Contemporary Comment

BATTERED WOMEN: IN BETWEEN SYNDROME AND CONVICTION

The last two issues of this journal contain a useful debate between Julie Stubbs and Patricia Weiser Easteal on whether the Battered Woman Syndrome (BWS) advances the position of women invoking self-defence.[1] Stubbs is wary of BWS, pointing to the possibility of it creating another stereotype — the reasonable battered woman — in addition to the existing stereotype of the reasonable man contained in the law of self-defence. She argues that those battered women who fail to fit the BWS stereotype may consequently be left with a defence conceived and implemented according to male standards of reasonableness. In contrast, Easteal hails BWS as the much needed solution for infiltrating the traditionally male-oriented plea of self-defence, enabling battered women's actions to be seen as reasonable self-defence. She goes so far as to regard the label "syndrome" as critical for admitting expert testimony into court to explain to jurors what constitutes reasonable behavior for battered women.

My concern here is to highlight recent Australian developments in the law of self-defence which enable women's perceptions of and responses to batterings to be accommodated much more than previously. These developments have occurred in the past decade, culminating in the High Court case of *Zecevic v DPP*.[2] The recent recognition of BWS by the courts of South Australia and New South Wales is a laudable step in the same direction.[3] However, that decision should be seen as representing only a part of the broader trend towards viewing the plea of self-defence from women's perspectives. So regarded, BWS is not the sole medium by which battered women can portray the reasonableness of their actions. A woman who fails to establish all the symptoms of the syndrome is not automatically resigned to conviction and punishment. The present liberalising of the law of self-defence enables her to successfully plead that defence.

Manifesting the symptoms of BWS would certainly greatly enhance the prospects of a woman defendant's acquittal but the syndrome should not be construed as crucial to a successful plea of self-defence. That there is a very real danger of BWS being regarded in this way is evidenced by the stance taken by writers like Easteal, and by the concerns expressed by Stubbs which have found judicial expression in some North American cases.[4]

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1 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; Easteal, P W, "Battered Woman Syndrome: Misunderstood?" (1992) 3 *Current Issues in Criminal Justice* 356; Stubbs, J, "The (Un)reasonable Battered Woman? A Response to Easteal" (1992) 3 *Current Issues in Criminal Justice* 359.

2 (1987) 162 CLR 645.

3 *R v Runjanjic, R v Kontinnen* (1991) 53 A Crim R 362 (South Australian CCA) and followed in *R v Kontinnen* (unreported, SA Sup Ct, Legoe J, 26 March 1992) and *R v Hickey* (unreported, NSW Sup Ct, Slattery AJ, 14 April 1992). See case comments on *Runjanjic and Kontinnen* in (1991) 15 *Crim L J* 445; and on *Hickey* in the August 1992 issue of the *Crim LJ* (forthcoming).

4 In these cases, battered women were convicted because they failed to conform with the profile of BWS. See Martinson, DC, MacCrimmon, GI and Boyle, C, "A forum on *Lavallee v R*: Women and

The debate between Stubbs and Easteal would be further enhanced by an appreciation of the recent major legal developments of self-defence which are conducive to the plight of battered women. In so asserting, I do not share the pessimism expressed by Julia Tolmie that the law of self-defence will continue to be dictated by male standards alone.[5] If shown the right direction, I am hopeful that lawyers and judges (though they might be predominantly male) will be prepared to utilize these new developments in self-defence in ways which adequately reflect the position of battered women defendants. Indeed, the South Australian and New South Wales decisions to recognise BWS may be regarded as an instance of such judicial liberalism.

The legal requirements of self-defence may be categorised into those which concern the accused's perception of the threatened danger and those which involve her or his reaction to such danger. Among the requirements under the first category, the law stipulates that the accused honestly and reasonably believed the danger to be of a certain nature.[6] This is a departure from the position, held by some older authorities, requiring a reasonable person's evaluation of the danger. The present law permits an accused to form a belief which differs from that which a reasonable person would have contemplated in the same circumstances. This is because the jury is required to initially consider who this particular accused is, taking into account her or his personal characteristics and circumstances. Only when the jury has a picture of this particular accused can it proceed to determine whether such a person could have had reasonable grounds for believing what he or she honestly believed. Hence, an integral part of jury deliberations on self-defence should involve constructing a picture of the particular battered woman accused and how she could have perceived the danger posed by her batterer.

Connected with the accused's belief as to the nature of the danger is the requirement of imminence of such danger. This requirement has been regarded as particularly problematic for battered women so long as it was construed as confining self-defence to a confrontational encounter. However, recent judicial pronouncements have considerably freed up the notion of imminence by emphasising that it is assessed according to the accused's reasonable perception as opposed to proving imminence as an objectively demonstrable fact.[7] Hence, the imminence of the threat will be established should the accused have honestly and reasonably believed that the perceived assailant "remained in a position of dominance and in a position to carry out the threatened violence at some time not too remote, thus keeping the apprehension ... ever present in the victim's mind".[8] Applying

Self-Defence" (1991) 23 *U Brit Columbia L R* at 54-55; Crocker, P L, "The Meaning of Equality for Battered Women who kill Men in Self-Defence" (1985) 8 *Harv Women's L J* 121 at 137.

5 Tolmie, J, "Add Women and Stir: An Australian Perspective on Defences to Murder for Women Who Kill their Violent Husbands", paper presented at the Law and Society Conference, Amsterdam, June 1991, and cited by Stubbs in (1991) 3/2 *Current Issues in Criminal Justice* at 269. See also Tolmie, J, "Provocation or Self-Defence for Battered Women Who Kill?" in Yeo, S (ed), *Partial Excuses to Murder* (1991), 61.

6 *Zecevic* [1987] 162 CLR 645 at 661, 687.

7 See, for example, *Morgan v Coleman* [1981] 27 SASR 334 at 337; *R v Lane* [1983] 2 VR 449 at 456-457.

8 Borrowing the words of *Zanker v Vartzokas* [1988] 34 A Crim R 11 at 16, a case on the requirement of imminent threat under the crime of assault.

this proposition to the case of a battered woman, it could be argued that she lived in constant and real fear of her male partner turning violent yet again at any time.

The second category of requirements for self-defence includes the stipulation that the accused honestly and reasonably believe in the necessity of her or his response to the threatened danger. This is a significant departure from previous authority which assessed the necessity of the response according to a reasonable man standard. The law now asks what *this* particular accused could have regarded as reasonably necessary defensive action, taking into account her or his personal characteristics and circumstances. Applying the law to a battered woman defendant, the jury must consider whether she could have reasonably believed her action to be necessary, bearing in mind her experiences of having been frequently bashed by the male victim.

There is also the related notion of proportionate force which was formerly regarded as a separate legal requirement of self-defence. The current law relegates proportionate force to a mere matter of evidence to be considered by the jury when assessing whether the accused honestly and reasonably believed her or his conduct to be necessary by way of self-defence.[9] This legal development has particular relevance to cases involving women who rely on a weapon such as a gun to kill their physically stronger male batterer or who take defensive action when he is asleep.

Another development which supports the cause of battered women is the abrogation of the legal duty to retreat before an accused can attempt to defend herself or himself. The High Court in *Zecevic* relegated the issue of retreat to "a circumstance to be considered with all the others in determining whether the accused believed on reasonable grounds that what he [or she] did was necessary in self-defence".[10] This change in the law lends itself to recognising the especially vulnerable position of battered women. Often, for these women, living separately is not a viable form of escape as their batterers locate them to bash or even kill them.[11] And for the women who remain in the relationship, effective police protection is virtually non-existent.[12]

The task ahead is to alert lawyers and judges to how these changes to the law of self-defence may be interpreted in terms of the battered woman responding in self-defence. That this task will not be easily accomplished is undeniable as a recent New South Wales case, referred to by Easteal, indicates.[13] What is involved is the breaking down of the stereotypical reasonable man acting in self-defence. However, it is a task which is achievable with time and with opportunities given to enlightened lawyers and judges to read women's perspectives into the law of self-defence.

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9 *Zecevic v DPP* [1987] 162 CLR 645 at 662.

10 Id at 663.

11 Wallace, A, *Homicide: The Social Reality* (1986) at 112–114.

12 Hatty, S, *Male Violence and the Police: An Australian Experience* (1988); McCulloch, "Police Response to Domestic Violence, Victoria" in Hatty, S (ed), *Domestic Violence* (1985) at 523.

13 *R v Whalen*, unreported, CCA (NSW), April 1991 and discussed in (1991) 3/3 *Current Issues in Criminal Justice* at 359. Apparently, the lawyers and judges did not think to consider self-defence in a case involving a battered woman who had killed her husband.

Regarding BWS as the only way by which the position of women can be reflected in the law of self-defence is to discard the whole body of recent law which has the potential to accommodate women's perspectives. It is to take the retrograde step of regarding BWS as a special defence devised for women who must fit into it to escape criminal liability. BWS is not a defence per se,[14] but a psychological condition which some women defendants may experience and which assists them in establishing a plea of self-defence. But between the woman experiencing BWS and one who is unjustified in taking defensive action is a whole range of battered women who can be regarded by our present law of self-defence as having taken reasonable action against their batterers.

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14 Describing BWS as a "defence" fosters the misconception that it is the sole medium by which battered women may be acquitted.

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