

# **BATTERED WOMEN WHO KILL: A PLEA OF SELF- DEFENCE**

**Dr Patricia Easteal  
Australian Institute of Criminology  
Canberra**

WHAT EXACTLY IS BATTERED WOMAN SYNDROME (BWS) AND HOW CAN IT be used as a plea of self-defence? This paper will answer those questions and raise what is, to the author, a more important question: why hasn't woman battering syndrome achieved a similar degree of legitimacy and acceptance in the Australian courts as we find exists in the United States?

The material presented in response to these queries was gleaned from an extensive review of the overseas and Australian literature. It must be noted that there is a vast amount of American research with a multitude of books and articles appearing during the 1980s. The lack of a commensurate amount of research in this country is itself perhaps reflective of the lack of apparent interest or effort that has been taken to ensure that women receive similar fair treatment in our courts. Reading page after page of what can only be described as horrific tales of cruelty and nightmarish existences that so often precede the final act of homicide in America, the reader may have some difficulty in maintaining a scholarly dispassionate perspective. Then when one turns to the Australian literature and finds so little either written or implemented, the horror can turn to something deeper and at the least provides the incentive to share some of the observations and concerns in the perpetual hope that bringing 'things out of the closet' can indeed initiate a process of change.

## **BWS as Self-defence in the United States**

Since 1979, BWS has been raised in hundreds of cases in America. Self-defence, for so long narrowly defined in a male perspective suitable to describing violent interactions between two males, began to be interpreted in a broader framework. It acknowledged that in many cases, both due to physiological and socialisation differences, a female simply cannot defend herself in the same manner as a male and even more specifically, that living in a battering situation for an extended period of time impacts on the individual's ability to act according to the way that 'a reasonable man' would behave. Let us therefore first examine how lawyers in the US have broadened the interpretation without actually changing the wording of self-defence.

However, one qualifier must be stressed. Although some women in America are being acquitted, many in fact continue to be convicted of murder or manslaughter. For example, in Ewing's (1987, pp. 42-3) sample of 100 cases of this type which occurred between 1978-1986, nine pleaded guilty, three were acquitted on grounds of insanity, and three had the charges dropped. Of the remaining 85 who went to trial claiming self-defence, 22 were acquitted whilst 63 were found guilty of some type of homicide; twelve of the latter received life imprisonment sentences. Fifty-five of the 63 appealed; 22 convictions were affirmed, 22 got new trials, and four had their cases dismissed. BWS has been used in sufficient numbers to merit a recent US Senate approval of an amendment which requires the Attorney-General and Secretary of Health and Human Services to review its use and assessment by legal practitioners ('Study of "Battered Women's Syndrome" ' 1991).

### *Battered woman syndrome*

BWS refers both to a certain pattern of violence and to the psychological consequences upon the recipient of the violence. For example, experts in the field of domestic violence have ascertained that being subjected to repeated physical, sexual and or emotional violence may result in certain behaviours and thoughts which contribute to an increasing inability to leave the batterer (Thyfaut 1984). This is of course a critical issue which the defence attorney needs to address: why didn't she just leave instead of killing him? BWS is considered to be a sub-type of post traumatic stress syndrome which has been identified as a consequence of enduring years as a hostage or other high stress scenario such as concentration camp internment.

The syndrome is the culmination of three stages which recur in the domestic violent situation (Thyfaut 1984; Walker 1989). The first phase of tension building leads to the second stage of severe bashing which is followed by the third phase which is exemplified by the batterer's contrition, promises, and temporary cessation of violence. This latter period acts to keep the woman in the relationship believing that the nightmare is over when in fact, most often it has just begun. The cycle continues with the stage two violence increasing in type over time.

These stages of course have subtle and direct implications in assessing the lack of immediacy of defensive action by the battered woman. For example, she may kill the batterer in stage one when there has not YET been a severe bashing in the current cycle but where she is focussed from past experience upon what will happen next. Her defensive response may not occur until phase three; the actual stage of his most acute violence does not permit the expression or even feeling of anger. All energy is directed upon surviving the violence.

Over time, a psychological process may occur with the victim acquiring a learned helplessness response to the situation. She becomes convinced that her options are negligible, that the batterer is all powerful and her repertoire of responses becomes very limited. ' . . . [l]earned helplessness explains how people lose the ability to predict whether their natural responses will protect them after they experience inescapable pain in what appears to be random and variable situations' (Walker 1989, p. 36). The woman is living with a Jekyll and Hyde person with the minute by minute uncertainty of which persona is there. Contributing to and resulting from the dynamics of the violent relationship are both the victim's increasing loss of self-esteem and her isolation from others (Douglas 1987). Shamefilled, her suffering is silent, a secret from friends, neighbours and the authorities.

Concurrently, another by-product of BWS is the development of self-destructive coping mechanisms. These may include alcohol or drug abuse, and minimisation of the violence and/or the anger it engenders. For example, one battered woman whose vagina was torn from repeated blows from her husband's fists, claimed in his defence that 'he didn't realise what he was doing; he was pleasing himself' (Douglas 1987, p. 43).

Lastly, fear becomes a constant companion. The battered woman lives in a state of terror, constantly vigilant against the ever present but erratic threat of violence.

Studies have shown that in situations where the victim ultimately kills her partner, there are factors that differentiate the situation from other batterings where homicide is not the result. First, the cases which end in death more often contain alcohol abuse, death threats, threats with weapons, more severe battering and sexual violence toward the woman and or others in the family (Browne 1987; Ewing 1987; Walker 1989). The actual killing is usually preceded by an unusual incident; something done by the male that was not in his usual repertoire of violence. This often concerns the children in the family; he either threatens their lives, begins to sexually assault one or more of the children, or the wife first learns of the latter. This has been referred to as 'the turning point': 'He never did that before'; something occurred that simply went beyond the range of what the woman had learned to live within (Blackman 1989; Browne 1987).

#### *What self-defence means in the US*

Gillespie (1989) points out that there are three components of the self-defence law that may be problematic for battered women who kill: a requirement that the threat was imminent or immediate; the need for the force to be commensurate with the attack; and the obligation to retreat or try to escape from an attack. The perception of imminence and severity of the assault plus the individual's perception of how much force is requisite to counter it must all be reasonable (Thyfault, Browne & Walker 1987). Psychologists and lawyers have worked hard to redefine the terms in this definition to fit the actions of a victim of BWS and place the defendant's actions against the norms of a reasonable battered woman not a reasonable man.

(Reasonable belief in) **The Immediacy Issue:** Traditionally, in the context of male vs male, this has been narrowly defined to mean that the attacker is in the process of attack; the defender is thus in immediate danger and strikes back in self-defence. After all, a real man does not sneak but calls his antagonist out for a fair fight. However, one must remember that the definition states 'reasonably believes that one is in immediate danger'. Two landmark cases did not involve battered women but are relevant to the issue of differing concepts of reasonable. In *State v. Wanrow*, the Washington Supreme Court ruled that the accused who had been on crutches had committed the killing in self-defence when the deceased, a known child molester with a history of violence, entered her home. The court stated 'It is clear that the jury is entitled to consider all of the circumstances surrounding the incident in determining whether the defendant had reasonable grounds to believe grievous bodily harm was about to be inflicted' (Eber 1981, p. 921). In *State v. Garcia* (1977) the defendant had been physically and sexually assaulted by two men who threatened to return. Garcia went home, got a gun, found them and killed. In her second trial she was acquitted on the grounds of self-defence (Thyfault, Browne & Walker 1987).

It has since been argued successfully in many US courts that the victim of BWS who kills during a lull in her partner's violence—even whilst he is asleep—may be seen to believe that she is in immediate danger, IF one defines the reasonable perception as based on the reasonable perception of a battered woman and NOT the reasonable perception of John White Male Smith. BWS theory suggests that the woman is living in a constant state of terror convinced that one day her partner will kill her. In this situation, the immediacy of danger is a constant (Eber 1981). Thus, in a 1985 New York Supreme Court decision (*People v. Torres*) the judge wrote:

... It is the defendant's state of mind and sense of fear which is critical to a justification defense. In this regard, proof of violent acts previously committed by the victim against the defendant as well as any evidence that the defendant was aware of specific prior violent acts by the victim upon third parties is admissible as bearing upon the reasonableness of the defendant's apprehension of danger at the time of the encounter' (Blackman 1989, pp. 188-9).

Since in a battering situation, violence is always a strong possibility, the threat is always there, even during the ostensible lulls. It must be remembered that the women in these cases are not alleging that because they are battered that they have the right to kill, but that because of the 'history of violence in the relationship', they become 'sensitive to cues from the batterer' that generate a feeling or belief of imminent danger (Thyfaut, Bennett & Hirschhorn 1987, p. 59).

**Reasonable amount of force:** *The State v. Wanrow*, the case above, also dealt with the issue of whether a woman can use a weapon to defend herself if the male is not armed. This particular court recognised that to fight equally with a man, a woman may need to use a weapon. The idea of equal force being defined the same for a woman/man conflict and a male/male conflict is quite ludicrous given not only the physical differences but also the gender differentiation in socialisation that is commonplace. When considering BWS victims, one must also remember that most of these women have endured long-term punching, throwing, choking and kicking. Their partners' hands, fists and feet have in fact been dangerous and potentially lethal weapons. Yet, until recently in America and in Australia case law has not been interpreted to include the danger of these body weapons as grievous enough or as a serious enough threat to permit self-defence with a non-body weapon (Gillespie 1989). Juries, without understanding BWS and the dynamics of battering, see a gun or a knife as excessive force in relation to the batterer's violence. Looking at proportionality of response in BWS killings involves a comprehension of the terror and the history involved.

**Use of such force necessary:** or 'Why didn't she just leave?': BWS evidence, if allowed in the court, helps to explain to the jury why a reasonable battered woman does not leave. Not that she was a masochist, but that as a victim of the syndrome, for a multiplicity of reasons, she had become incapable of such action. Aside from the psychological constraints, she may have practical problems, for example, where to go, and a fear of retaliation which is justifiable since such women are often threatened with death if they dare to go.

*The use of expert witnesses*

Expert witness testimony is presented to combat the existing myths about battered women, not to address the ultimate issue of guilt or innocence (Brotsky 1987). Without the expert witness, it would be virtually impossible for the jury to consider the battered women's actions as self-defence since the knowledge of what is reasonable for a BWS victim has been described as beyond the ken or the understanding of the average juror. *Ibn-Tamas v. United States* (DC Court of Appeals 1979) was the first court to hold that expert testimony about BWS was worthy of consideration in a case where a woman had killed her husband (Buda & Butler 1984-85). Numerous other courts have made similar rulings that have permitted the BWS expert's evidence (for list of cases, see Walus-Wigle & Meloy 1988). Admissibility has followed the determination by the various courts of the scientific and legal acceptance of battered woman syndrome. The acceptance of such testimony by the judge is certainly critical. Its failure to be allowed has been the grounds for numerous appeal court cases—many of them successful (Thyfault, Bennett & Hirschhorn 1987).

*Cases in the US*

It should be noted that until self-defence was argued, women were either found guilty of murder, pleaded guilty to a lesser charge of voluntary manslaughter, or were acquitted on the grounds of insanity as in the movie *The Burning Bed*. Since 1979, by employing the arguments above, hundreds of women have pleaded self-defence with quite mixed results. The following three cases illustrate the variety of situations, pleas and consequences that have ensued.

**Molly's case** (Browne 1987, pp. 132-4;161): Beaten for years by husband Jim, Molly was finally allowed to work and began to save to escape with her small son. (She was given more freedom because Jim had a young girlfriend with whom he was spending most of his time and his beating.) The girlfriend ran away and Jim returned home to vent his anger on Molly hitting her head with his fists, pounding her head against cupboards, kicking her in the ribs and stomach. She tried to dial the police; Jim dislocated her fingers. He pulled her hair out by clumps, gouged her eyes, punched her in the stomach and on and on for hours. She lay in her blood on the floor as he slept. When he awakened, he threatened to kill her if she was not able to find out the whereabouts of the girlfriend. '. . . I'll shoot you, you son of a bitch. I'll kill you dead. Dead, dead, dead,' he said over and over again as he left.

The day passed in a blur for Molly. She became more and more frightened. Jim returned that night very intoxicated and started to choke and beat her while he laughed. She ran out to the car and got his gun; ran to the neighbours but no-one answered. Jim fired at her. Then he threatened the baby. He had never done that before and came outside carrying the baby and put his arms around the infant's neck. She raised the automatic and shot Jim, grabbed the baby and ran to the neighbours. This time, they let her in and called the police. She was arrested, taken to gaol and charged with murder. The baby was placed in foster care. Molly ultimately asked to plead guilty to a lesser charge so that she could be reunited with him.

**State vs. Allery**, 1984 (Johann & Osanka 1989, pp. 284-6): Sherry Allery was found guilty of second degree murder by a trial court that did not allow BWS expert testimony to explain her fear of imminent danger and gave instructions to the jury that

did not adequately explain self-defence law. The history of violence in the marriage was extensive and severe. Since 1975, she had been beaten with fists, pistol whipped and attacked with knives. The battering increased over time and culminated with Sherry starting divorce proceedings. The husband, Wayne was served with a restraining order.

One night Sherry returned home fairly late and found Wayne in the house. He threatened her, 'I guess I'm just going to have to kill you sonofabitch. Did you hear me that time?'. He went into the kitchen and Sherry believed that he was getting a knife. Unable to escape through the bedroom window, she loaded a shotgun and killed Wayne whilst he was lying on the couch.

Sherry received a new trial. Aside from the issues already mentioned, the Appeals Court held that the trial court had failed to indicate to the jury that Sherry had no duty to retreat from her home. It should be noted that this case dramatises another truism about woman battering and marital murder. For those who do not understand BWS and how difficult it becomes for the woman to leave the home, perhaps they can understand that even if the woman manages to leave, the violence does not often end. In fact, her departure has been found to often act as the precipitator of increased violence and murder (*see*, for example, Walker 1989).

The *Diaz Case* 1985 (Blackman 1989, pp. 184-6): This case is particularly interesting since it exemplifies the increasing use of a self-defence plea in situations where, in traditional terms, there is no immediate sense of danger since the batterer is asleep (or passed out) at the time of the killing. Madelyn's husband, a police officer, had committed numerous acts of violence, including sexual, upon her during their marriage. These included taking her out in the car in winter, making her undress and inviting a stranger to rape her in the backseat while he watched.

The day preceding the killing, he had threatened their six-month-old daughter, holding a revolver at the baby's head. He had never done this before. The next morning as he still slept, Madelyn left with the three children to go grocery shopping. Having forgotten money, she returned and opened the drawer where the money was kept. She picked up the gun that lay there and hearing a flashback of his voice as he had held the gun to the baby, she fired it twice at his sleeping body. Then she left, went shopping and bought items that he normally liked. Initially, she told investigators that the apartment had been broken into; three days later, she remembered what she had done and confessed. Madelyn was indicted for murder in the second degree, the highest murder charge in New York State.

Ultimately, she was acquitted. The jury 'extended the definition of self-defense to include the circumstances Madelyn described'. The jury, with the help of expert witnesses, was able to see that the threat of violence was psychologically imminent.

### **Women who have killed: Australian Courts**

As stated earlier, there is comparatively little mention made in the Australian literature of battered women who kill their violent partners. It would appear that for numerous reasons, BWS has not been used as the grounds for self-defence by any of these

defendants<sup>1</sup>. Tarrant (1990) reports that in ten such cases in Western Australia from 1983 to 1988, a self-defence plea was only used directly in two and peripherally in two other; it was successful in one case. Among Bacon and Lansdowne's (1982) sample of thirteen, again it was raised for only two of the women, by the court for one and mentioned in two. Success was directly correlated with the conformity of the events preceding the killing with the traditional interpretation of immediacy.

Certainly its relative lack of use is not because self-defence is defined in a significantly different way in the Australian statutes: the same elements of reasonable perception of danger and reasonable amount of force are included. For instance, the Western Australia Criminal Code states that 'when a person is unlawfully assaulted in such a way as to cause reasonable apprehension of death or grievous bodily harm and the person assaulted believes on reasonable grounds that (s)he cannot otherwise be saved, there is justification for using deadly force against the assailant' (Tarrant 1990, p. 148).

The difference then is not in the wording but in the Australian courts' failure to interpret the law more broadly, thus recognising both differences derived from gender and the impact of BWS on reasonable perception. In lieu of self-defence, what has emerged in Australia is the sometimes successful use of a provocation defence which can reduce the charge from murder to manslaughter. (Provocation was used by seven of Tarrant's (1990) ten women and by five of the thirteen in Bacon and Lansdowne's (1982) sample). The use of provocation can act against the introduction of self-defence as the former becomes normative in this type of case. Tolmie (1991) believes that provocation is more palatable to many since it equates women as emotional and losing control instead of exonerating their action. It is interesting that even the use of what one can only view as this poor second to self-defence, has met with much controversy.

Provocation is problematic in the current legal environment when there is no immediate incident that can be construed as threatening. In other words, if the woman waits until her partner is asleep, which is understandable given what we know about BWS and the physical and socialisation differences between gender, it is doubtful that the court would accept provocation.

As Scutt states:

The interpretation of the law is significant and must be seen in context. Judges interpret the laws. Lawyers fight the cases for judicial decisions. Judges and lawyers until the early twentieth century, have all been men, and even now proportionately few women practise as solicitors or barristers. Men dominate the profession, so laws are interpreted with men, not women, in mind. This is nowhere more clear than in cases of murder (1983, p.184).

An informal survey of newspaper reports of dispositions by gender and the reading of many backgrounds and subsequent dispositions in cases of battered women who kill the batterer confirm Scutt's perspective and lead one to speculate whether there has been any change during the almost 10 years since she wrote the above. Greene (1989) does believe that in many of the cases, IF the woman's actions have conformed to the traditional interpretation of provocation, she is allowed to plead guilty to manslaughter and we do not hear much about these cases. Undoubtedly cases

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<sup>1</sup> Since the paper was presented, BWS evidence has been presented in two trials in April 1992 (*R v. Kontinnen* in South Australia and *R v. Hickey* in New South Wales. For more detail, see Eastaer 1992.

like *R v. R* in South Australia (Greene 1989; Scutt 1983, 1990) continue to take place. Although the deceased had essentially tortured his family for almost three decades, since R. killed him whilst he slept, as the law is currently interpreted, self-defence was not an option. Further, since provocation also involves the idea of immediacy, the trial judge refused to allow provocation to go to the jury; fortunately due to public pressure, the appeal court held that such a decision should have been left to the jury. Ultimately, R. who had learned within 36 hours of killing her husband that he had raped and wounded one daughter and had sexually abused all the daughters frequently, was acquitted.

The acquittal was described in one *Bulletin* article as 'perverse' (Harding 1989) and by another commentator as 'compassionate' (Rathus 1989); obviously a controversial decision. The latter advocate of self-defence for battered women who kill, expresses her view about the essential gender inequity of self-defence and provocation legal interpretation:

So why is it that a man who kills his wife because he finds her in bed with a lover can have a charge of murder reduced to manslaughter, with the expectation that the judge will impose a light sentence because he understands how the man must have felt. Meanwhile a woman who kills her husband after brooding about his having been raping her daughters for 20 years is convicted of murder because she thought about it too long (Rathus 1989, p. 41).

There is thus still an insistence upon one major provocative incident that occurred immediately prior to the killing. Because of this, Tarrant (1990) points out that attempts to use a history of domestic violence as opposed to the one incident can in fact backfire on the defendant as in the case of *R v. Bradshaw* in 1985. The prosecution used the background information conveyed by the defence as evidence of the woman's 'mere' anger. She was convicted of murder.

Specifically within the legal realm, aside from the preponderance of male players, in Australia there are factors which operate to keep BWS out of the court.

The laws of self-defence and provocation now involve an objective standard. Therefore, the jury should now measure the accused's actions in the framework of a reasonable battered woman and not a reasonable man. However, as Greene (1989) points out, it is doubtful that this will translate into such a practice since judges are prone to stress the concepts of cooling off time and 'proportionality of response'. Additionally, the courts in this country seem to be reluctant to allow the expert witnesses' testimony that would be a necessary component of showing exactly what is reasonable behaviour for a battered woman. The courts adhere to the common knowledge rule and the ultimate issue rule. (The common knowledge rule states that experts are not permitted to testify about subjects which are already understood by the average juror. The ultimate issue rule does not allow testimony which could be construed as giving an opinion on the guilt or innocence of the defendant. Both of these rules promote the inadmissibility of expert witnesses. Without experts, jurors are left with their own preconceived notions of reasonable behaviour for a battered woman. Thus, the objective standard is worthless if the jury is not equipped to understand what is indeed reasonable behaviour for a woman who has experienced long-term battering (Greene 1989).

It is certainly true that both in America where some women have been acquitted or granted clemency if in prison, as recently occurred in the states of Ohio and Maryland ('Celeste Gives Clemency to 25, Cites Battered Woman Syndrome' 1991; 'Clemency Drives Stepped Up for Battered Women Who Strike Back' 1991), and in Australia where it has been much less employed, the use of BWS has not been without its critics. The main arguments against the use of BWS as self-defence very ironically revolve around discussions of the judicial and societal purported ideal of gender equity. Thus, the deriders allege that BWS gives women special dispensation under the law to kill, exploits traditional stereotypes about women, and violates the due process rights of male homicide defendants and victims (Kuhl 1985; Rittenmeyer 1981). This seems like a rather poorly thought out argument. First, it presupposes that the existing or archaic self-defence interpretation is equitable to both genders. Secondly, BWS is a problem that affects females; woman battering occurs and woman battering syndrome results due to a plethora of overt and covert gender inequities that permeate the attitudinal, behavioural and organisational levels of our culture.

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