WHEN SELF-DEFENCE FAILS

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When Self-defence Fails

Elizabeth Sheehy, Julie Stubbs and Julia Tolmie

Feminist efforts to reform criminal defences to homicide have largely focused on expanding self-defence for women who kill their abusers on the one hand, and constricting defences for men who kill their female partners and former partners on the other. Self-defence is the preferred defence for battered women who kill: it is a complete defence; it conveys that the woman's act was justified; and its elements permit the jury to hear evidence about the experience of battering and the social realities that provide context to the woman's acts.

Yet self-defence may fail. So much depends upon judicial rulings on the evidence offered by the defence. Jurors may not hear all the testimony about the deceased's violence or threats (*R v Craig*). The woman's claim to self-defence may be hobbled by the fact that she failed to disclose the abuse, seek help or leave the relationship. Women who kill outside of a live confrontation may be denied self-defence even without a formal "imminence" requirement. And, women's credibility will be challenged by prosecutors who point to evidence of independence or prior violence by the woman to contest whether she was a "real" battered woman who faced lethal danger or rather a batterer herself or even, as some prosecutors propose, someone who chose homicide as the preferred way out of an unhappy marriage. In addition, even on an expansive reading of self-defence, not all battered women who kill do so in circumstances that are a good fit with self-defence.

For these reasons we turn our attention to other complete defences to homicide that may be available to women who kill an abusive partner. These have attracted less scholarly attention than self-defence or provocation, and an assessment of their potential application to battered women's homicide cases seems overdue. Recent reforms in several Australian states that have extended the defences of duress and necessity to murder, and the novel use of duress in a recent Canadian case, provide added reasons for this inquiry.

We begin by recognising the context commonly faced by battered women who kill and the challenges that arise in having that context acknowledged within conventional criminal defences whose paradigms were not developed with women in mind. We next examine the defences of mental disorder/insanity, automatism, duress and necessity. For each we analyse their possibilities and limitations for battered women, drawing on the small number of cases from Australia, New Zealand and Canada where these defences have been successfully applied.[1] Frequently this success has not been sustained on appeal or retrial, or is limited to a narrow set of facts. As a result the courts have failed to develop these defences in a manner that would make them generally available in battered women's cases. For each we also consider the extent to which it is tenable to advance these as alternative defences at the same time as self-defence.

[1] We provide cases to illustrate our argument but make no claim that the cases cited represent a comprehensive review of all relevant cases.

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The context of battered women's criminal offending

As with self-defence, the context and coercive imperatives (Stark, 2007: ch 9) faced by battered women who commit homicide may not be easy to accommodate within the doctrinal requirements of other defences. Firstly, family violence is rarely a one-off incident. Typically it is long-term and cumulative, operating within and reinforcing wider circumstances of women's inequality and social entrapment. The coercion that battered women experience cannot therefore be realistically understood solely in terms of the particular homicide incident, and yet defences that locate fault in the circumstances rather than the accused conventionally focus on discrete incidents.

Secondly, the experience of surviving abuse over a period of time has an enduring impact upon women. In cases involving long-term abuse, the accused's behavior may be affected by the abuse while also being a rational response to the circumstances of abuse. Yet these two features may appear difficult to reconcile. Defences that allow recognition of the trauma arising from long-term abuse may reinforce the idea that the accused's behavior is due to a psychological condition and thus is not a rational, reasonable or ordinary response to the circumstances they found themselves in.

Thirdly, the doctrinal underpinnings of some defences presume universal experiences of choice, individual responsibility and autonomy. Defences that require the accused to weigh competing potential harms, lesser evils and safe alternatives assume that battered women ought to know about and trust that State and other resources are both available and guarantee safety. Yet many battered women's lives and decisions have been constrained by male violence and control, sex discrimination, their relationships and responsibilities as mothers and as female partners and other serious structural disadvantages. Furthermore, State responses to help seeking behavior by family violence victims have often failed to guarantee women's safety (New Zealand Family Violence Death Review Committee, 2014).

Mental disorder

Intimate partner violence seriously compromises women's mental health (VicHealth, 2004). Battered women are more likely to experience mental illness and women with mental illnesses are acutely vulnerable to being abused (Trevillion et al, 2012). Approximately 80% of women who are psychiatric inpatients have experienced physical or sexual abuse; women make 3-4 times more suicide attempts than men (Pollett, no date, citing Rajan, 2004). Among those predisposed to mental illness, abuse may trigger or exacerbate illness (Pollett, no date). Trauma or mental illness that is misdiagnosed or untreated may result in addictions to prescription medications or abuse of alcohol or other drugs (Pollett, no date), which in turn can reinforce women's social entrapment in battering relationships and deepen their psychiatric symptoms (Stark and Flitcraft, 1996: 10-21).

However, legal conceptions of mental disorder are not consistent with medical understandings, and mental disorder *per se* may not support a defence. The labels used (e.g. mental impairment, mental illness, insanity) and the elements of a complete defence of mental disorder differ across the three jurisdictions, but all place the burden on the defence of proving on a balance of probabilities that the accused experienced what is in law seen as a mental disorder, which prevented her from either understanding the nature and consequences of her behaviour or of knowing that it was wrong. In Australia (except NSW and Victoria) the defence can also be raised if the disorder deprived the accused of the ability to control her actions. Some jurisdictions in Australia, unlike in Canada and New Zealand, also have a partial defence reducing murder to manslaughter for forms of mental impairment that do not meet this test (e.g. in NSW substantial impairment; in the Northern Territory, Australian Capital Territory and Queensland - diminished responsibility)

For battered women, a mental disorder defence may be inappropriate or unavailable. First, feminists have criticised the labeling of the aftermath of men's violence against women partners as women's mental illness—for stigmatizing women and for locating the problem as the woman's. Psychiatry and psychiatric institutions are not necessarily equipped to understand, or aid women's recovery from, the effects of battering and domestic captivity. Yet the outcome of a successful mental disorder defence is not an outright acquittal, but rather a qualified acquittal usually coupled with detention and forced treatment by the State on the advice of psychiatrists.

Second, this defence is not concerned with the how or why of the disorder but rather with proving the legal criteria. Thus, the role of male violence in triggering or deepening women's mental illness may be obscured in the decisions. More importantly, evidence of self-defence may not be brought forward, fully explored, or duly credited in the criminal trial if mental disorder is also at issue.

Third, mental disorder requires that the accused be so out of touch with reality that she does not understand that she is killing another person or appreciate that it is wrong to do so or, as noted above, in some Australia jurisdictions it is available if she is unable to control her actions. Battered women are frequently diagnosed with complex forms of post-traumatic stress disorder (PTSD), depression and anxiety, but in the absence of dissociation caused by shock or extreme intoxication, their cognition or volition is unlikely to be suspended to the necessary degree. Thus, battered women may not be able to raise mental disorder even when they have serious mental health issues at the time (Westway, 2011; *R v Gordon*; *R v Wihongi*). If their mental state is recognised, it may more typically result in a manslaughter conviction based on lack of *mens rea* for murder (*R v Stewart*; *R v Cavanough*; *R v Bristow*; *R v Craig; R v Hawkins*). An analysis of Australian cases indicates that guilty pleas to manslaughter on the basis of lack of intent, diminished responsibility or excessive self-defence (*R v Chen*; *R v Duncan*; *R v Ferguson*; *R v Scott*; *R v Mabbott*; *R v Melrose*; *R v Ka*; *R v Vandersee*; *R v Edwards*; *R v Flett*; *R v Dodd*; *R v Gilbert*; *R v Russell; R v Ney*) commonly occur when the accused has a mental illness, often in conjunction with intoxication or substance abuse.

When the accused suffers from a mental disorder it may be difficult to argue self-defence, which requires that the accused's use of violence be a rational defensive response to a serious threat, because the accused's disorder may undermine her credibility in claiming a rational appraisal of her circumstances. However, one Australian case, *R v Resnick*, demonstrates the potential for self-defence to be argued even while mental disorder is at play. In a judge-alone trial, the accused pleaded not guilty to manslaughter based on self-defence. On the facts the judge found that there was a reasonable possibility that she had accidentally stabbed the deceased with a knife she was using to scare him so that he would stop physically attacking her. The accused also suffered from a schizoaffective disorder with chronic residual psychosis and delusions at the time. The prosecution argued that she should be found guilty of excessive self-defence, or that if she was acquitted it should be based on mental impairment. The judge recognised that a qualified acquittal based on mental impairment may involve a deprivation of liberty, which should not occur "in circumstances that are not unambiguously clear or apparently necessary." He acquitted her on the basis of self-defence, holding that:

> While I am satisfied that the accused suffered, at the relevant time, from… a delusion, I am not satisfied that she carried out her conduct because of it. She may very well have done the same thing if she were not deluded: the deceased was cruelly and painfully assaulting her. (*R v Resnick*: para 28)

New Zealand law permits self-defence where an accused operates under an honest but mistaken, even unreasonable belief, about her circumstances, such that depression and PTSD may support the defence (*R v Ghabachi*; *R v Wang*). However, the Court of Appeal in *R v Bridger* left open whether, as a matter of policy, the phrase "the circumstances as he believes them to be" (*Crimes Act 1961* (NZ), s 48) applies only to "sane" beliefs. *Bridger* involved a man's use of (what he argued was defensive) violence against several women. How this issue is resolved will determine whether a battered woman who is acting to defend herself, but suffering from a disease of the mind that distorts her understanding of her circumstances, can be acquitted using self-defence or whether she is limited to an insanity verdict.

There are few Canadian cases where the accused was both battered and mentally disordered, in the legal sense, at the time of the homicide. This paucity may reflect the fact that the cause of an accused's mental disorder, or even the circumstances surrounding the homicide, are not necessarily relevant and therefore may not appear in the court record. In one case the Review Board acknowledged the causal relationship between domestic violence and the accused's mental illness:

> Ms Moussaoui, without any previous mental disorder problems, was in an abusive domestic relationship. Her husband was himself mentally disordered and abused her both verbally and physically over a long period of time. Eventually the effect of this was to create a mental disorder in Ms Massaoui which led her to develop certain illusions or delusions about her own safety and, and she felt that the only solution was for her to kill her husband. (*R v El-Moussaoui*: para 3)

However, even though a causal relationship was noted, the accused's concerns for her safety were relegated to the psychiatric world of "delusions".

Under Canadian law and in South Australia (*Criminal Law Consolidation Act 1935* (SA), s 269E) the issues of responsibility and mental disorder are separated. In Canada the jury must determine whether the prosecution has proven the case before the jury is confronted with the prejudicial issue of mental disorder (*R v Swain*). This two-step process leaves open the possibility that self-defence could found a jury acquittal before mental disorder enters the picture. Whether the accused is capable of testifying or doing so credibly will remain a challenge in these circumstances.

A mental disorder defence may well be a last resort for a battered woman on trial, given that its result is a qualified acquittal. The legal criteria, which focus on her mental condition at the time of the homicide, locate abnormality in the woman, even if any ordinary person would have become psychologically compromised by entrapment by an abusive partner. The onerous burden of proof and narrow legal understanding of mental disorder may not accommodate the fluctuations in mental functioning that can result from battering and coercive control (Herman, 1992: 93). While cases suggest that mental disorder may be available as an alternative to self-defence in a given trial, this is a precarious strategy since a mental disorder may compromise the requirement of rationality that underlies self-defence. Fair outcomes for battered women may require recognition of battering and its effects and a more nuanced understanding of choice, even where constrained by mental illness.

Automatism

Women who kill abusive male partners commonly have little or no memory of what happened (Sheehy, 2014: chapter 7). Battered women may have their consciousness impaired at the time of the killing by head injury, psychological trauma or stress, or because they have submerged their unacceptable or terrifying emotions of rage or fear by dissociating (Sheehy, 2014: chapter 7).

A guilty plea to manslaughter may be precipitated by a woman's lack of recall and her inability to provide testimony that she was acting in self-defence (*R v Rihia*). Whilst there are several cases where battered women seem to have been successful in raising self-defence even though they were dissociated and had no memory of the actual killing (*R v Seddon* in Canada, *R v Wright* in NSW[2]), such cases are unusual and would depend on independent evidence that supported a reasonable possibility that the accused was acting in self-defence, notwithstanding their lack of recollection of what their perceptions and motivations were at the time.

Automatism, an excuse-based defence, is premised on the principle that a person should not be held criminally responsible for actions over which she or he had no physical control. Involuntary

[2] This suggestion is drawn from the defence lawyer's website: http://www.conditsis.com/index.php/discussion/landmark-cases and media coverage (Knowles, 27 June 2002: 1; Knowles 29 June 2002:29).

actions include those performed whilst the accused is in an unconscious state due to dissociation.[3] However, notwithstanding the frequency with which battered women in homicide cases appear to lack recollection of the killing, automatism is rarely claimed by such accused. Furthermore, its use in cases in which men have killed their female partner has generated calls to circumscribe the automatism defence (*R v Yesler*; *Gorrie v R*; *Police v H*; *R v Singh*; McSherry, 2005:926; McSherry, 2004: 455).

Battered women face many difficulties in raising automatism. The first is in establishing that the woman was in a state of automatism. The lack of any memory of the event does not necessarily mean that she was acting without conscious volition at the time. Research suggests that many people dissociate while committing homicide, or thereafter, due to the trauma involved in killing another person (Bourget and Whitehurst, 2007). This form of dissociation will not afford an automatism defence, as it is a consequence of the accused's voluntary actions and may, accordingly, be characterised as a form of amnesia or reactive dissociation, rather than an involuntary killing (Porter et al, 2001).

The second difficulty is the degree of dissociation required to establish that *all* the deliberative functions of the accused's mind were suspended at the time that she killed. For example, Fisher J in *Police v Bannin* suggested that if the accused had some appreciation of the key facts relevant to the crime and some capacity to decide to act with respect to them, however impaired, then it could not be said that "their actions were not governed by the deliberative functions of their mind".

Third, in some jurisdictions such as Canada, certain triggering events, notably intoxication, cannot, as a matter of law, form the foundation of an automatism defence to homicide. When the accused is heavily intoxicated at the time of the homicide the accused's impaired consciousness may be attributable to intoxication, perhaps exacerbated by the damage caused by long-term substance abuse, rather than any physical or psychological blow associated with battering. Whilst in New Zealand and Australian states that still follow the High Court of Australia decision in *R v O'Connor*, extreme intoxication can theoretically form the foundation for arguing that the accused was in a state of automatism, in practice intoxication is almost never successful in this context (*Edwards v Macrae*: 15). Courts in Australia (*R v O'Connor*: 114) and New Zealand (*R v Patrick*: 116) have stressed that the mere fact that an accused does not *remember* their actions because of short-term amnesia, prompted by substance abuse does not mean that they were dissociated at the relevant time or acting involuntarily.

Intoxication is not atypical in homicide cases involving battered women. The use and abuse of alcohol, illicit and prescribed drugs, and combinations thereof are common strategies by battered women to alleviate pain and dull mental anguish. For example, one Canadian study found that among 49 sentencing decisions for manslaughter committed between intimate partners from 1991-2001, 15/19 women had experienced past abuse from their victim; intoxication was

[3] In some jurisdictions it has a statutory basis, as in WA (*Criminal Code (WA)* s 23A); in others like Canada, New Zealand (Criminal Code (NZ) s 20) and New South Wales it is a common law defence.

implicated disproportionately among the women offenders (17/30 men; 15/19 women, Case Law Review, 2002).

Establishing that a woman with a history of substance abuse who was intoxicated at the time of the killing was sufficiently dissociated to be acting automatically, as opposed to having acted voluntarily but suffering from short term memory loss after the event because of intoxication, might be impossible. This might explain why defence counsel have not raised automatism even in instances where the accused had no recollection of killing the deceased (*R v Rihia; R v Wihongi*).

Whilst the courts have also stressed that alcoholic amnesia does not mean that the accused lacked the requisite *mens rea* for murder, it is easier to prove lack of foresight or purpose on the part of the accused in relation to death or injury because of intoxication than it is to establish the more extreme disconnection between mind and body required for automatism. Counsel therefore tend to use intoxication instead to secure a manslaughter conviction on the basis of a lack of *mens rea* for murder where this is plausible on the facts (*R v Stewart*; *R v Dolan*; *R v Kennedy*; *R v Coldbeck*; *R v Burke*; *R v Brown*; *R v Keeper*).

In Canada the defence of "extreme intoxication" resulted from a constitutional challenge to the common law on the basis that it violates principles of fundamental justice to punish a person whose actions were involuntary. *R v Daviault* held that this defence is available where the accused was so intoxicated, whether by alcohol, drugs or a combination, as to be in a state of automatism, incapable of forming the minimum intent for the *mens rea* for a general intent offence or to be acting voluntarily, such that the *actus reus* is also unproven.[4]

The public response to the *Daviault* decision was resoundingly negative. Daviault sexually assaulted an elderly woman in a wheelchair, and his legal victory made it possible to advance extreme intoxication not only to sexual assault but also to manslaughter and assault of female partners. Even while acknowledging that "extreme intoxication" may be the only defence available to some battered women who kill, feminist activists and academics (Sheehy 1996), including Indigenous analysts (McKay 1994:18), opposed its legal entrenchment as socially harmful to women and an ineffective response to addictions. With feminist experts assisting, the government enacted legislation eliminating the "*Daviault* defence" in cases where the accused has interfered or threatened to interfere with the bodily integrity of another person (*Criminal Code* (Can), s 33.1). The provision remains controversial but has in some cases survived constitutional challenges in light of Parliament's recognition of the role of alcohol in male violence against women and the objective of condemning and deterring such violence (*R v SN*).

It follows that, in all three jurisdictions, although perhaps for different reasons, intoxication is unlikely to form the basis for, and may preclude, an automatism defence, but may result in a manslaughter conviction or plea.

[4] The defence requires expert evidence in support, must be proven on a balance of probabilities, and results in acquittal if successful.

A fourth difficulty for battered women is that raising automatism on the basis of dissociation opens the possibility that such a state will be attributed to an underlying mental disorder. The law distinguishes between automatism that arises from "a disease of the mind, or a mental disease or natural mental infirmity" (*R v Falconer*: 56) and that which has an external cause, such as head injury or a psychological blow (Victoria Law Reform Commission, 2004: 248-50). This distinction has important consequences. Mental disorder automatism returns the battered woman to the perils of a mental disorder defence, possibly resulting in a qualified acquittal. Non-mental disorder automatism, if successful, results in an outright acquittal. Furthermore, in Canada and Australia, although not in New Zealand, there is a presumption that dissociative automatism was caused by a mental disorder unless proved otherwise.

Whilst the burden and form of proof differs, judicial opinion across all three jurisdictions indicates that there is an emerging standard for psychological blow dissociation in non-mental state automatism: the dissociation must arise from a psychological blow that the mind of an ordinary person would not likely withstand, and the dissociation must be unlikely to recur (*R v Stone*; *R v Yesler*; *R v Falconer*).

Women who experience the psychological debilitation caused by repeated trauma in captivity (Herman, 1992), or "Battered Woman Syndrome", for example, may not meet the threshold for non-mental disorder automatism because these conditions are not necessarily "transient". Women's psychological healing from trauma may be slow and symptoms recurrent (Herman, 1992). Furthermore, the objective standard of the "ordinary person" may not account for women's experiences of psychological shock.

R v Falconer provides an early Australian example of the use of automatism by a battered woman. The accused was convicted at trial of murder but appealed on the basis that the trial judge had excluded the expert testimony of two witnesses in support of the claim that she was in a state of automatism so that shooting her ex-husband was an involuntary act warranting acquittal. The High Court of Australia agreed that the jury should have heard the evidence

Mason CJ, Brennan and McHugh JJ in *Falconer* held that:

> the law must postulate a standard of mental strength which, in the face of a given level of psychological trauma, is capable of protecting the mind from malfunction to the extent prescribed in the respective definitions of insanity. That standard must be the standard of the ordinary person: if the mind's strength is below that standard, the mind is infirm; if it is of or above that standard, the mind is sound or sane. (*R v Falconer*: para 27)

The result is that, "[i]t may be difficult for an accused who raises automatism to show that psychological trauma has not acted upon some underlying infirmity of mind to produce the automatism." (*R v Falconer*: para 25)

Thus Mary Falconer was to be measured against the ordinary person, an objective standard that precluded consideration of her experience of stress, fear, anxiety and her changed personality in the week preceding the homicide. The question for the new jury was:

> whether an ordinary woman of Mrs Falconer's age and circumstances, who had been subjected to the history of violence which she alleged, who had recently discovered that her husband had sexually assaulted their daughters, who knew that criminal charges had been laid against her husband in respect of these matters and who was separated from her husband as the result of his relationship with another woman, would have entered a state of dissociation as the result of the incidents which occurred on the day of the shooting. (*R v Falconer:* para 34)

It is perhaps not surprising that rather than face re-trial for murder, Falconer's counsel agreed to enter a guilty plea to manslaughter (Byrne 2003: 64). Certainly there remained a significant risk that her defence would be confined to mental disorder automatism or that her jury would have rejected either form of automatism defence.

The rare cases in Canada where battered women have successfully claimed automatism demonstrate almost insurmountable challenges for women who dissociate at the time of the offence. Physical blow automatism is probably the simplest case for a battered woman to prove, in part because the thorny issue of whether the woman suffered a mental disorder does not arise. But even then, women may not recall the blow that instigated loss of consciousness. Nonetheless, several Canadian women have been acquitted on this basis, often because others witnessed the deceased's attack or other evidence supported this explanation for the woman's loss of consciousness (*R v Haslam*; MacDonald and Gould, 1987: 143). Further, in at least two cases it appears that an acquittal resulted despite the absence of evidence regarding the cause of the dissociation, seemingly on the basis that the deceased must have done something to cause dissociation (*R v Seddon*; *R v Graveline*).

Dorothy Joudrie's case illustrates the risks of raising automatism for battered women. After a long separation, during which her husband Earl had continued to represent her as his wife for business and social purposes, Earl arrived at her home to have her sign divorce papers. Dorothy suddenly transformed; she became cold and distant and calmly fired six shots at him. She had no memory of the event between signing the papers and being brought back to reality by Earl's calls for help.

At her trial for attempted murder, Dorothy described a long marriage during which she was battered by a jealous, domineering and controlling man. Yet she minimized the abuse and could not recall even potentially lethal attacks described by other witnesses; she repressed Earl's brutality and engaged in "massive denial," according to her expert witness (Andrews, 1999: 22, 135).

Automatism was the sole defence presented. Defence experts said that Dorothy showed no signs of psychiatric disorder except for her alcoholism (Andrews, 1999: 135, 136). However, the

Crown's expert testified that Dorothy likely had organic brain damage due to alcohol abuse and/or physical abuse, and experienced mental disorder - "elements of paranoia, post-traumatic disorder as a result of years of abuse, anxiety, tension, depression, and thought deprivation - 'seeing the world in rosy colours'" (Andrews, 1999: 201, quoting Dr Julio Arboleda-Flores). As noted above, these are common diagnoses in cases involving battered women and, without more, do not generally raise a mental disorder defence. The jury returned a verdict of not criminally responsible on account of mental disorder (*R v Joudrie*). After spending five months in a treatment facility, which she described as a "nightmare" (Remington, 1999), Dorothy was granted conditional discharge and released on strict conditions in 1998.

Dorothy Joudrie's case makes manifest the risks of a "sane automatism" defence: not only was the prosecution able to recast her acts as those of a mentally ill woman, thus truly "pathologizing" her, but Earl's acts of criminal violence effectively disappeared through the focus on her mental state. It demonstrates the tensions noted above in respect of the mental disorder defence in crediting the abusive circumstances that she faced, while also focusing on her mental state; in this case the tension was resolved by giving little recognition to the abuse.

Despite the many hurdles of "psychological blow," non-mental disorder automatism, one battered woman has been acquitted on this basis. Rita Graveline was able to meet the evidentiary burden for automatism because both defence and Crown experts diagnosed her with dissociative amnesia - the defence expert called it antecedent and the Crown expert called it reactive to the homicide - but they agreed that she did not have a mental disorder. The judge left it to the jury to determine whether her loss of consciousness followed the homicide or whether it resulted from the cumulative effect of events and an act of an "abusive (but not necessarily shocking) nature" (*R v Graveline* 2005: para 76).

Graveline's acquittal was appealed to the Quebec Court of Appeal. The court ruled that the issue of non-mental disorder automatism was properly before the jury regardless of the absence of proof of an extreme shock. However, the court granted a new trial because the judge had muddied the waters by putting self-defence to the jury when it had not been argued by the defence and is inconsistent with dissociation. On appeal by Graveline to the Supreme Court of Canada, the Court re-instated her acquittal while acknowledging that self-defence and automatism were inconsistent in theory, though not necessarily in practice (*R v Graveline* 1999: para 10). Even so, the Court was not persuaded that the Crown had been prejudiced by the self-defence instruction, given that the jury had likely acquitted on the reasonable basis of automatism rather than the unreasonable possibility of self-defence.

Graveline's use of automatism is likely to remain a rare success for battered women who kill. It was dependent on agreement between the competing experts regarding the authenticity of her claim as to dissociative amnesia and that she was not mentally disordered. Graveline also had a sympathetic judge who inserted marital rape and self-defence into his closing instructions even though neither issue was explicitly argued by the defence. Despite this outcome, few lawyers and their clients will be willing to go to trial on automatism and risk a murder conviction, especially when they cannot provide a narrative that includes a physical or psychological blow.

Duress and Necessity

Duress and necessity are related defences. Both recognise that the accused acted under a form of compulsion – either a stand-over situation where they faced serious threats from another person who demanded that they commit the criminal offence, or emergency circumstances that left them with no real choice but to commit the offence. Battered women subjected to threat, violence and coercion by their abusers may be compelled thereby to kill; in such cases the defence would apply most readily to the homicide of a third person. However, in a recent Canadian decision discussed below, duress was raised where a woman planned to kill her abusive partner, that is, the person who threatened her.

Like automatism, duress and necessity are excuse-based defences. Duress has been described by the Canadian Supreme Court as a form of moral or normative involuntariness (*R v Perka*), that is, as distinct from automatism, the accused *is* in control of her physical body, but has been coerced into acting by overwhelming pressure that gave her no real choice in the matter.[5]

Duress

One of the preliminary hurdles to raising duress in such cases is that until recently it was not available as a defence to murder, and sometimes attempted murder and manslaughter, in most jurisdictions. In Canada the statutory form of duress, reserved for principals, excludes murder and some other offences. The Supreme Court has, however, suggested that the exclusions may be vulnerable to being struck down as unconstitutional (*R v Ryan* 2013: paras 83-84). The common law version of duress, for parties, contains no such limit. Nonetheless, one court has held that duress is not available even at common law for murder (*R v Sandham*), and in another the jury rejected duress for a battered woman charged as a party to the murder of her step-son (*R v Booth-Rowe*).

Such exclusions remain in some Australian states/territories despite criticism that they are unnecessary since the objective test for the defence is said to be sufficient to limit its scope, and reform has been recommended (Model Criminal Code Officers Committee (MCCOC), 1992; VLRC 2004 (para 1.36 and chapter 3); Law Reform Commission of Western Australia (LRCWA), 2007). However, following statutory reforms duress is now available as a defence to murder in Victoria (*Crimes Act (*1958) (Vic), s 9AG.), Western Australia (*Criminal Code Act Compilation Act 1913* (WA), s 32), the ACT (*Criminal Code 2002* (ACT) s 40), and under the Commonwealth *Criminal Code* (1995), s 10.2). In New Zealand, duress by threats (called

[5] Note that at common law there may be a separate and distinct form of necessity that is not built on the difficulty of complying with the law in circumstances of emergency (compulsion) but has been dubbed the "lesser evils necessity". This form of necessity deals with situations where the accused's will is not overborne by an emergency but where they have made a considered and rational choice to commit a crime in order to prevent the future occurrence of a greater harm: *AG v Leason, Murnane and Land* HC Wellington, CIV-2010-485-1940; *Re A (Children)* [2000] 4 All ER.

"compulsion") remains unavailable in relation to murder or attempted murder (*Crimes Act* 1961 (NZ), ss 24(2)(e) and (f)).

The criteria for duress vary considerably and are more favourable to battered women in some jurisdictions.[6] For instance, some versions of duress have very narrow factual requirements but employ a subjective test for the element of compulsion. In New Zealand (*Crimes Act* 1961 (NZ) s 24) the person who is threatening the accused must be physically "present" during the accused's offending, and there must be a specific threat of "immediate death or grievous bodily harm" should the accused not commit the crime in issue. The case law in non-homicide cases amply demonstrates the numerous difficulties battered women face in complying with these criteria, even in situations where the court has acknowledged that their relationship was grossly abusive and that their offending would not have occurred but for their reasonable fear of their partner (*Accident Rehabilitation and Compensation Insurance Corporation v Tua and MacPherson*: 15; *R v Lorenz:* para 48). The fact that the abuser was not physically present when the accused committed the crime (*R v Witika*; *R v Richards*; *Rihari v DSW*; *R v Maurirere*; *R v Atofia*; *Accident Rehabilitation and Compensation Insurance Corporation v Tua and MacPherson),* that the threat was not directed at her but at someone else that she was responsible for, that the threat was to abduct rather than physically harm her child (*R v Robins),* that the threat was of future not immediate harm to herself or her child (*R v Neho*; *R v Robins*), and that the accused committed the crime not because of any specific threat but because of the more general danger inherent in her abusive relationship (*R v Raroa*; cf the Australian case of *R v Runjanjic and Kontinnen*), have all prevented battered women from successfully raising duress. Many of these difficulties arise because the criteria necessitate finding coercion in the immediate circumstances surrounding the accused's offending, whereas a battering relationship creates an ongoing coercive environment.

By contrast, some versions of duress have relaxed or removed these strict criteria in favour of a more general but objective test for compulsion. For instance, in Western Australia reforms were adopted following explicit recognition that the law disadvantaged battered women (LRCWA 2007: 187). Duress no longer requires that the person making the threat be present, or that the threat be directed at the accused and be a threat of immediate death or grievous bodily harm.[7] In adopting these reforms, Western Australia shifted from a subjective test to an objective test consistent with other jurisdictions. The Victorian law is very similar but restricts the application of duress in murder to threats of death or really serious injury.[8] Victoria also makes explicit that evidence of family violence may be relevant to duress (*Crimes Act* (1958) (Vic) s 9AH (2) (c)).

[6] The legal position is complicated by the fact that in some jurisdictions common law versions of the defence survive statutory enactment, whilst in other jurisdictions they do not. In Canada, for example, there was a successful constitutional challenge to the statutory defence in *R v Ruzic* in 2001. However, constitutional challenges along the lines of those made in Canada have categorically failed in New Zealand. In *Akulue v R* the Supreme Court of New Zealand refused to follow the Canadian decision in *Ruzic,* holding that the common law defence of duress by threats did not survive the enactment of s 24 in New Zealand.

[7] *Criminal Code Act Compilation Act 1913* (WA), S32.

[8] *Crimes Act (*1958) (Vic) s 9AG(4; further reforms have been introduced in Victoria that inter alia apply the same statutory definition of duress to all offences: *Crimes Amendment (Abolition of Defensive Homicide) Act* 2014, s.332O(4), although the restriction re murder is retained.

In Canada duress requires a threat to cause bodily harm or death to the accused or another; a reasonable belief the threat will be carried out; no reasonable escape from the dilemma; that the crime committed is proportionate to that threatened; and that the accused is not party to a conspiracy whereby they have knowingly subjected themselves to compulsion (*R v Ryan* 2013)

Whilst some battered women have successfully raised duress in non-homicide cases (*R v Runjanjic and Kontinnen*; *Webb v R*; *Winnett v Stephenson*), they have also failed on the basis that a safe avenue of escape was available, that the woman's behavior was inconsistent with duress, or that the man's overt violence had tapered off before the crime was committed (*R v Larratt*; *R v Cozzi*; *R v Stephen*).

It was not until *R v Ryan* that the parameters of duress were briefly widened for a battered woman who struck back at her abuser. Nicole Ryan was charged with counseling murder after she was recorded hiring an undercover police officer to kill her ex-husband.[9] Her lawyer conceded proof of counseling murder but advanced duress, arguing that her acts were "morally involuntary" because her husband's abuse, threats to kill her and their daughter, and stalking behaviour had terrorised her. She saw no reasonable, safe escape because police had rebuffed her previous calls for help. The Crown failed to call Michael as a witness, likely because of his criminal and medical records for "rage". The Crown's vigorous cross-examination of Nicole, its introduction of email correspondence between Nicole and Michael, and the rebuttal evidence of several experts who described Nicole as troubled but not necessarily abused, failed to overcome the judge's reasonable doubt that she acted out of duress. He therefore acquitted her (*R v Ryan* 2010).

The Crown appealed, arguing that the judge committed an error of law in applying duress to someone who targets the threatener rather than a third party victim. The Nova Scotia Court of Appeal unanimously dismissed the appeal, finding no principled basis to deny duress in these circumstances: if the law affords a defence to one who commits a crime against an innocent third party in response to an overwhelming threat, why should duress not be available when the accused turns on her threatener? The court noted that had Nicole Ryan been successful in having her husband killed, self-defence would have been available. The appeal court reviewed a scholarly article that argued for a reinterpretation of duress to account for battered women's circumstances (Schaffer, 1999: 329-30) as well as Supreme Court authority on the relevance of battering to duress (*R v Malott*). The appeal court continued:

> It highlights the need for triers of fact to fully understand the plight of battered spouses (most often women) who, having reacted to threats from their abusive partners, must rely on the defence of duress. In turn, it also highlights the need for this defence to be sufficiently flexible to, when appropriate, accommodate the dark reality of spousal abuse. (*R v Ryan* 2011: para 91)

The Supreme Court reversed the courts below, holding that "the defence of duress is available when a person commits an offence while under compulsion of a threat made *for the purpose of compelling* him or her to commit it" (*R v Ryan* 2013: para 2) [emphasis in original]. The Court went on to say, "That being the case, the defence of duress was not available to [Nicole Ryan], no matter how compelling her situation was viewed in a broader perspective" *(R v Ryan* 2013: para 2*).*

The Court refused to expand duress to address the limitations of self-defence or to ensure that battered women do not fall between the defences: "The common law elements of duress cannot be used to 'fill' a supposed vacuum created by clearly defined statutory limitations on self-defence." (*R v Ryan 2013*: para 29) It insisted that a hard line be drawn between self-defence and duress: those who use force to defend themselves or others against force or threat act justifiably, whereas the excuse of duress should be more narrowly available to those whose acts are motivated by compulsion from others. The Court ignored the important context of wife battering and the potential for femicide that framed Nicole's actions, even though interveners had argued that the lower courts had properly developed duress consistent with battered women's equality rights, putting access to justice above the elegance or coherence of abstract criminal law principles that were never developed with women in mind.

Nicole was neither convicted nor sent back for a re-trial but instead received a stay of proceedings, an extraordinary remedy to avert an "abuse of process". The Court noted that the Crown had not taken the position that duress was unavailable as a matter of law (as opposed to on the facts) at trial, but had raised this issue only on appeal. Nicole would be strategically disadvantaged by a new trial; further:

> In addition, the abuse which she suffered at the hands of Mr. Ryan took an enormous toll on her, as, no doubt, have these protracted proceedings, extending over nearly five years, in which she was acquitted at trial and successfully resisted a Crown appeal in the Court of Appeal. There is also the disquieting fact that, on the record before us, it seems that the authorities were much quicker to intervene to protect Mr. Ryan than they had been to respond to her request for help in dealing with his reign of terror over her (*R v Ryan* 2013: para 35).

The *Ryan* decision leaves little room for a duress defence for a battered woman who strikes at her abuser. Duress might be available where the accused alleges that the deceased did, as Angelique Lyn Lavallee's partner Kevin Rust did, which is to threaten, "kill me or I'll kill you" (*R v Lavallee*). However, given that this circumstance would also raise self-defence, it is fair to say that despite the promise of the lower court rulings, duress is simply unavailable to battered women who kill their abusers.

Necessity

The common law defence of necessity, or duress of circumstances, operates where circumstances - natural or human threats - induce the accused to break the law to avoid even more dire consequences (*R v Loughnan*; *R v Cairns*).

In Australia, at common law necessity has not applied in cases of murder.[10] Several common law jurisdictions have legislated to overcome this limitation. Currently, in all jurisdictions that have a statutory definition, necessity is termed "emergency" and is available to murder. In jurisdictions that have followed the Model Criminal Code (s 2.3.16), the defence of "sudden or extraordinary emergency" applies providing that committing the offence is the only reasonable way to deal with the emergency and the conduct is a reasonable response to the emergency (*Criminal Code Act 1995* (Cth), s 10.3; *Criminal Code 2002* (ACT), s 41; *Crimes Act* (1958) (Vic), s 9AI). The Victorian statute is more limited and permits the defence to apply to murder only "if the emergency involves a risk of death or really serious injury" (*Crimes Act* (1958) (Vic), s 9AI (3)).

It remains unclear whether the extension of the defence of sudden emergency to murder will provide a new avenue for battered women who kill. In an early decision following the Victorian reforms, a man who had been attacked with a hammer sought to raise sudden emergency as an alternative to self-defence in a homicide trial, but the judge ruled that the circumstances did not constitute a sudden emergency, and that "The law is well settled that circumstances such as the present case give rise to self-defence" (*R v Vella*, para [39]). In the Northern Territory, Western Australia and Queensland, there are provisos that exclude emergency if the circumstances fall within other defences (e.g. self defence, duress, provocation; LRCWA 2007: 201).

In New Zealand, although it appears that necessity (called "duress of circumstances") has survived at common law (*Police v Coll*; *Police v Robinson*), it is as yet so undeveloped that whether it applies to homicide has not been confronted. The defence requires that the accused have a genuine belief on reasonable grounds in imminent death or serious injury; the circumstances are such that there is no alternative but to break the law; the breach of the law is proportionate to the peril sought to be avoided; and the accused has committed the crime because in the agony of the moment their will is overborne (*R v Hutchinson*).

Whilst duress of circumstances might appear to have application to battered women whose offending was in response to the life threatening situation presented by a dangerous relationship in New Zealand, in *R v Kawiti* it was held that it is not available if the threat comes from a human being. The accused was denied duress of circumstances when she drove whilst disqualified and with excess blood alcohol to the nearest hospital after her partner had dislocated her shoulder and under fear of further assaults. Thus, the accused who offends under a threat from her violent partner must fit herself within the narrow parameters of duress by threats, which as noted above, is unavailable in homicide cases (*Crimes Act 1961* (NZ), s 24(2)).

[10] LRCWA (2007: 190) questions whether necessity at common law has been applied other than in NSW and Victoria, and that it has probably been preserved in Tasmania by s. 8 .

Older jurisprudence suggested that necessity can never excuse murder (*R v Dudley and Stephens*) but in Canada access to necessity for murder is now constrained by other elements of the defence such as imminence and proportionality (*R v Latimer*). As in Australia (VLRC 2004: 118ff), reforms to necessity have been proposed on numerous occasions (Greene, 1994; Boyle et al 1985).

Canadian Supreme Court judges have framed necessity around the paradigm of the "lone alpinist" who faces a "sudden, agonizing choice" and breaks into a chalet to save his own life (*R v Perka*). The requirements that the accused face an "urgent and imminent peril," have no other legal avenue to avoid the emergency, that the crime committed be lesser than that avoided and that the accused's own decisions not have contributed to the "emergency" effectively mean that the window of necessity for battered women is very narrow indeed.

While to date necessity has not been advanced by women charged with homicide, battered women who have abducted their children to protect them from their former partner's abuse have been precluded from putting necessity before a jury based on the strict objective tests involved in assessing the imminence of the peril, the availability of other reasonable legal means of dealing with the peril and the question of proportionality (*R v Adams*; *R v CAV*). On the other hand, battered women charged with welfare fraud (*R v Lalonde*) and driving while impaired (*R v S(L)*) were successful in using necessity. However, when even impoverished persons who commit fraud to survive are denied necessity because they are held responsible for generating their own emergencies (*R v Gourlay*), battered women who kill are unlikely to be beneficiaries of this defence.

Conclusion

Jurisprudence and commentary on evidence concerning battering and its effects (US Department of Justice and US Department of Health and Human Services, 1996), or more narrowly Battered Woman Syndrome, has long recognised that its value is not confined to cases involving self-defence or provocation. Battered women commit homicide in response to threats, coercion and peril, but often do so while affected by the sequelae of abuse, including impaired consciousness due to physical or mental trauma, addictions and mental disorder. These sequelae are strongly associated with convictions or guilty pleas on the grounds of lack of intent. Most battered women's homicide cases do not go to trial and the complete defences other than self-defence are rarely raised. This pattern may reflect battered women's inability to withstand trial. But it also means that those defences have not been developed over time to account for women's experiences.

Battered women may thus be caught between a rock and a hard place and, like Nicole Ryan, fall between defences. They may be denied a qualified acquittal because a condition like PTSD is not in law a "mental disorder," but also be denied a non-mental disorder automatism defence on the basis that the condition is not transitory or unlikely to recur. They may be denied duress or necessity because their actions are cast as self-defensive, even when self-defence is barred on the facts.

Feminists have criticised both duress and necessity as poorly-suited to defending battered women against criminal sanction (Boyle et al, 1985; Greene, 1994; Shaffer, 1999). Where the doctrinal requirements of these preservation defences have retained a focus on the immediate circumstances surrounding their offending, the obstacles faced by battered women in accessing those defences remain formidable. Although these defences are understood as exculpating moral involuntariness on the basis that a threat of violence constrained the "choice" to act, both may be unavailable for murder either as a matter of law or as a result of other requirements like proportionality.

Recent reforms have broadened the circumstances in which duress and necessity apply in some of the jurisdictions under study. Nonetheless, early indications are that such defences will have limited application to cases in which battered women resort to homicide. Even when "presence" and "immediacy" requirements have been jettisoned, battered women may still be harshly judged by the requirement that there be no reasonable safe avenue of escape. The disqualification of battered women whose threatener did not specifically invoke death or serious bodily harm ignores the history and context that informs the threat. The demand for "sudden emergencies" or "imminent peril" for necessity fail to account for the chronic states of emergency in which so many battered women live. The use of pure objective tests, untempered by the accused's subjective perceptions and experience, for elements of duress and necessity fail to account for the fact that women's subjective realities have shifted their assessment of reasonable alternatives and their ability to resist threats. In the result, they may be unfairly credited with "choice" and assigned criminal responsibility.

The poor fit of the alternative defences for women who kill and the limited scope for their reform take us back to where we started—to self-defence. Elsewhere we have analysed Australia's distinctive approach in allowing self-defence in non-traditional self-defence cases, contrasting it with the traditional response taken in Canadian and New Zealand jurisprudence (Sheehy et al, forthcoming). Canada's self-defence law has just been reformed, offering potential benefit to battered women and rendering the narrowness of the other defences less worrisome. The contrast to New Zealand is particularly stark. The possible injustices arising from the failure to develop complete defences in accordance with the realities of battered women's lives is exacerbated in jurisdictions with no partial defences, and little or no discretion in sentencing for murder.