BATTERED WOMAN SYNDROME: AN ADVANCE FOR WOMEN OR FURTHER EVIDENCE OF THE LEGAL SYSTEM'S INABILITY TO COMPREHEND WOMEN'S EXPERIENCE?

The Battered Woman Syndrome (BWS) has assumed a particular significance in Australia in the past few months. In May of this year, in what appears to have been a first for Australia, the South Australian Court of Criminal Appeal ruled that a trial judge had erred in not allowing expert evidence concerning BWS to be put by the defence.[1] At two recent Australian criminological conferences there have been calls for the defence to be used in Australian courts in the context of self-defence for women who kill abusive spouses.[2] Such calls have been picked up and reported by the media. However, the discussion there has been to date in Australia concerning BWS has been uncritical, some might even characterise it as evangelical. A more measured assessment is required of what the pursuit of such a defence might have to offer women and at what cost.

That the legal system is constituted by male discourse on the basis of male experience and in a manner which largely excludes the possibility of women's interests being furthered, or even understood, is accepted wisdom among many feminist legal scholars. That the law and the legal system is poorly equipped to deal with the experiences of women is exemplified in all too many cases where male standards of reasonableness or other legal tests apply. The struggle with how best to conceptualise the actions of women defendants who do not fit that male standard can be seen starkly in cases such as that of the *Queen v R*[3] where the jury in the re-trial determined that acquittal seemed the only "just" outcome whatever the law.

The experiences of women who kill their partners following prolonged periods of abuse do not neatly coincide with the prescribed standards for the use of legal defences such as self-defence or provocation.[4] It is true that in New South Wales it was just these

1 *The Queen v Runjanjic, The Queen v Kontinnen* CCA (SA) King CJ, Legoe and Bollen JJ. CCA 226 & 227 of 1991, unreported. The facts of the case represent an unusual use of the BWS defence. The appellants, both women, were convicted in the Supreme Court on charges of false imprisonment and causing grievous bodily harm to a third woman. They raised BWS in the context of their defence of duress, arguing that they had each endured a relationship of submission and domination at the hands of Runjanjic's recently deceased de facto, Hill. Hill had been charged also with the offences but had died before coming to trial. It was argued that the appellants' wills had been overborne by fear of Hill's violence. The appeal was brought on the basis that the verdict was unsafe and unsatisfactory, and secondly that the trial judge had been wrong to exclude expert evidence concerning the battered woman syndrome" which had been proffered by the defence. The court ruled that the verdicts were not unsafe or unsatisfactory but ordered a re-trial on the basis that the expert evidence had been wrongly rejected. For further detail see Magner, E, "Case note,*The Queen v Runjanjic, The Queen v Kontinnen*" (1991) *Crim LJ* (forthcoming) and "Case of the Month: Women and Violence" (Sept 1991) *Law Society Bulletin* 12.

2 Easteal, P, "Battered Women: A Plea of Self-defence", paper presented at the Australian Institute of Criminology Conference on Women and the Law; Easteal, P, "The Battered Woman Syndrome", paper presented at the Australian and New Zealand Society of Criminology Conference; *Sydney Morning Herald*, 22 October 1991.

3 (1981) 4 *A Crim R* 127. The accused was convicted at trial of the murder of her husband with an axe after she had learned that he had been sexually abusing their daughters over many years. She was awarded a re-trial after appeal, and was acquitted by the jury despite the fact that her defence, that of provocation, does not provide a full defence to murder, but only reduces it to manslaughter.

4 See Tolmie, J, "Add Women and Stir: An Australian Perspective on Defences to Murder for Women Who

sort of considerations which drove the law reforms regarding homicide in the early 1980s. The public campaigns around the cases of Violet and Bruce Roberts, and Georgia Hill were significant in demonstrating the inadequacies of the then existing legislation.

The resultant reforms to the *Crimes Act* 1900 (NSW) (s23) are not to be dismissed lightly even if some problems remain. One only needs to compare the New South Wales position regarding provocation with that prevailing in Britain to appreciate the gains which have been made here. For example, Sara Thornton,[5] who killed her husband after prolonged abuse, was convicted of murder and is serving a sentence of life imprisonment. The provocation defence is so narrowly defined in Britain that the facts of her case were not consistent with it. By comparison with Britain, New South Wales has a liberal interpretation of the requirement of sudden and temporary loss of self control which recognises cumulative provocation and allows a time interval between the final provoking incident and the killing.[6] The prevailing New South Wales law would arguably have allowed Ms Thornton a defence of provocation in which case her conviction would have been reduced from murder to manslaughter, though it would not justify an acquittal. Provocation is a partial but not complete defence to murder.

Where the New South Wales reforms failed was in their inability to grasp the harder issue of self-defence. A successful plea of self-defence represents legal acknowledgement that the defendant acted in a manner which was justifiable and results in a complete aquital. Despite debate at the time about the difficulties women defendants face in meeting the requirements for self-defence, law reforms addressed provocation but not self-defence.

The manner in which self-defence is currently framed requires a number of elements to be present. The person must be acting against a threat that is imminent — it must be a threat of at least "really serious" harm; there is a duty to retreat which requires that all other avenues of self-help must be exhausted; the chosen action must be necessary to avert the threatened harm; and the accused's response must be considered proportional to the attack. In addition the accused's belief that these elements are present must be on "reasonable grounds".

These elements reflect an approach to self-defence which is grounded in male experience, and presumes a conflict between (male) equals. The requirements of imminent attack and proportional response are particularly difficult for women defendants to meet. Being less accustomed to engaging in physical aggression and less physically able to defend themselves, women who kill abusive partners typically resort to the use of a weapon.[7] It is also common that women who kill in the context of domestic violence do so at a time when there is a lull in the violence perpetrated by their partner, such as while he is asleep, incapacitated due to alcohol or otherwise distracted. These characteristics of homicide by women are readily explicable in terms of the unequal nature of physical aggression between a male and what usually will be a smaller, lighter and less physically

Kill Their Violent Husbands", paper presented at the Law and Society Conference, Amsterdam, June 1991.

5 *R v Sara Thornton* ((UK) Court of Appeal, 22 July 1991).

6 See Yeo, S, "Sudden Provocation Downunder" (1991) *New L J* (forthcoming).

7 Wallace, A, *Homicide: The Social Reality* (1986).

able woman. However, these same characteristics mean that women's actions are unlikely to be judged as self defence and as justifiable.

Tolmie[8] argues that recent shifts in formulations of self-defence in Australia have introduced enough flexibility in the interpretation of self-defence to make it in principle available to women who kill in response to domestic violence. However, she also argues that courts have not in fact dealt with such cases sympathetically and have demonstrated the inability of judges and juries to comprehend the realities facing battered women.

It is in the context of the inadequacies of the existing defences for women who kill faced with on-going and often life threatening violence from male intimates that it is argued by some that BWS should be invoked to help establish a new standard against which the defendant's behaviour might be measured.

This approach has been utilised in some jurisdictions in North America. Expert evidence is presented in order to establish a pattern of responses commonly exhibited by battered women on the basis that it is beyond the capacity of the jury to otherwise understand the conduct of the defendant.[9]

The battered women's syndrome describes a cluster of symptoms (though opinion differs as to what this cluster might contain) which constitute a psychological state engendered by the abuse a woman has suffered. Her behaviour is compared not with the standard of (male) reasonableness but rather with a different standard appropriate for battered women. The set of symptoms which she is alleged to hold is given a legitimacy by carrying the scientific label 'syndrome'. The court is spared the problem of relying upon the women's own account of events but instead can call upon the testimony of experts — one professional discourse engaging with another to establish the likely behaviour of a battered woman.

Why then the concern by feminists both in Australia and elsewhere about the danger inherent in such an approach? Why not embrace the BWS as strategy to assist individual women, even if one is not convinced by the psychological literature concerning the syndrome?

Some of those advocating the BWS route in Australia have been strangely silent concerning the criticisms and experience arising around the issue in other countries, especially the US and Canada, or else have characterised criticism as reactionary and misogynist.[10] However, much of the criticism has arisen from feminists who are well versed in, and sensitive to, the needs of battered women.

The battered woman syndrome relies heavily on the work of psychologist Dr Lenore Walker.[11] She proposes that relationships in which battering occurs are characterised by a cyclical pattern of violence. In the first stage there is a build up of tension, the second stage is that of acute violence and the third stage is one of contrition. It is the loving and

8 Ibid.

9 Restrictions on the use of expert evidence mean that it is not routinely admitted in trials, however it is becoming more commonly accepted as relevant in some jurisdictions in the US and was recently accepted by the Supreme Court of Canada in the case of *Lavallee v The Queen* 55 CCC (3d) 397 (1990).

10 Easteal, ibid.

11 Walker, L, *The Battered Woman Syndrome* (1984).

contrite third stage which is said to explain in part why some women remain in violent relationships. She further proposes that women exposed to the experience of ongoing and unpredictable violence lapse into a depressive and passive state which is labelled learned helplessness.[12] They may also develop self destructive coping mechanisms such as alcohol or drug abuse.

Whilst the battered woman syndrome has been accepted by some North American courts and by the South Australian Court of Criminal Appeal as a recognisable body of scientific knowledge, debate continues about whether the syndrome has been proved to exist. Dr Walker's own research methodology has been criticised as flawed. Both the cycle of violence and learned helplessness have been questioned and it has not been empirically demonstrated that battered women share a range of psychological symptoms.

The approach has also been criticised as a defence strategy. The focus it places upon psychological characteristics of battered women individualises and medicalises defendants, and rather than attacking male standards of reasonableness reinforces stereotypes about women's emotionality and psychological vulnerability. It does little to demonstrate that a defendant's behaviour might be rational and explicable in the face of ongoing and life threatening violence, and in the context of the economic, social, cultural and religious factors which limit women's options. The defendant's behaviour is constructed as due to psychological disability rather than as a necessary act of self-preservation. An excuse is offered rather than a justification.[13] Other critics point out the flawed logic of a position which invokes learned helplessness to explain the actions of a woman who has killed an abusive partner. Such actions may be desperate, but they are neither passive nor helpless.

It has also been argued that it is dangerous to establish a new, narrow, standard by which battered women on trial will be judged. This raises the possibility of a woman defendant failing to meet two conflicting stereotypes — that of the reasonable man or the (reasonable) battered woman.[14] Not only will some battered women fail to fit the BWS stereotype, but equally important, this approach does not assist women who kill in other contexts and have difficulty complying with male standards.

The proponents of the use of BWS as defence strategy no doubt have the interests of women defendants at heart. Unfortunately such an approach is more likely to entrench the inequities which women face within the legal system rather than challenge them. The approach does not address the problem that standards such as reasonableness are formulated in a way which excludes women's experience. It does not tackle fundamental problems of the legal system but rather re-defines and remakes women's lives and experiences in a manner which fits them into the prevailing narrow masculine legal strictures. The battered woman syndrome is a construction which meets the law's needs not women's needs.

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12 This is a term borrowed from psychological research concerning the responses of animals to unpredictable and unavoidable painful stimuli.

13 Tolmie, above n4 at 20.

14 Crocker, P L, "The Meaning of Equality for Battered Women Who Kill Men in Self-defense" (1985) 8 *Harvard Women's L J* 121; O'Donovan, K, "Defences for Battered Women Who Kill" (1991) 18 *J of Law and Society* 219.