Expert opinion and the battered woman syndrome

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This paper examines recent developments in Australian law relating to the admission of novel expert evidence through acceptance by courts of defences grounded in the Battered Woman Syndrome (BWS) to overcome difficulties involving female defendants who have experienced intimate partner violence.

Cases before and after the landmark case of *Runjanjic and Kontinnen v R* will be reviewed and the rules of expert evidence that have been most influential in this development will be identified, to illustrate the need for courts to more actively assess the reliability of scientific evidence. [2]

Introduction

Female defendants have been permitted since the 1970s2 by American courts to adduce expert evidence of the BWS to exculpate them or justify their acts in relation to killing an abusive partner.[3]

However, the BWS has only recently been accepted by the courts in Canada[4] and Britain[5] and first utilised in an Australian court in June 1991, in *Runjanjic and Kontinnen v R*.

In the first Australian case the South Australian Court of Criminal Appeal ruled that the two female appellants, R and K, should be retried because the trial judge had erred in refusing to accept expert testimony on the existence of BWS. At trial in the first instance R and K had attempted to argue a defence of duress, on the basis that their abuse and domination by a man named Hill, with whom they had a menage a trois, had affected their ability to act independently.

Approaches pre-Runjanjic and Kontinnen

Prior to *Runjanjic and Kontinnen v R* Australian female defendants found it very difficult to successfully argue a defence of provocation or raise a defence of self-defence, by reference to an ongoing relationship with an abusive partner. In relation to the defence of provocation

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[1] Note: This paper was written in 1994 and accordingly reflects the legislation and development of the law extant at that time.

[2] *Runjanjic and Kontinnen v R.* (1991) 53 A Crim R 362

[3] Faigman DL. 'The battered woman syndrome and self-defense: A legal and empirical dissent.' (1986) 72 *Virginia Law Review* 619; Freckleton I. 'Contemporary comment: when plight makes right - the forensic abuse syndrome.' (1994) 18 *Criminal Law Journal* 29. See also King CJ review of cases in *Runjanjic and Kontinnen v R.* (1991) 53 A Crim R at 370-371.

[4] Boyle C. 'A forum on Lavallee v R: Women and self-defence. V. A duty to retreat?' (1991) 25 *University of British Columbia Law Review* 51; Grant I. 'A forum on Lavallee v R: Women and self-defence. The syndromisation of women's experience.' (1991) 25 *University of British Columbia Law Review* 51; MacCrimmon M. 'A forum on Lavallee v R: Women and self-defence. The social construction of reality and the rules of evidence.' (1991) 25 *University of British Columbia Law Review* 36.

[5] *Kiranjit Ahluwalia*. (1993) 96 Cr App R 133; *R v Ahluwalia*. [1992] 4 All ER 889; *R v Thornton*. [1992] 1 All ER 306; McColgan A. 'In defence of battered women who kill.' (1993) 13 *Oxford Journal of Legal Studies* 508; Nicholson D, Sanghvi R. Battered women and provocation: the implications of R v Ahluwalia.' [1993] *Criminal Law Review* 728; O'Donovan K. 'Defences for battered women who kill.' (1991) 18 *Journal of Law and Society* 219.

> '(t)he paradigmatic danger envisaged by the defence is that which emanates from an immediate single attack. Where there is no physical attack in progress and no perception that one is literally imminent the defence is precluded.'[6]

There are limitations with these defences. For instance, as female defendants tend to kill their abusive partners when there is not a life-threatening situation, for example when their partners are asleep, this is interpreted as premeditation. Further, if they were to successfully argue provocation, this would only reduce the charge from murder (or wilful murder), to manslaughter, as

> 'the law must make concession to the fact that a person may be provoked to kill by the conduct of another and that such hot-blooded killings are less blameworthy than pre-meditated killings.'[7]

Many of these killings involve a triggering occurrence, usually the result of cumulative sexual and physical abuse of the woman or her children. These factors mean not only was evidence of the context of the abusive relationship inadmissible, but at trial 'battered women who kill after surviving extended violence may not show any remorse ... the battered woman who kills to save herself and/or her children will have the intent to kill'.[8]

It has also been argued that as these self-defences are

> 'grounded in male experience, and presume a conflict between (male) equals (therefore) ... requirements of imminent attack and proportional response are particularly difficult for women defendants to meet. Being less accustomed to engaging in physical aggression and less physically able to defend themselves, women who kill abusive partners typically resort to the use of a weapon.'[9]

The manner in which the rules on admissibility of evidence on provocation have worked against female defendants who had killed abusive partners has been discussed in a number of cases prior to *Runjanjic and Kontinnen v R*.[10]

In *R v Hill* a murder conviction was quashed and a conviction of manslaughter was substituted.[11] In *Rose v R*, where the woman had disarmed her partner of a knife and then stabbed him, she was convicted of manslaughter, as it was considered that she should have preserved herself in another way as the danger had ceased when she had disarmed him.[12]

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[6] Tarrant S. 'Provocation and self-defence - a feminist perspective.' (1990) 15 *Legal Service Bulletin* 147, 149.

[7] Greene J. 'A provocation defence for battered women who kill?' (1989) 12 *Adelaide Law Review* 145.

[8] Eastel PW. *Killing the beloved: Homicide between adult sexual intimates*. Canberra, Australian Institute of Criminology, 1993, 143.

[9] Stubbs J. 'Battered woman syndrome: an advance for women or further evidence of the legal system's inability to comprehend women's experience?' (1991) 3 *Current Issues in Criminal Justice* 267, 268.

[10] Greene J. 'A provocation defence for battered women who kill?' (1989) 12 *Adelaide Law Review* 145; Harding, R. 'Not murder, she quoth.' *Bulletin* 27 August 1989, 40; Tarrant S. 'Provocation and self-defence - a feminist perspective.' (1990) 15 *Legal Service Bulletin* 147.

[11] R v Hill (1981) 3 *A Crim R* 397.

[12] *Rose v R*. Supreme Court of Western Australia, unreported decision No. 91/89, August 1989.

In *Cornick v R* the court rejected a defence based on provocation by relying on:

- the need for a proximate assault emanating from the deceased,
- that Cornick did not actively repel her assailant and
- that the stabbing was not proportional. [13]

Cornick also lends credence to contentions of judicial reluctance to intra-familial violence the same rules as applied to violence between strangers.

> 'In imposing punishment the learned judge quite properly emphasised that even in a volatile situation where violent though immediately regretted acts are perpetrated under the stress of fear and anger due to sudden provocation there is a need to reinforce the sanctity of human life and to make it clear to the public that serious violence is not an acceptable means of solving domestic problems.'[14]

In the notable case of *Queen v R* the deceased and R were married for 27 years, over which time she and her children had been brutally domineered by her husband, and had committed incest with all their daughters.[15] R only learnt of this from her younger daughter on a Wednesday morning, and in the early hours of Thursday axed her husband to death, hitting him eleven times. On appeal the South Australian Supreme Court quashed and ordered a new trial, on the basis the jury should have been instructed on provocation.

While the court in *Queen v R* was unwilling to treat cumulative domestic abuse as satisfying the requirements for provocation, it ingeniously stretched the meaning of provocation by treating the deceased' s affectionate words and conduct shortly before the killing as provocation.[16]

> 'The history of incest occurring in the absence of the appellant cannot of itself amount to provocation, even though recounted to her later. Words or conduct cannot amount to provocation unless they are spoken or done to, or in the presence of, the killer.'[17]

It is suggested the courts could have come to the assistance of female defendants killing their abusive partners, as under the second limb of S. 248 of the Western Australian Criminal Code a person may use deadly force in self-defence for an unprovoked assault, if they had a 'reasonable apprehension of death or grievous bodily harm' at the time.

The adoption by the court in *R v Muratovic* of an earlier statement by Webb J that reasonableness includes knowledge of the assailant's previous conduct, would appear to enable female defendants who kill abusive partners to adduce evidence of their cumulative effect of the abuse.

> 'The nature of the assault would, I think, depend not merely upon what the assailant did and said at the time of the assault but also upon the disposition and mental attitude of

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[13] *Cornick v R*. Supreme Court of Tasmania, Court of Criminal Appeal, unreported decision 40/1987, 28 July 1987.

[14] *Cornick v R*. Supreme Court of Tasmania, Court of Criminal Appeal, unreported decision 40/1987, 28 July 1987, 18 per Cox J.

[15] Queen v R (1981) 28 *SASR* 321.

[16] This contradicted the accepted view that anger was a necessary emotional response to raise this defence: Sheehy EA, Stubbs J, Tolmie J. 'Defending battered women on trial: the battered woman syndrome and its limitations.' (1992) 16 *Criminal Law Journal* 369, 378.

[17] Queen v R (1981) 28 *SASR* 321, 325-6 per King CJ.

> the assailant as disclosed, say, by his previous manifestations and declarations of hostility to the person assaulted; and the 'apprehension of the latter would naturally be grounded on the knowledge he possessed of such manifestations and declarations.'[18]

Approaches post-Runjanjic and Kontinnen

Since *Runjanjic and Kontinnen v R* the defence of BWS was first applied in *R v Kontinnen*, where K was acquitted by the South Australian Supreme Court in March 1992, of the murder of her abusive partner, Hill, who was asleep, by shooting him.[19]

At trial the defence presented extensive evidence of the severity of physical, sexual and mental abuse that H had inflicted on K. Experts explained how a fear of H' s retaliation, her meagre self-esteem and dependence were linked to the cycle of violence, post-traumatic stress disorder and learned helplessness, and had stopped her leaving H- features she had in common with other women who had the BWS.

In *R v Hickey*, H who had been involved with her abusive partner for a number of years, and was beaten frequently during the course of the relationship, was acquitted by the New South Wales Supreme Court in April 1992.[20] The killing took place during a physical fight and expert evidence of BWS was used to support H's self-defence, that she acted the way she did as there was no other alternative but to kill her attacker.

> 'The syndrome was tendered to explain why the accused could have reasonably believed the deceased to be embarking on a life-threatening attack even though she had been assaulted on numerous occasions, had survived, and had still returned to him.'[21]

Another consideration which may have contributed to H' s dependency on her abusive partner, was that as an Aboriginal woman living in a racist society she had less access to support services for battered women than non-Aboriginal women; and very high levels of domestic violence in Aboriginal communities.[22] These broader social factors were not adduced at trial, and reveal a weakness with the BWS, in that it is concerned with the woman's psychological status.

In March 1994, in *R v Graham and Singleton*, the New South Wales Supreme Court rejected the admission of expert testimony on the BWS to support a defence of duress.[23] In his judgement Levine J cautioned over the over-application of the BWS.

> '(It) has to be reconciled with the reasonable person component or supplant it, if the latter situation is achieved ... it would have to be in my view at the expense of the notion ... that the objective test of reasonableness exists in order to ensure that accused persons who are sensitive and so on are not permitted to escape responsibility for their actions.
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> If that point was reached, that there was no reconciliation between the notion of the BWS and the reasonable person test but the latter was supplanted by it, there would

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[18] R v Keith [1934] *St R Qd* 155.
[19] Greene J. 'Case and comment – Kontinnen.' (1992) 16 *Criminal Law Journal* 360.
[20] Yeo S. 'Case and comment – Hickey.' (1992) 16 *Criminal Law Journal* 271.
[21] Id at 273.
[22] Budrikis K. 'Note on Hickey: the problem with a psychological approach to domestic violence.' (1993) 15 *Sydney Law Review* 365.
[23] *R v Graham and Singleton*. Supreme Court of New South Wales, Criminal Division, unreported decision No. 910030/1993, 31 March 1994.

necessarily follow ... the development of an entirely different policy - that is, criminal responsibility would be judged solely by reference to discrete subjective circumstances of each accused person.'

Other concerns have been raised on a number of levels about the BWS, which in summary include:

1. methodological concerns about the Walker cycle theory, which purports to explain why the battered woman's perception of danger extends beyond each discrete battering episode, and the adaptation of Seligman' s theory of learned helplessness, which purports to explain why the woman does not leave her abusive partner;[24]

2. that expert evidence of the BWS infringes the ultimate issue rule, as it allows experts to give opinions on the female defendant's guilt or innocence;[25] and

3. that the BWS by use of the term 'syndrome' gives a scientific legitimacy to a set of symptoms arising out of a transient psychological state;[26] what one commentator has referred to as 'a medical fiction constructed to deal with a stance of the law that insists upon supposedly objective notions of ordinariness and reasonableness'.[27]

The rules of expert evidence

The well-established common law rule that opinion evidence is inadmissible is a corollary of another rule, that witnesses may only provide testimony on matters they have directly observed. The courts consider that

> '(i)f the subject-matter of the expert's evidence is one on which the average person is capable of forming an opinion unaided by expert evidence, then the expert evidence is not admissible.... The test is not whether the opinion of the expert would assist the judge or jury, but whether the judge or jury is capable of forming an opinion.' [28]

Furthermore, in dealing with expert testimony, especially on novel scientific evidence, such as the BWS, courts have maintained a deep scepticism, in that it

> 'may often have a prejudicial effect on the minds of a jury which far outweighs its probative value. The jury, being people without scientific training, may often be impressed by an expert's qualifications, appointments and experience and the confident manner in which he (sic) expresses his (sic) opinion.' [29]

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[24] Faigman DL. 'The battered woman syndrome and self-defense: a legal and empirical dissent.' (1986) 72 *Virginia Law Review* 619.

[25] Eastel P. 'Battered woman syndrome: what is 'reasonable?' (1992) 17 *Alternative Law Journal* 220.

[26] Stubbs J. 'Battered woman syndrome: an advance for women or further evidence of the legal system's inability to comprehend women's experience?' (1991) 3 *Current Issues in Criminal Justice* 267.

[27] Freckleton I. 'Contemporary comment: when plight makes right - the forensic abuse syndrome.' (1994b) 18 *Criminal Law Journal* 29.

[28] Arnold C. 'Expert and lay opinion evidence.' (1990) 6 *Australian Bar Review* 219.

[29] Muirhead J in R v Lewis, cited by McInerney J in R v Tran (1990) 50 *A Crim R* 233 at 242.

The courts permit experts to give evidence by the application of 'rules of expert evidence', which may be summarised as:[30]

a) the expertise rule,
b) the common knowledge rule,
c) the area of expertise rule,
d) the ultimate issue rule, and
e) the basis rule.

These 'rules of expert evidence' have two shared characteristics, firstly, stemming from a determination by the courts to keep to a minimum the opinion evidence given by witnesses and secondly, from a profound and long-standing mistrust of experts and what they have to offer to the legal system.

Three of these rules endeavour to ensure that the tribunal of fact has information which it can evaluate in a meaningful way:

1. the expertise rule requires that experts are genuinely expert in respect of the evidence which they put before the court;
2. the area of expertise rule insists that there be an area of expertise that is generally recognised as such, or is sufficiently reliable, in respect of which an expert may give evidence; and
3. the basis rule provides that the factual bases of opinion evidence must be formally proved before opinion evidence can be admitted.

These three rules have a protective function. Firstly, by ensuring courts are not misled by persons who may be expert in other areas but not the area in question; secondly, by precluding evidence that relates to fringe or spurious techniques or theories that are not accepted within the relevant expert community or are inherently unreliable; and thirdly, by preventing experts from acting as a conduit for the work of others, thereby precluding those views from proper critique.

The remaining two rules, the common knowledge rule and the ultimate issues rule, have a different function, to exclude expert evidence where it involves matters which are considered to be within the ordinary juror's knowledge, or matters the responsibility of the tribunal of fact to determine.

Rules of application to BWS

Two of these rules, the common knowledge rule and the area of expertise rule, have been identified as of particular significance in respect to expert evidence as to the BWS.[31]

In *Runjanjic and Kontinnen v R* the common knowledge rule was significantly relaxed, as the court found that theories of cyclic violence and learned helplessness postulated by Leonore Walker touched on matters beyond the experience of ordinary jurors.

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[30] Based on Freckleton IR. *The trial of the expert - A study of expert evidence and forensic experts*. Melbourne, Oxford University Press, 1987; Freckleton I. 'Expert evidence and the role of the jury.' (1994) 12 *Australian Bar Review* 73.
[31] Giugini P. 'Runjanjic v R.' (1992) 14 *Sydney Law Review* 511.

> '(O)rdinary human nature, that of people at large, is not a subject of proof by evidence, whether supposedly expert or not. But particular descriptions of persons may conceivably form the subject of study and special knowledge. This may be because they are abnormal in mentality or abnormal in behaviour as a result of circumstances peculiar to their history or situation.'[32]

A relaxation of the common knowledge rule had occurred in 1989, in *Murphy v R*[33], when the distinction between normality and abnormality was removed by the High Court, permitting expert evidence about a person's psychological attributes, on the basis of whether the tribunal of fact would receive assistance or not.

The relaxation of the common knowledge rule may overcome purported community prejudice against battered women, by admitting expert evidence as to the objective standard of the reasonable battered woman, instead of the reasonable woman, that the courts quaintly refer to as the "reasonable man".[34]

> 'It is assumed the community has a set of universally accepted generalisations about human behaviour based on common experience. Ordinary people are assumed to be competent at identifying these generalisations ... there is an assumption that understanding human behaviour is merely a matter of common sense and that triers of fact do not need help in interpreting human action'.[35]

The area of expertise rule may be used by the courts in two ways. Firstly, as a rule of exclusion, to keep novel scientific evidence out of court because it is not reliable enough. Secondly, in a discretionary fashion to excl de; the evidence as it's prejudicial value outweighs its probative value. There were shortcomings in the application of this rule by King CJ in *Runjanjic and Kontinnen v R*.

> 'Upon careful reflection and analysis, however, it is the opinion of this Court that the theory underlying the battered woman's syndrome has indeed passed beyond the experimental stage ·and gained a substantial enough scientific acceptance to warrant admissibility.'[36]

Future directions?

There have been serious doubts expressed about the general acceptance approach, in that the scope for experts to give opinions as to novel scientific evidence depends on a community of experts, rather than on the court determining reliability.[37]

As a result of a decision by the United States Supreme Court in June 1993, *Daubert v Merrell Dow*, a more strict criterion of admissibility has been adopted by American courts.[38] If this approach were adopted by Australian courts they may become much more instrumental in

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[32] Dixon CJ, Kitto and Taylor JJ in Transport Publishing Co Pty Ltd v Literature Board of Review (1956) 99 *CLR* 111 at 119, cited by King CJ in Runjanjic and Kontinnen v R. (1991) 53 *A Crim R* 362 at 368.

[33] Murphy v R. (1988-89) 167 *CLR* 94.

[34] R v Muratovic [1967] *Qd R* 15 at 28, per Hart J.

[35] MacCrimmon M. 'A forum on Lavallee v R: Women and self-defence. The social construction of reality and the rules of evidence.' (1991) 25 *University of British Columbia Law Review* 36, 38.

[36] Runjanjic and Kontinnen v R. (1991) 53 *A Crim R* 362 at 367, per King CJ.

[37] Freckleton I, Selby H. *Expert Evidence* (looseleaf service). Sydney, Law Book Company, 1993, paras 9.190 – 9.250.

[38] Freckleton I. "Expert evidence and the role of the jury". (1994) 12 *Australian Bar Review* 73, 87.

determining the reliability of novel scientific evidence, for instance,[39]

a) whether it has been tested (ie its susceptibility to falsifiability);
b) whether the theory or technique has been subjected to peer review and publication to increase the likelihood of detecting flaws in the methodology;
c) the known or potential rate of error and the existence of standards controlling the technique's operation; and
d) whether a technique has gained general acceptance within the scientific community.

In a number of bitemark cases appeal courts have overturned jury decisions because of a lack of agreement by forensic odontologists as to reliable methods to compare teeth marks left by biting with cast impressions of the teeth of suspects.[40]

These cases indicate the courts are prepared to adopt a more rigorous approach towards the adoption of novel scientific evidence. It is suggested the courts will have to become more active in the issue of reliability, as otherwise there is every likelihood they will be overwhelmed by what has recently been termed the "forensic abuse syndrome".[41]

[39] Id at 87-88.
[40] Carroll v R (1985) *A Crim R* 410; R v Lewis (1987) 29 *A Crim R* 267.
[41] Freckleton I. 'Contemporary comment: when plight makes right - the forensic abuse syndrome.' (1994) 18 *Criminal Law Journal* 29.

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