was convicted of murder." (Tarrant 1990.p.593).

- ***R v Bogunovich*** (1985) 16 A Crim R 456; Supreme Court of New South Wales
  NSW Supreme Court: Maxwell J
  Manslaughter, sentence mitigation.

  Summary:

  The accused pleaded guilty to the manslaughter of her husband after she was charged with his murder. The Crown accepted this plea on the basis that there was sufficient evidence of provocation on the part of the deceased towards the prisoner to justify a reduction from a charge of murder to a charge of manslaughter. The accused and her sons had been subject to extreme domestic violence by her husband over a period of 13 years. She had tried to leave him but was not able to. She thought she would be killed by him at any time. On the night of his death she went to pick him up from a club where he had been drinking. In the car park the deceased physically assaulted her, she went back to the car and grabbed a knife and stabbed him. The accused then drove herself to the police station to tell them what had happened. A psychiatrist was called as an expert to give evidence of their relationship for the Court. Maxwell J found "I am unable to find any valid reason for the imposition of a custodial sentence. I am quite satisfied that the deceased's persistent ill-treatment and abuse of the prisoner, and her knowledge of his assaults upon his sons, were such as to render this a special case in which a non-custodial penalty should be imposed" (p.462)

  The Supreme Court held: Non-custodial sentence. $5,000 and good behaviour for 4 years.

Maxwell J commentary

"However, that Mrs Bogunovich could perceive the conflict with her husband at that time as an actual major threat on her life is highly probable. It is very reasonable to state that she was motivated to persist in continuing somehow to try and hold on to life, something that she had done in spite of a severe level of chronic psychological stress. What she was very probably doing when, according to reports she stabbed her husband, was preserving her own life. It is not all that relevant as to what her husband might have intended to do to her at the time. Her mind was influenced by her severely depressed state." (p.460)

- ***R v Roberts*** (unreported, 31 August 1989)
  NSW Supreme Court: Hunt J
  Manslaughter, provocation.

  Summary:

  The accused had been indicted on murder but pleaded guilty to manslaughter. The Crown accepted this plea because there had been provocation so as to reduce the crime to manslaughter.

  The accused had been in a relationship with the deceased since she was 15 and they had later married. They had three children together. The accused had been subject to severe domestic violence during this time, and the deceased had even been charged with her assault from a previous occasion. On the day the deceased died he was at his cousin's house. He had left the accused as he had been having an affair with another woman. But their relationship still continued. The deceased confronted him and she was severely assaulted. She drove home and got his gun and returned and shot him once in the chest.

  Hunt J accepted the evidence of their relationship but said "It has been made very clear by the courts that the taking of a human life, even within the context of domestic violence, will not be viewed with leniency. Not even extreme domestic discord can ever be an excuse for the victim to take the law into her own hands and to extinguish the life of the aggressor." (at para 9)

  However, Hunt J went on to note the circumstances surrounding the case and the fact that deterrence wasn't a big consideration in this case.

  The Supreme Court held: Non-custodial sentence. $1,000 and 2 years good behaviour.

  Hunt J commentary

  A psychiatric report from Dr Milton and "an extraordinarily detailed, well researched and very helpful report from Ms Debra Kilby, a social worker with the Legal Aid Commission" were submitted to the Court (p.1).

1990 - 1999

Throughout the 1990s all Australian state supreme courts admitted evidence of Battered Woman Syndrome. Judges regularly admitted psychologists' and psychiatrists' evidence of Battered Woman Syndrome. In many cases the learned helplessness of battered women, or similar inadequacies and inabilities, were emphasised. This evidence purported to assist juries and judges to understand the effects of battering and, in particular, why battered women did not leave their abuser. Expert witnesses added their own gloss to Battered Woman Syndrome over time making it difficult to pin down a clear and consistent approach to Battered Woman Syndrome in Australian case law. In 1998 the High Court identified a number of inadequacies with Battered Woman Syndrome evidence.

- ***R v Runjanjic and R v Kontinnen*** (1991) 56 SASR 114
  South Australian Court of Appeal: King CJ, Legoe and Bollen JJ
  False imprisonment, grievous bodily harm, duress.

  The first Australian case to accept expert evidence of BWS.

  Summary:

  This case was an appeal against conviction. The appellants, both women, were found guilty on charges of false imprisonment and causing grievous bodily harm with intent. The (female) victim was lured to the home of one of the appellants which the latter shared with a male associate (Hill). Over a period of days the victim was detained against her will and subjected to physical abuse. Both appellants were involved in luring the victim to the home abovementioned and there was evidence that both were party to the detaining and abuse of the victim. The evidence before the jury indicated a history of dominance and habitual violence by Hill towards both appellants. The appellants sought to call expert evidence on the "battered woman syndrome". The trial judge ruled the evidence inadmissible by reason of the objective component of the test of duress. The appellants appealed against conviction on two grounds: (i) that the jury's verdict was unsafe; and (ii) that the trial judge's ruling on the admissibility of evidence relating to the "battered woman syndrome" was wrong.

  The Supreme Court held on appeal:

  1. The appeal be allowed, the convictions set aside and a new trial ordered.
  2. The ground assigned for the exclusion of the evidence relating to the "battered woman syndrome" was erroneous. The syndrome was properly the subject of expert testimony, subject to satisfactory proof that it is regarded by experts competent in the field as an accepted field of scientific knowledge.
  3. Evidence relating to the "battered woman syndrome" was relevant to the issue of duress.

Analysis of the principles regarding the admissibility of expert evidence of *Transport Publishing Co Pty Ltd v Literature Board of Review* (1956) 99 CLR 111 applied.

King CJ commentary

“There is now a considerable body of literature on this topic and a perusal of that literature enables one to flesh out from Mr Borick's *[Counsel for Appellants]* bare summary the sort of evidence which Mr Fugler *[Psychologist giving evidence of BWS at trial]* might have been expected to give if he had been permitted to do so. I propose to refer to the features of the "battered woman syndrome" as it is described in the literature. As I have said, the body of literature on the topic, particularly in the United States of America, is considerable. I have selected for citation from the mass of available material articles which I have found to be most useful because they relate features of the syndrome to legal issues which arise in criminal trials.” (at p.118)

“I gather from the literature that the idea of the battered woman syndrome was pioneered by Dr Lenore Walker in a publication entitled *The Battered Woman* (1979). She is the author of *The Battered Woman Syndrome* (1984). It now appears to be a recognised facet of clinical psychology in the United States and Canada. It emerges from the literature that methodical studies by trained psychologists of situations of domestic violence have revealed typical patterns of behaviour on the part of the male battered and the female victim, and typical responses on the part of the female victim. It has been revealed, so it appears, that women who have suffered habitual domestic violence are typically affected psychologically to the extent that their reactions and responses differ from those which might be expected by persons who lack the advantage of an acquaintance with the result of those studies.” (at p.118)

“A perusal of the literature to which I have referred, however, indicates a wide acceptance of the syndrome as having a valid existence. The attitudes of various courts in the United States are discussed in a number of the articles cited at 122. Two citations will suffice. In*People (New York) v Torres* 488 NYS 2d 358 (1985), the trial judge, Bernstein J, admitted expert evidence of the battered woman syndrome… Court of Appeals of New Mexico in*State (New Mexico) v Gallegos* 719 P 2d 1268 1986)…The same view has been taken in Canada: see *Lavallee v The Queen* (1990) 55 CCC (3d) 97, a case to which I shall return later. I am not aware of any case on the subject in Australia or in any other common law country.” (at p.119)

“The proffered evidence is …designed to assist the court in assessing whether women of reasonable firmness would succumb to the pressure to participate in the offences. It also serves to explain why even a woman of reasonable firmness would not escape the situation rather than participate in criminal activity. As such it is relevant.” (at p.120)

“I have considered anxiously whether the situation of the habitually battered woman is so special and so outside ordinary experience that the knowledge of experts should be made available to courts and juries called upon to judge behaviour in such situations. In the end, I have been impressed by what I have read of the insights which have been gained by special study of the subject, insights which I am sure would not be shared or shared fully by ordinary jurors. It seems to me that a just judgment of the actions of women in those situations requires that the court or jury have the benefit of the insights which have been gained. I am fortified in the conclusion to which I have come not only by the trend of authority in the United States of America but by the decision of the Supreme Court of Canada in *Lavallee* (supra).” (p.121)

Unusually King CJ cited academic literature in the case:

- "'The Psychologist as Expert Witness: Science in the Courtroom" (1979) 38 *Maryland Law Review 539.*
- Baumann, M A "Expert Testimony on the Battered Wife Syndrome" (1983) 27 *St Louis University Law Joumal 407.*
- Brodsky, D J "Educating Juries: The Battered Woman Defence in Canada" (1987) 25 No 3 *Alberta Law Review* 461.
- Cipparone, R C "'The Defence of Battered Women Who Kill" (1987) 135 *University of Pennsylvania Law Review 427.*
- Creach, D L "Partially Determined Imperfect Self Defence: The Battered Wife Kills and Tells Why" (1982) 34 *Stanford Law Review* 615 esp at 618.
- Dahl, P R "Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials" (1985) 73 *California Law Review* 411 esp at 420 et seq.
- Diamond, S "Criminal Law: The Justification of Self Defence" (1987) *Annual Survey of American Law* 673 esp at 690 et seq.
- Kaas, C W "'The Admissibility of Expert Testimony on the Battered Woman Syndrome in support of a Claim of Self-Defence" (1982) 15 *Connecticut Law Review* 121 esp at 130 et seq.
- Lipsman, J A "Criminal Law: Domestic Violence" (1985) *Annual Survey of American Law* 839 esp at 847 et seq.
- McKinnie, K "'The Use of Expert Testimony in the Defence of Battered Women" (1981) 52 *University of Colorado Law Review 587.*
- Schneider, E M "Equal Rights to Trial for Women: Sex Bias in the Law of SelfDefence" (1980) 15 *Harvard Civil Rights - Civil LibeT1ies Law Review* 623 esp at 636 et seq.
- Thar, A E "'The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis" (1982) 77 No 3 *Northwestern University Law Review 348.*
- Walker, L E ; R K Thyfault and A Browne, "Beyond the Juror's Ken: Battered Women" (1982) 7 No 1 *Vermont Law Review* 1.

- Waltrip, T B "Evidence - The Battered Woman Syndrome in Illinois: Admissibility of Expert Testimony" (1986) 11 *Southern Illinois University Law Joumal 137.*

Bollen J commentary

“[A]s a general proposition I think we may now say that the ‘battered wife Syndrome’ has become ‘an organised branch of knowledge in which’ a person may qualify as an expert: see *Clark v Ryan* (1960) 103 CLR 486 at 501-502, per Menzies J; see too per Dixon CJ (at 491).” (p.124)

“In the present case I think it probable that had the learned trial judge had the benefit of the writings which the researches of the Chief Justice revealed, he would not have ruled as he did. With all respect I think it now turns out that his ruling was premature. We cannot say at present whether the right things will be proved to enable the expert to testify at the retrial. But on proof of his expertise and capacity to offer opinions it may well, I think, turn out to be admissible. There is a caveat. A number of the American texts refer to the ‘danger’ seen in the possibility that the value of the expert testimony may be outweighed by countervailing considerations said to be prejudicial to the accused person. It appears that expert evidence has been rejected by some courts in the United States of America on that score. I think this well answered, and answered well for South Australia, by an article by M A Baumann, "Expert Testimony on the Battered Wife Syndrome" (1983) 27 *St Louis University Law Journal* 407 …” (at pp.124-125).

Feminist Commentary:

Neutral

The first Australian case to accept expert evidence of BWS. (Graycar and Morgan 2002, p.438; Barnett 1998, p.274)

“Another factor which may have contributed to the manner in which Australian law and practice first developed was the need in *Runjanjic and Kontinnen* to justify the introduction of expert evidence on the basis that it went beyond the ‘behaviour of normal people and of situations which are within the experience of ordinary persons or are capable of being understood by them’. What this meant, of course, is that it was originally easier to justify the admission of psychological testimony if it was directed at explaining a ‘syndrome’ or abnormal mental state.” (Stubbs and Tolmie 1999, p.723)

This case used in an example where Seuffert is discussing: “The assumption that it is contradictory for women to love men who abuse them physically, psychologically and sexually is sometimes used in cross-examination of women who have been in abusive relationships to suggest that they are lying about the

abuse, or to impinge on their credibility as witnesses." (Seuffert 1999, p.211-212)

Positive

"Until mid-1991 there is no record of the mention of BWS in Australian courts. Then, in*Runjanjic and Kontinnen v The Queen* an appeal judge ruled that the defendants should be retried on the charges of false imprisonment and causing grievous bodily harm since the trial judge had not permitted the admission of expert evidence on BWS. The defence was trying to show that long-term battering had affected the ability of the defendants,*Runjanjic and Kontinnen*, to act freely; that they had been under duress. The Crown Prosecutor's address to the jury in that trial illustrates how the Crown can imply, assert and rebut the concept of duress by using an objective standard which excludes BWS in the absence of expert testimony to the contrary." (Easteal 1992, p.222)

"The authors are not aware of any reported judgment in which self-defence has been successfully argued prior to the recent South Australian and New South Wales [referring also to *R v Hickey*] decisions introducing and relying on battered woman syndrome." (Sheehy et al 1992, p.371)

"The appeal court dealt with whether expert evidence concerning BWS should be admitted, and ruled that BWS may be relevant in order to assist the court to understand [it.]" (Stubbs and Tolmie 1999, p.722)

Negative

"However, it is probably fair to say that in the majority of Australian cases in which BWS has been introduced it appears to have been narrowly construed and directed primarily towards explaining the psychology of the particular accused or of battered women in general." Authors are also referring to the cases of *Bradley*, *Tassone, Hickey*, *Runjanjic*and *Kontinnen*, *Raby*. (Stubbs and Tolmie 1999, p.727)

"As a consequence both cases [referring to *Kontinnen* as well] mention the actual circumstances of the violence survived by the women concerned but neither do more than partially locate that violence within the broader set of circumstances in which it took place. Furthermore, those surrounding circumstances that do receive mention are stripped of 'objective reality' by the focus places on the offender's psychology. The suggestion is that these circumstances form a part of the 'subjective' impressions of a mind temporarily affected by an abnormal experience of violence." (Stubbs and Tolmie 1994, pp.203-204).

- ***R v Kontinnen*** (Unreported 27 March 1992)
  South Australian Supreme Court: Legoe J
  Murder, self-defence, provocation.

Summary:

Further to the above case, this is the case where Kontinnen killed Hill. Kontinnen was charged with murder and pleaded self-defence. Legoe J directed the jury that they should consider provocation if they reject self-defence.

On the night of Hill's death, the accused said that because she recalls the smell of the gunshot powder and recalls seeing Hill in bed, lying face down on the bed naked and that she recalls certain other facts, she has come to the conclusion that she must have fired the shot. In the house at the time were Runjanjic and a child (Archie). Kontinnen gave evidence that the accused said to her in effect that he was going to sleep and that when he woke up all three of them, Erika, Olga and Archie would be dead.

Legoe J went into the expert evidence given on BWS and stated "Both of the experts agree that the syndrome that we are talking about in this case is an attitude of mind. Therefore, it is not a matter of the psychiatrist or the psychologist diagnosing any psychological or psychiatric illness. It is it matter of assessing - I think, is the proper way to look at it in this case - the material which the psychologist or the psychiatrist relies upon which may include the experience of that expert." (p.3 at para 9)

"The battered wife syndrome, as such, is not the defence. If you are looking for a defence, do not just look at the battered wife syndrome. It is part of the history of what the defence put into the whole case, ultimately, of course, to point out to you and to argue, as they have done, that the Crown have failed to prove its case beyond reasonable doubt because, if I may put it very simply, the situation that Erika was in the early hours of that Monday morning, was a cumulated set of circumstances, a cumulated attitude of mind, which had been built up in the way in which she had been treated by Jan Hill and the way in which Olga had been treated, or the two women had been treated, in relation to when they were there and when they were not there and all of those other matters." (p.13 at para 14)

The Supreme Court held: Not guilty of any charge.

Legoe J Commentary:

Legoe J directed that the jury must consider 'reasonable person' as a female subject, "So a reasonable person is somebody having the powers of control that would be expected of an ordinary person of that sex, the female sex, and of her age, but in other respects sharing such of her characteristics as you think would affect the gravity of the provocation which was directed towards her and indeed in this case towards the other female Olga and, of course, you will have to assess that yourselves because that is very much a jury question. But that is

the legal framework in which provocation could be said to arise and is an aspect of this case which you will have to consider." (p.10, at para 31)

Legoe J also went through BWS in detail when summing up to the jury - "I have read you quite a bit of Mr Fugler's evidence-in-chief because I think that displays the aspects of the defence case which the defence say will lead you, ladies and gentlemen, to at least entertain a reasonable doubt, bearing in mind the defence do not have to prove anything, you will entertain a reasonable doubt that the accused, if you are satisfied beyond reasonable doubt that she shot the deceased with the intention of killing him, was in an attitude of mind, at least, where this long history of battering had so brought her down, if I may use a common expression, both mentally and physically, that she was in what Mr Fugler described as a Catch 22 ... that she believed on reasonable grounds that it was necessary for her to do in self-defence what she did, or alternatively that she was provoked to do what she did in the sense that I outlined to you earlier." (p.15 at para 50)

Feminist Commentary:

Neutral

"Two clinical psychologists examined the defendant pre-trial and testified about BWS and the effects of the syndrome on Erika Kontinnen... Kontinnen was acquitted. The jury, through expert evidence, apparently became convinced that, for her, the danger was imminent and that the homicide was committed in self-defence. Whether this outcome was the result of BWS testimony or the extreme nature of the violence which the defendant had endured, cannot be assessed except though time and the continued use of BWS in the courts." (Easteal 1992, p.223)

"Whilst there are now examples of battered women who have killed in the context of domestic violence successfully raising self-defence [refers to *Kontinnen* and *Hickey* here] it is still the case that there are many instances of women who seem to fall within the substance of self-defence either being convicted of manslaughter on the basis of provocation or plea bargaining a manslaughter charge." (Stubbs and Tolmie 1998, p.74)

Negative

"A focus on the battered woman syndrome and Ms Kontinnen's psychology is unfortunate in the context when the lack of available protection and support for her to leave the violent relationship is evident." (Sheehy et al 1992, p.385)

- ***Webb v R***(unreported, 19 June 1992)
  South Australian Court of Appeal: White ACJ, Cox J, Mohr J
  Burglary.

This was an appeal by a defendant against her conviction on a charge of breaking, entering and stealing. There were four charges that went before the jury in a trial that was completed within two sitting days. She appealed the inadequacy of the direction of the trial judge on the issue of duress.

She told the jury of the manner of her association with Cahill and the domestic footing upon which they lived, and her case was based on the battered wife syndrome, “as it has sometimes, and particularly recently, been called”. She said that she was acting under Cahill's influence and domination, and that is why she participated in the two breaking offences. She called as a witness Mr Fugler, the forensic psychologist, whom she had consulted on at least two occasions and who supported her case by explaining to the jury what the battered wife syndrome is all about, and how it can lead to the subject being dominated by the offending partner.

The Court of appeal held: The trial Judge’s directions were adequate. Appeal dismissed.

- ***R v Stephenson*** (Unreported, August 1992)
  Queensland Supreme Court:
  Murder, self-defence.

  “Dagmar Stephenson was acquitted of murder on the basis of self-defence. The solicitor instructing in her case was the co-ordinator of the Brisbane Women’s Legal Service and chairperson of the Queensland Domestic Violence Council. The defence team chose not to tender evidence of the battered woman syndrome.” (from Stubbs and Tolmie 1994, p.223)

  Feminist commentary:

  Positive

  “The authors are now aware of three Australian cases in which self- defence has been successfully run by women who have been the target of domestic violence without the use of supporting BWS evidence. Such outcomes may reflect a growing awareness by the judiciary and the community of the incidence and nature of domestic violence.” Authors are referring to *Lock*, *Stephenson*, and *Stjernqvist*. (Stubbs and Tolmie 1999, pp.739)

- ***R v Hickey*** (unreported, 14 April 1992)
  NSW Supreme Court: Slattery AJ
  Murder, self-defence, Indigenous.

  “Hickey was acquitted of the murder of her ex de facto, Priestley. Evidence was presented of a long history of violence by the deceased against the accused and also against their children. Hickey had left the relationship three weeks before the killing and had obtained an apprehended violence order. The

deceased had ignored the order, allegedly tearing it up in front of her. On the night of the killing Hickey had agreed to meet with her ex de facto to allow him to see the children. He tried to prevent her from taking the children, threw her on the bed and attempted to strangle her. After he had stopped his attack and sat on the bed, she stabbed him with a knife. Expert evidence concerning the battered woman syndrome was admitted at Hickey's trial without question, and with no objection from the Crown." (Sheehy et al 1992, p.383)

Feminist commentary

Neutral

"Hickey was the third Australian case, and the first in the state of New South Wales, to accept evidence of the battered woman syndrome." (Stubbs and Tolmie 1995, pp. 125)

Positive

"The circumstances of this homicide were more identifiable as self-defence in the traditional terms of immediacy. BWS testimony was not needed to redefine immediacy but to explain why she had no other recourse but to kill." (Easteal 1992, p.222)

Negative

"For Australian feminists pondering the consequences of introducing the battered woman syndrome into our criminal courts, Hickey represents the optimum in terms of the result. However, a close analysis of Hickey reveals an important issue, one that is vital to understanding the context in which the defendant acted and yet one that has not been adequately addressed by feminist scholarship concerning the battered woman syndrome: the issue of race and racism. What the synopsis of the facts of Hickey presented above does not mention, and what many feminist responses to battered woman syndrome to date have not read as significant, is that, like the accused in Lavallee, Hickey was an Aboriginal woman... We will argue that the use of the battered woman syndrome worked to reinforce racist and ethnocentric assumptions about the accused, to represent her as inadequate, and to obscure the violence she had suffered." (Stubbs and Tolmie 1995, pp. 125)

"The argument of this case note is that despite the acquittal of Hickey, the evidence of the psychologist reveals the inadequacy of this model for battered women, particularly Aboriginal women and women of ethnic minorities, and the danger of BWS reinforcing inappropriate stereotypes of women." (Burdrikis 1993, p.365)

"First, the fact that Hickey was an Aboriginal woman is crucial to any realistic understanding of the circumstances prompting her defensive behaviour.

Secondly, the expert witness's characterization of Hickey as fitting within the learned helplessness model, although ostensibly silent on race, is heavily laden with racist and ethnocentric assumptions." (Stubbs and Tolmie 1995, pp. 128)

"One reading highlights the justice done in the jury's decision to acquit her, and yet expresses disquiet about the manner in which women who are battered are constructed by the courts. A second, more sobering reading, is that her acquittal comes as a consequence of a racist criminal justice system not valuing the life of an Aboriginal man. The first is a feminist reading, the second a reading informed by anti-racist discourse. Both are probably true, but neither alone attends to the particularity of Hickey's positioning." (Stubbs and Tolmie 1995, pp. 157)

"However, it is probably fair to say that in the majority of Australian cases in which BWS has been introduced it appears to have been narrowly construed and directed primarily towards explaining the psychology of the particular accused or of battered women in general." Authors are referring to the cases of Bradley, Tassone, Hickey,Runjanjic and Kontinnen, Raby. (Stubbs and Tolmie 1999, p.727)

"By using rules of evidence the court is able to control the type of explanations presented in court of domestic violence and the effects it has on women. Allowing evidence of BWS places domestic violence in the realm of science, to be presented to the jury by an "expert" witness. The law appropriates a certain image of domestic violence, shaped by the preconceptions of psychologists and devalues the woman's own experience. Women's crime is often portrayed in medical terms as the product of irrationality. In the case of BWS psychological evidence such as that given in Hickey results in the continuation of the portrayal of women as irrational beings. The psychological evidence in Hickey emphasises the passivity and dependency of Hickey's personality. The psychologist states "that the woman who fits into the[e] category [of BWS] is somebody who has a learned helplessness in a situation and is also passive in a situation". (Burdrikis 1993, p.366)

"The psychologist explains learned helplessness in BWS as a consequence of Hickey's personality, rather than a result of the sustained violence, as contemplated in the work of Lenore Walker. In his evidence he states that Hickey is an immature, dependent person of low intelligence, who would 'only be able to cope with a simplistic lifestyle'. (Burdrikis 1993, p.367)

"The evidence provides limited insight into the dynamics of domestic violence and the reasons why a woman may kill to escape a violent relationship. Stereotypical images of battered women are perpetuated: they make it easy to blame the woman for domestic violence. By focusing on Hickey's personality, attention is diverted from any analysis of the physical conditions under which she lived. While her act was a response to assaults by her spouse, there is little

discussion of Priestley or the dynamics of male violence. The financial situation of the couple is not stated, nor whether poverty may have contributed to conflict in the relationship."(Burdrikis 1993, p.368)

- ***R v Spencer*** (Unreported, 18 December 1992)
  NSW Supreme Court: Matthews J
  Manslaughter, provocation, diminished responsibility.

  Summary:

  The accused's manslaughter conviction for killing her abusive husband was accepted by the prosecution on the basis of the provocation offered by her husband . It was accepted that the victim had taunted and physically abused the accused and that this extended over a long period of time. In sentencing, the judge focussed on the emotional fragility and vulnerable personality as providing explanations for her extreme stress reaction. The judge mentioned the amnesic effect of extreme stress. The sentencing judge considered that the evidence of the 'fragile nature of the prisoner's mental state' was relevant as it raised the possibility of diminished responsibility, 'whether or not the defence ... existed in a legal sense' (at 12)." The judge notes that 'it is a not unusual phenomenon for women, even women without children, to feel trapped in relationships and to lack the will or the capacity to escape from them.' (at 11). She was imprisoned for three years, to be served by way of periodic detention.

  Feminist Commentary:

  Positive

  "While the Court did not use the label 'battered woman syndrome', it accepted expert evidence from a psychologist and a psychiatrist which amounted to the same thing.' (Stubbs and Tolmie 1994, p.202).

- ***R v Kina*** [1993] QCA 480 (29 November 1993) | austlii
  Queensland Court of Appeal: Fitzgerald P, Davies and McPherson JJA
  Murder, provocation, petition for mercy.

  Summary:

  In 1988, after a trial which lasted less than a day the appellant was convicted in the Supreme Court of Queensland of murdering her de facto partner, and was sentenced to imprisonment with hard labour for life. The appellant did not give or call evidence at her trial, and her chance of acquittal depended solely on the possibility that the jury might not be satisfied from the prosecution evidence that she intended to cause death or grievous bodily harm.

  The prosecution case was that, at about 9 o'clock in the morning of the deceased's death, the appellant and the deceased had an argument in the

room which they shared at a house in West End, the appellant ran from the room to the kitchen of the house, obtained a knife, and returned to the bedroom where the deceased had remained. The appellant then knocked a chair which the deceased had picked up out of his hand and stabbed him with the knife, causing the injuries of which he died.

The trial judge ruled that there was insufficient evidence to justify leaving provocation for the consideration of the jury. That decision was subsequently upheld in the Court of Criminal Appeal, which dismissed an appeal by the appellant against her conviction on 23 November 1988.

In May 1993, a petition for a pardon was delivered to the Governor on behalf of the appellant following which, pursuant to section 672A of the *Criminal Code*, the Attorney-General referred "the whole case with respect to the conviction of ... Robyn Bella Kina on the charge of murder to the Court of Appeal to be heard and determined by the said Court".

The Court of Appeal held: miscarriage of justice, appellant's conviction quashed.

Fitzgerald P and Davies JA commentary

"[I]t is not for this Court on this occasion to express an opinion on the elements and characteristics of what has been termed the "battered woman syndrome" or to decide what consequences follow if the appellant was a victim of that syndrome when she killed the deceased. ... it was submitted that self-defence had now emerged as a possible ground of exculpation but was not raised by the material available to the appellant's legal advisers at the time of trial. Conversely, it was contended that, while the circumstances known to the appellant's legal representatives at the time of trial were sufficient, if given in evidence, to require that provocation be left to the jury, the present material does not raise provocation as an issue "because she never had an intention to stab the deceased until she was forced to in order to defend herself ...". However, it was accepted that, on any of the appellant's accounts, "there'd have been a good arguable case of ... lack of necessary intent." Further, it was accepted by the respondent that there is nothing to indicate that the appellant's lawyers at the time of her trial adverted to the significance of what she then said as a basis for raising provocation for the jury." (p.14)

"The force of the respondent's argument based on the changes in the appellant's account of events is diminished if regard is had to the cultural, psychological and personal obstacles to full and frank disclosure by the appellant which have been eliminated or reduced by the passage of time, counselling and an increasing understanding of aboriginal communication difficulties and the "battered woman syndrome" and the problems which are presented in these matters. It is perhaps sufficient to observe that there is no

basis upon which, in the circumstances, this Court could hold that the appellant's evidence must or should be rejected. Each of the experts, for different reasons, expressed opinions favouring the acceptance of her evidence." (at p.14)

"In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of: (i) her aboriginality; (ii) the battered woman syndrome; and (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased. These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice". (at p.15)

Literature cited by Fitzgerald P and Davies JA

- Burt, L 'The Battered Woman Syndrome and the Plea of Self-Defence' (1993)*University of British Columbia Law Review* Vol. 27, Issue 1, 93.

Feminist commentary

Positive

"In *R v Kina* (1993) a battered woman's successful appeal against conviction for murder was based on the fact that poor communication between the appellant and her lawyers had effectively denied her satisfactory legal representation and the capacity to make informed decisions on the basis of proper advice. Battered woman syndrome was one of the factors identified by the majority of the court as having contributed to the poor communication." (McMahon 1999, p.24)

"The *Kina* case also raises the possibility of the review of the sentences or convictions of those women already serving long sentences for killing their violent partners." (Stubbs and Tolmie 1994, p.203)

Neutral

"The clearest example of the distorting effect of poor communication with legal representation is the case of *Kina.*" (Bradfield 1998, p.72)

"It is possible that if the full story had been revealed to her lawyer, self-defence would have been raised at her trial" (Bradfield 1998, p.73)

- ***R v Woolsey*** (Unreported, 19 Aug 1993)
  NSW Supreme Court: Newman J
  Manslaughter and provocation.

Summary

The accused who pleaded guilty to the manslaughter of her husband, John Woolsey. Initially the accused was arraigned for the murder of her husband but the Crown accepted her plea for manslaughter in full satisfaction of the indictment. At the time when the Crown accepted her plea, it did so on the basis that there was sufficient provocation at the relevant time to justify the acceptance of the plea to the lesser but still serious charge.

The deceased was abusive to the accused and her children when drunk. On the night of his death he had been drinking and had assaulted the children. The accused was scared and grabbed a knife just to 'scare him off'. The deceased then assaulted her and she stabbed him. Two psychologists gave evidence of 'chronic domestic violence' and 'battered woman syndrome' which the judge accepted.

However, Newman J found "It follows that this is a feature which weighs very heavily in terms of mitigation of sentence in the instant case. I should add that the facts of the matter do not amount to a situation where I believe that, as the law now stands, the prisoner could have successfully claimed that she acted in self-defence of either herself or her son. (See *Zecevic v Director of Public Prosecutions* (Victoria), (1987) 162 CLR 645, particularly at 661). The importance of the finding of "battered woman syndrome" arises not in the context of the law relating to self-defence, but rather in the context, as I have said, of a powerful mitigating circumstance."

Newman J commentary

In discussing BWS citing the case of *Runjanjic and Kontinnen* he finds that BWS is a "powerful mitigating circumstance." (para 9)

Supreme Court held: 4 years good behaviour bond. No imprisonment ordered.

Feminist commentary

Positive

"Battered woman syndrome evidence was run successfully in mitigation of sentence and the Supreme Court of New South Wales imposed a suspended sentence." (Stubbs and Tolmie 1994, p.201)

"The cases *Gilbert*, *Woolsey* and *Taylor* demonstrate that there is now a significant possibility of a non-custodial or suspended sentence following a verdict of manslaughter." (Stubbs and Tolmie 1994, p.203)

- ***Winnett v Stephenson*** (unreported, 19 May 1993)
  Australian Capital Territory Magistrates Court: Burns SM

Summary

“Shirley Stephenson was accused of seven counts of imposing upon the Commonwealth, contrary to s.29B of the *Crimes Act* 1914 (Cth). It was alleged that she had obtained two unemployment benefits and rent assistance from the Department of Social Security at a time when she was employed (the amount was approximately $45 000). The matter was defended on the basis of duress. The defendant admitted to the acts but gave evidence that throughout the relevant period she was subject to constant threats of death and acts of violence by her (ex) de facto spouse. This violence escalated over time and correlated with her decrease in income. When she obtained employment and wanted to stop receiving the dole, the defendant alleged that her partner abused her and threatened her (with covert references to death) if she did. Although she left the violent relationship in 1989, the batterer followed her and continued to threaten her with death. As a consequence, at his insistence she signed up for the dole in another jurisdiction, in her maiden name. By consent, the matter was dealt with summarily in the ACT Magistrates Court....[The] Defence counsel called the evidence of a criminologist (Patricia Easteal) in order to assist the court in understanding how a woman of 'ordinary firmness of mind' would respond in the experiential context of domestic violence, that is, the objective element of the test for duress.” (Easteal et al 1993, p.139)

Feminist commentary

Positive

“The case of *Winnett v Stephenson*…is noteworthy in a number of respects. Although its potential value as a precedent is limited, it has the potential value for further instructing lawyers and judges about battered women and how the objective test for duress can be redefined for such women. It also illustrates the educative role of publications such as the*Alternative Law Journal* since the solicitor involved, Kate Hughes, read about battered woman syndrome in a 1992 issue and decided to lead it in evidence.” (Easteal et al 1993, p.139)

“The fact that a non-medical expert's evidence was admitted is a precedent in this area and may go some way to allaying the anxieties of those feminists concerned with the medicalising of women's experiences.' Instead of the defendant's individual psychology, Dr Easteal stressed the societal variables and the on-going violence that can contribute to the situational response of battered woman syndrome. A clinical psychologist's evidence was also heard. This related specifically to the defendant whom he testified 'exhibited the indicia of battered woman syndrome': the subjective element of the test for duress.” (Easteal et al 1993, p.140)

“Of particular significance in this decision is that a magistrate learned that reasonable behaviour for a battered woman may not be the same as it is for others: a lesson for the judiciary in understanding that what they, as white middle class males see as reasonable, is limited by their own narrowly defined perceptions. Another breakthrough was the acceptance of non-medical expert evidence about battered woman syndrome. All in all, this was a notable case which hopefully will act as a precedent or as a model in other similar situations. Certainly an essential first step for non-gender based 'justice' is to enable the judiciary to understand the battered woman's experience.” (Easteal et al 1993, p.139)

- ***Scott v SA Police*** (1994) 61 SASR 589
  South Australian Supreme Court: Mullighan J
  Shoplifting

  Summary

  The appellant was charged with the larceny from a supermarket. She pleaded not guilty and, after a trial, was found guilty and convicted of that offence. It was then alleged that she was in breach of a bond into which she entered into in 1992.

  The appellant acknowledged that she was in breach of the bond. On that charge she was sentenced to imprisonment for seven days and on the other charge she was sentenced to imprisonment for fourteen days to be served cumulatively. She appealed against these sentences on the grounds that they were manifestly excessive.

  The accused suffered serious ill health and extensive violence and mental abuse at the hands of her de facto husband. Dr Fugler, a forensic psychologist, expressed the opinion that the appellant had poorly developed coping skills under conditions of stress and her intellectual functioning is within the Lower Average range. According to him there were signs that she suffered the "battered woman's syndrome".

  Mullighan J found, “In my view the learned Magistrate gave too much emphasis to the prevalence of the offence of shoplifting and the need for general deterrence and too little emphasis to the personal circumstances of the appellant. True it is that she has a significant history of prior offending, but the material before the learned Magistrate established a psychological explanation for her conduct of a significant mitigating nature. It seems that the learned Magistrate discounted much of this material and there is no reason why he should have done so.” (p.3, para 6-7)

  The Supreme Court held: suspended sentences and accused to pay the sum of $200.

Feminist commentary

Positive

[BWS] “It has not been confined to homicide but has been introduced in a diverse range of matters including social security fraud, shoplifting, armed robbery, and charges of perverting the course of justice, breaching the *Companies (Tasmania) Code* and dishonestly obtaining financial advantage.” Author referring to *Scott v SA Police* and also*Casotti*, *Weiner*, *Winnett*. (Stubbs and Tolmie 1999, p.720)

- ***R v Singleton*** (1994) 72 A Crim R 117
  NSW Supreme Court: Levine J
  Intent to inflict grievous bodily harm, accessory, duress.

Summary

The accused was charged with intent to inflict grievous bodily harm and with being an accessory to the fact. The accused had acted with a man named Kirby (her abusive partner) to wound another man. The defence proposed calling evidence from a clinical psychologist which it submitted was relevant to the issue of the accused’s duress. The Court considered whether expert evidence of BWS was submissible for duress. It rejected that it could be admitted.

The Supreme Court held:

1. The evidence to be relied on by the defence was of a non-expert nature and was not elevated beyond those matters ordinarily to be considered and decided by a jury.
2. The evidence of the psychologist was distinguishable from that which has been properly been held to be admissible in relation to battered woman syndrome.
3. It may well be that there will be cases where something less than the battered woman syndrome in terms of evidence is relevant and properly the subject of expert testimony, but in the present case neither requirement is satisfied.

In rejecting the submission of BWS the Judge held that if it were to be admitted “there would necessarily follow, in mind, the development of an entirely different policy – that is, criminal responsibility would be judged solely by reference to discrete subjective circumstances and each accused person and thus itself would give rise to the question of who would judge the criminal responsibility in such circumstances...battered woman syndrome has opened the door; it can be opened wider, in the context of this case in something far

less than the recognised recognised condition of battered woman syndrome that the law of duress would admit expert testimony of something less." (p.125)

Literature cited by Levine J

- Sheehy, Stubbs, and Tolmie 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 16 Crim LJ 369.
- Leader-Elliott 'Battered But Not Beaten: Women who Kill in Self Defence' (1993) 15 Sydney Law Review 403.

However, note Levine J's decision to reject BWS evidence.

- ***R v Casotti*** (1994) 74 A Crim R 294
  Victorian Supreme Court: Vincent, Teague , Crockett JJ
  Armed robbery, sentence mitigation.

Summary

This was a case of an appeal against sentence. The applicant was found guilty of one count of armed robbery. Following a plea for leniency she was sentenced to 6 years imprisonment and 5 years non-parole period.

The appellant had been living with her de facto partner, Butterly, who had been convicted of numerous violent offences including manslaughter. The appellant and her partner committed a robbery together. The applicant's defence at trial was one of alleged duress. She said that her participation in the crime arose from a belief that if she did not participate she would suffer death or serious injury at Butterly's hands. It was submitted that the evidence disclosed that the applicant was suffering from "battered wife syndrome". The jury rejected the defence. Nevertheless, much was made in the course of a claim for clemency of what was said to be Butterly's dominion over and violence toward the applicant.

On appeal the appellant submitted:

1. the trial Judge erred in the exercise of his sentencing discretion in taking into account for sentencing purposes a statement made by Bessie Watts (the woman who was robbed).
2. The Judge erred in the exercise of his sentencing discretion in equating the jury's finding of guilt against the appellant with a rejection on their part of the material placed before them concerning aspects of the 'battered woman' syndrome and then sentencing accordingly.
3. The Judge erred in the exercise of his sentencing discretion in that he failed adequately to take into account the nature of the coercive relationship which existed between the appellant and Butterly in determining the appropriate sentence to be given to the appellant.

The Supreme Court held: A 5 year prison term is substituted and a non-parole period of 3 years.

Vincent, Teague, and Crockett JJ commentary

“But, as the applicant's counsel pointed out (more than once), whatever the phrase meant (and expert evidence on the topic from a consultant psychiatrist was called at the trial on behalf of the applicant), it was descriptive of a condition that might be, and probably was, different from a condition or state of mind whereby the applicant believed that she was at risk of imminent death or serious injury were she not to participate in the robbery. We think counsel was correct in the submission he made. It follows that we think that the judge misdirected himself on this aspect of the matter also. However, the error is of no significance.” [referring to this particular ground of appeal] (p.4, at para 7)

“Having regard to all the relevant circumstances we think that a sentence of five years should be passed. Those circumstances we should point out include the express finding of the judge that the applicant (who was 20 years Butterly's junior) had suffered violence at Butterly's hands; that he employed violence in order that he might dominate her and that he was "the brains of the outfit" who was responsible for corrupting the applicant. We would fix a non-parole period of three years.” (p.4, at para 9)

Feminist commentary:

Positive

[BWS] “It has not been confined to homicide but has been introduced in a diverse range of matters including social security fraud, shoplifting, armed robbery, and charges of perverting the course of justice, breaching the *Companies (Tasmania) Code* and dishonestly obtaining financial advantage.” Author also referring to *Casotti*, *Weiner*,*Winnett*. (Stubbs and Tolmie 1999, p.720)

- ***R v Chhay*** (1994) 72 A Crim R 1
  NSW Court of Criminal Appeal: Gleeson CJ, Finlay, Abadee JJ
  Murder, provocation.

  Summary

  This case was an appeal against conviction and sentence. The appellant was convicted of murder.

  The Crown case was that she killed her husband whilst he was asleep. The appellant’s main defence at the trial was self-defence, based on her statement that her husband was attacking her with a knife when she killed him. That defence was rejected. The appellant had been the victim of a long period of

violence physical and verbal abuse by her husband and there had been a violent quarrel, with threats and taunts from the husband, a few hours before he died. The appellant raised provocation at the trial, but the trial judge ruled that it was only available to be considered by the jury if they accepted as a possibility the appellant's story of the knife attack. In issue was whether the trial judge should have left provocation to the jury on a wider basis.

The Court of Appeal held:

1. To establish a defence of provocation, it is essential that at the time of the killing there was a sudden and temporary loss of self-control caused by the provocation. However, there is no requirement that the killing immediately follow upon the provocative act or conduct of the deceased. The loss of self-control can develop after a lengthy period of abuse, and without the necessity for a specific triggering event.
2. The combination of the history of the deceased's conduct towards the appellant, the taunts and threats made to her on the evening of his death and the fact that the appellant was a quiet and submissive person would have entitled the jury to conclude that when the appellant killed the deceased, her actions were as a result of a loss of self-control. The trial judge erred in refusing to put the issue of provocation on this wider basis.

Gleeson CJ commentary

In discussing the history of provocation, Gleeson CJ commented:

"One common criticism was that the law's concession to human frailty was very much, in its practical application, a concession to male frailty. It was noted earlier that the law of provocation originated, not as a coherent statement or principle, but as a multitude of single instances." (p.11)

"The law developed in the days when men frequently wore arms, and fought duels, and when, at least between men, resort to sudden and serious violence in the heat of the moment was common. To extend the metaphor, the law's concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstance of least as worthy of compassion." (p.11)

Gleeson CJ went on to provide the details of the amended s 23 (provocation section) of the *Crimes Act (NSW)* that was amended as a response to the 1982 Task Force on Domestic Violence report to the New South Wales Government. He also provided the introductory statement by the Attorney-General on the amending legislation at the time in*Hansard*. (pp.12-13)

Literature cited by Gleeson CJ

- Nicholson, D and R Sanghvi, ‘Battered Women and Provocation’ (1993) *Criminal Law Review* 728.
- Gleeson CJ cited a passage from this article:

  “According to research and many cases themselves, battered women tend not to react with instant violence to taunts or violence as men tend to do. For one thing, they learn that this is likely to lead to a bigger beating. Instead, they typically respond by suffereing a ‘slow-burn’ of fear, despair and anger which eventually erupts into the killing of their batterer, usually when he is asleep, drunk or otherwise indisposed.” (from p.730 of article [reproduced by Gleeson CJ on p.11 of the case])

Feminist commentary

Positive

“In spite of what appears clear language the question on appeal in *Chhay* was whether the abusive relationship, on its own, could constitute provocation or whether a specific triggering incident - the alleged knife attack by Mr Chhay- was required. The trial judge directed that the triggering incident was required but the Court of Criminal Appeal disagreed. The past abuse itself could be the provocation.” (Tarrant 1996, pp.192)

“[T]he courts have endorsed the concept of the 'slow-burn’ loss of self-control.” Author referring to *Osland* and *Chhay*. (Bradfield 2000, pp.22)

“A unique recognition of the gendered nature of the law on both self-defence and provocation in the Australian context is to be found in the judgment of Gleeson CJ in *Muy Ky Chhay*.” (Stubbs and Tolmie 1999, p.727)

Negative

“In light of the terms of s 23 the question was whether, in this instance, a specific triggering incident was required, but the Court nevertheless took the opportunity to address the gender issues inherent in the case in more detail. This throws up another matter. The fact that the question whether provocation should be put to the jury was addressed as a substantial issue suggests that in jurisdictions where a specific triggering event is not required the focus of analysis in provocation will shift to the objective element of the defence. Was the retaliation within the range that the ordinary person might have expressed? This is akin to the reasonableness requirement inherent in self-defence which, as *Runjanjic* ((1991) 53 A Crim R 362) and *Lavallee* ((1990) 55 CCC (3d) 97) show, itself raises important gender-related issues. Thus, other difficulties for women are foreshadowed in the trial judge's reasons. It would seem that even in the face of an express statutory provision he could not accept that Mrs Chhay's response to the abuse she received over 13 years was within the

range of possible responses that an ordinary person might have expressed." (Tarrant 1996, pp.192)

- ***R v Raby*** (unreported, 22 November 1994, no 94)
  Victorian Supreme Court: Teague J
  Manslaughter, automatism.

  ## Summary

  In this case the accused was found guilty of manslaughter.

  The accused had been married to the deceased for about eleven weeks prior to the time of his death. During this time she was subjected to severe domestic violence. After one particularly bad night of violence, the accused stabbed (9 times) the deceased to death. Teague J commented that "[o]ne element is common to the testimony of all of the witnesses, including the doctors who saw you during October 5 and 6, that is, that you were not acting normally. Among the less graphic descriptions given of you were 'dissociated', 'not with it', 'detached', and 'expressionless'. In my view, that abnormal state, although assessed by Dr Bartholomew as falling short of automatism, is a key factor in my ultimate assessment of how you should be punished." (at p.1)

  The Supreme Court held: Sentenced to 28 months imprisonment with non-parole period of 7 months.

  Teague J commentary

  "I interpret the jury's verdict of manslaughter as reflecting their finding that at the crucial time, you did have the requisite intent to very seriously injure the deceased, but that at that time you had lost your self-control as a result of the final provocative acts and words of the deceased, which must be viewed in the context of his treatment of you over the previous eleven weeks. Further, I take the view that, because of your dissociated state at the time that you lost your self-control, your actions are to be assessed as indicating a relatively low level of moral culpability." (at p.2)

  ## Feminist Commentary

  Positive

  "This case was the first in Victoria where "battered woman syndrome" (BWS) was used to form part of the defence of provocation. The story of Keith Raby's criminal assault and criminal sexual assault of Margaret Raby over the eleven weeks of marriage formed a significant part of the evidence led by the defence in the trial and at sentencing." (McCarthy 1995, p.141)

“McCarthy criticises the emphasis placed on Raby’s psychological state... [h]owever, such a strategy was required by the defence of provocation, which necessitates that the defendant have lost control. It is submitted that, given the circumstances in which the actual killing took place, this defence was the appropriate one.” [see McCarthy’s negative assessment below] (Hubble 1997-1998, p.117)

“It is difficult to see how Raby’s case illustrates any deficiencies in the law of self-defence. Certainly, McCarthy points to no evidence which suggests that Raby’s final use of lethal force was motivated by a fear for her life. While McCarthy laments that women’s experiences are contorted ‘to conform to legal categories constructed upon masculinist premises’ she similarly subverts Raby’s own experiences by ignoring both the circumstances of the killing and the sentiments that Raby expressed about her own husband.” (Hubble 1997-1998, p.117)

Negative

"Pathologised" and "medicalised", Margaret Raby's own version of the events within the marriage, including her experience of those events, were ultimately subordinated to the "psy" disciplines, those discourses of psychology and psychiatry.” (McCarthy 1995, p.144)

“The first of these criticisms concerns the relative invisibility of any kind of condemnation of the acts perpetrated by Keith Raby in the judge's sentencing remarks and in the subsequent media coverage. Through this omission, a critical opportunity was missed to communicate an intolerance of violent men by the law, posthumously in this case.” (McCarthy 1995, p.142)

This case used in an example where Seuffert is discussing: “The assumption that it is contradictory for women to love men who abuse them physically, psychologically and sexually is sometimes used in cross-examination of women who have been in abusive relationships to suggest that they are lying about the abuse, or to impinge on their credibility as witnesses.” (Seuffert 1999, p.211-212)

“However, it is probably fair to say that in the majority of Australian cases in which BWS has been introduced it appears to have been narrowly construed and directed primarily towards explaining the psychology of the particular accused or of battered women in general.” Authors are referring to the cases of *Bradley*, *Tassone, Hickey*,*Runjanjic* and*Kontinnen*, *Raby*. (Stubbs and Tolmie 1999, p.727)

- ***J v The Queen*** (1994) 75 A Crim R 522
  Victorian Court of Appeal: McDonald , Brooking , Southwell JJ
  Incest, indecent assault.

Summary of case

The appellant was convicted of 10 counts of incest and 3 of indecent assault against his daughter.

The appeal was based on the fact the expert at trial, Dr Bartholomew, referred to things he had read, without referring to the detail of those sources, so it was argued there was no support for his opinion. He did refer obliquely to two works by Dr Lenore Walker ("entitled The Battered Woman and The Battered Woman Syndrome.") Another question for the Court on appeal was whether the evidence of BWS should have been admitted at all. Brooking J held that it should not have been admitted because, "It is not clear whether he was saying on the voir dire that there was a syndrome which resembled the battered woman syndrome and which was or might be found in women or children who had been subjected to sexual abuse over a long period of time by a father or other person in a position of trust or whether on the other hand he was saying that the misconduct giving rise to the syndrome was sexual abuse by such a person combined with actual or threatened violence. The evidence of the complainant, and the short summary given to the witness near the beginning of his evidence on the voir dire, mentioned both forms of misconduct." (p.6)

Essentially, the Court found the evidence of BWS in the context of sexual abuse should not have been admitted in this case.

BWS was used to explain the why the victim of sexual abuse did not leave home until she was 29 years of age, despite her father sexually abusing her for over a 21 year period.

The Supreme Court held: overturned conviction of the accused and ordered a new trial.

The trial judge's commentary – via Brooking J

"In charging the jury his Honour summarised the evidence of Dr Bartholomew as follows: There was a well-recognised psychological condition known as the battered woman syndrome; it was part of or closely akin to a post-traumatic stress syndrome; the feature of it was a learned helplessness, a difficulty in breaking away from an assaultive or destructive relationship; if the complainant's narrative was accurate (as to which the witness expressed no opinion), that narrative was consistent with the syndrome; it was not inconsistent with the pathology of the condition for greeting cards to be sent or for the victim to go away on holiday and then return home. Shortly after this his Honour said that in considering the defence argument based on delay in complaining the jury should bear in mind the evidence of Dr Bartholomew that "one of the explanations may well be the battered woman syndrome" and his

evidence that from what he had read of the complainant's testimony there was nothing that would take her outside the battered woman syndrome." (at p.6)

Feminist commentary

"Judicial scepticism concerning the use of the term 'syndrome' is increasing, suggesting that the courts may more rigorously examine syndrome evidence - including battered woman syndrome - in the future. The Victorian Court of criminal Appeal in *J v The Queen*(1994) was critical of the expert testimony of a psychiatrist who gave evidence to the trial court concerning the psychological state of the complainant in a sexual assault case. The psychiatrist testified that the alleged victim demonstrated 'partial [battered woman] syndrome'. The court noted that the expert witness failed to inform the jury about battered woman syndrome and was critical of the extraordinarily wide' definition of a syndrome provided by the expert psychiatrist." (McMahon 1999, pp. 37)

"Some expert witnesses have characterised BWS in such a way as to suggest that battered women in general, or a particular accused, are not reasonable. This has the capacity to undermine claims to self-defence. A classic example of this approach is found in the expert testimony of *J v The Queen*." (Stubbs and Tolmie 1999, p.724)

- ***R v Taylor*** (unreported, 3 Feb 1994)
  South Australian Supreme Court: Olsson J
  Manslaughter, excessive self-defence

Summary

"On the night of the killing, the deceased 'punched, kicked and half strangled' the accused, leaving her 'lying on the floor in a state of considerable distress'. Marion Taylor went upstairs and loaded her husband's rifle. She shot the deceased while he was watching television. There was clear medical evidence that Taylor had been the 'victim of a major assault' on the night of the killing and the trial judge had no doubt about the brutality of the relationship. The cumulative course of conduct, including the violence on the night of the killing, could not form the basis for a plea of self-defence as it was said that the response was 'excessive.' Taylor pleaded guilty to the manslaughter of her husband." (from Bradfield 1998, p.78)

Feminist commentary

Positive

"The cases *Gilbert*, *Woolsey* and *Taylor* demonstrate that there is now a significant possibility of a non-custodial or suspended sentence following a verdict of manslaughter." (Stubbs and Tolmie 1994, p.203)

Negative

"The comments in *R v Taylor* support the view that the use of a weapon in response to a violent assault is generally excessive." (Bradfield 1998, p.78)

- ***R v Tassone*** (unreported, 16 April 1994)
  Northern Territory Supreme Court: Gray J
  Attempted unlawful killing, self-defence

  ### Summary

  "In *Tassone*, the Northern Territory Supreme Court left the question of self-defence to the jury. The accused was charged with attempted unlawful killing. She shot her violent husband (who survived) whilst he was sleeping and after he had assaulted and raped her. Her evidence was that she was terrified of his extreme and unpredictable violence, that she had unsuccessfully tried to leave him on a number of occasions and now believed that there was no escape from him, and that the rape had 'upped the ante' in the sense that it demonstrated a new level of violence towards her. Although her husband had not verbally threatened her before he fell asleep, the general and ongoing threat that he presented to her, which was demonstrated by his past behaviour towards her, was obviously satisfactory to the jury in terms of the Code. She was acquitted on the basis of self-defence." (from Stubbs and Tolmie 1999, p.734)

  Gray J, instructing the jury, said that the expert's evidence on BWS

  "seeks to explain why a woman suffering this kind of ill-treatment feels trapped within such a relationship, suffers a massive loss of self-esteem, is likely to exaggerate in her mind the immediacy of threats of further violence and generally feels overwhelmed by the endless hopeless future she sees before her, until very often a violent reaction occurs." (from Stubbs and Tolmie 1999, p.729)

  ### Feminist commentary

  Neutral

  "In *Tassone*, an expert witness testified that in some cases a woman's perception that she is trapped in an abusive relationship might be reinforced by reality. She said that: '[*S]ometimes ... that sense of no escape[,] of being trapped, helpless in the situation is reinforced by the reality of the situation. They can be caught up with that partner because of children, because of nowhere else to go to, no money to get there, no means of support. Sometimes those are definite realities sometimes they are just the result or perception of the individual because they have such a sense of worthlessness and hopelessness about themselves*.' She also made the point that 'the actual studies show that in a significant number of cases the abuse does end in the

death of the woman' and that it is unusual for women to kill in these circumstances - they are more likely to be victims." (Stubbs and Tolmie 1999, p.729)

Negative

"[A] close reading of the judge's comments throughout the trial transcript indicate that*Tassone* is not a strong authority for the proposition that pre-emptive strikes will satisfy the self-defence test. It is clear from comments made during the trial, although not from his instructions to the jury, that Gray J did not have much confidence that a sleeping aggressor could present a 'threatened assault' against which a woman could be defending herself. He also expressed doubts about the veracity of BWS evidence but felt bound by authority to admit it. In the end he left the question of self-defence to the jury on the basis that a trial judge needed to be extremely careful about withdrawing issues of fact from the jury. He commented that the case before him *'[o]n any conceivable view... [is] on the outer limit of self-defence cases, [it] will be very likely to be beyond the outer limit, but I say my inclination is to leave it [to the jury].'*" (Stubbs and Tolmie 1999, p.734)

"However, it is probably fair to say that in the majority of Australian cases in which BWS has been introduced it appears to have been narrowly construed and directed primarily towards explaining the psychology of the particular accused or of battered women in general." Authors are referring to the cases of *Bradley*, *Tassone, Hickey*,*Runjanjic* and*Kontinnen*, *Raby*. (Stubbs and Tolmie 1999, p.727)

- ***R v Bradley*** (unreported, 14 Dec 1994)
  Victorian Supreme Court: Coldrey J
  Manslaughter, provocation.

  Summary

  In this case the appellant was charged with murder but convicted of manslaughter at trial, for the death of her de facto husband, James Bradley.

  The Court found that the accused fired the fatal shot with the intention of killing Bradley; but that action was partially excused on the basis of provocation. The accused had purchased and hidden cartridges the day before the deceased's death and had told the police that she intended to kill the deceased to end her life of torment. She added, however, that she did not know when, where or how or whether she would have the courage to do so. The jury, by its verdict, rejected the allegations that this was a pre-planned killing.

  Coldrey J commented that "Courts must be careful not to appear to condone vigilante actions or to suggest that self-help in eliminating the problem of the battering male is legally acceptable. However, when considering the sentence

to be imposed in any particular case of manslaughter it is necessary to deal with that case in the light of all the circumstances relevant to the offence and the offender. I have already adverted to some of those circumstances in the present case." (p.4, para 150)

The Supreme Court held: Guilty of manslaughter, 2 years suspended sentence.

Coldrey J commentary

"I have by no means described every episode of your traumatic relationship with the deceased to this time but have covered some of the salient features of it which led Dr Kenneth Byrne and Mr Bernard Healey, both experienced clinical psychologists, and Dr Alan Bartholomew, a highly credentialed forensic psychiatrist, to conclude that you represent a classic case of battered woman syndrome. Among the characteristics of that syndrome is a feeling of helplessness where battered women believe there is nowhere they can go and no-one to turn to for help; and further, where such women become depressed, frightened and anxious." (p.3 at para 147)

"These events cannot be seen in isolation but as representing a culmination of years of abusive and controlling behaviour to which you had been subject. Additionally, you were in a debilitated state and experiencing fear and panic at what you perceived as your own imminent death. You also feared for the safety of your two sons. Consistent with the effect of the battered woman syndrome and your prior experiences, you formed the view that no-one could help you. It was at this point that the dam of self-control that you had built up over the years burst and the shooting occurred" (p.4 at para 149)

Feminist commentary

Positive

"Since 1991 expert evidence concerning BWS has been accepted in all Australian states and territories and in a range of contexts. It has been used extensively in mitigation of sentence [footnote referring to *Bradley* here]." (Stubbs and Tolmie 1999, p.720)

Negative

"The case of *Bradley* illustrates how the courts tend to interpret the killing of a violent partner as raising provocation rather than self-defence." (Bradfield 1998, p.73)

"There were certainly reasonable grounds for the accused believing that the only way to preserve her own life was to kill the deceased. Even without the evidence of battered woman syndrome, there appears to have been ample

evidence to leave the defence of self-defence to the jury for consideration. Why did the trial judge refuse to leave the defence of self-defence for the consideration of the jury in Bradley? The answer lies in the fact that the circumstances of the killing did not conform to the traditional ideas of a killing in self-defence." (Bradfield 1998, p.76)

"The verdict in the case of *Bradley*, as in the case of so many battered women who kill their husbands, was not just and it was not fair." (Bradfield 1998, p.81)

"However, it is probably fair to say that in the majority of Australian cases in which BWS has been introduced it appears to have been narrowly construed and directed primarily towards explaining the psychology of the particular accused or of battered women in general." Authors are referring to the cases of *Bradley*, *Tassone, Hickey*,*Runjanjic* and*Kontinnen*, *Raby*. (Stubbs and Tolmie 1999, p.727)

- ***R v Waugh*** (1994)
  Queensland Supreme Court
  Murder, accident, conditional pardon.

  ### Summary

  This case was a plea for clemency based on the applicant's exposure to domestic violence that came to light after sentencing.

  "The authors are aware of only one successful clemency plea in Australia. Although Eileen Waugh was in an unusual situation in that she was in the onerous position of being caught between jurisdictions, the case does present some hope that battered women who have been incarcerated for killing an abuser in more general circumstances might be able to take advantage of a similar process. Waugh, who had separated from her violent husband, shot him during a meeting she had agreed to in the hope that she could defuse the situation between them. Prior to the meeting he was persistently phoning her house and threatening to kill her and her boarder. At the time she was living in Queensland, having fled there from New South Wales during one of her many attempts to escape the violence. The Director of Public Prosecutions offered to drop murder charges if she agreed to plead guilty to manslaughter. She refused and her defence was conducted on the basis that she had accidentally shot her husband whilst struggling with her boarder who was holding a gun (purchased to protect them from the deceased) and arguing with the deceased. At the beginning of 1989 she was found guilty of murder and given a mandatory life sentence under s 305 of the *Criminal Code Act* 1899 (Qld). Waugh successfully applied to be transferred to New South Wales, where her family and friends resided, to serve her sentence. At the end of 1994 she made an application to the Governor of New South Wales to exercise the Royal prerogative of mercy, grant her a conditional pardon and immediately release her. This was the only

basis on which Waugh could get an early release as the provisions in the *Sentencing Act* 1989 (NSW) allowing for early release did not legally apply to interstate transfer prisoners. The Queensland Corrections Board would not consider her release whilst she remained a prisoner in New South Wales. The main ground for her request was that there was new evidence which had not been made available to the courts in the original trial and appeal. In particular the long history of domestic violence that she suffered was not 'ventilated in any meaningful way in her trial as it did not fall within any of the "defences" available to a charge of murder.' In particular her counsel submitted that:

'*The defences of accident, self-defence and provocation, in their present construction, cannot and do not adequately allow for her experience, and her state of mind at the time, to be taken into account. Until there is a real change in the laws so that the reasons why women kill their husbands may be adequately explored, women like Ms Waugh will continue to be convicted of murder. Ms Waugh's case presents an ideal opportunity to correct a grave injustice and provide that the legal system can and will work in the interests of justice*.'" (from Stubbs and Tolmie 1999, p.743)

- ***R v Rogers*** (Unreported, 11 Dec 1995)
  Victorian Supreme Court: Hampel J
  Manslaughter, mitigation of sentence.

  ### Summary

  The accused pleaded guilty to one count of manslaughter for the death of her de facto partner. The accused had been in a turbulent relationship with the deceased since 1991 which included abuse as well as physical and sexual assault. The accused said that she continued to live with the deceased because she did not have the strength to get away from him, that she was financially dependent upon him and that despite his abuse she still loved him. On the night of his death the accused told the police about the incident itself and demonstrated what had occurred. She said that the deceased became abusive, followed her into the kitchen near the sink area and tried to get hold of her around the neck. She said she just wanted him to keep away and she picked up a knife that was lying on the sink. He kept coming at her, and she stabbed him once in the chest. She said that you did not realise that she had stabbed him and had no intention of stabbing him. She said that she was afraid that he would hurt her as he had done on previous occasions. Hampel J said he did not have to decide whether or not the case was one of BWS (the psychiatrist gave evidence that she was suffering from BWS). Rather, his Honour stated, "[o]n the whole of the material before me I have concluded that despite your own conduct you were nevertheless the victim of repeated verbal and physical abuse."

The Supreme Court held: 4 year sentence, wholly suspended, and alcohol dependence treatment.

Hampel J commentary:

"The turbulent and violent relationship with the deceased in which you both participated but in which I find you to have been the victim of repeated violence in a state of intoxication at the time by both of you and the deceased, and the fact which I accept to a significant degree, your account that you were in fear at the time." (p.3 at para 17)

- ***R v Terare*** (unreported, 20 April 1995)
  NSW Supreme Court: Levine J
  Murder, self-defence, acquittal, judge alone trial.

  ### Summary

  Doris Terare was charged with the murder of Peter Golusin. She stabbed him in the course of a struggle. There was evidence that both parties had been violent. The accused was intoxicated when she stabbed the deceased. A Doctor provided evidence of battered woman syndrome. Justice Levine stated 'I am not persuaded in the overall picture of things that there was no reasonable possibility that the event occurred as the accused said, that she was acting in self-defence' (at 8). The judge accepted that the accused was trying to leave the relationship when the struggle began. She was acquitted.

- ***R v Lyons*** (Unreported, 25 Aug 1995)
  NSW Supreme Court: Dunford J

  ### Summary

  Not available.

  ### Feminist commentary

  Neutral

  "[T]here have been a few recent instances where an expert witness providing testimony concerning BWS has focused primarily on the context in which the accused found herself, rather than her psychology. One example is contained in *R v Lyons* where the expert witness' account focused heavily on the violence and psychology of the perpetrator rather than the accused. Whilst he listed 12 characteristics commonly seen in women with BWS...these latter states of mind are not presented by the expert as pathological but rather reasonable or normal in the circumstances." (Stubbs and Tolmie 1999, pp.728-729)

"The expert also identified 'eight types of behaviour which Amnesty International has described as psychological torture' which can appear in battering relationships. For example, controlling the person's social contact, exhaustion (sleep and food deprivation), manipulating the way the person perceives reality, threatening to kill a person and then their family, humiliation, administering drugs and alcohol, inducing an altered state of consciousness by disturbing a person's ability to think clearly, indulging the person for short periods of time: Transcript of Proceedings, *Lyons* (Supreme Court of New South Wales, Dunford J, commencing 21 August 1995, 25 August 1995) 271." (Stubbs and Tolmie 1999, pp.728-729 footnote 95:)

- ***R v Gadd*** (unreported, 27 March 1995)
  Queensland Supreme Court: Moynihan J
  Murder, self-defence, acquittal.

  The accused was acquitted of murder after stabbing her husband, Leonard Mickelo with a pocket knife. The most likely defence was self-defence. The witnesses testified to a history of family violence.

  Feminist commentary

  Positive

  "One of the most interesting features of this case is that the expert testifying about the material normally understood in terms of BWS was a social worker rather than a psychologist. The social worker had extensive experience working with battered women and amongst many other qualifications, had worked as the coordinator of a women's health centre, a domestic violence resource centre, and a women's refuge, as well as doing counselling or crises intervention work with over 700 women who had experienced domestic violence. She testified about domestic violence generally, including the cycle of violence. She explained the difficulty battered women might have in leaving violent relationships and their tendency to hide the abuse in terms of the violence they experience. She did not testify about the concept of learned helplessness nor any other psychological characteristics of the woman concerned." (Stubbs and Tolmie 1999, p.731)

- ***R v McIntyre*** (Unreported, 15 March 1996)
  NSW Supreme Court: McInerny J
  Manslaughter, provocation.

  Summary

  The accused was charged with the murder of her de facto partner. When indicted, she pleaded not guilty to murder but guilty to manslaughter, which the Crown accepted in full satisfaction of the indictment. The Crown case on provocation was based on the inhumane treatment she received from the

deceased over the time that she lived with him, a period of approximately three and a half years.The accused submitted that prior to her stabbing the deceased, the deceased grabbed her hair at the back of her head. That indicated to her, from previous occasions, that he intended to seriously assault her. She grabbed a knife and stabbed him 8 times.

Despite the horrific outlining of abuse that the accused had suffered, (and psychiatric evidence) McInerny J stated, “I emphasise that whilst it is said by some of the psychologists that this is analogous to a battered woman's syndrome, as I pointed out, this is not a case of a woman with young children who was utterly dependent on the support of her husband. She was free to leave at any time, and action could have been taken against the deceased to stop him harassing her or her family, but for the various reasons she advanced she chose to stay with him.” (p.8 at para 22)

The Supreme Court held: 6 years imprisonment, 2 years non parole period.

- ***R v McEwen*** (unreported, 7 February 1996)
  Western Australian Supreme Court: Walsh J
  Manslaughter, provocation, mitigation of sentence.

  Summary

  Robert McEwen was charged with the murder of Thomas Hodgson, his lover and partner of 14 years. At trial the jury could not reach a unanimous verdict. Prior to the retrial the prosecution accepted a plea of guilty to manslaughter on the basis of provocation. McEwan was sentenced to imprisonment for 5 years. McEwen was 17 years old and Hodgson was 33 years old when the couple met and began an openly homosexual relationship. At the original trial McEwen gave evidence that Hodgson was domineering, that he controlled McEwen’s finances, his social life and that he was fearful of Hodgson. A psychiatrist gave expert evidence of McEwen’s ‘learned helplessness’ at the trial (from Simone, 1997).

  Feminist commentary

  Negative

  ‘The BWS defence distorted more than it explained not only with respect to the particular responses of Robert McEwen to prolonged domestic violence, but more generally, in relation to the nature and context of same sex battering. In this sense, BWS can work to reinforce the rigid, hierarchical and gendered binaries (active/ passive, dominant/submissive, victim/agent) which already inform legal reasoning, and which limit understandings of both heterosexual and gay and lesbian relationships.’ (Simone, 1997, 239).

- ***R v Stjernqvist*** (unreported 18 June 1996)

Queensland Supreme Court: Derrington J
Murder, self-defence.

Summary

“The case involved a ‘non-traditional’ self defence fact situation in which the accused was using pre-emptive force.” (Stubbs and Tolmie 1999, p.739)

Derrington J commentary

“[W]hat emerges is necessarily a sad picture of serious violence – not violence that has caused any great physical harm at any particular time, but violence of such a nature that, you might think, would be virtually intolerable, particularly if one had the view that it was going to be never ending. To live in an atmosphere where there is constant threat of violence, you might think, is a very hard thing and must be very emotionally wearing. And, of course, after a while it becomes a case where not only is there physical violence, but the mere endurance of the threat of violence also becomes a form of psychological violence as well.” ([Derrington J at para 153], in Stubbs and Tolmie 1999, p.740)

“Then you would have to consider whether or not in those circumstances the situation was so intolerable that she could not stay, having regard to his refusal to let her have other women around and that type of thing, which means she had the impossible situation of remaining there in those circumstances, or leaving and then being subject to the threat of being killed by him.” ([Derrington J at para 177], in Stubbs and Tolmie 1999, p.740)

Feminist commentary

Positive

“*Stjernqvist* is an interesting case in which an acquittal was achieved without expert testimony concerning BWS.” (Stubbs and Tolmie 1999, p.739)

“Derrington J delivered a very traditional summing up on the defences of provocation and self defence. However, the judgment also reveals a sophisticated understanding of the phenomenon of domestic violence. Instead of analysing the violence which the accused faced as a series of discrete instances with periods of calm in between, he analysed it in terms of a general overall threat that the accused lived with.” (Stubbs and Tolmie 1999, p.739)

“Derrington J also had a clear grasp of the concept which Mahoney has labelled 'separation assault', assisted perhaps by evidence of the deceased man's repeated threats to track down and kill the accused should she leave him. Derrington J interpreted these threats as a 'continuing assault' in terms of the Queensland *Criminal Code Act* 1899.” (Stubbs and Tolmie 1999, p.740)

"The authors are now aware of three Australian cases in which self- defence has been successfully run by women who have been the target of domestic violence without the use of supporting BWS evidence. Such outcomes may reflect a growing awareness by the judiciary and the community of the incidence and nature of domestic violence." Authors are referring to *Lock*, *Stephenson*, and *Stjernqvist*. (Stubbs and Tolmie 1999, pp.739)

- ***R v Secretary*** (1996) 107 NTLR 1 | austlii
  Northern Territory Court of Criminal Appeal: Martin CJ (dissenting); Angel, Mildren JJ.
  Murder, self-defence.

  Summary

  The appellant pleaded guilty to manslaughter and was convicted for this.

  The accused had been in a de facto relationship with the deceased for 11 years. For the final eight years of the relationship, the deceased had verbally, mentally and physically abused the accused and their children. In 1994, the deceased had repeatedly assaulted the accused and just before falling asleep said words that may have amounted to a threat to kill or cause the accused grievous bodily harm. The accused returned to the bedroom with a gun and killed the deceased. At trial the accused was charged with murder, but because the defence of self-defence had not been allowed to go to the jury, the appellant pleaded guilty to manslaughter.

  At the trial in 1995, the trial judge ruled that the issue of self-defence pursuant to s 28(f) of the *Criminal Code* (NT) should not be left to the jury. On application by the accused pursuant to s 408(1) of the *Criminal Code*, the question of law the subject of this ruling was reserved for consideration by the Court of Criminal Appeal. The trial judge reserved this question for the Court of Appeal: ``Was the trial judge's ruling of 1 December 1995 correct, that self-defence was not open for consideration by the jury in the circumstances of the case?"

  Martin J dissented, holding "In this context the word ``being'', in relation to the assault in respect of which the accused is said to be acting in self-defence, denotes a contemporaneous connection between the assault and the act of self-defence. This notion is reinforced by the need for there to have been in the deceased an actual or apparent present ability to apply force at the time of the threat. The word ``present'' means occurring at this time or now. Neither circumstance existed when the accused shot him to death. "

  Held by the Court of Appeal: Conviction overturned and new trial ordered, and:

  1. To constitute an "assault" pursuant to s 187(b) of the Code, in the case of a threatened application of force, it must be evident from the facts known at the time the threat is made that at the time the threat is to be carried out, the person making the threat will then have the apparent ability to carry out the

threat. In this context the reference in the section to ``present ability'' means an ability, based on the known facts as present at the time of the making of the threat, to effect a purpose at the time the purpose is to be put into effect.

2. An assault is a continuing one so long as the threat remains and the factors relevant to the apparent ability to carry out the threat have not changed. Accordingly, there was no reason why the assault should have been regarded as completed merely because the deceased was temporarily physically unable to carry out his threat.
3. There was no reason the ``assault being defended'' for the purposes of s 28(f) of the Code, ought not to be characterised as a continuing assault constituted by the threatening words uttered by the deceased immediately before he fell asleep, so that it was that assault which was being defended, not a possible attack in the future that may or may not occur.

Angel J commentary

“In my view ss 187(b) and 28(f) comprehend people taking action to defend themselves from a threatened assault, availing themselves of the excuse of ’self-defence’ even if their action is in the nature of a pre-emptive strike. Having regard to the nature of the threat and the relationship between the accused and the deceased, as recounted in the stated case, it was in my view open for the jury to find that an assault was on foot at the time of the shooting (when the deceased was asleep) and that the accused was acting in self-defence. In my view self-defence ought to have been left to the jury.” (p.3 at para 3)

Mildren J commentary

“In the light of those observations and the approach the common law has taken since*Zecevic v Director of Public Prosecutions,* supra, there is no compelling reason why, in a case such as this, the ``assault being defended'' for the purposes of s 28(f) of the Code, ought not to be characterised as a continuing assault constituted by the threatening words uttered by the deceased immediately before he fell asleep so that, in truth, it is *that* assault which is being defended, not a possible assault in the future which may or may not occur, as the court in *Whynot* characterised it.” (p.8 at para 11)

“The focus is not on the accused's status as a battered wife; it is on the questions whether the force was not unnecessary force, and whether the threats which constituted the assault, having regard to the history of the relationship, were such as to cause the accused reasonable apprehension that death or grievous harm will be caused to her in the future if she did not act in the way she did. Relevant to these considerations would be whether there were other lesser reasonable alternatives open, but I agree with the observations of Wilson J at 29-30 in *Lavallee*, that the law of self-defence does not require a

person to retreat from his or her home instead of acting in self-defence." (pp.8-9 at para 11)

Midren J also discussed cases that had raised battered wife syndrome.

Feminist commentary

Negative

"In *Secretary*, the first instance judgment of Kearney J raises an important concern about battered women syndrome evidence in the... contemporary Australian context: that of the under-reporting of cases in which this form of evidence is involved. The issue of battered woman syndrome evidence was not addressed on appeal." (Tolmie 1996, p.online)

"Other expert witnesses have added their own psychological embellishments to the more usual features associated with BWS. For example, the expert in *Secretary* also talked about regressions to a childlike space and childhood abuse experienced by the accused. Such evidence can have the effect of suggesting that the accused killed the deceased in a state of mind that was far from that of the reasonable adult." (Stubbs and Tolmie 1999, p.728)

"One of the features of *Secretary* … is that all of the judges dealt with the matter as though the assault against which the accused was defending herself were the words uttered by the deceased before he went to sleep, rather than the general threat he represented in the relationship with her." (Stubbs and Tolmie 1999, p.735)

- ***1997 South Australia: Law Reform***

  Criminal Law Consolidation Act 1935.

  Key reforms:

  ***Criminal Law Consolidation Act* 1935**

  The amended self-defence provision is below:

  S 15 Self-defence

  …

  (2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if:

  1. the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but

2. the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

Consideration of feminist critique:

The change to this provision was based on the criticisms listed *Gillman* and *Bednikov* that the previous iteration was 'unworkable' and 'ill-worded' and was not based on any feminist criticism of the previous provision.

- ***R v Lock*** (1997) 91 A Crim R 356
  NSW Supreme Court: Hunt CJ
  Murder, intention, self-defence

Summary

The accused was charged with the murder of a man with whom she was living at the time, although no longer in a de facto relationship. The Crown case was that the accused and the deceased had earlier in the evening attended a club together, but that the accused had gone home in a taxi after an argument had taken place between them. When the deceased arrived home shortly afterwards, in the early hours of the morning, there was further argument between them which was heard by the neighbours. Both were substantially intoxicated. The deceased was stabbed once in the stomach severing a major artery and a major vein, and he died within minutes.

The issues raised by the accused were whether the stabbing was her deliberate act, whether the intention with which that act was done made it murder, and self-defence. In support of her case on self-defence, the accused intended to lead extensive evidence as to the nature of the relationship between the parties - in particular, that the deceased had violently assaulted her in their home over many years. The histories given by the accused related to violent assaults upon her by the deceased (mainly in the early hours of the morning) and of suicide attempts by her. In the trial itself, various friends of the accused confirmed seeing the injuries to which she had referred, and her son gave direct evidence of two occasions when it was clear that the deceased had assaulted the accused.

It was also submitted on behalf of the accused that there was no probative value in the evidence concerning the two stabbing incidents in October 1990, and October 1994 (where the accused had stabbed the deceased). The accused herself, however, was proposing to adduce evidence concerning the relationship between them which stretched back even earlier than 1990. Hunt CJ found no reason why the Crown should not be entitled to lead evidence relating to the same period.

But this evidence was also relevant to rebut self-defence, which was opened to the jury by counsel for the accused as *the* significant issue in the case, one which in turn depended strongly upon the general relationship between the accused and the deceased. The 'true' nature of that relationship was therefore of great importance in the case, and the probative value of this evidence upon the accused's state of mind as to the necessity to do this act in self-defence was correspondingly high.

The Supreme Court held: Not guilty of both murder and manslaughter, and that the evidence was relevant as relationship evidence, and there was no reason to exclude it pursuant to s137 *Evidence Act* NSW. S136 and s137 *Evidence Act* NSW considered.

Feminist commentary

Positive

"The authors are now aware of three Australian cases in which self- defence has been successfully run by women who have been the target of domestic violence without the use of supporting BWS evidence. Such outcomes may reflect a growing awareness by the judiciary and the community of the incidence and nature of domestic violence." Authors are referring to *Lock*, *Stephenson*, and *Stjernqvist*. (Stubbs and Tolmie 1999, pp.739)

"*Lock* contains a strong and explicit acknowledgment that a relationship of violence is a highly relevant context for the assessment of an accused's claim to have acted in self-defence. This is a positive step...Obviously, an acknowledgment of the significance of relationship violence means that the accused's own behaviour in the context of the relationship can be used by the Crown to cast doubt on her credibility. It is possible to imagine cases where expert evidence might be used to provide the court with a realistic context in which to judge the accused's past defensive force." (Stubbs and Tolmie 1999, pp.738-739)

Negative

"The case of *R v Lock* illustrates some of the potential difficulties women who fight back have in raising self-defence quite aside from issues of BWS. It may be just such difficulties which account for the fact that evidence of BWS was not offered in that case. The fact the accused in *Lock* previously had fought back against abuse by her partner may have been the reason why Hunt CJ at CL characterised the relationship as a 'love/hate' relationship, rather than as a relationship characterised by violence." (Stubbs and Tolmie 1999, pp.737-738)

- ***R v Lorenz*** [1998] ACTSC275 (14 August 1998) | austlii
  Northern Territory Supreme Court: Crispin J
  Robbery, duress, did not pass sentence.

Summary

The accused was arraigned on one count of robbery ($360 cash) with an offensive weapon, namely a knife. Upon her arraignment she pleaded not guilty.

The defence of duress was based upon a threat which she said was made by Mr Jason Henshaw on the night before the robbery and repeated the following morning to the effect that if she did not obtain enough money to enable him to re-register his car he would kill her.

The defence argued she was entitled to an acquittal on the grounds of duress. Her defence foreshadowed adducing evidence to the effect that the accused had been the victim of a violent and abusive relationship and that the defence of duress would be based upon what was described as "the battered woman syndrome".

The accused was in an extremely violent relationship with her defacto partner. He had threatened that he would kill her if she didn't get him money to register his car.

Crispin J stated "A diagnosis of battered woman syndrome does not of itself give rise to any defence. The law does not recognise any general principle that people should be absolved from criminal conduct because they had been beaten or abused or because a psychological condition caused by such treatment may have led them to commit the offences with which they are charged. Nonetheless, evidence that such a person may have had a psychological condition of this kind may be relevant to several defences known to the law." (para 31)

However, Crispin J found that in the present case, however, there was no threat of imminent danger. And that the acts were committed with the requisite voluntariness. Crispin J did take into account the violence she was experiencing at the time of sentencing though.

The Supreme Court held: Surety, in the sum of $1,000 and good behaviour for a period of three years.

- ***Osland v R*** (1998) 1 HCA 75 | austlii

  High Court of Australia: McHugh , Kirby , Callinan J J, (Gaudron and Gummow JJ dissenting). Murder, self-defence, petition for mercy.

  Summary

  Heather Osland and her son, David Albion, stood trial in the Supreme Court of Victoria charged with a single count of murder of Frank Osland (husband of

Heather Osland). The jury was unable to reach a verdict with respect to David Albion but convicted Heather Osland of murder.

Heather Osland appealed unsuccessfully to the Victorian Court of Appeal. By the time of her appeal, David Albion had been retried and acquitted. Heather Osland then appealed to this Court. One aspect of her appeal relates to the failure of the jury to convict her son. On the prosecution case, it was he, alone, who struck the blow or blows that caused Frank Osland's death.

Heather Osland mixed sedatives in with Frank Osland's dinner in sufficient quantity to induce sleep within an hour. According to the prosecution case, David Albion carried the plan to finality after Frank Osland went to bed by fatally hitting him over the head with an iron pipe in the presence of Heather Osland. And later, he and Heather Osland buried Frank Osland in the grave they had earlier prepared.

Heather Osland and David Albion each relied on self-defence and provocation. Those defences were raised against an evidentiary background of tyrannical and violent behaviour by Frank Osland over many years but, according to evidence given by Heather Osland and her son, escalating in the days prior to his death. The prosecution accepted that Frank Osland had been violent and abusive towards Heather Osland in the past but contended that that behaviour had ceased well before his murder. That contention was made on the basis of certain intercepted telephone conversations to which Heather Osland was a party. In those conversations, which took place well after Frank Osland's death, Heather Osland made statements to the effect that his violence had ceased some years before his "disappearance". Another aspect of the appeal relates to the admission of evidence of other intercepted conversations. Further reference will be made to those other conversations in due course.

In support of Heather Osland's case, expert evidence was led of "the battered wife syndrome". The use of that evidence and its relationship with self-defence and provocation are also in issue in this appeal. Evidence as to what has come to be known as "the battered wife syndrome" was given by Dr Kenneth Byrne, a clinical and forensic psychologist. That evidence was led without objection. Dr Byrne deposed as to characteristic patterns of behaviour in relationships involving physical, psychological or sexual abuse and characteristic reactions on the part of women in those relationships. “The evidence of Dr Byrne was that there is a reliable body of knowledge and experience with respect to persons living in abusive relationships based on research initially undertaken in the United States of America by Dr Lenore Walker. And it was Dr Byrne's evidence that that knowledge reveals a pattern of responses or reactions on the part of battered women, including those to which reference has already been made.” (at para 54)

On appeal were included the following two grounds:

1. *Provocation*: That the trial judge had erred in his summing up to the jury by: (a) referring to what an ordinary person in the accused's situation "would" have done, instead of what such a person "might" or "could" have done; (b) directing the jury at several points that provocation, to be made out, required a "specific triggering incident"; and (c) failing to make clear the connection between the evidence of "battered woman syndrome", admitted at the trial, and the law of provocation.
2. *Self-defence*: That the trial judge had erred in: (a) refusing to admit hearsay evidence of what the appellant had told others about the violence inflicted upon her by the deceased and threats allegedly made by him to her; (b) the directions which he gave in relation to the relevance of the fact that the appellant, with Mr Albion, had on the morning on which the deceased was killed (or perhaps earlier) dug a grave (described as a "hole") to receive the body of the deceased; and (c) failing to make clear the connection between the evidence of "battered woman syndrome", admitted at the trial, and the law of self-defence.

The High Court held: Appeal dismissed.

Kirby J's commentary

"There is now a substantial quantity of writing in legal literature concerning battered woman syndrome (BWS). It exists both in Australia and overseas." (para 159)

"Although BWS does not enjoy universal support, there is considerable agreement that expert testimony about the general dynamics of abusive relationships is admissible if relevant to the issues in the trial and proved by a qualified expert. The greatest relevance of such evidence will usually concern the process of "traumatic bonding" which may occur in abusive relationships. This phenomenon has been observed in the circumstances to which evidence of BWS may relate." (para 167)

Literature referred to by Kirby J:

- Lenore Walker, 'The Battered Woman' (1979) and 'The Battered Woman Syndrome' (1984)
- Sheehy, Stubbs and Tolmie, "Defending Battered Woman on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 Criminal Law Journal 369;
- Stubbs and Tolmie, "Race, Gender and the Battered Woman Syndrome: An Australian Case Study" (1995) 8 Canadian Journal of Women and the Law 122;
- Beri, "Justice for Women Who Kill: A New Way?" (1997) 8 Australian Feminist Law Journal 113;

- Australia, Committee of the Standing Committee of Attorneys-General, Discussion Paper, Model Criminal Code, Ch 5, Fatal Offences Against the Person, June 1998 at 89;
- Edwards, "Battered women who kill" (1990) New Law Journal 1380; O'Donovan, "Law's Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome" (1993) 20 Journal of Law and Society 427;
- Wells, "Battered woman syndrome and defences to homicide: where now?" (1994) 14 Legal Studies 266;
- Chan, "A Feminist Critique of Self-Defence and Provocation in Battered Women's Cases in England and Wales" (1994) 6 Women & Criminal Justice 39;
- Griffith, "Battered Woman Syndrome: A Tool for Batterers?" (1995) 64 Fordham Law Review 141;
- Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R v Lavallee" (1997) 47 University of Toronto Law Journal 1;
- Evatt, Foreword to Graycar and Morgan, The Hidden Gender of Law (1990) at vii;
- Other studies cited Scutt, Even in the Best of Homes -- Violence in the Family (1990) at 98, 109;
- Simone, "`Kill(er) man was a Battered Wife' the application of Battered Woman Syndrome to Homosexual Defendants: The Queen v McEwen" (1997) 19 Sydney Law Review 230;
- Heller, "Ill-founded outrage", The Times Literary Supplement, 13 August 1993 at 11 cited in Garcia v National Australia Bank (1998) 155 ALR 614 at 636 ; 72 ALJR 124;
- Goodyear-Smith, "Re Battered Woman's Syndrome [1997] NZLJ 436-438" (1998) New Zealand Law Journal 39;
- McDonald, "Battered Woman Syndrome" (1997) New Zealand Law Journal 436 at 437;
- Budrikis, "Note on Hickey: The Problems with a Psychological Approach to Domestic Violence" (1993) 15 Sydney Law Review 365;
- Stubbs and Tolmie, "Race, Gender, and the Battered Woman Syndrome: An Australian Case Study" (1995) 8 Canadian Journal of Women and the Law 122;
- Faigman and Wright, "The Battered Woman Syndrome in the Age of Science" (1997) 39 Arizona Law Review 67 at 111-113;
- Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R v Lavallee" (1997) 47 University of Toronto Law Journal 1 at 13-14, 25-33;
- Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" (1986) 9 Women's Rights Law Reporter 195;
- Freckelton, "Battered Woman Syndrome" (1992) *17 Alternative Law Journal* 39;

- "(Mis)Identifying Culture: Asian Women and the `Cultural Defense' " (1994) 17*Harvard Women's Law Journal* 57 at 93;
- Moore, "Battered Woman Syndrome: Selling the Shadow to Support the Substance" (1995) 38 Howard Law Journal 297;
- Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90 Michigan Law Review 1 at 42;
- Yeo, "Resolving Gender Bias in Criminal Defences" (1993) 19 Monash University Law Review 104 at 111;
- Manning, "Self Defence and Provocation: Implications for battered women who kill and for homosexual victims", NSW Parliamentary Library Research Service (Briefing Paper No 33/96), December 1996 at 19-20;
- Victoria, Law Reform Commission, Homicide (Report No 40), (1991) at paras 164-8. For criticism, see Women's Coalition Against Family Violence, Blood on whose hands? (1994) at 117-18;
- Australia, Committee of the Standing Committee of Attorneys-General, Discussion Paper, Model Criminal Code, Ch 5, Fatal Offences Against Person, June 1998, p 89;
- Women's Coalition Against Family Violence: Blood on Whose Hands? (1994) pp 117-118.

Feminist commentary

Neutral

"Battered woman syndrome is often invoked in order to explain why the victim remained with her partner and failed to formally complain or complained only selectively. Together with some other psychological syndromes this form of evidence has been called 'counter-intuitive'. The author examines the recent High Court decision in *Osland v. R* (1998)159 ALR 170 within this framework. While noting the dynamics of the battering relationship, and the law's failure to accommodate that within the definitional confines of the defence of provocation and self-defence, the author also points to the pragmatism inherent in the High Court approach. The author concludes with a mention of the symbolism inherent in Justice Kirby's approach in *Osland* in particular. This unequivocally rejected violent responses to violent situations and called for non-violence as the hallmark of a civil society." (Hocking 1999, pp.57)

"The recent High Court decision of *Osland* is the only other Australian appeal case to have discussed the preliminary issue of whether BWS evidence should, in principle, be introduced. In that case, all five judges based their decision primarily on the application of the legal principles of ancillary liability to the facts of the case. Only four of the judges also considered the issue of BWS evidence, with Gaudron and Gummow JJ producing a joint judgment that otherwise dissented on

the issue of ancillary liability." (Stubbs and Tolmie 1999, p.723)

“In its first consideration of what has been termed 'battered woman' or 'battered wife' syndrome, all five members of the High Court expressed varying reservations about the relevance of the syndrome with respect to a defence to a murder charge. The Court held that battered woman syndrome is not a new and sustainable defence on its own, while accepting that it must be accepted that the syndrome is a proper matter for expert evidence.” (Hocking 1999, pp.59)

Positive

“*Osland* was one of the first Australian decisions to attempt to spell out explicitly the connections in principle between BWS evidence and the legal defences of provocation and self-defence.” (Stubbs and Tolmie 1999, p.731)

“Arguably the most forward looking judgment dealing with BWS evidence in Osland was delivered by Kirby J. After canvassing some of the controversies around the use of BWS evidence he nonetheless accepted that it was admissible...his discussion of BWS evidence appears to be consistent with the recognition in North America of the gendered application of the law on self-defence.” (Stubbs and Tolmie 1999, p.725)

“[T]he courts have endorsed the concept of the 'slow-burn’ loss of self-control.” Author referring to *Osland* and *Chhay*. (Bradfield 2000, pp.22)

“Only once in the entire history of the High Court of Australia has an 'all woman' team appeared: *Osland v The Queen* (2000) 173 AUR 173. Rendering it even more rare, the team was all female at both the appeal and leave to appeal hearings.” (Scutt 2001, pp.42)

Negative

“What is disturbing about the approach of Gaudron and Gummow JJ is that they appear to relate BWS evidence exclusively to the subjective, or modified subjective, components of the defences of provocation or self-defence, rather than to the objective components as well. For example, they do not suggest BWS evidence might explain why there could be reasonable grounds for the accused’s perception that she was under life-threatening danger and needed to resort lethal self-help, only why she might honestly have believed this to be the case. Likewise they do not suggest that such evidence explains how an ordinary person could have lost self-control in the circumstances for the purposes of the defence of provocation...This reading of their judgment suggests that BWS evidence assists the court in understanding the personal or idiosyncratic – the ‘subjective’ responses of battered women who suffer from the syndrome – rather than explaining the effect that circumstances of violence might have on the responses or reasonable women. If this is so, then their judgment represents a considerable narrowing of the interpretation of BWS

offered by King CJ in *Runjanjic and Kontinnen*. It also represents a departure from the basis on which BWS was first developed and understood."

(Stubbs and Tolmie 1999, p.725)

"[O]ne of Australia's most controversial "sleeping husband" cases, *Osland v. Regina*,' demonstrated the High Court's unwillingness to provide strong authority for pre-emptive strikes. It also suggested the dangers of creating dichotomous images of the cold-blooded killer and the pitiable abuse victim with no satisfactory intermediate option between a murder verdict and an acquittal." (Ramsey 2010, p.62)

"Australians' polarized views of the *Osland* case reflect efforts to assimilate complicated facts into a simpler narrative of what happened. Heather probably was neither an innocent, passive victim, nor a coldly calculating killer. Because her behaviour did not accord with the stereotypes that the criminal law, BWS theory, or cultural values surrounding intimate partner violence demand, her story had to be reshaped to fit a legal verdict. The murder conviction expressed (and the High Court affirmed) a distinction between "a self-defensive response to a grave danger which can only be understood in light of a history of abusive conduct and a response that simply involves a deliberate desire to exact revenge for past and potential-but unthreatened-future conduct." In reality, however, Heather's behaviour may have fallen between these understandings of why abuse victims kill. To the extent that she engaged in planning activity by digging the hole and using the sedatives, her conduct showed self-protectiveness, as well as anger and desperation. If she is an icon for anything, it may be a new form of mitigation that covers defensive killings in which the lethal act is deemed less justifiable than the emotions and beliefs prompting it. Such a partial defence would have given the *Osland* jury another option besides provocation, for which there was allegedly insufficient evidence of a triggering incident, and thus avoided an all-or-nothing choice between murder and completely exculpatory self-defence. Unfortunately, this type of middle ground was unavailable in Heather Osland's 1996 trial. Her conviction for murder in Victoria announced that her beliefs and actions qualified for neither exoneration nor mitigation, whereas James Ramage's did. It was this situation and others like it that Victoria's reformers sought to change." (Ramsey 2010, p.63-64)

- ***R v Lane*** [1998] QCA 167 (8 May 1998) | archive.sclqld.org.au
  Queensland Court of Appeal: Pincus JA, Derrington J and White J
  Assault occasioning bodily harm, whether to record a conviction.

  ### Summary

  This case is the appeal against the recording of a conviction. The appellant was convicted of one count of unlawful assault occasioning bodily harm. The trial

Judge recorded a conviction and released her upon a recognisance of $1,000 to be of good behaviour for two years.

The applicant was 41years of age at the time of the offence and without any prior convictions. She had a career in the public service in association with her de facto partner. For a number of years he subjected her to serious psychological and physical abuse. This had re-occurred on the night before the offence. The offence was committed while he was asleep. She hit him on the head with a heavy mortar bowl and when he awoke and lay dazed she attempted to strike him with the same object again. Being in fear of his retribution she took a shotgun from her bedroom and then shot him in the stomach. There was then a struggle for the gun but the complainant weakened and let it go. He walked towards the shed where he kept firearms whereupon the appellant shot him in the back. The shooting charges resulted in an acquittal by the jury but she was convicted of the count in relation to the striking with the mortar bowl.

Derrington J commented that the verdicts of the jury should be interpreted as finding beyond a reasonable doubt that the appellant had not any basis in self-defence for the first attack; but that in respect of the shooting there was a reasonable doubt as to whether the defence was available out of a reasonable fear of an attack of a serious nature by the complainant in the circumstances that then existed.

The Court of Appeal held: Application for removal of record of conviction refused.

Derrington J commentary

“He [trial judge] made full allowance for the applicant's suffering at the hands of the complainant and for all other features favourable to her. With this approach I agree unreservedly.” (p. 2, at para 4)

- ***R v King*** [1998] NSWSC 289 (13 August 1998) | austlii
  NSW Supreme Court: Studdert J
  Murder, manslaughter, provocation.

  Summary

  The accused pleaded not guilty to murder but guilty to manslaughter upon the presentation of an indictment charging her with the murder of her husband. The Crown accepted that plea in full discharge of the indictment on the basis that there may have been provocation.

  The accused had been married to the deceased for 9 years and been subject to domestic violence during that time. On the night of the deceased’s death, both of them had been drinking at an RSL. On the way home the deceased

started verbally abusing the accused which didn't end when they arrived home. Eventually, the deceased walked into the bedroom and the accused followed him and stabbed him once with a knife. She immediately called for help. The judge found the prisoner caused this death whilst acting under provocation and regarded the behaviour of the deceased towards the prisoner as constituting provocation which could cause an ordinary person to form an intention to inflict grievous bodily harm. Studdert J found the relevant provocation as having caused the prisoner to lose her self-control and to act to inflict the grievous bodily harm before she had the opportunity to regain her composure.

However, Studdert J then proceeded to sentencing and held "I must have regard to the gravity of the offence viewed objectively. A human life has been taken and the courts have repeatedly emphasised that unlawful homicide is a very serious crime. I must also have regard to all the relevant purposes of sentencing identified in *Veen [No 2]* (1988) 164 CLR 465 at 476, namely 'the protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform.' In this case, I consider there is little prospect of the prisoner re-offending but retribution must be taken into account." (p.9)

The Supreme Court held: 6 years imprisonment with 3 years non-parole period.

Studdert J commentary

"It is relevant to have regard to the conduct of the deceased towards the prisoner not only on the day of his death but before that time. It is well settled that loss of self-control can develop after a lengthy period of abuse: see *R v Chhay* (1994) 72 A Crim R 1, and in particular the judgment of Gleeson CJ at 10-14. It is necessary to consider the cumulative effect of the conduct of the deceased upon the prisoner. It seems to me from the evidence which I accept that the prisoner endured much suffering by way of continuing mistreatment by the deceased over the years. The deceased treated the prisoner very badly indeed. The physical ill treatment was very serious in itself. But so too was the constant mistreatment by way of verbal abuse." (p.7)

"I have concluded that I should sentence the prisoner upon the basis that the cumulative effect of her earlier mistreatment contributed to her loss of self-control at the critical time as well as the relentless abuse by the deceased directed at the prisoner on the journey home from the club on 17 April 1996 and in the home thereafter. It seems to me that the level of provocation viewed in this way was great and that the level of the prisoner's criminality should be regarded as having been very substantially reduced by reason of such provocation."(p.8)

- ***R v Babsek*** [1998] QCA 116 (2 June 1998) | austlii
  (appeal against conviction – upheld – convicted at new trial.)

Queensland Supreme Court: Davies JA, McPherson JA, Moynihan J

Murder, admissibility of evidence.

R v Babsek (1999) 108 A Crim R 141 | archive.sclqld.org.au

McMurdo P, Pincus, Thomas JJ.

Appeal against inadequate sentence – after retrial – upheld.

Summary

The respondent was tried and convicted of murder but her conviction was quashed on appeal due to issues with the admissibility of evidence at the trial such as evidence (prejudicial) of her history of violence towards the deceased and his application for a protection order from the Police (all heard by the jury). The accused shot her partner in the head after she asked him to come back to her house with their son. The deceased had been trying to terminate the relationship and evidence was given of the accused's violence towards him. At the first trial, the respondent gave evidence that she acted in self-defence.

The Court of Appeal held: the conviction quashed a new trial ordered.

At her retrial in February 1999, Babsek did not give evidence and self-defence was not raised. The defence case in the address to the jury was that the respondent was guilty of manslaughter but did not intend to kill or do grievous bodily harm to the deceased. The jury returned a verdict of not guilty to murder but guilty to manslaughter. The jury's verdict was therefore consistent with the conclusion that the respondent pulled the trigger and caused the deceased's death.

Summary of appeal against inadequate sentence case

The respondent was sentenced (at her retrial) to nine years imprisonment with a non- parole period of three years. The appellant, the Attorney-General of Queensland, claimed the sentence imposed was manifestly inadequate.

The Court of Appeal held: sentence increased to 10 years, with no non-parole period given.

***** Question whether this is a BWS case because the evidence suggests that she was the violent partner not the deceased male. However, the topic was raised by the defence at the first trial, but largely discounted and the case did not go to the jury on that basis and no issue of that kind was argued on appeal.

Moynihan J commentary

"Given the issues in the case, including intent, self-defence and provocation, evidence 'throwing light on the relationship' between the appellant and the deceased was admissible... Moreover, s132B of the *Evidence Act 1977* made admissible 'relevant evidence of the history of the domestic relationship

between the defendant and the person against whom the offence was committed'." (p.2)

"It can nevertheless be accepted that the evidence, which seeks to explain why people do not leave a relationship with a violent partner and which suggests a heightened sensitivity on the part of the subject of the violence to prospective or threatened violence, was admissible... It was relevant to the issues of intent, 'reasonable apprehension' and 'belief on reasonable ground' raised by self-defence and to the evaluation of the deceased's conduct relied on as constituting provocation... The trial judge directed the jury to the effect that the evidence bore on the appellant's 'heightened sensitivity to an impending assault' and there is no complaint about this aspect of his direction." (pp.2-3)

Appeal against sentence

McMurdo P, Pincus and Thomas JJ commentary

"[I]t cannot be overemphasised that serious physical violence and death inflicted by one party on another in the course of the breakdown of a relationship will ordinarily result in a substantial term of imprisonment." (p.148 at para.36)

Feminist commentary

Positive

"(This) appeal has made clear that these circumstances include the full violent history of a relationship and that such circumstances, and their impacts, may be made intelligible to the fact finder through the admission of expert evidence. Accordingly, there is a compelling argument that the 'abusive relationship and all of the circumstances of the case' should, in any event, be a critical focus of attention in the assessment of a claim to self-defence in Queensland." Authors refer to *R v Babsek* [1998] QCA 116 (2 June 1998)and *MacKenzie*. (Easteal and Hopkins 2010, pp.136)

"In relation to self-defence, evidence of the history of the accused's relationship with her violent partner is relevant and admissible. This case-specific information about the accused's personal experience of violence can be used to inform the jury about her reality." (Bradfield 2002, pp. 178)

2000 - 2014

The period from 2000 to 2014 saw a proliferation of law reform commission reports and legislative changes around Australian homicide law, largely in response to circumstances where battered women kill, or are killed by, their violent partner or ex-partner after years of abuse. These reforms have led to the abolition and reform of the provocation defence in most states and territories, the development of self-defence and the introduction, in some states, of special

evidentiary provisions designed to ensure that the previous history of domestic and family violence is considered by courts. Despite the virtual disappearance of the language of Battered Woman Syndrome in Australian courts, psychologists and psychiatrists continue to be called on a regular basis to explain the context and effects of domestic abuse.

- ***2000 Northern Territory proposes law reform***

  Proposed Law reform:

  ***Self-Defence and Provocation*, October 2000**

  Northern Territory Law Reform Committee:

  The Attorney General requested the NT Law Reform Committee to inquire into and report on "whether the partial defence of provocation should be amended to extend its operation to cover what is sometimes known as the 'battered wife' syndrome". The Law Reform Committee's report in 2000 recommended deleting the requirement in the defence for the offender to have "acted on the sudden and before there was time for his passion to cool". It was also suggested that psychiatric evidence in respect of a history of abuse should be admitted in a consideration of provocation as it is possible that a battered wife could "become so dazed and humiliated as to lose self-control and kill her persecutor even if the killing does not take place immediately after an event of violence, threats or intimidation." (p. 41)

  The NT Government did not act on these recommendations at the time.

  Consideration of feminist critique:

  While no feminist literature was cited in the report, the suggested repeal of the provisions was said to be in light of the observations of Kirby J in *Osland*, Gleeson J in *Chhay*, and Phillips CJ in the Lesbia Harford Oration, all of which base their reasoning in feminist principles.

- ***R v MacKenzie*** [2000] QCA 324 (11 August 2000) | austlii
  Queensland Court of Appeal, McMurdo P, McPherson JA. Dutney J [unanimous reduction in sentence although McPherson J proposed longer term].

  Summary

  At trial the accused pleaded guilty to manslaughter on the basis of criminal negligence. The applicant was sentenced to 8 years imprisonment and non-parole period of 3 years.

  The accused was married to the deceased for 39 years, and was subjected to severe domestic violence over this time. The appeal case is that the sentence is manifestly excessive, and the accused should not have pleaded guilty in the

first place, because her legal counsel did not advise her that self-defence was available to her.

On the day of the killing, both the applicant and the deceased were under stress because they had recently sold their home and moved to a less expensive and far more basic rural home. The deceased forced unwelcome and unpleasant sexual contact on the applicant and later punched her (at least 3 times in the head). The accused then got a gun from the bedroom and pointed it in the deceased direction, she thought the gun was unloaded and as she was walking out, tripped, and it fired and killed the deceased. The accused's claim that she tripped on the stairs immediately before the gun discharged was not disputed. Within seconds she phoned 000 for assistance, was immediately and genuinely distressed and remorseful, and pleaded guilty.

The Court of Appeal found that the determination of an appropriate sentence in this case was difficult as the offence was one of criminal negligence and yet the applicant was a victim of serious and prolonged domestic violence.

On appeal, it was submitted that because of this the applicant was denied the benefit of competent advice, and so was prevented from making an informed decision in her own interests about whether or not to plead guilty to manslaughter, or to take her chance at a trial on a charge of murder. Assuming that this would, if established, demonstrate the necessary element of "unfairness" in her entering the plea of guilty, or show that a miscarriage of justice has taken place, it was necessary to consider whether there was any basis in law on which the applicant could be said to have had a chance of outright acquittal of which she was deprived by being given and acting on incompetent advice.

The Court of Appeal considered whether "battered wife syndrome" is in law material to an issue of self-defence on a charge of homicide. The Court also considered whether, if it is material, there was any evidence in this particular case capable of raising such an issue. The applicant had never said she was acting in self defence when she shot her husband, and there was little or no direct evidence from her on the subject.

In the result, no miscarriage of justice has been shown to have resulted from the failure of the applicant's legal advisers to advise her to go to trial on a charge of murder, or in advising her as they did to plead guilty to manslaughter on the basis of criminal negligence.

The Court of Appeal held: the application for leave to appeal against conviction dismissed. Application for leave to appeal against sentence granted. Appeal against sentence allowed by substituting a sentence of 5 years imprisonment and non-parole period of 12 months.

McMurdo P commentary

“An important issue for determination is what consideration, if any, the Court should give to the shocking history of domestic violence perpetrated upon the applicant by the deceased where the offence is one of criminal negligence.” (p.4, para 19)

“Psychologist Penny Gordon, who interviewed the applicant on a number of occasions and carefully documented her family dynamics and the history of the abuse, noted that one of the impacts on the applicant of the long term abuse and violence in the relationship was that it contributed "to ineffective problem solving behaviour and a perception by [the applicant] of the narrowing of her options over time. A perception of narrowed options can often result in decisions made by the abused woman that from the outside look like poor judgment." (p.5, para 20)

McPherson JA commentary

“If the applicant's counsel and solicitor in advising her were acting under the impression that self defence was available only in response to an immediate physical threat to the person of the applicant, then they were mistaken about the law. Evidence of "battered wife's syndrome" of the kind that was available to the applicant and her legal advisers in this case is a proper matter for expert evidence. See *Osland v R* (1999) 73 ALJR 173, 185 col 2C, 206-207. It is capable of demonstrating "the heightened arousal or awareness of danger which may be experienced by battered women" (Gaudron, Gummow JJ, in *Osland*, at 185 col 1D), which may bear directly on, or be relevant to, a defence of either provocation or self defence (Kirby J, at 206-207).” (p.10, para 46)

“In the many decisions in which s 271(2) has been considered, it seems to me that the authoritative view, and certainly the interpretation most favourable to someone (for present purposes, I will assume it is the applicant) relying on its provisions, is that the accused is entitled to be acquitted of a homicide charge if she believes on reasonable grounds that she cannot save herself from death or grievous bodily harm except by using life-threatening force to defend herself, irrespective of the consequences that may have for the life or health of her assailant.” (p.11, para 47)

“For present purposes it may be assumed that, by reason of her husband's previous treatment of her, Mrs MacKenzie satisfied that requirement; that is, that at the time she approached her husband on the veranda with the gun in her hands, her state of mind was such that she honestly and reasonably believed facts that put her life, health or bodily integrity at risk of a further and life-threatening assault by her husband.” (p.11, para 49)

"The fact of the abusive relationship is relevant to the sentence because in a case like this as with a case of diminished responsibility the deceased has, by his own conduct, significantly contributed to the fatal act. The seeking out of the weapon the negligent handling of which caused the death, is a predictable response to the deceased's abuse. The fact that here the killing was the result of negligent handling of a firearm the applicant believed was unloaded is a significant matter. In such a case the deterrent aspect does not carry quite the same importance as where the killing is the result of a willed act, albeit while the perpetrator is in a state of diminished responsibility. The absence of a willed act in my view enables the Court to take a more lenient view of the offence then might otherwise have been the case." (p.15, para 67)

Feminist Commentary

Positive

"The court stressed that it would be a mistake in law to believe that self-defence was only available in response to an immediate physical threat. These cases [also referring to*Stjernqvist*] suggest that some flexibility existed in relation to imminence in self-defence under section 271 of the *Criminal Code* (Qld) and that it may not necessarily have been as difficult for battered defendants to plead this defence as has otherwise been suggested." (Guz and McMahon 2011, pp.91-92)

"Appeal has made clear that these circumstances include the full violent history of a relationship and that such circumstances, and their impacts, may be made intelligible to the fact finder through the admission of expert evidence. Accordingly, there is a compelling argument that the 'abusive relationship and all of the circumstances of the case' should, in any event, be a critical focus of attention in the assessment of a claim to self-defence in Queensland." Authors referring to *Babsek* and *MacKenzie*. (Easteal and Hopkins 2010, pp.136)

- ***R v Denney*** [2000] VSC 323 (4 August 2000) | austlii
  Victorian Supreme Court, Coldrey J
  Manslaughter, mitigation of sentence.

  Summary

  This was the sentencing case after trial and conviction of the accused for manslaughter.

  The accused was married to the deceased and suffered severe domestic violence over a long period of time. On the day of his death, he had raped her and assaulted her. He fell asleep and the accused shot him with a gun. She dumped his body in bushland which remained concealed for 13 years, until finally his body was found by bushwalkers, and she was charged with murder.

At trial, the Crown showed that the accused fired the two fatal shots into the head of John Denney, with the intention of killing him, but the Crown had failed to exclude beyond reasonable doubt that she acted under the influence of provocation.

The accused detailed the provocative conduct of her husband to investigating police and also in evidence before the court. Coldrey J commented that the jury's verdict may be regarded as consistent with a substantial acceptance of her account.

Coldrey J commented "At your trial, expert evidence was given by Dr Lester Walton, a forensic psychiatrist, as well as Mr Ian Joblin. Dr Walton proffered the view that you were suffering from a chronic depressive disorder and that your conduct in the context of your marriage relationship, fell within the spectrum of behaviour labelled 'battered woman syndrome'. While Mr Joblin agreed with Dr Walton that you are chronically depressed, he was of the view that you did not fit the paradigm for battered woman syndrome. Nonetheless, he agreed with Dr Walton that abuse over time creates a state of 'learned helplessness' and that you were exhibiting it. Both experts pointed to the phenomena whereby victims conceal evidence of abuse so as not to aggravate the perpetrator of it. In Dr Walton's opinion you were not suffering from any psychosis but you have what he described as permanent psychological scarring requiring ongoing psychiatric treatment." (p.4 at paras 30-31)

The Supreme Court of Victoria held:

Three years imprisonment with the whole of that sentence suspended for a period of thirty six months.

- ***2002 New South Wales law reform***

  Law Reform:

  Reform of *Crimes Act 1900* (NSW)

  See *Crimes Amendment Self-defence Bill 2001*

  Reintroduced:

  S 421 Self-defence – excessive force that inflicts death

  1. This section applies if:
     1. the person uses force that involves the intentional or reckless infliction of death, and
     2. the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:

3. defend himself or herself or another person, or
4. to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

2. The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

Consideration of Feminist Critique:

According to the Explanatory Memorandum, the Bill was based on the Model Criminal Code, clause 313 which in its commentary does not mention any feminist justification for the modification.

- ***2003 Tasmanian law reform***

Law Reform:

Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003, (Tas. Acts No. 15/2003).

Removed the defence of provocation (s160) from the Criminal Code.

For commentary on the effect of the reform see Bradfield (2003).

Consideration of Feminist Critique:

It was noted in the Second Reading Speech on Thursday 27 March 2003 by Mr Parkinson, the Deputy Leader at that time, that there was "some argument in legal circles that the defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour ... Tasmania is being proactive by acting to remove this out-of-date and gender-biased defence."

No specific literature is cited in support of this proposition.

- ***R v O'Brien*** [2003] NSWCCA 121 (6 May 2003) | austlii

New South Wales Court of Criminal Appeal, Giles JA, Dunford J Smart AJ [unanimous decision]
Manslaughter of daughter (malnutrition)

Summary

This is an appeal against conviction and an application for leave to appeal against sentence O'Brien for the manslaughter of her daughter Kudaratilaal O'Brien who died of malnutrition in 2000. She was sentenced to 5 years imprisonment with a non-parole period of 2 years.

The accused gave evidence that she feared her husband who governed most of her actions and speech, that she had been subjected to extreme physical violence at times and there was also severe psychological and emotional abuse and restriction of personal liberties and freedoms. She had been isolated from friends and family, and it was fear of reprisal that prevented her from bringing this to the attention of the authorities. She said that when speaking to her husband after seeing Dr Webster, he said to her, "You're not taking her to hospital, I'll tell you that right now". The other evidence called in the defence case was that of Dr Olaf Nielssen, forensic psychiatrist. He did not find the appellant suffered any kind of psychiatric disorder but his opinion was that her situation fitted what is called the "battered wife syndrome" which is a state in which women who are subjected to severe abuse, particularly within a domestic relationship, form a kind of helplessness and inability to initiate action to leave that situation. He thought that her responses around the time of the baby's illness were characteristic of the kind of behaviour one would expect to see in a person with battered wife syndrome in that she accepted the decisions made by her husband despite having reservations about them. She was under her husband's control.

On appeal it was submitted:

1. The trial judge failed to direct the jury that the evidence of battered wives syndrome was relevant to the defence of duress.
2. The trial judge failed to direct the jury as to how the evidence of battered wives syndrome might apply to their determination of whether the Crown had negatived duress.
3. The trial judge's summing-up on the evidence of battered wives syndrome was inadequate.

The Court of Appeal held: The trial judge had summed up the evidence of BWS and directed the jury correctly. Appeal dismissed.

- ***R v Besim*** [2004] VSC 168 (17 February 2004) | austlii
  Victorian Supreme Court, Redlich, J.
  Manslaughter unlawful dangerous act, exclusion of evidence.
  R v Besim (No.2) (2004) VSC 169 (18 February 2004) | austlii
  Victorian Supreme Court, Redlich J
  Objective test dangerous act.

  Summary

  This case was about whether the Crown could exclude the evidence of the deceased's violence to his first wife.

  The accused was charged with manslaughter by unlawful and dangerous act as she struck her husband, David Besim, on the head with a heavy vase

fracturing his skull. The defence case is that she acted in self-defence in response to violence, and a threat of further violence from the deceased.

Evidence of disposition of the victim that tends to advance the exculpation of the accused and which relates to an issue in the case cannot be excluded in the exercise of discretion on the ground that it prejudices the Crown or the deceased.

The defence argued, *inter alia,* such evidence is said to make it more probable that the deceased acted in the violent manner described by the accused. In particular, the defence relies upon the fact that the deceased's former wife will testify that the deceased became more violent when she threatened to call the police. Evidence of an accused's past experiences of violence or knowledge of violence to others by the deceased may be relevant where self-defence or provocation is raised. It may bear upon the accused's state of mind and the reasonableness of their conduct.

The Supreme Court held: Evidence admitted with careful direction to jury about how to use it.

R v Besim (No.2) (2004) (Unreported)

This case addressed whether the objective nature of the test for a dangerous act precludes any consideration of the accused's emotions and circumstances at the time of the act.

Redlich J found in the affirmative for that proposition and stated “I will direct the jury in accordance with *Holzer's* case. As a consequence of the closing submission of Defence counsel, it will be necessary that I instruct the jury that the accused's emotions or state of mind or those that a reasonable person would have had in the circumstances in which the accused found herself are not relevant to the question whether the act was dangerous. I shall instruct the jury that whether the accused or a reasonable person in her position would have been so overwhelmed by emotions at the time of the act that they would not have adverted to whether the act was dangerous, is not a matter that they are to consider when making an objective assessment as to whether the act was dangerous.” (para 42)

While we cannot access the final case, in the Victorian Law Reform Commission *Defences to Homicide: Final Report*, it states that she was acquitted (p.140).

- ***2004 Victoria proposes law reform***

  Proposed Reform:

Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 61, esp. recommendation No.6, 89-90.

Key recommendations included the abolition of the defence of provocation, the reform of self-defence to embrace inevitability over immediacy and to firmly move away from proportionality, introduction of a form of excessive self-defence as a partial defence to murder, guidelines which allow the charging of manslaughter in the case of excessive self-defence being substantiated, and the introduction of a new family violence / 'social framework' evidence provision.

Consideration of Feminist Critique:

Provocation

The defence of provocation is gender biased due to the very different circumstances in which it is raised for men and women. (Bradfield 2002, p. 14)

The continued availability of provocation for men who have killed their female partners in response to jealousy or a desire to retain control may send an unacceptable message: that men's violence against women is legitimate and excusable. (Kirkwood 2000, p. 209)

It has "historically operated, and continues to operate, as a profoundly sexed and gendered excuse for men to kill their former or current partners." (Tyson, Submission 31)

"As men are more likely than women to respond to provocation instantaneously, the effect of retaining a defence that requires a sudden loss of self-control is seen as privileging men's experiences of violence over women's." (Roundtable 4 December 2003; Submission 16)

Self-Defence

"According to those who work with domestic violence survivors many survivors are really exercising a form of 'self-defence' for much of the relationship – often, by remaining 'passive' in the face of physical emotional and other types of abuse ... One day some of these women choose a different kind of self-defence – attack. This is often a kind of self-preservation or final desperate act and does not always happen when there appears to be a present threat – as would usually happen in a 'man-to-man combat' situation." (Office for Women 2000, p. 149)

The three possible models suggested for self-defence were taken from feminist commentary: the 'battered woman syndrome' model ; the 'self-preservation' model (Beri 1997, p. 113); and the 'coercive control' model .

It was found, based on many submissions from community legal centres focusing on feminist issues, that it was required that any leniency shown to women must be on the basis of legal principles, rather than mere sympathy. The defence as it is interpreted and applied should be reformulated so as to "incorporate the mental states that develop as a result of chronic and persistent violence and powerlessness". (Submission 25)

It may be inappropriate to follow the traditional understanding of self-defence in respect of family violence cases as the fear of serious injury experienced by a victim may be constant (Rathus 2002, p. 14)

If an abused woman is required to wait to react until under immediate attack, this may increase the likelihood of her being killed. (Eber 1981, p. 928)

It is very important that judges act to deter the jury from relying on stereotypes and assumptions about self-defence, those who are deserving of it, and the behaviour of abuse victims. (Bradfield 2002, pp. 226-231; Naylor 1990, p. 7)

Furthermore, juries may similarly struggle to understand a defendant from an indigenous or different cultural background and rely on stereotypes of such cultures. (Stubbs and Tolmie 1999, p. 748)

Excessive Self-Defence

This defence was seen as a possible 'safety net' for women who kill in response to family violence. (Discussed in preceding discussions: Roundtable 24 February 2004; Forum 5 December 2003)

However, other advocates on behalf of women cautioned against the idea that the actions of a person who honestly believes their life is in danger could be considered as 'excessive' and argued that it may result in convictions for manslaughter for women and acquittals for men. (The Federation of Community Legal Centres' Violence Against Women and Children Working Group, Submission 16)

"Plea bargaining may spare women the trauma of the criminal process but does not necessarily result in a more favourable outcome. It also diminishes opportunities for the legal interpretation and application of self-defence in ways consistent with the life circumstances faced by some battered women who use legal self-help to protect their lives or physical integrity (or that of their children)." (Stubbs and Tolmie 2004, p. 8)

The issue of plea bargaining is particularly an issue for indigenous women and women from other cultures. (Stubbs and Tolmie 2004, pp. 10-11)

Evidence

"… the key for the development of self-defence is an acceptance and comprehension of what it must really be like to live in a situation of ongoing violence." (Bradfield, Submission 17).

Jurors may in particular require guidance on why the abuse victim stayed in the relationship. (Reddy et al 1997, p. 141)

- ***2005 Victorian law reform***

  Crimes (Homicide) Act 2005

  Key reforms:

  s3B: Provocation no longer partial defence to murder.

  s9AD Introduction of offence of Defensive Homicide:

  A person who, by his or her conduct, kills another person in circumstances that, but for section 9AC, would constitute murder, is guilty of an indictable offence (defensive homicide) and liable to level 3 imprisonment (20 years maximum) if he or she did not have reasonable grounds for the belief referred to in that section.

  S9AH Introduction of 'Family Violence' Evidence provision:

  1. Without limiting section 9AC, 9AD or 9AE, for the purposes of murder, defensive homicide or manslaughter, in circumstances where family violence is alleged a person may believe, and may have reasonable grounds for believing, that his or her conduct is necessary—
     1. to defend himself or herself or another person; or
     2. to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person— even if—
     3. he or she is responding to a harm that is not immediate; or
     4. his or her response involves the use of force in excess of the force involved in the harm or threatened harm.
  2. Without limiting the evidence that may be adduced, in circumstances where family violence is alleged evidence of a kind referred to in sub-section
  3. maybe relevant in determining whether—
     1. a person has carried out conduct while believing it to be necessary for a purpose referred to in sub-section (1)(a) or (b); or
     2. a person had reasonable grounds for a belief held by him or her that conduct is necessary for a purpose referred to in sub-section (1)(a) or (b); or
     3. a person has carried out conduct under duress

Consideration of Feminist Critique:

No feminist critique is cited as the basis for the reforms in the Explanatory Memorandum but these reforms arise directly out of the Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) which was firmly rooted in these issues.

- ***2006 Northern Territory law reform***

  Criminal Reform Amendment Act (No. 2) 2006 (NT)

  Key reforms:

  s 158 Trial for murder – partial defence of provocation

  (4) A defence of provocation may arise regardless of whether the conduct of the deceased occurred immediately before the conduct causing death or at an earlier time. [...]

  (6) For deciding whether the conduct causing death occurred under provocation, there is no rule of law that provocation is negatived if:

  (a) there was not a reasonable proportion between the conduct causing death and the conduct of the deceased that induced the conduct causing death; or

  (b) the conduct causing death did not occur suddenly; or

  (c) the conduct causing death occurred with an intent to take life or cause serious harm.

  Consideration of feminist critique:

  The Attorney-General states in the Second Reading Speech on 31 August 2006 that the reforms were in response to criticism that the previous requirement that the defendant acted on the sudden "made the defence unavailable in cases where there has been a history of serious abuse inflicted on the defendant which ultimately leads them into attacking their abuser. This is the situation in what is commonly referred to as 'battered women cases'."

  However, there is no specific feminist literature cited.

- ***R v Russell*** [2006] NSWSC 722 (21 July 2002) | austlii
  New South Wales Supreme Court, Newman AJ
  Manslaughter, sentencing mitigation.

  Summary

This was a case of sentencing the accused for the manslaughter of her de facto partner. She was indicted on a charge of murder, however, the Crown accepted her plea of manslaughter in full satisfaction of the indictment.

The basis of the Crown accepting the prisoner's plea was the Crown accepted that it could not negate that the prisoner had been provoked within the ambit of that concept as contained in s 23 of the *Crimes Act* 1900. On the other hand, it is contended on behalf of the prisoner that it should not find that this is so, but that the deceased died as a result of the prisoner's unlawful and dangerous act.

The accused and the deceased were in a domestic relationship characterized by alcohol abuse and violence, such violence occurring mostly when the deceased was inebriated. On the night of the deceased's death the deceased approached the offender and struck her whilst she was still on the phone. The offender dropped the phone but her daughter heard the offender was screaming, "Please don't Jeff, no more".

The deceased took a knife and flashed it in the face of the offender and said "I'll kill you stone dead". At some stage the deceased put the knife down.

The offender took a knife from nearby. The deceased screamed at the offender, "stab me you bitch, you have not got the balls." The deceased continued to yell and scream. He shouted; "go on, do it, stab me." She stabbed him once on the chest. At the hearing psychiatrists gave evidence of the extreme nature of the violence she had experienced from him. However, Newman AJ distinguished the case of *R v Roberts* and held "The concept of battered woman syndrome is a factor to be taken into account by way of mitigation not by way of exculpation."

The Supreme Court held: Sentence 6 years and non-parole period of 3 years.

- ***BLM v RWS*** [2006] QSC 139 | archive.sclqld.org.au
  Queensland Supreme Court, Mackenzie, J.
  Property dispute after relationship dissolved.
  BLM v RWS [2006] QCA 528 | austlii
  Queensland Court of Appeal
  Keane JA, White J and Philip McMurdo J

  ### Summary

  This was a property dispute between the parties whose relationship had dissolved. The woman raised allegations of domestic violence in the relationship, contributing to psychological damage. The Judge accepted there had been violence perpetrated against her and said "At most, the evidence accepted in the paragraphs above tends to provide slight support for the other evidence, which I accept, pointing to domestic violence in the course of the

relationship." The Judge then went on to discuss the property division between the couple. (para 30)

'The issue of domestic violence has been analysed above. While the full extent of actual physical violence was in my view difficult to gauge, the evidence was sufficient to convince me that there was physical violence, and also verbal abuse, of a level that made the applicant's contribution to the homemaking and parenting role more onerous. For that reason some allowance in her favour will be made in the final assessment.' (para 85)

Mackenzie J commentary

"'[B]attered woman syndrome' is a collection of signs and symptoms rather than a psychiatric diagnosis. Physical abuse is a common factor but constant verbal abuse and demeaning and denigrating remarks can cause it without physical violence. Typically the woman is persuaded to enter the relationship by a person who appears charming but after a period the abusive behavior commences. Women involved in that situation typically experience difficulty in leaving the relationship. They rarely openly reveal the nature of the problem to a medical practitioner unless they have real trust in the doctor notwithstanding that they may display signs of injury caused by physical abuse." (para 26)

The appeal did not relate to the trial judge's conclusions in relation to the impact of domestic violence on the property issue.

- ***R v Elias*** [2007] VSCA 125 (19 June 2007) | austlii
  Victorian Court of Appeal, Nettle, Ashley, and Redlich JJA [unanimous decision]
  Theft, appeal against sentence.

  ## Summary

  The appellant pleaded guilty and was sentenced to 20 months imprisonment with a non-parole period of 12 months for 19 counts of theft committed over a period exceeding three and a half years. This case was an appeal against excessive sentence.

  The appellant was an accountant and worked for a insolvency/reconstruction business. Over that period she re-diverted bankruptcy monies that were supposed to go to creditors to herself. In the time that she worked at the business before she was married she did not steal, however, when she married her husband she was subjected to physical, sexual and psychological abuse by him. She was constantly told she didn't look good enough, so the money she stole went on approving how she dressed etc.

  The case on appeal was whether the sentence was manifestly excessive and whether a suspended sentence was appropriate due to "Impaired mental functioning" attributable to marital abuse and battered woman syndrome. The

gist of the submission advanced for the appellant was that the learned sentencing judge had accepted evidence that the appellant's offending behaviour was symptomatic of "battered woman syndrome" from which she had suffered at pertinent times. In sentencing the appellant, however, his Honour had referred only to the ameliorating impact of the condition upon the significance of general deterrence in the sentencing process. The case was conducted on the assumption that the appellant's "feelings of learned helplessness" – if the judge accepted Mr Joblin's evidence – could call the *Tsiaras* principles into play.

On appeal, counsel for the appellant contended that the *Verdins* restatement of principle had application. Counsel for the Crown accepted that *Verdins* could apply, but submitted that this was "not a strong situation". The Court held: the existence and quality of any impairment of the appellant's mental functioning was essentially left a blank canvas on the plea. Mr Joblin's evidence was very general, and he was not cross-examined in any depth.

Concerning the appellant's mental state at the time of offending, the evidence, which his Honour in effect accepted, because he accepted the evidence of the psychologist, Mr Joblin, found it was common ground before us that the syndrome from which the appellant allegedly suffered at pertinent times had not previously been relied upon in this State as bringing *Tsiaras/Verdins* principles into play in respect of offences of the present kind. Indeed, counsel for the Crown observed that hitherto the battered woman/learned helplessness situation had typically been raised in homicide cases.

The Court of Appeal held: Appeal dismissed.

Ashley J commentary

"What I have just said does not mean that *Verdins* principles could not apply in a case where learned helplessness is given as the explanation for the commission of, say, property offences. My caveat is rather that the assumptions – factual and legal – upon which the present case was conducted must be understood as being no more than that, their validity or otherwise remaining a matter for elucidation in the future." (p.3 at para 14)

- ***2007 Western Australia proposes law reform***

  Proposed law reform:

  Review of the Law of Homicide: Final Report (2007) 97 Law Reform Commission of Western Australia

  - Recommendation 22, 23: simplifying and clarifying self-defence to remove the specific requirements of imminence, proportionality, and the

duty of retreat and to introduce jury directions to ensure these elements are not applied traditionally.
- Recommendation 26: introducing partial defence of excessive self-defence.
- Recommendation 29: repealing the defence of provocation.
- Recommendation 43: abolishing mandatory life for murder.

Consideration of feminist critique:

Recommendations 22 and 23:

The requirements of self-defence are a “product of the historical context in which they arose”; in particular, the fact that homicides are more often committed by men. (Manning 1996, p. 6)

The requirements of self-defence have “traditionally reflected male standards of behaviour and male responses.” (Bradfield 1998, p. 71)

In order to overcome the traditional conception of self-defence, ie a ‘one-off physical attack’, it is suggested that evidence of battered women’s syndrome be presented to the courts in order to allow the jury to understand the women’s circumstances and properly assess the reasonableness of the women’s actions. (Tarrant 2006, p. 16)

The concept of imminence is a barrier for women relying on self-defence because women do not necessarily respond to an imminent attack as to do so may increase the danger. (Tarrant 1990, p. 597)

The requirement for an assault was abolished based on the opinions of Rathus 2002 and Tarrant 2006.

Recommendation 26

“It has been suggested that the introduction of excessive self-defence may disadvantage women who kill in response to domestic violence because the jury may convict an accused of manslaughter in circumstances when the accused should have been acquitted by reason of self-defence.” (Yeo 2003, p. 63)

Excessive self-defence should be introduced if the partial defence of provocation is abolished. (Tarrant 2006, p. 40)

Recommendation 43

Mandatory life imprisonment may prejudice victims of domestic violence who kill their abusive partners. The threat of life imprisonment may be so daunting

that the only choice is to plead guilty to manslaughter even though the circumstances strongly support self-defence. (Sheehy 2001, p. 553)

- ***2008 Western Australian law reform***

  Law Reform:

  ***Criminal Code* 1913 (WA)**

  Section 248 Self-defence - (Commenced 1 August 2008)

  1. In this section — harmful act means an act that is an element of an offence under this Part other than Chapter XXXV.
  2. A harmful act done by a person is lawful if the act is done in self-defence under subsection (4).
  3. If —
     1. a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and
     2. the person's act that causes the other person's death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be, the person is guilty of manslaughter and not murder.
  4. A person's harmful act is done in self-defence if —
     1. the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
     2. the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
     3. there are reasonable grounds for those beliefs.
  5. A person's harmful act is not done in self-defence if it is done to defend the person or another person from a harmful act that is lawful.
  6. For the purposes of subsection (5), a harmful act is not lawful merely because the person doing it is not criminally responsible for it.

  Consideration of feminist critique:

  "In situations of domestic violence there are many things about the response of the woman against whom violence is perpetrated that makes it difficult to fit into the customary or traditional defence of self-defence." (Hansard, Tuesday, 6 May 2008, p.2437)

- ***2009 Queensland proposes law reform***

  Proposed law reform:

Geraldine Mackenzie and Eric Colvin *Homicide In Abusive Relationships: A Report On Defences*. Prepared for the Attorney-General and Minister for Industrial Relations 6 July 2009.

This report recommended the introduction of a separate, partial defence to murder based on the principles of self-defence available to victims of seriously abusive relationships who kill in fear and desperation believing their actions to be necessary for self-defence.

The report concluded that the literature considered showed that abuse victims' perceptions are affected and often result in higher levels of fear and desperation and the feeling that the abuser's death is the 'only way out'.

As precursors to this Report, [after the *Sebo* case and public outrage a number of reports followed from the Qld Government]:

- Queensland Law Reform Commission, *A Review of the Defence of Provocation: Discussion Paper* (2008);
- Queensland Law Reform Commission, *A Review of the Defence of Accident: Discussion Paper* (2008).

Consideration of feminist critique:

The vast majority of all submissions to this report from feminist academics such as Rathus supported the creation of a partial defence to murder for cases where abuse victims who killed their abusers would be unable to rely on the complete defence of self-defence. The majority of all submissions also supported the creation of a separate defence rather than the expansion of self-defence to prevent the legal protection of unmeritorious defendants.

The understanding of an abusive relationship which gave rise to protection under these provisions was limited to one where there is an element of control exerted by the perpetrator of the abuse, based on the submissions of the Women's Legal Service, Heather Douglas and the Queensland Centre for Domestic and Family Violence Research.

It was noted that feelings of fear and desperation were said to be commonplace amongst victims of abuse. (Dobash and Dobash 2004, p. 340 and Barnett 2001, p. 10)

The Report found that victims may also be motivated by anger and the desire for retaliation or retribution (Swan et al 2008, p. 309) but the existence of this motive would not negate feelings of fear. (Dobash and Dobash 2004, p. 324)

It was noted in the report that feminist academics have noted the limitations of the BWS theory as it suggests some form of psychological dysfunction when in

reality, the victim is responding in a rational way to the danger. (Sheehy, Stubbs and Tolmie 1992, p.384-5)

This issue was also noted by the Women's Legal Service in their submission.

It was noted that victims of violence or abuse often have heightened awareness of potential harm. (Faigman and Wright 1997, p. 73; Blackman 1986, p. 229)

It therefore may be difficult for the court to identify the threat that triggered the act of the victim when there is no obvious imminent threat. (Bradfield 2002, 178)

Victims of violence may perceive a lack of options. (Gray and Kim 2008, p. 1465)

This is especially true given the risks of injury or death amongst women who have left their abusive intimate partners. (Rathus 2002, 4)

- ***2010 Queensland law reform***

  Law Reform:

  ***Criminal Code Act* 1899**

  Section 304B - (Commenced 10 February 2010)

  Killing for preservation in an abusive domestic relationship

  1. A person who unlawfully kills another (the deceased) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if—
     1. the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
     2. 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; and
     3. the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.
  2. An abusive domestic relationship is a domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other.
  3. A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.
  4. Subsection (1) may apply even if the act or omission causing the death (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.

5. Subsection (1)(a) may apply even if the person has sometimes committed acts of domestic violence in the relationship.
6. For subsection (1)(c), without limiting the circumstances to which regard may be had for the purposes of the subsection, those circumstances include acts of the deceased that were not acts of domestic violence.
7. In this section— domestic violence see the *Domestic and Family Violence Protection Act* 2012, section 8.

Consideration of feminist critique:

This law reform springs from the 2009 Bond Report which based its recommendations on feminist theory.

- ***R v Falls*** **(3 June 2010)**
  Queensland Supreme Court, Applegarth J.
  Murder, self-defence.

Summary

In May 2006, Susan Falls killed her husband, Rodney Falls. Susan and Rodney had known each other since they were teenagers and had married in 1987. They had four children together. In her testimony she graphically recounted numerous injuries; including being burned with an oxywelder and on another occasions being trapped in the roof of the house. On occasion Rodney became so angry that he had beaten nine of the family's pet dogs to death, he was relentlessly controlling, placing her on time limits to run errands, calling her at early hours of the morning for a lift home and often raping her. Rodney told her that if she ever left he would kill her or harm the ones she loved. Susan had made a number of statements to police about Rodney's violence during the relationship and had tried to leave. On one occasion police assisted her to leave Queensland but Rodney found her so she returned, fearful of what he would do to her family. In the weeks preceding the killing the violence escalated and Rodney threatened to kill one of the children. He created a lottery and demanded she choose a piece of paper. Susan selected a paper on which was written the name of her youngest son; she assumed Rodney would kill him. In the days before she killed him, Rodney had punched Susan in the chest with such force that it was painful to cough or sneeze. Susan was very small compared to Rodney; his thigh was bigger than her waist and this discrepancy in size was emphasised in the trial as a reason why she used a gun. Ultimately Susan laced her husband's evening meal with crushed Temazepam tablets and shot him twice as he dozed in a chair. She was assisted by others in disposing of the body. Justice Applegarth directed the jury on both the preservation defence and self-defence and she was acquitted of murder on the basis of self-defence.

Feminist Commentary

Positive

“[I]n the *Falls* case a decidedly welcome approach was taken to the legal analysis of 'assault' in this first element in Queensland self-defence law." (Edgely and Marchetti 2012, p.136)

“Applegarth J emphasised the fact that in considering the application of section 304B, the jury needed to take into account all of the circumstances of the relationship, not only the acts that would constitute acts of domestic violence. Evidence of battered woman syndrome, although not a psychological disorder, was relevant to Susan's mental state and 'whether she exhibited hyperarousal and other symptoms that are recognised in such cases'. It was, therefore clear that, had the jury had any doubts about whether Susan had acted in defence of herself and/or her family against an impending assault that they could easily have resorted to the new abusive domestic relationships defence.” (Edgely and Marchetti 2012, p.136)

“His summing up on self-defence explained to the jury that Susan’s actions must be considered in light of her experience of living in an abusive relationship. In understanding this, the jury could draw on the expert evidence as well as other evidence. These directions underscore the potential for the application of self-defence in the context of killings within an abusive relationship in Queensland and suggest that the preservation defence may have a very narrow application. It may be useful to amend the self-defence notes in the Supreme and District Courts Benchbook (2012) which provides guidance to judges to reflect Applegarth J’s approach.” (Douglas 2012, pp.577)

“As the first case to deal with self-defence in the shadow of the new preservation defence, Applegarth J’s summing up in *R v Falls* (2010) was particularly significant. This first part of his summing up confronted two of the key problems associated with battered women in Queensland attempting to apply self-defence to their circumstances: identification of a specific assault and the imminence of further assault or danger (Bradfield, 2002: 178). Applegarth J read the definition of assault (s245 QCC) to the jury and, referring to the cases *of R v Secretary* (1996) and *R v Mackenzie* (2000) he emphasised that a continuing threat, where there is a present ability to carry out the threat, is an assault for the purposes of triggering a defensive response.” (Douglas 2012, pp.576)

Negative

“As has been argued above, the application of *Secretary* in Queensland in the *Falls* case has given judges a new way to think about the 'present apparent ability' requirement, but some kind of specific assault (or as was

evident in *Falls*' case, some kind of continuing threat) is still required prior to the killing. Women who kill in the absence of a precipitating assault must resort to the abusive domestic relationships defence and will face a manslaughter conviction." (Edgely and Marchetti 2012, pp.170-171)

- ***2011 Queensland law reform***

Law reform:

***Criminal Code Act* 1899**

Section 304

Killing on provocation…

(3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if—
  (a) a domestic relationship exists between 2 persons; and
  (b) one person unlawfully kills the other person (the deceased); and
  (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—
    (i) to end the relationship; or
    (ii) to change the nature of the relationship; or
    (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

(4) For subsection (3)(a), despite the *Domestic and Family Violence Protection Act 2012*, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.

(5) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.

(6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.

(7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only changes to the partial defence of provocation (section 304, QCC).

Consideration of feminist critique:

The reform here followed the report by the Queensland Law Reform Commission which, on consultation with feminist stakeholders, found that the defence as it stood benefitted men who kill their intimate partners in response to infidelity, insults, or expression of a desire to end the relationship. (Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation: Report* (2008), p. 225)

"The amendments remove insults and statements about relationships from the scope of the defence; recognise a person's right to assert their personal or

sexual autonomy; and will reduce the scope of the defence being available to those who kill out of sexual possessiveness or jealousy." (Explanatory Memorandum, p. 3)

- ***R v Ney*** (2011) QSC (Unreported, 8 March 2011)
  Queensland Supreme Court, Dick AJ
  Manslaughter, diminished responsibility.

  "In 2007 Emma Louise Ney killed her partner, Graham Haynes. She struck Haynes' head and face with an axe. Haynes was hospitalised and died two days later. Initially charged with murder when she began her trial in 2010, she pleaded not guilty on the basis of self-defence or that she was guilty of manslaughter pursuant to the preservation defence. The defence lawyer, on opening the case, told the jury that Ney had experienced demeaning and humiliating violence and abuse at the hands of the deceased. Counsel said that Haynes had assaulted Ney on the night she killed him. Defence counsel told the jury that Ney just wanted the abuse to stop but she believed that if she didn't get the axe, Haynes would kill her. On day six, of a proposed two-week trial, the jury were discharged. According to newspaper reports, jury deliberations had been disclosed to someone not on the jury panel. The matter was returned to court in March 2011 and a plea of guilty to manslaughter, based on diminished responsibility (s304AQCC), was accepted (*R v Ney*, 2011: 6). Two expert reports identified Ney's alcohol and substance abuse and multiple traumas she suffered in a series of violent relationships. While Dick AJ was not confident that all the violence Ney described was a reality, she was prepared to act on the basis that Ney's perception was that Haynes was violent to her (R v Ney, 2011, p.2). Ney was sentenced to serve nine years imprisonment with a non-parole period of three years. (see Douglas 2012, pp.374-375)

  Feminist Commentary:

  Positive

  "Although Ney ultimately negotiated a plea to manslaughter on the basis of diminished responsibility, in sentencing Justice Dick quoted from the expert psychiatrist's report to understand why Ney was unable to leave the abusive relationship (*R v Ney*, 2011: 4). This evidence mitigated penalty (*R v Ney*, 2011: 10). ...These cases suggest that judges increasingly accept that expert evidence is relevant in understanding the circumstances in which battered women kill their abuser." (Douglas 2012, pp.576)

- ***Kells v R*** (2013) VSCA 7 (7 February 2013) | austlii
  Victorian Court of Appeal
  Manslaughter, sentence appeal, Buchanan and Tate JJA and T Forrest AJA.
  R v Kells [2011] VSC 679 (9 December 2011) | austlii

Victorian Supreme Court, Macaulay J.

Murder, manslaughter

Summary

The accused was on trial for murdering her partner by stabbing him with a knife. The defence contended the Court should give the jury a direction invoking the family violence provision in s 9AH of the *Crimes Act* 1958 (Vic). That provision somewhat widens the scope for the accused's exculpatory belief in the necessity to defend herself, or the scope of the reasonable grounds for having that belief, in circumstances where it applies.

The Crown says Kells intentionally killed Pye by stabbing him to the heart with a kitchen knife after a long night of aggressive and erratic behaviour on her part; when angry and frustrated about Pye having stolen her money and mobile phones; and with a known tendency to resort to weapons in confrontations with domestic partners.

The defence says Pye was physically assaulting Kells just before the incident; then disappeared into a bedroom; Kells armed herself with a knife fearing further assault; and, when Pye unexpectedly ran at her from the bedroom, she thrust at him with the knife in self-defence, killing him.

Central to the divide between the Crown and defence, and likely to assist the jury in determining their verdicts on intent and self-defence, is the question of who was the real aggressor on the morning Pye was killed; was it Pye or was it Kells?

Macaulay J found there was sufficient evidence before the jury for that conclusion to be open to them. Whether they draw it or not is a matter for them.

The Supreme Court held: proceed to direct the jury on the application of s 9AH.

R v Kells [2012] VSC 53

The accused was charged with murder but jury found her guilty of manslaughter. Accused claimed she acted in self-defence.

The Supreme Court held: Sentence 8 years and non-parole period of 5 years.

Macaulay J commentary

“It seems to me that the logic and evident purpose of the section comprehends the possibility that either or both parties in a violent domestic relationship could be subject to that vulnerable state of mind, borne of chronic abuse, that merits the more lenient approach of the section to self-defence. Who takes the benefit of the section would, of course, depend upon which of the parties committed

the act on the other attracting the homicide charge. Accordingly, I am not persuaded by the Crown's argument that the facts of the case do not potentially enliven s 9AH." (paras 22-23)

Feminist commentary

Negative

'An understanding of the broader social context of gender-based inequality, as well as an acknowledgement of the size and strength disparities between men and women, is critical in recognising the impact of violence in intimate relationships. In the case of Jade Kells, regardless of whether the previous violence in the relationship was mutual or not, the fact remains that, based on Dean Pye's prior violence and abuse, Jade Kells had reason to fear being harmed by him as he came towards her. Even if he were unarmed, his greater size may have meant that he posed a danger to her. She told police that earlier that day he had attempted to choke her and had pushed her against a wall. However, her reaction by stabbing him was determined by Justice Macaulay when sentencing to be 'out of any reasonable proportion to that threat' posed by Pye (R v Kells[2012] VSC 53, para 14).' Kirkwood et al 2013 29-33

- ***Black v R*** (2012) VSCA 75 (26 April 2012) | austlii
  Victorian Court of Appeal, Buchanan and Bongiorno JJA and Hollingworth AJA (concurring)
  Defensive homicide, sentence appeal, consideration of violence.
  R v Black [2011] VSC 152 (12 April 2011) | austlii
  Victorian Supreme Court, Curtain J.
  Defensive homicide.

Summary

The accused pleaded guilty to defensive homicide.

On the afternoon of Friday 30 October 2009, the accused was at home with the deceased, her de facto husband, Wayne Clarke. Her son, at that time was also living at that address. On that morning, she had returned from her nightshift work as a machinist at Godfrey Hirst, and together, she and the deceased went shopping and then to a hotel and drank alcohol. After they returned home, an argument ensued over Mr Clarke not wanting to go to his work later that night. During the course of the argument, which continued over a period of time, Mr Clarke made reference to her children and, in particular, to her son, which it appears exacerbated the argument. At this stage, she moved into the kitchen and Mr Clarke followed her. As it appears from the photos, the kitchen is a small U-shaped area and the argument continued, with Mr Clarke coming up to her and sticking his chest out and in that way pinning her in the corner of the kitchen. The accused told the police in her record of interview that Mr Clarke liked to stick his chest out "because he's a lot taller than me". She told Mr

Clarke that he was pushing it too far, and as he had you pinned in the corner of the kitchen, he was jabbing you in the body. She then grabbed a kitchen knife, however Mr Clarke continued to corner her and, and in those circumstances she stabbed him twice to the left chest.

Justice Curtain noted “In these circumstances, where the family violence was limited to threats, intimidation, harassment, jabbing and prodding as it was on this occasion, the Crown contend, and again it is acknowledged by your plea, that the belief that the knife could have been turned on you or that you had to get him first, or that you yourself were at risk of really serious harm if you did not act was not based on reasonable grounds.”

The Supreme Court held: Sentenced to 9 years with a non-parole period of 6 years.

Curtain J commentary

“You were initially presented on a charge of murder, but the Crown has accepted your plea to the count of defensive homicide on the basis that you admit that you killed Wayne Clarke in the belief that it was necessary to carry out that conduct in order to defend yourself from the infliction of death or really serious injury in circumstances where such belief was not based on reasonable grounds. The Crown did not dispute that you have been subjected to ongoing harassment and intimidation which, as such, would come within the definition of "family violence" pursuant to s 9AH of the Crimes Act 1958.” (para 7)

The later appeal against sentence (initiated by Black) was dismissed.

Feminist commentary:

Negative

‘… we contend that Karen Black’s response in stabbing Wayne Clarke could be seen as ‘reasonable’ (we note that this argument is also made by Toole 2012). Yet it would appear that, in Karen Black’s case, being forced into sex was not conceived as rape; indeed, the word ‘rape’ was not used during the plea hearing. The sentencing judge and the majority judgment in her appeal noted that she would ‘give in’ to Wayne Clarke’s demands. Being physically intimidated or forced into sex by a partner is often not seen as ‘real rape’ . Yet research shows that the experience of sexual violence by an intimate partner may have greater negative psychological effects than physical violence alone.’ (Kirkwood et al 2013 29-33 refs omitted)

- ***Creamer v R*** (2012) VSCA 182 (16 August 2012) | austlii
  Victorian Court of Appeal, Weinberg and Bongiorno JJA and T Forrest AJA (concurring)
  Defensive homicide, sentence appeal, seriousness of violence.
  R v Creamer (2011) VSC 196 (20 April 2011) | austlii

Victorian Supreme Court, Coghlan J.

Defensive homicide.

Summary

The accused pleaded not guilty to the murder of her husband. She was convicted of the alternative charge of defensive homicide. The trial had been conducted on the basis that she was guilty either of manslaughter or defensive homicide.

The accused and deceased had been married for 11 years. The relationship was characterised by both parties having numerous extra marital affairs. Evidence was accepted that the deceased had tried to make the accused engage in group sex, which she did not want to do. Coghlan J found that the accused regarded her position as extremely unsatisfactory and the future of her relationship with her husband as bleak. On the night the deceased died they had had an argument and the accused hit him over the head with a blunt object before stabbing him to death. There was only one event of domestic violence submitted for evidence. This was the day before the deceased's death when the deceased had hit the accused over the leg with a stick. Coghlan J found that the deceased's relatively long-term relationship with another woman and his stated ambition to resume his relationship with his first wife are all part of the material which would come under the heading of domestic violence.

The verdict of guilty to defensive homicide means that the jury entertained a reasonable doubt about the issue of self-defence. The accused could only have been convicted of murder if the jury were satisfied beyond reasonable doubt that at the time she committed the act or acts which would otherwise have been murder, she did not believe that it was necessary to do what she did to defend herself from the infliction of death or really serious injury.

The Court sentenced her on the basis that she had been overwhelmed by the whole of the circumstances as they surrounded her and, in particular, by her concern that she was being forced into a sexual scenario which she did not want.

The Supreme Court held: Convicted of defensive homicide. Sentenced to 11 years imprisonment with non-parole of 7 years.

The later appeal against sentence (initiated by Creamer) was dismissed.

Feminist Commentary

Negative

‘Misconceptions and confusion around family violence were evident throughout the trial. There appeared to be a lack of understanding about how psychological manipulation, sexual degradation and coercive control ‘are forms of family violence.’ (Kirkwood et al 2013, 28 refs omitted)

‘While the prosecution cast doubt over much of Eileen Creamer’s evidence, in our view there was consistency between her evidence at the trial and what she told the police and expert witnesses about her fear that, in the face of his constant psychological coercion, she would be unable to stand

up to her husband to prevent the group sex from occurring.’ (Kirkwood et al 2013, 28)

‘A significant problem for the defence was that some of the evidence of abuse was not corroborated

or was seen to conflict with some of the facts of the case. .. However, research on sexual assault and family violence reveals that victims often do not tell others because of a deep sense of shame and self-blame. Indeed, Eileen Creamer explained at the trial that she was too ashamed to tell anyone about what went on in the relationship. Research also demonstrates that there are a range of reasons why women stay in relationships with abusive partners. (Kirkwood et al 2013, 27 refs omitted)

Neutral

“It is arguable that *R v Creamer* (2011) demonstrates the importance of the ‘halfway house’ provided by defensive homicide; Creamer ran a trial on the basis of self-defence knowing that she had the safety net of defensive homicide. Alternatively, perhaps the *R v Creamer*(2011) result occurred because the jury decided that a conviction of defensive homicide was simpler than considering a complete acquittal based on self-defence (Fitz-Gibbon and Pickering). Some, like Wienberg, a Judge on Victoria’s Court of Appeal, question whether defensive homicide has given any effect to the underlying policy consideration it sought to respond to. It may be too early to tell as the jurisprudence underlying the application of defensive homicide may take, more time to become established.” (Douglas 2012, pp.371-372)

- ***R v Irsigler*** (2012) QSC (28 February 2012)
  Queensland Supreme Court, Mullins J
  Murder, acquittal, self-defence.

  Michele Irsigler killed her husband, Jonathan Watkins, in 2001. In 2012, she pleaded not guilty to both murder and interfering with a corpse. Assisted by others, she burnt the body, spreading the ashes on a farm. In her evidence at trial, Irsigler described a long history of abuse at the hands of the deceased including broken bones, rape and threats. On many occasions she had called

the police or tried to leave. Watkins had moved out of the family home prior to the killing because Irsliger had threatened to expose his sexual abuse of their daughter. Several days before the killing he returned to the family home and held Irsliger and their daughter hostage for three days. On the fourth day Irsliger managed to escape; she obtained a gun for protection so that she could collect her belongings. She returned to the house with a friend, Pilkington. On their arrival Watkins set upon Pilkington and Irsliger shot Watkins, killing him. While self-defence was the focus of the defence case, the preservation defence was raised as a 'fall-back' option and Justice Mullins directed on both self-defence and the preservation defence. Irsliger was acquitted of homicide but she and two co-offenders were found guilty of interfering with a corpse. She was sentenced to 18-months imprisonment, fully suspended.

Feminist commentary

Positive

"Defence counsel asked one expert psychiatrist to explain the concept of battered wife syndrome, the expert witness responded: 'it's not actually a psychiatric diagnosis, and the reason why it's not a psychiatric diagnosis in itself is because anybody in the situation of protracted violence will develop certain behaviours'. Clearly such evidence is pivotal in providing a social context that helps to explain the accused person's behaviours to the jury (and the judge). In this case expert evidence could support an alternative explanation for going to the house armed with a gun. Hunter suggests that such evidence can discount the possibility of psychiatric defences.... These cases [also referring to *Ney*] suggest that judges increasingly accept that expert evidence is relevant in understanding the circumstances in which battered women kill their abuser." (Douglas 2012, p.576 references omitted)

- ***2013 NSW considers law reform***

Proposed law reform:

In 2012 NSW launched a parliamentary inquiry into reforming the provocation defence. The inquiry resulted in a report: The Partial Defence of provocation. The report recommended, among other reforms:

  - the introduction of a social framework evidence provision (similar to Victoria)
  - renaming provocation defence to defence of 'gross provocation' and a limitation of the defence's operation (eg unavailable where provocation is based on choice to leave or change the relationship)

Crimes Amendment (Provocation) Bill 2014

Consideration of feminist critique:

Provocation

It was submitted to the inquiry that the “most intractable” issue in respect of the partial defence of provocation was its potential for gender bias. (Submission 29, Associate Professor Thomas Crofts and Dr Arlie Loughnan, p. 5)

Multiple submissions emphasised the defence as being “by men for men”. (Submission 31, NSW Domestic Violence Committee Coalition, p. 12 and Submission 37, Women’s Legal Services NSW, pp. 2-3)

It was noted that the defence has been criticised for sending the wrong message, ie that violence against women is acceptable. (Submission 36, Greg Bloomfield, FairGO, p. 1, Submission 1, Name suppressed, pp. 1-2, and Submission 49, Ms Catherine Smith, p. 2)

Feminist academics also noted that the defence also allows victim-blaming. (Submission 12, Mr Graeme Coss, p.6 and Dr. Kate Fitz-Gibbon, Evidence, 28 August 2012, p. 49; see also Submission 42, Submission 35, Submission 48; Submission 12; Submission 18; Submission 31, The NSW Domestic Violence Committee Coalition, p. 16, and Submission 45).

The previously used phrase “loss of self-control” was criticised by multiple groups as it is often used in respect of intentional and deliberate acts by the perpetrator of abuse to obtain compliance. (Submission 35, Warringa Baiya, pp. 3-4; Submission 37, Women’s Legal Services NSW, pp. 14-15; Submission 16, Women’s Domestic Violence Court Assistance Service NSW, p.5)

It was also noted that critics had highlighted that the law of provocation as it stood “empathises with and inappropriately privileges typically male responses.” (Submission 31, p.24; Submission 12, Mr Graeme Coss, p.4)

Self-Defence

It was submitted that the defence of self-defence more adequately reflects the circumstances in which victims of domestic violence kill compared with provocation. (Submission 12, Mr Graeme Cross, p. 9; Submission 40, Amy Fox, Wayne Zheng, Tanvi Mehta and Vanja Bulut, p. 10)

However, the defence is not perfect and does not cover all circumstances. (Submission 16, Women’s Domestic Violence Court Advocacy Service, p. 5)

To strengthen self-defence’s application to battered women, it was suggested that the court admit ‘social framework’ evidence to educate juries on the ‘context and consequences’ of domestic violence. (Submission 16, Women’s Domestic Violence Court Advocacy Service, p. 6; Submission 31, NSW Domestic Violence Committee Coalition, p. 2; Submission 37, Women’s Legal Services NSW, p. 5)

- ***2013 Victoria considers reform***

  Proposed law reform:

  After considerable concerns were raised about the operation of the offence of homicide there was debate in Victoria about whether it should be abolished. Consultation on the issue extended through 2013-2014 and the Victorian Department of Justice released a consultation paper titled: Defensive Homicide: Proposals for Legislative Reform in September 2013. The consultation paper recommended:

  - abolition of offence of defensive homicide
  - streamlining of self-defence
  - extension of the use of social framework evidence provision to all offences.

  In 2014 the Victorian parliament introduced a Bill *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, which will implement the proposed changes.

  Consideration of feminist critique:

  It was noted that the current regime was formally equal but not substantively equal. (Graycar and Morgan 2005, p. 399)

  "A succession of Australian studies has found that a high proportion of women who kill an intimate partner are responding to long-term violence by the partner. In these situations, women typically do not respond during a violent attack, and as they are often smaller and less experienced in physical combat than their victims, frequently use a weapon when retaliating. The actions of abused women, therefore, often lack both immediacy and proportionality…

  When an abused woman is convicted of murder on this basis, she has been denied the protection of self-defence because her actions do not conform to established patterns of male violence. This constitutes a gender bias in the interpretation and application (although not the framing) of the defence, which is inconsistent with the bedrock principle of equality before the law." (Toole 2012, p. 256-7)

  It was noted that the reforms thus far had improved outcomes for women. (Toole 2012, p. 267-71)

  However, in both those cases cited as examples of improvement, immediacy had not been of issue. (Tyson, Capper and Kirkwood, Submission)

  "What this defence provides is a half-way house or 'safety-net' for these women, when the law could instead be further reformed to accommodate their circumstances in terms of an arguably more accurate legal category of self-

defence. Consequently, through the inclusion of stories of battered women who kill under the offence of defensive homicide, battered women have come to occupy a compromised legal category." (Fitz-Gibbon and Pickering 2012, p. 177)

"Off-setting the abolition of the provocation defence with the introduction of a new partial defence ... [ensured] that juries would continue to hear the kind of exculpatory victim-blaming legal argument and evidence that the abolition of provocation was designed to address." (Howe, Submission)

The improvements of the self-defence law, such as the social framework evidence provisions, are "critically limited by the concurrent enactment of defensive homicide, which rests on the conception of the belief and behaviour of abused women as not being reasonable." (Toole 2012, p. 286)

"A key concern of the previously abolished partial defence of provocation was that it provided a mechanism through which a victim of homicide could be blamed for their own death. It is a concern that similar narratives of victim blame are emerging though the operation of the offence of defensive homicide." (Fitz-Gibbon, Submission)

Defensive homicide may have "provided an avenue for men to use similar types of arguments in relation to their behaviour that occurred with the provocation defence." (Tyson, Capper and Kirkwood, Submission)

The changes to the self-defence provisions were in part in response to suggestions that the focus should be on the reasonableness of the woman's response, rather than the grounds for her belief. (Howe, Submission)

- ***DPP v Bracken*** (2014) VSC 94 (12 February 2014) | austlii
  Victorian Supreme Court, Maxwell P
  Murder, self defence, acquittal, history of domestic violence.

  Philip Bracken was charged with murder after killing his partner Helen Curtis by strangling her. Bracken alleged he had been subjected to years of domestic violence (pursuant to s9AH Family Violence Evidence provision). A psychiatrist gave evidence during the trial of the effects of domestic violence. Bracken was acquitted of murder.

- ***DPP v Williams*** (2014) VSC 304 (27 June 2014) | austlii
  Victorian Supreme Court, Hollingworth J
  Defensive homicide.

  Summary

  Angela Williams killed her long-time partner, Dragan Dordevic, with a pick axe in 2008 and buried him in the back yard. In 2014 she pleaded not guilty to

murder and was found guilty of defensive homicide. Previous domestic violence was not well documented in this case and Williams had lied about her behaviour for some time. A law professor and family violence expert, Patricia Easteal, gave evidence at the sentencing hearing explaining the complexity of family violence. In sentencing Williams, Hollingworth J observed that the 'lack of complaint is not uncommon in family violence cases' and friends and family may not be aware of ongoing violence as it often happens behind closed doors. In her sentencing comments Hollingworth J's described domestic violence as often 'belittling and controlling'; that discrete acts form a pattern of abuse that may seem minor if looked at in isolation but that eventually the person will reach a point of explosive violence that seems disproportionate; and that Williams had few friends and was isolated. She was sentenced to imprisonment for 8 years with a non-parole period of 5 years.

- ***2014 NSW law reform***

  Key reforms:

  The Crimes Amendment (Provocation) Bill 2014 was passed in 2014 (assented 20 May 2014).

  23 Trial for murder—partial defence of extreme provocation

  1. If, on the trial of a person for murder, it appears that the act causing death was in response to extreme provocation and, but for this section and the provocation, the jury would have found the accused guilty of murder, the jury is to acquit the accused of murder and find the accused guilty of manslaughter.
  2. An act is done in response to extreme provocation if and only if:
     1. the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and
     2. the conduct of the deceased was a serious indictable offence, and
     3. the conduct of the deceased caused the accused to lose self-control, and
     4. the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.
  3. Conduct of the deceased does not constitute extreme provocation if:
     1. the conduct was only a non-violent sexual advance to the accused, or
     2. the accused incited the conduct in order to provide an excuse to use violence against the deceased.
  4. Conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death.

5. For the purpose of determining whether an act causing death was in response to extreme provocation, evidence of self-induced intoxication of the accused (within the meaning of Part 11A) cannot be taken into account.
6. For the purpose of determining whether an act causing death was in response to extreme provocation, provocation is not negatived merely because the act causing death was done with intent to kill or inflict grievous bodily harm.
7. If, on the trial of a person for murder, there is any evidence that the act causing death was in response to extreme provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation.
8. This section does not exclude or limit any defence to a charge of murder.
9. The substitution of this section by the Crimes Amendment (Provocation) Act 2014 does not apply to the trial of a person for murder that was allegedly committed before the commencement of that Act.
10. In this section: act includes an omission to act.

Consideration of feminist critique:

This piece of legislation was specifically based on the reforms suggested in the 2013 report which was informed greatly by feminist stakeholders: it was claimed in the Bill's Second Reading Speech that the government had "adopted almost in its entirety the committee's recommendations." (Hansard, p. 27147)

- ***2014 Victorian law reform***

Law Reform:

Crimes Amendment (Abolition of Defensive Homicide) Bill 2014

Assented September 2014.

The offence of defensive homicide was abolished and jury directions in respect of family violence were reformed.

Consideration of feminist critique:

The new jury directions "are designed to give jurors a better appreciation of the factors impacting victims of family violence" (Explanatory Memorandum, p. 23) and were based on the commentary by the Victorian Health Promotion Foundation 2010, Anderson et al 2003, Meyer 2012, and Barnett 2000.

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