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Desperate housewives get legal backing

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Introduction

You were probably attracted to the headline because of your familiarity with the television series of the same name. However, "desperate housewives" exist in real life, and a phenomenon known to psychiatrists and psychologists as the "Battered Wife Syndrome" has received quite a lot of attention from our criminal courts in recent years. In fact, it's reached the stage where women who murder their husbands or partners at the end of a long history of physical, verbal, sexual or emotional abuse have been given what amounts to their own set of laws, in the sense that they're judged by different societal standards from other so-called "murderers".

You would have to have been on another planet for quite a few years not to have become aware of various recent Government and other initiatives designed to bring attention to "violence against women", and, more to the point, to do something about it. Women who are the victims of abuse (and this can consist of simply verbal abuse) can apply to the courts of most states and territories for what are usually called "Domestic Violence Restraint Orders", or "Apprehended Violence Orders", which are court orders forbidding any repetition. Anyone who disobeys such an order can be fined or imprisoned, and interestingly enough, quite a few men have successfully applied for such orders against violent women.

Recent years have also witnessed the implementation of a variety of "public awareness" campaigns, and educational initiatives, designed (a) to let men know that violence of any sort against a partner is not regarded as appropriate, and (b) to let women know where they can go, and what they can do, if they are the victims of such violence.

Suffering in silence

But despite that, a depressing number of women still live in permanent abusive situations, in which they are regularly beaten, verbally and emotionally abused in order to diminish their self-esteem, and also routinely raped or subjected to other demeaning sexual assaults, as a form of "punishment" for things they are falsely accused of having done wrong, or because the male partner can't deal rationally with his own feelings of jealousy or inadequacy.

It's not the role of lawyers to explain why this happens, or to suggest solutions. We'll leave that to the social scientists. But lawyers do have to come to terms with what is happening when one of these abused women finally snaps, and hacks her partner to death with a kitchen knife, or 'blows him away' with a shotgun when he asks her to pass the sugar in the wrong tone of voice. And that last comment was not meant to be simply facetious or sarcastic; the tragic thing is that when these women finally "lose it", they often do so in circumstances which are totally inappropriate, and which seem bizarre and inexplicable to people who have not been through what they've had to endure for years on end.

A different set of standards?

The question for the criminal court then becomes one of "Do we judge these women by the standards of behaviour we expect of the 'average' citizen, or do we take into account the bizarre and seemingly twisted view of life which battered women acquire after years of abuse?

Psychologists have for many years now realized that being the victim of domestic abuse can give a woman a totally different perspective, not only of life in general, but also of events which are going on around her. The unique psychology of the domestic violence victim has been given the name "The Battered Wife Syndrome", and it is the gradual recognition of this phenomenon by our criminal courts which this short article is intended to draw attention to. Hopefully, it will be of interest to you even if you aren't studying law, or thinking of doing so. It is just as important to all budding psychologists, criminologists or doctors.

The "battered wife syndrome"

The first to recognize that domestic violence victims might exhibit a totally different psychology from the rest of us were the judges of the Canadian Supreme Court in the case of *Lavallee*[1]. L was a woman charged with the murder of a man she had been living with for some 3-4 years, and she pleaded self-defence at her trial for his murder. This defence looked to be on very shaky ground, because on her own admission, she had shot the man in the back of the head while he was in the process of leaving the room. Nor did it make it any better that the reason why she shot him was because he had threatened to kill her after their visitors had left.

Most of us, faced with that evidence, would be asking ourselves "Why didn't she just jump in the car and drive for help?", or "Why didn't she alert the visitors to the danger she was in?" At the very least, one has to ask "Why didn't she just run, when she had the chance?", or "Why didn't she leave him years ago?", given that there was a great deal of evidence led about the years of physical abuse she had suffered at the man's hands, much of which was well documented because she had been required to seek medical attention for injuries such as a broken nose.

As those of you studying law will probably know already, before one can plead "self-defence", it has to be shown that killing your attacker was the only alternative available in order to preserve your own life. To use the popular phrase, the accused must show that "she had her back to the wall", and had no other means of escaping instant and certain death.

As a result, "Why didn't she get out when she could?" is a question frequently asked by juries in cases such as this. Likewise, they are sometimes troubled by the fact that the incident which provoked the death was not one which carried any immediate danger to the accused (as in the Lavallee case itself, in which the husband was shot in the back of the head as he was walking away, having told the accused that

he was going to kill her when their guests had left).

Both difficulties are resolved when expert testimony is led to show that lengthy research into "Battered Wife Syndrome" has shown that it is part of the psychology of a battered wife to remain with the abusive partner, but that the slightest "trigger" can warn the victim – from experience – that violence is about to re-commence, or experience will suggest that the threats will be carried out later. In both cases, the "trigger" is likely to set off what lawyers call a "pre-emptive strike".

The importance of the admission of expert evidence in a "battered wife" case is that it explains to the jury why a woman living in such circumstances will often choose to remain. One of the greatest difficulties faced by a jury composed of what we might term "non-battered" people is to reconcile the fact that the victim remained in the abusive environment, rather than run away at the first opportunity.

Which is what made the approach taken by the Canadian Supreme Court in Lavellee so important. They approved the reception into evidence, in support of L's defence, of the expert report of a psychiatrist who had examined the accused, to the effect that the pattern of abuse she had suffered at the hands of the deceased had left her feeling, in his words, "trapped, vulnerable, worthless and unable to escape the relationship despite the violence".

So far as concerned the killing itself, the psychiatrist told the court that L

> *" . . . felt in the final tragic moment that her life was on the line, that unless she defended herself, unless she reacted in a violent way that she would die"*

What he was telling the court, in effect, was that things seem different in the mind of a violently abused but dependent female, and that what non-battered people would think of as irrational behaviour seems perfectly rational and logical to the battered wife. The question was whether or not the jury in this case were entitled to be told all this before deciding whether the accused had acted reasonably in her own defence.

In ruling that they were, Justice Wilson (who, perhaps not surprisingly, is a woman), made the following comments

> *"Expert evidence on the psychological effect of battering on wives and partners must, it seems to me, be both relevant and necessary in the context of he present case. How can the mental state of the appellant be appreciated without it? The average member of . . . the jury . . .can be forgiven for asking: Why would a woman put up with this kind of treatment? . . . . Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals . . . . . "The issue is not . . . what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience . . . . If, after hearing the evidence (including the expert testimony), the jury is satisfied that the accused had a reasonable apprehension of death or grievous bodily harm and felt incapable of escape, it must ask itself what the "reasonable person" would do . . . . Ultimately, it is up to the jury to decide whether, in fact, the accused's perceptions and actions were reasonable. The jury is not compelled to accept the opinions proffered by the expert about the effects of battering on the mental state of victims generally or the mental state of the accused in particular . . . . . but fairness and the integrity of the trial process demand that the jury have the opportunity to hear them"*

A new test for "provocation"

It was not long before the views expressed in the *Lavallee* case began to travel around the world, to the USA, the UK and New Zealand. Inevitably, they began to be quoted by defence lawyers in Australia, as, state by state, the awareness grew that it was necessary to hear the truth from psychiatrists before sitting in judgment on battered wives who eventually freak out and kill their abusers. One of the clearest examples of this gradual acceptance of the need for "special rules for battered wives" was the 1994 NSW case of *Muy Ky Chhay*[2].

This was a case involving a Cambodian woman who had been forced to marry a man who drank heavily and physically abused her over many years. Her version of events was that her husband had attacked her with a knife while drunk, but that she had managed to get the knife off him and hack him to death.

For various reasons, her self-defence argument did not find favour (probably because the forensic evidence was to the effect that the deceased was probably asleep at the time he was hacked), but she also raised the defence of 'Provocation', and the issue for the Court was whether or not this defence (which ordinarily requires that the accused be responding to a "sudden" provoking event which no "reasonable" person could have been expected to endure) could take into account the life of violence and misery which the accused had suffered at the hands of the deceased, and should not be restricted.to whether or not there had been an incident immediately before the death.

In a judgment of encouraging insight and sensitivity, Gleeson CJ ruled that

> *" . . . times are changing, and people are becoming more aware that a loss of self-control can develop even after a lengthy period of abuse, and without the necessity for a specific triggering incident. The presence of such an incident will assist a case of provocation, but its absence is not fatal. . . . . the ordinary person in question must be a person in the position of the appellant . . . . it was open to the jury to conclude that an ordinary person in the position of the appellant could, as a consequence of her husband's conduct, up to and including the evening [of his death], have so far lost self-control as to form an intent to kill her".*

Clearly, the Court was prepared to allow a considerable degree of latitude to women who react to a lengthy period of sustained physical or emotional abuse by making a fatal "pre-emptive strike" against the abusing husband, even though no 'immediate' danger exists.

It would be inconsistent with this approach either to require battered wives to be judged by the standard of 'ordinary' wives, or to insist that the behaviour which has provoked them occur immediately before the act causing death or injury.

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Application to Queensland

It was only a matter of time before the Queensland courts went the same way as the NSW court, and in R v Babsek the Queensland Court of Appeal agreed that

> *" . . . . the evidence which seeks to explain why people do not leave a relationship with a violent partner and which suggests a heightened sensitivity on the part of the subject of the violence to prospective or threatened violence [is] admissible"*

. . . . and final approval by the High Court

Similar decisions had also been handed down in Tasmania, South Australia and the Northern Territory before the High Court finally got the opportunity to put the seal of approval on what had begun with *Lavallee*, this time for the whole of Australia.

Osland[4] was a case in which a Victorian mother and son teamed up to kill their husband and step-father respectively. The murder was committed by means of O mixing sedatives in the deceased's evening meal, and her son then whacking him over the head with an iron bar when he got drowsy. They then both dumped him into a grave in the garden which they had dug the day before.

In the circumstances, neither self-defence nor sudden provocation seemed likely defences, but the defence were allowed to lead the evidence of a clinical psychologist who explained to the jury the effect of physical and other types of abuse on the victim, and the characteristics of the battered wife syndrome. He highlighted some of the most important as being that women who suffer from it

(a) are ashamed, and don't tell others what is going on behind closed doors;
(b) become unfocussed if they are frightened or feel threatened;
(c) become acutely aware of any "danger signal" from the abuser;
(d) feel they have no escape from the relationship;
(e) believe that one day, the abuser will kill them.

This clearly places a different focus on the way that victims view things from that experienced by non-victims, and in supporting the use of battered women syndrome evidence of this type in criminal cases, the High Court observed that

> *"Given that the ordinary person is likely to approach the evidence of a battered woman without knowledge of her heightened perception of danger, the impact of fear on her thinking, her fear of telling others of her predicament and her belief that she can't escape from the relationship, it must now be accepted that the battered wife syndrome is a proper matter for expert evidence . . . . . the issue is not simply whether the accused is a battered woman . . . . . Rather, the issue is usually whether she acted in self-defence and, if not, whether she acted under provocation. They are issues which arise in the factual context of the particular case".*

Since this case is "binding" on all courts in Australia, so far as concerns official recognition of the "special" perceptions experienced by women suffering from Battered Wife Syndrome, we now have what is in effect a "two-tier" system of justice in respect of defences such as self-defence and provocation. One set of rules applies to the vast majority of the population, who are expected to behave, and respond to external stimuli, in accordance with everyday experience, and the other applies to those who are affected by "battered wife syndrome", which gives them a different "view" of the world, and must be taken into account by a jury when assessing their guilt.

Further extension?

In future, it may not end with "battered wives", because during the course of his judgment in the Osland case, one of the High Court judges, Justice Kirby, pointed out that the professional psychology literature on the subject made it clear that the problems caused by the dominance of one person by another is not limited to men and women living in a domestic relationship. He went on to add that

> *"These observations suggest that, in each case where it is alleged that an accused's action can be explained by reference to Battered Wife Syndrome . . . the court should focus its attention upon the relevance, if any, to the conduct of the particular accused of evidence explaining commonly observed responses of people living in an abusive relationship of dependency"*

The obvious additional relationship which is brought to mind by that description is that of the child with abusive parents. Might there come a time when the special rules which are sometimes allowed to apply when a woman murders a man who has abused her over a lengthy period are also applied to children who murder their parents?

References

1. (1990) 55 CCC (3d) 97
2. (1994) 72 A Crim R 1
3. [1998] QCA 116
4. (1998) 197 CLR 316. The jury was "hung" so far as the guilt of the step-son was concerned, and his case went back for a re-trial

Question for Debate: *Should victims of violent abuse be entitled to behave to a lower standard of self-restraint, or, given their undoubtedly delicate mental state, should they be required to be even more careful in avoiding situations in which they might suddenly "freak", assuming that they are able to avoid them?*