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## **BATTERED WIFE SYNDROME EVIDENCE: THE AUSTRALIAN EXPERIENCE**

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It is perhaps timely to be talking about women who resort to lethal violence against their abusers.<sup>[1]</sup> In the United Kingdom was a recent landmark decision in the case of Emma Humphreys,<sup>[2]</sup> which may have ramifications for many women in similar situations.<sup>[3]</sup> However, spousal abuse is not restricted to a particular country and neither is the problem of how to deal with those who kill their abusers. Several recent Australian legal cases have addressed this problem, and this paper makes some observations about emerging Australian legal approaches to abused women who kill their abusers.

### **What is battered wife syndrome evidence?**

In many respects, the term *battered wife syndrome* is an unfortunate nomenclature to use in relation to the woman who is subjected to prolonged abuse by her partner. The criticisms of the use of the label and the identification of the problems as a syndrome are numerous but unfortunately there is no time for me to discuss them here.<sup>[4]</sup> In some respects it might be argued that the problems faced by battered woman are a microcosm of the wider problems of bias within the principles of the criminal law in general and criminal defences in particular. An analysis of these principles reveals other biases including those of gender, culture, race, economy, politics and social structure. This is not surprising given that the principles were developed for an androcentric stereotype which at times does not even cater for some males. Notwithstanding my criticisms and reservations of the so-called *battered wife syndrome* I have employed the term here because it conjures up an image with which we are familiar, at least in general terms, and thus provides us with a common starting place from which we can construct an informed discourse.

Domestic violence is not a new phenomenon. Nor is spousal killing. Historical records and statistical analyses show that many men kill their wives and, also, but less often, it is the wife who kills her husband.<sup>[5]</sup> However, we can only speculate on which of the women who are in jail are there only because she managed to kill him before he killed her. For many it is either their own death or gaol and if we believe in the concept of volition then we may say that they select the lesser of the available evils.<sup>[6]</sup>

In sketching the picture of spousal abuse and the abused spouse who kills it is important to note that until recently the abused woman has been denied an existence in that she has been hidden from view. In most of the early reported decisions there is scant or no reference to whether the woman had been subjected to abuse by her dead spouse. Reading the judgements closely may allow speculation that she was beaten. However, historically the background of abuse was regarded as irrelevant and therefore inadmissible to the question of whether the woman had acted voluntarily and intentionally and without lawful excuse.<sup>[7]</sup> In some cases it has been used by the prosecution to show intent.<sup>[8]</sup>

It is well established that the principles applicable to our criminal defences were developed to cover situations of stereotypical male behaviour. Thus the classic situation of provocation involved the scenario of a husband finding his wife in bed with another man. Self-defence has often been illustrated by the example of two men of equal stature being involved in a bar-

room brawl or a male defending a female from an attack by a male third party. Other defences are similarly constructed. Duress and necessity have both been seen as having an element of imminence as an integral principle. The examples often given to illustrate these defences in action would never involve the scenario of an abused woman who kills. The cases have shown her conduct did not come within a literal interpretation of the principles. However, the injustice of incarcerating an abused woman who kills her husband, whilst in nearly all cases allowing the abuser who killed his wife a plea of provocation and a lesser sentence, has finally been exposed. The problem has resulted in the dilemma of what to do with the woman who kills her abuser.[9] One way to overcome this was to allow women's experience to be taken into account when applying the relevant principles. Ironically the reality of the abused women's situation is not a matter of common understanding for the jury. The immediate answer appeared to be the introduction of expert testimony on the *battered wife syndrome*.

So far I have been speaking about the *battered wife syndrome* in general terms and have suggested that I am trying to steer clear of making this paper a critique of the syndrome. However, for the purposes of explaining the Australian approach, and to consider indications that the syndrome can be used to support partial rather than complete acquittals, it is useful to look briefly at what we mean by *battered wife syndrome*.

Lenore Walker's[10] exposition of the symptoms of the syndrome is often adopted without modification. Very briefly, what has been labelled as the *battered wife syndrome* is the identification of a situation where a woman has been subjected to a pattern of abuse in the context of a violent relationship and this has had an identifiable psychological impact upon her. Although specific details and responses vary it has been suggested that the syndrome is the response to a three-stage process. The first has been identified as involving a tension build up in the domestic situation and this moves into the second stage that involves the manifestation of the tension in beatings and other forms of abuse. The third stage is identified as one where the abuser shows remorse and may make promises of changes to his behaviour. There may be a lull in the cycle of violence. The effect of this cessation may allow the woman to believe that her situation will improve whereas, in fact, it rarely does. *Battered wife syndrome* is a description of a recurring and escalating cycle of violent behaviour.

The syndrome itself has been described in various ways but common to them all is the pattern of abuse and the subjection of the woman to a process which has a psychological impact on her. This will invariably include learned helplessness, reinforced by the lack of economic and social support from external agencies. Thus *battered wife syndrome* evidence focuses on the psychology of the woman in explaining why she may respond differently from traditional expectations. It has been used to explain why her reaction may lack the immediacy traditionally imputed to the male defendant's usual reaction.[11] It is often used to explain why she did not leave an abusive relationship.[12]

Two examples illustrate the way in which judges have typically expressed its use. In the New South Wales case of *Chhay*[13] Chief Justice Gleeson, in discussing the situation where 'a loss of self-control can develop even after a lengthy period of abuse and without the necessity for a specific triggering incident', commented '[t]hat this is an area in which psychiatric evidence may assist juries to develop their understanding beyond the *commonplace* and the *familiar*'. [14] In *Goma*[15] Badgery-Parker J instructed the jury in terms that the history of abuse might indicate that although she

'... equipped herself to kill [her spouse], she had not at that time firmly resolved to do so but had prepared herself to do so in the event he continued to mistreat her.' [16]

One of the problems with the use of the syndrome is that it focuses on the psychiatric health of the woman rather than looking at the circumstances surrounding her actions. Thus her social, economic, cultural and political circumstances are ignored. The focus should be on the situation in which the woman was placed and what it is about her circumstances which caused her to kill her abuser. In this way her actions may be seen as rational, necessary and reasonable. It is suggested that the focus on the woman's psychiatric condition is easier for the judiciary and others to cope with. It is maintainable without altering the stereotype of how women should behave. I'll not go into any detail here but just give you the gist of the analysis. This approach allows the Madonna/whore dichotomy to be maintained and thus the woman is mad rather than bad. The problem is the woman and not that of society and therefore the problem can be solved by treating the woman. It allows power relationships to be maintained and a paternalistic response. It does not threaten male hegemony.

Alternatively, if we look at the woman's circumstances and what it was that necessitated her choosing lethal force, we treat the woman as a rational human being who has assumed

power and has exercised the rights which her abuser has denied her throughout the years of the relationship. Enough said. I hope my generalisations are not regarded as polemic for I am quite prepared to support my analysis by arguing the point at a later time. At this point I will merely quote from an analysis by Stella Tarrant:<sup>[17]</sup>

'Women's learned physical helplessness (inability to fight back), vulnerability and sexual submissiveness (rapability), the exclusion of women from control of financial resources (financial deprivation) and the social isolation and 'privatisation' of women in the role of wife and homemaker are all elements of legitimate desired marriage relationships, they are also conditions for wife abuse. Thus women are not only the most frequent victims of marital violence but they are also the 'appropriate' victims.'

## **What is the role of the evidence and will its use result in an acquittal?**

There are four main situations in which evidence of abuse may be used. It may be relevant to show that the prosecution has not established the elements of voluntariness and intent necessary to the definition of the offence; or to support a complete defence; or in support of a partial defence, and/or it may be used in mitigation of sentence. Many prefer to restrict its use to the latter solution.

In England it is frequently assumed that such evidence is relevant only to the defence of provocation, and that there would be no need for it if the mandatory life sentence for murder was repealed and replaced with a discretionary sentence. The reports of the Emma Humphreys case may be responsible for this. In Australia we no longer have a mandatory life sentence and the evidence has been used in various situations. Also, it has been held relevant at both trial and sentencing stage.<sup>[18]</sup> This is because *battered wife syndrome* is not a defence as such but is merely evidence which may be used to explain the woman's behaviour and to bring it within the principles so as to negate voluntariness and/or intention or establish a defence. Thus it is capable of supporting a complete acquittal as well as a partial defence. It is the circumstances in which the woman finds herself because of the abuse that are important and may explain why her behaviour should be fitted within the principles of the defence. She is not granted the defence because she is abused. This is why the relevance of abuse should not be restricted to any defence in particular. An escalating pattern of abuse which may be termed murder by instalment, where the woman cannot leave and is placed in a situation where she acts in self-defence, may be one scenario. Another may be where the abuse causes the woman to lose self-control and act under provocation, or causes her to act in a state of dissociation or automatism. The facts of each case will indicate what response the abuse has brought about. At the outset it might be said that a properly instructed jury should find this task no more difficult than any cases where abuse is not involved and therefore if there is some evidence of the abuse being relevant to self-defence or to any other defence the issue should be left to the jury.

## **The Australian courts and evidence of spouse abuse**

Having made these comments by way of background, I will give an overview of how judges in Australia have approached the problem of the abused woman who comes before them charged with a crime. In some of the cases there has been expert testimony of the *battered wife syndrome* introduced by the defence. In others there has been evidence of a history of abuse only.

## **Self-defence and provocation under Australian law**

Before looking at the cases which have used evidence of spousal abuse I will briefly outline the principles applicable to self-defence and provocation. Unfortunately there is insufficient time to do this in respect of the other defences.

The test of self-defence is articulated in the High Court decision in *Zecevic v DPP*:<sup>[19]</sup>

'The question to be asked in the end is quite simple. It is whether the accused believed on reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter then he is entitled to an acquittal.'

Traditionally, abused women were denied the opportunity of having self-defence put before the jury. The main stumbling blocks were those of

imminence

a duty to retreat

proportionality

lawfulness of the threat.

The importance of the *Zecevic* decision is that these concepts no longer have the status of legal principle but are only factors which are to be considered when deciding on whether the conduct was necessary and in the circumstances reasonable.

For provocation, the statement of Devlin J in *R v Duffy*<sup>[20]</sup> is still regarded as a good description of the defence:

'Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused a sudden and temporary loss of self-control rendering the accused so subject to passion as to make him or her for the moment not master of his mind.'

The leading case in Australia is *Stingel v R*<sup>[21]</sup> and it is of particular relevance when addressing the issue of who is the ordinary person. In that case it was held that in applying the 'ordinary person' test the permanent characteristics of the accused are relevant for gauging the gravity of the provocative act but, except for age, are not relevant for gauging the degree of self-control expected. The interesting aspect of the decision is that it is considered unfair on women to take sex into account for the second limb of the test because women are generally considered to have a higher level of self-control than men.<sup>[22]</sup>

I will turn now to a few of the main cases where the issue of abuse has played a central role in determining the fate of the abused spouse who commits a crime. These can be separated into the cases which resulted in a complete acquittal, and those which resulted in a partial defence only.

## Acquittals

*Duress*<sup>[23]</sup>

In Australia, *Kontinnen and Runjajic*<sup>[24]</sup> was the first case in which expert evidence of battered wife syndrome evidence was admitted in support of a defence of duress.<sup>[25]</sup> Here the abusive relationship resulted in two important cases. The abusive man, Hill, and the defendants were living in a menage a trois. There was evidence to suggest that he was grossly sadistic. He certainly was a brutal man and had complete control over the defendants. They were charged with falsely imprisoning and causing grievous bodily harm to one Hunter. They claimed that they had been forced to do this by Hill. Hill had also made threats against the children of the relationship. The defendants were convicted and appealed. It was held that expert evidence was relevant to show that such a thing as battered wife syndrome existed; that this was the way a person suffering from it was likely to react; that this was consistent with the overbearing of the will necessary to the defence of duress; and, was therefore admissible. Here Chief Justice King of the South Australian Supreme Court, in addressing the question of the admissibility of expert testimony, considered the Canadian decision of *Lavallee*<sup>[26]</sup> at length. His reasoning is somewhat technical and does not demonstrate the same empathy for the problems involved or an understanding of feminist issues as does the reasoning of Justice Wilson in *Lavallee*.<sup>[27]</sup> Nevertheless the case may be regarded as a breakthrough.

*Self-Defence*

A short time later, expert testimony of battered wife syndrome was admitted without objection in the case of *Kontinnen*.<sup>[28]</sup> Even at the time of her earlier trial Erica Kontinnen had been charged with the murder of Hill. Here the evidence was held to be admissible in relation to self-defence and in that case both self-defence and provocation were put to the jury. She was acquitted. Later that year evidence of battered wife syndrome was successfully used in New South Wales in *Hickey*<sup>[29]</sup> in support of a plea of self-defence.

*Non-insane automatism*

In *The Queen v Falconer*<sup>[30]</sup> the violence and abuse suffered by the woman had caused a dissociative state rather than an anger in fear or a fear situation. In this case the woman, Mary Falconer, had lived in a violent marriage for 30 years. The abuse included bashings, which caused broken bones; sexual assaults; being dragged by the hair; and various other acts on the part of the deceased. She discovered also that he had raped her daughters. Charges were laid against him and they separated. She became increasingly scared about what he might do to her daughters and obtained a non-molestation order. Mr. Falconer ignored this, entered the home, and sexually assaulted her. In brief, the result was that she panicked and the next thing she remembered was standing over his body with her discharged rifle in her hands. Thus in this case the evidence was held to be relevant as to the cause of the dissociated state of the defendant.

## Partial Defences

### Provocation

In 1978 the defendant, Chhay,<sup>[31]</sup> a Vietnamese national, was forced, by the authorities, to marry the deceased whom she did not know. From the outset he was cruel and abusive. They had a child who was sick and died when the husband refused to get medical assistance. She had three more children and the husband refused to care for or support her or the children. He spent most of their money on drink. The family emigrated to Australia and the beatings continued. He would beat her when she came home from church or when he lost jobs. The wife was required by her traditional upbringing to stay with her husband. They went into business but the business failed. This made him more angry and the beatings increased. On the night of his death he had been drinking, swearing, hitting the furniture, telling the defendant that she did not contribute and he would leave her without any support for her children. She became very scared. Eventually the husband took a blanket and pillow and lay down in the lounge room. It was common ground between the defence and prosecution that the defendant had killed her husband by cutting his throat and striking him on the head with a meat cleaver. However, there was conflict as to how this happened. Her account was he had attacked her with the meat cleaver and she had pulled his legs from under him and grabbed the meat cleaver when he let go of it. The prosecution alleged that she had killed him whilst asleep. Although the main case for the defence was based on self-defence, provocation was raised as an alternative. The trial judge stated that provocation would only be available if the jury accepted the defendant's story of the knife attack and that this triggered the response. The jury convicted her of murder, thus indicating that they did not believe her account of events. Her appeal was based on the ground that the issue of provocation should have been put to the jury on a wider basis.

In granting the appeal the New South Wales Court of Criminal Appeal held that at the time of the killing there must be a sudden and temporary loss of self-control caused by the provocative act. However, there is no requirement that the killing immediately follow upon the conduct of the deceased. It was possible that the loss of self-control might develop after a lengthy period of abuse and without the necessity for a specific triggering incident. The history of abuse was relevant to this. Since the issue of provocation should have been put on this wider basis a new trial was ordered.

The case is interesting for a number of reasons. It is a pity that the appeal court did not address the issue of self-defence. It is suggested that the analysis used to provide the wider basis for provocation could be used in relation to self-defence. The important issue is that it was necessary to do the action at the time she did and that the imminence of the attack is but a factor to be taken into account in determining reasonableness...

Secondly, it may be that her account was thought unbelievable because she was a petite, quiet, shy, gentle and submissive woman and not one who would be expected to be able to inflict mortal wounds in a confrontational situation. On the other hand, on this view, these characteristics did not preclude her from acting in accordance with the stereotype of women as being covert and sneaky in their methods of killing.

Thirdly, the issue of culture is another circumstance to be taken into account in understanding the experience of the abused woman who resorts to lethal self-defence.

Fourthly, Gleeson CJ made reference to the fact that the psychiatric evidence submitted at the sentencing hearing may have been useful at the trial, but also noted that this evidence



may not have been tendered at that stage due to tactical reasons related to the defence relying on self-defence.[\[32\]](#)

Raby

In November 1994 Raby[\[33\]](#) was the first case in Victoria in which expert evidence of the battered wife syndrome was admitted. Here it was used in relation to a charge of murder and a verdict of manslaughter due to provocation was returned. Margaret Raby had been married to the deceased for about 11 weeks prior to the killing. The deceased had almost continuously been adversely affected by alcohol and drugs during that time, had effectively imprisoned her and, according to the judge, brainwashed and abused her physically, psychologically and sexually.[\[34\]](#) The sexual assaults included using foreign objects on her in a sexual manner and urinating on her as well as other extremely unsavoury behaviour. On the day of the killing there was testimony to the effect that she had been not acting normally but had been acting as if she were 'dissociated', 'not with it', 'detached' and 'expressionless', and was 'clearly unwell'. She was seen by a doctor twice and refused to go to hospital when advised to do so. The deceased opposed her going. In the evening the accused sustained a severe cut to her right hand and the deceased sustained two superficial stab wounds. Her wound bled copiously and the deceased assaulted her again and dragged her across the carpet. He looked after his own wounds and showed no concern for hers. She attended a hospital for treatment but was concerned more for her husband and discharged herself from hospital. On arriving home the deceased would not let her in the house and so she broke a window to gain access. The deceased was sitting on a chair but when she spoke to him he refused to answer. She spoke endearingly to him and tried to kiss him. He then swore at her, said he would leave her and asked for money. She took up a knife and he laughed. According to the judge, in her dissociated state, she then lost control and stabbed him nine times. Justice Teague of the Supreme Court had felt that a term of imprisonment was appropriate where a woman had killed her abuser. He found that there was a low level of moral culpability, but that there should be and

'...[t]here is no message here that the conduct of the deceased was such that he was getting his just desserts. Nor is there a message that any other woman that is subjected to a similar form of subjugation ought to be encouraged to think that resort to self-help through violence is to be condoned. Disposing of battering men is absolutely unacceptable. Exposing them for the villains they are is to be encouraged.'[\[35\]](#)

Thus he sentenced her to 28 months imprisonment with a non-parole period of seven months. Since the time she had already spent in custody was deemed to have been served she was therefore released. I will have more to say in respect of this judgement after I have told you about the case of Bradley.[\[36\]](#)

Bradley

In December 1994 Justice Coldrey of the Supreme Court of Victoria presided over the trial of 47 year old Cheryl May Bradley, who had been charged with the murder of her husband, James Francis Bradley. She was aged 19 when she married the deceased. There were four children of the marriage, two girls, one of whom died at the age of seven months, and two boys. The early years of the relationship were described as stormy but the defendant was said not to have been subjected to actual physical abuse until the third year of the marriage when she told the husband that she wanted a divorce. His response was to beat her with his fists and a stick and force a box of matches into her vagina with the threat of setting it alight. He asserted that defendant would always belong to him and that no matter where she went he would find her. This was the first of many instances of abuse and in the years that followed the abuse inflicted by the husband escalated.

The abuses inflicted on Cheryl Bradley by James Bradley were extensive. She was frequently beaten; had suffered extensive bruising and black eyes on various occasions; had her hair cut and tea poured on it; had 90 per cent of her clothes destroyed by battery acid; was shot at by a spear gun; was chased by a vehicle in the bush; was threatened with a tomahawk; was forced to drink the deceased's urine and to lick up her own menstrual blood from the floor; had Christmas presents destroyed; was tied up and had her vagina scrubbed with a hairbrush; had her right arm shattered with a chain necessitating the insertion of a plate; was assaulted with a whip and forced to have oral sex; had her furniture and belongings destroyed; had her false teeth smashed; had her head held under water in an attempt to drown her; was struck in the face with a gun butt; was threatened with guns; was attacked with a monkey wrench; had lighted cigarettes applied to her legs; had knives thrown at her; had a teaspoon used on her to procure the abortion of a child whom the deceased believed

was not his; constantly had food thrown at her or at the walls; and, was constantly subjected to verbal taunts and the like. In addition the husband had been convicted of incest and the defendant believed that he was also responsible for the death of their seven month old daughter. These incidents are only some of those which she suffered at her husband's hands and since the abusive behaviour of the husband spanned over two decades it is impossible to detail all of the sufferings which she endured. Nevertheless the above catalogue gives a good indication of the atrocities inflicted upon her.

James Bradley was described as pathologically jealous, brutal and subject to irrational behaviour. It is evident that he had been in prison on several occasions. Cheryl Bradley divorced him in 1984 whilst he was serving a sentence for incest. His response was to find and brutalise the defendant upon his release and to force her to continue to live with him. On eight occasions she left her abuser. On each occasion he pursued her relentlessly. On one occasion he traced her to Perth, where she had fled from their Queensland abode. To do so he had used a reference made to the weather, in a letter she wrote to her son, as the basis of an enquiry at the Bureau of Meteorology and discovering her general whereabouts eventually tracked her down. On that occasion his punishment was to force her to dwell with her two sons in a two man tent in an isolated locality for a period of three months. During this time physical and psychological abuses were administered on a regular basis. On five occasions she went to women's refuges but even these failed to provide her with safety and each time she was compelled to return to her abuser. Those who helped her were threatened and harassed. There is no doubt that James Bradley regarded her as his chattel.

Finally she realised that there was no escape from his relentless pursuit and in 1990 the family moved back to Victoria. Some weeks before the killing the deceased became ill with pneumonia and believed he was going to die. It fell to Cheryl Bradley to nurse him. He continued to subject her to abuse, particularly psychological abuse. He would not allow her any rest nor let her out of his sight. In the days before his death she was emotionally and physically exhausted and in ill health. The deceased had told her that he had hidden cartridges in the house. His conduct had become increasingly irrational, and the defendant believed that he was going to kill her and that there was nowhere she could go. On the day before his death she purchased some cartridges. On the morning of the killing the defendant, on the demand of the deceased, she prepared breakfast and took it to him. He was in bed. The defendant requested that she be allowed to return to bed as she was tired. The request was denied and he referred to her as a 'dog' which in prison language meant the lowest of the low. He went back to sleep without eating the breakfast. The defendant then shot the deceased.

Justice Coldrey did not allow the defence of self-defence to go to the jury but instructed them on provocation. They returned a verdict of guilty of manslaughter. In his remarks at sentencing it is clear that he had a great deal of sympathy for the defendant and imposed a two year suspended sentence on her. Thus in effect the outcomes of Raby and Bradley are the same. Both women were freed after the completion of the trial.

## **Some observations on the decisions**

*Raby* and *Bradley* are not the only cases which have used evidence of abuse in support of provocation and/or other defences.<sup>[37]</sup> However, they give sufficient indication of the current situation and also allow several points to be further examined.

## **The dilemma faced by the judge**

The recent decisions indicate that within the judiciary there is sympathy for, although perhaps not complete understanding of, the abused woman who faces trial. Having reached the situation where it is no longer acceptable to hold all abused women who kill guilty of murder, the judge is faced with a dilemma. The judiciary may articulate this dilemma thus. On the one hand the judge realises that there is little point in sentencing the woman to imprisonment for a long period or perhaps at all. On the other hand, the actions of the woman must not be seen to be condoned.

In sentencing Bradley, Justice Coldrey noted that he was faced with the dilemma of what is appropriate as a punishment for the manslaughter of an abusive spouse. His Honour

approached the question of sentence from the notion that a non-custodial sentence is not always necessary where a defendant is convicted of manslaughter. He adopted the explanation of Lush J in *R v Marjorie Cole* who stated that

'In this case and in others like it, there are powerful conflicting considerations. On the one hand there is no danger of the commission of similar offences by the prisoner, and crimes of passion are not deterred by the punishment of those who are convicted. No real question of rehabilitation arises in any form; on the other hand, a life has been taken. This fact must always be significant in itself and often will, by itself, be sufficient to lead to the demonstration by the infliction of substantial punishment of the value placed on human life.'<sup>[38]</sup>

As I have already stated, in sentencing Raby, the judge had been adamant that her crime warranted a term of imprisonment. He sentenced her to a non-parole period equivalent to the time she had spent in prison already and therefore she was due for immediate release.

Paternalism and stereotypical attitudes towards women

Implicit in much of the reasoning is that women are still expected to behave according to the stereotype. This is implicit in not only the things judges say but the way in which the principles are articulated. In *Bradley* on the matter of general deterrence his Honour was of the opinion that the effect of sentencing on general deterrence ... *when the passions have exploded and a person is acting without self-control ... is open to doubt.*<sup>[39]</sup> However, he was certain that despite this, the court should not be seen as condoning violence as a solution in this type of situation and the court must be seen to uphold the sanctity of human life.

On the one hand Justice Coldrey was undoubtedly sympathetic to Cheryl Bradley's plight. Yet on the other, he could not be seen to be condoning or even encouraging self-help.

'The crime of manslaughter is a serious one. The courts have a duty to uphold the sanctity of human life and to express through the imposition of appropriate sentences the seriousness of which our society regards violence which destroys such human life. In so far as they are able to do so the courts, through the sentences imposed upon offenders, must attempt to deter others from embarking upon violent behaviour which may have fatal consequences. There is no right to take the life of a person because their conduct is outrageous and despicable. 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.'<sup>[40]</sup>

What are the implications of not allowing the issue of self-defence to go to the jury? It is clear that his Honour thought that an acquittal may amount to an acceptance of self-help and that this would go against well-established principles. There are undeniably contradictory considerations and conflicting interests operating here. Is this a case of double standards? It is clear that Coldrey J saw this as self-help, not as self-defence; and as anger rather than fear. The key to his approach illustrates the wider problem that whilst the judiciary is undeniably becoming more understanding of, and sympathetic towards, the problems faced by women they have not reached a position of empathy. The situation is still being addressed from the male paradigm. The alternative message of general deterrence is ignored. What of the message to the abuser who may be seen as killing his spouse by instalments? Does the message become one that states that a woman has the same right as a man to act in self-defence and that the abuser should continue to act on peril of her exercising her right?

## **Does the approach involve a distortion of legal principle and a blurring of the role of the judge and the jury?**

It is clear from *Bradley* and to some extent in *Raby* that the outcome of the case depends to a large extent on the view which the judge takes of the evidence. This is true, no doubt, of all cases. However, I suggest that the judge's decision in *Bradley* determined the outcome of the case. In that case only provocation was left to the jury. The comments on the judge in sentencing would appear to suggest that the defence had discharged the evidential burden and the issue of whether she had acted in self-defence was a question for the jury. Was it a distrust of the jury which led him to withdraw the issue from the jury? It is a pity that there will not be an appeal on this point.

Where there is sympathy for the abused women it leads to a subjective decision as to how much blame she should bear. This is manifested in the selection by the judge of either



provocation or self-defence as the appropriate defence to which the jury may apply the facts. The result is that the distinction between provocation and self-defence becomes obscured.

## Conclusion

The present approach favours treating the syndrome as a psychological rather than a gender, social, economic, political and sometimes cultural issue. At present, using evidence of abuse involves a distortion of legal principle. However, it must be recognised that this may be necessary until defences which accommodate the experiences of women can be the subject of legislative reform. In the meantime putting the appropriate emphasis on domestic violence is important to the problem of what to do with woman who kill their abusers. In many countries this problem is now being faced. The hypocrisy of sentencing a woman who kills her husband, after being subjected to years of abuse, to life imprisonment whilst convicting the male, who finally kills his wife after having beaten her for years, of manslaughter only has now been exposed. Unhappily many women, such as Emma Humphreys, have already served long terms in prison.

Unfortunately the task is ahead of us. The problems faced by these women merely focus on one aspect of laws which are indeed biased. A starting place is to rewrite the defences so as to minimise biases, particularly those of gender and culture.

## Postscript

Since presenting this paper there have been several cases involving prosecutions of women who have suffered abuse. For example, in *Secretary*,<sup>[41]</sup> where the defendant had suffered prolonged abuse from her spouse, it was held that self-defence could be relied upon even when the victim of homicide was asleep at the time of his death. However, it is significant that the appellate court did not enter an acquittal but rather ordered a new trial. This case may be seen as indicative of the current position in Australia. It is clear that the situation continues to be problematic. Whilst there is heightened sympathy for her plight and increasing recognition that many women are subjected to continued and relentless abuse from their spouses, there is a reluctance to accede to the proposition that some of these women may be justified in their actions and be deserving of an acquittal which would accurately reflect her moral blameworthiness. That these women may be being killed by instalment is still being used as relevant to provocation rather than self-defence is significant. Thus the present situation in Australia may be said to be similar to what it was in 1995. In theory self-defence is available but in practical terms little has changed.

## Notes

1. The term 'wife' here is not used in the narrow sense but includes women who are in or have been in a relationship with their abuser. [\[Back to text\]](#)
2. Her appeal against a conviction of the murder of her abuser boyfriend was quashed and a verdict of manslaughter was substituted - unreported decision of the Court of Appeal 7.7.95 (*The Times*, 7.7.95, pp. 1-2). [\[Back to text\]](#)
3. It has been suggested that there could be as many as 70 women in this position (*The Times*, 7.7.95). A subsequent report (*The Times*, 11.7.95, p. 3) concerned two cases at Liverpool Crown Court. Ann Joyce was due to go on trial for the murder of her common law husband John Smart, but the Crown Prosecution Service dropped the charge. She was said to be a similar situation to Humphreys. Carol Jones was reported as being placed on probation after admitting the manslaughter of her husband who bled to death after she stabbed him in the arm in a row over the television pages of a newspaper. However the CPS stated that the decision not to proceed 'was made purely on the evidence in the case and was not taken in the light of the finding in the Humphreys case'. [\[Back to text\]](#)

4. See for example Sheehy, E.A., Stubbs, J. and Tolmie, J., 'Defending Battered Women on Trial: Battered Wife Syndrome and its Limitations' (1992) 16 *Crim.L.J.* 369 and Freckleton, I., 'When Plight Makes Right - The Forensic Abuse Syndrome' (1994) 18 *Crim.L.J.* 29. [\[Back to text\]](#)
5. Law Reform Commission of Victoria - Report on Homicide: Bonney, R., *Homicide II - The Social Reality*, The NSW Bureau of Crime and Statistics and Research (1986). In England 41% of women and 8% of men who are killed are killed by their partners. See Nicolson, D. and Sanghwi, R., 'Battered Women and Provocation: the Implications of *R v Ahluwalia*' (1993) *Crim.L.R.* 728. [\[Back to text\]](#)
6. For a good discussion of killing by instalment and separation assault see Mahoney, M., 'Legal Images of Battered Women: A Legal Response: A Limited Solution' (1991) 90 *Michigan Law Review* 1. [\[Back to text\]](#)
7. In cases where the issue arose it was trivialised, regarded as domestic squabbling for which the woman by virtue of her gender was regarded as contributing to problem. See *Whalen*, unreported decision, Supreme Court of New South Wales, 14.4.92. [\[Back to text\]](#)
8. *Bradshaw*, unreported decision of the Supreme Court of Western Australia, 16.4.85; *Cornick*, unreported judgement of the Tasmanian Court of Criminal Appeal, 28.7.87. [\[Back to text\]](#)
9. See Wilson J of the Supreme Court of Canada in *Lavallee* (1990) 76 *CR* (3d) 329, who observed that the law catered for the accused in a confrontational situation rather than the accused who had become sensitised to danger from the abuser. [\[Back to text\]](#)
10. Walker, L.E., *The Battered Woman*, Springer, New York, 1984. [\[Back to text\]](#)
11. See Walker, op. cit. [\[Back to text\]](#)
12. It is interesting to note that a man in his own home has no duty to retreat. [\[Back to text\]](#)
13. (1994) 72 *A.Crim.R.* 1. [\[Back to text\]](#)
14. *My Chhay* (1994) 72 *A.Crim.R.* 1, 13-14; emphasis added. [\[Back to text\]](#)
15. *Goma*, unreported judgement of the Supreme Court of New South Wales, 27.4.94. [\[Back to text\]](#)
16. *Goma*, unreported judgement of the Supreme Court of New South Wales, 27.4.94: see also *Runjajic and Kontinnen* (1991) 53 *A.Crim.R.* 362; *Kontinnen*, unreported judgement of the Supreme Court of South Australia, 30.3.92; *Bradley*, unreported judgement of the Supreme Court, 7.12.94 and 14.12.94; *Raby*, unreported judgement of the Supreme Court of Victoria, 22.11.94 etc. [\[Back to text\]](#)
17. Tarrant, S., 'Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws', (1990) 20 *Western Australia Law Review* 573, 581. [\[Back to text\]](#)
18. *Bradley*, unreported judgement of the Supreme Court, 7.12.94 and 14.12.94; *Raby*, unreported judgement of the Supreme Court of Victoria, 22.11.94; cf. *Morabito* (1992) 62 *A.Crim.R.* 82. [\[Back to text\]](#)
19. (1987) 61 *ALJR* 375. [\[Back to text\]](#)
20. [1949] 1 *ALL ER* 932. [\[Back to text\]](#)
21. (1990) 97 *ALR* 5. [\[Back to text\]](#)
22. Yeo, S., 'Resolving Gender Bias in Criminal Defences', (1003)19 *Mon.L.R.* 104. [\[Back to text\]](#)
23. Also in *Winnett v Stephenson*, evidence of battered wife syndrome was used successfully in answer to a charge involving a social security fraud. *ACT*, Magistrates Court, unreported, 19.5.93. [\[Back to text\]](#)
24. (1991) 53 *ACrimR* 362. [\[Back to text\]](#)
25. However, this was not the first case where a history of domestic violence had been held admissible in the context of a defence. See *R* [1981] *SASR*. [\[Back to text\]](#)
26. (1990) 76 *CR* (3d) 329. [\[Back to text\]](#)
27. (1990)76 *CR* (3d) 329. [\[Back to text\]](#)
28. (1992) 16 *Crim.L.J.* 360: unreported judgement of the Supreme Court of South Australia, 30.3.92. [\[Back to text\]](#)
29. (1992) 16 *Crim.L.J.* 271. [\[Back to text\]](#)
30. (1990) 171 *CLR* 30. [\[Back to text\]](#)
31. (1994) 72 *A.Crim.R.* 1. [\[Back to text\]](#)

32. (1994) 72 *A.Crim.R.* 1,15. [\[Back to text\]](#)
  33. Unreported judgement of the Supreme Court of Victoria of 22.11.94. [\[Back to text\]](#)
  34. Id. 746. [\[Back to text\]](#)
  35. Id. 750-52. [\[Back to text\]](#)
  36. Unreported judgement of the Supreme Court of 7.12.94 and 14.12.94. [\[Back to text\]](#)
  37. See for example also *Morabito*, (1992) 62 *A.Crim.R.* 8; *Kina*, unreported judgement of the Court of Appeal Supreme Court of Queensland, 22.1.93; *R v Goma* [70021/93 NSW S/CT 27.4.94]; *Van Den Hoek*, (1986) 161 *CLR* 158. Two other relevant cases have recently been decided, but details were not available at the time of writing. [\[Back to text\]](#)
  38. Unreported judgement of the Supreme Court of Victoria, 9.6.78. [\[Back to text\]](#)
  39. *Bradley* 153a. [\[Back to text\]](#)
  40. *Bradley* 150a-51a. [\[Back to text\]](#)
  41. [1995] *NTR* [CA 20]. [\[Back to text\]](#)
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