

## Note on *Hickey*: The Problems with a Psychological Approach to Domestic Violence

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Sometimes the silences in a text are as significant as what is said. In the case of *Hickey*,<sup>1</sup> the NSW Supreme Court accepted psychological evidence on Battered Woman Syndrome (BWS) for the first time.<sup>2</sup> I propose to discuss the psychologist's evidence and examine issues not referred to in this evidence. Cynthia Hickey was charged with murdering her de facto husband, Mervyn Priestley. Evidence on BWS was used to establish that her response to an attack by her spouse was reasonable and taken in self-defence, given the history of violence between the couple. Hickey is an Aboriginal woman, a fact not referred to by the psychologist. The argument of this casenote is that despite the acquittal of Hickey, the evidence of the psychologist reveals the inadequacy of this model for battered women, particularly Aboriginal women and women of ethnic minorities, and the danger of BWS reinforcing inappropriate stereotypes of women.

### *Development of Battered Woman Syndrome*

Lenore Walker, a psychologist in the United States, developed BWS to overcome the difficulties battered women charged with the murder of their partners face in successfully arguing self-defence.<sup>3</sup> As this defence has been created by men, it reflects their experiences of being attacked, usually in an isolated incident by a person of approximately equal strength.<sup>4</sup> Women in a violent relationship for many years before fatally retaliating may have trouble establishing that they reasonably feared for their lives and responded in a proportionate manner, as required by the defence. Julia Tolmie notes that changes to the law in Australian jurisdictions have made self-defence more suited to the experiences of battered women.<sup>5</sup> The test enunciated in the High Court decision of *Zecevic*<sup>6</sup> is that the accused reasonably believes that it is necessary in self-defence to do what she did. Imminence of attack and retreat from the attack are no longer requisite to establish the defence. According to Tolmie, the problem lies with applications of the law in the criminal trial, rather than with the legal formulation itself.<sup>7</sup> Juries often fail to understand the reasons why the woman may remain in such a relationship and may believe popular myths that domestic violence results from the woman's incitement, her masochism, and her passivity.<sup>8</sup>

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1 Supreme Court, New South Wales : Slattery AJ, 14 April 1992.

2 The case of Cynthia Hickey has been commented on by Yeo, S, (1992) 16 *Crim LJ* 271.

3 Walker, L, "Battered Women, Psychology and Public Policy" (1984) 39 *Am Psychologist* 1178.

4 O'Donovan, K, "Defences for Battered Women Who Kill" (1991) 18 *J L&Soc* 219 at 233; Schneider, E, "Describing and Changing: Women's Self-Defence Work and the Problem of Expert Testimony on Battering" (1986) 9 *Women's Rights L Rptr* 195 at 201.

5 Sheehy, E, Stubbs, J and Tolmie, J, "Defending Battered Women on Trial: The Battered Women Syndrome and its Limitations" (1992) 16 *Crim LJ* 369 at 372.

6 (1987) 71 ALR 641.

7 Above n5.

8 Above n5.

BWS should be a tool to negate these misconceptions about violent relationships. Walker argues that some battered women suffered from learned helplessness, a psychological model created by Martin Seligman<sup>9</sup> after conducting experiments on dogs. He found that after several episodes of sustained beatings the dogs did not make use of opportunities to escape. According to Walker, learned helplessness explains why women sometimes remain in violent relationships. She asserts that battering occurs in cycles, the man following his assaults by conciliatory behaviour. Women in this situation lose the ability to take control of their lives, and have no perception that they can escape the violence. Sometimes they may kill their partners.<sup>10</sup>

By basing her theory of BWS on learned helplessness Walker adopts a deterministic approach to domestic violence and the behaviour of women in these situations. The relationship of violence is portrayed in a simple model of action and reaction, which does not allow for the influence of factors such as Aboriginality, paternalism, and religious beliefs. The learned helplessness model denies the possibility that staying in a violent relationship may be a rational decision. The reaction of women to battering is portrayed by Walker in predominantly psychological terms, although she does recognise the effect that poverty and lack of institutional assistance may have on a woman's ability to leave her home.<sup>11</sup>

### *The evidence of the psychologist in Hickey*

By using rules of evidence the court is able to control the type of explanations presented in court of domestic violence and the effects it has on women. Allowing evidence of BWS places domestic violence in the realm of science, to be presented to the jury by an "expert" witness.<sup>12</sup> The law appropriates a certain image of domestic violence, shaped by the preconceptions of psychologists and devalues the woman's own experience. Women's crime is often portrayed in medical terms as the product of irrationality. In the case of BWS psychological evidence such as that given in *Hickey* results in the continuation of the portrayal of women as irrational beings.

The psychological evidence in *Hickey* emphasises the passivity and dependency of Hickey's personality. The psychologist states "that the woman who fits into th[e] category [of BWS] is somebody who has a learned helplessness in a situation and is also passive in a situation".<sup>13</sup> The psychologist describes women with the syndrome as being

normally quite dependent people ... who initially when they get into the relationship place a great deal of emphasis on their mate, on the man, taking responsibility for their lives.<sup>14</sup>

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9 Seligman, M, Maier, N and Geer, J, "Alleviation of Learned Helplessness in the Dog" (1986) 73 *J Abnormal Psychology* 256.

10 Above n5.

11 Schneider, above n4 at 203; see also Walker, L, "A Response to Elizabeth M Schneider" (1986) *Women's Rights L Rptr* 223.

12 Above n5 at 384.

13 Transcript of proceedings, *Hickey*, Supreme Court, New South Wales: Slattery AJ, 14 April 1992 at 123.

14 *Ibid.*

The psychologist explains learned helplessness in BWS as a consequence of Hickey's personality, rather than a result of the sustained violence, as contemplated in the work of Lenore Walker. In his evidence he states that Hickey is an immature, dependent person of low intelligence, who would "only be able to cope with a simplistic lifestyle".<sup>15</sup> This assessment of her character is used to establish that Hickey has a predisposition to BWS. Thus the role of her spouse and his violence toward her are presented as irrelevant to BWS and no longer the subject of analysis. This misinterpretation of Walker's model is another facet of the problem with BWS envisaged by Elisabeth Sheehy, who states:

our concerns about the defence are heightened by the fact that the evidence and arguments for Battered Woman Syndrome are being shaped by defence lawyers who may be unaware of the difficulties articulated by feminists or may in fact be hostile to feminism.<sup>16</sup>

To make Hickey's actions more comprehensible to the jury, counsel for the defence asks the psychologist why a woman would consent to assaults by her partner and not leave the relationship. He answers "they simply don't know how not to [acquiesce to the violence]" and adds "they don't have the resources [to leave]. There can't be assertion in a relationship".<sup>17</sup> The psychologist uses the term resources in a psychological rather than a physical context, for example stating of Hickey that "she has very limited emotional resources to assist her in coping with life".<sup>18</sup>

The psychologist blames Hickey for her husband's violence, stating "[b]ecause of her lack of insight, a good deal of conflict is likely to occur in her relationships".<sup>19</sup> The only evidence given by the psychologist relating to the external factors of Hickey's life are that she has only minimal education, not having finished year ten of high school; has never been employed; and that her de facto husband ignored the Domestic Violence Order she had obtained against him. The predominant impression created by the evidence is that BWS, and even the violence itself, are a result of Hickey's psychological inadequacies.

### *Criticism of the psychologist's evidence and the construction of BWS*

An interrogation of the concepts used by the psychologist to describe Hickey reveals a construction of personality based on ethnocentric, masculine values. These conclusions may only be applicable in the context of male Western culture. An example of the assumptions underlying the psychologist's reasoning is his assertion that Hickey's dependent personality is illustrated by her reliance on her peers for approval. This ignores the value women and people of less individualistic societies place on relationships.<sup>20</sup> The absence of any consideration of Hickey's Aboriginality leads to a deficient understanding of her interactions with other people. His conclusion that women with BWS are

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15 Id at 122.

16 Above n5.

17 Above n13 at 124.

18 Id at 122.

19 Id at 120.

20 See, eg, Edmunds, M, "Doing Business, Socialisation, Social Relations, and Social Control in Aboriginal Societies" in Royal Commission into Aboriginal Deaths in Custody, *Discussion Paper* (May 1990) at 17.

likely to be reliant on their spouses ignores the reality that our society encourages women to be dependent on men, either fathers or spouses.

The psychologist determined Hickey's intelligence by conducting tests, including the Wechsler Adult Intelligence Scale. Intelligence tests have been criticised for the ideological assumptions upon which they are based.<sup>21</sup> Intelligence quotient (IQ) testing has its origins in eugenicist theories propounded at the beginning of the twentieth century, when it was used for political purposes to prove that certain groups in society were inherently more intelligent than others.<sup>22</sup> Claims of objectivity deny that the tests place value on skills considered important by those constructing the tests. The focus on logic and quickness of response may be unsuited to people from non-Western cultures.<sup>23</sup> In this context the conclusions that the psychologist makes about Hickey's intelligence and the links he makes between this and her "immaturity" and "general social maladjustment" are questionable, particularly as they are used to place the responsibility for BWS on Hickey.

The evidence provides limited insight into the dynamics of domestic violence and the reasons why a woman may kill to escape a violent relationship. Stereotypical images of battered women are perpetuated: they make it easy to blame the woman for domestic violence. By focusing on Hickey's personality, attention is diverted from any analysis of the physical conditions under which she lived. While her act was a response to assaults by her spouse, there is little discussion of Priestley or the dynamics of male violence. The financial situation of the couple is not stated, nor whether poverty may have contributed to conflict in the relationship.

Critics of BWS have noted that the syndrome minimises the effects of social factors.<sup>24</sup> Julie Stubbs states that BWS "serves to deny social, structural and political factors pertinent to an understanding of male violence".<sup>25</sup> Marilyn MacCrimmon analyses the use of expert evidence and states that it "abstracts the individual from her context and culture by narrowly defining the factors which influence behaviour".<sup>26</sup> Feminist theorists argue that domestic violence is an element of patriarchy. Physical domination complements and assists male pre-eminence in political, social and economic spheres.<sup>27</sup> These features of domestic violence are not contemplated in individualised models such as that presented in the evidence of the psychologist in the Hickey case.

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21 Meadmore, D, "The Ideology of Intelligence: Its Origins and Its Effects" (1989) 35 *Education Links* 9; Kearins, J, "A Quotient of Awareness" (1983) 18 *Education News* 18.

22 Meadmore, above n21 at 10.

23 Kearins, above n21 at 19.

24 Faigman, D, "The Battered Woman Syndrome and Self-Defence: A Legal and Empirical Dissent" (1986) 72 *Virg LR* 619 at 644-5; Mahoney, M, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90 *Mich LR* 1 at 37; Schneider, E, above n4 at 198-200.

25 Above n5 at 384.

26 Martinson, D, MacCrimmon, M, Grant, I and Boyle, C, "A Forum on *Lavallee v R: Women and Self-Defence*" (1991) 25 *UBCLR* 23 at 37.

27 Bolger, A, *Aboriginal Women and Violence*, Australian National University, North Australian Research Unit, Darwin (1991) at 42.

### *Aboriginal women and domestic violence*

The absence of an analysis of the way Aboriginality may affect experiences of violence is an example of the deficiency of BWS as presented by the psychologist. I will outline some of the factors pertinent to Aboriginal women and domestic violence. While these issues may not necessarily be relevant to the situation of Cynthia Hickey, ignoring the social context of domestic violence will limit the effectiveness of BWS, particularly for Aboriginal and minority women. Problems may arise in future with the use of BWS if women fail to conform to the image it constructs of battered women who kill, an image of limited use to non-Anglo women.

The syndrome focuses on the passivity and learned helplessness of the women and may not be applicable to women who have physically resisted assaults,<sup>28</sup> or who do not appear helpless because of their employment, education and other resources.<sup>29</sup> Black women, who are often the main wage-earners in their families, do not fit into stereotypes of oppression.<sup>30</sup> It has been noted that a common reason for assaults in Aboriginal communities is extortion of money from the victim.<sup>31</sup> Women who have left or attempted to leave their violent partners appear to contradict the theoretical basis of learned helplessness. Martha Mahoney argues that Walker's approach to battered women reflects white middle-class ideas that "women are either strong and assertive *or* coerced".<sup>32</sup> She believes that theories of battered women must be able to contain experiences of both strength and oppression.<sup>33</sup>

With its components of learned helplessness and the battering cycle, BWS is presented as a universal explanation of why battered women stay in violent relationships and may kill their partners. While domestic violence occurs in families from all socio-economic groups<sup>34</sup> issues of ethnicity and class shape experience, negating the value of theories that do not accommodate cultural diversity. One example of the narrow view of domestic violence contemplated in BWS is that it focuses on women who are assaulted by a partner. Aboriginal women, for example, are often attacked by other male relatives.<sup>35</sup>

Aboriginal people have identified domestic violence as a major problem in many communities.<sup>36</sup> In a study by Audrey Bolger it is estimated that the majority of Aboriginal women in the Northern Territory have been victims of domestic assaults.<sup>37</sup> Concern has been expressed by Judy Atkinson at the

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28 Above n5 at 386; Mahoney, above n24 at 41.

29 Crocker, P, "The Meaning of Equality for Battered Women Who Kill in Self-Defence" (1985) *Harv Women's LJ* 121 at 144.

30 Crenshaw, K, "A Black Feminist Critique of Anti-Discrimination Law and Politics" in Kairys (ed), *The Politics of Law* (1990) at 204; Thornhill, E, "Focus on Black Women!" (1985) 1 *Can J Women and Law* 153 at 159.

31 Langton, M, "Too Much Sorry Business" in Royal Commission Into Aboriginal Deaths In Custody, *National Report* vol 5, AGPS, Canberra (1991) at 420.

32 Mahoney, above n24 at 30.

33 Ibid; see also Schneider, above n4 at 221.

34 Above n27 at 40-41.

35 Above n31.

36 See Atkinson, J (ed), *Beyond Violence: Finding the Dream*, Office of Status of Women, Canberra (1990); Bolger, above n27; *Beyond These Walls: Report of the Queensland Domestic Task Force*, Brisbane (1988); for examples of the literature available on domestic violence in Aboriginal communities.

numbers of Aboriginal women imprisoned for killing someone who has been violent to them.<sup>38</sup> Bolger acknowledges that many responses to domestic violence are common to Aboriginal and non-Aboriginal women: feeling ashamed and hiding injuries, reluctance to report assaults to the police, and wanting to remain in the home because of the lack of support services. But she states that social and cultural factors "have a bearing on both attitudes to violence and the options open to women who are affected by it".<sup>39</sup> The Queensland Domestic Violence Task Force and the Royal Commission Into Aboriginal Deaths In Custody assert that domestic violence cannot be understood without acknowledging the historical context of Aboriginal-white conflict.<sup>40</sup> Both reports look at the strain the breakdown of traditional Aboriginal culture has placed on Aboriginal families. These reports suggest that the frustration felt by men at being deprived of their traditional roles has led to violence, directed at their wives and girlfriends.<sup>41</sup> The devastation of the traditional status of Aboriginal women also influences responses to domestic violence.<sup>42</sup>

Marlee Kline has linked issues of racism to the way that the reactions of black women in the United States to domestic violence may be different to those of white women:

[A]lthough both women of colour and white women sometimes experience the family as an institution of violence and oppression, for women of colour the family often functions as a source of support for its members against the immediate harassment of racism and provides a site of cultural and political resistance.<sup>43</sup>

The psychological evidence presented in the Hickey trial does not address how the need for support in a racist society may have influenced Hickey to maintain a relationship with Priestley despite the assaults she received.

The politics of racial oppression limit the way that Aboriginal women can respond to domestic violence. Many feel pressured by their communities not to call the police for help. Audrey Bolger states that:

Aboriginal women have shared [the] oppression [by white culture] and are now torn by feelings of sympathy and loyalty which make it difficult for them to act against men who are abusing them.<sup>44</sup>

Aboriginal Legal Service policy to not act in cases involving two Aboriginal people means they will not represent women in domestic violence cases

37 Above n27 at 24.

38 Atkinson, J, "Violence Against Aboriginal Women: Reconstitution of Community Law-the Way Forward" (1990) 2 *Aborig L Bull* 6.

39 Above n27 at 6.

40 Queensland Domestic Violence Task Force, above n36 at 258; Royal Commission Into Aboriginal Deaths In Custody, *National Report* vol 2, AGPS, Canberra (1991) at 314.

41 Queensland Domestic Violence Task Force, above n36 at 258-9; Royal Commission Into Aboriginal Deaths In Custody, above n40 at 102, 314; see also LaPrairie, C, "Some Issues in Aboriginal Justice Research: The Case of Aboriginal Women in Canada" (1989) 1 *Women and Criminal Justice* 81, for an analysis of this issue in Canada.

42 Above n27 at 45-50; Payne, S, "Aboriginal Women and the Law" in Cunneen, C (ed) *Aboriginal Perspectives on Criminal Justice*, The Institute of Criminology Monograph Series No 1, Sydney (1992) at 31-40.

43 Kline, M, "Race, Racism, and Feminist Legal Theory" (1989) 12 *Harv Women's LJ* at 122.

44 Above n27 at 59.

against Aboriginal men. This limits the ability of women to effectively combat the violence and increases the perception that involving white law is against the interests of the Aboriginal community as a whole.<sup>45</sup>

Despite such concerns, many Aboriginal women feel that the police should play a role in the prevention of domestic violence, yet fear that if called the police will do nothing, or even abuse the women themselves.<sup>46</sup> There is a widespread perception that the legal system does little to help Aboriginal women.<sup>47</sup> In *Beyond Violence: Finding the Dream* a woman in Queensland complained that "[f]ive women have died [in the community] because of domestic violence but no charges have been laid, not for the deaths anyway".<sup>48</sup> Hickey's spouse ignored the Domestic Violence Order she had obtained against him, which illustrates the ineffectiveness of current legal remedies for domestic violence when they are not enforced.

Racism and false anthropological arguments are blamed by Aboriginal women for the inadequate response of the criminal justice system. Commentators note the frequency of statements by the police and judiciary about the acceptability of domestic violence in "traditional" Aboriginal culture, leading to a leniency in the treatment of men who assault Aboriginal women.<sup>49</sup> Sharon Payne, Judy Atkinson and others refute such claims, stating the attitude is a product of white male values, not Aboriginal culture.<sup>50</sup>

Several other factors may lead Aboriginal women to stay in a violent relationship. Pressure may be placed by other relatives on women to stay with their spouses.<sup>51</sup> Audrey Bolger states that "cultural factors of obligations and loyalty to kin and families ... make women vulnerable to pressure to ... stay".<sup>52</sup> In *Beyond Violence: Finding the Dream* a woman in Queensland is asked why battered women stay and replies "[r]unning away doesn't solve anything. We've got to sort it out here. Find out how we can help each other".<sup>53</sup> The scanty services available to women who do leave their homes are used less by Aboriginal women than others.<sup>54</sup> Medical services, refuges and government departments providing assistance are often not staffed by Aboriginal people, resulting in an alienating and sometimes hostile environment.

45 Similar attitudes occur in the United States: Crenshaw, K, states: "many people within the Black community view the specific articulation of Black Women's interests as dangerously divisive", above n30 at 199.

46 Above n27 at 59; see Human Rights and Equal Opportunity Commission, *Report of National Enquiry into Racial Violence* (1991) at 88-89, for examples of complaints made by Aboriginal women and their treatment by police officers.

47 Payne, S, above n42; Selfe, J and Thomas, C, "Aboriginal Women and the Law", Aboriginal Justice Issues Conference, Australian Institute of Criminology (June 1992); National Committee to Defend Black Rights, "Miscarriages of Justice in Australia: Aboriginal Girls and Women", *Position Paper* (May 1992).

48 Atkinson (ed), above n36 at 15.

49 Above n38; Bolger, above n27 at 71-83; Payne, above n42 at 37-8.

50 Above n38 at 6; Bolger, above n27 at 50-53; Payne, above n42 at 37-38.

51 Above n27 at 57.

52 *Id* at 54.

53 Atkinson (ed), above n36 at 15.

54 Queensland Domestic Violence Task Force, above n36 at 263-4; Selfe and Thomas, above n47 at 50.

### *Conclusion*

Although Cynthia Hickey was acquitted of the murder of her spouse, this may be because her actions closely resembled the traditional concept of self-defence.<sup>55</sup> The use of expert evidence of BWS, as presented by the psychologist, does not refute negative stereotypes of battered women, as was intended by its creator. This is largely because there is no attempt to outline the cultural context of domestic violence. Explanations in purely psychological terms of why women remain in violent relationships are based on assumptions that may have little application to women from a variety of cultural milieu. Effective defence strategies for all women must be sensitive to issues such as racism, the political nature of male violence, and responses by the community and state institutions to this violence.

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<sup>55</sup> Above n2 at 273.

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