

Self-defence as a ground of justification in cases of battered women who kill their abusive partners

CANDIDATE'S DECLARATION:

I declare that "Self-defence as a Ground of Justification in Cases of Battered Women Who Kill Their Abusive Partners" is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

SELF-DEFENCE AS A GROUND OF JUSTIFICATION IN CASES OF BATTERED
WOMEN WHO KILL THEIR ABUSIVE PARTNERS

by

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INDEX

INTRODUCTION	1
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PART ONE: DOMESTIC VIOLENCE

<u>CHAPTER ONE</u>	9
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AN HISTORICAL PERSPECTIVE ON DOMESTIC VIOLENCE

1.1	INTRODUCTION	9
1.2	AN HISTORICAL PERSPECTIVE ON DOMESTIC VIOLENCE	12
1.3	DOMESTIC VIOLENCE IN SOUTH AFRICA	20
1.4	CHANGING ATTITUDES TO DOMESTIC VIOLENCE	23
1.4.1	The Effect of the Feminist Movement	23
1.4.2	The Evolving Human Rights Culture	24
1.4.3	The Abolition of the Rule that the Husband is the Head of the Household	25
1.5	CONCLUSION	25

PART ONE: DOMESTIC VIOLENCE

<u>CHAPTER TWO</u>	27
---------------------------	-----------

CHARACTERISTICS OF AN ABUSER AND A VICTIM OF DOMESTIC VIOLENCE AND THE PSYCHO-SOCIAL, SOCIO-ECONOMIC, AND ENVIRONMENTAL FACTORS THAT INFLUENCE AN ABUSED WOMAN'S DECISION TO REMAIN IN AN ABUSIVE RELATIONSHIP

2.1	INTRODUCTION	27
2.2	THE ABUSER	28
2.3	THE VICTIM OF DOMESTIC VIOLENCE	39
2.4	PSYCHO-SOCIAL, SOCIO-ECONOMIC, AND ENVIRONMENTAL FACTORS THAT INFLUENCE AN ABUSED WOMAN'S DECISION TO REMAIN IN AN ABUSIVE RELATIONSHIP	43
2.4.1	Understanding Why Battered Women Remain In An Abusive Relationship	44

2.4.1.1 <u>Sanctity of the Home</u>	45
2.4.1.2 <u>Relationship with the Criminal Justice System</u>	47
2.4.1.2.1 The Police Service	47
2.4.1.2.2 The Domestic Violence Act, 1998	49
2.4.1.2.3 The Court System	51
2.4.1.2.4 Conclusion	52
2.4.1.3 <u>Gender Stereotyping</u>	53
2.4.1.4 <u>Fear of the Abuser</u>	55
2.4.1.5 <u>Financial and Emotional Dependence</u>	56
2.4.1.6 <u>Hope and Love</u>	58
2.5 CONCLUSION	59

PART ONE: DOMESTIC VIOLENCE

CHAPTER THREE 60

SELECTED PSYCHOLOGICAL THEORIES AND THE DYNAMICS OF BATTERING THAT EXPLAIN AN ABUSED WOMAN'S CONDUCT IN AN ABUSIVE RELATIONSHIP

3.1 INTRODUCTION	60
3.2 THE BATTERED WOMAN SYNDROME AND THE THEORY OF LEARNED HELPLESSNESS	62
3.2.1 Introduction	62
3.2.2 The 'Cycle of Violence' Theory	63
3.2.3 Learned Helplessness	66
3.2.4 Criticisms of the Theory of Battered Woman Syndrome	67
3.3 THE THEORY OF TRAUMATIC BONDING, PSYCHOLOGICAL ENTRAPMENT, AND DEPENDENCE	71
3.4 THE THEORY OF SEPARATION ASSAULT	75
3.5 WHY SOME BATTERED WOMEN KILL THEIR ABUSIVE PARTNERS	77
3.6 CONCLUSION	82

PART TWO: SELF-DEFENCE

CHAPTER FOUR 83

THE LAW OF SELF-DEFENCE IN SOUTH AFRICA

4.1	INTRODUCTION	83
4.2	REQUIREMENTS OF SELF-DEFENCE	85
4.2.1	Conditions Relating to the <u>Attack</u>	85
4.2.1.1	<u>The Attack Must Have Been Unlawful</u>	85
4.2.1.2	<u>The Attack Must Have Been Directed Against an Interest Worthy of Legal Protection</u>	87
4.2.1.3	<u>There Must Have Been an Imminent Threat of an Attack or an Attack Not Yet Completed</u>	89
4.2.2	Conditions Relating to the <u>Defence</u>	95
4.2.2.1	<u>The Defence was Directed at the Attacker</u>	95
4.2.2.2	<u>The Defence Must be Necessary to Protect the Interest Threatened</u>	95
4.2.2.3	<u>There Must Be A Reasonable Relationship Between the Attack and the Defensive Act</u>	99
	The duty to flee	102
4.3	THE TEST FOR SELF-DEFENCE	105
4.3.1	A Consideration of the ‘Circumstances of the Accused’ and the Need For and Role of the Expert Witness in Cases Involving Domestic Violence	109
4.3.1.1	<u>General Rules of Admissibility of Expert Evidence</u>	110
4.3.1.2	<u>The Need For and Use of Expert Evidence in Cases of Domestic Violence</u>	112
4.3.1.3	<u>The Nature of the Expert Evidence that Will Be Admitted in Cases of Domestic Violence</u>	113
4.3.1.4	<u>The Qualifications of the Expert in Domestic Violence Cases</u>	117
4.4	CONCLUSION	119

PART TWO: SELF-DEFENCE

CHAPTER FIVE

THE LAW OF SELF-DEFENCE IN THE U.S.A.

5.1	INTRODUCTION	122
5.2	SELF-DEFENCE	127
5.2.1	Introduction	127
5.2.2	Conditions Relating to the <u>Attack</u>	128
5.2.2.1	<u>The Attack Must Have Been Unlawful</u>	129

5.2.2.2 <u>The Attack Must Have Been Immediate/Imminent</u>	130
5.2.3 Conditions Relating to the <u>Defence</u>	152
5.2.3.1 <u>There Must Have Existed a Reasonable Belief that Such Force Was Necessary to Avoid the Danger</u>	152
5.2.3.2 <u>The Amount of Force Used Must Have Been Reasonable</u>	160
5.2.4 A Consideration of the ‘Circumstances of the Accused’ and the Need For and Role of the Expert Witness	161
5.2.4.1 <u>General Rules of Admissibility of Expert Evidence</u>	162
5.2.4.2 <u>The Need For and Use of Expert Evidence in Cases of Domestic Violence</u>	162
5.2.4.3 <u>The Nature of the Expert Evidence that Will Be Admitted in Cases of Domestic Violence</u>	168
5.2.4.4 <u>The Qualifications of the Expert in Domestic Violence Cases</u>	173
5.3 CONCLUSION	174

PART TWO: SELF-DEFENCE

CHAPTER SIX 178

THE LAW OF SELF-DEFENCE IN CANADA

6.1 INTRODUCTION	178
6.2 REQUIREMENTS OF SELF-DEFENCE	180
6.2.1 Requirements of Self-Defence Under the Canadian Law	181
6.2.1.1 <u>Reasonable Apprehension of an Unlawful Attack</u>	181
6.2.1.2 <u>Reasonable Apprehension of Death or Grievous Bodily Injury</u>	182
6.2.1.3 <u>Reasonable Belief in the Lack of Alternatives to Prevent Death or Grievous Bodily Harm</u>	193
<u>The duty to retreat</u>	197
6.3 CONSIDERATION OF THE ‘CIRCUMSTANCES OF THE ACCUSED’ AND THE NEED FOR AND ROLE OF THE EXPERT WITNESS	198
6.3.1 General Rules of Admissibility of Expert Evidence	198
6.3.2 The Need For and Use of Expert Evidence in Cases of Domestic Violence	198
6.3.3 The Nature of the Expert Evidence that Will Be Admitted in Cases of Domestic Violence	200
6.3.4 The Qualifications of the Expert in Domestic Violence Cases	210

6.4	CONCLUSION	211
------------	-------------------	-----

PART TWO: SELF-DEFENCE

<u>CHAPTER SEVEN</u>	214
-----------------------------	-----

THE LAW OF SELF-DEFENCE IN AUSTRALIA

7.1	INTRODUCTION	214
7.2	THE REQUIREMENTS OF SELF-DEFENCE	217
7.3	CONDITIONS RELATING TO THE <u>ATTACK</u>	222
7.3.1	Unlawfulness	222
7.3.2	Imminence	224
7.3.2.1	<u>Victoria</u>	224
7.3.2.2	<u>Australian Capital Territory, Northern Territory, New South Wales, South Australia and Tasmania</u>	226
7.3.2.3	<u>Queensland and Western Australia</u>	230
7.4	CONDITIONS RELATING TO THE <u>DEFENCE</u>	231
7.4.1	The Accused's Belief and Defensive Action	231
7.4.1.1	<u>Victoria</u>	231
7.4.1.2	<u>New South Wales</u>	237
7.4.1.3	<u>Queensland and Western Australia</u>	241
	<u>The duty to retreat</u>	245
7.4.1.4	<u>Northern Territory</u>	246
7.4.1.5	<u>South Australia and Tasmania</u>	249
7.4.2	The Duty to Retreat	250
7.4.3	A Consideration of the 'Circumstances of the Accused' and the Need For and Role Of the Expert Witness	251
7.4.3.1	<u>General Rules of Admissibility of Expert Evidence</u>	251
7.4.3.2	<u>The Use of Expert Evidence in Cases of Domestic Violence</u>	253
7.4.3.3	<u>The Nature of the Expert Evidence that Will Be Admitted in Cases of Domestic Violence</u>	255
7.4.3.4	<u>The Qualifications of the Expert in Domestic Violence Cases</u>	258
7.5	CONCLUSION	259

PART THREE: CONCLUSION

CHAPTER EIGHT

265

RECOMMENDATIONS

8.1	INTRODUCTION	265
8.2	THE ELEMENTS OF SELF-DEFENCE AND RECOMMENDATIONS FOR THE SOUTH AFRICAN LAW	269
8.2.1	The Attack Must Have Been Unlawful	269
8.2.2	The Attack Must Have Been Imminent	274
8.2.3	The Defence Must Have Been Necessary	280
8.2.4	There Must Be A Reasonable Relationship Between the Attack and the Defensive Act	284
8.3	THE TEST FOR SELF-DEFENCE	285
8.3.1	'A Reasonable Person'	285
8.3.1.1	<u>The Battered Woman Syndrome</u>	286
8.3.1.2	<u>A Reasonable Battered Woman</u>	288
8.3.1.3	<u>A Reasonable Woman</u>	288
8.3.2	A Consideration of the 'Circumstances of the Accused' and the Need For and Role Of the Expert Witness	291
8.3.2.1	<u>The Use of Expert Evidence in Understanding the Act of the Accused</u>	291
8.4	CONCLUSION	296

<u>BIBLIOGRAPHY</u>	299
Legislation	299
Australia	299
Canada	299
South Africa	299
United States of America	299
Case Law	300
Australia	300
Canada	301
England	302
New Zealand	302
South Africa	302
United States of America	303
Books	306
Journal Articles	311
Other Documents	321

INTRODUCTION

*No lions rage against the lioness:
The tiger to the tigress is not fierce:
No eagles do their fellow birds oppress:
The hawk does not the hawk with talons pierce:
All couples live in love by nature's law,
Why should not man and wife do this and more?¹*

Despite the fact that in recent years, research and the popular presses have demonstrated the dark side of family relations, the notion of the home as a centre for warmth and happiness, a refuge from the outside world, is still very prevalent in society. Violence committed by one intimate partner on the other within the confines of the domestic relationship is thus, perhaps one of the greatest betrayals of human trust that can be perpetrated. Domestic violence is a worldwide scourge: yet, as with the rest of the social order, many legal systems have struggled to confront the reality and effects of intimate aggression. Accordingly, legal rules have sometimes proved unsuitable or inadequate to protect the victims of such abuse and to deal fairly and justly with its consequences.

This study focuses on violence in the heterosexual domestic relationship and specifically on men as the perpetrators of the abuse and women as the victims.² This emphasis is in no way intended to minimise the seriousness of women abusing men or intimate violence in same-sex relationships or abuse against children in family relationships: however, each of these topics is sufficiently wide, in its own right, to be the subject of an independent study.

Partner abuse has been extensively researched in the past years and numerous theories attempt to explain why men batter their intimate partners. However, notwithstanding all the practical and scientific, clinical and sociological input, intimate violence against women remains a commonly misunderstood issue. Part of the problem is the diverse responses of women who are abused - some

¹ William Heale, 1609.

² For a comprehensive definition of 'domestic violence', see section 1 of the *Domestic Violence Act* 116 of 1998.

women will endure their plight in silence and continue to live with the abuser; other women take steps to escape from the abusive environment; whilst others stay in the relationship and fight back and sometimes even kill their abusers whilst defending themselves. As this research will show, partner abuse is a complex and intricate problem that goes beyond normative partner interactions and acts of violence between strangers. Social, cultural, financial, emotional and psychological factors all affect the attitude of the woman to her situation, whilst historical attitudes to and sex role stereotypes of women, the justice system and welfare services all converge to determine the action of the victim.³

Authorities on criminal law agree that in order for there to be a 'crime', certain elements must exist. There must be an act; the act must be unlawful that is, it must be prohibited by law; the actor must have acted with criminal capacity; and lastly, the act must satisfy the element of fault.⁴ For the crime of murder specifically, there must be proof of the *unlawful and intentional causing of death of another human being*.⁵ Thus, it is that not every act which results in the death of another is a crime under the law. The legal definition specifically requires that to be judged as murder, the act must be accompanied by the element of unlawfulness and satisfy the element of intention (*mens rea*). Ostensibly therefore, whilst it may appear that a crime has been committed, one of the ways in which a perpetrator may be absolved from liability is if s/he can show that the conduct was justified and, therefore, not unlawful. In this context Robinson notes:

Justified conduct is correct behaviour which is encouraged or at least tolerated. In determining whether conduct is justified, the focus is on the *act*, not the actor. [In such cases, one does not deny that the conduct may be prima facie unlawful and undesirable but the general view of

³ For a more detailed discussion of the individual issues, see generally Chapters Two and Three below.

⁴ See CR Snyman *Criminal Law* (Butterworths, Durban: 2002) 32-9; and J Burchell *Principles of Criminal Law* (Juta and Co Ltd, Lansdowne: 2005) 139-54.

⁵ CR Snyman *Criminal Law* (Lexis Nexis, Durban: 2008) 447; see also Burchell above n4 at 667.

society is that] criminal liability is inappropriate because some characteristics of the actor vitiates society's desire to punish him.⁶

Conduct that is 'justified' is distinguished from conduct that is 'excused' in law.⁷ In the former case, the focus is on the act and seeks to show that the act was not unlawful whilst 'excuse' excludes intention on the part of the perpetrator.⁸

For the purposes of this study, the crime is murder and the ground of justification is self-defence; the situational construct is that of a battered woman who has killed her abusive partner. As Snyman points out, the rules of natural justice accord to every person the right to defend him- or herself against an unlawful attack.⁹ In relying on self-defence as a ground of justification for the battered woman who kills her abuser, the message is that 'the relevant conduct is approved or, at least, tolerated' in that particular circumstance.¹⁰ Were one to accept a defence of excuse the message would be different; for the law would then be saying that despite having recognised that the actor is free from blame, his actions remain wrongful and should be avoided. In this research the argument presented will not be directed at excusing the accused but will concentrate on an acknowledgement that under the circumstances, the abused woman reasonably believed that she was in danger of being killed by or sustaining grievous bodily harm from her abusive partner and that her only alternative was to kill him.¹¹ Her actions were, therefore, justified and not

⁶ PH Robinson 'Criminal Law Defenses: A Systematic Analysis' 1982 82 *Columbia Law Review* 199, at 229. In a similar vein Snyman points out that it is not always possible for the state to be on hand to protect an individual against an unlawful attack 'and for that reason every individual today still has the right to take the law into her own hands ... and temporarily act on behalf of the state authority in order to uphold the law.': above n5 at 103.

⁷ S Bronitt and B McSherry *Principles of Criminal Law* (Law Book Co., New South Wales: 2005) 301; A McColgan *Women Under the Law* (Longman, Essex: 2000) 202; I Leader-Elliot 'Battered But Not Beaten: Women Who Kill in Self-Defence' 1993 15 *Sydney Law Review* 403, at 405.

⁸ J Dressler 'Justifications and Excuses: A Brief Review of the Concepts and the Literature' 1987 33 *Wayne Law Review* 1155, at 1162-3.

⁹ Above n5 at 103.

¹⁰ G Mousourakis 'Distinguishing Between Justifications and Excuses in Criminal Law' 1977 1 *Stellenbosch Law Review* 165, at 166.

¹¹ Criminal law theory makes the distinction between justification and excuse. However, Stuart notes that many writers have avoided exploring the distinction on the basis that to do so would serve no real purpose for the law. He notes, 'The different terminology is said to relate to an ancient era preceding the Middle Ages when justification absolved, while excuses were merely a matter for mitigation of punishment. The legal effect of both has been the same.': DR Stuart

unlawful. However, as will become evident from this study, the battered woman's conduct in killing her abusive partner has not always complied with the prevalent standards for self-defence and her conduct has in several cases – especially cases prior to the 1980's - been found not to be justified.¹² However, Young notes:

In considering the defences available, it should be borne in mind that the options available to the woman before the point at which lethal force is used (that is, the possibility of leaving the relationship, calling the police, getting an injunction and so on) are of limited effectiveness. To forget this, as many commentators do, is to augment the problems faced by battered women.¹³

This study recognises these flaws. One of the primary incentives for the research was the hope that it would provide a necessary basis for informed legal reform. It is respectfully submitted that greater research into the extent and effects of domestic violence will further challenge conventional legal understandings and myths that impact negatively in cases of domestic homicide. Much credible research has already been done in this area but the discourse may certainly not be described as saturated. It is essential that the criminal justice and legal systems develop an understanding for the victims; for, it must be understood that the battered woman who stands accused of killing her abusive partner is not

Canadian Criminal Law (Carswell, Toronto: 1982) 379. Other writers like Fletcher disagree arguing that a distinction between the two concepts is vital. In this regard Fletcher notes (correctly, it is respectfully submitted) that excuses do not express policy goals but are simply reflections of compassion and justice in the individual case.: GP Fletcher 'The Individualization of Excusing Conditions' 1974 47 *Southern California Law Review* 1269, at 1308-9. Similarly, Snyman supports the distinction for the reason that, in his view, justification evaluates the act whilst excuse is a judgement of the person and his/her 'individual aptitudes, talents, weaknesses and insight'.: Snyman above n4 at 99 confirmed above n5 at 101. See also above n10 at 167, 178-9 and 180 where Mousourakis emphasises the importance of the distinction between the defences which justify and the defences which excuse the alleged proscribed conduct.

¹² Much has been written and many writers agree that the rules of self defence are male biased and written from the perspective of an assault between strangers - for a discussion see *Lavallee* (1990), 55 C.C.C. (3d) 97 at 115 (S.C.C.).

¹³ A Young 'Conjugal Homicide and Legal Violence: A Comparative Analysis' 1994 31 *Osgoode Hall Law Journal* 761, at 767. Confirming this comment, Fredericks and Dowd also found that in South Africa and other countries (including Australia, America and England) wife abuse remains still one of the most underestimated and under reported crimes. : IN Fredericks and LC Dowd 'The Privacy of Wife Abuse' 1995 3 *TSAR* 471, at 473.

looking for sympathy: rather, she seeks a fair hearing which, in this instance, would include an appreciation of her lived reality.

In defining intimate homicide, Showalter, Bonnie and Roddy note:

These offenses are often end points in an intense but ambivalent relationship in which one spouse (or spouse equivalent), the eventual victim, assumes the role of “tormentor” and the other, the eventual aggressor, perceives himself or herself to be sorely abused but is unwilling or unable to terminate the relationship.¹⁴

They continue with the argument that in most cases, one finds that the law tends:

... to address the public sphere and to neglect the private one that characterizes relationships and exchanges within marriage and the family. Because women have generally been confined to the private sphere and excluded from the public one through various limitations on outside employment and careers, the law has traditionally ignored their concerns and left them unprotected, along with children. The superior status of the male in the relationship and in the family, and the well-established dependence of women on men, have justified delegating to men the control and the administration of justice in the private sphere, leaving women dispossessed and unprotected. The irony, danger, and difficulty of a situation when their supposed protector is instead their attacker are clear and unescapable.¹⁵

In the case of battered women who retaliate with aggression, which results in the death of the batterer, one can be confused as to who is the real victim. In such cases, women sometimes find it difficult to meet the requirements of ‘reasonableness’ as defined by the law of self-defence because of the stereotypes and misconceptions that abound with regard to abusive relationships.

¹⁴ CR Showalter, RJ Bonnie and V Roddy ‘The Spousal-Homicide Syndrome’ 1980 3 *International Journal of Law and Psychiatry* 117, at 117.

¹⁵ EC Viano (ed.) *Intimate Violence Interdisciplinary Perspectives* (Hemisphere Publishing Corporation, Washington: 1992) xvii.

Courts applying the general principles regarding self-defence have found that the deadly force that the woman used was either not a necessary and/or not a reasonable response to the attack of the abuser which preceded the fatal assault. The case law demonstrates that many abused women have killed their abusive partners in circumstances which could not be described as situations of imminent or contemporaneous danger because the abuser was asleep, passed-out or walking away at the time.¹⁶ Furthermore, there is an uninformed view that exists which maintains that a woman could easily leave an abusive relationship if she wanted to, and the fact that she did not leave is indicative of her exaggeration of the harm suffered or because she enjoyed the situation.

In South Africa, there are only two reported cases which considered whether a victim of domestic violence was justified in killing her abusive partner, namely *Ferreira and Engelbrecht*.¹⁷ One of the reasons for the paucity of cases and the failure by accused to raise the fact that their act was triggered by a violent relationship, is that in many instances, the women, themselves, do not identify their relationship as making them a 'battered woman' even though case histories show differently. Statistics reveal that a high percentage of women are battered in varying degrees of physical, emotional and sexual assaults: yet, the killing of a man by a woman is still viewed by many as aberrational and, one of the greatest threats to the prevailing social order.¹⁸ The tension is exacerbated when the abused woman kills her abuser in a situation of apparent 'non-confrontation'.

The methodology used in this research is to make use of a broad literature survey in which the legal position of the battered partner who kills and relies on self-defence in South African law is compared with the position in the United States, Canada and Australia. The three comparative jurisdictions have been identified because of their reasonably well-reported and recorded legal experience in dealing with domestic violence and the positive developments in the law on the subject within the identified jurisdictions. All references are to

¹⁶ See Chapters Four, Five, Six and Seven for specific cases.

¹⁷ *Ferreira* 2004 2 SACR 454 SCA; and *Engelbrecht* 2005 2 SACR 41 W.

¹⁸ Bronitt and McSherry above n7 at 301; J Bridgeman and S Mills *Feminist Perspectives on Law* (Sweet & Maxwell, London: 1998) 624; McColgan above n7 at 202-3.

primary sources of information. The sources of information used in this study have been selected for both their probative value and availability.

The study is divided into three Parts, each of which is further divided into component Chapters.

PART ONE looks generally at the domestic relationship. Chapter One researches the historic perspectives on domestic violence and provides a background understanding of domestic violence - both at the national and international levels. Chapter Two describes the social and physical profile of the abuser and the abused. At the outset, the writer makes it known that batterers are not clones of one another and victims, equally, do not express a closed list of traits. The study denies any impression that batterers and victims are a homogenous group. This is evident from the studies to which reference is made in the course of this work. However, there are broad characteristics that may be seen as being of general application. Chapter Two further stresses the psychosocial and socio-economic dynamics of the family relationship and the environmental factors that bear on the decisions of the battered woman to remain in or leave an abusive relationship. Chapter Three focuses largely on the psychological effects of a battering relationship, whilst stressing that the victims of abuse must not be regarded as being mentally ill. This Chapter includes a study of the battered woman syndrome and learned helplessness, the theory of traumatic bonding and entrapment, and the theory of separation assault. The emphasis in this Chapter is on the psychological effects of abuse, recognising that the psychological consequences of the battering relationship are pertinent and more significant as they frequently explain the victim's behaviour. An acknowledgement of the consequences and repercussions of living in an abusive relationship are highly relevant to the understanding of the discussions in Parts Two and Three of this study when the writer examines the specifics of self defence in cases of battered women who kill and makes final recommendations on the law of self defence in South Africa. Chapter Three also provides a discussion on the specific factors that appear to incline some battered women to kill their abusive partners as a way out of the relationship by exploring the differences that distinguish abused women who kill from those who do not.

PART TWO deals specifically with the law of self defence as a ground for justification in each of the four identified jurisdictions. In Chapter Four the research examines the legal requirements for self-defence in South Africa and identifies the definitional and practical requirements of the law of self-defence that may create barriers to the case of an abused woman who has killed her abusive partner. In Chapters Five, Six and Seven the law of self-defence in the U.S.A., Canada, and Australia is studied with particular reference to the manner in which the law has dealt with cases involving abused women accused of murder, who raise self-defence to justify their actions. The selection and representation of research materials was based on the availability and prevalence of judicial precedent and legislation pertinent to domestic abuse and partner homicide in the three selected jurisdictions.

In all of the chapters in Part Two the research also interrogates and analyses the use of expert evidence in cases involving abused women who have killed their abusive partners and then rely on self-defence. In each Chapter the study examines the approach of the particular jurisdiction to expert evidence generally and in cases involving battered women specifically. The study further considers the pros and cons of placing reliance on expert evidence, as identified from the four jurisdictions.

PART THREE, Chapter Eight is the final Chapter which summarises the research findings and makes proposals for legal reform that will ensure that in a case of an abused woman who kills her abusive partner in self-defence, the law will be better positioned to recognise the dynamics of battery and apply the law in a manner that will be efficacious and fair. The proposals seek to respond to the realities of the current law and the lived reality in which battered women find themselves. When the criminal justice system is identified with this broader knowledge, battered women, like all other accused, will receive a fair trial and as Le Roux notes, 'In a society like South Africa's, which is desperately trying to establish the value of equality, the position of the weak is of particular importance.'¹⁹

¹⁹ W Le Roux 'Obedience to Illegal Orders: A Closer Look at South Africa's Post-Apartheid Response' 1996 17 *Obiter* 247, at 256.

PART ONE: DOMESTIC VIOLENCE

CHAPTER ONE

AN HISTORICAL PERSPECTIVE ON DOMESTIC VIOLENCE

Part One Chapter One draws together the early laws of England, Europe, the U.S.A., Australia and even Russia, which dictated the relationship and concomitant authority that characterised the partnership between a man and his wife. Against this backdrop the research examines the manner in which the various legal systems dealt with violence between husband and wife. The study further provides a detailed exposition of the early Roman Dutch law on the subject and makes some reference to the early South African indigenous legal rules and their application in respect of domestic violence.

1.1 INTRODUCTION

Viano writes:

Domestic violence and abuse describe a fundamental lack of understanding and appreciation of the commonality of our humanity, of what truly makes us human, of the bonds that support and nourish us.¹

Wife battering is not a novel phenomenon of recent years. It has been happening all the time but research reveals a social stranglehold that demanded the maintenance of a silence around the occurrence and the preservation of family privacy.² Today, whilst the shroud of secrecy continues, Boumil and Hicks confirm that society is becoming less willing to condone and overlook domestic violence under the pretence of protecting and promoting the integrity and privacy of family life.³

There is much literature on the subject of the battered woman and domestic violence and one of the key concepts that needs to be defined from the outset, is that of 'violence'. Unfortunately, there is no universal definition of 'violence' in the context of the domestic relationship. In writing on the topic some authors take

¹ EC Viano (ed.) *Intimate Violence Interdisciplinary Perspectives* (Hemisphere Publishing Corporation, Washington: 1992) 10.

² See the discussions later in this Chapter.

³ MM Boumil and SC Hicks *Women and the Law* (Fred B. Rothman & Co., Colorado: 1992) 551.

the limited view that violence refers only to physical assaults between intimate partners; whilst other authors freely incorporate other forms of violence, as well. An example of the former approach is that of Martin and Pagelow. Martin notes that any attack by one individual upon another is a violent act and an instance of illegal aggression, even when no visible injury results.⁴ However, with specific reference to domestic violence, he writes:

Domestic violence is the use of physical force by one adult member of the household against another adult member.⁵

According to Pagelow:

Battered women refers to adult women who were intentionally physically abused in ways that caused pain or injury, or who were forced into involuntary action or restrained by force from voluntary action by adult men with whom they have or had established relationships, usually involving sexual intimacy, whether or not within a legally married state. ... Battering is here defined as physical assault which ranges from painful slaps at one end and homicide at the other end of the continuum.⁶

NiCarthy, on the other hand, makes a clear distinction between the abused woman and the battered woman maintaining that:

An abused woman is one who has been subjected to physical assault, or emotional abuse, or both, by her intimate partner on more than one occasion.⁷

⁴ D Martin *Battered Wives* (Glide Publications, San Francisco: 1976) 21.

⁵ D Martin 'The Historical Roots of Domestic Violence' in DJ Sonkin (ed.) *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* (Springer, New York: 1987) 3.

⁶ MD Pagelow *Woman-Battering: Victims and their Experiences* (Sage Publishers, Beverley Hills: 1981) 33.

⁷ G NiCarthy 'Addictive Love and Abuse: A Course For Teen-Aged Women' in S Davidson (ed.) *The Second Mile: Contemporary Approaches in Counseling Young Women* (New Directions for Young Women, Tuscon: 1983) 116.

However, NiCarthy continues, when a person is described as a *battered woman* the emphasis is only on the physical assault and not other forms of abuse.⁸ Thus, according to NiCarthy it would appear that every battered woman is an abused woman but not every abused woman is a battered woman.

Douglas applies a broader definition stating that:

A battered woman is any woman who has been the victim of physical, sexual, and/or psychological abuse by her partner.⁹

For the purposes of this research, the definition provided by Douglas is preferred and will be used throughout this study. The other more limited definitions appear not to take cognisance of the full import of domestic violence; for, the writer maintains, psychological abuse can be as debilitating as physical injury, and is often even more destructive.¹⁰ The definition of 'domestic violence' in section 1 of the *Domestic Violence Act* 116 of 1998 appears to confirm this viewpoint. The Act does not define *battery*; however, it defines *domestic violence* to include physical, verbal, economic, psychological and sexual abuse, intimidation, harassment, stalking, wilful damage to property, entry into the complainant's residence without consent (in cases where the parties do not share the same residence), or any other controlling or abusive behaviour towards the complainant that harms or causes imminent harm to the safety, health or well-being of the complainant. Furthermore, throughout this study, the terms 'domestic violence', 'intimate abuse' or 'battery' are used to describe violence between adult intimates. It is differentiated from 'family violence' which is a broader concept

⁸ Ibid.

⁹ MA Douglas 'The Battered Woman Syndrome' in DJ Sonkin *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* (Springer, New York: 1987) 39.

¹⁰ The overlap between physical and psychological harm has long been recognised in South African law for, as the court ruled in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 A an injury to the brain or the psyche is as much an injury to the physical body as harm to an arm or a leg. '...is die brein- en senustel deel van die menslike liggaam, en is 'n psigiatriese besering dus inderdaad 'n "liggaamlike besering" ...': at 781.

and also includes child and elder abuse and other forms of violence between family members.

1.2 AN HISTORICAL PERSPECTIVE ON DOMESTIC VIOLENCE

To obtain the broader picture of domestic violence, one must seek to understand the fundamental injustices affecting women as group that has made violence against women acceptable and in many instances legal, for so long. As Davidson states, 'To find a time when wife beaters did not enjoy the advantage of having custom and law on their side, one would have to go back in history to pre-Biblical times.'¹¹ During this period, women as the bearers of children, were seen as the only discernible parents and were, accordingly, held in high esteem and enjoyed great power with the clans and social order.¹² However, Davidson's view is that as man began to recognise the importance of his role in the act of procreation, his 'religious status gradually changed as woman's status gradually became debased. As man became the Patriarch, society did an about-face toward a repressive mode of living'¹³ and with the transition to the pairing relationship, the 'father right' became entrenched.¹⁴ Martin notes:

Polygyny and infidelity remained men's privileges, but the strictest fidelity was demanded of the wife in order to guarantee and authenticate the husband's fatherhood. The wife was relegated to certain parts of the home, isolated, guarded, and her activities carefully monitored to protect her husband's "honour".¹⁵

Brownmiller explains women's acceptance of this role as follows:

¹¹ T Davidson 'Wifebeating: A Recurring Phenomenon Throughout History' in M Roy (ed.) *Battered Women: A Psychological Study of Domestic Violence* (Van Nostrand Reinhold Company, New York: 1977) 2.

¹² Above n5 at 4.

¹³ Above n11 at 5.

¹⁴ Above n5 at 4.

¹⁵ Ibid.

Female fear of an open season on rape, and not a natural inclination toward monogamy, motherhood, and love, was probably the single causative factor in the original subjugation of women by men, the most important key to her historic dependence, her domestication by protective mating.¹⁶

And following this trend of thought, Martin suggests, 'Thus began the "protection racket," the greatest hoax to be perpetrated on women.'¹⁷

The first laws on marriage are reputed to have been enacted by the Roman Emperor, Romulus, in 753 B.C.¹⁸ In terms of his proclamation, the husband was the ultimate ruler of his home. A wife had the duty of absolute obedience and the husband enjoyed the correlative right to discipline her for any misbehaviour. According to the Emperor, married women were required 'to conform themselves entirely to the temper of their husbands and the husbands to rule their wives as necessary and inseparable possessions.'¹⁹ Based on the early teachings of Romulus, the Church and the state supported the subordination of women in marriage.²⁰

Later, in Rome, two categories of marriage were recognised namely, *manus* marriages being those unions where the wife remained subordinate to her spouse (that is, under his *potestas*) and where she was ranked as a daughter. In the *Digest*, Grotius noted that 'where the testator's wife comes under his *manus*,

¹⁶ S Brownmiller *Against Our Will: Women, Men and Rape* (Plenum, New York: 1975) 16.

¹⁷ Above n5 at 5. In her book *The Second Sex*, Simone De Beauvoir argues that the state of women 'is not dictated by her hormones nor predetermined in the structure of the female brain: they are shaped in a mould by her situation'. : S De Beauvoir *The Second Sex* (Picador, London: 1949) 608. Martin's further comment is particularly interesting - she notes that the word 'family' comes from the Latin word *familia*, which signifies the totality of slaves belonging to a man. The slaveowner enjoyed absolute power of life and death over his wife and serfs, who belonged to him.: above n5 at 5.

¹⁸ J O'Faolain and L Martines *Not in God's Image: Women in History* (Fontana/Collins, Glasgow: 1974) 53.

¹⁹ *Ibid.* See also RE Dobash and RP Dobash 'Wives: The Appropriate Victims of Marital Violence' 1978 2 *Victimology* 426, at 426.

²⁰ Above n19 at 429. Even Martin Luther, recognised as the founder of the Protestant Reform Movement and a supporter of the notion that women 'are also God's creations', has been quoted as admitting to mild physical abuse of his spouse. In praising his happy marriage, he said, 'I am rich, God has given me my nun and three children; ... when Katie [his wife] gets saucy, she gets nothing but a box on the ear.': Above n11 at 14.

she thereby becomes in the position of a daughter (*filiae loco*).²¹ If the husband were subject to *potestas* himself, the wife also automatically fell under the *potestas* of her spouse's *paterfamilias*. Barlow notes that by virtue of her diminished status, the husband was allowed distinct powers of chastisement over his wife.²² By the latter part of 2 A.D. *manus* marriages were declining in popularity to be replaced by the second category of marriages namely, those without *manus*. A marriage without *manus* meant that the wife's legal status was not affected by her marriage and she did not become subject to the power of her husband or his *paterfamilias*.²³ However, whatever the form of marriage, the Romans recognised a strong duty of *reverentia* between spouses that required that the husband and wife both show each other respect, consideration and kindness.²⁴ As an element of his entitlement to respect, the law gave the husband an explicit 'correctional power' over his wife that entitled him to beat her if she failed to demonstrate the expected consideration.²⁵

During the Middle Ages, it was accepted that women across Europe could be flogged through the city streets, exiled for years or killed if they committed adultery or even other 'lesser' offences.²⁶ In France, a man was entitled to beat his wife were she to contradict him, abuse him or refuse to obey his command.²⁷ The *French Code of Chivalry* gave the husband the absolute right when dealing with a scolding wife to knock her to the earth, strike her in the face with his fist and break her nose so that 'she would always be blemished and ashamed'.²⁸ Wallace notes that such instructions were premised on the fact that under *Napoleon's Civil Code* women were the properties of their men. First, they were 'owned' by their fathers and upon marriage that 'ownership' vested with their

²¹ AFS Maasdorp (trans) *The Introduction To Dutch Jurisprudence Of Hugo Grotius* (JC Juta and Co., Cape Town: 1903) 2.139. See also JD Sinclair *The Law of Marriage* (Juta & Co., Kenwyn: 1996) 183-4.

²² TB Barlow 'The Rights of a Husband or Wife Against Whom a Delict is Committed by the Other Party to the Marriage' 1938 55 *South African Law Journal* 137, at 139.

²³ However, whilst the wife retained her independence, the husband had the *ius mariti* entitling him to determine all matters incidental to the common life of the spouses: See generally HR Hahlo *The South African Law of Husband and Wife* (Juta and Co., Johannesburg: 1985) 1-3; and see Sinclair above n21 at 184.

²⁴ PR Spiller *A Manual of Roman Law* (Butterworths, Durban: 1986) 69.

²⁵ This rule was only abolished in Italy in 1975 after seven long years of debate: above n3 at 33.

²⁶ Above n19 at 429.

²⁷ *Ibid.*

²⁸ *Ibid.*

husband.²⁹ Unfortunately, *Napoleon's Civil Code* which is regarded as a breakthrough into freedom for many disenfranchised groups (such as gays and Jews), marked a clear demise in the rights and safety of women, and particularly married women.³⁰

Barlow notes that under the Germanic law the wife was clearly regarded as the chattel of her husband and subject to his guardianship (*mund*).³¹ Barlow notes that the husband enjoyed a *jus vitae necisque* over his wife which meant (i) that his rights over her body were so extensive that no act of his could be regarded as illegal and (ii) that he enjoyed unlimited powers of chastisement which included the right of taking revenge upon his wife by killing, mutilating or flogging her, as he wished.³² With time, the force of this right began to diminish to the extent that the husband was only permitted to inflict moderate corporal punishment.³³

During the reign of Ivan the Terrible in Russia in the sixteenth century, the state church specifically sanctified the oppression of women by issuing a *Household Ordinance* that spelled out when and how a man might most effectively beat his wife. No restraint or sanction was imposed on the husband's conduct and this often resulted in the punishment that was meted out far exceeding the bounds of reasonableness. This was never seen as a problem, for the law further expressly recognised that a man was completely entitled to kill his wife (and servant) if he

²⁹ H Wallace *Family Law Legal, Medical And Social Perspectives* (Allyn and Bacon, Boston: 1999) 177.

³⁰ Above n9 at 14. The eighteenth century *Civil Code of Napoleon* also influenced French, Swiss, Italian, and German laws. Only in 1927 did the French courts accept that a husband did not have the right to beat his wife: above n4 at 33.

³¹ Above n22 140-1 citing Huebner and Van Apeldoorn.

³² *Ibid.*

³³ Barlow notes that the possible reason for the different attitude to wife abuse between the German and Roman societies was that amongst the Romans, marriage was a consensual relationship whilst the Germans saw it as a unilateral act on the part of the man, performed by an act of intercourse with a woman of his choice. However, by the Middle Ages, *concupitis* was no longer the yardstick of a legal marriage and the rule of consent became the standard. Above n22 at 143 quoting Digest 50.17.30. It is interesting to note that up until recently some marriage ceremonies still required the wife to vow to love, honour and *obey* her husband. The husband, in turn, vows to love, honour and *protect* his future wife.

did so for disciplinary reasons.³⁴ The reform of the law with regard to wife beatings in Russia was introduced in the late seventeenth century during the time of Peter the Great.³⁵ However, as Martin notes, ‘Unfortunately, these reforms did not reach most people at all, and actually affected only the upper classes of St. Petersburg.’³⁶

The early English common law recognised a husband’s right to discipline his wife provided that he ‘neither kill[ed] or maim[ed] her’.³⁷ In an effort to ameliorate the harshness of the law, the ‘rule of thumb’ principle was introduced that permitted a man to chastise his spouse, provided the stick was no thicker than his thumb. Blackstone, in his commentary on the English common law, justifies this rule on the ground that, under the law, a husband remained legally responsible for his wife’s behaviour. Accordingly, it was regarded as reasonable to entrust him with the power of restraint by domestic chastisement.³⁸

³⁴ Above n4 at 30. Further, whilst there was no law against wife killing, there was an express prohibition against husband killing.

³⁵ Ibid.

³⁶ Above n4 at 31.

³⁷ DL Rhode *Justice and Gender* (Harvard University Press, London: 1989) 27.

³⁸ Blackstone notes, ‘By marriage the husband and wife are one person in law, that is, the very being or legal existence of the wife is suspended during marriage, or at least is incorporated or consolidated into that of her husband; under whose wing, protection and care she performs everything.’: W Blackstone *Blackstone’s Commentaries on the Laws of England* Vol. 1 (RW Welsh & Co., Philadelphia: 1887) 443. The husband’s power and control over his wife under English law was further made clear by the laws dealing with spousal homicide. During the 14th century, women who murdered their husbands were charged with the crime of ‘petit treason’ whilst men were convicted of ordinary murder for killing their wives. In terms of the *Statute of Treasons* of 1352, ‘petit treason’ was ‘another sort of treason than high treason ... the slaying of a master by his servant; the slaying of a husband by his wife ...’: TFTA Plunknett *A Concise History of the Common Law* 5th Edition (Butterworth, London: 1956) 443. Accordingly, until 1790, the stake or death by burning was the most common form of punishment meted out to women (and only women) who were convicted of petit treason. S Gavigan ‘Petit Treason in Eighteenth Century England: Women’s Inequality Before the Law’ 1990 3 *Canadian Journal of Women and the Law* 335, at 336. Women murderers were under a further legal disability in that the *Treasons Act* of 1969 (which had been introduced to improve the conduct of trials for those convicted of high treason) specifically excluded any benefit to those charged with petit treason. Consequently, women defendants were still prevented from bringing any witnesses to give evidence in their favour or from giving evidence on

In terms of the early English common law, a husband also enjoyed 'sexual title' to his wife, which gave him the right to sexual intercourse upon demand.³⁹ If the wife refused her husband a sexual experience, he was entitled to force her to submit. Laws against rape were originally only a protection of unmarried daughters and the sexual exclusivity of wives.⁴⁰

In the American colonies, by the early 1800's, the traditional right of a husband to beat his wife was being generally recognised by the law.⁴¹ This austere position was somewhat relaxed in 1866 when the state legislature also adopted the 'rule of thumb' (which was being applied in England) which became the effective principle across North America. In applying this rule, the Supreme Court of North Carolina held in *Rhode* that a husband would not be convicted for the moderate correction of his wife. In weighing 'the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber' against the infliction of moderate force upon the wife, the court was of

oath themselves.: J Campbell ' "If I can't Have You, No One Can": Power and Control in Homicide of Female Partners' in J Radford and D Russell (eds) *Femicide: The Politics of Woman-Killing* (Open University Press, Buckingham: 1992) 52. The official justification for the offence of petit treason was that English wives were expected to maintain their subjection and obedience to their husbands. It was only in 1828 that women were tried for 'murder' for the death of a spouse. : S Gavigan above n38 at 336.

³⁹ Above n4 at 8.

⁴⁰ Ibid.

⁴¹ KL Taylor 'Treating Male Violence Against Women as a Bias Crime' 1996 76 *Boston University Law Review* 575, at 590. See also above n3 at 553. In 1824 in *Bradley* 1 Miss. 156 (1824) the Mississippi Supreme Court was the first to formally rule that the husband was entitled to administer moderate chastisement in cases of emergency: R Calvert 'Criminal and Civil Liability in Husband-Wife Assaults' in K Steinmetz and M Strauss (eds) *Violence in the Family* (Dodd, Mead, New York: 1975) 88. In *Black* 60 N.C. 162, 163 (Win 1864), the court in North Carolina emphatically articulated the policy of the courts toward domestic assault as follows:

[T]he law permits [a man] to use towards his wife such a degree of force, as is necessary to control an unruly temper, and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.

the view that the interest of protecting marital privacy was paramount.⁴² Thus, it is clear that the new rule did little to improve the plight of women who were being abused.

It was not until the late nineteenth century in the U.S.A. that the husband's power of correction began to be doubted.⁴³ In 1871, Alabama became the first state to rescind its laws sanctioning wife abuse.⁴⁴ In 1874, wife beating was ruled unacceptable by the Supreme Court of North Carolina, which held:

The husband has no right to chastise his wife, under any circumstances [However,] if no permanent injury has been inflicted, nor malice, nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.⁴⁵

From the available case law, it would appear that by the 1870's and 1880's, women were beginning to be accorded the right, at least on paper, not to be subject to spousal assault.⁴⁶

The Australian colonies followed the English rules. The early Australian courts clearly set out the predominance of the man and the corresponding obligation of the wife, mother and children to remain obedient to him.⁴⁷ As Scutt writes, one of women's commonest occupational hazards in Australia during the nineteenth century was wife beating. During this period domestic violence appears to have been both widespread and acceptable.⁴⁸ Confirming Scutt's conclusion Angel states:

Traditional law allowed possessive and angry men to act out by beating and killing "their women". The law was developed by men who could

⁴² *Rhodes* 61 N.C. 445, 448 (1868).

⁴³ Above n19 at 430.

⁴⁴ ME Kampmann 'The Legal Victimization of Battered Women' 1993 15 *Women's Rights Law Reporter* 101, at 103.

⁴⁵ *Oliver* 70 N.C. 60, 61-2 (1874); see also DA Moore (ed.) *Battered Women* (Sage Publishers, London: 1979) 9.

⁴⁶ *McAfee*, 108 Mass. 458 (1871); *Fulgham* 46 Ala. 143 (1871); *Gorman* 42 Tex. 221 (1875).

⁴⁷ JA Scutt *Women and the Law* (The Law Book company Limited, New South Wales: 1990) 278.

⁴⁸ Above n47 at 445.

identify with other men in pain and legitimized their abusive acts against women in such a way as to hide the horror of the behaviour.⁴⁹

By the late nineteenth century, all over the world domestic violence was, in theory, being recognised as unacceptable. Laws were promulgated which appeared to take a harder approach to wife-beating. In both Britain and America, specific penalties against a man who was cruel to his wife, were legislated.⁵⁰ However, such victories were largely illusory for, as Taylor notes, these laws were rarely enforced.⁵¹ Zorza, too, points out that up to the early twentieth century men were rarely prosecuted for beating their wives and intimate assaults were not treated as criminal acts.⁵²

Bosworth notes further that during the 1940's and 1950's, women reporting domestic violence often had to deal with the social workers who were strongly influenced by Freudian thought. Consequently, they were generally likely to interpret women's complaints as indicating either frigidity or a need to undermine her husband's authority.⁵³ This victim-blaming mentality also contributed to family violence becoming less visible. The U.S. Supreme Court in *Frontiero v Richardson* succinctly summed the historical attitude to women and wives:

⁴⁹ M Angel 'Susan Glaspell's *Trifles* and *A Jury of Her Peers*: Woman Abuse in a Literary and Legal Context' 1997 45 *Buffalo Law Review* 779, at 783-4.

⁵⁰ Above n47 at 430. The right of a man to punish his wife was officially abolished in England in 1891 in the case of *Jackson* [1891] 1 Q.B. 671. In *casu* Lord Halsbury described the notion of a husband's right to beat his wife as being 'quaint and absurd'. : Above n47 at 679. See also AL Wannop 'Battered Woman Syndrome and the Defence of Battered Women in Canada and England' 1995 19 *Transnational Law Review* 251, at 253. Several countries made wife-beating illegal in the early 1970's, including Scotland and Iran : Above n4 at 33. The Australian focus against domestic violence was not on the aggressive criminalisation of domestic violence but rather on civil protection orders, with protection order regimes being enacted by state and territory governments during the 1980's.: R Hunter 'Narratives of Domestic Violence' 2006 28 *Sydney Law Review* 733, at 736.

⁵¹ Taylor above n41 at 591.

⁵² J Zorza 'The Criminal Law of Misdemeanor Domestic Violence, 1970-1990' 1992 83 *Criminal Law and Criminology* 46, at 48. Bosworth also notes that when the issue of domestic violence arose, the perception amongst the law enforcement agencies – from police to judges was that women were falling down on their jobs of keeping marital harmony intact, or that they enjoyed physical or sexual violence.: J Bosworth 'The Trouble With Battered Woman's Syndrome' 1996 11 *Adelphia Law Journal* 63, at 73.

⁵³ Bosworth above n52 at 73.

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.⁵⁴

1.3 DOMESTIC VIOLENCE IN SOUTH AFRICA

The evolution of the South African law on domestic violence and abuse (which is based to a great extent in Roman Dutch law) is somewhat more complex. When the first Europeans came and settled at the Cape of Good Hope in 1652, they brought with them the laws that they had been applying at home, in Holland. This was Roman Dutch law that combined the rules of the Roman and Dutch legal systems. The fundamental law of Holland was Germanic law.⁵⁵ However, Roman law was adopted into Holland, so that by the sixteenth century the law of Holland had become heavily Romanised. Despite this fact, with regard to the law of persons, the local laws of Holland largely resisted the Roman influence and so, rather than a complete change over, the law of persons remained a hybrid system of Roman and Dutch (German) laws.⁵⁶

The Roman Dutch law with regard to the husband's role and authority over his wife is documented in a series of writings. According to Voet '[i]t is certain that ... a husband enjoys marital power over his wife. If nevertheless he abuses that power by inflicting somewhat savage wrongs in act, nothing forbids her suing on that account. However, because of the honour due to wedlock she must do so in an action that is restrained in its words.' To support his approach Voet cites Sande who states clearly that a wife cruelly beaten by her husband has an *actio in factum* against her husband. There was, however, never the right of an *actio*

⁵⁴ *Frontiero v Richardson* 411 U.S. 677 (1973). Interesting, too, is the case of the Japanese Prime Minister, Eisako Sato, who was awarded the Nobel Peace Prize in 1974. Prior to his nomination, Sato's wife made a public accusation against him of abuse and violence. Apparently, the Nobel Peace Prize committee did not consider wife beating a breach of the peace. And in Japan itself, in keeping with the traditional patriarchal and authoritarian culture, Sato's popularity increased enormously when his wife revealed that he was a good husband in that he only beat her once a month!: above n4 at 45.

⁵⁵ Above n22 at 140.

⁵⁶ Above n24 at 69.

iniuriarum as this might result in the husband losing certain civil rights.⁵⁷ Similarly, in *De Jure Connubiorum* Brouwer notes that a beaten wife had no action under the *actio iniuriarum* but could proceed under the *actio in factum* to the effect that the husband pay compensation for the injuries he brought upon her.⁵⁸ Grotius, however, states that by marriage legally contracted, the wife becomes a minor and the man is called the husband and guardian.⁵⁹ Consequently, a wife owed full obedience to her husband. This status, however, did not confer upon the husband an entitlement to beat his wife or otherwise ill-treat her; ‘and whichever of the spouses forgets himself or herself as against the other, is liable to such fine as prescribed at each place for such offence, and is occasionally even more severely punished.’⁶⁰ Huber is far more patriarchal in his approach and states that under the law, the wife was subject to her husband in all things. ‘However, since no power in the world can be effective without compulsion, the husband must also possess certain means of compulsion, in case the wife refuses to bow to his sway in reasonable matters.’⁶¹ On the other hand, Groenewegen, commenting on the *Novellae* of Justinian (117.14) states that ‘if anyone vents his rage against his wife without cause, by our customs he may be fined by the judge.’ However, like Huber, he is clear that it was completely lawful for a husband to chastise his wife.⁶²

A summary of the Roman Dutch writings leads to the inevitable conclusion that in terms of the Roman Dutch common law, a husband had a right to administer moderate chastisement upon his wife. However, if he exceeded the limits, he could be punished. The determination of ‘moderate’ and ‘reasonable’ were not

⁵⁷ P Gane (trans) *The Selective Voet Being the Commentary on the Pandects by Johannes Voet and the Supplement to that Work by J Van der Linden* (Butterworths, Durban: 1957) 209-10, at 47.10.2.

⁵⁸ P Van Warmelo and FJ Bosman (trans) *Hendrik Brouwer, Regsgeleerde oor die Huweliksreg* (Lex Patria, South Africa: 1967) 159, at 2.29.12.

⁵⁹ Maasdorp above n21 at 17: 1.5.19.

⁶⁰ Maasdorp above n21 at 17: 1.5.20.

⁶¹ P Gane (trans) *The Jurisprudence of my Time by Ulrich Huber* (Butterworths and Co., Durban: 1939) 48, at 1.10.1.

⁶² B Beinart (trans and ed.) *Simon A Groenewegen Van Der Made: A Treatise on the Laws Abrogated and no Longer in use in Holland and Neighbouring Regions* (Lex Patria, South Africa: 1987) 254-5, at 8.18.117.Ch14. (Justinian, however, in the *Novellae* (117.14) states clearly that it was reasonable that an errant husband could be made to pay his aggrieved wife one-third of the matrimonial property by which he was enriched prior to their marriage. There is no reference to this rule in the translation of Groenewegen’s work presented by Beinart.)

defined and appear generally to have been left to the discretion of the magistrate seized with the complaint. Furthermore, Roman Dutch law appears adamant that there was no action for damages by a victimised wife against her abusive husband.⁶³ One reason was that under the law, marriage in community of property was the norm and by virtue of such a union, the husband and wife became one, the second reason for refusing the *actio iniuriarum* was that it could cause *infamy* to the husband which was not conducive to a good marriage relationship. The refusal of the remedy was an attempt by the law to protect the 'dignity' of the husband, despite the fact that he had, admittedly, caused harm and injury to his spouse.

In terms of the indigenous laws of South Africa, a husband is obliged to treat his wives with consideration and kindness and to house, feed and clothe them in a manner commensurate with his means.⁶⁴ In her turn, the wife was required to render respect and obedience to her husband. If she failed to conduct herself accordingly, customary law permitted the husband the right to administer moderate corrective chastisement. If the husband overstepped the bounds of moderation and reason, the wife was entitled to permanently vacate the marital home and return to her family home.⁶⁵

In specifically looking at African customary law in the context, Ludsin and Vetten note that even today it is generally accepted that a couple cannot marry until the groom has paid the dowry (*lobola*) to the bride's family. The effect of this is that amongst both men and women there is a perception that payment of the dowry grants the men ownership of their wives and entitles them to do with the women 'as they please.'⁶⁶ Furthermore, Ludsin and Vetten note that under the

⁶³ See *Mann v Mann* 1918 CPD 89 where Searle J concluded: 'Upon the whole, therefore, and not without some hesitation and some regret I come to the conclusion that there is no sufficient authority to show that [an action for civil compensation for assault between spouses] is allowable by Roman Dutch law.': at 99. Barlow acknowledges the view of Menochius (*De Arbitr. Judic.* 2.6.501) that whilst a husband enjoyed the right to whip his wife, if this treatment were too severe, the wife was entitled to institute an *actio iniuriarum* against him.: however, Barlow also recognises that in this view, Menochius stood alone.: above n22 at 138.

⁶⁴ JC Bekker and JJJ Coertze *Seymour's Customary Law in Southern Africa* (Juta and Co., Johannesburg: 1982) 140.

⁶⁵ Above n64 at 140-1. See also *Jonas Stolleh v Piet Mthwalo and Ano.* 1947 NAC (C and O) 33.

⁶⁶ H Ludsin and L Vetten *Spiral of Entrapment: Abused Women in Conflict with the Law* (Jacana Media, Johannesburg: 2005) 24. They note that in some instances this attitude is so entrenched

customary law when a woman marries, she becomes part of her husband's family. Should she wish to leave the home, the husband's family may be entitled to reclaim the dowry that has been paid.⁶⁷ The African customary law does, however, excuse the repayment of the dowry in cases where the wife leaves because of domestic violence but this 'only provides a wife with a justification for leaving in cases in which the violence is so severe that it makes cohabitation dangerous or impossible.'⁶⁸

1.4 CHANGING ATTITUDES TO DOMESTIC VIOLENCE

The historical gauge on domestic violence shows an acceptance of conduct that seriously compromised the well-being and dignity of women. Today, however, there is a marked change in the world approach to the subject of gender equality and concomitantly the treatment of violence against women. These positive changes may be attributed to the following factors:

1.4.1 The Effect of the Feminist Movement

Judicial intolerance to wife beating was slow to develop.⁶⁹ However, towards the 1970's, the emergence and strengthening of the feminist movement contributed to changes in our perceptions and attitudes towards women. One of the direct effects of this was that the hitherto private experience of battered wives began to gain a public platform. The feminist movement enabled women to define 'acceptable force' and 'violence'.⁷⁰ Further, women also were urged to explode the myths and expose the fallacies surrounding violence against women.⁷¹

that for example in the case of *Mvamvu* (unreported case no. 350/2003, judgment delivered on 29/09/2003) at para 16 the Supreme Court of Appeal justified the reduction of the mandatory minimum sentence of a man convicted of raping his wife on the basis that 'It is clear from his evidence that at the time of the incidents the accused honestly (albeit entirely misguidedly) believed that he had some "right" to conjugal benefits.': at 25.

⁶⁷ Above n66 at 24.

⁶⁸ Ibid. See also E Curran and E Bonthuys *Customary Law and Domestic Violence in Rural South African Communities* (CSVR, Pretoria: 2004) 17-8.

⁶⁹ AF Kuhl 'Personality Traits of Abused Women: Masochism Myth Refuted' 1984 9 *Victimology* 450, at 450; JA Mercy and LE Saltzman 'Fatal Violence Among Spouses in the United States, 1976-85' 1989 79 *American Journal of Public Health* 595, at 595.

⁷⁰ Moore above n45 at 11.

⁷¹ Ibid.

Feminist theory revealed the impact of oppression and unequal power and incorporated these understandings into an analysis of the dynamics of domestic violence. Wife beating began to be recognised as a major social problem and the previously private experience of violence against women in the home became a political issue.⁷² In 1993, the United Nations recognised violence against women as a human rights violation in terms of the General Assembly *Declaration on the Elimination of Violence Against Women*.⁷³

Laws against the abuse of women and battering of wives were initially introduced as a feminist issue that is, as an issue that demonstrated the secondary status of women in society. Wife abuse in the feminist view was the direct result of patriarchal trends and sexist attitudes that degraded and oppressed women.⁷⁴ However, Gondolf notes, 'From these feminist and activist beginnings, wife abuse increasingly became a humanist issue.'⁷⁵ Thus, 'the feminist self-defence work on behalf of battered women developed within an equal rights framework which sought to equalise women's rights to a fair trial within the traditional criminal law framework and not, as some have mistakenly portrayed this work, to invoke special defences or special standards for women.'⁷⁶ Gondolf and Fisher note further that one of the great achievements of feminism is that domestic violence is now defined as a social and legal problem, not merely a phenomenon of violent individuals or private relationships.⁷⁷

1.4.2 The Evolving Human Rights Culture

The writer submits that the emerging and growing culture of human rights includes a strong movement lobbying for victims' rights, which includes women's

⁷² Above n3 at 553; Hunter above n50 at 736; and PF Mangum 'Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering' 1999 19 *Boston College Third World Law Journal* 593, at 594.

⁷³ General Assembly Resolution 104, U.N. Doc. A/48/49 (1993).

⁷⁴ EW Gondolf and ER Fisher *Battered Women as Survivors* (Lexington Books, Massachusetts: 1988) 1.

⁷⁵ *Ibid.*

⁷⁶ J Stubbs and J Tolmie 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman's Syndrome' 1999 23 *Melbourne University Law Review* 709, at 712.

⁷⁷ Above n74 at 3.

rights to independence and equal and humane treatment. In this *milieu*, the law is being promoted as an important agency for social change.

1.4.3 The Abolition of the Rule that the Husband is the Head of the Home

History reveals that the conception of the husband as the head of the home can be traced back to almost every social order. Despite the fact that in many legal systems, this rule has been specifically rendered nugatory by subsequent legislation,⁷⁸ the common assumption of the husband's role persists in many families.⁷⁹ In South Africa, the *Matrimonial Property Act* 88 of 1984 abolished the power that the husband held over the person and property of his wife (section 11) but it did not expressly exclude his position and authority as the head of the family (section 13). However, in 1993, section 30 of the *General Law Fourth Amendment Act* 132 of 1993 eliminated all reference to the husband's position as head of the family as contained in section 13 of Act 88 of 1984. However, Sinclair is of the view that this does not effectively remedy the problem, for the husband's role as the family authority springs not from any legislative enactment, but rather from the common law.⁸⁰ The *General Law Fourth Amendment Act* 132 of 1993 does not change the common law position and, in the absence of direct legislative intervention, it would appear that, ostensibly, the husband retains his powers of control over the family.⁸¹ Whilst such a situation is unacceptable, some solace is gained from the fact that enforcement of the common law position would be unlikely to withstand a constitutional attack by an aggrieved wife.⁸²

⁷⁸ L van Zyl 'Section 13 of the Matrimonial Property Act: An Historical Relic?' 1990 23 *The Comparative and International Law Journal of Southern Africa* 228, at 230-1.

⁷⁹ Sinclair above n21 at 439.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Section 9 of the *Republic of South Africa Constitution Act* 108 of 1996 provides for everyone to be treated equally before the law. This provision includes the right of all persons to the full and equal enjoyment of all rights and freedoms. Furthermore, section 9(3) specifically denies any person the power to unfairly discriminate directly or indirectly against another on various grounds which include *inter alia* marital status.

1.5 CONCLUSION

History has shown that the position of women in many western societies was characterised by inequality, subservience and subordination. As a consequence, domestic violence and abuse of women in the home found a more conducive environment. However, today this picture has been ameliorated and there is a strong lobby for women's rights and equal treatment. Domestic violence has been placed under the spotlight and the abuse of women in intimate partnerships is now beginning to receive the deserved legal and social sanction. However, the writer cannot cite any society that can reasonably claim to have completely eliminated the problems of the past.

PART ONE: DOMESTIC VIOLENCE

CHAPTER TWO

CHARACTERISTICS OF AN ABUSER AND A VICTIM OF DOMESTIC VIOLENCE AND THE PSYCHO-SOCIAL, SOCIO-ECONOMIC, AND ENVIRONMENTAL FACTORS THAT INFLUENCE AN ABUSED WOMAN'S DECISION TO REMAIN IN AN ABUSIVE RELATIONSHIP

In Part One Chapter Two the question 'who is an abuser?' and 'who is an abused woman?' is examined by drawing together and analysing the character traits of the so-called abuser and victim of domestic violence as identified by various research authorities. The Chapter, whilst pooling particular character traits that have been identified in abusers and victims of abuse, does not identify a stereotype of an abuser or a victim. In fact, the research specifically recognises the diversity in the profiles that exist of abusers and victims of domestic violence. In this context, the myth of a typical battered woman is convincingly dispelled.

Further in this Chapter the social, emotional, economic and environmental factors that also impact on the lives of many abused women is reviewed. The researcher considers how each of these factors affects the life and decisions of the victims and also how these various factors impact singly or in combination to create a 'prison' for the victim.

2.1 INTRODUCTION

Evaluating the character traits of both the victim of abuse and the abuser is specifically relevant when discussing the law of self-defence in the circumstances of battered women who kill their abusive partners for the fact that they further clarify how domestic violence shapes and affects the behaviour of the victim. Knowing the pertinent character attributes fosters a better understanding of the victim's lived reality and her reaction to her abuser, and goes further towards providing some explanation why many battered women remain in abusive relationships. Further, understanding the character traits of a victim of abuse against the backdrop of the research that has been conducted into intimate homicides assists the court to understand the conduct of the accused for purposes of evaluating the reasonableness of her conduct.

2.2 THE ABUSER

Despite many studies being conducted, researchers have been unable to come up with a definitive profile of an abuser.¹ However, having recognised that abusers do not constitute a homogeneous social group, researchers have identified characteristics that are often likely to be present in one who commits intimate partner assault.² Again, it must be stressed that these are commonly recognised characteristics that are not necessarily all present in every abuser. These characteristics include but are not limited to the following, in no specific order or priority.

(a) Growing up in an environment of violence.³ The common denominator in many research studies on domestic violence is the fact that the abuser grew up in a home where the father figure committed acts of violence against members of the family.⁴ It may be a situation of either the abuser witnessing the aggression on his mother or being the direct recipient of the abuse himself. The abuser's later conduct is thus described as an expression of

¹ See generally RE Dobash and RP Dobash 'Wives: The Appropriate Victims of Marital Violence' 1978 2 *Victimology* 426; D Everstein and L Everstein *People In Crisis: Strategic Therapeutic Interventions* (Brunner/Mazel, New York: 1983); BM Quigley and KE Leonard 'Desistance of Husband Aggression in Early Years of Marriage' 1996 11 *Violence and Victims* 355.

² See generally SM Anderson, TR Boulette and AH Schwartz 'Psychological Maltreatment of Spouses' in RT Ammerman and M Hersen (eds) *Case Studies in Family Violence* (Plenum, New York: 1991) 296-7; DG Dutton *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives* (UBC Press, Vancouver: 1995) at 63-160; D Martin 'The Historical Roots of Domestic Violence' in DJ Sonkin (ed.) *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* (Springer, New York: 1987) 44-71; MD Pagelow *Family Violence* (Praeger, New York: 1984) 326-7; A Rosenbaum and M Maiuro 'Perpetrators of Spouse Abuse' in RT Ammerman and M Hersen (eds) *Treatment of Family Violence* (John Wiley, New York: 1990) 280-309; LE Walker *The Battered Woman* (Harper Colophon, New York: 1979) 7-67.

³ The violence need not always be physical. For example, Showalter *et al* found from their study of victims and abusers that, in fact, only two of the abusers had suffered direct physical abuse from their parents. However, they noted that in most of the cases, the abuse expressed was psychological. They, therefore, stress that in many instances, psychological violence experienced in childhood may be just as damaging to the individual as physical abuse: CR Showalter, RJ Bonnie and V Roddy 'The Spousal-Homicide Syndrome' 1980 3 *International Journal of Law and Psychiatry* 117, at 124.

⁴ See generally A Bandura *Aggression: A Social Learning Analysis* (Prentice-Hall, New Jersey: 1973); HD Krause *Family Law: Cases, Comments and Questions* (West Publishing Co., Minnesota: 1990); LEA Walker 'Post-Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Women Syndrome' 1991 28 *Psychotherapy* 21; RJ Gelles and MA Straus *Intimate Violence* (Simon and Shuster, New York: 1988) 88; and Showalter, Bonnie and Roddy above n3.

learned behaviour from experiences observed in the family of origin. Bandura notes that '[c]hildren were much more inclined to imitate a familiar aggressive model than an unfamiliar one. This was especially true of boys ...'⁵

Bandura's findings are that boys are almost three times more likely to imitate behaviour in a male model they know, even if they do not particularly accept such conduct.⁶ Krause verifies this view and records that research finds that the sons of most violent parents have a rate of wife beating ten times greater than that of the sons of non-violent parents.⁷ According to Walker, witnessing fathers beat mothers puts a boy at a seven hundred times greater risk to use violence in his own home.⁸ Similarly, in the study of Straus, Gelles and Steinmetz, they concluded that '[e]ach generation learns to be violent by being a participant in a violent family – "Violence begets violence".'⁹ With specific reference to children who are the victims of violence in the home, Gelles and Straus point out, '[C]hildren who were abused *tend* to grow up to be abusive.'¹⁰

Dutton provides another very interesting perspective. He notes that many men who engage in abusive conduct also report high degrees of verbal and physical abuse from their mothers (but not from their fathers).¹¹ Whilst one may expect that such men would grow up to feel quite powerless in an adult relationship, male sex-role socialisation teaches men that powerlessness and vulnerability are unacceptable emotions. Dutton notes that as a consequence, one finds heightened power concerns in such men, along with

⁵ Bandura above n4 at 80.

⁶ Ibid.

⁷ Krause above n4 at 273.

⁸ Walker above n4 at 22.

⁹ MA Straus, RJ Gelles and SK Steinmetz *Behind Closed Doors: Violence in the American Family* (Anchor Books, New Jersey: 1980) 121. Bandura makes a further interesting finding noting that tests show that people do not have to be personally involved in the violent experience in order to be influenced by it. They learn equally well from hearing or reading about it.: Bandura above n4 at 73. Thus, constantly hearing people tell of the benefits of violent behaviour or seeing aggressive behaviour being rewarded in the media, can satisfy some individuals that such conduct is acceptable and appropriate.: Pagelow above n2 at 121.

¹⁰ Gelles and Straus above n4 at 49.

¹¹ Dutton above n2 at 66-7.

a mistrust of women and anxiety about intimacy with a woman. Any perceived threat to his control will produce exaggerated arousal, anxiety, and anger responses.¹²

It would appear that growing up in a home where violence was the norm will contribute to the individual's learned experiences. Gelles and Straus note that the learning experience of seeing one's parents strike each other is, in fact, more significant than actually physically experiencing the violence. They state:

Experiencing, and more importantly observing, violence as a child teaches three lessons:

- (i) those who love you are also those who hit you, and those you love are those you hit;
- (ii) seeing and experiencing violence in your home establishes the moral rightness of doing the same to those you love; and
- (iii) if other means of getting your way, dealing with stress, or expressing yourself do not work, violence is permissible.¹³

The forementioned explanation of why some men resort to battery is also contained in the psychotherapeutic theory of behaviour, which holds that early childhood experiences predispose an individual to violence.¹⁴ The proponents of this theory argue that theories of modelling and reinforcement have an important role to play in the lifestyle of the individual.¹⁵

¹² Ibid.

¹³ Gelles and Straus above n4 at 91.

¹⁴ M Russell 'Wife Assault Theory, Research and Treatment: A Literature Review' 1988 3 *Journal of Family Violence* 193, at 194.

¹⁵ Ibid. However, it is also recognised that other factors of socialisation and individual personality will also play a relevant role in the child's development; for many children who do not have their emotional needs met do not grow up to be abusers. :above n14 at 196-7. See also D Singh 'Children Who Witness Adult Domestic Violence: Part 1 – The Impact and Effects' 2005 6 *Child Abuse Research in South Africa* 37-45.

- (b) The study by Rosenbaum and Maiuro led them to the conclusion that abusers, as a group, demonstrate greater psychopathology than members of the general population.¹⁶ They will often show evidence of personality disorders and, according to the study by Anderson *et al* the greater majority demonstrate personality types that involve aggressive behaviour.¹⁷ Showalter *et al* also found from their study that abusers often displayed tendencies towards infantile and childish emotionality.¹⁸ Pagelow's studies reveal further that abusers are likely to present with extreme mood swings, unpredictably alternating between happiness and anger. Pagelow describes them as wall-punchers, who demonstrate frustration by punching walls, kicking chairs or hitting animals.¹⁹ However, extrapolating from their research findings, Barnard *et al* confirm that most abusers (95.7 percent of the study) are not mentally insane and were deemed competent to stand trial. 82.6 percent were judged to be sane at the time of committing the abusive act.²⁰ Mather also states that generally one finds that except in very rare cases, the perpetrator of intimate abuse knows exactly what he is doing.²¹
- (c) Many abusers are, fundamentally, extremely traditional in their way of thinking. Thus, where the male-partner in the couple believes that his social image as the head of the home is being threatened or compromised by his partner's behaviour, he may resort to violence.²² Moore notes that often these men seem to judge their partner's feelings for them by the extent to which she fulfils *his* expectations.²³

¹⁶ Rosenbaum and Maiuro above n2 at 280-309.

¹⁷ Anderson, Boulette and Schwartz above n2 at 296-7.

¹⁸ Above n3 at 125.

¹⁹ Pagelow above n2 at 326-7.

²⁰ GW Barnard, H Vera, MI Vera and G Newman 'Till Death Do Us Part: A Study of Spouse Murder' 1982 10 *Bulletin of the American Association of Psychiatry and the Law* 271, at 275.

²¹ VM Mather 'The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense and Expert Testimony' 1988 39 *Mercer Law Review* 545, at 549.

²² DA Moore (ed.) *Battered Women* (Sage Publishers, London: 1979) 15. This response was also identified by the writer during her work at the Advice Desk for the Abused, an NGO operating in the KwaZulu-Natal province.

²³ Above n22 at 15-19.

Traditional social beliefs often require that the man be in control of his home.²⁴ When the traditional roles are reversed because the woman has a better job or is more highly qualified than her partner, this may also be the catalyst for abuse. Moore believes that, in many cases, the battery is a means of suppressing the wife and re-enforcing the abuser's power and control.²⁵ It is also noted that many abusers are either unemployed or are unhappy in their jobs. They believe that their skills and abilities are not being recognised and that they are underachieving. The aggression by the abuser is typical of the kick-the cat theory of the displacement of aggression.²⁶ This situation is aggravated in cases where the woman also accepts the broader power relations and cultural and social norms requiring that the male partner enjoy higher status. The woman now either believes that she deserves the aggression for upsetting the balance and emasculating her partner publicly, or she may justify his conduct on the ground that she is not behaving in a manner that is sufficiently feminine. Bowker notes that one perceived way to make herself more 'feminine' (and concomitantly, the male partner more masculine) is to allow him to exercise control through physical and psychological abuse.²⁷

Further, abusers are often described as having poor communication skills and are incapable of expressing emotions, other than anger or jealousy.²⁸ If the intimate partner is more eloquent, the problem is exacerbated. The abuser may then compensate for his deficiency and reinforce his control through violence. Many abusers use violence as a means of expressing their emotions. When asked why they hit their partner, they will respond 'Because I love her'.²⁹ Further, traditional social norms often do not permit a man to cry or complain, but expect a lack of emotion and a permanent demonstration of control. The batterer claims to have no alternate outlet to express his

²⁴ Above n22 at 17. This attitude was a recurrent refrain heard by the writer during her work with battered women and domestic violence at the Advice Desk for the Abused.

²⁵ Above n22 at 17.

²⁶ LH Bowker *Beating Wife-Beating* (Lexington Books, Toronto: 1983) 46.

²⁷ Above n26 at 48.

²⁸ H Wallace and A Seymour *National Victim Assistance Academy Lecture Series* (U.S. Department of Justice and Office of the Victims of Crime, Fresno: 1999) 8-9.

²⁹ Discussions conducted with victims of intimate violence at the Advice Desk for the Abused between the period 1994 and 2000.

frustrations except in the privacy of his home. His partner's availability (and sometime, subservient demeanour) makes her his most convenient target.³⁰

Another issue that arises when men adhere to the traditional sex role stereotype happens when the woman may be more liberal in her attitude to women's roles.³¹ There will inevitably be a clash with her male partner who clings to the traditional sex-role stereotype values. According to Walker, if the man perceives his partner's conduct as a direct threat to his masculinity (the image of which is of extreme importance to him) and if he also has a violence prone personality, such conflict may well be expressed by violence against her.³² Pagelow, however, indicates that many of these men are actually proud of the achievements of their partner but her success may also cause him to feel threatened and/or inferior.³³

According to the feminist approach of behavioural dynamics, domestic violence mirrors the patriarchal organisation of society, and maintains the notion of the male dominance within the family.³⁴ Wallace and Seymour note that this is supported by the fact that many abusers will present with an inherent tendency to manipulate and control others but they are also opportunistic and will defer to external authority. The same restraint is, however, rarely demonstrated within his own home.³⁵ However, the feminist approach has been questioned for placing too great an emphasis on cultural factors to the exclusion of the individual character.³⁶

³⁰ Above n28 at 8-15.

³¹ LE Walker *The Battered Woman Syndrome* (Springer Publishing Company, New York: 1984) 12.

³² Ibid.

³³ Pagelow above n2 at 327-8.

³⁴ E Pence and M Paymar *Education Groups For Men Who Batter: The Duluth Model* (Springer, New York: 1993) 5.

³⁵ Above n28 at 8-12. See also above n34 at 4.

³⁶ Dutton notes that in view of the research on battering that occurs in homosexual relationships, one might better argue that abuse is not a result of a power struggle between the parties but rather that intimacy generates anger that is sometimes expressed violently. He notes that if one were to be convinced by the feminist (or so-called sociological model) one should be able to find evidence of greater violence directed towards women in more patriarchal cultures. However, when one compares spousal assault rates in Mexico with that in the United States (Mexico having a recognisedly more patriarchal socialisation) one finds the opposite - the statistics reflect less abuse in Mexico than in the United States: Dutton above n2 at 38-9. This criticism is supported by Campbell who reports that there is no clear or simple linear correlation between female status and

- (d) Many men who are guilty of domestic violence are substance abusers, either in the form of alcohol or other addictive substances.³⁷ However, whilst drugs and alcohol are not causative factors of intimate violence, they are without doubt coercive factors. The old theory was that alcohol intake broke down people's inhibitions and led to antisocial behaviour.³⁸ However, Gelles and Straus note that there is broad evidence to refute the explanation that it is the chemical property of alcohol which, when acting on the physiological system, causes people to be violent. As they see it, drinking or claiming to be drunk simply provides an excuse for instances of socially unacceptable behaviour, such as domestic abuse.³⁹ Substance abuse may be one of the traits demonstrated by many abusers but according to Herman alcohol is less a root cause of violent interactions than a facilitator and a rationalisation for them.⁴⁰
- (e) Many abusers have difficulty maintaining social relationships outside of the home. They, accordingly, also deprive their intimate partners of such contacts. Kuhl's study reveals that of the 420 abused women to whom she spoke, thirty percent had been actually physically imprisoned in their time.⁴¹
- (f) Abusers may be extremely demanding of their partners and respond with aggression when a task is not met. Wallace and Seymour also found that in many instances, abusers appeared overly dependent on their wives.⁴² This

rates of wife assault: J Campbell ' "If I can't have you, no one can": Power and Control in Homicide of Female Partners' in J Radford and D Russell (eds) *Femicide: The Politics of Woman-Killing* (Open University Press, Buckingham: 1992) 19. In his writing, Dutton points out that research has identified *family-related* female status to be more predictive and reflective of wife beating than were societal level variables.: Dutton above n2 at 39.

³⁷ Above n28 at 8-2.

³⁸ For a discussion of this view and the subsequent shift away from it see above n28 at 8-4 and 8-10. See also A Padayachee and D Singh 'Intimate Violence and Substance (Ab)Use – The Correlative Relationship' 2003 16 *Acta Criminologica* 108, at 108-9.

³⁹ Gelles and Straus above n4 at 45-6. See also Padayachee and Singh above n38 at 108-114.

⁴⁰ JL Herman 'Considering Sex Offenders: A Model of Addiction' 1988 13 *Signs* 695, at 714-5; Martin above n2 at 56.

⁴¹ AF Kuhl 'Personality Traits of Abused Women: Masochism Myth Refuted' 1984 9 *Victimology* 450, at 452.

⁴² Above n28 at 8-9.

finding was confirmed by Showalter *et al* in their study.⁴³ Abusers are often extremely jealous and possessive of their partner. They will regularly present with signs of insecurity and records repeatedly show that they will accuse their partner of sexual infidelity.⁴⁴ This was borne out by Walker's study. She noted that men who are insecure often need a great amount of nurturance and are very possessive of the woman's time.⁴⁵ Studies indicate that many battered women are also frequently beaten whilst pregnant. With regard to such incidents of abuse, there is general *consensus* amongst the experts that a batterer who is usually insecure and very dependent on his partner, feels threatened by or is jealous of the pending arrival of the child.⁴⁶

- (g) Batterers generally appear not to share the view of the law that what they did was wrong, much less criminal. Many abusers will not admit the extent of their violent conduct and will often minimise the extent of the harm caused or blame it on others. Rhode notes that:

Those tendencies [unfortunately] gain legitimacy through a legal response that avoids attaching criminal sanctions to assaultive behaviour and instructs victims to modify their conduct in return for their assailants' promises to modify theirs⁴⁷

Much of the research indicates that batterers have an unhealthy need to control their partners.⁴⁸ Dobash and Dobash studied a sample of one hundred and nine women who had had experiences of violence with a partner.⁴⁹ They found that many of the battering incidents had arisen from disagreements over relatively minor domestic affairs. Dobash and Dobash found that any challenge made to the male partner's perceived authority, even in these minor

⁴³ Above n3 at 125-7.

⁴⁴ E Hilberman and L Munson 'Sixty Battered Women' 1977-78 2 *Victimology* 460, at 461-2.

⁴⁵ Above n31 at 12; see also above n26 at 45; E Hilberman 'Overview: The Wife-Beaters Wife Reconsidered' 1980 137 *American Journal of Psychiatry* 1336, at 1339.

⁴⁶ Above n21 at 552.

⁴⁷ DL Rhode *Justice and Gender* (Harvard University Press, London: 1989) 240.

⁴⁸ The often quoted words of Fromm are apposite: 'The core of sadism, common to all its manifestations, is the passion to have absolute control over a living being. . . . It is transformation of impotence to omnipotence': E Fromm *The Anatomy of Human Destructiveness* (Fawcett, New York: 1973) 5.

⁴⁹ Dobash and Dobash above n1 at 24.

affairs, greatly increased the chances of being beaten. From the man's perspective, he construed any lengthy discussion or debate as nagging by the spouse, which was regarded as provoking and justifying of a violent response. They state:

Men who assault their wives are actually living up to cultural prescriptions that are cherished in Western society - aggressiveness, male dominance and female subordination - and they are using physical force as a means to enforce that dominance.⁵⁰

Evidence of the correlation between power and intimate violence was also identified in Adler's study of fifty couples from diverse backgrounds which provided further scientific proof of a clear relationship between wife-beating and male domination in decision-making processes in so-called normal families.⁵¹ This domination may be reflected not only in their physical attacks on their intimate partner, but also through financial and emotional coercion. Hempill agrees with these findings. From her research she noted that male batterers seldom act because they 'have lost self-control'. In many instances their conduct 'is purposeful' with the men admitting that the abuse was 'to shut her up physically'.⁵²

What is apparent from the above is that, whilst there is not complete consensus on why men batter, there is, however, some degree of overlap as to the general character of a batterer. In dealing with this subject Moreland provides a rather interesting perspective. He states:

Men's anger towards women is as a result of the repression of emotion in men, the limitation of intimacy only with women, and to the socialisation of men to be powerful. Given the few numbers of men who really get to exercise

⁵⁰ Ibid.

⁵¹ ES Adler 'The Underside of Married Life: Power, Influence and Violence' in LH Bowker *Women And Crime in America* (Macmillan, New York: 1981) 22.

⁵² AL Hempill 'Spousal Murder: A Look at Available Defenses and their Application from a Feminist Perspective' 1998 46 *Chitty's Law Journal and Family Law Review* 1, at 2.

power and the fact that we are all socialised to be powerful, there are a lot of us walking around who are pent up volcanoes ready to explode.⁵³

Another behavioural theory that is particularly relevant to understanding the conduct of the abuser is the social exchange theory.⁵⁴ It is based on the fundamental premise that human interaction is guided by the pursuit of rewards and the avoidance of punishment at all costs.⁵⁵ It holds further that not all observed behaviour will be repeated - in order for it to be re-enacted by an individual s/he must recognise that it will bring reward or, at least, no sanction. In applying the social exchange theory to domestic violence, it is noted that the rewards from domestic abuse include first working off momentary anger.⁵⁶ In this regard Bandura states that biology and genetics may have some role to play.⁵⁷

In discussing the social exchange theory, Hempill provides the following example of how the theory applies: 'If a husband who wants no more discussion on his behaviour slaps his wife and gets her to stop talking about it then and later (because she is too afraid to bring up the topic), he is "successful".'⁵⁸ Secondly, there is the immediate gratification that the violent individual gets from hitting. Gelles and Straus note that if the force is sufficient, the victim will most certainly stop whatever she may have been doing that angered the abuser.⁵⁹ The immediacy of the reward is quite valuable to some individuals who do not have the patience to use the

⁵³ D Moreland in DA Moore above n22 at 42. Roy appears to be in agreement with the comment by Moreland. She notes that in a violent society, all members are capable of violence against one another. However, since men are usually taller, heavier and stronger than women, they can do more harm. 'Both men and women must admit that men, women, and children learn that physical aggression can be a useful tool, and that given the right set of circumstances, everyone can be violent.: MS Roy *Battered Women: A Psychological Study of Domestic Violence* (Van Nostrand Reinhold Company, New York: 1977) xii.

⁵⁴ In addition to the social exchange theory there is also the social leaning theory which describes how aggressive behaviours can be acquired through direct experience and changed through trial and error.: Dutton above n2 at 75.

⁵⁵ Gelles and Straus above n4 at 22-36.

⁵⁶ Above n52 at 1.

⁵⁷ Bandura above n4 at 26.

⁵⁸ Above n52 at 2.

⁵⁹ Gelles and Straus above n4 at 34.

lengthier, more reasoned approach. Power, control and self-esteem are other rewards for family violence. Gelles and Straus maintain:

The consequences of intimate violence further increase the rewards for an individual who desires to control another. Repeated violence tends to beat down victims to the point where they will do anything, or say anything, to please their batterers and avoid violence.⁶⁰

This feeling of greater control can also increase the abuser's feeling of self-esteem. For the batterer whose sense of self-worth has been diminished by external forces, control at home is most important. '[T]he hitting served to make these men feel that they could control something in their lives.'⁶¹ Another reward for those who hit is revenge. When conflict escalates between partners, it is easier to hurt each other because partners are generally more cued into each others specific vulnerabilities. 'If the conflict escalates and the one partner goes for the other's jugular, violence may be the only way the partner can defend himself or herself.'⁶² These are the recognised rewards and the sanction is low. However, in short, the comment of Gelles and Straus is apposite. They state, '[P]eople hit family members because they can ... '⁶³

Klein, a former Chief Probation Officer in Massachusetts, who conducted extensive research amongst convicted abusers, maintains that it is extremely difficult to identify a batterer without being part of his private home. He concludes that batterers have a distinctly separate private and public *persona*. Most abusers will present a very different image in public, appearing to be compassionate and caring, whilst their private posture is quite the opposite.⁶⁴ Most of the abuse takes place within the confines of the home, free from public scrutiny and surveillance. This is reasonably understandable, given that society clearly defines acceptable public behaviours. However, the abuser's constraints lose their efficacy at the door to the home, 'especially if the

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Gelles and Straus above n4 at 35.

⁶³ Gelles and Straus above n4 at 22.

⁶⁴ A Klein *Spousal/Partner Assault: A Protocol for the Sentencing and Supervising of Offenders, Quincy, Massachusetts* in Wallace and Seymour above n22 at 8-9.

husband comes home filled with the tension of his work and often a few beers and confronts a vituperative wife. Given this *milieu* physical confrontation is not unpredictable and quite predictable is the outcome, that the husband's fists are more damaging than the wife's tongue, however sharp.⁶⁵ Even when drunk, however, these men are careful to avoid public demonstrations of their abuse.⁶⁶

This finding was also borne out in Walker's study. She indicates that abusers, described as having Dr Jekyll and Mr Hyde personalities, often show their violent side only to their partners, thereby reinforcing the victim's opinion that no one would believe them if they complained about their abuser's conduct.⁶⁷ Gelles and Straus share this view. Relying on the work of Beatrice Whiting, a cultural anthropologist, they note that violence between family members did not occur when families lived in communal residences. It was 'when the walls of [separate houses] went up, the hitting started.'⁶⁸ As the family became more private, it also became more insulated from social control. 'Quite inadvertently, the family has evolved over the years into a perfectly shielded setting for private violence.'⁶⁹

2.3 THE VICTIM OF DOMESTIC VIOLENCE

There is no typical profile of an abused woman. She could be anyone. Research studies show that she does not present with peculiar, particular psychological traits that make her more susceptible to domestic violence. According to Boumil and Hicks studies have been unable to demonstrate any significant relationship between being battered and a victim's personality, behaviour or demographics.⁷⁰ Whilst they recognise that battered women usually all experience shame and guilt, they are quick to add that this does not suggest a personality marker that causes the victim to go in search of, cause, and remain in an abusive relationship. Those common or uniform personality traits that are subsequently

⁶⁵ Krause above n4 at 274.

⁶⁶ Above n26 at 45.

⁶⁷ Above n31 at 23.

⁶⁸ Gelles and Straus above n4 at 28.

⁶⁹ Gelles and Straus above n4 at 29-30.

⁷⁰ MM Boumil and SC Hicks *Women and the Law* (Fred B. Rothman & Co., Colorado: 1992) 571.

observed in victims are probably simply the result of their continued exposure to pain and terror.⁷¹ Thus, when ascribing characteristics, one must be careful to distinguish between traits that make a woman *prone* to abuse and markers that are the *result* of abuse. Some of the findings of living in an abusive relationship are set out hereafter.

1. Rhode has noted that the victims of the battered woman's syndrome are usually individuals who identify themselves primarily as wives and mothers. They see their role as being that of the caregiver in the home.⁷² Thus, when there is abuse in the home, they take full responsibility for the violence and believe that it is their fault.
2. A rather controversial feature that some authorities found common to battered women was that many of them had grown up in homes where there was violence. Researchers note that this led to an incorrect belief amongst the women that violence in the home was acceptable, that all women are abused, or the woman might even confuse abuse with love and attention.⁷³ Gelles also believes that the greater the exposure of women to violence as children, the more likely they are to accept their victimisation, as adults.⁷⁴ Dutton and Painter, too, believe that parents who behave violently towards or in the presence of their children are providing models of behaviour that the children are easily able to learn and copy.⁷⁵

Young girls growing up in a home where the women (or her mother) was intermittently assaulted by her father may develop the belief that such conduct is the model of marriage and, consequently, acceptable in a marriage

⁷¹ Ibid.

⁷² Above n47 at 241. For a fuller explanation of the battered woman's syndrome, see Chapter Three.

⁷³ H Wallace *Family Law Legal, Medical and Social Perspectives* (Allyn and Bacon, Boston: 1999) 192-3; above n44 at 460; A Browne *When Battered Women Kill* (Free Press, Macmillan: 1987) 23.

⁷⁴ RJ Gelles *Family Violence* (Sage, Beverley Hills: 1979) 101.

⁷⁵ D Dutton and SL Painter 'Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse' 1981 6 *Victimology* 139, at 142-3. See also Dutton above n2 at 175.

relationship.⁷⁶ They will then accept the violence in their lives just as they saw their mothers accept the beatings. Bowker's study has, however, provided a completely opposite result. In a study of one hundred and forty-six abused women, he found that:

... the wife's previous experiences with parental disputes, seeing parental assaults, and being assaulted by parents, had essentially no relationship to the characteristics of her own marital victimization.⁷⁷

Pagelow also found that women who had been abused as children were likely to leave violent relationships somewhat sooner than those who were inexperienced in violence.⁷⁸ Dobash and Dobash also argue strongly against the notion that women learn to be victims of domestic abuse through experiences of childhood violence.⁷⁹

It has been noted, however, that women who witnessed or experienced violence in childhood might experience feelings of greater helplessness when the violence recurred in their lives, and thus coped less effectively than someone without previous experience of abuse.⁸⁰ Browne, however, shares the view that in cases where the woman has never experienced violence the sudden exposure may leave her feeling shocked and confused. The abused victim may then make deliberate efforts to alter her behaviour to avoid further conflict and when this does not work, feelings of helplessness and depression may set in.⁸¹

From the above studies, it would appear that there are inconsistent findings on whether childhood exposure to violence leads girls into violent

⁷⁶ JC Bekker and JJJ Coertzee *Seymour's Customary Law in Southern Africa* (Juta and Co., Johannesburg: 1982) 143. This view was also heard many times by the writer during her work at the Advice Desk for Abused Women.

⁷⁷ Above n26 at 52.

⁷⁸ Pagelow above n2 at 404.

⁷⁹ Dobash and Dobash above n1 at 155.

⁸⁰ Browne above n73 at 27.

⁸¹ Browne above n73 at 28.

relationships, or makes them more inclined to stay in a violent relationship. Thus, Browne argues:

The assumption that how well a woman copes with violent acts by an adult partner is primarily related to whether or not she was exposed to violence as a child is greatly oversimplified, and may mask the much more important issue of how a woman explains the violence to herself.⁸²

3. A myth that must be conclusively set aside is the belief that battered women cause their assault because of their highly masculine and aggressive behaviour and that they enjoy the assault because of their masochistic tendencies and may consciously, or even unconsciously, court abuse.⁸³ Dutton and Painter ascribe such a belief to the fact that many abused women will remain in an abusive relationship or repeatedly return to the same environment, despite being offered an apparent chance to leave.⁸⁴ In fact, there appears to be no psychological research to support the notion that abused women exhibit masochistic tendencies.⁸⁵ Kuhl's research found that battered women appear to be quite far removed from the masochistic, aggressive individuals they have been made out to be. She describes them as cautious people, who try to avoid confrontation and feel inadequate in handling stress and trauma. They will often retreat into fantasy because they are dissatisfied with the *status quo*.⁸⁶ The fallacy that battered women are masochistic is further borne out by studies that show *inter alia*, little evidence that abused women are in search of pain, going from one abusive relationship

⁸² Browne above n73 at 30.

⁸³ Snell, Rosenwald and Robey submit that the husband's violent behaviour fulfils the masochistic needs of the wife while serving to release him from the anxiety about his effectiveness as a man. They continue to ascribe to the battered woman characteristics of aggression, ultra-efficiency, masculinity and sexual frigidity. The effects of wife battering are, therefore, mutually beneficial in diminishing the tensions of the relationship: J Snell, RJ Rosenwald, and A Robey 'The Wife Beater's Wife: A Study of Family Interaction' 1964 11 *Archives of General Psychiatry* 107-113.

⁸⁴ Above n75 at 143.

⁸⁵ See RJ Gelles and JW Harrop 'Violence, Battering and Psychological Distress Among Women' 1989 4 *Journal of Interpersonal Violence* 400, at 401-3.

⁸⁶ Above n41 at 460.

to another. In most cases, the women had never previously been in an intimate relationship characterised by violence.⁸⁷

As seen above, there is no set of characteristics that define an abuser or one likely to be abused. As Moore describes it, 'The practice of wife beating crosses all boundaries of economic class, race, national origin, or educational background.'⁸⁸ The traits are multifaceted and include social upbringing and environment, stress and frustration with life. These factors are often totally unrelated to the woman, herself, and are more often than not, related to external factors such as pressures at work, financial problems, low self-esteem, and being unable to meet personal goals and expectations.⁸⁹

2.4 PSYCHO-SOCIAL, SOCIO-ECONOMIC, AND ENVIRONMENTAL FACTORS THAT INFLUENCE AN ABUSED WOMAN'S DECISION TO REMAIN IN AN ABUSIVE RELATIONSHIP

Despite the focus that has been given to the abhorrence of violence against women, those who work to stop violence against women – that is, the people staffing the hotlines and shelters and legal service centres, those who argue and cajole to make law enforcement and justice act responsively and responsibly, those who lobby for legislative reform – know that the next time a woman is battered few people will question: What is wrong with the man? What makes him believe he can do this and get away with it? No, the first question, and probably the only question that leaps to mind is: Why doesn't she leave him?⁹⁰

Probably the most intriguing questions for the average person is: 'What is wrong with these women?' and 'Why do they remain in the violent relationship?'. The answer is as complex as the question is intriguing. To even begin to comprehend

⁸⁷ Above n75 at 143. At any rate, with the incidence of partner abuse being so high, it is not inconceivable that a woman who enters a subsequent relationship may find herself being abused again. It would be unreasonably simplistic to explain the situation on the basis that she thrives on violence and goes in search of the abuse. Such argument misses a crucial dimension of the problem namely that the rate of partner abuse is far too high.

⁸⁸ Gelles and Straus above n4 at 38.

⁸⁹ Above n22 at 16.

⁹⁰ EW Gondolf and ER Fisher *Battered Women as Survivors* (Lexington Books, Massachusetts: 1988) 23 and 38.

the answer, one needs to be sensitive to the various psychological factors (discussed in Chapter Three) and the social framework and economic constraints confronting the victim of abuse. The strength of the emotional ties between many women and the men who batter them is (frustratingly) well known to persons working with abused women. To most people it appears bizarre that a person subjected to repeated assaults would remain in the abusive environment and hence there are the suggestions that the victims must either be lying about the violence or that they are masochistic and enjoy the violence. (And, as Dutton and Painter point out, '[Such] beliefs may be more acceptable as they protect the professional from having to admit that their particular system is not functioning efficiently.'⁹¹) Such an attitude also conforms to the view that the 'world is just and people only get what they deserve'; and it further precludes the need for making any change.⁹² However, as Follingstad *et al* point out, rather than (incorrectly) considering the victimisation as evidence of the existence of some pathology on the part of the victim, one must take note of the more important sociological explanations, which have emphasised battered women's lack of options in the relationship.⁹³

2.4.1 Understanding Why Battered Women Remain In An Abusive Relationship

The reasons why a battered woman stays in a relationship will provide critical insight to a court judging a battered woman who is charged with killing her abuser. As will become evident from the later discussions in this Chapter, one issue that often arises in cases of battered women claiming self-defence to a charge of murder of their abusive partners is why, if the abuse was as bad as the abused victims claim, they remained in the violent relationship and did not leave the abuser. The fact that the women do remain in the relationship then raises the question of whether the circumstances were, in fact, as difficult as alleged by the accused. A proper understanding of the circumstances and lived reality of the

⁹¹ Above n75 at 143.

⁹² Ibid.

⁹³ DR Follingstad, AP Neckerman, and J Vormbrock 'Reactions to Victimization and Coping Strategies of Battered Women: The Ties that Bind' 1988 8 *Clinical Psychology Review* 373, at 373.

accused is highly relevant to a consideration of self-defence as it reflects directly on the reasonableness of the victim's actions. Again in assessing the reasonableness of the conduct of the accused, the courts will have to make the enquiry into whether killing was her only alternative to preserve herself.⁹⁴

What follows (in no order of priority) is an attempt to identify and explain some of the social, psychological, economic and environmental reasons why a victim of domestic violence remains in the abusive relationship.⁹⁵

2.4.1.1 Sanctity of the Home

As discussed in Chapter One, society has always stressed a belief in the sanctity of the home. Angel notes, 'Traditionally, a veil of secrecy, of privacy, has been drawn over sexual and physical abuse of women in the family.'⁹⁶ The very idea of abuse within the walls of the home contradicts the basic notion of the home and family as a place of protection and love. Consequently, as confirmed by Ludsin and Vetten, many women believe (albeit incorrectly) that if that is what is expected, then that must be what is correct. To indicate that something different is happening in her home is a direct, negative reflection upon the woman herself. The woman experiences guilt or embarrassment at the thought of admitting that she is being beaten because she believes that others will attribute her abuser's conduct to some fault on her part.⁹⁷ Other women are humiliated to admit the abuse because they believe that it is their own doings that have resulted in the battery; there is also a sense of shame that anyone could consider them so bad

⁹⁴ As will be evident from the cases discussed in Part 2 of the study there are many instances where, *prima facie*, the battered woman is not held in the abusive environment by force or against her will: however, whilst the restraint may not be overt, an understanding of the social, economic and psychological factors raised in this Chapter and in Chapter Three will assist a court to contextualise the circumstances of the accused and appropriately understand the impact, effect and concomitant consequences of living in an abusive relationship.

⁹⁵ The psychological variables that affect a battered woman's decision to remain in an abusive relationship are discussed further in Chapter Three. This section deals mainly with the access to social and economic resources, cultural factors, and dynamics of the relationship between the abuser and the abused, as well as factors such as role models and role expectations.: See above n93 at 374. See also Martin above n2 at 33 who also explains why some women can leave the abusive relationship whilst others remain immobilised.

⁹⁶ M Angel 'Susan Glaspell's *Trifles* and *A Jury of Her Peers*: Woman Abuse in a Literary and Legal Context' 1997 45 *Buffalo Law Review* 779, at 784.

⁹⁷ See H Ludsin and L Vetten *Spiral of Entrapment Battered Women in Conflict with the Law* (Jacana Media, Johannesburg: 2005) 23.

that they would have to beat them. Thus, victims may conclude that because of their conduct, they deserve to be beaten.⁹⁸ Sometimes women are embarrassed because they have stayed in the abusive relationship for so long. The further shame and embarrassment consequent upon her leaving her home can often also provide her with sufficient reason to stay in the relationship as unmarried and divorced women have, in certain cultures, traditionally been regarded as failures.⁹⁹ Sometimes, the woman is even convinced by other family members that any revelation on her part of the abuse would stigmatise not only her, but the entire family.¹⁰⁰

The lack of support and the emotional pressure to remain can be overwhelming. The belief that domestic abuse is a private matter is reinforced further by social standards - neighbours who look away, police and social workers who do not respond to reports of violence, and public attitudes that tolerate or deny family violence.¹⁰¹ Research also shows that for many black women, living in tribal or rural clans, leaving a violent relationship may mean them having to leave the area entirely and, as a result, moving away from their homes, their family and their friends. This also means giving up the physical and emotional support of their extended families and their communities.¹⁰²

⁹⁸ Above n97 at 23-4.

⁹⁹ PL Crocker 'The Meaning of Equality for Battered Women who Kill Men in Self-Defense' 1985 8 *Harvard Women's Law Journal* 121, at 134.

¹⁰⁰ Above n99 at 134-5. This comment of Crocker was confirmed in discussions and interviews with abused women and responses of Workshop participants and counsellors at the Advice Desk for the Abused, an NGO in KwaZulu-Natal between the period 1994 and 2007.

¹⁰¹ M Minow 'Words and the Door to the Land of Change: Law, Language and Family Violence' 1990 43 *Vanderbilt Law Review* 1665, at 1683. It is difficult, however, to generalise women's patterns of response to domestic abuse. Certain cultures are obviously more conservative whilst others appear to have addressed the problem in a more direct fashion. For example, research indicates that Aborigine women are far less likely to respond passively to any form of physical abuse and will more readily fight back: J Tolmie 'Pacific-Asian Immigrant and Refugee Women Who Kill their Batterers: Telling Stories that Illustrate the Significance of Specificity' 1997 19 *Sydney Law Review* 472, at 512. Similarly, Zawitz's research indicates that in the United States, the wives-to-husbands ratio for spousal murder differs for blacks and whites. She noted that 59% of black victims of spousal murder were wives while 74% of white victims were wives. Between 1977 and 1992, she found that the murder rates of young black females killed by intimates had declined from 8.4 per 100 000 to 6 per 100 000. During the same period, the rate for young white females remained relatively constant: MW Zawitz 'Violence Between Intimates' (November 1994) *U.S. Department of Justice NCJ-149259*, at 2-3.

¹⁰² See J Tolmie and J Stubbs 'Race, Gender, and the Battered Woman Syndrome: An Australian Case Study' 1995 8 *Canadian Journal of Women and the Law* 122, at 133.

In the past, the veil of secrecy was more comfortable and amenable to sustaining the existing social values. Had there been open public recognition of wife abuse and battery, it may have required a full interrogation of the entire social order, its standards and conduct. Thus, we coined euphemisms such as ‘family matter’ or ‘domestic disturbance’ to serve as smokescreens for conduct that would be considered assault (and often even assault with intent to do grievous bodily harm) were the act committed by a stranger.¹⁰³

2.4.1.2 Relationship with the Criminal Justice System

2.4.1.2.1 The Police Service

The response of the police and other law enforcement agencies to domestic violence and abuse has been somewhat ineffective.¹⁰⁴ In South Africa, the first piece of legislation placing an onus on the police specifically with regard to domestic violence was the *Prevention of Family Violence Act* 133 of 1993. The Act made provision for the mandatory arrest of an abuser in cases of domestic violence where the woman was in possession of a Family Violence Interdict. Despite this authority, however, practice demonstrated that the general response of the police who were called to attend at a scene of domestic violence was to try and get the man ‘to cool off’ and the parties to ‘settle their differences’.¹⁰⁵ Arrest was extremely rare. If there was any form of detention, it was merely to take the

¹⁰³ Gelles and Straus above n4 at 28.

¹⁰⁴ Above n97 at 34. See also E Shoham ‘The Battered Wife’s Perception of the Characteristics of Her Encounter with the Police’ 2000 44 *International Journal of Offender Therapy and Comparative Criminology* 242, at 242-256. Tolmie raises a controversial point based on her research conducted in Australia and New Zealand on domestic violence and the police response. From her study she emphasises the particularly poor response by the police to complaints from women, minority groups and racially disadvantaged communities and she comments that if a person can be identified by more than one of these factors, she may find the disadvantages she faces even more greatly compounded.: Tolmie above n101 at 499.

¹⁰⁵ This was the factual experience of the writer gathered during her service as a volunteer legal advisor at the Advice Desk for the Abused. The conclusion was drawn based on numerous interviews with the victims of abuse, various discussions and feedback from the counsellors at the Advice Desk, from engagements with the police themselves, and from interactions at numerous workshops on the domestic violence legislation facilitated by the writer. This finding is also supported at a more general level by Crocker.: above n99 at 134.

man for a drive 'around the block' to calm him down.¹⁰⁶ In many cases, police dispatchers attached a low priority to calls for help in cases of domestic abuse and the police often simply did not respond to the call or, when they did, the response was made long after the incident was over. As one policeman remarked during a training programme conducted by the Advice Desk for the Abused with the Phoenix police, 'We have only two vans to service the entire area. Therefore, when you have a robbery in progress, a dead body on the road, a motor car accident and a woman phoning in to say that her husband is beating her, how would you have us prioritise the cases?'¹⁰⁷ Unfortunately, this attitude still prevails and was clearly noticeable from the evidence of the accused in *Engelbrecht*.¹⁰⁸

The police further acknowledge that in many cases of domestic violence they make a conscious choice not to intervene and they support their stance of non-interference with the reason that it is really what the victim wants. They justify the statement by reference to the numbers of cases in which, after the abuser is arrested and charged, the victims make subsequent earnest appeals that he be released and/or 'the case dropped'.¹⁰⁹ The reality is that women will often change their minds or recant the original version of the incident to secure the freedom of the abusing partner and one can understand the frustration of the law

¹⁰⁶ Posch indicates that a similar attitude has been noted amongst the law enforcement officers in the U.S.A., as well. She notes, 'At most, the officers would take the alleged abuser for a walk to the end of the road to cool down.': P Posch 'The Negative Effects of Expert Testimony on the Battered Women's Syndrome' 1998 6 *Journal of Gender and the Law* 485, at 487.

¹⁰⁷ See also above n97 at 35.

¹⁰⁸ *Engelbrecht* 2005 2 SACR 41 W. The case of *Engelbrecht* is dealt with in detail in Chapter 4. In this case, the accused shot and killed her husband whom she alleged had abused her for years. In her evidence, she testified that she had made several attempts to seek the assistance of the police who had either been reluctant to assist her or had not responded at all when she telephoned for help after specific incidents of violence.: at 62-83 (or see above Chapter 4 fn88).

¹⁰⁹ Research also indicates that many policemen positively identify with the husbands and believe that the victims 'must like it or they would leave'. A shelter worker assisting a battered woman pack her things to leave her abusive husband recounts the unhelpful attitude and sarcastic response of the policeman at the scene who said to her, '[N]ext you will be helping my wife.': J McCulloch 'Police Response to Domestic Violence, Victoria' in SE Hatty (ed.) *Domestic Assault* (Australian Institute of Criminology, Canberra: 1985) 530. See also *Balistreri v Pacifica Police Department* 855 F.2d 1421 (9th Cir. 1988).

enforcement agents.¹¹⁰ However, what is being missed here is the reason for many women retracting their initial statement. Experience shows that this often happens at the time when there is some attempt at reconciliation between the victim and the abuser. However, her apparent *volt-face* is not always because the victim has once again 'fallen in love' with her assailant or even because she 'feels sorry' for him but because of fear of further assault and reprisals or the threat of the withdrawal of financial support.¹¹¹ As McCulloch notes, 'It is a brave woman who will maintain she will give evidence against a violent man while he is at large to repeat his bashing, or living in the same house as she.'¹¹²

However, it must be acknowledged that with the increased lobbying from women's organisations and the growing focus on domestic violence, the selective inattention that has characterised the attitude of the police to domestic violence is beginning to change but, for now, it must be noted that there are still many police officers who continue to entertain a personal misguided belief that inactivity preserves the private nature of family life.¹¹³

In 1998 the *Domestic Violence Act, 1998* repealed the *Prevention of Family Violence Act, 1993* and has *inter alia* removed the absolute requirement of mandatory arrest: rather, the later Act provides that the police officer must make an arrest only if of the view that there is a threat of further imminent harm to the complainant. Otherwise, the alleged abuser is served with a Notice to appear in court to answer the charge against him.

¹¹⁰ Above n97 at 36-7. The remarks of Ludsin and Vetten have been borne out in the writer's own work with victims of abuse and the police and other law enforcement agents dealing with domestic violence.

¹¹¹ See also 'Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials' May 1996 U.S. Department of Justice NCJ 160972 or <http://www.ncjrs.org/txtfiles/batter.txt> 16 (accessed 21/10/2001).

¹¹² McCulloch above n109 at 525. Also, as noted by Wallace and Seymour, the battered woman's reluctance to become involved in lengthy criminal proceedings may be as a result of an avoidance reaction associated with post-traumatic stress disorder.: above n28 at 8-18. They note further that the victim's refusal to participate in the case is often a means to forestall the re-experiencing of the traumatic event. This is one of the coping mechanisms identified as characterising persons suffering painful and distressing emotions.: above n28 at 8-18.

¹¹³ Above n106 at 487. Also noteworthy is the finding of Wallace and Seymour that many abused women also do not bother to report incidents of abuse to the police because they recognise that the abuser has little or no respect for the law and there is little that the police can do to prevent the abuse.: above n28 at 8-18.

2.4.1.2.2 The *Domestic Violence Act*, 1998

The *Domestic Violence Act*, 1998 (hereafter referred to as the Act) has made provision for victims of abuse of apply to the court for a Protection Order against the abuser. Unfortunately, the application form is long and written in a language that is technical and confusing for many victims. The unintended consequence is that many victims either leave court without completing the application, or submit incomplete forms, or forms with incorrect information (which results in unsuitable orders being made by the presiding magistrate).¹¹⁴ Furthermore, the imprecise language of the forms and the failure to define terminology has resulted in magistrates taking wide latitude in interpreting the forms.¹¹⁵ Ludsin and Vetten note that '[w]ithout appropriate training regarding domestic violence, ill-informed attitudes towards victims or ignorance of what constitutes abuse could deny [and does deny] many women their legal remedies to violence.'¹¹⁶

Section 2 of the Act further requires that where reasonably possible, the police officer at the scene of an incident of domestic violence must hand the complainant a Notice which details the remedies and protections available to her, in the official language of the complainant's choice. This immediately raises another problem. In South Africa, with its eleven official languages, the Notice when it is available at police stations is often only available in English. The excuse that has been repeatedly heard from attending officers for non-compliance with the instruction of the Act is that the South African Police Service has not provided the necessary documents because of financial constraints.¹¹⁷ However, this is an essential service. Victims reporting incidents of abuse are often in a heightened state of distress. Even when the Notice is explained to them, it is unlikely that full cognisance will be taken of its contents at the time.

¹¹⁴ See also above n97 at 29-30; and P Parenzee, I Artz and K Moults *Monitoring the Implementation of the Domestic Violence Act: First Research Report 2000-1* (Institute of Criminology, University of Cape Town: 2001) 24.

¹¹⁵ Most of the problems of application and interpretation arise particularly with regard to section 7 of the Application for a Protection Order Form (Form 2) under the Regulations to the *Domestic Violence Act* 106 of 1998.

¹¹⁶ Above n97 at 31.

¹¹⁷ This comment was repeated and confirmed by members of the South African Police Service attending a training programme presented by the writer in Durban from 9-10 February 2007 for the Advice Desk for the Abused. See also above n97 at 34.

Most victims of domestic abuse will not easily seek advice regarding their rights from third parties: however, if the Notice is readily available, she can read it in private and decide on an informed course of action.

According to the Regulations to the Act, after presenting a copy of the Notice to the victim, the police officer must also explain the contents of the Notice to the complainant, which includes an explanation of the legal remedies available to her. This requirement presupposes that the responding officer is familiar with the spectrum of legal remedies available to the victim. Further, many officers indicate that language barriers and the emotionally charged atmosphere prevent them from performing the explanatory function.¹¹⁸

2.4.1.2.3 The Court System

Many applicants complain that the Clerks of the Court are rude and condescending towards them. This was confirmed by the study of Parenzee *et al* who write:

The frustration felt by [court] personnel ... are then directed towards complainants seeking assistance. An unexpected consequence of this was also revealed in our interviews with court and police personnel, namely, the tendency to over-empathize with the respondent (the abuser). In both sectors there was an alarming number of interviewees who identified more closely with the circumstances of the respondent than with those of the complainant.¹¹⁹

A further criticism levelled against the courts and their response to domestic violence is in respect of the sanctions imposed for a breach of a Protection Order. In terms of the Act, the prescribed sanction for a violation of the Protection Order is a fine or imprisonment for a period not exceeding five years, or both. However,

¹¹⁸ Response of police officers at the training workshop to which reference was made above in n117.

¹¹⁹ Above n104 at 107. This is particularly concerning in light of the duty placed upon such officers of the court (and specifically the Clerk of the Court) by section 4 of the *Domestic Violence Act*, 1998 requiring them to inform the complainant, in the prescribed manner of the relief available in terms of the Act.

first offenders have, as a rule, received extremely lenient treatment, and repeat offenders have not fared significantly worse.¹²⁰ Imprisonment is rare and the reason provided, over and over again, is that the court needs to be cautious of breaking up homes and families.¹²¹

Ludsin and Vetten raise a further problem confronting women seeking Protection Orders. They note that once an applicant has completed the application form, despite the Act requiring a hearing as is reasonably possible,¹²² 'the court process suffers from long delays. ... The delayed process means that women seeking protection orders risk continued abuse during the waiting period.'¹²³ Additionally they note that even when an Order is granted, it only becomes effective when it is served upon the respondent. Research studies show that service can take days, weeks or up to four months to be effected. 'For women terrified of abuse, this gives little security.'¹²⁴

2.4.1.2.4 Endnote on the 'Relationship with the Criminal Justice System'

Critically evaluating the relationship between the criminal justice system and victims of domestic violence as discussed above, there is evidence to support the reasonableness of the belief held by many battered women that the police, the law, will neither protect them from the abuser nor stop the domestic violence.

¹²⁰ This finding is a consolidation of the experiential work of the writer serving as a legal advisor for the Advice Desk for the Abused at the shelter and at the Durban and Pinetown Family Courts during the period 1996 to 2002. The findings were subsequently repeated in a research project undertaken by the writer at the Durban Family Court. In this project the researcher reviewed 30 court files from the Durban Family Court from March to June 2005 and found that mainly the magistrates prescribed a suspended sentence for persons found to be in breach of a Protection Order. Where a fine was imposed, the amount ranged between R50,00 and R400,00. This project forms part of a research study on sentencing trends in cases of domestic violence being undertaken by the writer.

¹²¹ Discussions held with Acting Magistrate S Panday from the Durban Magistrates' Court in November 2006. This view was confirmed in a study of 30 file records from the Durban Family Court. See also above n97 at 32 and for the (similar) international experience, Tolmie above n101. Boumil and Hicks indicate that a similar response from the courts in many states in the U.S.A. They note, 'They [the police] do not address violence among close acquaintances as they would address similar crimes between strangers.': above n70 at 553. Battered women in Australia also speak of similar experiences with regard to the investigation of their complaints.: Tolmie above n101 at 486.

¹²² Section 5 of the *Domestic Violence Act*, 1998.

¹²³ Above n97 at 31.

¹²⁴ Ibid.

Ludsin and Vetten also make a similar finding from their research studies with battered women and the law, noting that the realities of the battered woman's interaction with the police and legal system 'show that the assumption that the justice system can always help an abused woman is patently false.'¹²⁵

Understanding something of the nature and effects of battery, and the mind of the victim, will assist police and the legal system to respond more appropriately. The reality is that a battered woman who believes that she is denied proper protection from the criminal justice system, also believes that she has very few options other than remaining with the abuser or freeing herself by killing him. Thus, the law is seen as part of the violence when the judge refuses a Protection Order to a woman who fears that she will be beaten by her intimate partner; or when the court dismisses the wife's claim of marital rape; or when the magistrate or court personnel blame her for her victimisation because she failed to leave the home; or when the law enforcement agencies trivialise her experiences of abuse at the hands of her partner.¹²⁶

2.4.1.3 Gender Stereotyping

Gender stereotyping of acceptable or normative behaviour plays an important role in explaining and understanding why women do not immediately recognise the problem of domestic abuse. Boys learn that they need to be aggressive, they play fighting games and war games, and are bought guns and cars, boxing gloves and racing sets. They grow up identifying with Power Rangers and the X-Men. Little girls, on the other hand, are schooled into playing with dolls and holding tea parties. Boys don't listen to the girls - they take charge - and as they grow older this translates into power and control. For years, women have been socialised into accepting that control. This view is confirmed by Barnard *et al* who express the view that masculinity, by social definition, is articulated largely through the demonstration of physical courage, toughness, competitiveness, and

¹²⁵ Above n97 at 37.

¹²⁶ As Cover points out further with regard to the courts, 'judicial action as well as inaction can be violent.': RM Cover 'Violence and the Word' 1986 95 *Yale Law Journal* 1601, at 1601. Minnow cites a specific case of a judge who scolded a battered woman who had come before him to apply for a restraining order 'for wasting the court's time'. The woman was later found dead and her husband was the chief suspect.: Minnow above n101 at 1672.

aggressiveness; whilst femininity is distinguished by gentleness, expressiveness, and responsiveness.¹²⁷ Whilst this view may be gradually dissipating, it still remains apposite.

Allied to the defined roles for men and women, is the belief that 'girls must marry' and that a woman is not fulfilled until she is married, has children and is spending time caring for house and family.¹²⁸ This kind of prescribed role will often keep her in a relationship, in order to conform to the designated social norms. When incidents of violence occur, the woman may try harder to maintain the relationship and she begins to invest more time and effort in making it work. Thus, notes Wallace, men with abusive and controlling tendencies will often seek out partners 'who are easily victimised, willing to take responsibility for the relationship, passive and fit the self-sacrificing role'.¹²⁹

Linked to gender stereotyping, is the finding that many women have no control over household finances. This is even the case in homes where the women work and earn independent salaries. Waits finds that many battered women will accede to their husband's demand to hand over all their earnings to him. In many cases, the initial agreement is an attempt to maintain the peace in the home. However, he notes that in just as many instances, the women believe that complete command over family finances is a husband's right.¹³⁰

In *The Second Sex*, Simone de Beauvoir contemplated the socially determined roles of men and women. Describing the role of the boy De Beauvoir wrote:

Against any insult, any attempt to reduce him to the status of an object, the male has recourse to his fists, . . . he does not let himself be transcended by others, he is himself at the heart of his subjectivity.

¹²⁷ Above n20 at 271.

¹²⁸ See EC Viano (ed.) *Intimate Violence Interdisciplinary Perspectives* (Hemisphere Publishing Corporation, Washington: 1992) 6-7. However, Straus actually attributes very few wife beatings to cultural factors: see M Straus 'A Sociological Perspective on the Prevention and Treatment of Wifebeating' in M Roy (ed.) *Battered Women: A Psychological Study of Domestic Violence* (Van Nostrand Reinhold Company, New York: 1977) 195.

¹²⁹ Wallace above n73 at 185.

¹³⁰ K Waits 'The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions' 1985 60 *Washington Law Review* 267, at 280-1.

Violence is the authentic proof of each one's loyalty to himself, to his passions, to his own will. [But with regard to girls s]uch masterful behaviour is not for young girls, especially when it involves violence.¹³¹

Times have changed since De Beauvoir's days and one can say with authority that all women are not inevitably 'doomed to docility, to resignation'.¹³² The transition from the traditional gender stereotype to the new age of women's rights and empowerment has been difficult for many men (and women). Partners in intimate relationships begin to blame and resent each other for expecting the traditional roles to be fulfilled. The incompatible desires to more firmly rely on old values and early expectations in the face of changing social *mores* and the lack of *consensus* concerning current gender roles, may lead couples to face new frustrations which can lead to conflict in the marriage.¹³³ When that conflict expresses itself violently, as it very well may, the woman, as the physically weaker partner, is most likely to bear the physical brunt of the ordeal.¹³⁴

2.4.1.4 Fear of the Abuser

Fear of the abuser's reaction to her leaving often keeps the battered woman a prisoner in the home.¹³⁵ The battered woman may reasonably fear that should she attempt to withdraw from the relationship, the batterer will take revenge upon her or the children or even her family. The reality of this belief is borne out by the intimate homicide statistics cited by Silverman and Mukherjee,¹³⁶ as well as Snodgrass who states that in the United States specifically '[w]omen who leave their batterers are at a seventy-five percent greater risk of being killed by the

¹³¹ S De Beauvoir *The Second Sex* (translated and edited by HM Parshley) (Knopf Publications, New York: 1953) 330-1.

¹³² Above n131 at 331.

¹³³ S Prescott and C Letko 'Battered Women: A Social Psychological Perspective' in M Roy *Battered Women* (Van Nostrand Reinhold Company, New York: 1977) 78.

¹³⁴ Martin above n2 at 43.

¹³⁵ See LB Rosewater 'The Clinical and Courtroom Application of Battered Women's Personality Assessments' in DJ Sonkin (ed.) *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* (Springer Publishing Co., New York: 1987) 91.

¹³⁶ RA Silverman and SK Mukherjee 'Intimate Homicide and Analysis of Violent Social Relationships' 1987 *5 Behavioural Sciences and the Law* 37, at 39.

batterer than those who stay.¹³⁷ Thus Hempill notes, 'Staying with one's batterer provides some minimal security in that the battered woman knows his whereabouts and what he is doing. Thus, a battered woman's behaviour may be reflective of emotions rather than helplessness.'¹³⁸

Research by Walker, Thyfault and Browne led them to the finding that during the experiences of battering, many women do make efforts to leave the abusive situation. They write:

Some actually had gotten away but their husbands traced them and followed them, even to another state. . . . Some of the women . . . had been separated or divorced for up to two years . . . and yet still experienced life-threatening harassment and abuse.'¹³⁹

As Truss notes, 'The combination of extreme dependence and violent control makes the abuser a dangerous man to live with, but an even more dangerous man to leave.'¹⁴⁰

2.4.1.5 Financial and Emotional Dependence

Society may be to blame for fostering women's dependency. In many homes, the man she marries determines a woman's social and financial status.¹⁴¹ In the past, employment opportunities for women were scarce. If there were children, her employability was reduced even further. Thus, the woman became largely dependent on her husband to provide the necessities for the home. Even today, with better work opportunities for women, many women are still unable to support themselves independently. It is a well-accepted fact that dependency in marriage

¹³⁷ JL Snodgrass 'Who Are We Protecting: The Victim or the Victimizer?' 2002 33 *McGeorge Law Review* 249, at 249.

¹³⁸ Above n52 at 5.

¹³⁹ LEA Walker, R Thyfault and A Browne 'Beyond the Juror's Ken: Battered Women' 1982 7 *Vermont Law Review* 1, at 12.

¹⁴⁰ JM Truss 'The Subjection of Women . . . Still: "A Sociological Perspective on the Prevention and Treatment of Wifebeating"' in M Roy (ed.) *Battered Women: A Psychological Study of Domestic Violence* (Van Nostrand Reinhold Company, New York: 1977) 195.

¹⁴¹ Wallace above n73 at 182.

relationships is often linked to economics.¹⁴² Straus notes that it is not uncommon for an abuser to sever his partner's financial support and limit (or eliminate) and ability for her to leave the relationship.¹⁴³ Economic dependence establishes a vicious cycle of power and control for, as Allison and Martineau write 'the abused spouse's economic independence is injured by her isolation, and her social contacts and possible sources of support are concurrently limited by her economic abuse.'¹⁴⁴ This is again borne out by Snodgrass who notes that in the United States for example, there are nearly three times more animal shelters than there are shelters for battered women and children and fifty percent of all homeless women and children are on the streets due to domestic violence.¹⁴⁵

Although divorce is much easier today and men may be ordered to pay maintenance, divorce may result in a reduction in the standard of living, or maybe even instant poverty. In some cases, the batterer has a substantially better financial standing than his victim. In these cases, he may threaten to contest her claim for custody of their children or if he relinquishes custody, he may refuse to pay any form of maintenance to her, for herself or the children. Thus, Rounsaville notes that all things being equal, many abused women remain because of economic reasons.¹⁴⁶

Emotional dependency is often another reason why women remain in abusive relationships. During the marriage, the abuser will begin to isolate his partner from her friends and family.¹⁴⁷ In this way, she has no one in whom to confide,

¹⁴² Above n75 at 144.

¹⁴³ Straus above n128 at 185.

¹⁴⁴ JH Allison and ED Martineau 'The Secret Formula to Successful Domestic Violence: An Examination of Abuse as a Means to an End and the Options Available to Halt the Violence' 1996 11 *Adelphia Law Journal* 1, at 5.

¹⁴⁵ Above n137 at 249-250.

¹⁴⁶ B Rounsaville 'Theories in Marital Violence: Evidence from a Study of Battered Women' 1978 3 *Victimology* 11, at 17.

¹⁴⁷ This finding was born out by the study conducted by Nielson *et al* who noted further that because of the isolation that characterised the battered women, they were also less likely than non battered women to report that they could rely on relatives, neighbours and friends in times of illness, financial troubles, or other crises: JM Nielson, RK Endo and BL Ellington 'Social Isolation and Wife Abuse: A Research Report' in E C Viano (ed.) *Intimate Violence Interdisciplinary Perspectives* (Hemisphere Publishing Corporation, Washington : 1992) 56 and 58. See also the

and no one to draw her attention to the unacceptability of the abuser's conduct. Her only emotional link is to the abuser and her entire world is limited to the values and actions of her partner. This enables the abuser to completely dominate and control her.¹⁴⁸ This power-play of dependence and control, acts to reduce the victim's self-esteem and the abuser gains absolute control over her. When isolation is combined with physical or sexual abuse, the effects can be even more debilitating. The intermittent acts of violence serve to reinforce the abuser's authority over her. Wallace notes that in relationships of this nature, the 'intermittent reinforcement creates a traumatic bond in which the abused partner becomes progressively more attached to the abuser and intent on modifying him'.¹⁴⁹ Many women will themselves begin to avoid friends and family for fear that they will ask her questions about her injuries or want to discuss her relationship with her partner. These topics are often uncomfortable for an abused woman to discuss and she would rather, simply, keep away from socialising with others. Thus, it appears that isolation seems to both precede and result from battering.

2.4.1.6 Hope and Love

A very important reason why battered women remain in the abusive relationship is a combination of hope and love. As incomprehensible as it may sound, many battered women have strong affective feelings for their partners. She loved him when she married him and that love comes to the fore again when he is not beating her.¹⁵⁰

The strong affective bond that binds women to their abusive partners was clearly reflected in Browne's study of forty-two women who were charged with killing

findings reported in D Singh 'Intimate Abuse – A Study of Repeat and Multiple Victimization' 2003 16 *Acta Criminologica* 34-51.

¹⁴⁸ Above n52 at 185.

¹⁴⁹ Ibid. For more detail on the theory of traumatic bonding, see Chapter Three.

¹⁵⁰ As Burke notes, 'Love is a powerful incentive and can convince women that the batterer's repeated promises of change will eventually be kept. [One battered woman] explains that "[y]ou end up staying because you really want to believe that the person you love loves you back. ... Because you hate what they're doing, it doesn't mean that you hate them ... [a]nd you believe that they'll change.'" Battered women may value the possibility of that change more than they do their own safety.' AS Burke 'Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, Out of the Battered Woman' 2002 81 *North Carolina Law Review* 211, at 273.

their batterers. Browne notes that most of the women reacted to their actions with sorrow and horror - many were, in fact, responsible for calling the medical services and even the police to the crime scene.¹⁵¹

2.5 CONCLUSION

The research demonstrates that there is no stereotype of an abuser or a battered woman. Numerous factors operate singly or in various combinations to shape the individual lived reality and experience of a victim of domestic violence. Thus, in evaluating the conduct of a battered woman, courts must be aware of the reality of her individual circumstances that may have shaped her conduct. It would be a grave error for courts to try and rely on a 'typical' profile of a victim of domestic violence in judging her conduct.

The foregoing discussion also highlights the interdependencies between the various social, sociological, economic and personal factors that result in many victims of domestic violence remaining in the abusive relationship. The research presented is especially relevant for the fact that it explains the myth that women in abusive relationships may leave the relationship at any time and that those victims of abuse who remain in the violent home environment do so out of choice. Once one begins to understand these factors, it is submitted that instead of always asking 'why doesn't she leave', a more appropriate and less blaming query might be 'what is it that keeps her captive in a violent relationship.'

¹⁵¹ In several of the cases, the women expressed the feeling that they did not want the man to die and many repeatedly stated that they had never stopped loving the man.: Browne above n73 at 141. Similarly Rounsaville notes, 'The most striking phenomenon that arose in the interviews and in the treatment with battered women was [that e]ven those who had divorced or separated from the partner stayed in contact with the partner beyond ordinary activities such as visitation of children.: above n146 at 20-1. Burke also notes that some women are coerced to remain in the abusive relationship because of the abuser's threats to commit suicide if she were to terminate the relationship. In this regard Burke states, 'The victim's feelings of responsibility for the batterer's well-being may defeat her strong desire to protect herself by leaving the abusive relationship.': Above n150 at 272.

This is totally contradictory to the findings of Adler who notes that 'women who killed their husbands seldom expressed remorse. Instead, they often expressed relief and occasionally expressed joy after killing their spouses.': above n51 at 880. The greater research findings appear to contradict Adler who, it is submitted, makes far too generalised a statement based on an inadequate sample.

PART ONE: DOMESTIC VIOLENCE

CHAPTER THREE

SELECTED PSYCHOLOGICAL THEORIES AND THE DYNAMICS OF BATTERING THAT EXPLAIN AN ABUSED WOMAN'S CONDUCT IN AN ABUSIVE RELATIONSHIP

Part One Chapter Three is a discussion and analysis of the nature and effects of the psychological forces that characterise abusive domestic relationships in which the woman is the victim of the abuse and the male partner, the perpetrator. Three theories namely, the Battered Woman Syndrome, the Theory of Traumatic Bonding and Psychological Entrapment, and Separation Anxiety, are discussed. The discussion also focuses on providing a better understanding of the concept of 'learned helplessness' and its impact with regard to the abused woman and her lived reality and experience and assists further to explain why many abused women remain in an abusive relationship despite the violence and aggression.

The Chapter provides an analysis of the literature on the battered woman syndrome as a marker for all battered women and engages with the criticisms levelled against the theory as defined by Walker.

3.1 INTRODUCTION

Kilpatrick states:

Victimization can obliterate the most fundamental assumptions that people rely upon in order to function each day of their lives - that they are immune from harm; that events in this world are predictable and just; and that they are worthwhile, decent individuals.¹

According to Boumil and Hicks, a 'battered woman' is one who has an intimate relationship with a man who repeatedly uses physical or psychological coercion in order

¹ DG Kilpatrick *National Victim Assistance Academy Lecture Series* (U.S. Department of Justice and Office of the Victims of Crime, Fresno: 1999) 6.1-1

to force her to maintain the relationship.² Allison and Martineau identify a general six-stage emotional and psychological decline that they claim is experienced by most battered and abused women.³ *Phase 1* follows immediately after the assault: The victim experiences shock and terror, shock at the realisation that her partner was responsible for such aggression directed at her and terror as a reaction to the abuse. The researchers identify that in cases of sexual and emotional abuse, the victim may go through an overwhelming feeling of humiliation. There is also hope that the incident will not be repeated.⁴ This emotion of positive hopefulness is the basis for *Phase 2*, during which the victim makes every effort to appease the abuser, believing that her placatory acts will subvert any future violence. With the commission of the second incident of violence the victim proceeds to *Phase 3*, which is usually an attempt to reach out for help - either to family, friends, the justice system or women's organisations. If the victim is unsuccessful in her effort to secure real aid (which is often the case) there is an increased fear, often accompanied by increased abuse. In *Phase 4* the abused victim begins to view her life as being out of her control. Allison and Martineau are clear, though, that the victim's feelings of powerlessness during this stage do not necessarily translate into passivity in the face of violence. 'In fact, forty percent of female victims who experienced violence from their partner responded physically to protect themselves.'⁵ They argue further that whilst it is quite reasonable for a person to feel entirely powerless to change his or her situation, in the face of a direct threat the same individual still has the capacity to resist.⁶ (This is a possible explanation toward understanding how the apparently helpless victim of abuse builds up the courage to eventually attack (and sometimes even kill) her abuser.) During *Phase 4* the victim is still cognisant of the wrongful nature of her partner's actions; however, in *Phase 5* the victim begins to internalise the problem and see herself as being in the wrong.

Martineau and Allison attempt to explain this change in belief as follows: All efforts at help have been useless and the victim begins to understand that the abuse is deserved.

² MM Boumil and SC Hicks *Women and the Law* (Fred B. Rothman & Co., Colorado: 1992) 570. In the clinical study by Gelles and Harrop, they found that the psychological consequences of abuse were often just as significant as the physical consequences. RJ Gelles and JW Harrop 'Violence, Battering and Psychological Distress Amongst Women' 1989 4 *Journal of Interpersonal Violence* 400, at 415-6.

³ JH Allison and ED Martineau 'The Secret Formula to Successful Domestic Violence: An Examination of Abuse as a Means to an End and the Options to Halt the Violence' 1996 11 *Adelphia Law Journal* 1, at 7-9.

⁴ Above n3 at 8.

⁵ Ibid.

⁶ Ibid.

'Once this state of self blame is reached, the victim can become numb and exhausted,'⁷ Arising from their research, Miller and Porter distinguish two kinds of self-blame: self-blame for causing the abuse and self-blame for tolerating the violence. In their study, they found that self-blame shifted along the duration of the violence. They noted that the less the woman blamed herself for causing the violence, the more she blamed herself for tolerating the abuse.⁸ However, they note, whichever stage she was in, the feeling of self-blame kept her captive in the relationship.⁹ *Phase 6* is the last step in a victim's response to a persistently abusive situation. During this phase, many abused women could present with symptoms of post-traumatic stress disorder.¹⁰

3.2 THE BATTERED WOMAN SYNDROME AND THE THEORY OF LEARNED HELPLESSNESS

3.2.1 Introduction

Leonore Walker published her research on battered women in the 1970's and introduced the battered woman syndrome in her book *The Battered Woman*.¹¹ According to her findings, any woman who experiences a 'battering cycle' at least twice with the same man, and remains in the relationship, has become a battered woman.¹² Researchers

⁷ Ibid.

⁸ DT Miller and CA Porter 'Self-Blame in Victims of Violence' 1983 39 *Journal of Social Issues* 139, at 146.

⁹ Ibid.

¹⁰ BM Housekamp and DW Foy 'The Assessment of Posttraumatic Stress Disorder in Battered Women' 1991 6 *Journal of Interpersonal Violence* 367, at 373; and A Kemp, EJ Rawlings and BL Green 'Post-Traumatic Stress Disorder (PTSD) in Battered Women: A Shelter Sample' 1991 4 *Journal of Traumatic Stress* 137, at 144. Kilpatrick identifies four characteristics that will be present in a victim suffering from post-traumatic stress disorder namely, (i) a persistent re-experiencing of the traumatic event to the extent that it always remains alive in the mind of the victim; (ii) persistent avoidance of things associated with the traumatic event; (iii) a reduced ability to form emotional links and bonds; and (iv) symptoms of 'increased arousal' including sleep difficulties, outbursts of anger, and extreme startle responses.: above n1 at 6.1-7/8. To this list McCormack adds the trait of 'hyperalertness' which, notes Walker, carries the concurrent trait of hypervigilance to cues of further harm.: A McCormack, AW Burgess and C Hartman 'Familial Abuse and Post-traumatic Stress Disorder' 1988 1 *Journal of Traumatic Stress* 231, at 232; and LEA Walker 'Post-Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome' 1991 28 *Psychotherapy* 21, at 21.

Of further note is the fact that battered woman syndrome has been accepted as a sub-category of post-traumatic disorder since 1987 in the *Diagnostic and Statistical Manual of Mental Disorders (DSM III)* published by the American Psychiatric Association (Washington: 1994) 393.

¹¹ LE Walker *The Battered Woman* (Harper Colophon, New York: 1979).

¹² Walker above n11 at 5-6. For a fuller explanation of a 'battering cycle', see further below.

accept that it may be reasonable (but not necessarily acceptable) for a woman to find herself in a violent situation once. However, if after a second incident of abuse she continues to participate in the relationship, she is not only a battered woman but has also become the victim of a process known as battered woman syndrome.¹³ It is recognised that not all women who are battered by intimate partners will react in the same way, or even similarly to the violence. However, Douglas finds that those who do suffer from battered woman syndrome, typically, are less able to respond effectively to the violence against them.¹⁴

3.2.2 The Cycle of Violence Theory

One of the main characteristics of the battered woman syndrome is what Walker describes as the 'battering cycle' or 'cycle of violence'.¹⁵ Walker states that this 'cycle of violence' is defined by three distinct phases that are repeated over the history of the relationship. She identifies the first phase as the 'tension-building' phase; the second phase is the 'explosion' or 'acute battering' phase; and the third phase is the 'honeymoon' phase', characterised by a calm, loving respite from the tension and violence.¹⁶

The tension-building phase is signified by a build-up of stress and tensions between the partners, hence the name. During this time, the woman's role is characterised by attempts to remove or reduce all known irritants from her partner's environment and to

¹³ Boumil and Hicks above n2 at 570. At the outset, it must be noted that battered woman syndrome is not a defence but simply seeks to explain the behaviour of women in violent relationships by identifying the symptoms or characteristics typically exhibited by such women. Authorities describe the battered woman syndrome as a collection of common behavioural and psychological characteristics exhibited by victims of prolonged, repetitive patterns of physical and emotional abuse at the hands of their partners. It is generally accepted as a form of post-traumatic stress disorder.: MS Raeder 'The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence' 1996 67 *University of Colorado Law Review* 789, at 795; Lecture presented by Dr Steven Walker at the *National Victim Assistance Academy Lecture Series* in 1999 held at the University of Fresno, California.

¹⁴ MA Douglas 'The Battered Woman's Syndrome' in DJ Sonkin (ed.) *Domestic Violence On Trial: Psychological and Legal Dimensions of Family Violence* (Springer Publishing Co., New York: 1987) 40.

¹⁵ LE Walker *The Battered Woman's Syndrome* (Springer Publishing Co, New York: 1984) 55-70.

¹⁶ Ibid. See also the Report of the U.S. Department of Justice which acknowledges to the findings by researchers that some abusive relationships are specifically characterised by distinctive patterns before, during and after episodes of physical assault against partners: *Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials* U.S. Department of Justice NCJ 160972 May 1996 or <http://www.ncjrs.org/txtfiles/batter.txt> 19 [accessed 21/10/2001].

keep him calm. The woman becomes more nurturing and in this way she hopes to prevent her partner from losing control. 'A woman begins to organise her life so as to maximally placate her mate and to avoid any semblance of provocation,' write Boumil and Hicks.¹⁷ The victims rationalise their conduct of appeasement of the abuser with the belief that any resulting abuse must be their fault. The victims, therefore, accept that it is their obligation to try and prevent the assault.¹⁸ However, notes Wallace, many abusers are spurred on by the victim's passivity and make no effort to control their own emotions.¹⁹

Wallace and Seymour found that during this phase, the abuser often becomes paranoid that his spouse is trying to leave him or is having an extramarital relationship. The victim's efforts to keep out of his way (to avoid an explosion) serve to reinforce his paranoia.²⁰ Every move the victim makes is subject to misinterpretation. During this phase, there may be incidents of 'minor' abuse like a shove or a slap or insults and verbal abuse. However, Wallace maintains that women who have been in abusive relationships over a period of time are all fully aware that the incidents of minor battering will increase with time.²¹ The abuser becomes more oppressive, controlling and jealous.²² The relationship becomes a game of cat and mouse, until eventually the game plan can no longer accommodate the stress and tension and completely breaks down.

Despite the placatory efforts of the victim, research shows that in an abusive relationship Phase 2 (characterised by the acute battering incident) is an inevitable consequence following upon Phase 1. Phase 2 occurs when the tension from Phase 1 appears to have reached a climax and has no other outlet. 'No matter how carefully a woman acts during the tension-building phase, her partner will still erupt in violence, and the violence toward her will continue no matter what she says or does.'²³ Phase 2 is characterised by an extreme physical and emotional outburst. It is identified by the acute battering

¹⁷ Boumil and Hicks above n2 at 571.

¹⁸ H Wallace *Family Violence Legal, Medical and Social Perspectives* (Allyn and Bacon, Boston: 1999) 190.

¹⁹ Ibid.

²⁰ H Wallace and A Seymour *National Victim Assistance Academy Lecture Series* (U.S. Department of Justice and Office of the Victims of Crime, Fresno: 1999) 8-15.

²¹ Above n18 at 190.

²² Above n20 at 8-15.

²³ Boumil and Hicks above n2 at 571.

incident that occurs during this phase. The abuser has reached a state of being beyond control. During this time, he is motivated by his impulses and, according to Boumil and Hicks, nothing the woman or any other interventionist does will divert his pattern of violence.²⁴

The third phase has been described as the 'honeymoon phase' or the phase of remorse and contrition. It is characterised by the abuser's pleas for forgiveness and promises never to commit further acts of violence against his partner. The abuser is contrite, attentive to the woman and the family and may even make promises to seek help for his behaviour. It is during this phase that most battered women make the decision whether to leave or remain in the relationship.²⁵

Gelles and Straus write that their research has demonstrated that the actual physical assaults are only one cause of the psychic damage experienced by abused women. Many battered women explained that the waiting and wondering about what would set off the next attack was even more damaging than being hit.²⁶ One woman in the study by Gelles and Straus explained that being hit was often a relief after the tension that characterised the preceding period.²⁷

Dutton and Painter note that the immediate reaction of a victim of abuse is often dissociation coupled with a sense of disbelief that the violence has actually happened to her. This is then followed by an emotional collapse, characterised by a combination of lethargy, depression, self-blame and feelings of helplessness, in varying degrees. The trauma and its effects render the woman, understandably, vulnerable and dependent for some time after the battering incident.²⁸ Thus, exhibitions of the abuser's desire for

²⁴ Ibid.

²⁵ The drama playing out in the mind of the woman was, for me, aptly summed up by a most unusual source – Jim Davis, in a Garfield comic who wrote: 'An imagination is a powerful tool. It can tint memories of the past, shade perceptions of the future, or paint a future so vivid that it can entice ... or terrify, all depending upon how we conduct ourselves today.: J Davis *Garfield in the Fast Lane* (Ravette Books, London: 1993) 10-28.

²⁶ RJ Gelles and MA Straus *Intimate Violence* (Simon and Shuster, New York: 1988) 130.

²⁷ Above n26 at 130-1.

²⁸ D Dutton and SL Painter 'Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse' 1981 6 *Victimology* 139, at 150.

reconciliation and his efforts at reconciliation appear to be an almost idyllic situation. It is no wonder that many women are duped into remaining in the relationship.²⁹

3.2.3 Learned Helplessness³⁰

The battering cycle, with its concomitant physical and emotional injury (which is in most instances beyond the victim's control), and the well-documented experiences that makes escape appear psychologically impossible, economically ruinous, or an invitation to further brutality, contribute to growing perceptions of 'helplessness' that many victims experience. They view their situation as one completely without hope. A critical factor that has often been cited as leading to this debilitating effect is the report by women of being unable to make a difference in lessening abuse by responding actively to violence.³¹ The women indicate that it is often easier and less hurtful to submit to the abuser in the hope that such inaction will prevent further abuse. Furthermore, women feel unable to make environmental changes to decrease the probability of abuse because the attacks are often unprovoked, without cues, or of a degree not corresponding to external events.³² Once the person comes to the realisation that the negative outcomes are independent of her own conduct, she loses the motivation to alter or even attempt to change the contradictory situation.³³

²⁹ It is also interesting to note that, during counselling sessions at the Advice Desk for the Abused, several women commented that they were initially attracted to their husbands because of his strong and masculine appearance. Many were also led on by attention that he gave her. However, Dutton and Painter note that in romantic relationships, power imbalances magnify so that each person's sense of power or powerlessness feeds on itself. What may have been initially benign, sometimes even attractive, becomes ultimately destructive to positive self-regard: above n28 at 148.

³⁰ 'Learned helplessness' is essentially that condition which results after an organism has been repeatedly subjected to unpredictable and harmful *stimuli*. Over a period of time, the organism presents responses of passivity, feelings of powerlessness, diminished ability to think independently and solve problems, and a general unwillingness or inability to avoid painful *stimuli*.: See LE Walker *Terrifying Love: Why Battered Women Kill And How Society Responds* (HarperCollins, New York: 1989) 50-58.

³¹ DR Follingstad, AP Neckerman and J Vormbrock 'Reactions to Victimization and Coping Strategies of Battered Women: The Ties That Bind' 1988 8 *Clinical Psychology Review* 373, at 382.

³² Above n31 at 382-3.

³³ *Ibid.* Drawing on Seligman's theory of classical conditioning, Walker concluded that women in abusive relationships who had attempted unsuccessfully to avoid the violence – only to have it unpredictably repeated – diminished the women's motivation to respond. She noted that this gradual process of conditioning was one of the primary causes of battered women remaining in the violent relationship longer than would be reasonably expected.: Above n15 at 87-94. However, see also JB Robertson 'Battered Woman Syndrome' 1998 9 *Otago Law Review* 277, at 281.

In sum, the battered woman syndrome theory is predicated on two premises: (a) battered women in abusive domestic relationships become trapped in the cycle of violence; and (b) as a result of the conflicting signals received from their abuser, battered women develop a 'learned helplessness' that renders them passive and unable to perceive or access alternatives that may enable them to leave the violent relationship.³⁴ As a result of these attributes, Walker believes that the women develop a stereotype or profile that is common to most of them.³⁵

3.2.4 Criticisms Against the Battered Woman Syndrome

(a) Rhode cautions against too much stress being placed upon the theories of 'learned helplessness' in attempting to understand the sources of the battered woman's apparent disempowerment. She argues that undue stress upon this particular characteristic has often obfuscated the truth about the abused woman's capacity for resistance.³⁶ Rhode's research shows that there are cases in which the abused woman, who finds herself locked into a relationship that she is unable to leave, 'will finally respond to the extreme fear with extreme force.'³⁷ This finding is also supported by the research conducted by the National Institute of Justice (U.S.).³⁸ The authors of the NIJ Report made the observation that despite earlier portrayals of abused women as completely passive and helpless, many battered women engaged in positive efforts to resist, avoid, escape and stop the violence against them.

Waits recognised that many abused women learned to play their circumstances and gave the appearance of passive acceptance of their victimisation. However, Waits' research indicates that despite the façade of acceptance, many battered women are filled with rage against the abuser and themselves, which anger they have managed to 'keep within themselves.'³⁹

³⁴ Above n11 at 42-70.

³⁵ Above n15 at 69.

³⁶ DL Rhode *Justice and Gender* (Harvard University Press, London: 1989) 242.

³⁷ *Ibid*; see also above n30 at 45-51.

³⁸ Above n16 at 28.

³⁹ K Waits 'The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions' 1985 60 *Washington Law Review* 267, at 283.

The research of Gelles and Straus also led them to the finding that whilst abused victims will not always actively respond against their abusers, they still retain their feelings of anger. Most often these feelings are internalised and expressed against non-family members or by throwing things and smashing objects.⁴⁰ However, Gelles and Straus do not deny the existence of learned helplessness in some victims. Some of the participants in their study showed clear signs of hopelessness. 'Yet, to cast all battered women as compliant, passive, and submissive is unfair and unjust.'⁴¹ Finally, Moore adds her support for the understanding that in situations involving intimacy and violence, women are not necessarily powerless.

(b) Battered woman syndrome has provided insight into the dynamics of battering and the abusive domestic relationship within a prescribed context. However, concomitant with the acknowledgement for the positive advantages from the recognition of battered woman syndrome, there has emerged a strong lobby of experts on the subject who have attacked its application as the only co-ordinate for the behaviour of all women who have lived in abusive relationships.

(c) Walker's methodology is criticised for various reasons: the first issue raised is with regard to the selection of the study sample. In her work, Walker admits that the women chosen to be part of the sample were a group specifically selected because they were victims of intimate violence and that 'time and expense' precluded a second control sample.⁴² Faigman is highly critical of the lack of a control group against which the responses of the study sample could have been tested.⁴³ Furthermore, Walker's sample has been criticised for lacking representivity and being limited to white, middle-aged, educated women.⁴⁴ In addition Burke notes that that few of Walker's respondents had killed their abusers. She comments thus that '... because the principal application of Walker's data is to battered women who are accused of violating the law, one would think that she would have designed her study

⁴⁰ Above n26 at 138.

⁴¹ Above n26 at 143.

⁴² Above n15 at 202-3.

⁴³ See DL Faigman 'The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent' 1986 72 *Vancouver Law Review* 619, at 642.

⁴⁴ See above n13 where Raeder urges that this constraint of Walker's study will be particularly useful 'when the complainant is a black woman because they rarely fit the current battered woman's syndrome profile, which is based on white, middle-class women.': at 814.

to look at differences not only between battered women and non-battered women, but also between battered women who use force and battered women who do not.⁴⁵ Faigman further criticises Walker's commitment to a three-stage cycle of violence suggesting that given the admission by Walker that all the interviewers responsible for conducting the interviews and gathering the data for the study had been specifically trained with regard to the cycle of violence hypothesis, this could have resulted in leading questions being asked and selective responses being recorded.⁴⁶

(d) Schopp points out that nowhere in Walker's findings does she state whether the first two phases definitely occurred in the same relationship. It might well be that the phases to which reference is made could possibly have emanated from entirely separate relationships.⁴⁷ Faigman is of the view that since Walker's own research subjects did not convincingly authenticate her three-stage cycle of violence theory, it is likely that most other battered women will also not be able to identify this pattern in their own relationships.⁴⁸ This conclusion is supported by Dutton who maintains that not all abuse follows a distinct pattern.⁴⁹

⁴⁵ AS Burke 'Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, out of the Battered Woman' 2002 81 *North Carolina Law Review* 211, at 237.

⁴⁶ Above n43 at 637. See also R Schopp 'Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse' 1994 1 *University of Illinois Law Review* 45, at 55.

⁴⁷ Above n46 at 58. See also above n51 at 639-40.

⁴⁸ Above n43 at 640.

⁴⁹ MA Dutton 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' 1993 21 *Hofstra Law Review* 1191, at 1195-6. Based on his own research, Don Dutton also supports this conclusion noting that whilst there may be 'intermittency' between acts of abuse, these changes 'need not be (and generally are not) cyclical and/or knowable.': DG Dutton *The Physical Assault of Women: Psychological and Criminal Justice Perspectives* (UBC Press, Vancouver: 1995) 212-3. See also RE Dobash and RP Dobash 'The Nature of Antecedents of Violent Events' 1984 24 *British Journal of Criminology* 269, at 281 (who found that the majority of abusers in their study indicated no remorse except when the victims tried to leave the relationship); and I Leader-Elliot 'Battered But Not Beaten: Women Who Kill in Self Defence' 1993 15 *Sydney Law Review* 403, at 413 (who also concluded that in relationships where the violence had become established, it was more usual for the aggressor simply to refuse to acknowledge his violent episodes). See also RA Schuller and N Vidmar 'Battered Woman Syndrome Evidence in the Courtroom' 1992 16 *Law and Human Behaviour* 273, at 280. Interestingly, in *The Battered Woman's Syndrome*, Walker herself qualified her original assertions describing the characteristics of the 'Contrition Phase' noting that 'phase three could also be characterised by an absence of tension or violence, and no observable loving contrition behaviour, and still be reinforcing for the woman.': above n15 at 96. However, later in *Terrifying Love: Why Battered Women Kill and How Society Responds*, Walker once again presents loving contrition following the violence as being the more regular experience.: above n30 at 44-5.

(e) Walker has further characterised battered women as presenting with low self-esteem, and experiencing depression and feelings of powerlessness.⁵⁰ Yet, the women in Walker's study group actually viewed themselves in a less traditionalist role than a group of college students surveyed by Seligman.⁵¹ It is thus difficult to extrapolate the general description of 'powerlessness' from the information presented by Walker. Additionally, Walker ascribed to all battered women the characteristic of passivity and learned helplessness. In commenting on this conclusion, Stark maintains that battered woman syndrome as posited by Walker appears to apply only to 'respectable women of the Victorian mould who deserve the defence and not to the assertive, independent rough women, who apparently do not.'⁵²

Since Walker's findings were published, researchers have found that many battered women will often make real efforts to extricate themselves from an abusive relationship. Gondolph and Fisher note that, in fact, many abused women may well be described as active, resilient survivors and not victims of a paralysing helplessness.⁵³ The writer agrees with the conclusion of Gondolph and Fisher. The writer's view is based on her experience of working with survivors of domestic violence for a period of seven years at the shelter facility at the Advice Desk for Abused Women, a non-governmental organisation operating in Durban. The writer, like Mahoney, rejects the notion of emphasising helplessness in the psychology of individual women on the grounds that it runs into the danger of contributing to

⁵⁰ Above n15 at 78-82.

⁵¹ Above n15 at 55-70.

⁵² E Stark 'Re-Presenting Woman Battering from Battered Woman's Syndomes to Coercive Control' 1995 58 *Albany Law Review* 973, at 999 and 1007. Similarly, Beri notes, 'BWS evidence interacts cultural and gender stereotypes with the result that women who kill abusers have to fit within an "abused woman" straitjacket. This corresponds to a stereotype of a white, middle-class woman and stresses passivity, docility and helplessness. It categorically excludes the experiences of [other] women whose experience of abuse [may also be] shaped by [for example] racism.': S Beri 'Justice for Women Who Kill: A New Way?' 1997 8 *Australian Feminist Law Journal* 113, at 123.

⁵³ EW Gondolph and EK Fisher *Battered Women as Survivors: An Alternate to Treating Learned Helplessness* (Lexington Books, Massachusetts: 1988) 16. Gondolph and Fisher note further that often the women's flight is retarded by social and economic constraints rather than psychological inertia. Some women may, however, collapse into a state of lethargy when all avenues fail and their efforts to leave the abusive relationship are met with increased abuse.: at 16. See also MA Dutton above n49 at 1191.

stereotyping.⁵⁴ Mahoney states, 'The standard is so defined that the moment any battered woman kills her abuser, she has immediately defied the standard.'⁵⁵ In other words, as long as battered woman syndrome remains the yardstick for domestic abuse, an abused woman who is unable to paint a picture of sufficient helplessness, passivity and no self-esteem, will not pass the courtroom test of being recognised as a battered woman.

- (f) Raeder takes her criticism of battered woman syndrome beyond the characteristics of helplessness and powerlessness.⁵⁶ She argues that it is inappropriate to challenge a battered woman when she fails to mirror any or all of the symptoms of the syndrome because 'battered woman syndrome is not an all-encompassing diagnostic tool: Rather, it should be seen simply as a helpful aid to explain behaviour that conforms to the syndrome.'⁵⁷

Schaffer argues that the whole notion of the battered woman syndrome with its emphasis on the psychological trademarks of learned helplessness, perceived failure, and lack of motivation to change, implies that battered women remain in abusive relationships because they are too emotionally damaged to act normally.⁵⁸

Burke describes battered woman syndrome as '... a sympathetic psychological and legal fiction that has been created to accommodate the self-defense claims of domestic violence victims whose cases may not always meet traditional self-defense requirements.'⁵⁹ However, he (correctly, it is submitted by the writer) continues, the unintended consequence has been to incorrectly pathologise all victims of abuse making them out to be psychologically impaired. In most cases, however, this is not a true reflection of the accused whose actions could be properly and rationally explained by her involvement in an abusive relationship.⁶⁰ He notes that 'individual factual circumstances [of the accused] may, in fact, demonstrate that the woman is a

⁵⁴ MR Mahoney 'Legal Images of Battered Women: Redefining the Issue of Separation' 1991 90 *Michigan Law Review* 1, at 42.

⁵⁵ Above n54 at 40-1

⁵⁶ Above n13 at 814.

⁵⁷ *Ibid.*

⁵⁸ M Schaffer 'The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R v Lavallee*' 1997 47 *The University of Toronto Law Journal* 1, at 10-11.

⁵⁹ Above n45 at 296.

⁶⁰ *Ibid.*

rational actor making a reasoned decision based upon an evaluation of her viable escape options and the value she assigns to competing priorities.⁶¹

3.3 THE THEORY OF TRAUMATIC BONDING, PSYCHOLOGICAL ENTRAPMENT, AND DEPENDENCE

Many of the experts who criticise the term 'learned helplessness', embrace the theory of traumatic bonding to explain why many battered women do not leave the abusive relationship.⁶² The effects of battery and traumatic bonding are not entirely different from the model described by Walker, except that the basis of a battered woman's reactions under the theory of traumatic bonding is ascribed to the intermittency of the abuse (and not a battering cycle),⁶³ and the concomitant strong emotional links that develop between two people where one intermittently abuses, threatens, harasses and intimidates the other.⁶⁴ Such ties begin to manifest themselves in positive feelings and attitudes experienced by the subjugated person towards the intermittently abusing party.⁶⁵ Thus, it is explained that the battered woman, confronted with on-and-off patterns of abuse, can develop strong emotional attachments with her abuser.⁶⁶

The theory of traumatic bonding described by both Dutton and Ewing identifies two specific characteristics of the abusive relationship which gives rise to the apparent incapacity of the victim namely, the power and control imbalance and the consequent emotional bonding that occurs; and secondly, the intermittent nature of the abuse.⁶⁷ Firstly, Dutton points out that when there is an unequal power balance in a relationship and one of the parties begins to experience a low self-esteem as a result of repeated

⁶¹ Above n45 at 266.

⁶² SE McClure 'The Battered Woman Syndrome and the Kentucky Criminal Justice System: Abuse Excuse or Legitimate Mitigation' 1996/7 85 *Kentucky Law Journal* 169, at 176.

⁶³ DG Dutton above n49 at 206-12. It is noteworthy that Pence and Paymar found that many of the women in their control group criticised theories attributing battering to a cyclical pattern. They believed that it was a constant force in the relationship and linked to men's inability to cope with their own stresses and their desire to gain complete control of their partner.: E Pence and M Paymar 'Theoretical Framework for Understanding Battering' in E Pence and M Paymar *Education Groups for Men Who Batter: The Duluth Model* (Springer Publishing Co., New York: 1993) 3. According to the respondents in their study, 'abuse ... is part of a greater picture and not simply isolated incidents of pent-up anger, frustration or painful feelings.': at 2.

⁶⁴ Above n28 at 146-7.

⁶⁵ Above n28 at 147.

⁶⁶ Above n 28 at 146.

⁶⁷ DG Dutton above n49 at 190; CP Ewing *Battered Women Who Kill: Psychological Self-Defense as a Legal Justification* (Lexington Books, Massachusetts: 1987) 19.

abuse, that individual feels more negative about him/herself and more in need of the person with power.⁶⁸ Accordingly, Dutton and Painter note that attachment to a person stronger than oneself concurrently increases one's own feelings of personal power.⁶⁹ The experience of lowered self-esteem and dependency is emphasised over and over again during the abusive relationship as the violence is repeated. The abused partner begins to believe that she cannot do without the other and, ultimately, this feeling of extreme dependence creates a strong affective bond between her and her abusive partner.⁷⁰ Specifically with regard to the abusive relationship, Dutton notes that a battered woman who experiences chronic and escalating violence may come to perceive the batterer as all-powerful. She begins to believe that she will not be able to survive without him because of the traumatic bond that has developed between them.⁷¹

The second reinforcement and probably the most relevant characteristic of the traumatic bonding process is the fact that the pattern of violence is episodic, interspersed with periods of normal, socially acceptable behaviour by the batterer. This situation of alternating positive and negative emotional highs and lows is described as partial or intermittent reinforcement. Rounsaville notes that the intermittent nature of the abuse is perhaps one of the primary reasons why the abused victim remains in the relationship. He notes that based on his research 'many [of the sample respondents] described highly pleasant periods of reconciliation between episodes. ... This pattern was conducive to ignoring the problem or thinking of it as an aberrant, exceptional part of the relationship.'⁷² Dutton believes that such *stimulus* is highly effective in producing

⁶⁸ DG Dutton above n49 at 190.

⁶⁹ Above n28 at 147.

⁷⁰ Ibid; and also above DG Dutton above n49 at 190;. In 1942, Anna Freud postulated the concept of 'identification with the aggressor'. She maintained that in situations of extreme power imbalance, where the person wielding the greater power may occasionally be punitive, persons in low power would adopt the aggressor's assumed perspective of themselves. However, this does not mean that the battered woman becomes void of emotions. According to Dutton and Painter, often the victim will either internalise her own aggression or redirect it.: above n28 at 147. Therefore, this intense anger would be repressed.: above n31 at 383. In one of their studies of psychiatric patients, comparing abused with non-abused female patients, Follingstad, Neckerman and Vormbrok noted that 24% of the abused women were indicated by the hospital staff as directing their anger inwards in an uncontrolled manner as opposed to the 9% of the non-abused women: above n31 at 384-5.

⁷¹ DG Dutton above n49 at 190.

⁷² B Rounsaville 'Theories in Marital Violence: Evidence from a Study of Battered Women' 1978 3 *Victimology* 11, at 17.

persistent patterns of behaviour that are associated with strong emotional attachment to the abuser that become difficult to change or modify.⁷³

Thus, even when a woman does finally manage to leave an abusive partner, once her immediate fears begin to diminish, her latent attachment to the abuser and the needs previously provided for by him begin to come to the fore. In this state, she is more vulnerable to the abuser's statements of contrition and pressures to return. Research shows that in some cases, there may be long periods of respite between the battering. According to Campbell *et al* the time lapse between successive episodes of battery may be as long as twelve months.⁷⁴ As time passes, the victims begin to believe that the abuse will not recur and that they will be safe in the relationship. Anderson *et al* describe this type of mindset as 'traumatic bonding and entrapment'.⁷⁵ The abused woman convinces herself that the instance of battery is an exceptional period that will pass. However, as the assaults continue, becoming more and more intense, the woman may feel that she has already invested too much in the relationship to leave. This often results in her justifying the batterer's conduct and minimising the intensity of the injuries to herself.⁷⁶ This paradoxical state of mind identified in some victims was described by Ochberg in 1966 as the 'Stockholm Syndrome', so-named after a hostage situation in Stockholm, Sweden when two escaped prisoners held up a bank and kept four employees hostage for approximately 131 hours. By the end of their ordeal, the victims feared the police more than their captors and expressed gratitude toward the robbers for sparing them their lives.⁷⁷

⁷³ DG Dutton above n49 at 191. Dutton and Painter argue that intermittent re-enforcement actions have been found to produce persistent patterns of behaviour and strong emotional bonding effects in both animals and humans that are extremely difficult to extinguish or terminate.: above n28 at 148. The study by Rajecki, Lamb and Obmascher also showed that inconsistent treatment (i.e. alternating affection and maltreatment) from a single source produced a heightened effort by the victim to gain proximity to the source: P Rajecki, M Lamb and P Obmascher 'Toward A General Theory of Infantile Attachment' 1978 3 *The Behavioural and Brain Sciences* 417, at 425.

⁷⁴ JC Campbell, P Miller, MM Cardwell and RA Belknap 'Relationship Status of Battered Women Over Time' 1994 9 *Journal of Family Violence* 99, at 99.

⁷⁵ See SM Anderson, TR Boulette and AH Schwartz 'Psychological Maltreatment of Spouses' in RT Ammerman and M Hersen (eds) *Case Studies in Family Violence* (Plenum, New York: 1991) 305-6 and 314.

⁷⁶ *Ibid.*

⁷⁷ DG Dutton above n49 at 164. NiCarthy and Symonds both agree that where the contact between the abuser and the victim span a lengthy period of time, the victim responds with adaptive behaviour aimed at survival. In such a state, the victim clings to the very person who is endangering his or her life and becomes obedient, compliant and submissive to that person.: G NiCarthy *Getting Free: A Handbook for Women in Abusive Relationships* (Seal Press, New York: 1986) 117; M Symonds 'Victim Responses to

Whilst the studies of Nicarity and Symonds contemplate a single long experience with the captor or criminal,⁷⁸ the situation is aggravated in the case of the battered woman, who is repeatedly placed in the captive situation. As Follingstad *et al* note, most victims of extreme abuse feel that they are essentially kept hostage by their husbands.⁷⁹ The consequent psychological alteration that she may face is, arguably, likely to be even more acute than in the ordinary hostage situation.

3.4 THE THEORY OF SEPARATION ASSAULT

Mahoney describes a condition that is also similar to battered woman syndrome and traumatic bonding, yet different, called 'separation assault'.⁸⁰ The theory of separation assault stresses the various social and psychological forces that prevent a woman from leaving a relationship or which conspire to draw her back into the relationship. It focuses expressly on the retaliation that the victim suffers from the abuser when she does attempt to leave.⁸¹ As Mahoney writes, 'At the moment of separation or attempted separation ... the batterer's quest for control often becomes most acutely violent and potentially lethal.'⁸²

Research indicates clearly that in intimate homicides, the reasons for killing by a male and female partner are quite different. When a woman kills her partner, the homicide is usually precipitated by the man's use of physical force or threats. The woman's response is usually an effort at protecting herself.⁸³ However, where the victim in an intimate homicide is the female partner, the reason for the killing was very likely to have

Terror' in F Wright, C Bahn and RW Reiber *Forensic Psychology and Psychiatry* (The New York Academy of Sciences, New York: 1980) 129-132. Browne comments that as the threat of danger becomes a reality, the victim's response becomes ingratiating and centred on appeasing her captor.: A Browne *When Battered Women Kill* (The Free Press, New York: 1987) 123 and 125.

⁷⁸ See fn77 above.

⁷⁹ Above n31 at 377.

⁸⁰ Above n54. See also M Angel 'Susan Glaspell's Trifles and A Jury of Her Peers: Women Abuse in a Literary and Legal Context' 1997 45 *Buffalo Law Review* 779, at 810. Mahoney's findings are not new; however, the specific naming of the concept as 'separation attack' or 'separation assault' is.

⁸¹ Above n54 at 65.

⁸² Above n54 at 5-6. One large German study, for example, found that in ninety-nine out of one hundred cases in which men beat, shot, choked, stabbed, or burned their mates to death, the woman was attempting to break out of the relationship.: A McColgan *Women Under the Law: The False Promise of Human Rights* (Longman, Essex: 2000) 201.

⁸³ According to Browne, a woman is seven times more likely than a man to kill in self-defence: above n77 at 10.

been to prevent the woman they have been battering from leaving the relationship.⁸⁴ Barnard *et al* found that in the cases of women who killed, the homicides fell mainly into the category of 'victim-precipitated homicides',⁸⁵ whereas for men, the most frequent type was what they called 'sex-role threat homicide'. Their study demonstrated similar findings to all the previous investigations namely, that a walkout, a demand, or a threat of separation was taken by the men to represent intolerable desertion, rejection and abandonment.⁸⁶ As Barnard *et al* note, their data simply confirmed earlier observations that the threat of separation is usually a trigger for further violence by men on the intimate partners.⁸⁷

The theory of separation assault expressly proves why the abused woman does not leave: leaving an abusive relationship is extremely dangerous for the abused victim and can be deadly.⁸⁸ Researchers and other data collectors often miss this fact, especially when it is an expressed *decision* to leave rather than the actual separation that triggers the attack. The circumstances of the homicide in this instance will not reveal the assault on separation, as the couple may well have still been together. However, further investigation might reveal that the attack was a direct response to the woman's decision to separate or her first small moves toward separation.

The theory of separation assault realistically underscores the victim's place in the relationship against the setting of the abuser's violent quest for control. The theory of separation assault does not deny the learned helplessness profile of the victim but it more fully explains the woman's situation by combining objective difficulties with subjective fear and helplessness in explaining the normalcy of her response in staying in

⁸⁴ ME Kampmann 'The Legal Victimization of Battered Women' 1993 15 *Women's Rights Law Reporter* 101, at 101; NA Cazenave and MA Zahn 'Women, Murder, and Male Domination: Police Reports of Domestic Violence in Chicago and Philadelphia' in EC Viano (ed.) *Intimate Violence Interdisciplinary Perspectives* (Hemisphere Publishing Corporation, Washington: 1992) 95.

⁸⁵ The studies by Barnard *et al* led them to report that over 70% of women indicated that they had been battered by their eventual victim. They concluded that there was thus no doubt that this situation was an antecedent of victim-precipitated homicide: GW Barnard, H Vera, MI Vera and G Newman 'Till Death Do Us Part: A Study of Spouse Murder' 1982 10 *Bulletin of the American Association of Psychiatry and the Law* 271, at 279.

⁸⁶ Above n85 at 278. Similarly, the study by A Wallace 'Homicide: The Social Reality' 1986 *New South Wales Bureau of Crime Statistics and Research, Research Study No 5* 151 in which she found that of the 296 cases of domestic homicide studied, 217 involved killing by men. Of these, 75 were cases of killing after separation and 23 were killings during a separation.

⁸⁷ Above n85 at 278.

⁸⁸ DG Dutton above n49 at 183.

the abusive relationship. In terms of 'learned helplessness' the victim has difficulty perceiving an exit from the abusive relationship; separation assault confirms the difficulties of that exit.

In the study conducted by Browne, she found that many women stayed 'because they had tried to escape and been beaten for it, or because they believed their partner would retaliate against an attempt to leave him with further violence.'⁸⁹ One victim who sought refuge at the shelter of the Advice Desk for the Abused indicated that her husband had threatened to torch their home and her parent's home if she left him. The evening she moved out of the house, her house was razed to the ground. The woman returned to her husband 'because I could not expose my parents to his madness'.⁹⁰ The women in Browne's study all genuinely believed that the abuser would or could kill them. Particularly in the case of those respondents who had subsequently killed their batterers, Browne found that they were convinced that they could not escape the dangers of their relationships by simply leaving.⁹¹

This argument was repeated in Hooper's research. She notes that '[m]ost women kill their partners because they know they or their children are going to die. I have never met a man who killed his partner because he thought he was in physical danger.'⁹² The concept of separation assault supports the victim's argument that her perception of danger and fear was rational and reasonable. It also stresses the reasonableness and the normal character of her reaction to violence. The advantage of such a re-conceptualisation of the woman's behaviour and why she remains is that it explains those situations when the woman fights back or otherwise does not conform to the model of helplessness.⁹³

⁸⁹ Browne above n77 at 113.

⁹⁰ Consultation with a client at the Advice Desk for the Abused, an NGO functioning in KwaZulu-Natal, June 1998.

⁹¹ Browne above n77 at 113

⁹² M Hooper 'When Domestic Violence Diversion is No Longer an Option: What to do with the Female Offender?' 1996 11 *Berkeley Women's Law Journal* 168 at fn33.

⁹³ Above n13 at 799-780.

3.5 WHY SOME BATTERED WOMEN KILL THEIR ABUSIVE PARTNERS

The research is unable to provide a definitive answer to the question why only some victims of domestic violence will resort to murder but research studies have been able to identify certain differences between abused women who kill their batterers and those who do not. Two specific studies that dealt directly with the issue were those of Browne and Walker - Browne's study comprised forty-two battered women who had killed their abusive spouses and a control group of forty-two abused women who did not;⁹⁴ and Walker's study was a comparison of four hundred and thirty seven women who had been in abusive relationships, fifty of whom had actually killed their abusers.⁹⁵ Neither of these studies is intended to provide scientific proof of the differences between battered women who kill and those who do not (and it may even be argued that they are not sufficiently representative of battered women); however, their value lies in the fact that they appear to identify trends that may help one to understand why some battered women kill and others do not. The factors considered by Browne and Walker included:

(a) Escalation in frequency and severity of abuse

Comparing the test group (that is, those who killed their abusers) with the control group, Browne was not able to discern much difference in the number of abusive incidents suffered by the two groups. However, the women who killed their violent partners had suffered greater physical injury and also, the frequency of the assaults was greater amongst this group of women.⁹⁶ Walker also identified severity of the violence as a distinguishing factor and she noted further that a rapid escalation in the severity of the assaults (as opposed to a gradual increase in the violence) is a good predictor of a likely homicide incident.⁹⁷ Ewing made a similar finding describing the situation in which a woman kills her abuser as involving rapidly escalating, serious sexual and physical abuse.⁹⁸

⁹⁴ See generally Browne above n77.

⁹⁵ See generally Walker above n15. The writer acknowledges that a limitation concomitant upon the reliance on the studies by Browne and Walker is that in Browne's study the control group was actually a sub-set of Walker's study of the four hundred and thirty seven abused women. Accordingly, Browne's study was not completely independent of Walker's study sample.

⁹⁶ Browne above n77 at 68-9.

⁹⁷ Above n15 43-4.

⁹⁸ See EAD Leonard 'Convicted Survivors: The Imprisonment of Battered Women Who Kill' at www.freebatteredwomen.org/pdfs/convsurv.pdf 25 (accessed on 30/09/2006).

(b) Previous threats of death or grievous bodily harm made by the abuser

Browne records that eighty-three percent of the women in the test group had claimed that the abusers had previously made threats to kill them or others; whilst, only fifty-three percent of the control group made such a claim.⁹⁹ This factor as a predictor of homicide was repeated in Walker's research. She noted that about ten percent of the control group indicated that their abusers had ever threatened them with a weapon but fifty-eight percent of the test group reported such a threat.¹⁰⁰ Ewing also found that, typically, the abused woman who resorts to murder has been threatened with death and weapons.¹⁰¹

(c) Prevalence of sexual abuse

Browne indicates that sexual abuse amongst the test group respondents appeared to be much higher than amongst the control sample. Seventy-six of the test group were recorded as having been subjected to sexual abuse by the abuser; as compared with fifty-nine percent of the women constituting the control group. In addition, forty percent of Browne's test group reported frequent rapes by the abuser; whilst this was the case in thirteen percent of the control group.¹⁰²

(d) Substance abuse

Browne notes that substance abuse by either or both parties increased the risk of homicide. She notes that approximately thirty-nine percent of the test group reported that the abuser had used some form of narcotic substance; whilst this was reflected in only eight percent of the control group.¹⁰³ Walker also found that alcohol abuse appeared to be more prevalent in her test group sample.¹⁰⁴

(e) Age of the victim

Browne concludes from her study that battered women who killed their abusers were generally older than their counterparts who did not resort to homicide. She recorded that the mean age of the abused women who murdered their abusive partners was 36 years.¹⁰⁵

⁹⁹ Browne above n77 at 65.

¹⁰⁰ Above n15 at 42.

¹⁰¹ Above n67 at 34.

¹⁰² Browne above n77 at 95-6.

¹⁰³ Browne above n77 at 71.

¹⁰⁴ Above n15 at 43.

¹⁰⁵ Browne above n77 at 13.

Ewing also found from his study that many of the victims of abuse who resorted to murder of an abusive spouse had fewer social alternatives available to assist them.¹⁰⁶ Similarly, Boumil and Hicks conclude that many battered women resorted to homicide when they perceived the situation as desperate and the barriers against leaving appeared insurmountable. In reference to this, they write:

Some women acting out of desperation have harmed or killed their abuser either as an instinctive response to being continuously subordinated, abused, and terrorised or as the result of an altered psychological state of mind in which the repeatedly terrorised woman believes that the only means to her survival is the elimination of the abuser.¹⁰⁷

Ewing notes further that in some cases a further catalyst that resulted in the homicide of the abuser was when the victim specifically identified that her children were also becoming victims of abuse and violence at the hands of the abuser.¹⁰⁸

A trend that emerges from the research is that those women who kill their abusers are in relationships of apparently greater adversity than the women who do not resort to lethal violence. As Walker explains, 'Battered women who kill can perhaps be set apart from those who do not kill in terms of the perceived danger of their situations, and the severity and brutality of the violent physical, sexual, and psychological abuse they have endured.'¹⁰⁹ Thus, when the victim finally perceived that the violence was not going to stop but would only escalate until someone died, she killed to defend her own life. Browne agrees and notes that many battered women who killed their abusers often presented with minimal memory of any cognitive processes other than an intense focus

¹⁰⁶ Above n67 at 36-7.

¹⁰⁷ Boumil and Hicks above n2 at 572. Boumil and Hicks state further that their research showed that whilst men might resort to violence to inflict punishment or to force their will upon women and subordinate them, women typically only turned to violence when they believed that they or their children were in mortal danger.: at 553. See also the research of LP Eber 'The Battered Wife's Dilemma: To Kill or be Killed?' 1981 32 *Hastings Law Journal* 895; SJ Schulhofer 'The Gender Question in Criminal Law' 1990 7 *Social Philosophy and Politics* 105; and A Browne, KR Williams and DG Dutton 'Homicide Between Intimate Partners' in MD Smith and MA Zahn (eds) *Studying and Preventing Homicide* (Sage Publications, London: 1999) 59.

¹⁰⁸ Above n67 at 36.

¹⁰⁹ Above n30 at 101.

on their own survival.¹¹⁰ This view is further convincingly supported by the research of Adler. She, too, notes that the homicidal wives in her study showed clear evidence that they had killed 'out of desperation' or to 'protect themselves from abusive spouses'.¹¹¹ Johann and Osanka note that it is generally uncommon for a woman to resort to killing her spouse, and if she did, the act was usually one of self-defence.¹¹² From their research, they found that in the cases of women who did kill an intimate partner most had been either emotionally abused or otherwise physically battered by the deceased.¹¹³

Barnard *et al* describe four theories of intimate homicide: psychotic homicide, drug-related homicide, victim-precipitated homicide and 'sex-role threat homicide'.¹¹⁴ Most battered women who kill their spouses fall into the third class of homicide. The theory of victim precipitated homicide, notes Goetting, originated in the 1940's when it was noted that in certain homicides 'the victim shapes and moulds the criminal'.¹¹⁵ He further explains that this category of homicide recognises that the victim is a major contributor to the criminal event with his or her role being characterised by being the first to use force against the subsequent killer.¹¹⁶ In their research of thirty-four spouses accused of killing their partners, Barnard *et al* found that eight out of the eleven women in the study fell into the category of victim precipitated homicide, whilst only two of the twenty-three men fitted this category.¹¹⁷ Wolfgang found, in his study, that 59.6 percent of the women

¹¹⁰ Browne above n77 at 69.

¹¹¹ JS Adler ' "I loved Joe, but I had to shoot him": Homicide by Women in Turn-of-the Century Chicago' 2002 93 *The Journal of Criminal Law and Criminology* 867, at 877. Adler notes further that in most cases of partner killings, the women had acted after months and years of physical abuse.: at 877. Research indicates that men are socialised into being aggressive and demanding control - women mostly resort to violence as a protective reaction, in self-defence or out of fear.: DA Moore (ed.) *Battered Women* (Sage Publishers, London: 1979) 38. This point of view is supported by Goetting who notes that for the homicidal husband the act is nearly always offensive; whereas for the wife it is usually defensive. A Goetting 'Patterns of Marital Homicide: A Comparison of Husbands and Wives' 1989 20 *Journal of Comparative Family Studies* 341, at 352.

¹¹² SL Johann and F Osanka 'I Didn't Mean to Kill Him' 1987 14 *Barrister: American Bar Association Journal* 18, at 20.

¹¹³ *Ibid.*

¹¹⁴ Above n85 at 277-8. Under the first category, they include those accused who kill whilst in an altered mental state so that they are unable to appreciate their conduct or the behaviour of others. The second group encompasses those accused of murder whose faculties at the time of killing were impaired by some chemical substance. Most male accused of killing their spouses fell into the fourth group with the precipitating factor being some threat of separation by the deceased.

¹¹⁵ Goetting above n111 at 348

¹¹⁶ *Ibid.*

¹¹⁷ Above n85 at 278.

accused of killing an intimate partner fell within this category and Goetting's study records a finding of 71.1 percent of the female accused being guilty of victim-precipitated homicides.¹¹⁸ The discussion of Barnard *et al* is almost exactly on par with the findings of Goetting. They describe their collective experience as leading to the conclusion that over seventy percent of women accused of spousal murder report being battered and/or abused by their eventual victim. They thus conclude, 'There is no doubt this situation is an antecedent of victim-precipitated homicide.'¹¹⁹ Mercy and Saltzman also confirm this finding, noting that arguments were more likely to be associated with the killing of husbands than wives and in support of their contention they cite statistics of 76.0 percent (in the former instance) and 60.7 percent (in the latter cases).¹²⁰

3.6 CONCLUSION

As noted from the discussion and the discussion in Part One Chapter Two there are a number of possible explanations for why a woman who is abused by her intimate partner may remain in the abusive relationship. Apparently, no single theory or belief accounts for the conduct of the individual woman; in fact, multiple theories may coalesce to explain the behaviour of a single battered woman. Identities developed during the abusive relationship (including powerlessness, low self-esteem and learned helplessness) contribute directly to the battered woman's responses. In law, therefore, a correct understanding of the effects and dynamics of battery, post-traumatic stress disorder, the battered woman syndrome, separation assault, and theories of traumatic

¹¹⁸ Goetting above n111 at 348.

¹¹⁹ Above n85 at 279.

¹²⁰ JA Mercy and LE Saltzman 'Fatal Violence Among Spouses in the United States, 1976-85' 1989 79 *American Journal of Public Health* 595, at 596. See also CR Showalter, RJ Bonnie and V Roddy 'The Spousal-Homicide Syndrome' 1980 3 *International Journal of Law and Psychiatry* 117, at 118. Regarding the use of numbers, it is recognised that statistics are important to prove the incidence of an occurrence but one needs to be cautious that the meaning of the information presented does not become lost in the sea of numbers and facts. The quote from Dworkin is, however, very appropriate: 'We are very close to death. All women are. And we are very close to rape and we are very close to beating. ... We use statistics not to try to quantify the injuries, but to convince the world that those injuries even exist. Those statistics are not abstraction.' A Dworkin 'I want a twenty-four hour truce during which there is no rape' in *Letters from a war zone: Writings, 1976-1987* (Secker and Warburg, New York: 1988) 163.

bonding and psychological entrapment is important in criminal cases, particularly those cases in which a battered woman is being tried for the crime of murder of her abusive partner and introduces self-defence to justify her conduct. In such cases, for the court to understand her evidence, it is necessary that the myths and ordinary misconceptions that often surround domestic abuse and battery are contextualised and a proper understanding of the reality of domestic violence and battery is established.

PART TWO: SELF-DEFENCE

CHAPTER FOUR

THE LAW OF SELF-DEFENCE IN SOUTH AFRICA¹

4.1 INTRODUCTION

As a rule, the South African law does not support community justice, vigilantism or self-help, requiring rather that citizens resort to the law. However, it is recognised that there are circumstances when an individual has to gain necessary and/or immediate redress that will not be achieved by waiting for the law to intervene. In such circumstances, the law permits the individual a right to resort to self-defence.² Thus, in defining self-defence Kriegler and Kruger write:

Noodweer [self-defence] is die gebruik om 'n wederregtelike aantasting van eie persoon af te weer in omstandighede waar die aangevallene redelike gronde het om te glo dat sy of haar lewe in gevaar is om ernstig beseer to word. Wanneer hy of sy in dié omstandighede sy of haar aanvaller dood, moet die beskuldigde vrygespreek word van moord of manslag, tensy hy of sy teengeweld gebruik het wat buitensporig was vergeleke by die gevaar waarin hy of sy verkeer het.³

This does not mean that the state condones private retaliation but rather that '[n]atural reason permits one to defend oneself against danger.'⁴

¹ The authors Burchell and Snyman refer to private defence as the general expression of the defence. See J Burchell *Principles of Criminal Law* (Juta, Lansdowne: 2005) 230 *et sec* and CR Snyman *Criminal Law* (Lexis Nexis, Durban: 2008) 103-115. The notion of private defence – which includes the defence of person (self or other), property and personality rights - is broader than self defence. On the other hand, the term self defence refers to a narrower frame of reference namely, defence of the self. See *Walters* 2002 7 BCLR 663 CC par 53 fn66 where the court described self-defence 'as a species of private defence.' In this study, the writer will use the term self defence in its narrower connotation except where cited literature or case law makes reference to private defence and the writer quotes directly from or refers specifically to such authority.

² Burchell n1 above at 230 and 233.

³ J Kriegler and A Kruger *Hiemstra Suid-Afrikaanse Strafproses* (Butterworths, Durban: 2002) 659.

⁴ Burchell above n1 at 230 fn3 citing Cicero.

In South African criminal law a distinction is drawn between two types of legal defences namely grounds of justification and excuses.⁵ As stated by Mousourakis, a justification-based defence challenges the unlawful character of an act which, *prima facie*, contravenes a criminal prohibition; on the other hand, a claim of excuse does not deny the wrongfulness or unlawfulness of the act but rather challenges the actor's blameworthiness or culpability.⁶ Self-defence falls under the rubric of grounds of justification. Thus, when self-defence is raised in evidence, the accused person is, in fact, seeking to negate the element of unlawfulness from her conduct by claiming that her action, despite meeting the definitional elements of the crime, is nevertheless justified and, consequently, not unlawful.

In such cases, the onus of proof remains on the state to prove beyond a reasonable doubt that the act of the accused was unlawful.⁷ Snyman notes that in allowing a person to claim that her conduct was justified (and consequently lawful), 'the law grants such a person a concession to perform an act which is contrary to the legal norm.'⁸ Thus, in allowing the defence, the law is effectively acknowledging that the conduct of the defender was objectively right in the circumstances and that anyone would have been entitled to act as she did, given her situation.⁹ Thus, Le Roux notes, the principles of self-defence seek to establish policy goals and an act of self-defence 'will only be regarded as justified if its general observance is equally good for all.'¹⁰

⁵ See Burchell above n1 at 230-356 and 502-21; Snyman above n1 at 95 *et sec* and 149 *et sec* respectively; and G Mousourakis 'Distinguishing Between Justifications and Excuses in the Criminal Law' 1998 2 *Stellenbosch Law Review* 165, at 167.

⁶ Mousarakis above n5 at 165. In a much earlier article, Van Oosten, however, noted that in practice there was sometimes a conflation between the defences of justification and excuse. He attributed this consequence to the fact that some of the courts used the reasonable man test to assess both unlawfulness and culpability when dealing with self-defence.: FFW van Oosten 'Case Comment: S v Antwerpen 1976 3 SA 399 T' 1977 1 *De Jure* 179, at 180. See also (from the same year) JV van der Westhuizen 'Vonnisbesprekings: S v Motleleni 1976 1 SA 403 A en Chetty v Minister of Police 1976 2 SA 450 N' 1976 2 *De Jure* 371, at 372. Interestingly, Labuschagne also raises this concern later in JMT Labuschagne 'Die Proses van Dekonkretiserin van Noodweer in die Strafrege: 'n Regsantropologiese Evaluasie' 1999 1 *Stellenbosch Law Review* 56.

⁷ *Ntuli* 1975 1 SA 429 A, at 457. In raising the defence, the accused does not acquire the onus of proving the requirements of the defence (or of proving that her conduct was lawful).

⁸ Snyman above n1 at 102.

⁹ *Ibid.*

¹⁰ W le Roux 'Obedience to Illegal Orders: A Closer Look at South Africa's Post-Apartheid Response' 1996 17 *Obiter* 247, at 256.

4.2 THE REQUIREMENTS OF SELF DEFENCE

In order for the defender to show that self-defence was appropriate and that her conduct was, thus, justifiable and lawful, she must satisfy the court that:

- (i) the attack was unlawful;
- (ii) the attack was directed against an interest deserving of legal protection;
- (iii) there was an attack on her, which requirement is satisfied by showing that the attack was either imminent or commenced but not yet completed;
- (iv) the defence was directed at the attacker;
- (v) the defence was necessary to protect the interest threatened; and
- (vi) there must be a reasonable relationship between the attack and the defensive act.¹¹

4.2.1 Conditions Relating to the Attack

4.2.1.1 The Attack Must Have Been Unlawful

Defining the Attack

In defining the element of attack under the law of self-defence, Snyman states it 'presupposes a voluntary human act'.¹² Further defining the attack Snyman notes that (i) it need not be committed culpably; (ii) it need not be directed at the defender; and (iii) it need not consist of a positive act of commission.¹³ In *Engelbrecht* – a case in which the accused killed her husband after years of being abused by him – Satchwell J expressed her opinion on the element of the attack. She expressly noted that whilst the attack may be physical in nature, it could also 'include psychological or emotional abuse, degradation of life, diminution of dignity and threats to commit any such acts.'¹⁴

The two assessors in the case did not support this viewpoint and Snyman concurs with the assessors.¹⁵ Snyman expresses the opinion that the legal convictions of the community do not permit that emotional abuse, degradation of life, diminution of dignity

¹¹ Snyman above n1 at 104-113; Burchell above n1 at 233-255.

¹² Snyman above n1 at 104.

¹³ Snyman above n1 at 104-5. See also Burchell above n1 at 179.

¹⁴ *Engelbrecht* 2005 2 SACR 41, at 133.

¹⁵ Above n14 at 105.

and threats to commit any such acts can be regarded as an unlawful attack, giving the accused the right to kill. In his view, 'to rule otherwise, would result in the rules of [self-defence] becoming too vague and could lead to a misuse of [self-defence] as a ground of justification.'¹⁶

Referring particularly to cases of battered women accused of killing their abusers, the court in *Engelbrecht* agreed that 'one individual incident of abuse, a series of violations or an ongoing cycle of maltreatment' could constitute an attack for the purpose of self-defence.¹⁷

Unlawfulness of the attack

In order that the act attains the status of legal censure, it must have been unlawful or as Burchell writes, '... the conduct, whether in the form of a circumstance or resulting in a consequence, must be unlawful.'¹⁸ In satisfying the requirement that the attack or imminent threat must have been unlawful, Snyman notes that the attack should be of such a character that it 'is contrary to the community's perception of justice or equity.'¹⁹

In *Ndara* the Appellate Division had to make a determination regarding the lawfulness or not of an attack by the accused (appellant) which caused the death of the deceased and formed the basis of the charge.²⁰ On the facts as accepted by the trial court, the appellant was the originator of the attack. He was then chased by the deceased and a group of friends who, in evidence, agreed 'that they would have handed him over to the

¹⁶ Ibid. The writer disagrees with the view expressed by Snyman for an attack (or threat of an attack) on one's psyche or to one's dignity may be just as debilitating as a physical assault. The writer favours the broader approach adopted by Satchwell with the understanding that each case will be assessed on its own merit to ensure that it meets the legally recognised elements of self-defence. In this way, there can be no argument that the rules of self-defence are being blurred.

¹⁷ Above n14 at 133.

¹⁸ Burchell above n1 at 178.

¹⁹ Snyman above n1 at 98. This has also been described as the *boni mores* test. See Snyman above n1 at 98. Grant points out that another consideration of unlawfulness is the 'legal convictions of the community, now as informed by the values in the Constitution.': J Grant 'The Double Life of Unlawfulness: Fact and Law' 2007 20 *South African Journal of Criminal Justice* 1, at 2. Wolhuter also points out that the act is an external objectively verifiable fact and the test for unlawfulness is, therefore, purely objective.: L Wolhuter 'Excuse them though they know what they do – the distinction between justification and excuse in the context of battered women who kill' 1996 9 *South African Journal of Criminal Justice* 151, at 160. Thus, unlike the law of private defence in the USA, Canada and Australia (which follow the normative theory of criminal liability), the state of mind of the accused in relation to the circumstances of his/her act is entirely irrelevant.: Wolhuter above n19 at 160-1. See also Chapters Six, Seven and Eight.

²⁰ *Ndara* 1955 4 SA 182 A, at 183.

police'.²¹ The defence argued that once the appellant had begun to run away, events had taken such a turn that he was entitled to defend himself against his pursuers. Schreiner ACJ disagreed. The judge was satisfied that the Crown witnesses were entitled to arrest the appellant and that they did nothing unlawful in pursuing him in order to arrest him. Thus, the 'attack' by the deceased and his friends was lawful. Accordingly, the court held:

[T]he mere fact that one who has committed a crime for which he may be arrested without warrant is running away from the scene of his crime pursued by those who saw him do it does not change him into a threatened innocent with the right to use violence against those who are trying to effect his arrest.²²

There was, thus, nothing in the nature of an unlawful attack upon the appellant 'and this is, in general, a requisite of self-defence.'²³ The appeal was, accordingly, dismissed.²⁴

4.2.1.2 The Attack Must Have Been Directed Against an Interest Worthy of Legal Protection

In considering the nature of the interest worthy of legal protection, the South African courts have recognised that a person may act in private defence to protect life,²⁵ bodily integrity,²⁶ property,²⁷ and dignity.²⁸ He may also shield himself against unlawful arrest

²¹ Above n20 at 184. They did admit that they may have first given him a 'good hiding' but ultimately would have handed him to the police: at 184.

²² Above n20 at 184.

²³ Ibid.

²⁴ In *Kibi* 1978 4 SA 173 E the judge stated unequivocally, 'It is abundantly clear that private defence (*noodweer*) cannot arise where the "attack" is lawful.': at 180.

²⁵ See *Zikalala* 1953 2 SA 568 A; *K* 1956 3 SA 353 A; and *Segatle* 1958 1 PH H125 A. See also Snyman above n1 at 106; and Burchell above n1 at 235.

²⁶ See Burchell above n1 at 236; and Snyman above n1 at 106.

²⁷ According to Labuschagne one should be allowed to rely on self-defence in protection of any property provided that one applies the limiting rules applicable to self-defence.: JMT Labuschagne 'Noodweer ten Aansien van Nie-Fisiese Persoonlikheidsgoedere' 1975 1 *De Jure* 59, at 67. On the subject, in a later commentary, Burchell questions the continued success of private defence (as opposed to self-defence) as a defence in the protection of property believing that the challenge may be based on the argument that 'it unjustifiably undermines the pre-eminence given to the right to life (as opposed to property) in the Constitution.': Burchell above n1 at 142.

²⁸ *Van Vuuren* 1961 3 SA 305 E. See also Snyman above n1 at 106; and Burchell above n1 at 236 who notes, however, the need to draw a distinction between 'dignity' and 'honour'. Labuschagne had earlier made a similar comment. Referring to the old authorities, he concluded that 'on the whole the old authorities did not favour the use of force in the protection of honour.': Above n26 at 62.

(or stated otherwise, defend personal freedom),²⁹ unlawful entry into a house,³⁰ and trespassing.³¹ Additionally, a person may act to prevent a rape,³² arson,³³ *crimen iniuria*,³⁴ and defend sexual integrity.³⁵ However, the interests recognised for the purpose of self-defence are narrower than those that fall under private defence.³⁶ In defining this ‘interest’ in the case of battered women who kill their abusers and raise self-defence, Satchwell J noted in *Engelbrecht*:

It follows that the interests which are attacked and which an abused woman may protect, include her life, bodily integrity, dignity, quality of life, her home, her emotional and psychological wellbeing, her freedom as well as those interests of her child(ren). In short, she defends her status as a human being and/or mother.³⁷

4.2.1.3 There Must Have Been an Imminent Threat of an Attack or an Attack Not Yet Completed

The applicable rules pertaining to the definition of imminence and the application of the condition have been set out by the authors Burchell and Snyman and in the case law. The discussion below is a reflection of the rules that have been generally accepted and applied with regard to the element of ‘imminent threat’.

Burchell defines imminent as ‘immediately about to begin’,³⁸ and Snyman refers to ‘an ... immediate threat of an attack’.³⁹ Both authors stress the importance of immediacy of

²⁹ *Mfusen* 1923 NPD 68; *Kleyn* 1927 CPD 288; *Karvie* 1945 TPD 159; Burchell above n1 at 236 and Snyman above n1 at 106.

³⁰ *Jackelson* 1926 TPD 685; *Thomas* 1928 EDL 401; and Snyman above n1 at 106.

³¹ *Botes* 1966 3 SA 606 O; and Snyman above n1 at 106.

³² *Mokoena* 1976 4 SA 162 O; *Van Wyk* 1967 1 SA 488 A, at 497; and Snyman above n1 at 106.

³³ *Van Wyk* above n32 at 496, 498, and 504.

³⁴ *Ndlangisa* 1969 4 SA 324 E; and Snyman above n1 at 106.

³⁵ *Nomahleki* 1928 GWL 89 referred specifically to sodomy which was a separate crime at the time. However, today the conduct of the accused would fall under the broad rubric of indecent assault. See also Burchell above n1 at 236.

³⁶ Snyman above n1 at 103; Burchell above n1 at 236 and 230 fn 2 where Burchell notes in defining self-defence that it is ‘a term that implies that what is in issue is only the defence of the physical self, the person. Since the defence is available for the protection of other persons and other interests, ... it [self-defence] is misleading.’ Thus, Burchell refers to private defence.

³⁷ Above n14 at 133.

³⁸ Burchell above n1 at 234.

³⁹ Snyman above n1 at 106.

danger. In explaining further, Burchell confirms that fear alone is insufficient to justify an act of self-defence – there must have been either (i) an actual attack which had commenced but was not yet completed or, at least, (ii) the imminent threat of an assault.⁴⁰

A defendant will further not be able to claim self-defence where s/he had the time or opportunity to seek alternate protection. In other words, 'Where the attack is anticipated at some time in the future, resort to a pre-emptive attack is not permissible.'⁴¹ The test is the temporal proximity between the anticipated fear and the defensive action. Applying this rule to real life situations, the courts have recognised that it would be absurd if the rule were interpreted to suggest that a potential victim should wait until the first blow has fallen before taking retaliatory measures.⁴² In dealing with this issue in *Motleleni* the court took cognisance of all the events which had preceded the fatal stabbing of the deceased by the appellant.⁴³ These circumstances of which the court took cognisance included a fight between the accused and the deceased two days prior to the fatal stabbing and the fact that, on that occasion, the deceased had drawn a knife causing the accused to flee. The court further noted that on the day of the fatal stabbing, there was a further confrontation between the accused and the deceased during which (according to the evidence of the accused) the accused believed that 'the deceased had him cornered and that he was about to stab him, in accordance with a threat uttered that very morning.'⁴⁴ The appellant had then stabbed the deceased without waiting to see what he would do.⁴⁵ In dealing with the facts, Galgut AJA held:

The fact that a knife was drawn on Friday which was followed by the threat on the Sunday morning which in turn was followed, in the afternoon, by the unexpected appearance of the deceased, keeping his hand in his pocket, might well have caused another person in his position to have the fears he did have.⁴⁶

⁴⁰ Burchell above n1 at 234.

⁴¹ Burchell above n1 234.

⁴² Snyman above n1 at 106.

⁴³ *Motleleni* 1976 1 SA 403 A, at 405-6.

⁴⁴ *Ibid.*

⁴⁵ Above n43 at 406.

⁴⁶ Above n43 at 406-7.

The evidence was that '[t]he deceased looked directly at the accused and kept his right hand in his pocket. This attitude conveyed to the accused that the deceased had a knife in that hand and was about to carry out his threat of the morning.'⁴⁷

Based on the facts, the court was of the view that, in the circumstances, the accused was justified in believing that the deceased had sought him out and therefore also justified in fearing that he was about to be stabbed. The court also accepted that the accused *in casu* was entitled to act on the perceived threat in order to avoid harm.⁴⁸

In the case of *Mogohlwane* the facts were as follows:⁴⁹ The deceased had attempted to steal food and clothing belonging to the accused. The accused resisted the attack on his property by the deceased, whereupon the deceased threatened the accused with a Tomahawk axe and gained possession of the accused's bag of goods. The accused demanded the return of his property from the deceased but the latter refused to give back the goods. The facts as accepted by the court were that the accused then ran to his parent's home for assistance and, upon finding no-one home, grabbed a table knife and returned to the scene of the theft. Seeing the deceased, the accused attempted to retrieve his bag by grabbing it from the deceased. The deceased hung on to the bag and again threatened the accused with the axe. The accused stabbed the deceased with the knife.⁵⁰

In finding that the accused had acted in private defence, the court noted that the goods in question were valuable to the accused. If the deceased had run off with the goods, the accused would have lost them forever. The court further held that the two incidents (the initial theft of the goods by the deceased and the subsequent defence of his property by the accused) were, in fact, one and the same immediate and continued act of resistance. In other words the accused's continued action in the recovery of the bag and the force which had been applied during that time had formed part of the *res gestae* of the robbery.⁵¹ What is particularly relevant in this case, is the court's application of the *instante* rule. It was clear that the time delay occasioned by the accused running off

⁴⁷ Above n43 at 406.

⁴⁸ Ibid.

⁴⁹ *Mogohlwane* 1982 2 SA 587 T.

⁵⁰ Above n49 at 589.

⁵¹ Above n49 at 588.

to fetch help at his parents' home (which according to the accepted evidence was between three hundred and four hundred metres from the incident) and then subsequently returning to the scene of the attack and 'defending' his goods was not considered by the court to have ended the first act and commenced a new second act. The court found that the attack and defence remained part of the same activity.⁵²

In *Mokgiba* the facts were that the incident forming the basis of the charge took place between 3h00 and 4h00 in the morning.⁵³ The accused and his common law wife were asleep in their corrugated iron shack when they heard a noise outside the dwelling and then what sounded like someone banging on the side of the shack. The evidence was that the door of the shack was only pushed closed as it did not lock from the inside. The accused got out of bed, opened the door and looked outside – where he saw a person standing outside the dwelling. The person said nothing. The accused hastily shut the door and retrieved his gun. He then opened the door again, and seeing the person still standing there he fired a warning shot. He opened the door a third time shortly thereafter and seeing the person standing in front of the door, he fired off two more shots, which were responsible for the death of the person.⁵⁴ Now, it may well be argued that there was neither an attack nor a clear threat of an attack. However, on appeal against a conviction by the court *a quo*, Edeling J held:

... die aanwesigheid en optrede insluitende die onheilspellende stilswye van die oorledene in die omstandighede *per se* 'n gevaar situasie geskep het wat veelvuldiglik toegeneem het toe hy ten spyte van 'n waarskuwingskoot nie die aftog geblaas het nie en inteedeel sy opwagting reg voor en in die deur gemaak het, nog steeds sonder om 'n woord te praat. Die appellant was geregtig om te aanvaar dat hy nie gekom het om te kuier of om werk te soek nie. Sy optrede het onmiddellike bedreiging vir die lewe en liggaam van die appellant en sy vrou ingehou. Die appellant was geregtig om dit met alle mag en alle middele tot sy beskikking af te weer, selfs al sou dit die dood van die oorledene tot gevolg hê. Daar was geen verpligting op hom om te wag totdat die oorledene hom fisies te lyf gaan of om hom te ondervra oor die doel van sy besoek nie. ... [In *casu* is

⁵² Above n49 at 593.

⁵³ *Mokgiba* 1999 1 SACR 534 O.

⁵⁴ Above n53 at 543-5.

daar] geen suggestie dat die oorledene agteruitgetree het of enige teken gegee het dat sy besoek vredeliewend is alvorens hy geskiet is nie. ... Appellant was dus geregtig om te skiet ...⁵⁵

Burchell endorses this approach noting that '[i]f the nature of the attack is such that the threatened harm cannot be avoided, the victim should be entitled to act with such anticipation as is necessary for effective protection.'⁵⁶ In considering victims of the 'abused partner syndrome' Burchell notes that such 'victims ... ought to be allowed to pre-empt the anticipated and inevitable attack of the abusive partner.'⁵⁷ Regrettably Burchell does not pursue the 'inevitability versus imminence' discussion.

Dealing pertinently with domestic violence and self-defence in *Engelbrecht*, the court was called upon to specifically consider the actions of a battered woman who eventually killed her abusive partner in a situation of non-confrontation. In *casu* the court had to decide whether the requirements of self-defence – and especially the condition of imminence – had been met. The facts presented in Engelbrecht's case indicate (i) a history of violence and abuse, (ii) numerous efforts by the accused to get assistance from the police and the criminal justice system, all without success,⁵⁸ and (iii) various attempts by the accused to leave the abuser - but ultimately returning to him for diverse reasons.⁵⁹ Specifically considering the day of the killing, the evidence was that the deceased had been drinking for the entire day.⁶⁰ In the evening the family had dinner and then sat watching television. During this time, the child (C) dropped a clip on the floor and in trying to reach it, bumped her father (the deceased) in his face with her hand. He became extremely angry and grabbed her by the arm and beat her on the buttocks, saying that she had hit him deliberately.⁶¹ The deceased continued shouting at the child. When the accused intervened, the deceased let go of the child and began kicking the accused, threatening *inter alia* to kill her.⁶² At one point after the incident

⁵⁵ Above n53 at 550.

⁵⁶ Burchell above n1 at 234.

⁵⁷ Ibid.

⁵⁸ Above n14 at 61, 64-7, 68-73, and 75-9.

⁵⁹ Above n14 at 62-3, 67, and 80.

⁶⁰ Above n14 at 82

⁶¹ Above n14 at 83.

⁶² Ibid.

with the child, the deceased asked the accused for sleeping pills.⁶³ The accused testified that at some time during the night in question the deceased woke up and ‘went wild’, behaving ‘like someone possessed’.⁶⁴ However, the accused acknowledged that the conduct was not directed at her.⁶⁵ The accused stated that after trying to calm the deceased, she went to the kitchen, where she smoked a cigarette and was crying. When she returned to the bedroom she saw that the deceased was lying on his back on the bed, with the appearance of having passed out. The accused testified that ‘[s]he turned him over, cuffed his hands behind his back [with the thumbcuffs she claimed she had purchased as a sexual toy for him], tied a plastic bag over his head and left the room.’⁶⁶

The state argued that the accused was not entitled to claim self-defence as there was no imminent threat to any protected interest and her actions could, consequently, not be considered reasonable in the light of the *boni mores* of South African society.⁶⁷ The defence argued that the traditional application of the imminence rule did not take proper cognisance of the plight of the battered women.⁶⁸

Referring to the Canadian case of *Lavallee* and *Gallegos* (from the U.S.A) the judge in *Engelbrecht* expressed the view that ‘where the abuse is frequent and regular such that it can be termed a “pattern” or a “cycle” of abuse then it would seem that the requirement of “imminence” should extend to encompass abuse which is inevitable.’⁶⁹

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Above n14 at 104. In summarising the evidence, the state noted specifically ‘that there was no attack pending upon the accused or her daughter. Notwithstanding the deceased’s threat, there is no evidence that he would proceed to action and try to kill her. The injuries previously sustained by the accused were not life-threatening. Even when the deceased had threatened to kill the accused if she went in to comfort the child, he had not done or said anything to her when she actually did so. ... He went to sleep. ... The accused’s evidence that she feared the deceased would place her and C’s lives in danger is contradicted by her own evidence that he was a good father.’: at 106.

⁶⁸ The defence commented specifically that:

... where there is a pattern of violence and psychological denigration, interludes between violent or cruel episodes may be as stressful as the actual assaults. Assaults become familiar terrain and the incessant waiting in-between is exhausting, terrifying and renders the victim full of anxiety and despair. The threat of violence or psychological or emotional cruelty endures beyond the immediate proximity of the victim and perpetrator, reaching past separation, since abusers are notoriously adept at finding their victims and enacting violence.: above n14 at 62.

⁶⁹ Above n14 at 134 & 146. See also Chapter Six, the Canadian case of *Lavallee* (1990), 55 C.C.C. (3d) 97 at 120 (S.C.C.) and Chapter Five, the American case of *Gallegos* 719 P.2d 1268, 1271 (1986 NM). Snyman, however, is of the opinion that the view expressed by Satchwell J in *Engelbrecht* ‘went too far’

The judge noted further that premeditation of the defensive act 'is not necessarily inconsistent with reliance placed upon this ground of justification.'⁷⁰ Snyman is of the view that a 'proactive attack' can be permissible under certain circumstances in terms of the upholding of justice theory of private defence.⁷¹ He comments that 'If the law were to have required the defender to wait for the first blow to strike him or her before retaliating, there is the possibility, if not probability, that such first blow could kill the innocent defender or otherwise put him or her out of action, thus resulting in injustice.'⁷²

4.2.2 Conditions Relating to the Defence

4.2.2.1 The Defence was Directed at the Attacker

Self-defence is focussed on the attacker and may not be directed against a third party.⁷³

4.2.2.2 The Defence Must be Necessary to Protect the Interest Threatened

Burchell states that the defence will be necessary 'where it is the only means available at the time for warding off the attack on her rights and interest. The fact that other means of relief are available does not make the defence unnecessary if at the time of the attack it was impossible for the defender to obtain that relief.'⁷⁴ Thus, in *K* based on the evidence presented namely, (i) that the appellant was a youth of 13 years; (ii) the appellant was confronted by his mother who appeared to be in a state of frenzy; (iii) the appellant was unable to resort to flight; and (iv) the appellant eventually had to be rescued from the situation by his sister, Centlivres CJ found that the appellant had acted

and is not defensible under the standards of imminence applied in the South African law.: above n1 at 106 fn38.

⁷⁰ Above n14 at 134. In support of this view Satchwell J noted that our law has already recognised the setting up of lethal mechanisms as precautionary measures in protection of commercial property.: at 133. However, see also D Ally and F Viljoen 'Homicide in Defence of Property in an Age of Constitutionalism' 2003 16 *South African Journal of Criminal Justice* 121, at 133-4 who take a strong view that life must be prized over property.

⁷¹ CR Snyman 'The Two Reasons for the Existence of Private Defence and their Effect on the Rules Relating to the Defence in South Africa' 2004 17 *SACJ* 178, at 183. He also notes that under the 'upholding of justice' theory of self-defence people acting in self-defence perform acts whereby they assist in upholding the legal order.: Snyman above n1 at 103. The underlying principle is that a person can resort to self-defence 'only if the ordinary legal remedies do not afford her effective protection.': Snyman above n1 at 107 and again n71 at 180-1.

⁷² Above n71 at 184.

⁷³ Burchell above n1 at 242; Snyman above n1 at 107.

⁷⁴ Burchell above n1 at 238.

in self-defence when he acted against the deceased (his mother).⁷⁵ In *Jackson* the court accepted that the defence was necessary where the facts indicated that the deceased had stood over the accused and the accused had believed that the deceased would 'finish him off'.⁷⁶ Taking cognisance of the circumstances of the accused at the time he defended himself, the court accepted that in killing the deceased, the accused had acted in a manner necessary to protect his own life.⁷⁷

In *Motleleni* the evidence was that on the day of the fatal incident, the accused had found himself cornered in the house. There was a window in the house but the only means of leaving the house was by the door, which was occupied by the deceased.⁷⁸ At the trial, the state argued in the alternative that the accused could have fled the scene without resorting to stabbing the deceased. In rejecting the state's argument and finding that the accused had acted in self-defence, Galgut AJA held:

[The submission of the state] loses sight of the fact that there is no evidence to show where the only window was or whether it was open or closed or whether the accused could have reached it, and left the house thereby, before the deceased could inflict blows on him. The only other exit was the door which was occupied by the deceased.⁷⁹

In *Engelbrecht*, to support its contention that the conduct of the accused was *inter alia* necessary to protect her life, the defence placed great reliance on the testimony of the expert witness.⁸⁰ Expert evidence was led to assist the court to contextualise and understand the situational experience and exposure of the accused. The expert witness explained the aspect of 'necessity' in relation to the circumstances of the case as follows:

She [the accused] was accustomed to her husband belittling, undermining and humiliating her in front of her family, her colleagues and friends. Mrs Engelbrecht had so little sense of self or personal entitlement that she might have lived like

⁷⁵ *K* above n25 at 359.

⁷⁶ *Jackson* 1963 2 SA 626 A, at 628.

⁷⁷ *Ibid.*

⁷⁸ Above n43 at 405-6.

⁷⁹ Above n43 at 407.

⁸⁰ Above n14.

that indefinitely if it wasn't for the fact that her husband put her into a position where she could not serve him and be the mother that she vowed to herself to be at the same time. She was eventually forced to make a choice.⁸¹

In considering the requirement of necessity, Satchwell J emphasised that it was important that the court critically analyse the extent to which the ordinary law of the land was available to the accused and effective in supporting her and freeing her from the violence and its impact.⁸² In dealing with this issue, Satchwell J referred to the case of *Baloyi* in which the Constitutional Court criticised the efficacy of the criminal justice system to assist victims of domestic violence.⁸³ In *Baloyi* the court expressed the opinion that the 'ineffectiveness [of the criminal justice system] ... intensifies the subordination and helplessness of the victims' and 'sends an unmistakable message to the whole society that the daily trauma of vast numbers of women counts for little.'⁸⁴ The court held that the apathy of the system served to compound the belief that domestic violence is inevitable and so, '[p]atterns of systemic sexist behaviour are normalised rather than combated'.⁸⁵

However, on the facts before them, the assessors in *Engelbrecht* were not satisfied that the accused had given the legal system, the South African Police Service and society a fair chance of helping her. Accordingly, they came to the decision that 'it was not reasonable in all the circumstances for Mrs Engelbrecht to kill Mr Engelbrecht ...'⁸⁶ Satchwell J found that 'there was objectively an imminent threat to the fundamental attributes of personhood of both Mrs Engelbrecht and C at the hands of Mr Engelbrecht. The killing of Mr Engelbrecht was reasonably necessary in all the circumstances'⁸⁷

The judge stressed that in considering whether the accused reasonably exhausted other remedies, regard had to be given to the full conspectus of the evidence presented and

⁸¹ Above n14 at 102.

⁸² Above n14 at 134-5 & 150.

⁸³ Above n14 at 150-1. See also *Baloyi* 2000 1 SACR 81 CC, at 88.

⁸⁴ Above n83 at 88.

⁸⁵ *Ibid.*

⁸⁶ Above n14 at 157.

⁸⁷ *Ibid.*

the circumstances of the accused.⁸⁸ Finally, it must be recalled that the accused was a victim of ongoing and habitual abuse and exhibited the signature marker of feelings of helplessness, powerlessness and dependence on the abuser. The evidence was also that the accused had tried to leave the deceased on numerous occasions but returned either because of his threats or because she felt sorry for him or because of financial need.⁸⁹

In dealing with the right to act in self-defence, Snyman notes that this right 'is *subsidiary* in nature: it takes effect only when the state is not there to protect a particular person.'⁹⁰ The implication of this is that if help from the state in the form of the police is available to protect a person, such person should not without more go ahead and violate another's physical integrity in private defence.'⁹¹ Acknowledging this principle in light of the facts in the *Engelbrecht* case, as well as paying appropriate heed to the *dictum* of Kriegler J in *M*, the writer's view is that the assessment of the situation of the accused as advanced by Satchwell J in *Engelbrecht* is more reasonable and cognisant of the effects of abuse and the dynamics of intimate violence.⁹² The writer submits that the decision in *Engelbrecht* should have been that the conduct of the accused was necessary as she had had no effective protection from the state. Underscoring the fallacy in the approach of the assessors in *Engelbrecht*, which resulted in the appeal being dismissed, Ludsin and Vetten note that an ongoing hurdle confronting battered women in the courtroom 'seems to be that legal practitioners cannot accept that the police and courts fail in their

⁸⁸ Above n14 at 62-83. In summary, the facts presented in evidence included numerous instances when the accused tried unsuccessfully to obtain support from the SAPS, having to deal with uncooperative and hostile staff in the Victim Centre linked to the SAPS, the difficulties with obtaining a Protection Order because of having to juggle her work schedule, non-service of documents, and a failure by the courts to give effect to the provisions of the Domestic Violence Act, and the further failure by the office of the Sheriff to effect service of a divorce summons. In addition, the accused was always required to take care of and protect C in an openly abusive environment – if she had to leave the house because of the abuse, she had to take C with her, and the accused also had to keep her job (often working two shifts) to ensure that there was sufficient money in the home. Whilst friends sought to assist her during difficult periods, such assistance was not permanent and the accused had, invariably, to fend for herself and C.

⁸⁹ See above n14 at 63-83.

⁹⁰ Above n71 at 179.

⁹¹ *Ibid.*

⁹² In *M* 1991 1 SACR 91 T, at 100 Kriegler J stated with particular reference to the facts of his case and the evidence of the expert that 'the wise judicial officer does not lightly reject expert evidence on matters falling within the purview of the expert witness's field. The judicial process is difficult enough. ... Here a highly qualified and obviously well informed expert proffered not only expert evidence but volunteered valuable assistance in the future handling of the prisoner before the court. That witness dealt with questions beyond the field of ken of laymen. One does not reject such evidence readily where the expert has furnished his opinions – and the foundational reasons therefor – in a satisfactory manner.'

duty to protect abused women from domestic violence. The need to maintain the utmost faith in the criminal justice system seems to blind them to the reality of women's experiences with domestic violence.⁹³

4.2.2.3 There Must Be A Reasonable Relationship Between the Attack and the Defensive Act

Burchell notes that whilst 'it may have been necessary for a person to resort to the use of force in private defence, this alone is not sufficient to establish that the defender acted lawfully.'⁹⁴ There must be a reasonable relationship between the attack and the defensive action,⁹⁵ or stated otherwise the evidence must show that 'the method used to avert the attack was reasonable in the circumstances.'⁹⁶ According to Snyman the reasonableness of the relationship between the attack and the subsequent defence will be a factual determination that should be judged casuistically in light of the circumstances in which the events took place.⁹⁷ In outlining the measures to determine the reasonableness of the relationship between attack and defence, Snyman gives consideration to (i) the relative strength of the parties, (ii) their sex and age, (iii) the means they have at their disposal, (iv) the nature of the threat, (v) the value of the interest threatened, and (vi) the persistence of the attack. A further factor for

⁹³ H Ludsin and L Vetten *Spiral of Entrapment: Abused Women in Conflict with the Law* (Jacana Media, Johannesburg: 2005) 102. In dealing with this issue, Grant points out that Satchwell J concluded that it was reasonable for the accused to have lost faith in the criminal justice system so that the force she resorted to was necessary in the circumstances. In Grant's view this set the standard. Yet, the assessors took the view that the accused had acted unreasonably in not giving social welfare and the criminal justice system a fair chance. Grant is highly critical of their input declaring that 'here again they stray into the domain of the judge – declaring what would be reasonable and in effect, purporting to declare the law.': above n19 at 14.

Specifically dealing with the negative relationship between victims of domestic violence and the courts, see K Naidoo 'Justice at a Snail's Pace: The Implementation of the Domestic Violence Act (Act 116 of 1998) at the Johannesburg Family Court' 2006 19 *Acta Criminologica* 77. (Shoham confirms the unfortunate truth namely, that the discord between victims of domestic violence and the courts is not limited to South Africa - see E Shoham 'The Battered Wife's Perception of the Characteristics of Her Encounter with the Police' 2000 44 *International Journal of Offender Therapy and Comparative Criminology* 242, at 245-7.)

⁹⁴ Burchell above n1 at 239.

⁹⁵ Snyman above n1 at 109. Burchell describes this element as the need to show that in addition to the force used being necessary, the gravity of the attack and the style and extent of the defence against the attack must be more or less proportional.': Burchell above n1 at 239-40.

⁹⁶ Burchell above n1 at 240.

⁹⁷ Snyman above n1 at 109 and 111.

deliberation must be 'the means of defence available to the defender at the crucial moment.'⁹⁸

In *Ntanjana v Vorster and Minister of Justice*,⁹⁹ the court held that the issue for determination was not whether there were alternative means of defence which could have been successfully employed by the accused 'but whether the method in fact adopted can be justified.'¹⁰⁰

In *Jackson*, Hoexter AJA held that the question under these circumstances should be:

Did the accused reasonably fear for his life? Would a reasonable man in the situation have feared that his life was in danger? If he was justified in having that fear, and defending himself in that way, then he was not guilty ...¹⁰¹

In *Ex parte Die Minister van Justisie: In re S v Van Wyk* the court expressly rejected the requirement of proportionality as a condition of private defence. The Appellate Division held that one who affronts the rights of another in a manner that s/he can only be stopped by extreme means must be regarded as 'the author of his own misfortune' for, questioned the court (rhetorically), 'why should the defender who is unquestionably entitled to protect his rights, be viewed as the one acting unlawfully if he uses deadly force rather than sacrifice his rights?'¹⁰²

In dealing specifically with the commensurate nature of the weapon used in defence when compared with the means of the attack, Steyn J clarified the legal rule in *T*.¹⁰³ Based on the evidence the court held that *in casu* even though the aggressor's attack on the accused may not have placed the accused's life in danger, the accused was nevertheless justified in using a firearm against his attacker (and even shooting and killing the aggressor) if to do so would avoid serious harm to himself.¹⁰⁴ In *Ntsomi v*

⁹⁸ Snyman above n1 at 111. Snyman is clear, however, that if an accused person could have applied less harmful means then her conduct is not justified.: Snyman above n1 at 112.

⁹⁹ *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 K.

¹⁰⁰ Above n99 at 408.

¹⁰¹ Ibid.

¹⁰² *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 1 SA 488 (A), at 497. Contrast this with the earlier case of *Biyela* 1958 (1) PH H12 (A), at 19-20 where the Appellate Division expressly stated the view that the degree of force in averting an attack must be proportionate to the initial act of aggression.

¹⁰³ *T* 1986 2 SA 113 O.

¹⁰⁴ Above n103 at 128.

Minister of Law and Order the court also rejected a requirement of 'equilibrium between the weapons used'.¹⁰⁵ Van Deventer J found that in a situation of attack, it is the assailant who chooses his weapon of attack: a 'victim can only employ the weapon that happens to be at hand'.¹⁰⁶

With regard to battered women claiming self-defence after they have murdered their abusers, another question which may be raised is 'why, if the violence was so intolerable, did the abused woman not leave her abuser long ago'.¹⁰⁷ In responding to the question and effectively placing the matter to rest, Satchwell J in *Engelbrecht* referred again to *Lavallee* and confirmed:

I am of the view that the Court must, in this context, be extremely cautious in seeking to rely upon examination of the efforts taken by an abused woman to extricate herself from the abusive situation or to escape the abusive spouse or partner. Judgment should not be passed on the fact that an accused battered woman stayed in the abusive relationship. Still less is the Court entitled to conclude that she forfeited her right to self-defence for having so done.¹⁰⁸

In *Engelbrecht* Satchwell J again emphasised that in considering the relationship between the attack and a consequent defence, proper notice must be taken of the circumstances and lived realities of the battered woman accused when making the determination as to whether the force used by her was proportional to the attack or reasonable in the circumstances. She sets out a clear list of factors for consideration which includes the ages of the parties, their relative strengths, gender socialisation and experiences. Further factors that she raises are the nature, duration and development of the relationship between the parties. Satchwell J also acknowledged the relevance of the power relations that often characterised abusive relationships and she also emphasised the importance of noting the socio-religious and psychological factors that typify the relationship. Finally, she noted that the court would have to take notice of the social and state-legislated support that was available to victims and, very importantly,

¹⁰⁵ *Ntsomi v Minister of Law and Order* 1990 1 SA 512 C, at 529.

¹⁰⁶ *Ibid.*

¹⁰⁷ Above n14 at 135.

¹⁰⁸ *Ibid.*

the victim's ability to access and utilise the above channels.¹⁰⁹ It is the writer's view that these factors should be taken into consideration when a court has to determine whether the force used was reasonable. It is submitted that this will enable the court to take cognizance of the full spectrum of the private and public lived reality of the accused in assessing the reasonable relationship between the attack and the defensive action.

The duty to flee

The duty of a person who is attacked to flee from harm rather than retaliate has been raised before the courts and it is submitted that from a reading of the case law, there is no duty upon an attacked person to flee.¹¹⁰ Labuschagne notes that the view that a person should flee if he can so avert the danger is supported by many of the old writers and apparently reflects the common law.¹¹¹ However, his observation is that if there is doubt about whether the danger can actually be averted by flight, then there's no obligation to retreat.¹¹² Labuschagne explains further that the obligation that a person acting in self-defence should be required to flee to avoid an attack is difficult to reconcile with the principle of self-defence for purposes of keeping law and order. In actual fact, such a pre-requisite would create the impression that a legal regime does not take a stand against unsolicited force.¹¹³ In *Mnguni* the court held that 'no one can be expected to take flight to avoid an attack, if flight does not afford him a safe way of escape; ...'¹¹⁴ Trollip J further noted that a man was not bound to expose himself to the risk of a stab in the back when by killing his assailant he could secure his own safety.

¹⁰⁹ Above n14 at 136. Snyman is of the opinion that Satchwell goes too far in her list of factors. His view is that many of the considerations are ill-defined and too vague and 'unjustifiably drag subjective factors into an enquiry which is entirely objective.': Snyman above n1 at 111-2 fn62. Snyman points out that the Satchwell approach could 'result in emotional people acquiring a right to kill where more unemotional people do not have it.': Snyman above n1 at 112 fn62. It would appear that Snyman juxtaposes the human and legal factors proposed by Satchwell J and finds that the human considerations are not legally convincing. The writer, however, disagrees with Snyman and stresses that the so-called human factors are all equally important factors to be considered under the circumstances. The comment of Snyman is, in the writer's view, an example of the lack of real understanding of the circumstances and lived realities of women who live in abusive relationships often found in the legal fraternity. See also Chapter Two.

¹¹⁰ See *Zikalala* above n25 at 572; *K* above n25; *Patel* 1958 3 SA 121 A, at 123; *Mnguni* 1966 3 SA 776 T, at 779; followed in *Teixera* 1980 3 SA 755 A, at 765; above n102 at 527; and *Mothoana* 1992 2 SACR 383 O, at 385. See also above n71 at 184.

¹¹¹ Labuschagne above n25 at 62.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Mnguni* above n110.

In *casu*, the court did not find that the accused had acted in self-defence because there was no evidence to prove that the deceased would have chased him and attacked him.¹¹⁵ However, the writer submits that the converse may also have been true as there was also no evidence to prove that he would not have. According to Snyman the question is not ‘Should she have fled?’: rather, the issue falls under the broader rubric of whether she was entitled to go to the lengths that she did in defending herself in the circumstances.¹¹⁶

Snyman holds the view that there is no duty upon an attacked person to flee as this could be seen as a ‘capitulation to injustice’.¹¹⁷ Burchell endorses this view.¹¹⁸

Snyman states further unequivocally that no person is expected to flee from her home if she is attacked there.¹¹⁹ Specifically with regard to battered women Satchwell J in *Engelbrecht* noted that by its very nature, domestic violence is ‘concealed’ and frequently confined to the privacy of the home.¹²⁰ The judge thus argued:

I am cautious about requiring the abused woman (and her children) to vacate her (their) home leaving the abusive spouse in full occupation.¹²¹

Ludsin and Vetten are of the opinion that a ‘double standard’ is applied by some courts when dealing with victims of domestic violence in the criminal courts.¹²² Discussing the issue further, they compare the cases of *Mogohlwane* and *Nape*.¹²³ Specifically, with reference to *Nape* (a case in which a woman killed her husband after a long history of abuse) Ludsin and Vetten refer to the remark of the judge in dealing with mitigation of sentence:

¹¹⁵ *Mnguni* above n110 at 779-80. The comment of Van der Westhuizen bears recall where he noted that although in respect of unlawfulness regard is had to real results and not probable results, all probabilities can never be totally ignored.: above n6 at 376.

¹¹⁶ CR Snyman *Criminal Law* (Butterworths, Durban: 2002) 107.

¹¹⁷ Snyman above n1 at 109.

¹¹⁸ Burchell above n1 at 239.

¹¹⁹ Snyman above n1 at 108.

¹²⁰ Above n14 at 135.

¹²¹ *Ibid.*

¹²² Ludsin and Vetten above n93 at 123.

¹²³ *Ibid.* See also above n49 and *Nape* (unreported CC67/97 – on file with the Centre for the Study of Violence and Reconciliation, Johannesburg).

The accused had a wide range of options available to her at the time of the commission of the offence, such as removing the firearm from where it was placed, going away from the house together with the children, even if it was late. Nothing could be more risky than staying in a house where somebody was threatening to use a firearm against you.¹²⁴

Ludsin and Vetten note that in *Nape's* case the court accepted that the deceased had threatened the accused with a firearm on numerous occasions and at the time of the incident which formed the basis of the charge against the accused and the court agreed that the accused had faced great danger at the hands of the deceased. However, they note that despite the evidence (which was accepted by the court), the court nevertheless still 'required her to take her children and run. Her failure to do so weighed against mitigation of sentence.'¹²⁵ Yet, in *Mogohlwane* 'the court did not place a duty to flee on him, although it is apparent that he could have fled safely,' write Ludsin and Vetten.¹²⁶

4.3 THE TEST FOR SELF-DEFENCE

In deciding whether self-defence will be successful, the courts must apply an objective standard to test all the requirements set out above - it is not sufficient to prove the elements of the defence by merely demonstrating the accused's perceptions and her assessment of the position at the time that she resorted to self-defence.¹²⁷ The

¹²⁴ Ludsin and Vetten above n93 at 123.

¹²⁵ Ibid.

¹²⁶ Ibid. Specifically, Ludsin and Vetten point out that in *Mogohlwane*, the accused would only have been required to flee from the street – and not from his home, as was the case in *Nape*.'

¹²⁷ Where the accused genuinely (that is honest and *bona fide*) believes that a defence excluding unlawfulness exists (but it does not) or the accused honestly thinks that she is entitled to use such force as she did (but she is not), then the accused is said to lack fault in the form of intention. There is no requirement that the mistake be reasonable as well as in good faith.: Burchell above n1 at 503. This was clarified in *De Blom* 1977 1 SA 513 A and Snyman explains that whilst the court did not specifically discuss whether unreasonable or negligent mistake constituted a defence, an assessment of the judgment yields to the unavoidable conclusion that 'a purely subjective test was introduced to determine whether X acted with culpability if charged with a crime requiring intention.' He concludes that mistake of the law (or fact), even if unreasonable, excludes intention.: Snyman above n1 at 204. See also *De Blom* above n127 at 532.

This genuine mistake by the accused is described as putative private defence and is not true private defence.: See J Burchell and J Milton *Principles of Criminal Law* (Juta, Kenwyn: 1999) 346; Burchell above n1 at 243; and Snyman above n1 at 113. In *De Oliveira* 1993 2 SACR 59 A Smalberger JA

requirements must be judged objectively.¹²⁸ In applying the objective test, the courts must be wary of adopting a sterilised approach to the facts. The current approach adopted by the courts is to place the reasonable person in the position and circumstances of the accused before making a finding on the conduct of the accused.¹²⁹

In dealing with the issue of considering subjective factors under the objective test for unlawfulness, Van Winsen AJ held in *Ntanjana v Vorster & Minister of Justice*:

The very objectivity of the test ... demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the

described the difference between private defence and putative private defence as being, from a juristic point of view, 'significant': *De Oliveira* above n127 at 63. The writer agrees that there is a fundamental distinction between the two notably that private defence considers the issues of objective unlawfulness and justification, whilst putative private defence focuses on the subjective intention of the accused and the requirement of culpability to excuse the conduct of the accused. Thus, whilst Burchell (correctly, it is submitted) expresses the view that putative private defence may be an appropriate defence for battered women who kill their abusive partners, for the purpose of this study - which deals only with private defence - the writer will not discuss putative private defence in any detail.: Burchell above n1 at 454.

It is noteworthy that in the U.S.A., Canada and Australia the courts have not made the same clear distinction between true private defence (objective unlawfulness) and putative private defence (subjective intention) in dealing with cases of private defence. See Chapters Five, Six and Seven. Thus, for the sake of completeness and to facilitate the comparison with the other jurisdictions forming part of this study, the writer will briefly set out the principles of putative private defence in South Africa and the distinction between putative private defence and true private defence.

In *De Oliveira* 1993 2 SACR 59 A Smalberger JA confirmed the test for private defence as being objective – would a reasonable person in the position of the accused have acted in the same way. And, he noted, '[i]n putative private defence it is not lawfulness that is in issue but culpability' – if an accused honestly believes his life ... to be in danger, but objectively viewed it is not, the defensive steps he takes cannot constitute private defence.: above n127 at 63. The evaluation in the latter case is not one of objective reasonableness vis-à-vis the conduct of the accused but rather whether an accused subjectively honestly believes his life to be in danger. As Burchell points out, in such cases the accused may avoid liability on the ground that he did not intend his conduct to be unlawful.: Burchell above n1 at 515-6. Where putative private defence is successfully raised, it negates intention and the conduct of the accused is thus excused (as opposed to justified which would be the outcome were the court to find that the accused had acted in private defence). However, in *De Oliveira* putative private defence failed because the court found that the issue for determination was whether the state had proved beyond a reasonable doubt that the accused had the necessary intention to commit the crime (or that the accused 'did not entertain an honest belief that he was entitled to act in private defence.'): above n127 at 64. However, the accused did not testify as to his belief and refute the *prima facie* proof before the court that he could not have honestly harboured such a belief.: above n127 at 65. The law relating to putative private defence as set out in *De Oliveira* was confirmed in *Joshua* 2003 1 SACR 1 SCA, at 10-11 and followed in *Dougherty* 2003 2 SACR 36 W, at 45 and 47.

¹²⁸ Burchell above n1 at 242.

¹²⁹ Snyman above n1 at 113. Grant notes that the use of the reasonable person test is actually a proxy for the test of the legal convictions of the community.: above n19 at 4.

position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted.¹³⁰

In *Zikalala* the Appellate Division confirmed that '[i]n considering the question of self-defence, a jury must endeavour to imagine itself in the position in which the accused was.'¹³¹ The facts *in casu* were that the appellant knew that the deceased was a dangerous person who had, five days prior to the conduct which was the subject of the case, for no apparent reason made an attack on the appellant which could have been fatal to the appellant. On this occasion, the deceased again made an attack on the accused without reasonable cause – and with a lethal weapon, whilst supported by friends, and with evident determination. Van den Heever JA found, on the evidence, that the '[a]ppellant had every reason to believe that his life was in imminent danger.'¹³² In ruling against the decision of the court *a quo*, Van den Heever JA dealt with two observations made by the lower court in reaching its decision namely, firstly the learned judge *a quo* observed, 'I find it difficult to understand why the accused didn't cry out for help and why the other people there did not overpower the deceased ...'¹³³

Secondly, the court *a quo* observed, 'I have great difficulty in this case in holding that the accused could not get away and that he did not have a reasonable chance to get away if he wanted to.'¹³⁴ In dealing with this observation, Van den Heever JA pointed out that courts should be wary setting a standard that required a person confronted by extreme violence to respond in a manner that required mental calm and an ability to reason that was more reasonably appropriate to an *ex post facto* determination of how the harm could have been avoided.¹³⁵

Commenting on *Motleleni*, Van der Westhuizen acknowledges that whilst the test for unlawfulness is objective, were one to exclude all the subjective and human characteristics in respect of the defender, the objectivity that is attempted to be applied

¹³⁰ Above n99 at 406.

¹³¹ *Zikalala* above n25 at 572.

¹³² *Ibid.*

¹³³ *Zikalala* above n25 at 572-3.

¹³⁴ *Zikalala* above n25 at 573.

¹³⁵ *Ibid.*

would be too mathematical and would lead to an unrealistic application thereof on the action.¹³⁶

In *T* the facts were as follows: The accused, a sixteen year old schoolboy, was charged with culpable homicide and convicted by the trial court. On appeal, the court held that the magistrate *a quo* had erred in applying the totally objective 'reasonable man' test to the appellant's conduct. Following the established precedent, Steyn J took the view that the proper approach would have been to adopt a more individualised approach – and the criterion used should have been that of a reasonable sixteen year old schoolboy. He held that although the test for self-defence must be an objective one, there remains an unavoidable element of subjectivity pertinent to the people involved and the surrounding circumstances.¹³⁷

With particular reference to battered women, Satchwell J noted in *Engelbrecht*:

It is necessary to understand what is encompassed by the concept “domestic violence” and the core features thereof It is appropriate to recognise the “hidden” and “unacknowledged” character of this behaviour in our society before assessing the evidence of those who claim it did or did not exist in the Engelbrecht relationship. It is advisable to evaluate the responses of the criminal justice system, as well as informal family and social networks, before passing judgment on Mrs Engelbrecht's own behaviour.¹³⁸

The jurisprudence clearly recognises that the objective test of self-defence must be tempered with an element of subjectivity ('subjektiwiteit') – the nature of the test being confirmed as that of a reasonable person in the circumstances and in the position of the accused. In *Government of the Republic of South Africa v Basdeo and Another* the court noted a list of factors that ought to be taken into account when reaching a value

¹³⁶ Van der Westhuizen above n6 at 407.

¹³⁷ *T* 1986 2 SA 113, at 127 - see also *Ntsomi's case* above n105 at 529 where the court specifically approved the test set out in *T*.

¹³⁸ Above n14 at 86.

judgment on the general criterion of reasonableness. Specifically, in this regard, the court included ‘a consideration of all the circumstances of the case.’¹³⁹

Burchell and Milton are, however, adamant that the approach by the courts has not introduced an element of subjectivity into the assessment of self-defence. They note that the application by the courts ‘means only that the matter is considered objectively in the particular circumstances of the case.’¹⁴⁰ Satchwell J also confirmed that the test is and remains one of objective reasonableness. She was emphatic in stating in *Engelbrecht*:

I do not, of course, forget that the appreciation of the situation by the abused woman and her belief as to the reaction which it required requires an objectively verifiable basis for such perception.¹⁴¹

‘The questions asked are what would the ‘reasonable man’ have done?, was the force used ‘reasonably necessary in the circumstances’?, or did the accused ‘act reasonably and legitimately to protect himself against the deceased?’, stated Satchwell J.¹⁴² The writer agrees with this approach and is of the opinion that there is no need to subjectify the standard of the reasonable person when dealing with cases of battered women; what is relevant is that the courts take informed cognisance of her lived realities and experience.¹⁴³

¹³⁹ *Government of the Republic of South Africa v Basdeo and Another* 1996 1 SA 355 A, at 367. The other factors that required consideration were (i) morality and policy; and (ii) the court’s perception of the legal convictions of the community.: at 367.

¹⁴⁰ Burchell above n1 at 243. Grant agrees with this approach and notes that the test is ‘what the legal convictions of the community permit’: however, he confirms that ‘there is always the question of whether the conduct of the accused falls, in fact, within what is permitted by the legal convictions of the community. This is the factual (reality based) enquiry ...’: above n19 at 3.

¹⁴¹ Above n14 at 137.

¹⁴² Above n14 at 129.

¹⁴³ Interestingly, in light of the *Engelbrecht* decision, is the much earlier article of Labuschagne responding to the judicial direction emerging towards the end of the previous century.: Labuschagne above n6. In it Labuschagne noted that already it was becoming clearer that with the continuing evolution of human and socio-judicial value structures, self-defence had developed normative boundaries. He noted further that a review of the case law on self-defence showed that in deciding the issues, the courts were taking cognisance of factors such as the defender’s knowledge of the attacker’s state of mind and characteristics and what was going on in the head of the person acting in self-defence. Specifically, he stated, ‘*Wáárop dit hier weselik aankom, is die aangevallene se kennis van die toestand, geestesvermoë of van relevante eienskappe van die aanvaller.*’ And later, he states again, ‘*In finale instansie gaan dit ook hier om wat in die aangevallene (noodweerdader) se kop aangaan.*’: Labuschagne above n6 at 65. And later, he emphasises, ‘*In finale instansie gaan dit ook hier om wat in die aangevallene (noodweerdader) se kop*

4.3.2 A Consideration of the ‘Circumstances of the Accused’ and the Need For and Role of the Expert Witness in Cases Involving Domestic Violence

From the above discussion, it appears that the South African courts tend to accept that in assessing self-defence, the requirement of ‘objective reasonableness’ must take account of the circumstances of the accused person.¹⁴⁴ In giving proper consideration to the circumstances of the accused in cases involving battered women on trial for murder, the courts in *Ferreira*¹⁴⁵ and *Engelbrecht*¹⁴⁶ unequivocally accepted the need for expert evidence to assist the court. In *Engelbrecht*, Satchwell J conceded as follows:

This Court freely admits that we do not ourselves have knowledge or experience of the tragedy of domestic violence so as to make any findings thereon without the assistance of persons with special knowledge.¹⁴⁷

4.3.1.1 General Rules of Admissibility of Expert Evidence

The basic rule on the admissibility of expert evidence in criminal cases is set out in section 210 of the *Criminal Procedure Act* 51 of 1977 which states:

No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.

All the South African authorities are in agreement that relevance is the fundamental test for admissibility.¹⁴⁸ According to Schwikkard *et al* the test for relevance in the case of an expert witness is whether the opinion of the particular expert in the specific

aangaan.’: at 65. At the time, Labuschagne cautioned that the evolution process was not completed and other new standards may yet be introduced. However, he concluded that as a result of this evolution process, the requirements of self-defence were becoming less concrete and this deconcretisation process was slowly eroding the objective foundation of self-defence.: Labuschagne above n6 at 64 and 68.

¹⁴⁴ See above n139 at 367; above n14 at 130-1; and the cases cited in the discussion above.

¹⁴⁵ *Ferreira and Others* 2004 2 SACR 454 SCA.

¹⁴⁶ Above n14.

¹⁴⁷ Above n14 at 86.

¹⁴⁸ PJ Schwikkard, A St Q Skeen, and SE van der Merwe *Principles of Evidence* (Juta and Co, Lansdowne: 2001) 76. DT Zeffert, AP Paizes and A St Q Skeen *The South African Law of Evidence* (Butterworths, Durban: 2003) 290.

circumstances of the case could assist the court in determining the issues.¹⁴⁹ In *Gentiruco A.G. v Firestone S.A. (Pty) Ltd* the court recognised a more flexible interpretation to the rule and found that despite its being able to reach an independent conclusion, the opinion of the expert would be of appreciable assistance to the court in reaching it.¹⁵⁰ The court ruled that in such circumstances, the opinion was also relevant and that a court would be entitled to receive it.¹⁵¹ In *Holtzhauzen v Roodt* the court emphasised that whilst the opinion of the expert will carry probative value, the opinion evidence should never be permitted to usurp the court's function and the expert is, consequently, not permitted to give an opinion on the legal or general merits of the case and the expert should not be permitted to present an opinion on the ultimate issue for decision.¹⁵² In *Vilbro* the court applied the test as follows:

- (i) there is no general rule that a witness can never state an opinion upon an issue which the court will have to decide; and
- (ii) if the court is unable to reach a decision on the ultimate issue without the assistance of the expert, then it must necessarily be assisted by the expert opinion;¹⁵³ but
- (iii) there will also be some ultimate issues upon which a witness's opinion will always be inadmissible. For instance *inter alia*, a witness is not permitted to give an opinion on the legal or general merits of the case.¹⁵⁴

¹⁴⁹ PJ Schwikkard, A St Q Skeen and SE Van der Merwe above n148 at 83. See also DT Zeffert, AP Paizes and A St Q Skeen above n148 at 291; PJ Schwikkard and SE van der Merwe *Principles of Evidence* (Juta Law, Lansdowne: 2002) 80; *Morela* 1947 3 SA 147 A, at 153; *Vilbro* 1957 3 SA 223 A, at 228; *Ruto Flour Mills Ltd v Adelson (1)* 1958 4 SA 235 T, at 237; *Coopers (SA) Ltd v Deutsche Schädlingsbekämpfung Mbh* 1976 3 SA 352 A; and *Holtzhauzen v Roodt* 1997 4 SA 766 W, at 776.

¹⁵⁰ *Gentiruco A.G. v Firestone S.A. (Pty) Ltd* 1972 1 SA 589 A, at 616.

¹⁵¹ Above n150 at 616-8. See also *Coopers (SA) Ltd v Deutsche Schädlingsbekämpfung Mbh* above n149 at 370 where the court could arrive at an independent conclusion on the facts presented but the assistance of an expert was found to be helpful; and above n92 at 100.

¹⁵² *Holtzhauzen v Roodt* above n149 at 556. In *Engelbrecht* Satchwell J summarized the test for admissibility as follows:

Firstly, the matter in respect of which the witness is called to give evidence should call for specialized skill and knowledge. Secondly, the witness must be a person with experience or skill to render him or her an expert in a particular subject. Thirdly, the guidance offered by the expert should be sufficiently relevant to the matter in issue to be determined by the Court. Fourth, the expertise of any witness should not be elevated to such heights that the Court's own capabilities and responsibilities are abrogated. Fifth, the opinion offered to the Court must be proved by admissible evidence, either facts within the personal knowledge of the expert or on the basis of facts proven by others. Sixth, the opinion of such a witness must not usurp the function of the Court.: above n14 at 54-5.

¹⁵³ As Schmidt and Zeffert note, 'An expert must testify on the ultimate issue if his evidence would be relevant in the sense that it would be of real assistance to the court.': CWH Schmidt and DT Zeffert *Evidence* (Butterworths, Durban: 1997) 31.

The general rule with regard to the legal or general merits is that the expert's opinion is taken together with all the other evidence and adjudicated to determine the accused's guilt or absence thereof.¹⁵⁵ However, Zeffert, Paizes and Skeen caution that whilst in theory it is true that the court has the final discretion to accept or reject the witness's opinion, there is always the practical danger that the opinion of the of the expert may be given greater value than it deserves by virtue of its source.¹⁵⁶

4.3.1.5 The Need For and Use of Expert Evidence in Cases of Domestic Violence

In *Engelbrecht* Satchwell J provided a clear statement on the use of expert evidence in cases of domestic violence.¹⁵⁷ Referring to the Canadian case of *Lavallee*, she stated:

Firstly, expert testimony is admissible to assist the fact-finder in drawing inferences in areas where the expert has relevant knowledge and experience beyond that of the lay person; secondly, there are stereotypes – for instance that battered women are not really beaten as badly as they claim, otherwise they would have left the relationship, alternatively, that women enjoy being beaten because they have a masochist strain in them – which stereotypes may adversely affect consideration of a battered woman's claim to have acted in self-defence in killing her mate and expert evidence can assist in dispelling these myths; thirdly, expert testimony relating to the ability of an accused to perceive danger from her mate may go to the issue of whether she “reasonably apprehended” death or grievous bodily harm on a particular occasion; fourthly, expert testimony pertaining to why an accused remained in the battering relationship may be relevant in assessing the nature and extent of the alleged

¹⁵⁴ *Vilbro* above n163 at 228. This summary of the law is also supported by CWH Schmidt and DT Zeffert above n149 at 29. In explaining the concept of ‘legal merits’, Schwikkard and Van der Merwe refer to those issues which entail a conclusion of law or which require the application of a standard of law to the facts.: PJ Schwikkard and SE van der Merwe above n149 at 82. See also *Ruto Flour Mills Ltd v Adelson (I)* above n149 at 237; and *Mngomezulu* 1972 1 SA 797 A, at 798-9.

¹⁵⁵ *Mngomezulu* above n154 at 798-9.

¹⁵⁶ DT Zeffert, AP Paizes and A St Q Skeen above n148 at 294.

¹⁵⁷ Above n14 at 56. Meintjies-Van der Walt also proposes the involvement of the expert during trial preparation. She notes that in many instances, ‘Without [the insight provided by the expert] defence counsel would not be able to prepare properly for trial and to understand appropriate avenues to question results or argue convincingly.’: L Meintjies-Van der Walt ‘Expert Evidence and the Right to a Fair Trial: A Comparative Perspective’ 2001 17 *South African Journal of Human Rights* 301, at 308.

abuse; fifthly, by providing an explanation as to why an accused did not flee when she perceived her life to be in danger, expert testimony may also assist in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life.¹⁵⁸

4.3.1.6 The Nature of the Expert Evidence that Will Be Admitted in Cases of Domestic Violence

Ferreira was the first case in South Africa where the defence sought to justify the alleged criminal conduct of the accused by relying on her violent domestic relationship with the deceased.¹⁵⁹ In *Ferreira* the accused did not testify at the trial. Her version of the facts was contained in a written explanation accompanying her guilty plea. The accused recounted her life and experiences with the deceased to a social worker (Bhana) and the gender co-ordinator (Vetten) at the Centre for the Study of Violence and Reconciliation (CSVR) in Johannesburg. Bhana and Vetten gave expert evidence for the defence in the trial proceedings.¹⁶⁰

Outlining a history of severe mental and physical abuse coupled with a clear failure by the police to provide assistance, Bhana testified that in the period immediately preceding the killing of the deceased, the accused reported that the abuse had become increasingly intolerable.¹⁶¹ The culminating incident was when the deceased assembled fifteen black labourers and called the accused outside and demanded that she show her genitals to the men. The accused refused. The same evening, the deceased raped her and threatened to hire black men to also rape her if she ever attempted to leave him again. The court admitted the testimony of Bhana on the thoughts and mindset of the

¹⁵⁸ Above n14 at 56. This was in line with a previous decision of Satchwell J in *Holtzhausen v Roodt* above n149 at 561 where the judge had held in a case involving rape that the opinion of a psychologist, social worker and counsellor at POWA could be admitted into evidence as it would be useful to the court. The evidence of the experts related to the fact that women who had been raped did not often immediately reveal this information to third parties. Further, the expert evidence related to the behavioural changes exhibited by the victims. Satchwell's view was that since a judicial officer would not comprehend the 'kaleidoscope' of emotions and experiences of the victim, an expert was better qualified to draw the relevant inferences.

¹⁵⁹ Above n145.

¹⁶⁰ Both women presented recorded evidence of their consultations with the accused and further testified in court. Both were accepted as expert witnesses based on their knowledge and expertise regarding victims who kill their abusers, which knowledge they had acquired by research, study, and by practical experience of dealing with cases of abused women themselves.: see above n145 at 461.

¹⁶¹ Above n145 at 463-4.

accused after the incident and further admitted the expert's opinion on the link between the accused's frame of mind as a result of her circumstances and her consequent actions.¹⁶²

Having heard the evidence, the trial court did not accept that the accused was unable to leave the deceased. Prinsloo AJ, considered the evidence of the expert's 'unconvincing' and further held it against the accused that she did not testify.¹⁶³ On appeal, however, Howie P made it clear that he did not support the criticism that the accused did not testify especially as the state had made it clear that it accepted the facts as relayed by the accused to the expert witnesses and recorded by them.¹⁶⁴

With regard to the finding by the court *a quo* that the accused could have left the relationship at any time, Howie P rejected the finding and accepted the expert testimony and explanation as to why battered women often, subjectively, believe that they are unable to escape the abusive relationship in any other manner than by killing their abuser.¹⁶⁵

In *Engelbrecht*, the accused gave evidence during the trial. Her evidence was supported by the testimony of two expert witnesses – Vetten, the gender co-ordinator at the Centre for the Study of Violence and Reconciliation (CSVV) and Carr, a psychologist who had consulted with both the accused and the deceased during their marriage and with the accused after the killing of the deceased. The experts sought to give evidence on the circumstances of the accused during her relationship with the deceased and on the accused's state of mind preceding and at the time of the killing of the deceased.¹⁶⁶ Both experts provided the court with guidance on the nature and effects of domestic violence and Vetten further provided the court with an exposition on spousal killing referring to various authorities and her own research.¹⁶⁷

In summarising the approach of the court to the expert evidence provided, Satchwell J stated:

¹⁶² Above n145 at 464.

¹⁶³ *Ibid.*

¹⁶⁴ Above n145 at 465-6.

¹⁶⁵ Above n145 at 466.

¹⁶⁶ Above n14 at 95-98.

¹⁶⁷ Above n14 at 99-100 and 128.

Where the facts are common cause and the opinions of the experts are based on those facts, we accept such opinion if it is reasonably possibly true. Where the facts upon which an expert relies is at variance with the evidence of the accused, then we do not accept such opinion. Where an expert has given evidence on facts not testified to in evidence by the accused we take the view that the weight to be given to the opinion of the expert is affected thereby.¹⁶⁸

Specifically regarding the nature of the evidence that it would admit, Satchwell J accepted the opinion evidence of the experts ‘both for purposes of contextualisation and for purposes of identifying the reasonable behaviour of the reasonable woman in this particular situation and assessing the behaviour of Mrs Engelbrecht against such a standard.’¹⁶⁹ Satchwell J stated clearly, however, that in a case based on self-defence, an expert could not present an opinion on the reasonableness of the conduct of the accused. Satchwell J remained adamant that this decision remained a function of the court.¹⁷⁰

The benefits of expert testimony in cases involving battered women who killed their intimate partners and claimed self-defence is apparent from both *Ferreira* and *Engelbrecht*. Also, taking specific note of the finding of the trial judge in *Ferreira*,¹⁷¹ and the view expressed by the minority judgment in *Ferreira* on appeal,¹⁷² it is submitted that expert evidence is still necessary in the courtroom in cases involving battered women.

However, from the two reported cases, an interesting question emerges regarding the nature of the opinion that will be admitted: in *Ferreira’s* case, the court was prepared to accept the experts’ opinion on the state of mind and thinking of the accused at the time

¹⁶⁸ Above n14 at 129.

¹⁶⁹ Above n14 at 140.

¹⁷⁰ Above n14 at 56. Of the two assessors sitting with Satchwell J, Opperman was prepared to accept opinion evidence ‘insofar as it contextualises the situation in order that adverse credibility findings are not drawn regarding abuse and in order to understand the predicament of abused women in general and Mrs Engelbrecht in particular. However, Naudé took a more limited approach to the admissibility of opinions of the experts being prepared to accept the evidence of the experts ‘only insofar as it throws light upon the circumstances under which a battered woman finds herself.: above n14 at 140. Naudé was adamant that for the purposes of meeting the objective standards of self-defence, ‘the expert’s opinions cannot be used to inform the Court of the state of mind of Mrs Engelbrecht.’: above n14 at 129.

¹⁷¹ Above n145 at 463-4.

¹⁷² Above n145 at 474-5.

of the killing, despite the fact that the accused did not testify at the trial;¹⁷³ whilst in *Engelbrecht* while the court did not specifically rule on the issue, the judgment makes express reference to the view of one of the assessors (Naudé) vetoing this approach.¹⁷⁴ The approach advocated in *Ferreira* is contrary to the general rule for, as Schwikkard *et al* note, an expert witness may not as a rule base his opinions on statements made by a person not called as a witness.¹⁷⁵ However, as Meintjies-Van der Walt notes, an important factor in South Africa regarding the cogency of expert evidence appears to be the issue of whether or not the evidence has been challenged.¹⁷⁶ Meintjies-Van der Walt concludes that the absence of a challenge by the other party 'could cause prima facie proof to become conclusive proof.'¹⁷⁷ (In *Ferreira* the state accepted the evidence of the two experts without issue.)

Summarising the nature of the expert evidence that should be admitted in cases of domestic violence to assist the courts to understand the circumstances of the accused, the writer is of the opinion that:

- (i) although the South African courts have made no express stipulation regarding the expert's right to express an opinion on the accused's state of mind at the time of the criminal act, such an opinion should only be admitted with extreme caution.¹⁷⁸
- (ii) It is clear that the courts have accepted that the expert should be permitted to provide evidence on the general effects of abuse and express an opinion on, at least, the consistency between the conduct of the accused and a person subjected to repeated acts of abuse and violence.

¹⁷³ Above n145 at 464-5.

¹⁷⁴ Above n14 at 129.

¹⁷⁵ PJ Schwikkard, A St Q Skeen and SE Van der Merwe above n148 at 91. See also above n157 at 307. See also L Meintjies-Van der Walt 'A Few Plain Rules? A Comparative Perspective on Exclusionary Rules of Expert Evidence in South Africa' 2001 64 *THRHR* 236, at 247.

¹⁷⁶ L Meintjies-Van der Walt 'Decision-makers' Dilemma: Evaluating Expert Evidence' 2000 13 *SACJ* 319, at 337.

¹⁷⁷ *Ibid.*

¹⁷⁸ In *Engelbrecht* the court allowed the experts to express their opinion on the accused's state of mind at the time of the killing but did not take it into consideration for purposes of the decision because of the circumstances of the case namely, that the court was unanimous that the accused had, in fact, pre-planned the killing of the deceased.: above n14 at 143. See Chapters Five and Six for the decisions of the courts and the discussion on the issue in the U.S.A. and Canada.

- (iii) The fact that Satchwell J in *Engelbrecht* refused to permit the expert to express an opinion on the reasonableness of the conduct of the accused¹⁷⁹ may not provide optimal assistance to the courts. Recognising that such a determination is a legal issue, the writer is of the opinion that where the opinion of the expert would be of 'appreciable assistance' in aiding the court to reach a conclusion on the issue of reasonableness, that opinion should be received by the court.¹⁸⁰ It will then still be the function of the court to exercise its discretion on whether or not to accept the opinion presented by the expert¹⁸¹ - and reach its own conclusion on reasonableness based on the evidence before it.

4.3.1.7 The Qualification of the Expert in Domestic Violence Cases

According to Zeffert, Paizes and Skeen a witness is qualified as an expert if the court is satisfied that the person possesses sufficient skill, training and expertise in the specific area to assist it.¹⁸² Gillmer, Louw and Ver Schoor re-iterate this approach expressing the view that '[t]he knowledge and experience must be of a recondite kind beyond that of the ordinary layman.'¹⁸³ In explaining the character of the competent expert, Schwikkard is insistent that the following criteria must be met:

- (i) the witness must have specialist knowledge, training, skill or expertise in the particular area and must be able to apply this information to assist the court in deciding the issues;
- (ii) the witness must withstand the scrutiny of qualification as an expert; and
- (iii) the witness will confine his opinion to the facts and evidence of the case and not base his conclusions on hypothetical information that has no bearing on the case in issue.¹⁸⁴

¹⁷⁹ Above n14 at 56.

¹⁸⁰ See *Mngomezulu* above n154 and *Ruto Flour Mills v Adelson (1)* above n149.

¹⁸¹ See above n92 at 99-100.

¹⁸² DT Zeffert, AP Paizes and A St Q Skeen above n148 at 302. See also *Mahomed v Shaik* 1978 4 SA 523 N.

¹⁸³ BT Gillmer, DA Louw and T Ver Schoor 'Forensic Expertise: The Psychological Perspective' 1995 8 *SACJ* 259, at 259.

¹⁸⁴ PJ Schwikkard, A St Q Skeen and SE Van der Merwe above n148 at 87. See also *Kotze* 1994 2 *SACR* 214 O, at 225 where Lombard J admitted and placed great reliance upon the testimony of the expert because the experts not only provided reasons for their opinion but also because their opinions had the 'stempel van objektiewe professionalisme.':

In South Africa there is no general rule that the expert's knowledge must derive from either theoretical learning (that is, a formal qualification) or practical experience.¹⁸⁵ However, in *Menday v Protea Insurance Co Ltd* Adelson J made it clear that the test for expertise under the South African law was not necessarily the formal qualification or book learning of the proposed expert. In *casu*, the court held:

However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The dangers of holding otherwise – of being overawed by a recital of degrees and diplomas – are obvious; the Court has then no way of being satisfied that it is not being blinded by pure 'theory' untested by knowledge or practice.¹⁸⁶

This approach has been supported by legal writers.¹⁸⁷ Consequently, in the two cases involving domestic violence that have come before the courts, the approach of the courts has been to accept as an expert witness, persons who demonstrate the necessary knowledge, skill and training in the field.¹⁸⁸ The role of the expert is to link the circumstances of the accused with her act of killing her abuser. Thus, there has been no limitation requiring that the expert be a person with professional training particularly in the field of psychiatry or psychology. The reason for this more flexible approach is as a direct result of the approach of the South African courts to consider the 'effects of battery' as opposed to restricting themselves to battered woman syndrome as a character marker for all battered women.¹⁸⁹

¹⁸⁵ Above n153 at 30. See also L Meintjies-Van der Walt 'Science Fiction: The Nature of Expert Evidence in General and Scientific Evidence in Particular' 2000 117 *South African Law Journal* 771, at 773.

¹⁸⁶ *Menday v Protea Insurance Co Ltd* 1976 1 SA 565 E, at 579. See also *Holtzhauzen v Roodt* above n149 at 555.

¹⁸⁷ See DS de Villiers and JH Vorster *Giving Evidence (A Practical Guide for Witnesses)* (Pergo Publications, Pretoria: 1994) 11; PJ Schwikkard, A St Q Skeen and SE van der Merwe above n148 at 88; and above n183 at 259.

¹⁸⁸ See both *Engelbrecht* above n14 and *Ferreira* above n145.

¹⁸⁹ Compare this with the approach of the U.S.A., Canada and Australia in Chapters Five, Six, and Seven. In the aforementioned jurisdictions, the courts have limited themselves to defining battered women violence according to the character markers of the battered woman syndrome as set out by the American Psychiatric Association in the *Diagnostic and Statistical Manual Of Mental Disorders DSM-IV*, which focuses on the psychiatric health of the woman rather than looking at her circumstances (which is the approach adopted when the courts look at the 'effects of battery'). In keeping with their approach to dealing with battered women, the courts in the U.S.A, Canada and Australia have thus inclined to accepting only the expert evidence of professionals qualified in the field of psychiatry or psychology. The writer submits

4.4 CONCLUSION

The general requirements and application of the law of self-defence in South Africa are well established in the case law. However, it is equally clear that the conventional legal rules and their application are predicated upon self-defence in cases of confrontations between strangers. Where the question of self-defence is raised in cases of battered women who have killed abusive partners, two of the established requirements namely, imminence and the necessity of the attack to protect the legal interest may present difficulties for the accused to overcome.

To meet the requirement of imminence, the current law stipulates that there must be either (i) an attack which has commenced but which is not yet completed; or (ii) an immediate threat of assault.¹⁹⁰ In the latter case specifically, the test is the temporal proximity between the anticipated fear and the defensive action.¹⁹¹ Battered women who kill their abusive partners are often confounded when the alleged defence takes place outside of the traditionally-recognised situations of confrontation. (The literature indicates that battered women often resort to killing their abusive partners when the latter are asleep, comatose or otherwise indisposed.¹⁹²) The act of the accused in such cases does not meet the conventional requirements of the law namely, that the accused reasonably believed that at the time of the killing, the deceased was about to harm or kill her.¹⁹³ Acknowledging the foundation laid by *Mogohlwane* and the discussion on the requirement of imminence in cases involving domestic violence in the later case of *Engelbrecht*, the writer endorses the view that in cases involving intimate partner abuse, the threat of violence is ever-present and the accused reasonably knows that further violence is inevitable.¹⁹⁴ However, the issue of 'inevitability of harm' as a marker under the requirement of imminence must still be pronounced upon by the courts but, it is

that the approach of the South African courts is a better approach, particularly in cases involving domestic violence.

¹⁹⁰ Burchell above n1 at 234.

¹⁹¹ Ibid.

¹⁹² See case law and literature cited in Chapters Five, Six, and Seven.

¹⁹³ See above n14 at 104-106 for the argument raised by the state in specifically dealing with this requirement of the law.

¹⁹⁴ Above n49 at 588; and above n14 at 146.

submitted by the writer, this would be one of the situations to which Snyman refers when he states that a 'pro-active' attack will be permissible under particular circumstances.¹⁹⁵

Secondly, regarding the requirement that the defence must have been necessary to protect the interest threatened – this will be a factual assessment of the circumstances of the accused.¹⁹⁶ However, in reaching a properly informed decision, it remains germane that the courts continue to admit and accept expert evidence to assist them to understand the situational personal and public social realities of women in violent relationships.¹⁹⁷ Particularly, expert evidence will also explain why women in abusive relationships often do not leave the relationship and, if they do, why they will just as often return to the violent partnership. However, a question which still requires further attention from the courts with regard to the nature of expert evidence that will be admitted in cases of domestic violence is whether the expert will be permitted to express an opinion on the issue of the reasonableness (or not) of the conduct of the accused when she killed her abusive partner.

¹⁹⁵ Above n71 at 183.

¹⁹⁶ See Rumpff JA in *Goliath* who summed up the test as follows:

... in deciding what the accused should or should not have done in particular circumstances, the fictitious normal person must be placed in the position of the accused, subject to all the external circumstances to which the accused was subjected and also in the position in which the accused was placed physically.: above n21 at 11 (translated by J Burchell and J Milton *Cases and Materials on Criminal Law* (Juta, Kenwyn: 1997) 182.

¹⁹⁷ In the opinion of the writer, the two assessors in *Engelbrecht* seemed less familiar with and consequently, not to properly understand the social realities and the lack of support and assistance from the law enforcement agencies and criminal justice system experienced by victims of abuse -and the accused specifically - when they came to the conclusion that the accused had not satisfied this requirement of the defence.: above n14 at 157.

PART TWO: SELF-DEFENCE

CHAPTER FIVE

THE LAW OF SELF-DEFENCE IN THE UNITED STATES OF AMERICA (U.S.A.)

5.1 INTRODUCTION

Broadly, Herbeling states, that a rule of general application under the criminal law in all states in the U.S.A is that there are two categories of defences: those which may be categorised as justifications and those which may be regarded as excuses.¹ Self-defence appears to straddle both the justification and excuse.² In *Leidholm* Vande Walle J provides a summary of the application of the law of self-defence and its positioning as either a defence of excuse or justification.³ He states:

Conduct which constitutes self-defense may be either justified or excused. Although the distinction between justification and excuse may appear to be theoretical and without significant practical consequences, because the distinction has been made in our criminal statutes we believe a general explanation of the difference between the two concepts ... is warranted.⁴

Summarising the 'general explanation' provided by Vande Walle J, it would appear that fundamentally, in order to be accepted as a defence of justification, there would have to be present a set of circumstances that would correspond with the actor's belief in the need to take action and thereby make legal what

¹ PDW Herbeling 'Justification: The Impact of the Model Penal Code on Statutory Reform' 1975 75 *Columbia Law Review* 914, at 916.

² *Leidholm* 334 N.W.2d 811, 814 (N.D. 1983). This blurred distinction is confirmed by Lenkevitch who describes self-defence law in Virginia as comprising 'excusable self-defense' and 'justifiable self-defense' and the distinguishing characteristic being that with the latter 'the defendant is free from fault in provoking the attack.': MH Lenkevitch 'Admitting Expert Testimony on Battered Woman Syndrome in Virginia Courts: How *Peeples* Changed Virginia Self-Defense Law' 1999 6 *William and Mary Journal of Women and the Law* 297, at 302.

³ *Leidholm* above n2 at 814-5.

⁴ *Leidholm* above n2 at 814.

would otherwise be criminal conduct with concomitant liability.⁵ On the other hand, a defence of excuse does not deny the criminality of the conduct, but rather excuses such criminality because the actor 'believed that the circumstances actually existed which would justify the conduct when in fact they did not.'⁶ In this regard, Vande Walle J notes, 'In short, had the facts been as he supposed them to be, the actor's conduct would have been justified rather than excused.'⁷

Relating this general principle specifically to self-defence, Vande Walle J noted that where a person believed that his conduct was necessary to prevent unlawful imminent harm and his belief is proved to be correct in that it coincides with what was actually the case, then the actor's conduct must be justified. However, where the belief, though reasonable, is found to be incorrect, then the use of force is only excused.⁸ The fundamental distinction between the two sets of facts is that in the case of justification, the belief of the actor is proved to be correct (and consequently reasonable); whilst in the case of excuse, the belief of the actor – even though reasonable – is found to have been incorrect. However, Vande Walle J concludes:

The distinction is arguably superfluous because whether a person's belief is correct and his conduct justified, or whether it is merely reasonable and his conduct excused, the end result is the same, namely, the person avoids punishment for his conduct. ... Therefore, the decisive issue under our law of self-defense is not whether a person's beliefs are correct, but rather whether they are reasonable and thereby excused or justified.⁹

⁵ In this regard, Robinson notes, 'The harm caused by the justified behaviour remains a legally recognized harm that is to be avoided wherever possible. Under the special justifying circumstances, however, that harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest.': PH Robinson *Criminal Law Defences* (West Publishing Co., Minnesota: 1984) 83.

⁶ Above n2 at 814.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid. In this regard and with specific reference to battered women Crocker writes:

Although both excusable and justifiable self-defence fully pardon the defendant from criminal liability, an important ideological distinction separates the two. ... Unlike excuse, justification posits the *act* as right, and therefore not condemnable; the substance of the deed rather than the person's state of mind is at issue.

Fletcher thus notes that what is apparent in the practice of the criminal law in the U.S.A. is that a flatter approach has emerged over time with the boundaries between justification and excuse becoming increasingly fainter and the condition of 'reasonableness' becoming the standard of guilt or innocence.¹⁰ According to Fletcher, what this means is that the criminal law has evolved in a manner so that it is now represented by a system in which all the criteria pertinent to the resolution of a legal problem revolve around the application of a single norm – that of reasonableness.¹¹ In justifying this approach for the U.S.A., Greenwalt notes that it has 'much to do with the fact that, in practice, elements of excuse often appear to overlap with elements of justification. He writes:

The difficulty in distinguishing rests largely on the conceptual fuzziness of the terms "justification" and "excuse" in ordinary usage and on the uneasy quality of many of the moral judgments that underlie decisions that behaviour should not be treated as criminal. Beyond these conceptual

Whether society justifies a woman for taking a man's life while defending herself or excuses her for thinking she was worth defending is crucial for battered women. By focussing on the actor as wrong but pardonable, excusable self-defense would imply that her response was typical and idiosyncratically emotional. The doctrine would perpetuate the views that the woman could not have been rational in assessing the danger and that the legal system must compensate for her mental and physical weaknesses.

Justification, on the other hand, would assume that society values a woman's and a man's lives equally, and thus considers women's lives worthy of self-defense. It would recognize that a woman has the capacity to correctly and reasonably perceive that the act is warranted, legitimate, and justified. Justification would encourage, indeed would compel, a legal recognition that a woman's capacity for reasonable judgment – comparable to that of a man's – can be the basis for engaging in the "correct behaviour" of self-defense.: PL Crocker 'The Meaning of Equality for Battered Women who Kill Men in Self-Defense' 1985 8 *Harvard Women's Law Journal* 121, at 130-1.

¹⁰ GP Fletcher 'The Individualization of Excusing Conditions' 1974 *Southern California Law Review* 1269, at 1269-1309 where he argues specifically for the re-awakening in the distinction between justification and excuse in Anglo-American criminal jurisprudence. See also S Yeo 'Proportionality in Criminal Defences' 1988 *Criminal Law Journal* 227 and G Mousourakis 'Justifications and Excuses in Criminal Law' 1998 2 *Stellenbosch Law Review* 165, at 177 where he notes: 'The main obstacle in the American law in drawing a clear distinction between justifications and excuses is that, in oral discourse, warranted conduct ranges from that which might properly be approved and encouraged through to that which might only be accepted to what might be tolerated as a regrettable but unavoidable consequence of the interplay of human nature and circumstance. Anglo-American law has attempted to circumvent these problems of moral shading by avoiding framing legal defences in terms of justification and excuse; placing the emphasis, instead, on the all-embracing requirement of reasonableness.'

¹¹ Fletcher above n10 at 1309.

difficulties, there are features of the criminal process, notably the general verdict rendered by lay jurors in criminal trials that would impede implementation in individual cases of any system that distinguishes fully between justification and excuse.¹²

Fletcher points out that the all-embracing standard of reasonableness enables the law to transcend the more formal sources of criminal law to attain a more 'normative plane' and there appears to be an 'ever-increasing tendency towards leaving questions of reasonableness to be determined by the jury, the embodiment of community values and expectations.'¹³ However, he is critical of this approach particularly on the ground that it effectively blurs the lines between justification and excuse, and between wrongfulness and blameworthiness, thus rendering it impossible 'to order the dimensions of liability'. In his view, to utilise a single standard namely, 'What would a reasonable person do under the circumstances?' conflates what would (and should) otherwise have established distinct indicators of either wrongfulness and/or blameworthiness - as 'criteria of both justification and excuse are amenable to the same question.'¹⁴

This Chapter focuses on self-defence as a justification for the conduct of the battered woman accused of murder. However, in reading the law, one must be cognisant of the less structured approach of the courts to the issues of unlawfulness and culpability and the fact that behaviours which excuse or justify the actions of the accused may both fall under the rubric of self-defence.

With particular regard to the law of self-defence, LaFave and Scott note that the basic requirements for the use of force to defend oneself against an unlawful attack are generally well-settled.¹⁵ The basic doctrinal requirements of the law of self-defence are contained in the *Model Penal Code* (1962) with individual states retaining the authority to enact legislation either in compliance with the *Code* or

¹² K Greenwalt 'The Perplexing Borders of Justification and Excuse' 1984 84 *Columbia Law Review* 1897, at 1898.

¹³ GP Fletcher 'The Right and the Reasonable' 1985 98 *Harvard Law Review* 949, at 980.

¹⁴ Above n13 at 962-3.

¹⁵ WR LaFave and AW Scott *Substantive Criminal Law* (West Publishing Co., Minnesota: 1986) 578.

contrary to the *Code*, which will be applicable within the specific state jurisdiction.¹⁶ According to the *Code*:

The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force ... on the present occasion.¹⁷

The *Code* permits the use of deadly force if the actor 'believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.'¹⁸

As an introduction to the subject of self-defence Robinson states that in order for any behaviour to qualify as self-defence and be justifiable in law, there must

¹⁶ Above n1 at 915. Thus, state Ogle and Jacobs, there is not a single law of self-defence across the U.S.A. Obviously, each state recognises the defence 'but the federalist system allows each to define and understand it separately.': RS Ogle and S Jacobs *Self- Defense and Battered Women Who Kill* (Praeger, Connecticut: 2002) 93. Thus one notes differences in the law from State to State which, note Ogle and Jacobs, makes it difficult to draw meaningful generalisations.: at 93. In this Chapter, the writer thus refers to cases of the courts pertinent to the conditions of self-defence and justification. The selection of cases was based on relevance and accessibility.

¹⁷ *Model Penal Code* section 3.04(1) (1962). According to LaFave section 3.09 attempts to save this provision from becoming an excuse for private vengeance by making the conduct of the defendant 'not justifiable' if the defender's belief as to the unlawfulness of the force was erroneous and his error was due to ignorance or mistake as to the provisions of the *Code*, or any other provisions of the criminal law, or the law governing the legality of an arrest or search. The latter instances would go to the issue of the defender's mind (belief) and whilst still described as self-defence and negating criminal liability, it is described as an excuse (rather than a justification for the defensive conduct).: WR LaFave *Criminal Law* (Thomson West, Minnesota: 2003) 540. Thus, for example in *Glass* the Massachusetts Supreme Court held that when the defender's belief was reasonable, even though it may have been a mistaken belief, the defender is still entitled to the defence [being self-defense].: *Glass* 519 N.E.2d 1311, 1314 (Mass. 1988).

¹⁸ *Model Penal Code* above n17 at section 3.04(2)(b) (1962). Interestingly, the self-defence formulation in the *Model Penal Code* contains no explicit requirement of 'reasonableness'. Thus, it has been argued that this means that the Code does not require reasonableness as an element of the defence.: Ogle and Jacobs above n16 at 119. However, the case law appears clear that that the defence of justification will not be apposite where the actors behaved unreasonably.: Ogle and Jacobs above n16 at 119 and 120. (At this point it bears notice that the *Model Penal Code* is not binding on any state or law.: Jacobs and Ogle above n16 at 119.)

In commenting on the provision of the *Model Penal Code*, Veinsreideris notes that one justification for this seemingly broader allowance of force by the actor is the extreme degree to which the identified crimes deprive the victim of the opportunity to exercise their right to self-determination.: ME Veinsreideris 'The Prospective Effects of Modifying Existing Law to Accommodate Pre-Emptive Self-Defense by Battered Women' 2000 149 *University of Pennsylvania Law Review* 613, at 616.

always have been a 'triggering condition' which sets the conduct apart from being just another criminal act.¹⁹ With respect to self-defence, this triggering condition would be the act or threat of physical harm to the person of the defender. However, Robinson emphasises that a triggering condition alone does not suffice to justify a reaction from the defender – in addition it must be shown that the defender's response was necessary to protect or further the interest at stake and reasonable in relation to the harm threatened or the interest to be furthered.²⁰

5.2 SELF-DEFENCE

5.2.1 Introduction

LaFave states that '[o]ne who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes:

- (a) that he is in immediate danger of unlawful bodily harm from his adversary; and
- (b) that the use of such force is necessary to avoid the danger.'²¹

However, Roberts adds that in order to be successful, the self-defence claim must also contain the element of proportionality between the attack and the force used in defence.²² The judicial system in the U.S.A. uses the jury system to reach a verdict on the facts in criminal cases. The law, thus, encompasses both rules of law determined by the courts and a social standard of reason determined by a jury.²³ For example, notes Roberts, in self-defence under the requirement that 'there must have been a reasonable belief that force was necessary', the

¹⁹ Above n5 at 86-7.

²⁰ Above n5 at 87.

²¹ LaFave above n17 at 539; BA Garner (ed.) *Black's Law Dictionary* (West Publishers, Minnesota: 2004) 1390.

²² JW Roberts 'Between the Heat of Passion and Cold Blood: Battered Woman's Syndrome as an Excuse for Self-Defense in Non-Confrontational Homicides' 2003 *27 Law and Psychology Review* 135, at 136. See also La Fave above n17 at 615. Buel describes the conditions of self-defence in the U.S.A. similarly. She lists the conditions as requiring that the actor must have: (1) had a reasonable belief that she faced imminent death or serious bodily harm; (2) had no other viable options; and (3) resorted to no more force than was necessary to repel the danger.: S Buel 'Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct' 2003 *26 Harvard Women's Law Journal* 217, at 302.

²³ Roberts above n22 at 136.

court will first decide the issue of whether the force used was necessary and then the jury will settle on whether the belief of the defender was reasonable and whether the acceptable standard has been met by the facts of the case. In order to be granted a jury instruction on self-defence, however, the defence must have shown all the elements of the self-defence claim. This does not mean that the accused is required to *prove* self-defence but that he should have provided 'some credible evidence in support of his claim' to establish all of the acknowledged conditions of the defence.²⁴

Federal Rule of Evidence 404(a)(2)(a) does not allow an accused to put the character of a homicide victim on trial 'because to do so would improperly focus the jury's attention on the decedent's character, rather than on the events occurring at the time of the homicide.'²⁵ However, where self-defence is claimed Federal Rule of Evidence 702 makes specific provision for the accused to introduce evidence of the accused's violent nature to support that claim on the recognition that '[p]rior violent behaviour is relevant in many self-defense cases to show that the abused spouse reasonably feared deadly force at the abuser's hands.'²⁶

For the purposes of this study, the discussion of self-defence in the U.S.A. will focus primarily on the rules and standards as applied in cases of non-confrontational fatal self-defence, and where possible examples will be drawn from cases involving intimate violence and domestic abuse.

5.2.2 Conditions Relating to the Attack

LaFave notes that the law of self-defence in the U.S.A. requires that:

1. the attack (act) against which the defence is made must have been unlawful; and
2. the attack must have been immediate or imminent.²⁷

²⁴ Ibid.

²⁵ Roberts above n22 at 137.

²⁶ K Kinports 'Defending Battered Women's Self-Defense Claims' 1988 67 *Oregon Law Review* 393, at 399-400.

²⁷ LaFave above n17 at 544-6.

5.2.2.1 The Attack Must Have Been Unlawful²⁸

According to LaFave it is only the person who is unlawfully attacked by another who is allowed by law to take reasonable steps to defend himself from harm.²⁹ In determining the issue of the unlawfulness of the attack for the purposes of gauging the lawfulness of the defensive action, LaFave points out that it is not absolutely necessary that the attacker's force be, in fact, unlawful; it will also suffice if the defendant reasonably believed it to be unlawful force.³⁰

In considering the aspect of the attack specifically, the Supreme Court of North Carolina in *Spaulding* held that an actual show of deadly force was not necessary to satisfy this requirement.³¹ The past violent conduct of the deceased towards the accused would be evenly relevant in assessing what the accused perceived to be a situation of danger (in other words, an attack). In *Spaulding's case*, the evidence was that the deceased victim had in the very recent past made verbal death threats to the accused. When the two of them met in the prison yard, the deceased began walking towards the accused with his hand in his pocket. The accused made warning noises at the deceased to stop his behaviour but the deceased simply continued walking at him with his hands jammed in his pocket. The Supreme Court found that in light of previous confrontations between the accused and other inmates at the prison (when the accused had, in fact, been the victim of specific stabbing incidents), the accused was justified in believing that he was about to be attacked again and to take defensive action.³²

²⁸ In this regard, LaFave and Scott note that the attack must have been against a legally protected interest and that an individual's right to life and physical integrity are clearly acknowledged for such purpose by the law of the U.S.A.: above n15 at 578.

²⁹ LaFave above n17 at 539.

³⁰ LaFave above n17 at 540. It is noted that under South African law, such a finding (based only on the actor's reasonable belief) would identify the issue as one of possibly putative self-defence; and if proved, the accused's conduct would be excused. However, because of the blurring of the boundaries between justification and excuse in the U.S. law of self-defence, no such differentiation between self-defence (justification) and putative self-defence (excuse) is made.

³¹ *Spaulding* 257 S.E.2d 391, 391 (N.C. 1979).

³² Above n31 at 396.

From the following case law it would appear that a threat will also justify lethal self-defence. In *Williams* the facts were that a cab driver had fired at a gang after one of the members of the gang threw a cement block and a brick at the cab causing serious damage to the vehicle.³³ The Illinois Appeal Court held that the driver's action was justified as he felt threatened and reasonably believed that the gang was about to attack him.³⁴ In *Bush* (a case involving a battered woman pleading self-defence to a charge of murdering her abusive husband) the California Court of Appeal held that a person who has received threats against her life by another 'is justified in acting more quickly and taking harsher measures for her own protection ... than would a person who had not received such threats.'³⁵ It also appears that the fact that an individual who has been previously threatened may elect to arm herself for defence will not deprive her of the right to claim self-defence and justification.³⁶ In *Gonzales* whilst the Court did not decide that a party previously attacked should seek out his attacker, the California Supreme Court held that '[t]he person threatened is entitled to go about his business as normal and not avoid situations simply because he knows he may encounter the aggressor.'³⁷

5.2.2.2 The Attack Must Have Been Immediate or Imminent

Veinsreideris notes that this rule has been dealt with differently under the different state statutes. 'Certain state statutes use language stating that any threatened force must be "imminent" before self-defense is allowed [whilst o]ther statutes use language indicating that any force used must be "immediately necessary".'³⁸ He states further that in addition to this distinction a requirement of reasonableness is also found in certain state statutes.³⁹ Not all state statutes contain a requirement of reasonableness: However, according to Veinsreinderis,

³³ *Williams* 205 N.E.2d 749 (Ill. App. Ct 1965).

³⁴ Above n33 at 754. In *casu*, the further evidence was that after the accused had stopped his cab and got out, the gang out youths started advancing towards him. The court found, 'There is only one conclusion that can be reached – defendant actually believed that a danger existed.': at 753.

³⁵ *Bush* 148 Cal.Rptr. 430, 435-6 (1978). See also above n31.

³⁶ See *Moore* 275 P.2d 485 (Cal.1954); *Cochran* 430 P.2d 863 (N.M.1967); *Starks* 627 P.2d 88 (Utah1981). In the last-mentioned case, the court held, 'One is entitled to go where he has a right to be without losing his right to assert self-defense in a murder prosecution.': at 91.

³⁷ *Gonzales* 12 P.2d 783 (Cal.1887).

³⁸ Above n18 at 616.

³⁹ Above n18 at 617.

'The presence of reasonableness indicates that the jurisdiction has an objective standard of self-defense, while the lack of such a requirement generally indicates a subjective standard of self-defense.'⁴⁰ LaFave sums up the position as follows:

Most of the modern codes [introduced by the different States] require that the defendant reasonably perceive an "imminent" use of force, although other language making the same point is sometimes found.⁴¹

As a general rule, the fear of harm at some future date is not sufficient to justify a claim of self-defence.⁴² The authority for this rule is *Acers* where the U.S. Supreme Court defined the condition so that the danger could not be a past danger, or a danger of a future injury, but a present danger and a danger of great injury to the person injured that would maim him, or that would be permanent in its character, or that might produce death.⁴³ Thus, in *Bello* where a prison inmate claimed that his act of assaulting another prisoner in the prison recreational facility was done in self-defence, the U.S. Supreme Court ruled that no self-defence instruction was necessary because (i) eighteen hours had passed since the assaulted party had made the threat on the accused; and (ii) in the intervening time, the accused could have reported the threat to the guards and requested necessary protection.⁴⁴

In *Wanrow* the Supreme Court of Washington was required to provide *inter alia* an interpretation of the condition of imminence as contained in the state law on self-defence.⁴⁵ In *casu* the accused was charged with the killing of Wesler. The evidence was that deceased had allegedly sexually molested the child of Shirley

⁴⁰ Ibid. See also *Goetz* 497 N.E.2d 41, 49-50 (N.Y. 1986) where the court discussed the difference between subjective and objective jurisdictions and compared New York's objective standard to the subjective standard contained in the *Model Penal Code* provisions.

⁴¹ LaFave above n17 at 544.

⁴² *Acers* 164 U.S. 388 (1896).

⁴³ Ibid. LaFave notes that at the times of the *Acers* judgment the requirement of the law was that the defender reasonably believe that the attacker's unlawful violence was 'almost immediately forthcoming': LaFave above n17 at 544. However, since then most state laws have relaxed the requirement to one of imminent (as opposed to immediate) danger.

⁴⁴ *Bello* 194 F.3d 18 (1st Cir. 1999) at www.cases.justia.com/us-court-of-appeals/F3/194/18/505141. In *casu* the court did not accept the statement by the accused that 'he faced greater danger from other inmates if he were labelled a "snitch"': at paragraph 35.

⁴⁵ *Wanrow* 559 P.2d 548 (Wash.1977).

Hooper, a friend of the accused. This was apparently not the first incident of sexual abuse by the deceased who had also previously been committed to a State Hospital for the mentally ill. Upon learning about the conduct of the deceased, Hooper had called the police and asked that he be immediately arrested. She was advised that this could not be done and that she should go to the police station after the weekend 'and swear out a warrant'.⁴⁶ Hooper's evidence was that in the week preceding her finding out about the deceased's molestation of her daughter, she had noticed somebody prowling around her house and during that period someone had even attempted to enter her bedroom and had slashed the window screen. Hooper testified that she believed that the deceased was the prowler.⁴⁷ Hooper also testified that after reporting the deceased to the police, she was too afraid to stay alone at home and invited a group of friends to stay with her – one of whom was the accused.⁴⁸ The accused admitted that she had come to the Hooper home armed with her pistol in her handbag.⁴⁹ The evidence was that at about 5h00 one of Hooper's friends had gone to the home of the deceased and accused him of molesting little children. The deceased then suggested that they return to the Hooper home 'and get the whole thing straightened out'.⁵⁰ The testimony of the witnesses was that the deceased was a large man who was visibly intoxicated when he arrived at the Hooper home. Hooper asked him to leave but he refused and 'there was a good deal of shouting and confusion'.⁵¹ The accused's evidence was that she 'then went to the front door to enlist the aid of Chuck Michael. She shouted for him and, upon turning around to re-enter the living room, found Wesler standing directly behind her. She testified to being gravely startled by this situation and to having then shot Wesler in what amounted to a reflex action'.⁵² In giving the jury instruction on self-defence, the judge stated:

To justify killing in self-defense, there need be no actual or real danger to the life or person of the party killing, but there must be, or reasonably

⁴⁶ Above n45 at 551.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

appear to be, at or immediately before the killing, some overt act, or some circumstances which would reasonably indicate to the party killing that the person slain, is, at the time, endeavouring to kill him or inflict upon him great bodily harm.⁵³ [my emphasis]

On appeal against such an interpretation of the law, the Washington Supreme Court held that the interpretation of the self-defence rule as applied by the court *a quo* was incorrect.⁵⁴ Focussing specifically on the phrase 'at or immediately before the killing', the court held that it improperly limited the scope of the enquiry. The Supreme Court ruled that 'the justification of self-defense is to be evaluated in light of *all* the facts and circumstances known to the defendant, including those known substantially before the killing.'⁵⁵

In considering the imminence of attack requirement specifically in the context of a battered partner, it must be noted that some battered women will kill their abusers in the heat of an abusive incident: However, many more will kill their abusers at a time when it would appear that there was no imminent threat. LaFave points out:

It sometimes occurs that a wife who has repeatedly been subjected to serious bodily harm by her husband will take his life on a particular occasion when there was not, strictly speaking, any immediate threat of repetition of the husband's conduct, though the wife knew with virtual certainty that more severe beatings were in the offing. ... Some [authorities] have argued that the battered wife thus is literally faced with the dilemma of either waiting for her husband to kill her or striking out at

⁵³ Above n45 at 555.

⁵⁴ Ibid.

⁵⁵ Above n45 at 556. Admittedly, the court in *Wanrow* was not dealing specifically with the case of a battered woman. However, the analogy between *Wanrow* and a case involving a battered woman accused of murder is obvious: in both cases the women were intimately familiar with the past violent behaviour of the victim, they had sought assistance but without success, battered women also state that they are afraid to leave the abusive environment because they fear for the safety of their children or other family members (as was the case in *Wanrow*, where the accused testified that the presence of her children precluded any efforts to leave), a number of battered women also indicate that the abuse occurred whilst the attacker was highly intoxicated. Thus, given the relational similarities between the two cases, it is submitted that the broader interpretation of the court to the imminence rule in *Wanrow's* case may just as easily be applied to cases involving battered women.

him first, and that consequently the imminence requirement should be abolished or loosely construed so that on such facts the battered wife's self-defense claim will prevail. Others just as fervently contend that the battered wife [case] shows just how essential the imminency requirement really is, as especially in such circumstances the law must encourage resort to alternatives other than the taking of a human life.⁵⁶

It is respectfully submitted that advocates of the latter option demonstrate little understanding of the dynamics of battery and the realities of the victim of abuse. However, in trying to provide an acceptable middle ground between the two extreme options of either (i) jettisoning the imminence requirement or (ii) maintaining it steadfastly, Diamond notes that a battered woman should be allowed to use force against her abuser in circumstances which do not reflect an immediacy of attack when the battered woman's circumstances most approximate those of kidnap victims.⁵⁷ From the previous discussion it is evident that many battered women live in a state of constant fear of harm and research shows that they are sometimes simply not able to leave the dangerous environment with any degree of safety.⁵⁸ In *Niemeyer* the Connecticut Supreme Court stated expressly that the combination of physical abuse and implicit threats to the victim if she left sufficed to constitute restraint and abduction and even kidnapping.⁵⁹ Diamond notes that evidence of such conduct by the abusive partner would 'justify lethal self-defense'⁶⁰ because as long as she remains in that environment, she is always in imminent danger.

The courts in the U.S.A. have had to deal with battered women who killed their abusive partners in several cases. In some of the cases, there was clear evidence of a direct confrontation between the parties during the fatal episode,⁶¹

⁵⁶ LaFave above n17 at 545-6.

⁵⁷ See generally GA Diamond 'To Have But Not to Hold: Can "Resistance Against Kidnapping" Justify Lethal Self-Defense Against Incapacitated Batterers' 2002 102 *Columbia Law Review* 729, at 729-773.

⁵⁸ See Chapters Two and Three.

⁵⁹ *Niemeyer* 782 A.2d 658, 666-7 (Conn. 2001).

⁶⁰ Above n57 at 754.

⁶¹ See for example *Hundley* 693 P.2d 475 (Kan.1985); *Bechtel* 840 P.2d 1 (Okla. 1992).

whilst in other cases, there appeared *stricto sensu* no imminent danger.⁶² These latter cases have sometimes been described as the ‘non-confrontation’ cases – and it is these cases that have generated the most discussion in respect of the requirement of temporal proximity in self-defence cases involving partner homicide and where the accused claims to have been a battered woman in the relationship.

In *Emick*, in establishing a rule of application when determining imminence of harm, the Supreme Court of New York held that:

... it was up to the jury to determine, from a subjective standpoint, whether defendant reasonably believed that she was in imminent danger of having deadly physical force inflicted upon her ...⁶³

In *Norman* the self-defence claim of the accused was rejected by the Supreme Court of North Carolina.⁶⁴ The facts were that the accused had been physically and mentally battered by her husband for about twenty-five years. The abuse included hitting, punching, scarring, being forced into prostitution, being made to eat the pet’s food out of the animal’s bowl, having to sleep on the floor next to the bed of the deceased, social isolation, being forced to return to the marital home when she tried to leave, and threats of maiming and killing.⁶⁵ The three days prior to her killing the deceased were marked by particularly harsh incidents of violence.⁶⁶ On the day preceding the killing, the accused had called the police to her home because the deceased was again beating her.⁶⁷ However, she did not file a complaint.⁶⁸ The police left without arresting the deceased.⁶⁹ The following day when the deceased lay down to take a nap he made the accused lie on the

⁶² See for example *Leidholm* above n2; *Emick* 481 N.Y.S.2d 552 (1984); *Gallegos* 719 P.2d 1268 (N.M.1986); *Grove* 526 A.2d 369 (Pa.Super.1987); *Stewart* 763 P.2d 572 (Kan.1988); *Norman* 378 S.E.2d 8 (N.C.1989); *Aris* 264 Cal. Rptr. 167 (Cal.App.Ct.1989).

⁶³ *Emick* above n62 at 561.

⁶⁴ *Norman* above n62.

⁶⁵ *Norman* above n62 at 9, 10, and 11.

⁶⁶ *Norman* above n62 at 12.

⁶⁷ *Norman* above n62 at 19.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

concrete floor next to his bed because ‘dogs don’t lie on beds’.⁷⁰ As he slept, their infant grandchild began to cry. The accused got up to take the child to her mother’s home where she found her mother’s gun.⁷¹ When she returned home, she used the gun to shoot her husband while he still lay sleeping.⁷² The trial court did not admit evidence that the accused acted in self-defence. However, the Court of Appeal reversed this decision: It based its finding on:

... evidence that the defendant exhibited battered wife syndrome, that she believed she could not escape her husband nor expect help from others, that her husband had threatened her, and that her husband’s abuse of her had worsened in the two days preceding his death. ... [Accordingly,] a jury reasonably could have found that her killing of her husband was justified as an act of perfect self-defense ... even though he was asleep when she killed him.⁷³

The Supreme Court of North Carolina disagreed with the reasoning of the Court of Appeal.⁷⁴ The Supreme Court held that underpinning self-defense was a belief by the defender that it was necessary to kill the attacker to save herself from imminent death or grave bodily harm.⁷⁵ That belief in the imminence of harm must be reasonable in that the circumstances as they appeared to the defendant would create such a belief in the mind of a person of ordinary firmness.⁷⁶

In further defining imminence the court stated:

The term “imminent” as used to describe such perceived threats of death or great bodily harm as will justify a homicide by reason of perfect self-defense, has been defined as “immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law.” Our cases have

⁷⁰ Ibid.

⁷¹ *Norman* above n62 at 20.

⁷² Ibid.

⁷³ *Norman* above n62 at 12.

⁷⁴ *Norman* above n62 at 8.

⁷⁵ *Norman* above n62 at 20.

⁷⁶ *Norman* above n62 at 12.

sometimes used the phrase “about to suffer” interchangeably with “imminent” to describe the immediacy of threat that is required to justify killing in self-defense.⁷⁷

The court held that with regard to the fundamental requirements of self-defence, the sleeping victim was not performing a threatening act when he was shot.⁷⁸ The court found that no evidence was led to show that the accused had a reasonable belief that it was necessary to kill her husband to save herself from imminent harm or death.⁷⁹ In delivering the majority decision, Mitchell J stated:

All of the evidence tended to show that the defendant had ample time and opportunity to resort to other means of preventing further abuse by her husband. There was no action underway by the decedent from which the jury could have found that the defendant had reasonable grounds to believe either that a felonious assault was imminent or that it might result in her death or great bodily injury. Additionally, no such action by the decedent had been underway immediately prior to his falling asleep.⁸⁰

The focus of the Supreme Court in *Norman* was to identify whether there was ‘additional evidence that the accused had a reasonable belief that killing her husband was necessary to avoid imminent harm.’⁸¹ It is respectfully submitted by the writer that from a reading of the evidence, it is difficult to understand what further facts were required: the factual evidence was graphic and horrifying and the danger to the accused appeared to be ongoing and possibly even escalating in severity. In the circumstances, one can only think that the problem arose when the court applied its mind to the case and opted for the very narrow interpretation of the word imminent. This is clear from the later discussion of the facts of the case by the court. In dealing with this issue, the court held, ‘[A] defendant’s

⁷⁷ *Norman* above n62 at 13.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

subjective belief of what might be “inevitable” at some indefinite point in the future does not equate with what she believes to be “imminent”.⁸²

Aris was heard before the Appeal Court of California.⁸³ The accused gave evidence that she had been abused by her husband during the ten years of their married life.⁸⁴ With specific reference to the night that she killed him, the accused testified that the deceased had beaten her that evening and threatened that she would not live until the morning.⁸⁵ He then went off to bed and fell asleep. The accused stated in her evidence that she then went to get ice for her face and a gun for her protection.⁸⁶ She returned to the bedroom and shot her husband five times in the back as he lay asleep.⁸⁷ The accused testified that she had to do it ‘[b]ecause [she] felt when he woke up that he was going to hurt [her] very badly or even kill [her].’⁸⁸ The court noted that no jury composed of reasonable men could have concluded that a sleeping victim presents an imminent danger of great bodily harm, especially when the accused was able to, and actually did, leave the bedroom, and subsequently returned to shoot him.⁸⁹

Bechtel was another case of prolonged abuse and battery.⁹⁰ The evidence of the accused was that she made several attempts to leave the deceased, as well as efforts to seek assistance from the family of the deceased and treatment facilities.⁹¹ The deceased had repeatedly promised to seek help for his alcohol problem but never did.⁹² On the night of the killing, the deceased had returned

⁸² *Norman* above n62 at 14.

⁸³ *Aris* above n62.

⁸⁴ *Aris* above n62 at 171.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ What has emerged as a perplexing question during a study of the cases is: How can a person in the midst of a violent assault on another, simply cease his action and go off to sleep? This enquiry has been explained by social psychiatrists who recognise such conduct and describe it as ‘deindividuated violence’. During this time, the male is described as being in a highly aroused state of anger, unresponsive to pleading, and in some cases, will just beat his victim until he is simply too exhausted to continue.: Personal discussion with Dr Hemanth Nowbath, a practising psychiatrist in Durban, KwaZulu-Natal.

⁸⁸ *Aris* above n62 at 171.

⁸⁹ *Aris* above n62 at 176.

⁹⁰ *Bechtel* above n61.

⁹¹ *Bechtel* above n61 at 4 and 5.

⁹² *Bechtel* above n61 at 5.

home intoxicated and continued to drink.⁹³ He insisted that the accused sit with him and her evidence was that he was alternatively maudlin and aggressive. The evidence was that later in the evening the deceased removed all his clothing and in this state he grabbed the accused and threw her on the bed threatening to kill her.⁹⁴ He became increasingly violent and climbed on top of her, held her down by placing his knees on her arms and banged her head against the headboard.⁹⁵ He ejaculated on her face and stomach after which he slumped on top of her' and fell asleep.⁹⁶ The accused testified further that as he slept she went into the bathroom to wash herself. However, the deceased woke up and followed her into the bathroom and began assaulting her again. All the while he was 'crying and rambling.'⁹⁷ Finally he fell asleep again and the accused's evidence was that she eased herself away from him. As she sat on the floor, she claims that 'she heard a gurgling sound, looked up and saw the contorted look and glazed eyes of the deceased with his arms raised. [She] reached for the gun under the bed and shot the deceased as she tried to get up and run.'⁹⁸ The District Court of Oklahoma rejected the accused's plea of self-defence. On appeal, the Court of Criminal Appeals of Oklahoma noted:

Based on the traditionally accepted definition of imminent danger and its functional derivatives, a battered woman, to whom the threat of serious bodily harm or death is always imminent, would be precluded from asserting the defense of self-defense.

Under our 'hybrid' reasonableness standard, the meaning of *imminent* must necessarily envelope the battered woman's perceptions based on all the facts and circumstances of his or her relationship with the victim.⁹⁹

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ *Bechtel* above n61 at 5-6.

⁹⁹ *Bechtel* above n61 at 12. Under the law of self-defence in the state of Oklahoma, section 733(2) states that homicide is justifiable '[w]hen committed in the lawful defense of such person, ..., when there is a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished; ...': *Bechtel* above n61 at 6.

Drawing from the research materials available on the issue of the battered woman's cues to danger from her abuser and her recognised state of hypervigilance, the court held further:

Thus, ... an abused woman may kill her mate during the period of threat that precedes a violent incident, right before the violence escalates to the more dangerous levels of an acute battering episode. Or, she may take action against him during a lull in an assaultive incident, or after it has culminated, in an effort to prevent a recurrence of the violence. And so, the issue is not whether the danger was in *fact* imminent, but whether given the circumstances as she perceived them, the defendant's *belief was reasonable that danger was imminent*.¹⁰⁰

In *casu*, the Court of Criminal Appeal was satisfied that the actions of the accused satisfied the condition of imminence required under the state law of self-defence.¹⁰¹ However, this decision appears to be somewhat exceptional.¹⁰² In the subsequent case of *Ha*, the Alaska Court of Appeals agreed with the contention of the defence that the imminency of a defendant's peril had to be determined from the standpoint of the defendant.¹⁰³ In *casu*, the defence further contended that a reasonable person in the accused's position – hearing the deceased's threat on his life and knowing the propensity for violence of the deceased and his family – would reasonably fear that the deceased or one of his family would inevitably come some day to carry out the threat of the deceased to kill him.¹⁰⁴ The court also agreed that there was sufficient evidence that a reasonable person in the position of the accused would have feared injury or death from the deceased.¹⁰⁵ However, the court held:

¹⁰⁰ *Bechtel* above n61 at 12. Once again, the court emphasised the importance of considering not only the objective test but also the subjective standard (the so-called hybrid test) based on the belief of the accused as a result of her lived realities.

¹⁰¹ *Bechtel* above n61 at 12-3.

¹⁰² In discussing the *Hundley* case, Ryan notes that the approach of the court to imminence 'was rather unique.': SA Ryan 'Criminal Law: The Kansas Approach to the Battered Woman's Use of Self-Defense [*State v Hundley* 236 Kan.461, 693 P.2d 475 (1985)]' 1985 25 *Washburn Law Journal* 174, at 180. Since *Hundley* (above n61), the writer has not been able to access any other judgment which took a similar view to the condition of imminence until *Bechtel* (above n61).

¹⁰³ *Ha* 892 P.2d 184, 190 (Ala.Ct.App. 1995).

¹⁰⁴ Above n103 188-9.

¹⁰⁵ Above n103 at 191.

... “inevitable” harm is not the same as “imminent” harm. Even though [the accused] may have reasonably feared that [the deceased] would someday kill him, a reasonable fear of future harm does not authorize a person to hunt down and kill an enemy.¹⁰⁶

Although the case did not involve a battered woman, the court expressly referred to the fact that the same approach would be applied to killings by battered women. On the subject, Mannheimer J stated:

... a trial judge is authorized to reject self-defense instructions where there is some evidence that the defendant acted to defend himself, but no evidence of imminent peril. An example of circumstances under which self-defense instructions might be denied based on lack of imminent peril may be found in “battered wife syndrome” homicides. Typically, these cases involve a battered wife who kills her husband in his sleep. Although in such instances there is commonly ample evidence to support a finding that the killing was motivated by fear and that the fear was as real and as urgent as at the time of the killing as it was when the husband was awake and actually capable of immediate physical abuse, cases have uniformly refused to apply self-defense to this category of crime. The basis of the refusal has been lack of an immediate threat of harm.¹⁰⁷

In considering whether the condition of imminence is satisfied, especially in non-confrontation cases, some courts have also placed in issue the existence of an adequate triggering incident to warrant lethal self-defence. In *Gallegos* the District Court, Cibola County, New Mexico refused to issue a self-defence instruction despite the accused’s evidence that ‘as a result of [the deceased’s] prior violent action toward [her], and his threats to kill her, she perceived an immediate danger of death or great bodily harm.’¹⁰⁸ The District Court found that in the absence of evidence that at the time of the killing, the deceased had been

¹⁰⁶ Above n103 at 191.

¹⁰⁷ Above n103 at 191-2.

¹⁰⁸ *Gallegos* above n62 at 1270.

overtly threatening her it could not find that the element of immediacy had been satisfied. The court ruled that 'past violent actions by the deceased toward defendant could not, without some obvious threat at the time of the slaying, provide the foundation for a self-defense instruction.'¹⁰⁹ On appeal against the decision of the District Court, the New Mexico Court of Appeals had to decide whether the accused had *inter alia* satisfied the requirement of immediacy when she shot her husband in their bedroom and was, accordingly, entitled to a self-defence instruction.

The New Mexico Supreme Court was of the view that the District Court had erred in its interpretation of the requirement of immediacy. The Supreme Court confirmed the view that '[t]his element [i.e. immediacy] is measured by a subjective standard.'¹¹⁰ Later on in his judgment, however, Bivins J provided clarity on the complete evaluation of the condition. He held that in assessing immediacy of danger there was no onus on the accused to prove that she was in actual danger: rather the court would take consideration of whether her fear of the danger was reasonable in that the accused had conducted herself as a reasonable person would have in the same circumstances. Thus, Bivins J clarified, '[O]urs is a hybrid test, combining both, the subjective and objective, standards.'¹¹¹

In recognising the subjective component of the assessment Bivins J expressly endorsed the judgment in *Leidholm* that and noted with particular reference to cases of domestic violence that:

The subjective perceptions of an individual, brutalized regularly by domestic violence, are especially critical to the determination of whether her actions in purported self-defense were reasonable.¹¹²

¹⁰⁹ *Gallegos* above n62 at 1269.

¹¹⁰ *Gallegos* above n62 at 1270.

¹¹¹ *Gallegos* above n62 at 1271. Once again, as in the *Bechtel* case (above n61) the court placed stress upon the importance of considering a combination of subjective and objective elements in determining immediacy.

¹¹² *Gallegos* above n62 at 1270 & 1271. See also *Leidholm* above n2 at 818.

In specifically referring to victims of abuse, Bivins J noted that the relationship of domestic violence was characterised by a cumulative experience of terror. Thus, whilst it was adequate to merely raise the abusive relationship to justify the conduct of self-defence, the court also did not require evidence of actual physical assault. According to the judge some subjective showing of impending danger prior to the defendant's use of force had to be established. He held:

Threatening behaviour or communication can satisfy the required imminence of danger. ... The evidence of past incidents of violence then bears directly on the apparent immediacy of danger.¹¹³

Thus, based on the facts of the case, the Supreme Court of New Mexico found that the accused had suffered a long history of extreme physical and sexual abuse – not only in her relationship with the deceased but also from her father and brother. She had received no support from the police on the grounds that they had never 'witnessed the brutality.' On the day of the killing, the deceased had sodomised the accused, spent the day drinking, and when she expressed her intention to leave him, he threatened that he would kill her. During the evening, after the children had gone to bed, the abuse continued. The accused testified that at one point 'when she looked at George, she saw her father, her brother, and George, all coming toward her.'¹¹⁴ Later in the evening, during a brief lull in the violence, when the deceased called her into the bedroom, the accused stated that she 'feared for her life' as she did not know whether the deceased intended to kill her, rape her, or beat her.¹¹⁵ She admitted picking up a loaded gun which the deceased kept in the living room and as he lay on the bed, she shot him.¹¹⁶ After hearing expert evidence on the effects of battery, the court concluded:

The fear present in this case was also prompted by more than a history of abuse. Based on the brutality which defendant testified she had experienced that day, George's anger, and her knowledge of what had

¹¹³ *Gallegos* above n62 at 1271.

¹¹⁴ *Gallegos* above n62 at 1272.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

happened to her in similar circumstances, George's calling her into the bedroom could provide the requisite immediacy of danger. ... To deny the defense of self-defense under the facts of this case would ignore reality.¹¹⁷

The decision of the District Court was, accordingly, reversed.

In *Grove*, however, the Supreme Court of Pennsylvania refused to allow a self-defence instruction in favour of an accused who had shot her sleeping husband, poured gasoline over him and set his body alight.¹¹⁸ Reasoning similarly to the District Court in *Gallegos* the court held that the prior violence and pattern of abusive behaviour of the deceased were not relevant to the circumstances of the case. The determining factor as far as the court was concerned was that '[b]ecause the victim was drunk and asleep at the time of the murder, [there was] no imminent danger on that present occasion.'¹¹⁹ It was further held that as a matter of law, any imminence of the appellant's perceived risk of death or serious bodily injury ended when the deceased went to bed and fell asleep.¹²⁰

A similar finding was made by the Kansas Supreme Court in *Stewart*.¹²¹ The evidence was that the accused and the deceased had had an extremely violent relationship. After years of enduring the abuse, the accused had eventually found the courage to leave the home. The evidence of the expert witnesses who

¹¹⁷ *Gallegos* above n62 at 1273. Bivins J noted that this case bore strong resonance with an earlier case that was heard by the Illinois Court of Appeal namely *Scott* (unreferenced). In that case noted Bivins J, the accused had also been the victim of brutal physical and mental abuse from her partner, the deceased. On the night she killed him, the deceased had been drinking and then started accusing her of sexual infidelity and began beating her with a pistol and his fists. The deceased had then telephoned a friend and told the friend that the accused would be gone in forty-five minutes. Whilst on the telephone, the deceased signalled to her that she was to bring him his handcuffs. The accused, based on previous encounters, knew that the deceased would often handcuff her before beating her. Instead of getting the handcuffs, she picked up a gun and shot the deceased. Her evidence was that she had shot in out of fear of what he might do to her. The trial court, however, refused to instruct the jury on self-defence and convicted the accused. The appellate court reversed the decision, acknowledging the validity of a subjective belief of immediacy of the threat. The court concluded that the reasonableness of the accused's subjective belief, in light of the surrounding facts, was a question for the jury.: *Gallegos* above n62 at 1273.

¹¹⁸ *Grove* above n62.

¹¹⁹ *Grove* above n62 at 373.

¹²⁰ *Grove* above n62 at 375.

¹²¹ *Stewart* above n62.

treated the accused during this period was that the accused's demeanour was characterised by symptoms of extreme helplessness. Thus, when her husband located her and coerced her into returning home, she acquiesced. The accused testified that when they reached home, the deceased threatened that if she ever left him again, he would kill her – and she believed him.¹²² As soon as they returned home, the deceased forced her into the house and demanded that she have oral sex with him. The following morning she discovered a loaded gun in the house. This was particularly disturbing as her husband had previously promised that he would keep his guns unloaded. The accused took the gun and hid it under the mattress in the spare bedroom of the home. The further evidence was that during the morning, the deceased had made repeated remarks that led her to believe that he intended to kill her. These included comments such as that she 'should not bother with cleaning the house as she would not be there long', and that she 'should not bother with her things because she could not take them with her'.¹²³ Later that evening, after the deceased had sodomised her, threatened her with a loaded gun which he had brought into the bedroom with him, and repeated his determination to kill her if she ever left him, the deceased went off to bed. The accused took the gun and shot and killed the deceased as he lay asleep. She testified that she had contemplated suicide and had heard voices in her head repeatedly saying 'kill or be killed'.¹²⁴ Whilst the trial court allowed a self-defence instruction to the jury, the Kansas Supreme Court overturned this decision. The Supreme Court recognised that the traditional rules of self-defence might not always be applicable in cases of domestic violence because 'of the prior history of abuse, and the difference in strength and size between the abused and the abuser, [and] the accused in such cases may choose to defend herself during a momentary lull in abuse, rather than during a conflict'.¹²⁵ However, be that as it may, the Supreme Court was adamant that an overt act of aggression immediately (my emphasis) preceding the homicidal act must be evident to satisfy the requirements of self-defence and the court found

¹²² *Stewart* n62 at 581.

¹²³ *Stewart* above n62 at 575.

¹²⁴ *Ibid.*

¹²⁵ *Stewart* above n62 at 577.

that this was lacking in the *Stewart* case.¹²⁶ The Supreme Court found that the accused could not claim self-defence for failing the imminence requirement. 'Under such circumstances, a battered woman cannot reasonably fear imminent life-threatening danger from her sleeping spouse.'¹²⁷ The court specifically noted that the wife could have escaped the home if she wished, as 'she had a car and access to car keys.'¹²⁸ To allow a self-defence instruction under such circumstances would, in the opinion of the court, constitute 'a leap into the abyss of anarchy',¹²⁹ promoting 'unacceptable notions of self-help and vigilanteism.'¹³⁰ In explaining imminence, the Supreme Court took an extremely narrow view of the circumstances requiring the act of self-defence ought to be 'contemporaneous with the initial confrontation.'¹³¹

In his dissenting judgment, Herd J was especially critical of the manner in which the majority judgment had dealt with the requirement of imminence. He found that the ruling of the court had, in effect, reintroduced the 'immediacy of harm standard' which, he pointed out, had been expressly jettisoned by previous decisions of the court.¹³² The writer respectfully submits that the majority judgment in *Stewart* is a clear example of a situation where the court raised all the correct issues but unfortunately, because of what appears to be ignorance and a lack of understanding of the dynamics of intimate violence, came to all the incorrect conclusions. 'Immediacy of harm' as a standard for self defence fails to take cognisance of the realities of many victims and was accordingly properly

¹²⁶ In this case, the Supreme Court strictly applied the traditional objective standard in assessing imminence. It clearly refused to adopt the broader hybrid test applied in *Bechtel's case* (above n56) and to take cognizance of the lived reality and extended circumstances of the battered woman accused.

¹²⁷ *Stewart* above n62 at 578.

¹²⁸ *Stewart* above n62 at 572.

¹²⁹ *Stewart* above n62 at 579.

¹³⁰ *Ibid.*

¹³¹ *Stewart* above n62 at 578.

¹³² *Stewart* above n62 at 593. The standard for judging imminent harm had been firmly established by the court in *Hodges* 716 P.2d 563, 571 (Kan.1985), *Osbey* 710 P.2d 676 (Kan.1985), and *Hundley* above n61. In *Hundley* the Kansas Supreme Court held specifically that the immediacy of harm rule was erroneous and that in considering a battered woman, one needed to be cognisant of the fact that during every confrontation with her abuser she could reasonably believe that she was in imminent danger, based on the past history and pattern of abuse.: at 480. The court further stated that the danger sensed by an abused woman, whilst not always immediate or about to occur 'without loss of time', is always imminent or 'ready to take place' at any time.: at 480.

rejected by other courts. The hybrid test set out in *Bechtel* is a much fairer assessment of the factual reality of the accused and the principle for taking cognisance of the broader environment and circumstances of the accused had already been clearly endorsed by the Supreme Court of Kansas in *Hundley*.¹³³

The requirement that the accused must have considered the danger from her abuser imminent is probably one of the most critical aspects of the defence. Expert evidence in cases of battered women, especially those who kill in the so-called situations of non-confrontation can play a determining role in establishing the perception of the accused in this regard. Perhaps the single most important reality that the expert will bring to the court is the notion that a battered woman, because of her experience with her abuser's violent conduct, can detect the smallest changes or signs of novelty in the pattern of normal violence ('cues of danger') that are indicative of a heightened anger or increased certainty that the threats will be carried out, and a consequent need for defensive behaviour by the victim, which may include subtle, yet telltale, changes in facial expression, tone of voice, or particular mannerisms.¹³⁴ In *Gallegos Bivins J* thus noted:

Remarks or gestures which are merely offensive or perhaps even meaningless to the general public may be understood by the abused individual as an affirmation of impending physical abuse.¹³⁵

In *Diaz* the accused was charged with the murder of her husband. In supporting her claim of self-defence, the expert emphasised the fact that the accused, who was a victim of intimate abuse, had a reasonable subjective belief that future life-threatening harm was now imminent because her abusive husband had made a unique threat directed at their infant daughter the evening before. It was her view that the accused believed that she needed to act against the deceased or face being killed herself.¹³⁶ Similarly, in *Humphrey* the accused testified that on the night prior to the killing which formed the basis of the charge in this case, the

¹³³ *Hundley* above note 61 at 480.

¹³⁴ See further below for a discussion on the subject.

¹³⁵ *Gallegos* above n62 at 1271.

¹³⁶ J Blackman 'Potential Uses for Expert Testimony: Ideas Towards the Representation of Battered Women Who Kill' 1986 9 *Women's Rights Law Reporter* 227, at 237 discussing the unreported case of *Diaz*.

deceased had been 'getting crazy' and had a particular 'look on his face' when he had shot at her, and that 'he wasn't the same person'. The accused further testified that on the day of the fatal shooting, she knew that the deceased would kill her because of his threats and prior violence and because when he was angry, his walk became 'very, very heavy'.¹³⁷

However, it is clear from the case law that there is not a general consensus on the interpretation of 'imminence' or 'immediate harm'.¹³⁸ Some courts have adopted a more robust approach assessing the condition from the perspective of the accused, whilst others have been more conservative in defining the requirement viewing it more strictly from the perspective of the reasonable man in the circumstances of the accused. It is submitted that the formulation of the imminence rule as stated by Perkins and Boyce (and applied for instance in *Leidholm*) should be considered as a possibly appropriate starting point. Perkins and Boyce state:

... imminence should not be tested as being "the actuality of impending harm ..." [Rather, it is] the reasonable belief of the defender [that] is controlling ... [The question being:] What harm did he reasonably believe was impending ...? And in the excitement of the moment he is not required to judge these matters with precise calculation.¹³⁹

Much earlier Robinson had also demonstrated a clear insight into the inequities created by a conservative formulation of the imminence rule and proposed that

The proper enquiry is ... [i]f a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of

¹³⁷ *Humphrey* 921 P.2d 1 (Cal.1996). In *casu*, the Superior Court of Fresno County had convicted the accused of manslaughter. The Supreme Court granted the application for a review of the decision and held specifically that expert testimony that the accused was suffering from battered woman syndrome was admissible not only on the question of whether the accused actually believed that it was necessary to kill in self-defense, but also on the question of the reasonableness of that belief.: at 1.

¹³⁸ It is noted that all of the writers acknowledge that there should be a link between the harm and the consequent defensive act. They differ on how the standard of connection is to be interpreted.

¹³⁹ RM Perkins and RN Boyce *Criminal Law* (The Foundation Press, New York: 1982) 1115.

self-defense must permit him to act earlier – as early as is required to defend himself effectively.’¹⁴⁰

This approach appears to incline itself towards a test of ‘inevitability of harm’ and the right to take defensive action in such circumstances. This has been the approach presented by Ripstein who argues that courts will have to consider ‘unavoidable harm’ rather than imminence if they wish to ensure that accused persons are treated justly by the legal process.¹⁴¹ It should also be borne in mind that in many instances, the accused would have killed her abusive partner while he slept because she knew that in any other scenario she would not be able to effectively stop him. This is reasonably understandable as the fact that the abuser was asleep at the time often compensates for the disparity in size and physical strength between the abuser and his victim. Rosen also argues that the ‘imminence of harm’ rule as it is applied by some courts is extremely unfair to the accused and she advocates a complete rejection of the imminence rule. Consequently, Rosen suggests a test of necessity, rather than imminence understood in the simplistic temporal fashion, when evaluating the defensive act. In explaining her approach she makes it clear that imminence of the threat of harm is not irrelevant, ‘but it should not be allowed to take on a life of its own and become the defining element in battered women (or other) self-defense cases.’¹⁴²

¹⁴⁰ Above n5 at 78.

¹⁴¹ A Ripstein ‘Self-Defense and Equal Protection’ 1996 57 *University of Pittsburgh Law Review* 685, at 698-704. Ripstein suggests that the inevitability/unavoidability rule is superior to the imminence rule because it expresses the real purpose of the self-defence theory.: at 704.

¹⁴² RA Rosen ‘On Self-Defense, Imminence, and Women who Kill Their Batterers’ 1993 71 *North Carolina Law Review* 371, at 375-6; see also above n141 at 691. According to Rosen, the test for self-defence should consider the ‘necessity’ of the defendant’s actions. As she explains it, ‘necessity’ is not a temporal concept – but rather relies on the notions of inevitability or unavoidability. Under a ‘necessity’ rule, the test would be ‘whether the accused had any choice but to act as she did in order to avoid grave risk of death or serious injury by her husband’.: at 376. He argues that imminence of impending harm is really a ‘translator’ for necessity, and when imminence and necessity conflict, necessity must prevail.: at 387. (It must be acknowledged that the necessity rule proposed by Rosen must not be confused with the current separate defence of necessity – this is not her intention.: at 376.) Ogle and Jacobs comment that the approach of Rosen also reflected in the Model Penal Code section 3.04 which makes it clear that necessity is a critically important element in determining self-defense on a given occasion.: Ogle and Jacobs above n16 at 128. Further in this regard Ogle and Jacobs note:

[W]e must recognise that there are cases in which the threat of harm is reasonably perceived and it is necessary to forcefully prevent it – or it will not be preventable. The mechanism for allowing self-defense to operate and to be considered by the jury in these

Specifically noting his support for the recommendations of both Ripstein and Rosen, Sebok clarifies the point noting that implicit in such an approach is the fact that the onus will always be on the defendant to satisfy the court that the probability of future occurrence of the events indicated by the facts proffered are very high.¹⁴³

Veinreideris, however, takes a different view and comments that ‘replacing imminence with necessity [as suggested by Rosen] is logically unsound, and would not achieve the desired result because the harm of homicide would be greater than the harm avoided in most cases.’¹⁴⁴ Other antagonists of the Rosen/Ripstein formulation are of the opinion that the abolition or even a relaxation of the rule of imminence will create an open season for vindictive homicides and self-help.¹⁴⁵ Eber, however, counters with the view that these women only kill their partners ‘because they realize that there is no other way to end the abuse. Battered women are not likely to kill motivated by the assumption that they will be able to get away with it.’¹⁴⁶ The argument that abused women kill under circumstances of desperation is borne out by the study conducted by Browne, Williams and Dutton on homicides in the U.S.A. during the periods 1976-

more difficult cases is to employ the concept of necessity. That is, we should not simply ask: Was the harm imminent? We should ask instead: Was it necessary to employ the force used in order to protect against the threat of harm? If it was necessary, self-defense may be considered.: Ogle and Jacobs above n16 at 129.

¹⁴³ AJ Sebok ‘Does An Objective Theory of Self-Defense Demand Too Much?’ 1996 57 *University of Pittsburgh Law Review* 725, at 753. Angel also supports this approach noting that for the abused woman ‘time is elongated.’: M Angel ‘Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man’ 2008 16 *Buffalo Women’s Law Journal* [forthcoming] or <http://ssrn.com/abstract=1078007> 9 [accessed 30/06/08]. Angel continues to note that with abused women it is fear and not anger that is their primary emotion, a fear which continues to increase as the woman realizes that escape is impossible.: Angel n143 at 19. Thus, she argues:

The action of the abused woman who kills when her abuser is asleep or otherwise incapacitated can be justified as an immediately necessary response “on the present occasion” if she acted in self-defense with reasonable fear of a future attack, which she cannot escape and which she does not have the strength to repel.: Angel n145 at 23.

¹⁴⁴ Above n18 at 623.

¹⁴⁵ In *Wang*, however, the Court of Appeals expressed the view that to allow women who killed their partners in situations of non-confrontation to rely on self-defence would be to return to the law of the jungle: [1990] 2 NZLR 529.

¹⁴⁶ LP Eber ‘The Battered Wife’s Dilemma: To Kill or be Killed?’ 1981 32 *Hastings Law Journal* 895, at 930. Schulhofer also suggests that the ‘traditional insistence on a literally “imminent” infliction of great bodily harm must be abandoned outright’ if one adopts the enquiry of necessity of harm rather than ‘imminence per se.’: SJ Schulhofer ‘The Gender Question in Criminal Law’ 1990 7 *Social Philosophy and Politics* 105, at 127.

1984 and 1980-1995.¹⁴⁷ Their findings were that female on male homicides were markedly lower in those states where resources such as shelters, crisis lines, and domestic violence legislation were in place.¹⁴⁸ This downward trend continued during the second study leading them to the conclusion that ‘legal and extralegal resources for battered women had provided women facing violence and threats with a greater variety of alternatives, thus preventing them from resorting to lethal defensive action.’¹⁴⁹

Wallace’s proposal for defining imminence is based on a comparison between the traditional individual self-defence law and the international law of self-defence.¹⁵⁰ In terms of the international law of self-defence, the three factors (beyond temporality) that have been articulated as defining imminence are probability, availability of alternative recourses, and magnitude of harm.¹⁵¹

In providing an interpretation of probability, Yoo notes that it will include ‘the likelihood that this probability will increase, and therefore the need to take advantage of a limited window of opportunity.’¹⁵² Thus, Wallace notes, in considering probability one must have regard to

... the intuitive point of probability, which entails some assessment of risk based on past behaviour. Past experience helps the threatened party to determine more accurately whether a threat is presented. Second, in accordance with common sense, if the threat is imminent in the sense of being permanent, the threatened party should be allowed to act when

¹⁴⁷ A Browne, KR Williams and DG Dutton ‘Homicide Between Intimate Partners’ in MD Smith and MA Zahn (eds) *Studying and Preventing Homicide* (Sage Publications, London: 1999) 59.

¹⁴⁸ Above n147 at 64.

¹⁴⁹ Above n147 at 74.

¹⁵⁰ S Wallace ‘Beyond Imminence: Evolving International Law and Battered Women’s Right to Self-Defense’ 2004 71 *The University of Chicago Law Review* 1749, at 1749-1781.

¹⁵¹ See *The National Security Strategy of the United States of America* 25 (2002), online at <http://www.whitehouse.gov/nsc/nss.pdf> (accessed on 08-23-2004) where it is stated: ‘We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. ... To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.’ See also above n150 at 1751 and at fn12.

¹⁵² J Yoo ‘International Law and the War in Iraq’ 2003 97 *American Journal of International Law* 563, at 574.

presented with a “window of opportunity,” rather than allowing the aggressor to choose the exact time and manner of confrontation.¹⁵³

5.2.3 Conditions Relating to the Defence

5.2.3.1 There Must Have Existed a Reasonable Belief that Such Force Was Necessary to Avoid the Danger

In explaining this condition LaFave notes that at the outset it should be noted that the condition is not simply that the defender must have had a reasonable belief that force was necessary but also that the defender subjectively had an *actual* belief in the need for force against her attacker.¹⁵⁴ Thus, in applying this requirement, he writes that the first consideration is the subjective enquiry for the court to assess the subjective belief of the accused in the necessity for force.¹⁵⁵ The second deliberation which follows is then the objective enquiry during which the jury must decide whether the defendant's belief in the necessity of using force to prevent harm to herself was a reasonable one.¹⁵⁶ These are not two distinct enquiries and will often take place simultaneously. Thus, in explaining the condition the Court of Criminal Appeals, Oklahoma in *Bechtel* stated:

The bare belief that one is about to suffer death or great personal injury will not, in itself, justify taking the life of his adversary. There must exist *reasonable* grounds for such belief at the time of the killing. Further, the right to take another's life in self-defense is not to be tested by the

¹⁵³ Above n150 at 1771. In including the proposals of Wallace, the writer is cognisant that there may be different factors and interests at play in respect of international law and the domestic laws of self-defence. There is also an argument to be made that Wallace's proposals could lead to a situation of anarchy and remove all responsibility from the battered woman to find alternative options. Nevertheless, it is suggested that the principle recorded by Wallace remains apposite especially where the evidence demonstrates an inevitability of the harm materialising. The courts must, however, take cognisance of all the factors characterising the relationship and the reasonableness of the timing of the accused's lethal act.

¹⁵⁴ LaFave above n17 at 542.

¹⁵⁵ In evaluating the requirement of necessity specifically the court in *Stewart* confirmed this approach, stressing the subjective nature of the assessment and noting expressly that the decision to be made was whether the defendant subjectively sincerely and honestly believed in the necessity to kill in self-defence.: *Stewart* above n62 at 573.

¹⁵⁶ LaFave above n17 at 542.

honesty or good faith of the defender's belief in the necessity of the killing, but by the fact whether he had reasonable grounds for such belief.¹⁵⁷

However, acknowledging the objective component of the test, the Maryland Appeal Court in *Katsenelenbogen v Katsenelenbogen* emphasised:

The objective standard does not require the jury to ignore the defendant's perception in determining the reasonableness of his or her conduct. ... [T]he facts or circumstances *must* be taken as perceived by the defendant ... *so long as a reasonable person in the defendant's position could also reasonably perceive the facts or circumstances in that way.*¹⁵⁸

Similarly, in looking at the issue of whether the force was necessary, the Wisconsin Appeal Court in *Fischer* clearly stated what has been generally applied as a rule namely, that the test is not whether the jury believed that the force used was necessary in self-defence but whether the jury believed that the accused acting as a reasonable person had this belief.¹⁵⁹ Accordingly, the court held that '[t]he court's instruction [on self-defence] can stand only if it included the essential element that the person using the force need only reasonably believe, in light of all the facts and circumstances known to him, that he or another person was in danger.'¹⁶⁰ This approach was confirmed by the Kansas Supreme Court in *Hodges* where the court held that 'the jury must determine, from the viewpoint of the defendant's mental state, whether the defendant's belief in the need to defend herself, was reasonable.'¹⁶¹

In *Leidholm* the court accepted the following test to determine whether the defence was necessary:

A defendant's conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under the like

¹⁵⁷ *Bechtel* above n61 at 6.

¹⁵⁸ *Katsenelenbogen v Katsenelenbogen* 775 A.2d 1249, 1259 (Md. 2001).

¹⁵⁹ *Fischer* 598 P.2d 742 (Wn.App.1979).

¹⁶⁰ Above n159 at 744.

¹⁶¹ *Hodges* above n132.

circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to protect himself from apprehended death or great bodily injury.¹⁶²

In so setting out the test, the court stressed the significance of differentiating between the circumstances as perceived by the 'defendant alone' and the alternative approach of viewing the accused's conduct from the standpoint of the 'reasonably cautious person'. According to the court, the inherent value of the former appraisal is that it specifically allowed the jury to focus on the 'reasonableness of the accused's actions against the accused's subjective impressions of the need to use force' rather than directing itself to a consideration of what it perceived to be appropriate from a hypothetical reasonably cautious person under similar circumstances.¹⁶³

Thus, Vande Walle J concluded:

[A] correct statement of the law of self-defense is one in which the court directs the jury to assume the physical and psychological properties peculiar to the accused, viz, to place itself as best as it can in the shoes of the accused, and then decide whether or not the particular circumstances surrounding the accused at the time he used force were sufficient to create in his mind a sincere and reasonable belief that the use of force was necessary to protect himself from imminent and unlawful harm.¹⁶⁴

However, in *Nunn* the Iowa Court of Appeal refused to accept that a battered woman accused of killing her live-in boyfriend had a reasonable belief in the necessity to use force against him.¹⁶⁵ In *casu*, the court relied on the facts that firstly, the altercation between the parties had ended several minutes before the accused had fatally stabbed the deceased and secondly, the accused had acted

¹⁶² Above n2 at 818.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Nunn* 356 N.W.2d 601 (Iowa Ct.App. 1984).

at a time when the deceased was unarmed.¹⁶⁶ The court found that there was no need at the time for the accused to have used such force as she did and that the accused's alleged fear of life-threatening danger was not justified in the circumstances.¹⁶⁷ The court reached this conclusion despite hearing evidence of a violent relationship between the accused and the deceased and the deceased's threat to kill the accused made earlier on the day of the murder.¹⁶⁸

In *Wanrow*, relying on the modified requirement that the reasonable person be placed in the circumstances of the accused, counsel for the accused successfully argued that the test for self-defence required the jury to consider the actions of the accused by seeing what she saw and knowing what she knew.¹⁶⁹ The Washington Superior Court accepted the argument instructing the jury that the standard for determining reasonableness that was required was that it place itself squarely in the position of the defender, taking into account all the circumstances as known to the accused at the time, including 'those known substantially before the killing.'¹⁷⁰

¹⁶⁶ Above n165 at 604.

¹⁶⁷ Above n165 at 608.

¹⁶⁸ See also *White* 414 N.E.2d 196 (Ill.App.Ct. 1980) where the facts were that in the past, the deceased had viciously assaulted the accused, even to the extent of breaking her elbow, dislocating her elbow (on a separate occasion), leaving her with fractured ribs, cutting her face with a broken bottle and hitting her on the head with a motor vehicle jack. On the day of the killing, the deceased had threatened the accused with another beating.: at 198. The accused went to the bedroom and armed herself with a gun. When she saw the deceased coming toward her 'walking fast', she shot him.: at 198. The jury decided that the accused's belief that deadly force was necessary to prevent harm or injury was not reasonable.: at 199. Compare these decisions with the judgment of the Supreme Court of Virginia in *McGhee* where it was held that a reasonable fear assessed from the perspective of the accused would suffice to satisfy the condition.: *McGhee* 248 S.E.2d 808, 810 (Va. 1978). It must be noted that the *McGhee* decision does appear to be an exception to the generally applied interpretation of the condition. This view is supported by Heller who, in making an analysis of the subsequent case law on the subject, confirms that this approach has not been followed and was, in fact, rejected by later courts.: KJ Heller 'Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Reasonableness in Self-Defense and Provocation Cases' 1998 26 *American Journal of Criminal Law* 1. For example she cites the subsequent case of *Goetz* where the New York Supreme Court stated explicitly that the test for reasonableness of belief was an objective standard applied in the circumstances confronting the defendant. Accordingly the Court of Appeal found that the court *a quo* had erred in describing the standard as merely requiring that the defendant's belief be reasonable to him.: above n40 at 29-30.

¹⁶⁹ Above n45.

¹⁷⁰ Above n45 at 555. See also *Stewart* above n62 at 579.

In *Leidholm* the North Dakota Supreme Court stated that, in determining reasonableness, the jury may consider the knowledge and physical attributes of the accused, as well as the psychological effects of abuse. It was not sufficient to consider the physical circumstances of the accused. The courts were required to extend their assessment to her unique psychological characteristics, as well.¹⁷¹

In specifically explaining the requirement that force must have been necessary, Buel argues that it may be restated as ‘Did the actor have no other viable options?’¹⁷² She notes that for the purpose of completeness, in addressing this issue courts should also take note of prior help-seeking activities of the accused. Buel concludes that in many cases, the repeated failure to secure assistance and the knowledge that she cannot leave, makes killing the abuser her only option – and a reasonable one, at that.¹⁷³

It is clear from the above that that the courts are prepared to take cognisance of the circumstances relating to the particular defendant that are relevant to the particular case.¹⁷⁴ Some courts have even opted to use a more customised test for reasonableness namely, the test of the reasonable battered woman.¹⁷⁵ Such a standard was applied in the case of Cynthia Hutto. Hutto shot and killed her sleeping husband. Her counsel argued that she had acted in self-defence. The evidence revealed that earlier that evening the couple had been arguing and the deceased had picked up a shotgun, pointed it at his wife and said, ‘Either I’m going to kill you or you’re going to kill me.’ He handed her the gun and left the room. Later, as he lay sleeping, the accused took the gun, levelled it at him and shot him. The evidence of witnesses was that the accused had been battered by her husband through the duration of their five year marriage. Counsel for the accused argued that the court was required to instruct the jury not to consider the accused’s conduct in light of the traditional reasonable person standard but they should determine whether her conduct was justified in light of their perception of

¹⁷¹ Above n2 at 818.

¹⁷² Buel above n22 at 302.

¹⁷³ Buel above n22 at 235.

¹⁷⁴ LaFave above n17 at 542.

¹⁷⁵ See *Hutto* (unreported) in SD Rittenmeyer ‘Of Battered Wives, Self-Defense and Double Standards of Justice’ 1981 9 *Journal of Criminal Justice* 389; *Hundley* above n61; *Stonehouse* 555 A.2d 772 (Pa.1989); above n33; and *Burtzloff* 493 N.W.2d 1 (S.D.1992).

how a 'reasonable battered wife' would have reacted in similar circumstances. This argument was accepted and Hutto was acquitted on the charge of murder.¹⁷⁶

However, the writer favours the test which judges the conduct of the accused against the standard of the reasonable person in the position and circumstances of the accused to that of the woman's conduct being judged according to the norm of the reasonable battered woman.¹⁷⁷ The argument against the latter standard is that it tends to stereotype women who are victims of abuse. Thus, women who present themselves differently from the stereotype, despite being battered, are refused the right of a fair hearing.¹⁷⁸

An enquiry often linked to the requirement that the accused should have reasonably believed that the force was necessary is whether the accused could not – and should not - have retreated before resorting to lethal self-defence. Regarding the duty to retreat from an attack, LaFave notes that there is a strong movement in the U.S.A. against the unnecessary taking of human life. On the other hand, there is also a general policy view against making one act in a

¹⁷⁶ See Rittenmeyer above n175 at 389 where the author refers to a personal communication with Dale Cobb – the attorney for Hutto – in 1980. Clearly, this standard as applied by the court assisted Hutto in avoiding the pitfalls of the imminence requirement.

¹⁷⁷ However, Angel cautions that whilst the 'reasonable man' may have been replaced by the 'reasonable person', that person continues to function and be judged within the legal doctrines conceived by men and interpreted to fit the facts of men's lives: Angel above n143 at 1. Similarly, Ogle and Jacobs express the view that '[i]n these more enlightened and politically correct days, one might be inclined to say "reasonable person" standard [but] the law typically does not.': Ogle and Jacobs above n16 at 107.

¹⁷⁸ See Chapter Three. See also J Bosworth 'The Trouble with Battered Women's Syndrome' 1996 11 *Adelphia Law Journal* 63 and DL Faigman and F Wright 'The Battered Woman Syndrome in the Age of Science' 1997 39 *Arizona Law Review* 67. Hempill, however, takes a slightly different view and whilst agreeing that the conduct of the woman must be seen as justifiable within her *milieu*, she urges that the *comparator* standard be that of a 'reasonable woman' in the circumstances of the accused': AL Hempill 'Spousal Murder: A Look at Available defences and their Application from a Feminist Perspective' 1998 46 *Chitty's Law Journal and Family Law Review* 1, at 5. The writer also disagrees with this approach as the normative yardstick as it, too, seeks to establish a separate benchmark.

cowardly and humiliating role.¹⁷⁹ It would thus appear that States differ on whether one faced with a deadly assault should be obliged to flee if it is safe to do so rather than resort to deadly force in self-defence.¹⁸⁰ However, in summing up the position LaFave notes:

The majority of American jurisdictions holds that the defender ... need not retreat, even though he can safely do so, before using deadly force upon an assailant whom he reasonably believes will kill him or do him serious bodily harm. A strong minority, however, ... holds that he must retreat ... before using deadly force, if he can do so in safety.¹⁸¹

LaFave notes further in this regard that an aspect of the rule that is unanimous is that a defender who may safely do so, is not required to retreat from his home or place of business before using deadly force. However, an exception to this rule is made when the attacker and defender are co-occupants of those premises.¹⁸² Thus, in *Bobbitt* where the evidence was that the accused had shot and killed her husband in their home after he attacked her, the Florida Supreme Court refused to accept that she had acted in self-defence. The court held that the castle doctrine did not apply where both the defendant and the victim were the legal occupants of the same house and had equal rights to be there.¹⁸³ In that situation, a victim's duty to retreat remained intact.¹⁸⁴ In *Weiland* the Florida Supreme Court had to decide on this issue.¹⁸⁵ The accused was a woman described by the expert witness as one who showed all the signs of battered woman syndrome. According to the expert the accused believed that her

¹⁷⁹ LaFave above n17 at 547.

¹⁸⁰ LaFave above n17 at 539.

¹⁸¹ LaFave above n17 at 547.

¹⁸² LaFave above n17 at 548. The rule that one is not expected to retreat from an attack in one's own home is based on the time-honoured rule that 'one's home is one's castle', in other words, it is the ultimate sanctuary. Taking into account the fact that the defender has a real interest in the premises and that the attacker is an intruder, this rule makes absolute sense when dealing with an attack between 'strangers'. However, the application of the rule becomes more complicated when one is dealing with cohabitantes. In such cases, recognising that both parties have equal vested right and interest in the property, the law has limited the right and imposed in many cases a duty on the attacked party to retreat from the home before committing a deadly assault.: LaFave above n17 at 548.

¹⁸³ *Bobbitt* 415 So.2d 724, 724-5 (Fla.1982).

¹⁸⁴ Above n183 at 725.

¹⁸⁵ *Weiland* 732 So.2d 1044 (Fla.1999).

husband would eventually kill her. The accused shot and killed the deceased during a violent argument because, she testified, she believed that she had no other alternative.¹⁸⁶ In instructing the jury, the trial court stated:

The fact that the defendant was wrongfully attacked cannot justify her use of force likely to cause death or great bodily harm if by retreating she could have avoided the need to use that force.¹⁸⁷

The accused was convicted and sentenced to eighteen years in prison. Florida's Second District Court of Appeal confirmed the decision.¹⁸⁸ However, the Florida Supreme Court, declaring the issue to be of great public importance, found as follows and, accordingly, directed that the case be re-argued.¹⁸⁹

Firstly, the *Bobbitt* decision did not give sufficient emphasis to the sanctity of human life: Rather, it was predicated upon the sanctity of property and the rights of possession.¹⁹⁰

Secondly, since the decision in the *Bobbitt* case, public policy had evolved and there was a concerted focus on reducing domestic violence. The court found that spousal abuse was a legislated crime in all fifty states in America and executive agencies had even been established, countrywide, with the specific function of counselling and advising victims affected by domestic abuse.¹⁹¹

Thirdly, the state had succumbed to the myth that women in abusive relationships can leave whenever they wanted to and in *Weiland's* case specifically, the prosecution argued that the accused could have left the house or got into her car before picking up a gun. The Supreme Court held that to permit a jury instruction that suggested retreat as an option for battered women, totally undermined the research and expert evidence. The Supreme Court went on to recognise the various studies that demonstrated the increased risk of harm resulting from attempts by the abused victim to leave the abusive relationship and concluded

¹⁸⁶ Above n185 at 1048.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Weiland* 701 So.2d 262 (Fla.2d.D.C.A.1997).

¹⁸⁹ Above n185.

¹⁹⁰ Above n185 at 1056

¹⁹¹ *Ibid.*

that by forcing women to leave, one could actually be increasing the risk of harm and not minimising it.¹⁹²

Fourthly, placing upon cohabittees a duty to retreat would have a definite adverse impact on victims of intimate violence (who often have nowhere else to go). There could, thus, be no duty to retreat imposed upon victims of intimate violence who pleaded self-defence. To retain such a rule handicapped women from defending themselves against an aggressor spouse.¹⁹³

However, alert to the fact that completely eliminating the duty to retreat might be an invitation to violence, the Supreme Court formulated a jury instruction that imposed a limited duty to retreat within the residence to the extent reasonably possible, but not to leave the residence.¹⁹⁴

5.2.3.2 The Amount of Force Used Must Have Been Reasonable

Lethal force could only be used against what was reasonably believed to be an attack with deadly force.¹⁹⁵ It was, therefore, never reasonable to use deadly force against a non-deadly attack or an unarmed assailant.¹⁹⁶ The rule in respect of the unarmed attacker has, however, been moderated over time. The courts have held that when dealing with an unarmed attacker, cognisance must be taken of the respective sizes of attacker and defender, their respective sexes, their health, the presence of multiple assailants, and the nature (violent or not) of the unarmed attack.¹⁹⁷

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Above n185 at 1058. In *Gartland* the Supreme Court of New Jersey also recognised the inequity of an obligation to retreat on a cohabittee, especially one who is a victim of abuse. However, applying the relevant state statute the court had to find that the wife who had been attacked in her bedroom had a duty to retreat before using deadly force against her attacker.: *Gartland* 694 A.2d 564 (N.J. 1977). The court was aware of the potential for unfairness of the obligation to retreat and raised the issue inviting the state legislature to reconsider the application of the retreat doctrine in the case of a spouse battered in her own home.: at 569. See also DA Smith 'State v Gartland: New Jersey Leaning Toward a More Lenient Application of the Duty to Retreat Rule as it Affects Battered Women Who Kill Their Partners' 1999 20 *Women's Rights Law Reporter* 173, at 177-9. In this regard, Angel also notes that the *Model Penal Code* section 3.04(2)(b)(ii)(A)(1962) gives abused women assaulted within their own homes effective relief from the retreat doctrine. The problems arise in that manner that the state laws and courts apply the rule.: Angel above n 143 at 21.

¹⁹⁵ LaFave above n17 at 542.

¹⁹⁶ LaFave above n17 at 539 and 542. See for example the court's decision in *Nunn* above n165.

¹⁹⁷ LaFave above n17 at 542.

The test to decide if the force used was reasonable is whether the force used in defence was ‘reasonably related to the threatened harm which he seeks to avoid.’¹⁹⁸ According to LaFave this will be the case only ‘if he reasonably believes that the other is about to inflict unlawful death or serious bodily harm upon him (and also that it is necessary to use deadly force to prevent it).’¹⁹⁹

Regarding the use of a weapon against an unarmed attacker, the Illinois Court of Appeal held in *Reeves* that:

It is a firmly established rule that the aggressor need not have a weapon to justify one’s use of deadly force in self-defence ... and that a physical beating may qualify as such conduct that could cause great bodily harm.²⁰⁰

In *Wanrow* the factor of gender was taken into account in assessing the reasonableness of the accused’s conduct.²⁰¹ In *casu*, the Washington Supreme Court considered the standard by which a jury ought to assess the reasonableness of the female appellant’s use of a gun against an unarmed defendant. The court took specific note of the fact that the appellant was a physically small woman with a broken leg. The attacker was a physically large man and intoxicated. Taking the specific circumstances into account, the court noted that ‘in our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons.’²⁰² The court thus found that in requiring that the accused should have repelled her attacker ‘without employing weapons in her defence, unless the jury finds her

¹⁹⁸ LaFave above n17 at 540. This requirement namely ‘reasonableness of force’ is described by Huss *et al* as one of the three key psychological considerations that are important in judgments regarding battered women who kill. (The other two are blame and severity of the abuse suffered by the defendant.): MT Huss, AJ Tomkins, CP Garbin, RF Schopp, and A Kilian ‘Battered Women Who Kill Their Abusers: An Examination of Commonsense Notions, Cognitions, and Judgments’ 2006 21 *Journal of Interpersonal Violence* 1063, at 1073.

¹⁹⁹ LaFave above n17 at 541.

²⁰⁰ *Reeves* 362 N.E.2d 9, 13 (Ill.App.Ct.1977).

²⁰¹ Above n45 at 554.

²⁰² Above n45 at 558.

determination of the degree of danger to be objectively unreasonable – constitute[d] a ... distinct misstatement of the law and, in the context of this case, violate[d] the respondent's right to equal protection of the law.²⁰³ It was thus held that the trial judge had erred in his jury instruction when he created the impression that the objective standard of reasonableness that was to be applied to the accused was that of an altercation between two men. In considering the facts of the case, the court stated clearly that women should be allowed to resort to a weapon under circumstances in which such conduct would not be permissible for men, because of the fact that in a similar situation a man would be adequately protected defending himself with his fists.²⁰⁴

5.2.5 A Consideration of the 'Circumstances of the Accused' and the Need For and Role of the Expert Witness

In deciding a case where self-defence is placed in issue, the courts have been unanimous that an integral element of the assessment is to recognise and acknowledge the circumstances of the accused. It has further been noted that the lived realities of the battered woman are often beyond the understanding of the ordinary person.²⁰⁵ Consequently it is often necessary for an expert witness to assist the court to reach such an understanding.

5.2.5.1 General Rules of Admissibility of Expert Evidence

The rules regarding the admissibility of expert opinion testimony in the U.S.A. were established in *Frye*,²⁰⁶ where the court described the test for admissibility as being whether the theory or technique enjoyed general acceptance in the

²⁰³ Above n45 at 554.

²⁰⁴ Above n45 at 558. Adler also points out that in dealing with this condition it is worth taking note of the fact that most often women will choose the weapon that insured that the violence would be decisive.: JS Adler ' "I loved Joe, but I had to shoot him": Homicide by Women in Turn-of-the-Century Chicago' 2002 92 *The Journal of Criminal Law and Criminology* 867, at 880.

²⁰⁵ See CP Ewing and M Aubrey 'Battered Women and Public Opinion: Some Realities About the Myths' 1987 2 *Journal of Family Violence* 257; E Greene, A Raitz and H Lindblad 'Jurors' Knowledge of Battered Women' 1989 4 *Journal of Family Violence* 105 and case law cited later in the section.

²⁰⁶ *Frye* 293 F.1013 (D.C.Cir. 1910).

relevant scientific community.²⁰⁷ In 1993, the court in *Daubert v Merrell Dow Pharmaceuticals Inc* expanded on the standard set in *Frye* and broadened the rules governing the admissibility of scientific evidence.²⁰⁸ Whilst admitting the importance of the 'general acceptance' standard, *Daubert* added the following criteria for consideration: (i) whether the theory or technique could be and had been tested, (ii) whether the theory or technique had been subjected to peer review and publication, and (iii) the known or potential rate of error of the theory or technique.²⁰⁹ The court in *Daubert* however, also emphasised that the list should not be seen as either rigid or exhaustive.²¹⁰

5.2.5.2 The Need For and Use of Expert Evidence in Cases of Domestic Violence²¹¹

The question whether expert evidence on the battered woman syndrome could be offered in cases of intimate homicide was comprehensively argued for the first

²⁰⁷ Above n206 at 1014. The court held:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while it will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.: at 1014.

²⁰⁸ *Daubert v Merrell Dow Pharmaceuticals Inc* 509 U.S. 579 (1993). Ogle and Jacobs note that currently the rules concerning admissibility of expert testimony vary according to jurisdiction between the *Frye* and *Daubert* tests.: Jacobs and Ogle above n16 at 136.

²⁰⁹ *Ibid* at 593-4.

²¹⁰ *Ibid*.

²¹¹ A conspectus of the recent available information indicates that all fifty states in America have considered the admissibility of expert evidence on the battered woman's syndrome and forty-nine have held it to be admissible, to a greater or lesser degree, to assist in understanding why a battered woman's killing of her abuser can be justifiable self-defence.: Ogle and Jacobs above n16 at 137. In Louisiana the courts have taken the view that battered woman syndrome testimony can only be associated with a diminished capacity defence.: Ogle and Jacobs above n16 at 137. However, of the states that have accepted BWS testimony in cases of self-defence, twelve states have specifically enacted legislation to support the admissibility of expert evidence in such cases. These include Alaska: *Alaska Stat* (1993) s11.41.200; Arkansas: *Ark. Code Ann* (1993) s5-10-101; California *Cal. Evid. Code* (1994) s1107; Hawaii: *Haw. Rev. Stat.* (1993) s700-707; Illinois: *Criminal Offenses, Specific Offenses, Offenses Directed Against the Person, Bodily Harm* (1993) s720; Indiana: *Ind. Code Ann* (1993) s35-42-2-1; Mississippi: *Miss. Code Ann* (1993) s93-21-103; Missouri: *Mo. Rev. Stat.* (1992) s563.03; Montana: *Mont. Code Ann.* Chap. 10, Rule 702 (1993); Nevada *Nev. Rev. Stat. Ann* (1993) s50.285; New Mexico: *N.M. Stat. Ann* (1993) s30-2-1; North Carolina: *N.C. Gen. Stat.* (1993) s14-17; North Dakota: *N.D. Cent. Code* (1993) s12.1-05-03; Ohio: *Ohio Rev. Code Ann.* (1994) s2901.06; South Carolina: *S.C. Code Ann.* (1991) s16-25-20; Utah: *Utah Code Ann.* (1993) s76-2-402; Virginia: *V.A. Code Ann.* (1993) s18.2-32; Wyoming: *Wyo. Stat.* (1993) s6-1-203.

time in the U.S.A. in the case of *Ibn-Tamas*.²¹² In *casu* the state alleged that the accused had shot and killed her husband because he had ordered her to pack her bags and leave the marital home. According to the evidence of the accused, her relationship with the deceased was one of continual violence. On the morning in question the deceased had against hit her several times and also threatened her with a gun which he kept in the house.²¹³ The accused testified that the deceased had then left the home to go to his office (which adjoined the main house) but then returned later in the morning and began assaulting her again.²¹⁴ The further evidence of the accused was that believing that the deceased would use the gun to kill her, she took the gun herself and fired several shots at the deceased, causing his death.²¹⁵ The prosecution argued that the reasonable response of a woman confronted with danger would be to call the police for assistance or leave the violent environment. Defence counsel sought to introduce expert testimony to assist the jury appraise the credibility of the defendant's argument that she had perceived herself to be in imminent danger from her spouse and to demonstrate the fallacy of the state's argument that her remaining with her husband was indicative of the fact that she did not really fear him. The application was refused by the trial court on the ground that to allow the experts to give such testimony would infringe the province of the jury.²¹⁶ The writer submits that the Supreme Court clearly misdirected itself in its generalised finding that battered women may leave the abusive environment at will. The decision of the court was a clear indicator of the lack of understanding that prevailed regarding the lived realities and experiences of victims of domestic violence.

On appeal, the District of Columbia Court of Appeals correctly (it is submitted) held that because the prosecution argued the 'ordinary lay perception' of the battered woman's situation namely that she had alternative action available to her and could reasonably have left her husband without killing him, expert testimony

²¹² *Ibn-Tamas* 407 A.2d 626 (Wash. 1979).

²¹³ Above n212 at 630.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

would have been helpful in providing a different interpretation of the facts.²¹⁷ The Appeal Court also pointed out that the fact that the average lay person did not always understand that battered women are afraid of their abusers but do not leave them because they believe that the abusers will find them and harm them even more. The court reasoned that, ordinarily, jurors would not draw such a conclusion for themselves.²¹⁸ The Appeal Court held further that the expert's evidence could serve two basic functions: firstly, it would strengthen the credibility of the accused and secondly, it would help the jury understand her belief that she was in imminent danger.²¹⁹ Ferren J found that the expert testimony relating to battered women, which was given by a clinical psychologist at the trial in support of the accused's claim of self-defense to the killing of her husband, was not inadmissible on grounds that it would invade the province of the jury or that its probative value was outweighed by its prejudicial impact.²²⁰

In the later case of *Kelly*, the New Jersey Supreme Court upheld the admissibility of expert evidence on the battered woman syndrome on the specific ground that it assisted the court to understand that the experience of the defendant 'although concededly difficult to comprehend, was common to that of other women who have been in similarly abusive relationships.'²²¹ The court was of the opinion that expert testimony 'would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge.'²²² In *Kelly* it was found that expert testimony assisted the jury in understanding that a woman who honestly feared that she would suffer serious bodily harm from her husband's attacks, nevertheless continues to remain with him.²²³

²¹⁷ Above n212 at 633. In support of its argument, the court drew the analogy with psychiatric testimony that was admitted in the case of *Hearst* 563 Fed.2d 133 (1977). Just as the court in *Hearst* held that the psychological effects of kidnapping were beyond the understanding of the average person, the Appeal Court in *Ibn-Tamas* concluded that the effects of battery were also beyond common knowledge.: above n212 at 635.

²¹⁸ Above n212 at 633.

²¹⁹ Above n212 at 634.

²²⁰ Above n212 at 626.

²²¹ *Kelly* 478 A.2d 364, 375 (N.J. 1984)

²²² Above n221 at 378.

²²³ Above n221 at 375. The court found that the expert is in a position to highlight the common myths that battered women are free to leave the abusive environment and their failure to do so is often an indication of a masochistic character trait; or proof that the beatings 'could not have been too bad'. The expert is able to assist the court to understand the battered woman's 'inability to

In *Torres* the New York Criminal Court also recognised that the average layman has several misconceptions concerning the options available to a victim of domestic violence and that the specialised input of an expert is essential to properly assist the jury to disregard their prior erroneous beliefs.²²⁴ Angel reiterates the need for courts to admit expert evidence to educate the jury and to explain the conduct of the accused. She points out that in many instances members of the jury come into the courtroom with preconceived – often incorrect – opinions and views on domestic violence.²²⁵ Thus, she proposes:

Education must take place during the trial; including specific events, and the expert evidence to explain both specific and context evidence.²²⁶

In clarifying the behaviour of victims of domestic violence experts have often referred to the victim's 'hyperalertness' to the behaviour of the abuser.²²⁷ The experts generally agree that a woman, who has been in an intermittently abusive relationship over a period of time, learns to recognise the smallest signs that precede an explosive outburst. This may include subtle changes in facial expression, tone of voice or particular mannerisms. The experts note specifically that the victim's perception of a threatening situation is made more acute by fact that she has experienced similar behaviour on several previous occasions.²²⁸

In discussing the character marker of hyperalertness evident in victims of domestic violence, Blackman notes that women who live with domestic abuse

leave' and the social, economic and psychological factors that impact on her decision to remain in the abusive relationship.: above n221 at 377.

²²⁴ *Torres* 488 N.Y.S. 2d 358, 363 (N.Y. Crim. Ct. 1985). See also *Hodges* above n132; *Ciskie* 751 P.2d 1165 (Wash. 1988) and *Day* 2 Cal. Rptr 2d 916 (Ct. App. 1992).

²²⁵ M Angel 'Susan Glaspell's *Trifles* and *A Jury of her Peers*: Women Abuse in a Literary and Legal Context' 1997 45 *Buffalo Law Review* 779, at 815.

²²⁶ Above n225 at 816.

²²⁷ See generally E Hilberman and K Munson 'Sixty Battered Women' 1977-8 2 *Victimology* 460; E Hilberman 'Overview: The "Wife-Beaters" Wife Reconsidered' 1980 137 *American Journal of Psychiatry* 1336; and specifically A Mc Cormack, AW Burgess and C Hartman 'Familial Abuse and Post-traumatic Stress Disorder' 1988 1 *Journal of Traumatic Stress* 231, at 233; LEA Walker 'Post-Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome' 1991 28 *Psychotherapy* 21, at 23; and DG Saunders 'Posttraumatic Stress Symptoms Profiles of a Battered Woman: A Comparison of Survivors in Two Settings' 1994 9 *Violence and Victims* 31, at 41.

²²⁸ *Ibid.*

have had the opportunity to hone their perceptions of their partner's violence and often become 'attuned to the violence'.²²⁹ Battered women develop 'a survival skill' which enables them to immediately identify danger which is different.²³⁰ 'Importantly, they can say what made the final episode of violence different from the others: they can name the features of the last battering that enabled them to know that this episode would result in life-threatening action by the abuser,' points out Blackman.²³¹

In other words, Blackman summarises:

... a battered woman, because of her extensive experience with the abuser's violence, can detect changes or signs of novelty in the pattern of normal violence that connotes increased danger.²³²

The trait of hyperalertness is a further aspect of the reality of the lived experience of the battered woman that the expert would bring into the courtroom and it is arguably one of the more valuable areas in which expert evidence can assist the lay person. Blackman further identifies this ability and the need for the court to understand this ability as being perhaps the single most important idea to be conveyed by expert testimony in cases where a battered woman kills her batterer whilst he is sleeping or not actively posing a threat to her and then pleads self-defence.²³³ However, Blackman emphasises that when placing hyperalertness before the court,

[s]upport for this assertion must come from the woman herself, in her spontaneous, self-initiated description of the events that precede her action against the abuser. Only then can testimony from an expert offer scientific support for the idea that such a danger detection process can

²²⁹ Above n136 at 229.

²³⁰ Ibid

²³¹ Ibid.

²³² Above n136 at 236.

²³³ Ibid.

occur and can be expected to be as accurate as the “reasonable man” standard [*sic*] would imply.²³⁴

Confirming the admissibility of expert evidence on the battered woman syndrome, the court in *Hennum* noted that the battered woman syndrome is beyond the experimental stage and has gained sufficient scientific acceptance to warrant admissibility.²³⁵

Specifically on the subject of expert evidence, President George W Bush (Sr) signed the *Battered Women’s Testimony Act* (1992) into law.²³⁶ Posch points out that it is important to note that the Act contains express provisions advising state officials to accept and adopt the use of BWS testimony in light of the increasing numbers of abuse reported abuse cases.²³⁷

However, in reviewing the rulings of the courts Burke raises a particularly interesting point. He points out that if one accepts the standards for admissibility set out in *Daubert* one is faced with the situation that whilst also focusing on ‘general acceptability’, it also requires specifically that consideration be given to the known or potential margin of error of the theory. In this regard and taking cognisance of all the literature on the subject, Burke suggests that the admissibility of the battered woman syndrome theory ‘has enjoyed more unquestioned acceptance than it should, particularly in light of recent scrutiny of

²³⁴ Above n136 at 237.

²³⁵ *Hennum* 441 N.W.2d 793, 800 (Minn.1989). However, from the above discussion, it is clear that there is no unanimity between the different states in the U.S.A. regarding the nature of the testimony that will be accepted from an expert in cases involving battered women.

²³⁶ This was a very important step in the right direction for as identified in the research of Schuller and Rzepa respondents provided with expert testimony rated the testimony quite favourably and ‘a greater verdict leniency was evidenced when battered woman syndrome testimony was presented compared to a no expert control.’: RA Schuller and S Rzepa ‘Expert Testimony Pertaining to Battered Woman Syndrome: Its Impact on Jurors’ Decisions’ 2002 26 *Law and Human Behaviour* 655, at 658.

²³⁷ Conrad urges that in addition to the role of the expert in the courtroom, early consultation during the preparation of the defence between the lawyer and the expert is necessary to assist counsel to develop an awareness of common misconceptions about battered women and to avoid the risk of those stereotypes tainting early case preparations.; AF Conrad ‘The Use of Victim Advocates and Expert Witnesses in Battered Women Cases’ 2001 30 *The Colorado Lawyer* 43, at 44. Conrad emphasizes the importance of counsel actually understanding (i) why the accused may believe that the killing was her fault, despite claiming that she acted to defend herself, (ii) why the accused might continue to attempt to rationalize the abuser’s violence by blaming herself for making him angry, and (iii) the social, legal and economic barriers faced by the accused.: at 44.

expert testimony generally.²³⁸ It is respectfully submitted that this may be the appropriate incentive for change by the courts in the United States – directing them to look at the effects of battering rather than only at the battered woman syndrome.

5.2.5.3 The Nature of the Expert Evidence that Will Be Admitted in Cases of Domestic Violence

In *Kelly* the New Jersey Supreme Court had to decide the question of whether the expert should be permitted to express an opinion on the subjective belief of the accused that she was in imminent danger as well as on the objective standard of reasonableness that applies in cases of self-defence.²³⁹ In his judgment, Wilentz CJ summarised the purpose of expert evidence and stated that expert testimony in cases involving battered women was not intended to explain and justify the defendant's perception of the danger (as was stated by the trial court): rather, the evidence is admitted to demonstrate the 'objective reasonableness of [her] perception.'²⁴⁰ The court held that whilst an expert is important to explain the battered woman syndrome, no expert testimony is needed to tell a jury that a person who has been beaten severely and continuously might have a reasonable fear that she is in imminent danger.²⁴¹ Thus, the court refused to allow the expert to express the opinion that Kelly's belief that she was in imminent danger was reasonable because, according to the court, the area of the expert's knowledge only related to the reasons why she was unable to leave her husband.²⁴² Further, the court stressed that the assessment of the objective element of reasonableness was considered a decision specifically within the authority of the court.²⁴³

²³⁸ AS Burke 'Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman' 2002 81 *North Carolina Law Review* 211, at 235; also Roberts above n22 at 141.

²³⁹ Above n221.

²⁴⁰ Above n221 at 368.

²⁴¹ Above n221 at 375.

²⁴² Ibid.

²⁴³ Above n221 at 374.

In *Aris* the California Appeal Court confirmed that expert evidence was only relevant insofar as the determination on the subject element of self-defence is concerned.²⁴⁴ In *casu*, the court was, however, prepared to grant the expert greater latitude in the nature of the evidence that would be admitted. The court found that battered woman syndrome expert testimony was ‘highly relevant to the first element of self-defense – the defendant’s actual, subjective perception that she was in danger and that she had to kill her husband to avoid that danger.’²⁴⁵ The court was prepared to admit expert evidence to substantiate the defendant’s credibility and support her actual belief of imminent harm but it was unanimous that expert evidence would not be admitted to show the *reasonableness* of the accused’s actions.²⁴⁶ In *Aris* (and subsequently also in *Day*²⁴⁷) the court took a firm approach that the opinions presented by the expert should not be used by the jury in its determination of reasonableness.

However, in *Humphrey*, deviating from *Aris* and *Day* (and *Kelly*), the court accepted that the evidence of battered woman syndrome is generally relevant to the subjective existence, as well as to the reasonableness of the defendant’s belief in the need to use deadly force to protect herself against the actions of the abuser.²⁴⁸ In reasoning its different approach, the court noted:

Those two cases [*Aris* and *Day*] too narrowly interpreted the reasonableness element. [They] failed to consider that the jury, in determining objective reasonableness, must view the situation from the *defendant’s perspective*.²⁴⁹

Although the court accepted that the opinion of the expert was relevant in the jury’s assessment of reasonableness, the court emphasised that the standard remained an objective one and that the ultimate question was still whether a reasonable person in the situation and with the knowledge of the accused – not a

²⁴⁴ *Aris* above n62.

²⁴⁵ *Aris* above n62 at 179-80. See also *Furlough* 797 S.W.2d 631, 651 (Tenn. Crim. App. 1990); and *Wilken* 407 S.E.2d 670, 672 (S.C. Ct. App. 1991).

²⁴⁶ *Aris* above n62 at 167 and 179.

²⁴⁷ *Day* above n224 at 922 and 924.

²⁴⁸ Above n137 at 10.

²⁴⁹ Above n137 at 8.

reasonable battered woman – would believe in the need to kill to prevent imminent harm. The court further confirmed that '[m]oreover, it is the *jury*, not the expert that determines whether the defendant's belief and, ultimately, her actions, were objectively reasonable.'²⁵⁰

Particularly with regard to expert evidence as to the accused's state of mind at the time of the incident forming the basis of the charge, the court in *Bednarz* referred to the principle set out in *Jensen*.²⁵¹ According to the court in *Jensen*, the expert 'may describe the behaviour of victims of the same type of crime; the expert may also be asked to describe the behaviour of the complainant; and then, the expert may be asked if the complainant's behaviour is consistent with the behaviour of other victims.'²⁵² The court in *Bednarz* confirmed that in accordance with *Jensen* no witness 'whether expert or lay, would be allowed to testify to the accused's state of mind ...'²⁵³

In *Wilken*, however, the Appeal Court of South Carolina expressed the contrary view and held that '[q]uestions going to an expert's knowledge of state of mind of the accused at the time of the crime are proper, and the expert's opinion as to state of mind is admissible.'²⁵⁴ However, a consequence of allowing the expert to

²⁵⁰ Above n137 at 9.

²⁵¹ *Bednarz* 507 N.W.2d 168 (Wis. Ct. App. 1993); *Jensen* 432 N.W.2d 913 (Wis. Ct. App. 1988).

²⁵² *Jensen* above n251 at 920.

²⁵³ *Bednarz* above n251 at 171. See also *Richardson* 525 N.W.2d 378, 383 (Wis. Ct. App. 1994); *Witt* 892 P.2d 132, 138 (Wyo. 1995); and *Christel* 537 N.W.2d 194, 201 (Mich. 1995). These rulings are in line with the opinion of some of the legal writers on an allied subject namely, expert opinion in child sexual abuse cases. Referring to the latter cases, Myers *et al* note that there is a spectrum of evidence that may be presented, ranging from an opinion that the abuse has occurred to an opinion that the child demonstrates age-inappropriate sexual knowledge and behaviour. JEB Myers, J Bays, J Becker, L Berliner, DL Corwin, and KJ Saywitz 'Expert Testimony in Child Sexual Abuse Litigation' 1989 68 *Nebraska Law Review* 1, at 79-86. They argue that expert testimony that states that a child has been abused usually presents problems. It is their opinion that the consensus view of the experts in the area is that experts can competently determine whether a victim exhibits age-inappropriate behaviour, but cannot competently determine whether sexual abuse has occurred.: 85. However, Serato takes a different view arguing that it is anomalous to allow the expert to testify in regard to the victim's characteristics and conduct and then to prevent inferences to be drawn from the expert's observations. He maintains that from the observations of children alleging sexual abuse, 'social scientists are better qualified than the courts to draw conclusions on veracity.': V Serato 'Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses' 1988 68 *Boston University Law Review* 155, at 181.

²⁵⁴ *Wilken* above n245 at 672. In *Peebles v Commonwealth* 504 S.E.2d 870 (Va.Ct.App.1998) the court was not faced with a case involving domestic violence but it was required to make a decision on the admissibility of expert evidence on an accused's state of mind at the time of acting in self-

testify on the state of mind of the accused is that it could rise to an adverse psychological examination of the accused by the state's expert. This was the case in *Hennum*,²⁵⁵ in which the trial court held:

The state of mind and subjective beliefs of the defendant prior to and at the time of her act is integral to her self-defense theory. Therefore, in order to have a fair opportunity to rebut it, the State should be entitled to have its own expert examine the defendant.²⁵⁶

The accused appealed against the Order of the trial court for an adverse medical examination. The Appeal Court of Minnesota ruled that to allow the defence to produce expert testimony based on a clinical examination of the defendant without providing the state with an opportunity to conduct a similar examination denied the state a chance to rebut the expert testimony of the defence.²⁵⁷ However, the court was also aware that in the absence of any legislative enactment authorising such an examination, it would be *ultra vires* to make such an order.²⁵⁸ In an attempt to circumvent the need for such a clinical examination and keep within the letter of the law, the Court of Appeal held that any expert testimony regarding battered woman syndrome would thus be restricted to (i) a description of the general syndrome and (ii) the characteristics which are present in a victim of the syndrome.²⁵⁹ The court held that the expert should not be allowed to testify as to the ultimate fact that the particular defendant actually suffered from battered woman syndrome. This determination must be left to the

defence. The court found that such evidence was not only relevant 'but crucial in deciding the truthfulness of a defendant's self-defense claim.': at 875. Lenkevitch notes that the 'expansion of the use expert testimony in self-defense cases may allow domestic violence victims the opportunity to introduce expert testimony at trial to explain the state of mind of the battered woman defendant at the time she struck back at her abuser.': above n2 at 300.

²⁵⁵ Above n235.

²⁵⁶ Above n235 at 799.

²⁵⁷ Above n235 at 800.

²⁵⁸ Above n235 at 785. The court in *casu* relied on the precedent that had been established in *Olson* 143 N.W.2d 69 (Minn. 1966) where the court had been asked to prohibit the compelled psychological examination of a defendant pleading not guilty by reason of insanity. At the time there was no rule authorizing such an examination and the *Olson* court had to consider whether it was within the inherent power of a district court to order a psychiatric examination to determine criminal responsibility where the statute of the state was silent on the relevant procedures.: at 71. The Minnesota Appeal Court in *Olson* held that in the absence of a legislative enactment, a court has no legal basis for ordering such an examination.: at 75.

²⁵⁹ Above n235 at 785.

triers of fact.²⁶⁰ The court held further that each party would be allowed to present witnesses who could testify to the characteristics possessed by the defendant which were consistent with those found in someone suffering from battered woman syndrome.²⁶¹ The court was of the view that this more restricted approach would remove the need for a compelled adverse clinical examination of the defendant. Since the expert would only be allowed to testify as to the general nature of the battered woman syndrome, neither side need conduct an examination of the defendant.²⁶² However, the point of the court in *Allery* is worth noting.²⁶³ In *casu*, the Supreme Court of Washington held that expert evidence would only be admitted after it was established that the expert was qualified to testify about the syndrome and the defendant had through her own evidence established herself as a battered woman.²⁶⁴

Thus, expert evidence on domestic violence and its impact provides an informed context within which a court may reason and reach its decision. As Schuller points out, 'Simply having [the accused] testify that she was beaten and afraid of her partner does not educate the jury to the dynamics of the situation.'²⁶⁵ It is submitted that the testimony of the expert will assist the court to more effectively evaluate the evidence and dispel the misconception that a reasonable person would never have remained in such an abusive relationship.²⁶⁶ Similarly, Dutton describes the purpose of the expert in cases of domestic violence as being primarily to provide the court with an understanding of general principles of

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Allery* 682 P.2d 312 (Wash. 1984).

²⁶⁴ Above n263 at 316. See also *Thomas* 423 N.E.2d 137 (Ohio 1981) where the Ohio Supreme Court made it clear that general information on battered woman syndrome had no role to play without the defendant specific information. The court held that the general testimony of an expert about battered woman syndrome 'was inadmissible, partly because the expert had no personal contact with the defendant and the defendant submitted no evidence that she suffered from the syndrome.': at 139.

²⁶⁵ R Schuller 'Juror's Decisions in Trials of Battered Women Who Kill' 1994 24 *Journal of Applied Psychology* 316, at 317.

²⁶⁶ For instance, without expert evidence it would be difficult for an ordinary person to understand why, after all the alleged beatings and abuse that the accused in *Hennum* claimed had been meted out to her by the deceased (her husband), she would still return to the stove to cook his supper.: above n235 at 795.

domestic violence, as well as a framework within which to assess the facts of the particular case being heard before the court.²⁶⁷

5.2.4.4 The Qualifications of the Expert in Domestic Violence Cases

Case law reflects that the expert witness is always someone with a background and experience in psychiatry or sometimes clinical psychology. Conrad is, however, highly critical of this approach and prefers to describe her expert more broadly.²⁶⁸ She is of the opinion that the expert should be someone who has either formally trained or has sufficient experience 'to develop familiarity with the experiences of women who have been battered.'²⁶⁹ Buel takes a similar view noting that who one should use as an expert must be assessed on a case by case basis.²⁷⁰ She refers to the possibility of using a credentialed professional, law enforcement officers, nurses, *experienced* domestic violence advocates, or ministers and states, '[Which discipline professional the] attorney chooses should also depend on what testimony is needed for the specific case.'²⁷¹ The writer supports the approach of Buel (which accords with the South African law) for the reason that it takes a broader approach to the lived realities of the battered

²⁶⁷ MA Dutton 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' 1993 21 *Hoffstra Law Review* 1191, at 1202. Dutton clarifies that in order for an expert to meet this challenge, the court must be informed of four key components supported by the facts of the case:

1. The cumulative history of violence and abuse experienced by the victim in the relationship in issue;
2. The psychological reactions of the battered woman to the batterer's violence;
3. The strategies used (or not used) by the battered woman in response to prior violence and abuse, and the consequences of (or the expectations that arise from) those strategies; and
4. The contextual factors that influenced both the battered woman's strategies for responding to prior violence, and her psychological reactions to that violence.: Dutton above n267 at 1202.

²⁶⁸ Above n237.

²⁶⁹ Above n237 at 47. This approach is endorsed by the state of Virginia and Lenkevitch notes that in Virginia in order to provide an expert opinion, the witness need not have an academic or professional degree. 'Anyone who possesses specialized knowledge, obtained through education, professional training, or experience, may testify as an expert.': Lenkevitch above n2 at 306.

²⁷⁰ Buel above n22 at 280.

²⁷¹ *Ibid.* Ogle and Jacobs support the use of 'lay testimony' to assist the jury understand the battering context in which the act which forms the basis of the charge occurred. They note, more specifically that 'the law allows lay witnesses to testify to what they have seen in the past, and to what they have heard ...; and it may even allow them to offer testimony on the conclusions they drew from these observations.': Ogle and Jacobs above n16 at 144.

woman rather than focussing only on the pathology of being a victim of domestic violence.

5.3 CONCLUSION

Two issues under the law of self-defence in the U.S.A. must be understood: firstly, self-defence may be a defence of either justification or excuse; and secondly, in dealing with the conditions of self-defence, the courts agree that the significant question is that of the reasonableness of the conduct and beliefs of the accused.²⁷² As Vande Walle J noted in *Leidholm*:

[T]he decisive issue under our law of self-defense is not whether a person's beliefs are correct, but rather whether they are reasonable and thereby excused or justified.²⁷³

Thus, each of the conditions of self-defence is evaluated against a standard of reasonableness. In assessing this requirement of reasonableness, the courts have evolved a hybrid standard of subjective factors and objective evaluations which take cognisance of the exigencies of the *milieu* of the accused, whilst maintaining a norm for objectivity. It is also noted that the different states have their own codes and laws; consequently, it has been difficult to identify a general approach to the requirements of self-defence. The references to the various judgments are thus stated for the principles of legal application that they represent and the interpretations and possible application of the conditions of the law of self-defence.

²⁷² As Fletcher describes it: 'American lawyers tend to think of all available legal defenses as analogous, tend to assume that what is permissible is justified, and tend to view right as trumpable claims. At the foundation of these assumptions lies the cement of reasonableness, a concept that enables Americans to blur the distinction between objective and subjective, self-defense and putative self-defense, wrongdoing and responsibility.': above n13 at 979-80.

²⁷³ *Leidholm* above n2 at 814.

From the case law it is evident that one of the more contested issues under the law of self-defence has been the interpretation of the requirement of temporal proximity between the attack and defensive conduct. All the courts in the U.S.A. have acknowledged temporal proximity as a condition of self-defence. Whilst being prepared to assess imminence of danger from the perspective of the accused, more of the courts have demanded that the belief be reasonable in that there must have been evidence of some triggering incident indicating that the deceased was threatening and able to inflict serious bodily harm.²⁷⁴ This has proven contentious in cases of non-traditional confrontation. In such cases it is evident that jurisdictions which define imminent danger as 'immediate danger' have generally refused to allow a self-defence instruction to an accused in this battered woman situation. On the other hand, jurisdictions that have defined imminent danger to mean something other than immediate danger have held that a battered woman who kills her abuser during a lull in the violence is entitled to a self-defence instruction.²⁷⁵ In this regard and cognisant that they represent the more unique application of the condition of imminence, the writer would, nevertheless, like to single out the judgments in *Hundley* and *Bechtel* for being especially insightful in dealing with the requirement of temporal proximity and acknowledging the ongoing fear that characterises the reality of the battered woman.²⁷⁶

A further condition to be satisfied under the law of self-defence is whether the accused had a reasonable belief that the force used was, in fact, necessary to avert harm. In determining whether the accused believed that force was necessary all courts have acknowledged the relevance of the specific circumstances of the accused.²⁷⁷ The different courts have taken cognisance of the physical, social, and psychological experiences and realities of the accused.

²⁷⁴ See *Norman* above n62; *Aris* above n62; above n84; *Grove* above n62; *Stewart* above n62. In *Norman* above n62 and *Ha* above n103 the courts were clear that inevitable harm could not replace the requirement of imminent harm.

²⁷⁵ *Yaklich* 833 P.2d 760, 762 (Colo.App. 1991).

²⁷⁶ *Hundley* above n61; and *Bechtel* above n61. See also *Gallegos* above n62.

²⁷⁷ This has not made the standard a subjective one. LaFave confirms that it is clear that there is a requirement of objective reasonableness that attaches to the evaluation of the accused's beliefs.: La Fave above n17 at 542.

Another issue under the determination of reasonableness is whether the comparative standard should be that of the 'reasonable person' or, more specifically, the 'reasonable woman'. From the case law, it would appear that many of the courts have adopted the standard of the reasonable person. There is also evidence that some courts, as a concession to the reality of intimate violence, have opted for a test of the 'reasonable battered woman' in the circumstances of the accused.²⁷⁸ It is submitted for the reasons stated earlier that this last-mentioned development is not sound practice.

The further condition of self-defence is that force used in defence must have been reasonable. However, it is not required that the defence be proportional to the attack in the sense that fists should only be met with fists and guns always met with guns.²⁷⁹ In this regard, the law has shown itself to be sufficiently flexible in order to adapt to the specificity of the circumstances and position of the accused. In adjudicating the reasonableness of the defender's action most states have acknowledged that the lived realities of battered women and the effects of domestic violence are beyond the ordinary knowledge and understanding of the average person. Accordingly, expert evidence has been allowed to assist in the understanding of the dynamics of intimate abuse and to provide contextual reference to why the conduct of a battered woman accused may be regarded as reasonable.²⁸⁰

The position of the battered woman in the U.S.A. is further exacerbated by the fact that despite the research and developments in the field, the courts have persisted in applying the battered woman syndrome as defined by Walker as the yardstick for all battered women. Yet, the research on battered women indicates clearly that battered woman syndrome is not the sole marker of all abused women and, whilst initially introduced with the intention of assisting victims of abuse whose lived reality was not understood, it has sometimes proved to be an unnecessary liability in the defence of women accused with the murder of

²⁷⁸ *Hutto* in Rittenmeyer above n175.

²⁷⁹ See above n45; and *Zenyuh* 453 A.2d 338 (Pa.Sup.Ct.1982).

²⁸⁰ This conclusion is based on the records of the cases and legal articles referred to in this Chapter.

abusive partners.²⁸¹ However, whilst recognising battered woman syndrome as the measure in cases involving domestic abuse and battery, the courts in the U.S.A. has not recognised battered woman syndrome as a separate defence. In *Romero* the California Court of Appeals was explicit in settling the issue. The court held:

There nevertheless still exists a misconception by some lawyers and judges that there is a defense called ‘battered woman syndrome’ giving women who are battered some unique right simply because they are battered. This is not the law in California (or, as far as we can tell, anywhere else).²⁸²

Acknowledging that domestic violence and the battered woman syndrome is generally beyond the understanding of the ordinary person, expert evidence has been widely accepted by the courts to assist in understanding the lived reality and circumstances of the battered woman accused. Expert testimony has been applied to establish reasonableness of the accused’s belief in the necessity for self-defence, to dispel myths about domestic violence and to show typical emotional and behavioural responses of women living with intimate violence.

²⁸¹ See above Chapter Two.

²⁸² *Romero* 13 Cal. Rptr. 2d 332, 337 (Cal. Ct. App. 1992). See also *Pisciotta* 968 S.W.2d 185, 186 (Mo. Ct. App. 1998). Buel also agrees with the conclusion drawn by the court in *Romero*: Buel above n22 at 296.

PART TWO: SELF-DEFENCE

CHAPTER SIX

THE LAW OF SELF-DEFENCE IN CANADA

6.1 INTRODUCTION

In terms of the Canadian criminal law two types of defence are acknowledged: justification and excuse and the courts have been adamant to maintain the distinction between them.¹ The law of self-defence which is a ground for justification is set out in the Canadian *Criminal Code*. There is general consensus amongst legal writers that the *Code* is 'notoriously complex'² and that the law is 'bedevilled by excessively complex and sometimes obtuse *Code* provisions. It is small wonder that our Courts have sometimes ignored *Code* rules or been inventive in their interpretation of them.'³ However, for the purposes of this study, the *Criminal Code* will be discussed as the basis of the law on self-defence in Canada and the case law will be used to demonstrate the interpretation of the *Code* provisions by the courts.

Canadian law recognises four instances when an act in self-defence will be justified namely:

- (i) self-defence against an unprovoked assault where there is no intent to kill or do grievous bodily harm (section 34(1) of the *Code*);

¹ In *Perka* [1984] 2 S.C.R. 232 (B.C. C.A.) the Supreme Court of Canada *per* Dickson J was clear that '[c]riminal theory recognises a distinction between "justifications" and "excuses". A "justification" challenges the wrongfulness of an action which technically constitutes a crime. ... In contrast, an "excuse" concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that no liability is attributed to the actor.': at 246. In a separate concurring judgment, Wilson J confirmed that 'criminal law theory recognizes a distinction between justification and excuse. In the case of justification the wrongfulness of the alleged offensive act is challenged; in the case of excuse the wrongfulness is acknowledged but a ground for the exercise of judicial compassion for the actor is asserted. ... Thus, the nature of an excuse is to personalize the plea so that, while justification looks to the rightness of the act, excuse speaks to the compassion of the court for the actor.': at 268-9. See also DR Stuart *Canadian Criminal Law* (The Carswell Company Limited, Toronto: 1982) 378.

² K Roach *Criminal Law* (Irwin Law Inc., Ontario: 2004) 310.

³ Stuart above n1 at 384.

- (ii) self-defence against an unprovoked assault where the defender intends to and does cause death or grievous bodily harm (section 34(2) of the *Code*);
- (iii) self-defence by an aggressor (section 35 of the *Code*); and
- (iv) defence of person to prevent an assault (section 37(1) of the *Code*).⁴

In explaining the application of the law the court in *Baxter* held:

Where self-defence is relied upon and an issue is raised as to whether the accused intended to cause death or grievous bodily harm, the trial Judge must instruct the jury as regards the provisions of both s. 34(1) and (2) of the *Criminal Code* notwithstanding the fact that grievous bodily harm was, in fact, inflicted. ... The jury should be instructed that if the accused was the subject of an unprovoked attack and did *not* intend to cause death or grievous bodily harm then pursuant to s. 34(1) he was justified in using as much force as necessary to enable him to defend himself but if he intended death or grievous bodily harm then pursuant to s. 34(2) he was justified only if he was under a reasonable apprehension of death or grievous bodily harm and on reasonable grounds believed that he could not otherwise protect himself. ... The jury should also be instructed that the person defending himself against an attack, reasonably apprehended, cannot be expected to weigh to a nicety the exact measure of necessary defensive action.⁵

Section 34(2) of the *Criminal Code* is distinguished from the other sections of the *Code* in that it is specifically intended to cover the situations where the accused has intended to cause death or grievous bodily harm.⁶ The case law and the legal writers are *ad idem* that the word 'intentional' should be read into section

⁴ Stuart above n1 at 394-401.

⁵ *Baxter* (1976), 27 C.C.C. (2d) 96 at 97-8 (Ont. C.A.).

⁶ This was specifically outlined in *Baxter* above n5 at 106 and 110 where Martin J held, interpreting the section of the *Criminal Code*, 'In my opinion, the words in section 34(2) "who causes death or grievous bodily harm" mean "even though he intentionally causes death or grievous bodily harm". See also Howland JA in *Bogue* (1976), 30 C.C.C. (2d) 403 at 406 (Ont. C.A.).

34(2).⁷ It is, thus, the most apposite section of the *Code* for the purposes of this study and will be discussed in detail.

Section 34(2) states:

Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

- (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and
- (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

6.2 REQUIREMENTS OF SELF-DEFENCE

In analysing section 34(2) of the *Code* Roach notes that the specific requirements of the defence are:

- 1. reasonable apprehension of death or grievous bodily injury, and
- 2. reasonable belief in the lack of alternatives to prevent death or grievous bodily injury.⁸

Further, however, Roach notes that despite the clear wording of section 34(2), an additional requirement has been introduced through the case law namely:

- 3. the person acting in self-defence 'must have had a reasonable apprehension of an unlawful attack'.⁹

In assessing whether the conduct of the accused is justifiable as self-defence, the courts will look at whether the accused had a subjective belief of all three requirements and a reasonable basis for such belief. Thus, in *Baxter* the Ontario Court of Appeal *per* Martin J was convinced that in making a decision on a plea of self-defence, the jury would have to be instructed to consider the subjective

⁷ See above n5 at 110; above n6 at 406; Stuart above n1 at 398; DR Stuart and RJ Delisle *Learning Canadian Criminal Law* (Carswell, Ontario: 2001) 974-5; and above n2 at 302.

⁸ Above n2 at 303-305. See also the *Canadian Criminal Code* <http://www.efc.ca/pages/law/cc/cc.34.html> [accessed 17/11/2008].

⁹ Above n2 at 303.

apprehension and belief of the accused and then, in deciding whether it was based upon reasonable grounds, the assessment of what a reasonable man would believe or do in the circumstances was a relevant consideration.¹⁰

6.2.1 Requirements of Self-Defence Under the Canadian Law

6.2.1.1 Reasonable Apprehension of An Unlawful Attack

According to Roach, under this requirement, the issue for consideration by the jury is the element of the attack – did the accused reasonably believe, in the circumstances, that she was being assaulted or being threatened with an unlawful assault.¹¹ Roach confirms this approach by reference to the case law. In *Pétel*, in deciding the issues of self-defence, the court (referring to *Nelson*) at the outset confirmed that a condition of self-defence was ‘the existence of an unlawful attack or threatened attack’.¹² In *Cinous* the court re-iterated the requirement of the unlawful attack and went further to explain the requirement to the jurors as follows: the question which they (the jurors) were required to ask was not whether the accused was unlawfully attacked, but rather whether he believed on reasonable grounds under the circumstances, that he was being unlawfully attacked.¹³

¹⁰ Above n5 at 109.

¹¹ Above n2 at 304. See also Stuart above n1 at 380. Dealing with the ‘threat of harm’ aspect: in *Pétel* (1994), 87 C.C.C. (3d) 97 at 100-101 (Que. C.A.) the Superior Court of Quebec was clear in noting that an accused ‘did not even have to wait to be hit first in order to rely on self-defence.’ See also *Malott* [1998] 1 S.C.R. 123, at 132, *Cinous* (2000), 143 C.C.C. (3d) 397 at 407 and 408 (Que. C.A.), and *LaKing and Simpson* (2004), 185 C.C.C. (3d) 524 at 525 (Ont. C.A.). *Contra Whynot* (1984), 9 C.C.C. (3d) 449 (N.S.S.C. App. Div.) where the Appeal Court noted that ‘[u]nder s. 34 the assault must have been underway and unprovoked.’: at 464.

¹² *Pétel* above n11 at 104; see also *Nelson* (1992), 71 C.C.C. (3d) 449 at 455 (Ont. C.A.). See also *Currie* (2002), 166 C.C.C. (3d) 190 at 206 (Ont. C.A.).

¹³ *Cinous* above n11 at 408. In *Pétel*, too, the court set out the test for satisfying the requirement as follows: that it would be the accused’s state of mind that had to be examined and it was the accused (and not the victim) who should be given the benefit of the doubt.: *Pétel* above n11 at 104. In Canada the criminal law recognizes ‘putative’ justifications (distinct from excuse) to describe circumstances where an accused honestly believed that he was justified in law to act as he did but the facts negative any legal justification.: Stuart n1 at 381. Thus Roach explains that the rule applied by the courts also includes that a mistaken belief by the accused that she is under attack or

6.2.1.2 Reasonable Apprehension of Death or Grievous Bodily Injury¹⁴

In applying this requirement, the court must consider whether the accused had a reasonable apprehension of death or grievous bodily harm as a result of the initial unlawful assault by the deceased or the way the deceased person pursued his purpose.¹⁵ Secondly, the provision is clear that all that is required is an 'apprehension of harm' by the accused. Thus, the court noted in *Reilly* that since section 34(2) places in issue the accused's perception of the attack upon him and the response required to meet it, the accused may still be found to have acted in self-defence even if he was mistaken in his perception. Thus, a mistake regarding the harm threatened will not exclude the defence: provided that the mistake was honest and reasonable.¹⁶ Thirdly, the courts have also confirmed that the position and circumstances of the accused must be considered in applying this stipulation.¹⁷ Consequently, in *Pétel* the Appeal Court made it clear that 'the jury should try to determine how the accused assessed the situation and compare the assessment with what a reasonable person placed in the same circumstances would have thought.'¹⁸ The court also found that the threats prior to [the fatal incident] form an integral part of the circumstances on which the perception of the accused might have been based.¹⁹ Similarly, in *Pintar* the

facing attack will not be fatal to her defence provided that she can show that the mistake was reasonable.: above n2 at 303.

This approach differs from that adopted by the South African courts which require specifically an objective unlawful attack.: see Chapter Four. The issue of the honest belief of the accused may only excuse the conduct of the accused and is dealt with under the law of putative self-defence. It would appear that the Canadian courts do not distinguish putative self-defence from self-defence as is the case with the South African law.

¹⁴ In *Baxter* above n5 at 105 the trial court recognised that the case dealt not with the occurrence of death but 'grievous bodily harm' which it described as 'really serious harm'. The court noted that the determination of what constituted 'grievous bodily harm' was for the jury to decide but remarked that '[i]t is not a pat on the wrist or a stomach tap ... I think you will find that generally in society to be shot in the neck or back is to suffer grievous bodily harm.': at 105.

¹⁵ Above n5 at 105.

¹⁶ *Reilly* (1984), 15 C.C.C. (3d) 1 at 8 (S.C.C.); above n2 at 303; *Stuart* above n1 at 399.

¹⁷ See *Lavallee* (1990), 55 C.C.C. (3d) 97 at 120 (S.C.C.); *Pétel* above n11; and *Malott* above n11.

¹⁸ *Pétel* above n11 at 105.

¹⁹ *Pétel* above n11 at 106-7. The Appeal Court in *Pétel* also noted that previous threats were relevant in determining the accused's belief that there was no solution other than to kill the attacker.: *Pétel* above n11 at 106.

court acknowledged the importance of the accused's knowledge of the attacker's propensity for violence.²⁰

Specifically in respect of battered women accused of murder, Roach states that 'evidence of prior threats and beatings would be relevant to the determination of whether the accused could perceive danger from an abuser and had a reasonable apprehension of death or grievous bodily harm.'²¹ In *Lavallee* the court took note of the relational context of intimate violence, the years of brutality that the accused had experienced at the hands of the deceased and the cycle of violence that characterised the relationship between the accused and the deceased. Wilson J noted further that 'the cyclical nature of the abuse is that it begets a degree of predictability to the violence that is absent in an isolated encounter between two strangers. This also means that it may be possible for a battered spouse to accurately predict the onset of violence before the first blow is struck, ...'²² Similarly, in *Malott* in instructing the jury with regard to the issue of reasonable apprehension, the trial judge explained:

Now you have heard of the assaults of the accused and of the threats of violence to her made [by the deceased] over almost 20 years. Such evidence can support an inference that [the deceased] had a disposition for violence of a kind likely to result in conduct of a kind that might cause the accused to consider it life-threatening. It can also be considered as support of her version of the events.²³

An aspect of this element of self-defence that has caused some confusion is the traditional requirement of temporality between the attack and the ensuing defence especially in cases of battered women who kill their abusers in situations of non-confrontation. Section 34(2) refers to a reasonable apprehension of harm

²⁰ *Pintar* (1996), 110 C.C.C. (3d) 402 at 435 (Ont. C.A).

²¹ Above n2 at 305.

²² Above n17 at 118-9. This approach was confirmed in the report submitted by the Canadian Department of Justice where it is noted that evidence of prior abuse and the effect of the abuse on the woman's perceptions must be considered in analysing a claim of self-defence. *Self Defence Review Final Report* – modified 4 April 2008 – submitted to the Minister of Justice of Canada and the Solicitor General of Canada July 11, 1997 <http://www.justice.gc.ca/eng/dept-min/pub/sdr-eld/2.html> 4 [accessed 27/06/2008].

²³ *Malott* above n11 at 136.

without including any specificity that there should be a degree of temporal proximity between the defence and the attack. However, Stuart and Delisle note that case law has read a requirement of imminence into the defence.²⁴ Both Roach and Stuart and Delisle agree that the rationale for imminence as a requirement (or, at least as a factor to be considered in determining whether the accused had a reasonable apprehension of death or grievous bodily harm) is understandable.²⁵ As Stuart and Delisle note:

It [imminence] justifies the act because the defender reasonably believed that he or she had no alternative but to take the attacker's life. If there is a significant time interval between the original unlawful assault and the accused's response, one tends to suspect that the accused was motivated by revenge rather than self-defence.²⁶

Considering the case law on imminence in self-defence cases under section 34(2) Schaffer, too, notes that the problem arose with the interpretation of the *Criminal Code* by some of the courts namely, in requiring that the accused act under a reasonable apprehension of death or grievous bodily harm the courts concomitantly required that the threat to the accused be imminent. In other words, the restricted interpretation by the courts requires that the accused show that the attack was actually underway or, at least, about to occur.²⁷

The imminence rule, as interpreted and applied by the courts was one of the problems confounding the case of the accused in *Lavallee*.²⁸ In *Lavallee*, the

²⁴ Above n7 at 988. See for example *Baxter* where the Appeal Court of Ontario in describing the elements of self-defence stated them as being *inter alia* 'the accused's subjective belief that he was in imminent danger of death or grievous bodily harm and that his action was necessary in self-defence ...': above n5 at 108 and 110; see also above n6 at 407.

²⁵ Above n7 at 988; above n2 at 305.

²⁶ Above n7 at 988. In describing imminence, Stuart and Delisle note that the sense in which imminence has been used by the courts tends to conjure up 'the image of "an uplifted knife" or a pointed gun. ... If there is a significant time interval between the original unlawful assault and the accused's response, one tends to suspect that the accused was motivated by revenge rather than self-defence.': above n7 at 988.

²⁷ M Shaffer 'The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R v Lavallee' 1997 47 *University of Toronto Law Journal* 1, at 1.

²⁸ Above n17. From the outset it is important to note that *Lavallee's case* did not intend to create a 'battered woman syndrome' defence such that all an accused had to show was that she was a battered woman in order to be acquitted.: at 126. This was again confirmed in *Malott* above n11 at

accused was a twenty-two year old woman who had been in a relationship of approximately four years with the deceased. Several witnesses testified that the relationship was one characterised by continual violence and abuse. On the night in question, the accused and the deceased were hosting a party at their home. In the early hours of the morning, after most of the guests had departed, the accused and the deceased had another violent altercation upstairs in the bedroom of the accused. As the deceased was leaving the room, the accused shot the deceased in the head, killing him. In her statement to the police the accused stated that on the night of the fatal shooting, she and the deceased had been arguing again. The deceased was becoming increasingly aggressive, grabbing at the accused, yelling at her, slapping her and hitting her across the head. The accused repeatedly testified that she was 'so scared'. 'All I thought about was the other times he used to beat me, I was scared, I was shaking as usual.'²⁹ Three witnesses who had attended the party and were still at the home of the accused and deceased at the time that the accused killed the deceased also testified to hearing 'sounds of yelling, pushing, shoving and thumping coming from upstairs prior to the gunshots.'³⁰

In specifically dealing with the aspect of imminence, Wilson J summarised how the earlier courts had applied the rule of imminence as follows:

The sense in which "imminent" is used conjures up the image of 'an uplifted knife' or a pointed gun. ... If there is a significant time interval between the original unlawful assault and the accused's response, one tends to suspect that the accused was motivated by revenge rather than self-defence. In the paradigmatic case of a one-time barroom brawl between two men of equal size and strength, this inference makes sense.³¹

140 where the accused argued on appeal that the instruction to the jury 'that the perception of the accused developed against the background of her abuse, was required to be assessed in determining if her actions were reasonable self-defence' was inadequate and that the Judge had failed to emphasise the issue of battered woman syndrome as a defence. The Supreme Court was unanimous in dismissing the appeal.

²⁹ Above n17 at 101.

³⁰ Above n17 at 102.

³¹ Above n17 at 115.

However, the judge noted that such an application of the imminence rule did not permit the court to properly contextualise its enquiry. Under the current rule, it would be inherently unreasonable to apprehend death or grievous bodily harm unless and until the physical assault was actually in progress, at which point the victim would be able to presumably gauge the requisite amount of force needed to repel the attack and act accordingly.³² Continuing, Wilson J noted that the requirement that a battered woman wait until the physical assault is under way before her apprehension can be validated in law would be tantamount to sentencing her to ‘murder by instalment’.³³ The writer submits that the comment of Wilson J should not be read as creating a different rule in respect of battered women but rather that it should be acknowledged for the recognition that it makes to the lived reality and ongoing violence that characterises a relationship of domestic abuse.

The approach of Wilson J was endorsed by Mailhot JA in *Vaillancourt* where the accused was charged with murder after killing her sleeping husband. The Quebec Court of Appeal confirmed that ‘[c]ontrary to a widely held view, self-defence is not necessarily consecutive or concurrent with a specific incident when it is raised by a person who is suffering from *battered woman syndrome*.’³⁴

The court in *Lavallee’s case* took the view that the standard for judging the ‘reasonable apprehension of death’ of the accused was not based on imminent

³² Above n17 at 116.

³³ Above n17 at 120. The court in *Lavallee* was acutely aware of the ruling on the requirement of imminence in self-defence cases that had been laid down in *Whynot* namely, that ‘[a] person who seeks justification for preventing an assault against himself or someone under his protection must be faced with an actual assault, something that he must defend against, ..., and that assault must be life-threatening before he can be justified in killing in defence of his person or that of someone under his protection.’: *Whynot* above n11 at 464. In dealing with this judgment, Wilson J referred to the evidence which showed that when the accused and the deceased fought, the accused ‘invariably got the worst of it’.: Above n17 at 120. Thus, in rejecting the rule that had been established in *Whynot*, Wilson J held:

The requirement imposed in *Whynot* that a battered woman wait until the physical assault is “underway” before her apprehension can be validated in law would, in the words of an American court, be tantamount to sentencing her to “murder by instalment”.: above n17 at 120 referring to *Gallegos* 719 P.2d 1268, 1271 (N.M. 1986) as persuasive authority.

³⁴ *Vaillancourt* (1999), 136 C.C.C. (3d) 530 at 545 (Que. C.A.).

harm; nor could it be based on the test of the 'reasonable man' or even 'the reasonable person' - both of which ignore the lived realities of women. The court noted that the definition of what constitutes 'reasonable' must be adapted to the circumstances occupied by the battered woman, which are entirely foreign to the hypothetical 'reasonable person'.³⁵ For example, using the facts of the case, Wilson J stated that 'the "reasonable man" 'might have thought, as the majority of the Court of Appeal seemed to, that it was unlikely that Rust [the deceased] would make good on his threat to kill the appellant that night because they had guests staying overnight.'³⁶ However, remarked Wilson J, '... the issue is not ... what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.'³⁷ Thus, in considering the reasonableness of Lavalée's apprehension of serious harm in light of the expert testimony that was presented,³⁸ Wilson J noted that whilst the 'reasonable person' would not see any real danger of death from a man walking away, the accused would.³⁹

In the later case of *Pétel Lamer* CJC expressly put to rest the rule requiring that the apprehended danger be imminent noting that it did not appear anywhere in the text of the *Criminal Code* and was, in fact, a mere assumption based on common sense.⁴⁰ In *casu*, on appeal by the Crown, counsel for the respondent argued that the trial judge had erred in his explanation of self-defence to the jury.

³⁵ Above n17 at 120. Whilst the standard of the reasonable person is traditionally the objective test for negligence, in *casu* the court considered the reasonable person as a possible measure of the objective wrongfulness of the conduct of the accused to determine whether her apprehension of death was reasonable. In this context, Stuart notes specifically that the law of self-defence allows an accused to defend himself against an unlawful attack and measures his conduct against a standard of reasonableness. Thus, he questions, 'Doesn't the criterion of reasonableness indicate an objective standard of simple negligence?' To which he responds, '[I]t seems safe to suggest that the objectivity here is a different matter to that in respect of the fault element.': Stuart above n1 at 380.

³⁶ Above n17 at 120.

³⁷ Ibid.

³⁸ Dr Shane, who was the expert called by the defence, testified that Lavalée was able to sense that a fatal attack was imminent and knew that her only means of survival was to take the accused out of the picture.: above n19 at 103. Wilson J noted, from the evidence presented that 'the assault precipitating the appellant's alleged defensive act was Rust's [the deceased's] threat to kill her when everyone else had gone.': above n17 at 115.

³⁹ Above n17 at 114. Again the court stressed that in understanding the circumstances and apprehension of the accused, it was important that expert evidence be presented to explain the specific issues prevalent in an abusive relationship.

⁴⁰ *Pétel* above n11 at 104.

The Supreme Court of Canada agreed and dismissed the appeal. At the trial, for purposes of the jury instruction, the trial judge had identified the elements of the defence under s. 34(2) of the *Criminal Code*, summarised the evidence and stressed that the jury was required to base its decision on the accused's assessment of the situation. In the course of its deliberations, the jury then came back to the court with a question as to whether self-defence concerned threats or acts over several months or only that evening. The trial judge answered that the threat or act giving rise to self-defence had to occur on the evening of the crime and that the previous threats or acts were only relevant to assessing the assault that evening.⁴¹ The accused was convicted. On appeal by the Crown,⁴² the Supreme Court of Canada ruled that the imminence rule that had become a part of the Canadian law of self-defence was 'undoubtedly derived from 'the paradigmatic case of self-defence, which is an altercation between two persons of equal strength. ... There is thus no formal requirement that the danger be imminent. Imminence is only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that [he] could not extricate [himself] otherwise than by killing the attacker.'⁴³

⁴¹ *Pétel* above n11 at 101. In interpreting the explanation of the trial court, Stuart and Delisle note that the Judge's answer appeared to suggest that the only relevance of the threats prior to the day of the killing was in enabling the jury to determine whether there had actually been an assault on that day. Their only value would be to make it more plausible that the deceased had made the threats as alleged at the time of the killing.: above n7 at 996. See also *Pétel* above n11 at 106.

⁴² In *casu*, the accused had appealed the decision to the Quebec Court of Appeal, which allowed the appeal and ordered a new trial. The Crown then appealed the decision to the Supreme Court of Canada.

⁴³ *Pétel* above n11 at 104. *Cinous* confirmed the view that imminence is not a conditional element of self-defence. In *casu*, the facts were as follows: The accused was charged with the murder of a 'friend' named Vancol. The accused and Vancol were both members of a gang. On the day in question, the accused, the deceased and other members of the gang were on a mission to carry out computer theft. The accused was the driver of the van. The accused testified that he noticed that one of the gang members (Ice) was wearing grey canvas gloves whilst the deceased was wearing latex surgical gloves. The accused further testified that in their environment, those gloves were only worn when one might expect blood to be spilled. The accused states the he looked at Ice and the deceased but they each turned away. Ice remained sitting with his hand on his gun. No one talked about the theft which was unusual, according to the accused. The accused formed the distinct impression and a strong conviction that he was about to be assassinated and that the killing would be done by Vancol. The accused further stated that he began to feel trapped. The accused stopped the van at a service station on the pretext of requiring windshield wiper fluid. He alighted from the vehicle, went into the shop, returned, filled the windshield fluid into the vehicle and then went to the back of the van. He opened the back door and seeing his opportunity, fired a bullet into the deceased's head.: *Cinous* above n11 at 403-4. In explaining self-defence to the jury, the trial judge stated, 'We are concerned with attempts or threatens [*sic*] by act or gesture.': *Cinous*

The Supreme Court of Canada went further and noted that in assessing the reasonable apprehension of death or grievous bodily harm by the accused, all the background and circumstances of the accused had to be considered. Lamer CJC found that the previous threats made by the deceased against the accused were thus very relevant concerning her apprehension of the risk of death. By failing to mention this, the trial judge seriously limited the relevance of the earlier threats.⁴⁴ ‘The threats prior to [the day of the killing] form an integral part of the circumstances on which the perception of the accused might have been based. The Judge’s answer to this question might thus have led the jury to disregard the entire atmosphere of terror which the respondent said pervaded her house. It is clear that the way in which the reasonable person would have acted cannot be assessed without taking into account these crucial circumstances.’⁴⁵ Endorsing the finding in *Lavallee* Lamer CJC noted, ‘By unduly limiting the relevance of the previous threats the Judge in a sense invited the jury to determine what an outsider would have done in the same situation as the respondent.’⁴⁶

Just when it may have appeared that the law was beginning to settle itself, the later decision of Charron JA in *Currie* held:

above n11 at 403-4. On appeal, the court found that ‘[t]he jury could easily have understood from this passage that if a victim does not pose any gesture, self-defence does not apply,’ particularly in view of the continued explanation given by the judge that ‘as the second condition of application of the defence of self-defence, ... the accused [must have been] acting under the reasonable apprehension of death or grievous bodily harm from the violence [of the accused].’: *Cinous* above n11 at 411-2. Accordingly the Appeal Court held that ‘the condition formulated in that way could have induced the jurors into error. How can one talk about the violence with which an attack was carried out if a victim is seated, his hands in his pockets and his back to the accused?’: *Cinous* above n11 at 412. Relying on precedent of *Vaillancourt* the court remarked that it would be incorrect to ‘always speak of the violence of an attack especially once one is not telling the jury that the attack does not have to be imminent.’: above n34 at 412. It was thus held, on appeal, that the jury had not been properly instructed on the law of self-defence and the appeal was allowed.: Above n34 at 400.

⁴⁴ *Pétel* above n11 at 106.

⁴⁵ *Pétel* above n11 at 107.

⁴⁶ *Ibid.* In *Hamilton* (2003), 180 C.C.C. (3d) 80 at 92 (B.C. C.A.) the court took that issue even further ruling that in particular cases involving self-defence, evidence of prior acts of violence and the deceased’s disposition for violence could be admitted by the courts to (i) demonstrate the deceased’s propensity for violence, and (ii) enhance the argument of the accused that he was attacked. See also *LaKing and Simpson* above n11 at 525.

[A]n act of intentional killing will not be reasonable unless there is a temporal connection between the assault, or reasonably apprehended assault, and the intentional killing in “response” to it. Otherwise, the “response” is not a response at all; the assault or apprehended assault merely provides the accused with a motive for the killing, not justification at law.⁴⁷

In explaining the issue of temporality or ‘imminence’ the Ontario Court of Appeal noted the remark of Lamer CJC in *Pétel* that the alleged rule that the apprehended danger be imminent was not a rule but ‘a mere assumption based on common sense.’ In responding Charron JA noted in *Currie* that ‘[c]ommon sense dictates that the accused’s response for which justification is sought under s. 34(2) must relate to something that is happening or about to happen.’⁴⁸ Referring to the *dictum* in *Cinous* Charron JA agreed that self-defence was intended to cover ‘situations of last resort’.⁴⁹ In applying s. 34(2), a jury would have to be satisfied that ‘the accused believed on reasonable grounds that his own safety and survival depended on killing the victim *at that moment*.’⁵⁰ Thus, Charron JA confirms:

Hence, it is my view that an act of intentional killing will not be reasonable unless there is a temporal connection between the assault, or the apprehended assault, and the intentional killing in “response” to it. Otherwise, the “response” is not a response at all; the assault or apprehended assault merely provides the accused with a motive for the killing, not justification at law.⁵¹

...

In this case there was no evidence that the appellant believed that he was going to be attacked by [the deceased on the day of the killing]. ... [T]he

⁴⁷ *Currie* above n12 at 210. See also *McConnell* [1996] 1 S.C.R. 1075 referred to in *Currie* above n12 at 210.

⁴⁸ *Currie* above n12 at 210.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* See also *Cinous* above n11.

⁵¹ *Currie* above n12 at 210.

appellant's subjective belief that [the deceased] would attack him *in the future*, and the reasonableness of that belief, without any connection to the [day of the killing] cannot provide the evidential foundation for a s. 34(2) defence for the shooting on that day.⁵²

However, so as not to be seen as making a return to the imminence rule of *Baxter*, it must be pointed out that the Ontario Court of Appeal agreed with the distinction made by the trial judge between this case and *Lavallee* namely, that in the latter 'there was an evidential basis upon which a jury could infer that the accused reasonably apprehended an attack at the time of the killing.'⁵³

Thus, Stuart and Delisle note that it would appear that the emphasis to be placed on the requirement of temporality in cases under section 34(2) is not completely settled.⁵⁴ Nevertheless, they continue, there appears to be consensus that as far as battered women are concerned, the imminence rule has been 'relaxed' which can have a result that the so-called non-confrontation cases may not be excluded from a plea of self-defence.⁵⁵ However, the importance of the evidence which will establish the basis of the accused's apprehension and particularly expert evidence which will assist the court in understanding how the accused could have reasonably perceived danger from the deceased in the circumstances is noted.⁵⁶ In evaluating the imminence requirement in cases of battered women and in *Lavallee's* case specifically, Stuart and Delisle further note that women's physical size and strength and their socialisation generally renders them unable to engage with men in acts of hand-to-hand combat on an equal basis.⁵⁷ They thus confirm that the requirement set in *Whynot* that a battered woman waits until the physical assault is 'underway' before her apprehension can be validated in law cannot be accepted.⁵⁸

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Above n7 at 991

⁵⁵ Ibid.

⁵⁶ For further discussion, see below.

⁵⁷ Above n7 at 991-2.

⁵⁸ Ibid.

It is also a fact that in some cases the abused woman's failure to leave the home often also brings into question another issue namely, the 'real' seriousness of the abuse and the 'reasonableness' of her apprehension of danger. The argument is that if the abuse were as bad as the victim describes, surely any person would have left. This question displays a distinct lack of understanding for the dynamics of battering and resorts within the contemplation of the popular myths that the woman 'was not as badly beaten as she claimed or else she liked it.'⁵⁹ Underpinning this misconception is the belief that a battered woman is free to leave the home whenever she pleases.⁶⁰

Thus, in seeking to summarise the statement of the law on this condition of self-defence with particular reference to battered women, the majority of the court in *Malott* agreed with the finding in *Lavallee* that gender and socialisation impacted upon an individual's experiences and perspectives and that women's experiences and perspectives might be very different from the experiences and perspectives of men. The majority in *Malott* agreed that this difference was completely relevant to any legal enquiry into whether the accused's apprehension of death or bodily injury was reasonable.⁶¹ The writer supports the comment in *Malott* that the significance of the stance adopted by the *Lavallee* court is that it 'demonstrated a willingness to look at the whole context of a woman's experience in order to inform the analysis of the particular events.'⁶² However, *Malott* was quick to emphasise that this should not be understood as merely an example where an objective test had been modified to admit evidence of the subjective perceptions of a battered woman: rather, the court acknowledged that *Lavallee* set out a standard that ensured that that the lived reality of women (who 'have historically been ignored') now featured evenly in the assessment of the objective standard of the reasonable person in relation to self-defence.⁶³

⁵⁹ Above n7 at 992.

⁶⁰ See generally Chapters One and Two above.

⁶¹ *Malott* above n11 at 142.

⁶² *Ibid.*

⁶³ *Ibid.*

6.2.1.3 Reasonable Belief in the Lack of Alternatives to Prevent Death or Grievous Bodily Harm

In reading this section, there is no evident requirement that the repelling force be proportionate to the unlawful assault.⁶⁴ And in *Bogue* the court was at pains to explain why this requirement is not to be read into section 34(2) of the *Criminal Code* for, the court said, to do so would result in confusing section 34(2) with section 34(1).⁶⁵ Proportionality is a requirement of section 34(1) because the statement of the *Criminal Code* is that the party claiming self-defence should have used 'no more force than is necessary to enable the accused to defend himself.'⁶⁶ This is an objective test of which proportionality is an element for consideration.⁶⁷ However, section 34(2)(b) requires that the accused believe on reasonable grounds that he cannot otherwise preserve himself from death or grievous bodily harm. Section 34(2)(b) recognises the fact that when a man's life is in the balance he cannot be expected to make the same decision as he would on sober reflection.⁶⁸ 'The essential question to be determined under s. 34 (2) (b) in considering whether the force is excessive, is the state of mind of the accused at the time the force is applied.'⁶⁹ The fact that the force used in defence was, objectively viewed, actually disproportionate to the force of the attack is merely an item of evidence which the jury may consider in determining whether the accused had a reasonable apprehension of grievous bodily harm and a reasonable and probable belief that she could not otherwise preserve herself.⁷⁰

One of the issues in *Bogue* that had to be dealt with by the Ontario Court of Appeal was that whilst the trial judge claimed to apply section 34(2), he

⁶⁴ Above n6 at 407-11; *Herbert* (1996), 107 C.C.C. (3d) 42 at 50 (S.C.C.).

⁶⁵ Above n6 at 407 and 408.

⁶⁶ *Canadian Criminal Code* – section 34(1) reads: 'Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.': above n8.

⁶⁷ Above n6 at 408.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Above n6 at 403.

repeatedly directed the jury to specifically consider the issue of proportionality between the attack and the defence in evaluating the reasonableness of the conduct of the accused. In the first instance, the trial judge stated (in dealing with the reasonable belief of the accused), ‘... the question is, did the accused have a reasonable belief that there was no other way that she could protect herself, *always bearing in mind that the force employed must not be out of proportion to the original assault by the [attacker].*’⁷¹ On the second occasion (again dealing with the meaning of s. 34(2), the trial judge stated, ‘...she [the accused] believes on reasonable and probable grounds that she cannot otherwise preserve herself from death or grievous bodily harm and the *amount of force used must not be out of proportion to the original assault by the deceased.*’⁷² And lastly (characterising the final issues regarding self-defence), the trial judge asked the jury to consider, ‘*Is the force applied by her out of proportion to the circumstances?*’ Counsel for the accused argued that the trial judge had misdirected the jury in making proportionality an additional requirement of section 34(2).⁷³ In allowing the appeal, Howland JA stated that it was clear that the trial judge had added the proportionality requirement to the criteria in section 34(2) (a) and (b).⁷⁴ In listening to the direction provided by the trial judge ‘the jury might ... reasonably have understood that, in addition to the requirements specified in s. 34(2), there was, as a matter of law, a further requirement that the force used by the accused must be proportionate to the assault made upon her by the deceased in order for the defence of self-defence to be available.’⁷⁵ The Ontario Court of Appeal rejected this viewpoint and held that if the conditions of section 34(2) (a) and (b) are met and ‘the jury was either satisfied that the accused had such apprehension and belief, or entertained a reasonable doubt with respect to it, [the accused] was entitled to an acquittal.’⁷⁶

⁷¹ Above n6 at 410.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Above n6 at 411.

⁷⁵ Ibid.

⁷⁶ Above n6 at 411 and 407. See also above n64 at 50 where the court stated clearly, ‘Under s. 34(2), the use of excessive force by the accused will not take away self-defence.’ In *Edgar* (2000), 142 C.C.C. (3d) 401 (Ont. C.A.) the instruction by the trial judge to the jury regarding section 34(2) was as follows: ‘To fall within this sub-section, the force used cannot be excessive in self-defence unless the accused acted under a reasonable apprehension of death or grievous bodily harm to his person. ...’: at 416. On appeal, Charron JA held: ‘Even though the words “the force

According to Roach section 34(2) – unlike section 34(1) - does not make it a requirement that the accused ‘use no more harm than is necessary.’⁷⁷ All the provision requires is that the accused believe on reasonable grounds that she could not have otherwise been saved from the harm.⁷⁸

The approach of *Lavallee* towards section 34 (2)(b) was confirmed in *Pétel* when the Supreme Court of Canada held that the prior attacks by the deceased and his partner on the accused and her daughter were relevant in determining the reasonableness of her belief that she could not extricate herself otherwise than by killing the attacker.⁷⁹ Evidence of the history of the relationship and the lived realities of the accused can make many issues more understandable to the often uninformed trier of fact. In *Malott* the trial judge also emphasised the importance of this evidence in summarising his understanding of why battered women remain in the abusive environment and consider killing the abuser as an only alternative to freedom from the abuse.⁸⁰ Again, in *Vaillancourt* the Quebec Court of Appeal stressed the circumstances of the accused as a pertinent factor in evaluating whether she reasonably believed that killing the accused was her only option. In considering the options available to the accused, Mailhot JA urged that the courts examine the evidence from the perspective of a ‘victim of violence’ and ask whether the accused could be said to have reasonably believed ‘that killing her aggressor was the sole manner for her to save her own life.’⁸¹

used cannot be excessive in self-defence” were qualified, it would have been preferable to avoid this phraseology and to instruct the jury more in accordance with the language in s. 34(2).’: at 416.

⁷⁷ Above n2 at 302. This is a specific requirement under section 34(1) of the *Code* – see above n8.

⁷⁸ Above n2 at 302. See also *Mulder* (1978), 40 C.C.C. (2d) 1 (Ont. C.A.). Thus, in instructing the jury on the application of section 34 (2)(b) – and specifically whether the accused had a reasonable belief that she could not have saved herself except by using deadly force – the court in *Lavallee* was of the opinion that ‘the question the jury must ask itself is whether, given the history, circumstances and perceptions of the [accused], her belief that she could not preserve herself from being killed by [the deceased] that night except by killing him first was reasonable.’: above n17 at 125. Again, as with the application of the law in section 34 (2)(a) mistake regarding the amount of force required to repel the attack does not rule out a self-defence claim on condition that it is shown that the mistake was honest and reasonable.: See above n2 at 303; Stuart above n1 at 399; and also *Chisam* (1963), Cr.App.R 130.

⁷⁹ *Pétel* above n11 at 106. See also *Malott* above n11.

⁸⁰ *Malott* above n11 at 137-8. The evidence led was that the accused had sought the assistance of the police but that the deceased was a police informer and whenever the accused had laid a complaint, the police would inform the deceased and the abuse toward her would escalate.: *Malott* above n11 at 123.

⁸¹ Above n34 at 546.

In *Kerr* the court had to decide the efficacy of a self-defence plea in a case where the accused, a prison inmate, had admittedly armed himself in anticipation of a threatened attack.⁸² The facts presented in evidence indicated that given the history of the deceased's conduct, the accused had reason to fear that the threatened attack could materialise.⁸³ In dealing with the accused's plea of self-defence the court found that the accused had believed that his life was under threat and that appeared to be 'a perfectly justified conclusion at the time...'⁸⁴ The trial judge took note of the fact that that the accused had gone to the dining room anticipating an attack by the deceased and that he had deliberately armed himself to meet the attack. However, in the circumstances, the court was satisfied that the accused had met both requirements of section 34(2): he had acted under reasonable apprehension of death and he believed, on reasonable grounds, that he could not otherwise preserve himself from death or grievous bodily harm.⁸⁵ Accordingly, the trial court held that the accused was justified in causing the death of his assailant.⁸⁶

The Court of Appeal dismissed the Crown appeal against the finding of the trial court that the respondent's belief that he had no alternate course of action open to him at the time but to arm himself with lethal concealed weapons in preparation to kill or be killed in the event of a perceived or actual assault was objectively reasonable in the circumstances.⁸⁷ When the matter came before the Supreme Court, the court took note of the facts and circumstances of the accused, and further noted the prevalent conditions in the prison as well as the dangers attendant upon inmates carrying concealed weapons.⁸⁸ The court found that arming himself did not make the act of the accused a pre-emptive attack nor

⁸² *Kerr* (2004), 185 C.C.C. 3d 1 (S.C.C.).

⁸³ Above n82 at 140-3.

⁸⁴ Above n82 at 40.

⁸⁵ Above n82 at 43.

⁸⁶ Above n82 at 40.

⁸⁷ Above n82 at 41.

⁸⁸ Above n82 at 44. However, despite noting the circumstances and environment of the accused, the Supreme Court emphasised that in such cases, the legal issues had to prevail and the conditions or the need to make a deterrent statement should not affect the legal decision.: at 44.

did it make him the aggressor and the court was satisfied that the weapon was intended only for and used in self-defence.⁸⁹

Finally, Stuart and Delisle caution that in deciding the 'reasonable belief' of the accused at the time of the incident which forms the basis of a charge, the courts must avoid becoming armchair critics.⁹⁰ Specifically they note, 'Section 34(2)(b) recognizes the fact that when a man's life is in the balance he cannot be expected to make the same decision as he would on sober reflection.'⁹¹

In dealing specifically with 'a duty to retreat in the face of harm' the court in *Howe* recognised the standard set by the Supreme Court namely, that to retreat before employing force is no longer to be treated as an independent and imperative condition if a plea of self-defence is to be made out.⁹² Similarly, in *Ward* the court held that it is not correct to state that as a matter of law self-defence is justified only when there is no other reasonable means whereby a person can retreat.⁹³ In dealing particularly with an obligation to retreat from one's home, Branca JA in *Stanley* confirmed the principle that a man's home is his castle.⁹⁴ In specifically considering the castle doctrine in a case involving a woman who had been in a relationship of cyclical violence with an intimate partner, Wilson J in *Lavallee* was clear that whilst a 'man's home may be his castle ... it is also the woman's home ...'⁹⁵ The judge emphasised that the courts do not expect that a person be required to leave her home when attacked there instead of defending herself and it was 'not for the jury to pass judgment on the fact that an accused battered woman stayed in the relationship. Still less is it entitled to conclude that she forfeited her right to self-defence for having done so.'⁹⁶

⁸⁹ Above n82 at 44.

⁹⁰ Above n7 at 982.

⁹¹ *Ibid.*

⁹² *Howe* (1958), 100 C.L.R. 448 at 462-3.

⁹³ *Ward* (1978), 4 C.R. (3d) 190 at 192 (Ont. C.A.). See also *Deegan* (1979), 49 C.C.C. (2d) 417 at 430 (Alta. C.A.).

⁹⁴ *Stanley* (1977), 36 C.C.C. (2d) 216 at 226 (B.C.C.A.). See *Semaynes* (1605), 5 Co. Rep. 91a. at 91b, 77 E.R. 194 (cited in *Stanley*).

⁹⁵ Above n17 at 124. See also *Antley* (1964), 2 C.C.C. 142 (C.A.).

⁹⁶ Above n17 at 124.

6.3 A CONSIDERATION OF THE 'CIRCUMSTANCES OF THE ACCUSED' AND THE NEED FOR AND ROLE OF THE EXPERT WITNESS

6.3.1 General Rules of Admissibility of Expert Evidence

The general rule with regard to the admissibility of expert evidence is set out in *Kelliher v Smith*.⁹⁷ The finding of the court was that in order for the evidence of an expert to be admissible, 'the subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.'⁹⁸ Referring specifically to the admissibility of psychiatric evidence, *Abbey* is apposite. In his judgment in *Abbey* Dickson J stated the rule as follows:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury.⁹⁹

6.3.2 The Need For and Use of Expert Evidence in Cases of Domestic Violence

The seminal case in Canada on the importance and necessity of expert evidence in cases of battered women who kill their abusive partners is *Lavallee*.¹⁰⁰ In *casu* the court, in reaching its decision, emphasised its awareness of the various myths and stereotypes that attach to the battering relationship and also noted as

⁹⁷ *Kelliher v Smith* (1931) 4 D.L.R. 102.

⁹⁸ Above n97 at 116.

⁹⁹ *Abbey* (1982), 68 C.C.C. (2d) 394 at 409 (S.C.C.) citing Lawton LJ in *Turner* (1974) 60 Cr.App.R. 80, at 83.

¹⁰⁰ Above n17.

a fact that intimate violence is 'beyond the experience of the average juror ...'¹⁰¹ The court laid the foundation for its judgment and decision to admit expert testimony in cases involving battery in its opening statement. Handing down judgment for the majority, Wilson J recognised that expert evidence was admissible to assist the trier of fact in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of the lay person.¹⁰² She acknowledged that in cases of domestic violence and battered women it was unlikely that the mental state of the accused could be properly appreciated without such evidence and therefore the expert testimony was both relevant and necessary.¹⁰³ Wilson J noted that

The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with such kind of treatment? Why should she continue to live with such a man? How can she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? 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.¹⁰⁴

Stressing the importance of expert testimony in cases of domestic violence, Wilson J cautioned that courts should be wary of refusing to listen to experts because of 'a belief that judges and juries are thoroughly knowledgeable about "human nature" and that no more is needed.'¹⁰⁵ In confirming the importance of expert evidence in cases involving battered women, murder and self-defence, L'Heureux-Dube J in *Malott* was of the opinion that (referring to the decision in *Lavallee*):

¹⁰¹ Above n17 at 98.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Above n17 at 112.

¹⁰⁵ Above n17 at 111.

A crucial implication of the admissibility of expert evidence in *Lavallee* is the legal recognition that historically both the law and society may have treated women in general, and battered women in particular, unfairly. ... The expert evidence is admissible, and necessary, in order to understand the reasonableness of a battered woman's perceptions ... that she had to act with deadly force in order to preserve herself from death or grievous bodily harm¹⁰⁶

In her minority judgment in *Malott*, L'Heureux-Dube J also emphasised the importance of an individualised approach in appreciating the battered woman's unique experience;¹⁰⁷ but stressed that it would be:

... wrong to think of this development of the law as merely an example where an objective test ... has been modified to admit evidence of the subjective perceptions of a battered woman. [Making reference to *Lavallee* she continued to state that m]ore importantly, a majority of the Court [in *Lavallee*] accepted that the perspectives of women, which have historically been ignored, must now equally inform the objective standard of the reasonable man in self-defence.¹⁰⁸

Commenting on the judgment of L'Heureux-Dube, Tang is of the view that the judge was effectively urging future courts dealing with cases involving domestic violence to ensure that their legal enquiry focussed on the reasonableness of the actions of the battered woman within her personal experience and the relationship of abuse between her and her partner.¹⁰⁹ The issue, states Tang, is thus not whether the accused fitted the mould of the battered woman syndrome but rather on the reasonableness of her behaviour taking account of the circumstances of her life and environment.¹¹⁰

¹⁰⁶ *Malott* above n11 at 140-1. See also above n7 at 993.

¹⁰⁷ *Malott* above n11 at 140-1.

¹⁰⁸ *Ibid.*

¹⁰⁹ K Tang 'Battered Woman Syndrome Testimony in Canada: Its Development and Lingering Issues' 2003 47 *International Journal of Offender Therapy and Comparative Criminology* 618, at 623.

¹¹⁰ *Ibid.*

6.3.3 The Nature of the Expert Evidence that Will Be Admitted in Cases of Domestic Violence

In considering the Canadian law of self-defence and specifically section 34(2) of the *Criminal Code* the court in *Lavallee* held that the evidence of the expert would be especially relevant in assisting the court to deal firstly, for the purposes of section 34(2)(a), with the issue of the temporal connection between apprehension of death or grievous bodily harm and the act allegedly taken in self-defence by explaining the heightened ability of the accused to perceive danger from the deceased. In dealing with this aspect, the court held:

Expert testimony relating to the ability of the accused to perceive danger from the deceased would go to the issue of whether she reasonably apprehended death or grievous bodily harm on the occasion in question. While s. 34(2) does not actually stipulate that the accused apprehend imminent danger before acting in self-defence, there is an assumption that it is inherently unreasonable to apprehend death or grievous bodily harm unless and until the physical assault is actually in progress at which point the victim can reasonably gauge the requisite amount of force needed to repel the attack and act accordingly. ... The issue is not, however, what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.¹¹¹

In attempting to contextualise the actions of the accused, the defence in *Lavallee's* case relied on the battered woman syndrome and admitted expert testimony to explain the syndrome and avoid the court 'improperly concluding that she [the accused] was not as badly beaten as she claim[ed] or she would

¹¹¹ Above n17 at 96.

have left the man a long time ago, or even if she was severely beaten that she stayed out of some masochistic enjoyment of it.’¹¹²

However, also referring to ‘the so-called battered-spouse syndrome’ the trial judge in *Lavallee* had cautioned that labels and labelling should be avoided: rather the court emphasised that what was important was the evidence and how the evidence influenced the accused’s actions.¹¹³

Both the trial court and the Supreme Court of Canada in *Lavallee’s* case took the view that the experts were not required to testify to the accused being a battered woman or even that she presented with the characteristics of a battered woman: Rather, the court was more interested in the evidence of the expert (presented without the ‘labels’) insofar as it would assist the court in providing a contextual understanding of the reasonableness of the accused’s belief that her life was in danger.¹¹⁴ The Supreme Court emphasised that there was no acquittal for being a battered woman and Wilson J noted, ‘Battered women may well kill their partners other than in self-defence. The focus is not on who the woman is, but on what she did.’¹¹⁵ However, some commentators have been critical of the judgment in *Lavallee* for failing to expressly jettison the battered woman syndrome from the law.¹¹⁶ Shaffer is one of the critics and notes that the intention expressed by Wilson J to dispel stereotypes about battered women was certainly not realised by her judgment.¹¹⁷ Tang is especially critical of the fact that despite *Lavallee* being an aboriginal woman, the court did not even address the issue of women of colour.¹¹⁸ On the other hand, Trotter gives acclaim to *Lavallee* for specifically transforming the law of self-defence in Canada ‘by

¹¹² Above n17 at 98.

¹¹³ Above n17 at 126. See also *Malott* above n11 at 140.

¹¹⁴ Above n17 at 126.

¹¹⁵ *Ibid.*

¹¹⁶ Above n109 at 624-7.

¹¹⁷ Above n27 at 13. See also D Martinson ‘Implications of *Lavallee v R* for Other Criminal Law Doctrines’ 1991 25 *U.B.C. Law Review* 25, at 25-36; EM Schneider *Battered Women and Feminist Law Making* (Yale University Press, New Haven: 2002) 66; and RA Schuller, BM McKimmie and T Janz ‘The Impact of Expert Testimony in Trials of Battered Women Who Kill’ 2004 2 *Psychiatry, Psychology and the Law* 1, at 11.

¹¹⁸ Above n109 at 624.

recognizing the important role of BWS evidence.¹¹⁹ What is apparent is that as a result of the reference to battered woman syndrome in *Lavallee*, other courts have also accepted BWS with its defining character markers as a part of the Canadian law.¹²⁰

Four years later, in *Malott* the minority judgment sought to address the issue of battered woman syndrome in the courtroom. In *casu*, L'Heureux-Dube J argued for the courts to go beyond the narrow definition of battered woman syndrome stating, 'It is possible that women that are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defense fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman. This should not prejudice their claim to the reasonableness of their conduct.'¹²¹ L'Heureux-Dube J thus stated that the test of reasonableness (as opposed to a reference to the battered woman syndrome) was able to overcome stereotypes of battered women. She noted, 'Finally, all of this should be presented in such a way as to focus on the reasonableness of the woman's actions, without relying on old or new stereotypes about battered women.'¹²²

¹¹⁹ GT Trotter 'Justice, Mercy and the Royal Prerogative of Mercy: Examining the Self-Defence Review' 2001 26 *Queen's Law Journal* 339, at 340.

¹²⁰ See above n27 at 20. Tang points out that like their counterparts in the U.S.A., legal researchers in Canada have been highly critical of the use of 'syndrome' which is seen as an attempt to 'medicalize' the issue of domestic violence.: above n109 at 621. See also I Grant 'The "Syndromization" of Women's Experience' 1991 25 *U.B.C. Law Review* 51, at 51. In attempting to provide some explanation for the introduction of battered woman syndrome to the courts and their reciprocal acceptance of it, Tang suggests that one plausible explanation of this reference by the defence has to do with the historical predisposition on the part of the Canadian courts to accept psychiatric evidence because it carries the canon of science.: above n109 at 622. White-Mair develops the idea further noting that in the context of the Canadian courts 'medical evidence that [also] resonates with the common life experience of male judges and juries are more readily taken up as the explanation of why certain women behaved as they did.': K White-Mair 'Experts and Ordinary Men: Locating R v Lavallee, Battered Woman Syndrome, and the "New" Psychiatric Expertise on Women Within Canadian Legal History' 2000 12 *Canadian Journal of Women and the Law* 406, at 437.

¹²¹ *Malott* above n11 at 142.

¹²² *Malott* above n11 at 144. See also Grant above n120 at 52.

The court in *Lavalle* was clear that when dealing with the law of self-defence and battered women, in addition to general evidence on the nature and effects of battery, the courts should admit the opinion of the expert regarding the accused's heightened sense of danger which may assist to explain why the battered woman's reaction in the circumstances was reasonable, although an ordinary average person may not have seen the danger. However, the ultimate issue of reasonableness remains a decision of the court. In commenting on self-defence in cases of battered women who murder their intimate partners, Stuart and Delisle endorsed the view that courts need to be informed of the nature of the battering relationship and the psychological connection that grows between the abuser and his victim. In particular they note that distinct from an isolated attack between strangers is the fact that domestic violence is often characterised by a cyclical pattern of abuse that enables the battered spouse to correctly predict the onset of a violent episode even before the first blow is struck.¹²³

Stuart and Delisle maintain a definite scepticism that the average fact-finder would be capable of appreciating why the subjective fear of the accused might have been reasonable. Given that the test for self-defence is not about what an outsider would have reasonably perceived but, specifically, what the accused reasonably perceived, given her situation and her experience,¹²⁴ they, thus, emphasise the relevance of expert testimony in assisting the courts to understand the lived reality of the battered woman and her heightened sensitivity to her partner's behaviour.¹²⁵

Secondly, in covering the elements of section 34(2)(b) the court in *Lavallee* took the view that expert evidence would also be of assistance to the jury on the issue of whether the accused believed on reasonable grounds that it was not possible to otherwise preserve herself from death or grievous bodily harm.¹²⁶ The court was satisfied that the expert would be able to provide an explanation as to why the accused did not flee when she perceived her life to be in danger, and in this way expert testimony could assist the jury in assessing the reasonableness of the

¹²³ Above n7 at 990-1.

¹²⁴ Above n7 at 991; above n2 at 284; above n17 at 112; and *Pétel* above n11 at 104.

¹²⁵ Above n7 at 991.

¹²⁶ Above n17 at 96.

belief of the accused that killing the deceased was the only option available to her to save her life.¹²⁷

Clearly, the expert's opinion will be admitted in respect of the general character of domestic violence and the behaviour of the woman exposed to repeated acts of violence. However, the expert was not permitted to express a view on the reasonableness of the accused's behaviour. This was made clear by the Appeal Court in *Lavallee* which emphasised that '[u]ltimately, it is up to the jury to decide whether, *in fact*, the accused's perceptions and actions were reasonable. Expert evidence does not and cannot usurp the functions of the jury.'¹²⁸ Noteworthy was the fact that in *Lavallee* the Appeal Court was, however, prepared to allow the expert to express an opinion on the mental state of the accused at the time of the killing. Wilson J held:

The jury is not compelled to accept the opinions proffered by the expert about the effects of battering on 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.¹²⁹

The information presented by the expert would, however, be relevant in the jury's decision on the reasonableness (or not) of the conduct of the accused.

However, having established the need for and nature of the expert evidence that would be admitted in cases of domestic violence, the court in *Lavallee* stressed the 'obligation' of the party tendering the evidence of the expert to establish 'through properly admissible evidence, the factual basis on which such opinions are based. ... Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.'¹³⁰

¹²⁷ *Ibid.*

¹²⁸ Above n17 at 126.

¹²⁹ *Ibid.*

¹³⁰ Above n17 at 107 citing Dickson J in *Abbey* above n99. The latter case dealt specifically with the admissibility of expert evidence by the Canadian courts and the use to which such evidence could be put.

This issue becomes pertinent in cases involving intimate violence and murder especially if the accused does not testify at the trial and the court is presented with the circumstances and mental insight of the accused through an expert witness. In *Lavallee* after the testimony of the expert witness that he found the accused credible, the prosecution brought an application to have his evidence withdrawn from the jury. The prosecution argued that this was ‘wholly improper’ in view of the accused’s failure to testify to the facts upon which the expert had based his opinion.¹³¹ In denying the application, the trial court took a rather robust approach. Whilst noting the concerns of the prosecution, the judge ruled as follows:

I think, under the circumstances, that the better course of action and the more realistic one to follow is to deal with the fact that it is in evidence and to attempt to explain to the jury as adequately as I can the difference between what is in evidence and the impact that that ought to have on the weight that they choose to attach to the opinion of Dr Shane.¹³²

On appeal to the Manitoba Court of Appeal, the majority decision of the court was that the trial judge’s instruction to the jury fell short of the standard required by the Canadian law and that whilst the trial judge’s general instructions regarding the weight to be placed on expert evidence was proper, ‘they did not go far enough in the circumstances of this case.’¹³³ However, on appeal to the Supreme Court, Wilson J referred to the standard that had been set out in *Abbey* and summarised it as follows:

1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.

¹³¹ Above n17 at 104.

¹³² *Ibid.*

¹³³ *R v Lavallee* (1988) 44 C.C.C. (3d) 113, at 127 & 128.

3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.¹³⁴

Based on the above, Wilson J was satisfied that the trial judge's instruction was sufficient not to warrant the ordering of a new trial.¹³⁵ In dealing with the last requirement specifically she emphasised that this did not require that each and every fact relied upon by the expert should be independently proven and admitted into evidence before the entire opinion could be given any weight. Wilson J held:

In my view, as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.¹³⁶

In also dealing with the issue of expert opinion that is based entirely on unproven hearsay, Sopinka J noted that a distinction had to be drawn between evidence that an expert obtains and acts upon within the scope of his or her expertise and evidence that an expert obtains from a party to litigation touching a matter directly in issue.¹³⁷ It was his opinion that in the former instance the opinion of the expert could not be competently disregarded especially where the evidence was of 'a general nature which is widely used and acknowledged as reliable by experts in that field'; whilst in the latter instance 'a court ought to require independent proof of that information.'¹³⁸ A lack of proof will have a direct effect on the weight given to the opinion, 'perhaps to the vanishing point,' stated the judge.¹³⁹ However, agreeing with the approach of Wilson J to the evidence of the expert in *Lavallee*, Sopinka J noted:

¹³⁴ Above n17 at 127-8.

¹³⁵ Above n17 at 129.

¹³⁶ Above n17 at 130.

¹³⁷ Above n17 at 132.

¹³⁸ *Ibid.*

¹³⁹ Above n17 at 133.

... as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.¹⁴⁰

This approach conforms with an earlier decision of the Canadian Supreme Court namely *Abbey*,¹⁴¹ where the expert witness of the defence (a psychiatrist by profession) relied solely on out of court statements made to him by the accused in reaching his opinion on the mental state of the accused at the time of the alleged offence. In admitting the opinion, the trial judge also treated them as factual even though the accused never took the stand.¹⁴² On appeal the Supreme Court confirmed the admissibility of the expert's opinion but held that the testimony should only have been admitted 'to show the basis for the psychiatrist's opinion and that the jury should have been so instructed.'¹⁴³ Wardle notes that the *Abbey* decision effectively forces the accused either to tender the evidence of the psychiatrist alone, and have it given little or no weight by the trier of fact, or to take the stand himself to confirm the premise on which the opinion is based.¹⁴⁴ In an effort to protect the accused's constitutionally protected right to silence, Wardle questions the possibility that another standard be applied when the expert opinion on the mental state of the accused is presented by a psychiatrist. He states that the rationale for excluding hearsay evidence is:

First, the reception into evidence of out-of-court statements does not give any guarantee of either the sincerity of the declarant or his powers of memory and perception. Second, the failure to provide these guarantees

¹⁴⁰ *Ibid.*

¹⁴¹ Above n99.

¹⁴² Above n99 at 407.

¹⁴³ *Ibid.*

¹⁴⁴ P Wardle 'R. v. Abbey and Psychiatric Opinion Evidence: Requiring the Accused to Testify' 1985 17 *Ottawa Law Review* 116, at 124.

means that the statement of the declarant is not logically probative of the facts stated therein.¹⁴⁵

Wardle argues that this rule does not apply to the evidence of the psychiatrist expert evidence because, he states:

the psychiatrist has an ability to separate truth from fiction [and] that should be taken into account by the rules of evidence. On a very basic level, this argument really amounts to a suggestion that the psychiatrist's experience in dealing with people should be acknowledged. ... [W]e may have to conclude that he will not usually be fooled. The psychiatrist has more than just his experience with people against which to measure the accused's statements; ...¹⁴⁶

However, he cautions that if his comment (stated above) is accepted, it could amount to 'a suggestion that the psychiatrist, because of his abilities, ought to be allowed to take over the jury's task of deciding credibility in a case involving the mental state of the accused.'¹⁴⁷ Wardle is cognisant of the fact that it is contrary to the tenets of justice to allow a psychiatrist to decide whether the accused is telling the truth or not.¹⁴⁸ Thus, (referring to *Abbey*) he concludes that in order to avoid such a situation 'the accused may have to take the stand in order to guarantee the sincerity of what he has told the psychiatrist. ... If he does not do so the psychiatrist's opinion, to the extent that it is premised on his statements, is irrelevant.'¹⁴⁹ In coming to this final argument, Wardle concedes that the approach violates an accused's right to silence, but he notes that such an interference 'is justified by the basic principle of evidence that all evidence is inadmissible unless logically probative or relevant to an issue in the case.'¹⁵⁰

In summarising the value the expert evidence in the decision-making process the court in *Malott* held:

¹⁴⁵ Above n144 at 125.

¹⁴⁶ Above n144 at 129.

¹⁴⁷ Above n144 at 129-30.

¹⁴⁸ *Ibid.*

¹⁴⁹ Above n144 at 130.

¹⁵⁰ Above n144 at 130-1.

Once battered woman syndrome defence is raised, the jury should be informed of how that evidence may be of use in understanding why an abused woman might remain in an abusive relationship, the nature and extent of the violence that may exist in a battering relationship, the accused's ability to perceive danger from her abuser, and whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm.¹⁵¹

In order to assure the greatest assistance from the expert, the court in *Malott* suggested the following questions/issues that could be raised:

- (1) Why a person subjected to prolonged and repeated abuse would remain in such a relationship.
- (2) The nature and extent of the violence that may exist in such a relationship before producing a response. On this issue, Major J noted that in a case involving self-defence as it applies to an accused who has killed her violent partner, the jury should be instructed 'on the violence that existed in the relationship and its impact on the accused. The latter will usually but not necessarily be provided by an expert.'
- (3) The accused's ability, in such a relationship, to perceive danger from the abuser.
- (4) Lastly, whether, in the evidence, the particular accused believed on reasonable grounds that there was no other way to preserve herself or himself from death or grievous bodily harm than by resorting to the conduct giving rise to the charge.¹⁵²

6.3.4 The Qualifications of the Expert in Domestic Violence Cases

In *Lavallee* and *Malott* the expert opinion was presented by Dr Shane, a psychiatrist with extensive professional experience in the treatment of battered

¹⁵¹ *Malott* above n11.

¹⁵² *Malott* above n11 at 133-4.

wives,¹⁵³ and Dr Jaffe respectively.¹⁵⁴ It is suggested that the use of medical professionals may be as a result of the fact that in both cases the defence relied specifically on the battered woman syndrome to define the conduct of the accused.¹⁵⁵ This is understandable in light of the *dictum* of La Forest J in *Lyons* where the judge noted that psychiatric evidence would always be clearly relevant to the issue whether a person is likely to behave in a certain way 'and, indeed, is probably relatively superior in this regard to the evidence of other clinicians and lay persons.'¹⁵⁶

However, in responding to the judgment presented in *Malott* particularly regarding the relevance and need for expert opinion evidence, Downs suggests that the intended outcomes could all still be easily achieved by a more generalised consideration namely, that of battering and its effects rather than by insisting on a strict adherence to the battered woman syndrome standard.¹⁵⁷ Tang concurs with this view noting further that if the former were to become the accepted standard, then 'evidence from professionals other than psychiatrists and psychologists should [also] be admissible in court.'¹⁵⁸

6.4 CONCLUSION

As noted from the discussion, it would appear that the law of self-defence in Canada has evolved into a simple test. It is a progressive blend of subjective evaluations and objective assessments with sufficient flexibility to ensure that justice is done. Thus, in understanding the conceptual paradigm of an accused, the courts have recognised both present circumstances and past history insofar as it is relevant to the conduct with which the accused is charged. Evidence of past beatings and threats as well as the accused's knowledge of the attacker's

¹⁵³ Above n17 at 103.

¹⁵⁴ In *Malott* the admissibility of the expert opinion of Dr Jaffe was not challenged by the prosecution and therefore was not an issue.: *Malott* above n11 at 133.

¹⁵⁵ This approach may be attributable to the fact that battered woman syndrome has been specifically acknowledged as a psychiatric condition and is so reflected in the DSM-IV Manual.: *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, Washington: 1994) 393.

¹⁵⁶ *Lyons* (1987), 37 C.C.C. (3d) 1 at 48 (S.C.C.).

¹⁵⁷ D Downs *More Than Victims: Battered Women: The Syndrome Society and the Law* (University of Chicago Press, Chicago: 1998) 131.

¹⁵⁸ Above n109 626.

propensity for violence have all been held to be relevant in gauging the reasonableness of the defender's beliefs and her response to the attacker.¹⁵⁹

The Canadian law has also established that there is no requirement of a *de facto* assault before the defender's response can be justified as self-defence. Rather, the requirement is that the defender must have had an apprehension (based on reasonable grounds) of an unlawful assault that could result in death or grievous bodily harm.¹⁶⁰ A further constructive note of progress in the law is the intention not to arrogate to the definitional requirements of self-defence the elements of imminence and proportionality. With specific reference to imminence, no such reference is contained in the law but the legal writers blame the case law for reading such a condition into the law. However, in *Lavallee Wilson J* sought to settle the law of self-defence *vis-à-vis* imminence stating explicitly, especially with regard to battered women before the law, that the traditional rules of imminence did not permit the courts to properly contextualise the enquiry. To seek to impose such a requirement would be inherently unfair.¹⁶¹ With regard to the requirement of proportionality between the defensive response and the attack, it appears well-settled that proportionality is one of the elements for consideration when assessing the necessity of the force used in defence – it is not a defining requirement of self-defence. It is clear that the test under Canadian law is not the reasonableness of the force used but rather the reasonableness of the belief that force was necessary in the circumstances.

Interesting about the interpretation of section 34 (2)(b) especially with regard to the 'apprehension' or 'belief' of the accused is that it creates a space for 'mistake' under the law of self-defence.¹⁶² In South Africa, for instance, a reasonable mistake would rather be considered under the condition of culpability and the accused's state of mind. It would, accordingly constitute an excuse of the alleged criminal act and not a justification.¹⁶³ However, under the Canadian law, a

¹⁵⁹ Above n2 at 3-5.

¹⁶⁰ Above n2 at 4.

¹⁶¹ Above n17.

¹⁶² Above n16 at 7-8.

¹⁶³ Under the South African law, a defence allied to self-defence (though not to be confused with self-defence) is putative (or supposed) self-defence. It applies where the defender genuinely believes that a defence excluding unlawfulness exists (but it does not) or the defender honestly

mistaken apprehension or belief that is reasonable will be properly addressed under self-defence.

Especially positive about the law of self-defence as it has developed, is that whilst a reference has been made to battered woman syndrome, there is an implicit understanding that the law will not create categories of victims by imposing labels.¹⁶⁴ Also, and in keeping with this approach, it is clear from *Lavallee* and *Malott* that the law has shown no intention to establish battered woman syndrome as a separate defence. In *Lavallee* Wilson J emphasised that '[t]he focus is not on who the woman is, but on what she did.'¹⁶⁵ In *Malott* L'Heureux-Dube J stated unequivocally that 'battered woman syndrome is not a legal defence in itself such that an accused woman need only establish that she is suffering from the syndrome in order to gain an acquittal.'¹⁶⁶

thinks that she is entitled to use such force as she did (but she is not), then the defender is said to lack fault in the form of intention.: J Burchell and J Milton *Principles of Criminal Law* (Juta, Kenwyn: 1999) 346. This genuine mistake by the defender regarding the existence of a defence negatives fault in the form of intention on the part of the accused and may serve to excuse the conduct of the accused.: at 346-7.

¹⁶⁴ Above n17 at 126. See specifically the cited comment of the trial judge. According to Tang the Canadian courts have been clear that battered woman syndrome is not a legal defence in itself 'but rather it is a psychiatric explanation of the mental state of an abused woman that can be relevant to understanding a battered woman's state of mind.': above n109 at 619. This approach was confirmed in the Canadian Self-Defence Review submitted to the Minister of Justice and Solicitor General of Canada.: above n22 at 5.

¹⁶⁵ Above n17 at 126.

¹⁶⁶ *Malott* above n11 at 140. Interestingly, in the Australian case of *Osland* (1998) 159 ALR 170 (HC) Callinan J interpreted the Canadian law otherwise. He noted:

The reasons of Major J [in *Malott*], which followed earlier considerations of the "battered woman syndrome" in the Supreme Court of Canada in *Lavallee v R*, show that his Lordship and the courts in Canada may regard "battered woman syndrome" as a separate defence.: at 242.

In support of his contention, the judge cites the following passage from the judgment of Major J:

The admissibility of expert evidence respecting battered woman syndrome was not at issue in the present case. The admissibility of the expert evidence ... on battered woman syndrome was not challenged. However, once the defence is raised, the jury ought to be made aware of the principles of that defence as dictated by *Lavallee*. In particular, the jury should be informed of how that evidence may be of use in understanding the following:

1. *Why an abused woman might remain in an abusive relationship. ...*
2. *The nature and the extent of the violence that may exist in a battering relationship.* In considering the defence of self-defence as it applies to an accused who had killed her violent partner, the jury should be instructed on the violence that existed in the relationship and its impact on the accused. ...
3. *The accused's ability to perceive danger from her abuser.* Section 34(2)(a) [of the Criminal Code] provides that an accused who intentionally causes death or

-
- grievous bodily harm in repelling an assault is justified if he or she does so “under reasonable apprehension of death or grievous bodily harm”. ...
4. Whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm.: at 242.

Having read the Canadian judgments and paid attention to the section cited by Callinan J in *Osland* the writer remains convinced that the Canadian courts did not intend to introduce an autonomous defence called battered woman syndrome. It is clear from the *dicta* of both courts, read as a whole, that they only intended to use the information on battered woman syndrome to assess the conduct of the accused under the defence of self-defence. It is submitted that what appears to be a reference to a separate defence is possibly the result of imprecise language by the judge in *Malott's case*.

PART TWO: SELF-DEFENCE

CHAPTER SEVEN

THE LAW OF SELF-DEFENCE IN AUSTRALIA

7.1 INTRODUCTION

In describing the origins of Australian criminal law, Waller and Williams state that 'it is generally accepted that the early settlers in Australia brought the common law with them and the English law of that period thus formed the basis of criminal law in the various states.'¹ However, over the years the law evolved with each state and territory making changes and legislating for itself. During the 1990's, Australian jurists, dissatisfied with the idea of a divided set of criminal laws, sought to bring about greater harmonisation between the laws of the different states. As Goode points out, the law of Australia should be 'systematic and comprehensive, offering the prospect of a criminal law that is easy to discover [and] easy to understand ...'² Thus, in 1990, the Standing Committee of Attorneys-General established the Model Criminal Code Officers Committee (MCCOC) to draft a model uniform criminal Code that would be accepted in all states and territories. The Committee finalised its recommendations on a harmonised set of principles of criminal responsibility, which were codified as part of the federal law in the *Criminal Code Act 1995 (Cth)* of Australia.³ As a result,

¹ L Waller and CR Williams *Brett, Waller and Williams CRIMINAL LAW Text and Cases* (Butterworths, Sydney: 1993) 5.

² M Goode 'Codification of the Australian Criminal Law' 1992 16 *Criminal Law Journal* 5, at 8.

³ Only the sections of the *Commonwealth Criminal Code Act 1995* on self-defence relevant to this study are cited below:

- Section **10.4** (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:
- (a) to defend himself or herself or another person; or
- ...
- (e) ...;
- and the conduct is a reasonable response to the circumstances as he or she perceives them.
- (3) ...
- (4) ...

the current position is that self-defence in all Australian jurisdictions is now regulated by statute, specifically the *Model Criminal Code*, 1998.⁴ However, states still have their respective sovereignty with regard to the promulgation of domestic laws and not all the states and territories have implemented the provisions of the Model Criminal Code into their respective laws.⁵ Thus, as Bradfield notes, the definition of and approach to self-defence still varies across the various Australian jurisdictions.⁶

The law of self-defence across the states and territories of Australia is contained in the following legislation. In Victoria and the Australian Capital Territory (ACT), self-defence is regulated by the *Crimes Act 1958* (Vic) and the *Criminal Code 2002* (ACT) respectively. In New South Wales the law of self-defence is contained in the *Crimes Act 1900* (NSW) and in South Australia it is in the *Criminal Law Consolidation Act 1935* (SA).⁷ In Queensland, a separate criminal Code – *Criminal Code Act 1899* (Qld) - was enacted.⁸ This Code was adopted by Western Australia in 1902 but repealed and then re-enacted in 1913 as the *Criminal Code Act 1913* (WA).⁹ In 1924 Tasmania adopted a modified version of this Code – *Criminal Code Act 1924* (Tas) - and in 1983, the Code was adopted also with modifications by the Northern Territory as the *Criminal Code Act 1983* (NT).¹⁰ However, an analysis of the comparative jurisdictions reveals that even though not all states have specifically adopted the *Model Criminal Code*, 1998 there are definite fundamental principles common to all the states which will become clear in the following discussion. Further, Bronitt and McSherry note –

See also D Brown, D Farrier, S Egger and L McNamara *Materials and Commentary on Criminal Law and Process of New South Wales* (The Federation Press, New South Wales: 2001) 736.

⁴ J Yule 'Current Issues with Regards the Defences of Provocation and Self-Defence in the Criminal Law Context' 2007 in *Proceedings: Australasian Law Teachers Association 1*, at 14. See also the Victorian Law Reform Commission, *Defences to Homicide: Final Report* October 2004 at 63.

⁵ See Brown *et al* above n3 at 33.

⁶ RJ Bradfield 'The "Frightened Woman" – The Defence of Self Defence and Homicide' eprints.utas.edu.au/10457/Bradfield_ch6.pdf 199 [accessed on 16 June 2009]. See also S Bronitt and B McSherry *Principles of Criminal Law* (Lawbook Co., New South Wales: 2005) 300.

⁷ Above n1 at 5-6.

⁸ It is often called the *Griffith Code* after its primary author and came into effect in 1901.: above n1 at 6; Bronitt and McSherry above n6 at 70; RG Kenny *Criminal Law in Queensland and Western Australia* (Butterworths, Sydney: 2000) 1 and 5.

⁹ Above n1 at 6. See also Bronitt and McSherry above n6 at 70.

¹⁰ Above n1 at 6; above Bronitt and McSherry n6 at 70; S Gray *Criminal Laws Northern Territory* (The Federation Press, New South Wales: 2004) 9.

referring to *DPP Reference (No 1 of 1991)* – that in practice, the law of ‘self-defence in Australia is open in its formulation in the sense that there are not many substantive rules limiting its scope.’¹¹ They conclude that self-defence is a matter of fact which is generally left to the jury to decide.¹²

Australian jurists have also entered the at times academic debate on whether self-defence should be a defence of excuse or justification. In distinguishing between the rules of justifiable and excusable homicide in Australia, Wilson, Dawson and Toohey JJ noted in *Zecevic v DPP (Vic)* that the fundamental distinction between the two defences is in the consequences – justifiable homicide carried the sanction of commendation rather than blame and entitled the accused to a complete acquittal ‘entailing no forfeiture of goods and requiring no pardon.’¹³ Excuses on the other hand were said to focus on the actor’s state of mind and the effect of a successful plea involved both a pardon and the forfeiture of goods.¹⁴ In discussing the distinction, Snelling notes (referring to Foster – without citing the source) that excusable homicide was not entirely without blame and the accused may be regarded as being ‘in some measure blameable’ and thus the killing is merely excused rather than acquitted.¹⁵ In further explaining the excuse defence, Dixon notes that it was concerned not with the execution of justice, but simply with a necessary and reasonable response to a threat to life and limb.¹⁶ In 1828, the principle of forfeiture was abolished and Bronitt and McSherry express the opinion that this then rendered the distinction between excuse and justification obsolete.¹⁷ In *Zecevic v DPP (Vic)* Wilson,

¹¹ Bronitt and McSherry above n6 at 301. See also *DPP Reference (No 1 of 1991)* (1992) 60 A Crim R 43 at 46.

¹² Bronitt and McSherry above n6 at 301.

¹³ *Zecevic v DPP (Vic)* (1987) 162 CLR 645 at 657-8; and see also Bronitt and McSherry above n6 at 299.

¹⁴ Above n13 at 658.

¹⁵ HA Snelling ‘Killing in Self-Defence’ 1960 34 *Australian Law Journal* 130, at 133; see also O Dixon ‘The Development of the Law of Homicide’ 1935 9 *Australian Law Journal* 64.

¹⁶ Dixon above n15 at 65-6.

¹⁷ Bronitt and McSherry above n6 at 299. Acknowledging the comment of Bronitt and McSherry and noting the preceding discussion, it would appear that the difference between excuse and justification lay in the nature of the punishment that attached to the defence. This is contrary to the position in South Africa where the distinction between a defence of justification and one of excuse lies in the fact that the former focuses particularly on aspects of the case that exclude the unlawfulness of the act whilst the latter focuses on excluding the element of intention.

Dawson and Toohey JJ also indicate a blurring of the boundaries between justification and excuse stating:

True it is that in result a successful plea of self-defence resembles justification rather than excuse because it entitles the accused to a full acquittal, but in scope and in practice nowadays the plea has a greater connection with excusable homicide, being in the most cases related to the preservation of life and limb rather than the execution of justice.¹⁸

The conflation of excuse and justification is evident in the written judgment of Brennan J who states at one point that 'When the defence of self-defence is available to an accused, it justifies or excuses the ... act which is alleged to have caused the death.'¹⁹

7.2 THE REQUIREMENTS OF SELF DEFENCE²⁰

The common law rules of self-defence, still apposite in **Victoria**, were clearly set out in the leading case of *Zecevic v DPP (Vic)*.²¹ In describing the law of self-defence, Wilson, Dawson and Toohey JJ set out the requirements as follows:

It is whether the accused believed upon reasonable grounds that it was necessary in self defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.²²

¹⁸ Above n13 at 658.

¹⁹ Above n13 at 666.

²⁰ Bradfield notes that the traditional position required that the threat of harm be immediate or, at least, imminent when the accused the defensive action: however, she emphasises that imminence is no longer a formal requirement of self-defence.: Bradfield above n6 at 206.

²¹ Above n13.

²² Above n13 at 661. This expression of the law was accepted by all four of the other judges, as well. See the judgments Mason CJ at 654, Brennan J at 666, Deane J at 681, and Gaudron J at 685. Thus, the six-stage test for self-defence previously set out in *Viro* (1978) 141 CLR 88 was expressly set aside as being unworkable in practice.: above n13 at 653. For completeness, the *Viro* test is set out hereafter. The court in *Viro* held: Where threat of death or grievous bodily harm to the accused is in question and the issue of self-defence arises, the task of the jury must be stated as follows:

Extrapolating from the court's ruling, the requirements for self-defence under the common law may be said to be:

1. a belief that it was necessary to act in self-defence; and
2. there must have been a reasonable basis for such a belief.²³

The test is an amalgamation of subjective and objective elements in that it requires that the accused's belief be tested by reference to reasonable grounds.²⁴ They are further quick to note that '[t]here is, however, no requirement that the accused's belief be tested against that of an ordinary person; the question is what the accused might reasonably have believed in all the circumstances.'²⁵ It is further appropriate to note that in outlining the requirements of the test for self-defence, *Zecevic v DPP (Vic)* also made it clear that unlawfulness of the attack, proportionality between attack and defence, and an obligation to retreat before taking defensive action are no longer explicit elements of the defence.²⁶

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- 1.(a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily injury was being or about to be made upon him.
 - (b) By the expression 'reasonably believed' is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.
 2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.
 3. If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.
 4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.
 5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury – did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?
 6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.: at 88.

²³ Bronitt and McSherry above n6 at 302.

²⁴ Bradfield above n6 at 199; Bronitt and McSherry above n6 at 301. See also above n13 at 673, and the Queensland Government Taskforce Report on *Women and the Criminal Code: Defences to Violence* Chapter 6 www.qld.gov.au/resources/criminal-code/documents/chapter-6.pdf 5 and 9 [accessed on 16 June 2009].

²⁵ Bronitt and McSherry above n6 at 301.

²⁶ Above n13 at 663-4. With specific reference to the requirement of proportionality, *Zecevic* expressly rejected this requirement, overturning the

In all the other Australian jurisdictions, a slightly different wording to the *Zecevic* test is applied but the majority of the states refer to the requirements of necessity and reasonableness. In **New South Wales** and the **Australian Capital Territory** sections 418 of the *Crimes Act* 1900 (NSW) and 42 of the *Criminal Code* 2002 (ACT) respectively both require that:

1. the accused must have had a belief that the conduct was necessary; and
2. the conduct was a reasonable response in the circumstances as the accused perceived them.²⁷

In **Queensland** and **Western Australia** the use of force by a person acting in self-defence is set out in sections 271 and 272 of the *Criminal Code Act* 1899 (*Qld*) and sections 248 and 249 of the *Criminal Code Act* 1913 (*WA*). These two *Codes* make a specific distinction between self-defence relating to a provoked attack and self-defence relating to an unprovoked attack and also the use of

statement on self-defence set out in *Viro* (which required that in assessing the efficacy of a plea of self-defence the jury must consider *inter alia* ‘whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.’): above n22 at 147. In firmly abolishing the proportionality requirement in the law of self-defence, the court in *Zecevic’s* case stated unequivocally that ‘the use of excessive force in the belief that it was necessary in self-defence will not automatically [negate self-defence. Only i]f the jury concludes that there were no reasonable grounds for a belief that the degree of force was necessary, the defence of self-defence will fail ...’: above n13 at 654. In attempting to ensure that the issue of proportional force was not completely forgotten, the court in *Zecevic*, however, noted that it would in many cases ‘be appropriate for a jury to be told that, in determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered.’: above n13 at 653. (The writer is of the opinion, however, that such a jury instruction on its own could lead to confusion that proportionality was a definitional requirement of the defence and that this is not the legal position also needs to be made clear to the jury.)

²⁷ Again one notes that proportionality is not a requirement of the defence. Thus, in *Lean and Aland* (1993) 66 A Crim R 296, in response to a jury instruction by the trial judge that the proportionality between the defence and attack had to be considered as a separate requirement, the New South Wales Court of Criminal Appeal held firmly that the court *a quo* had erred.: at 296. The Appeal Court confirmed that ‘there is no rule of law that the use of excessive force necessarily establishes that the accused did not act in self-defence.’: at 298. In dealing with proportionality, however, it may be reasonably concluded that it will always be one of the factors when considering necessity and/or reasonableness of the force used.

lethal and non-lethal force in self-defence.²⁸ For purposes of this study, the discussion will be limited to self-defence in cases of an unprovoked assault where the accused has used lethal force to defend herself. Accordingly, sections 271(2) of the *Code (Qld)* and 248 of the *Code (WA)* are apposite.

Section 271 (2): Self-defence against unprovoked assault, reads as follows:

If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using the force by way of defence believes, on reasonable grounds, that the person cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.²⁹

The same provision is contained in section 248 of the *Code (WA)*.

Thus, in applying the section, the courts of Queensland and Western Australia must consider whether the accused had:

1. a reasonable apprehension of death or grievous bodily harm; and
2. a belief based on reasonable grounds that the force used is necessary for defence, even though such force may cause death or grievous bodily harm.

Bronitt and McSherry note that the test is subjective for assessing the fear of the accused but objective insofar as determining whether or not the force used by the accused was reasonably necessary.³⁰

²⁸ Sections 271 and 248 apply to self-defence against an unprovoked assault; whilst sections 272 and 249 cover the situation of self-defence where there has been a provoked attack. Above n8 at 230 and Bronitt and McSherry above n6 at 302.

²⁹ Section 248 *Criminal Code (WA)* 1913 is not materially different from the provisions in section 271 *Criminal Code (Qld)* 1899. The Queensland Government Taskforce Report, however, notes that whilst section 271 does not make any reference to the requirement of immediacy, the courts often read it into the Code provision when determining whether the force used was reasonably necessary. The Taskforce acknowledged that this is an unfortunate interpretation of the law and should be avoided by the courts.: above n24 at 13-14. It specifically noted that self-defence and pre-emptive strikes are not mutually exclusive.: at 4.

³⁰ Bronitt and McSherry above n6 at 308.

In **South Australia**, section 15(1) of the *Criminal Law Consolidation Act (SA) 1935* as amended by the *Criminal Law Consolidation (Self-Defence) Amendment Act 1997* permits the use of force if the person 'believes that the force is necessary and reasonable for self-defence and conduct was reasonably proportionate to the threat that the accused genuinely believed to exist.' The requirements of the defence, thus, are:

1. a belief that the force was necessary and reasonable for self-defence; and
2. the defence was reasonably proportionate to the attack.

South Australia is the only state in Australia which has expressly reintroduced the requirement of proportionality as a condition of self-defence.

In **Tasmania**, section 46 of the *Criminal Code Act 1924 (Tas)* provides that a 'person is justified in using in defence of himself or another person such force as, in the circumstances as, he believes them to be, it is reasonable to use.' Thus Bradfield notes that the primary condition of self-defence in Tasmania is that:

1. the force used, in the circumstances as the accused believed them to be, must have been reasonable.³¹

The test thus appears to be objective insofar as assessing whether the force applied was reasonable but subjective for determining the circumstances of the act which gave rise to the basis of the charge. It is also interesting to note that Tasmania is the only one of the states that makes no reference to a requirement that the accused believe that his/her conduct was necessary.

In the **Northern Territory**, section 28 of the *Criminal Code Act 1983 (NT)* is relevant. It provides specifically for lethal force to be used where 'the nature of an attack is such as to cause the person using the force reasonable apprehension of death or grievous bodily harm.' According to Bronitt and McSherry the requirements of the defence are:

1. the accused reasonably apprehended death or grievous bodily injury; and
2. the accused believed that such defensive conduct was necessary.³²

³¹ Bradfield above n6 at 222. Also Bronitt and McSherry above n6 at 303. In Tasmania, there is no expressed requirement of necessity.

7.3 CONDITIONS RELATING TO THE ATTACK

7.3.1 Unlawfulness

According to Bronitt and McSherry, **Victoria** prescribes no requirement of ‘unlawfulness’.³² This was confirmed in *Zecevic v DPP (Vic)* where the court noted that ‘[w]hilst in most cases in which self-defence is raised the attack said to give rise to the need for the accused to defend himself will have been unlawful, as a matter of law there is no requirement that it should have been so.’³⁴ In the opinion of Bronitt and McSherry, however, self-defence against a lawful attack will only be upheld in exceptional circumstances.³⁵

In **Queensland** and **Western Australia** in establishing the requirements of self-defence, the Codes - Section 271 of the *Criminal Code Act 1899 (Qld)* and section 248 of the *Criminal Code Act 1913 (WA)* - make specific reference to an ‘unlawful’ assault and this has become one of the qualifying conditions for the application of the sections.³⁶ In clarifying the element of ‘unlawful’ as used in the *Griffith Code* Brennan J in *Zecevic v DPP (Vic)* stated that ‘“unlawful” is used in the self-defence provisions [of the Griffith Code] to describe the character of the force against which a person may defend himself, not to describe the force

³² Bronitt and McSherry above n6 at 303. See also Bradfield above n6 at 224.

³³ Bronitt and McSherry above n6 at 306.

³⁴ Above n13 at 653. Brennan J, however, disagreed with the majority judgment on this issue. It was his view that ‘the defence of self-defence is not available when the force against which the accused defends himself is lawfully applied.’: at 667. In his judgment he expressly affirmed the view expressed by Gibbs J in *Viro* namely that ‘[i]t is obvious enough that a person cannot rely upon a plea of self-defence unless the violence against which he sought to defend himself was unlawful.’: at 667. However, Brennan too noted a disfavour with the use of the term ‘unlawful’ and indicated a specific preference for the expression ‘unjustified’, stating that the concept of ‘unlawful’ may be confounded by legal technicality.: at 682.

³⁵ Bronitt and McSherry above n6 at 306.

³⁶ See above n8 at 231. In drafting the *Criminal Code Act 1995 (Cth)*, the MCCOC followed the approach of Queensland and Western Australia. Consequently, section 10.4(4) of the *Criminal Code Act 1995* states that self-defence will not apply if the accused is responding to lawful conduct and he or she knew that the conduct was lawful.

applied by a victim who is criminally responsible for applying it.³⁷ Stated otherwise, 'unlawful' in the Code provisions describes force which is 'not authorized, justified or excused by any law whatever be the state of mind of the person who applies it.'³⁸

In the **Australian Capital Territory** and **Northern Territory Codes** there is a clear statement that self-defence will not apply if the accused was responding to lawful conduct and he knew that the conduct was lawful.³⁹

In **South Australia** section 15(4) of the *Criminal Law Consolidation Act 1935* (SA) also states clearly that where the accused resists a person attempting to exercise the power of arrest or who is acting in response to an unlawful act committed by the accused, self-defence will only be available if the accused is able to show that s/he believed on reasonable grounds that the other person was acting unlawfully.⁴⁰ In *Fry* the issue of self-defence against a lawful arrest was specifically brought into question.⁴¹ In *casu* the accused raised a plea of self-defence after stabbing a police officer who was attempting to make a lawful arrest. The trial court found that self-defence was not proved and found the accused guilty of murder. On appeal, the Court of Criminal Appeal, South Australia dismissed the appeal and put the matter, especially with regard to self-defence against a lawful arrest, to rest. White ACJ stated:

... lawful arrest, even accompanied by some violence, is one of those situations where self-defence could hardly be said to arise – except perhaps in extreme cases of violence.⁴²

However, following Victoria, **Tasmania** makes no specific requirement that self-defence will only be available against an unlawful attack but Bronitt and McSherry

³⁷ Above n13 at 668.

³⁸ *Ibid.*

³⁹ Bronitt and McSherry above n6 at 306. See also sections 27(g) and 28(f) of the *Criminal Code Act 1983 (NT)*.

⁴⁰ Bronitt and McSherry above n6 at 306.

⁴¹ *Fry* (1992) 58 SASR 424.

⁴² Above n41 at 443.

note again that it will probably only be in rare situations that a lawful attack would provide reasonable grounds for self defence.⁴³

In *Thomas* the Criminal Court of Appeal in **New South Wales** followed the ruling of the court in *Zecevic* and accepted that in unusual cases, an accused might plead self-defence to a lawful arrest.⁴⁴ In *Thomas*, the victim arrived home to realise that his home had been burgled. The victim went out in search of the thief (who turned out to be the accused). Finding the thief, the victim attacked him, attempting to arrest him. A struggle ensued during which the accused stabbed the victim. The accused was convicted of assault and using an offensive weapon to resist lawful apprehension. The accused appealed on the basis that the self-defence instruction given to the jury by the trial court regarding the lawful conduct of the victim was erroneous. The Court of Criminal Appeal allowed the appeal and held:

If the impression conveyed by the directions at the time ... was that no issue of self-defence could arise if the actions of the [victim] were lawful, then ... a direction which conveyed such an impression was wrong.⁴⁵

⁴³ Bronitt and McSherry above n6 at 306 and section 46 of the *Criminal Code Act 1924 (Tas)*. In explaining their view, Bronitt and McSherry cite the example of a suspect who ‘defends’ himself against a police officer attempting to effect a lawful arrest. According to the authors, self-defence will not be available under such circumstances (except possibly in cases of extreme violence by the law enforcement agent): Bronitt and McSherry above n6 at 306. In the Report of the Law Reform Committee of the Northern Territory *Self Defence and Provocation* October 2000 at <http://www.nt.gov.au/justice/policycoord/documents/lawmake/Self%20Defence.pdf> [accessed on 7 December 2008] the authors note that the test for self defence in **Northern Territory** ‘removes the ... requirement that the response of the accused be to an unlawful arrack; ...’: at 8.

⁴⁴ *Thomas* (1992) 65 A Crim R 269 (NSW CCA).

⁴⁵ Above n43 at 273.

7.3.2 Imminence

7.3.2.1 Victoria

In Victoria, the legal rule with regard to the required temporal proximity between the *actus reus* and *mens rea* was defined by Lowe J in *McKay* as follows:

Reasonable self-defence is not limited to cases in which the life of the person committing homicide is endangered or grave injury to his person is threatened. It is also available where there is a reasonable apprehension of such danger or grave injury. There is such a reasonable apprehension if the person believes on reasonable grounds that such danger exists.⁴⁶

In *Zecevic v DPP (Vic)* the court held that self-defence is applicable when there is a physical attack on the accused and also in circumstances where the accused perceived that there was a danger that an attack would occur. All that is required is that the accused believed on reasonable grounds that she was being threatened or attacked.⁴⁷ Thus, the requirement of temporal proximity between the attack and the defence in the law of self-defence is satisfied if (i) the attack is

⁴⁶ *McKay* [1957] VR 560 at 562-3. In *Lane* [1983] 2 VR 449 (an interesting judgment that has analogous application in cases of battered women) the facts were as follows: the accused, a homosexual, had picked up the deceased in a bar and they had returned to the home of the accused. The accused testified that shortly thereafter, the deceased became belligerent, started smashing items of furniture in the house and threatened the accused. The accused retaliated and hit the deceased with a champagne bottle and continued assaulting him even after he was immobilised.: at 453-4 and 460. In advising the jury on the appropriateness of a self-defence finding, the Supreme Court of Victoria noted that there appeared evidence that the accused was terrorised by the deceased, who was a younger and stronger man. There was also evidence of the problems 'associated with the public disclosure of the presence of the naked deceased in his raving condition and in the applicant's own home' that prevented the accused from calling for help.: at 455. More importantly, the court recognised that the accused could easily have retreated from the *fracas*. However, it held that retreat was not an element of immunity. According to the court, a person in his own home, placed in constant danger of serious bodily threat, is entitled to take pre-emptive action, anticipating renewal of the attack by the intruder.: at 456. The evidence of the accused clearly indicated that, at the time of the killing he had not been the victim of physical assault but he testified, 'I couldn't work him out – he kept saying sorry and then smashing more things – well, I wasn't going to be the next victim. Bad enough having all my furniture smashed to pieces.': at 453. Considering the circumstances of the battered woman against the facts and decision in *Lane*, the writer submits that she has far more at stake when she defends herself against her abuser within the confines of her home.

⁴⁷ Above n13 at 651-2 (*per* Mason J), 657-9 (*per* Wilson, Dawson, and Toohey JJ), 672 (*per* Deane J) and 683 (*per* Gaudron J).

underway; (ii) there is a threat of danger; and/or (iii) the accused had a reasonable apprehension of harm. The court in *Zecevic v DPP (Vic)* showed express signs of abandoning the traditional requirements of imminence in favour of a simpler assessment of whether the accused believed that 'it was necessary to do in self-defence what he did.'⁴⁸ In expressly describing the law on the subject, Wilson, Dawson and Toohey JJ stated:

... a person who kills with the intention of killing ... can hardly believe on reasonable grounds that it is necessary to do so in order to defend himself unless he perceives a threat which calls for that response. A threat does not ordinarily call for that response unless it causes a reasonable apprehension on the part of that person of death ... If the response of an accused beyond what he reasonably believed to be necessary to defend himself or if there were no reasonable grounds for a belief on his part that the response was necessary in defence of himself, then the occasion will not have been one which would support a plea of self-defence.⁴⁹

Similarly, in *Osland* (a case which dealt with intimate partner homicide) Kirby J noted specifically that self-defence may still be applicable in a case involving a battered woman who kills an abusive partner even though no actual attack by the deceased is underway at the time. The court recognised, however, that the justification for the accused's conduct – specifically that there was a genuinely apprehended threat of imminent danger sufficient to warrant conduct in the nature of a pre-emptive strike – must be established by the evidence and, if successful, would result in the acquittal of the accused.⁵⁰ Thus, it would appear that the court acknowledged that whilst there may be no overt evidence of a proximate attack, the threat and fear from the prior conduct of the victim remains on foot and may justify a response in self-defence. In each case, the courts will consider the particular facts of the case in reaching its decision.

⁴⁸ Above n13 at 666 *per* Brennan J.

⁴⁹ Above n13 at 662.

⁵⁰ *Osland* (1998) 159 ALR 170 at 185 and 220 (HC) *per* Gaudron and Gummow JJ and Kirby J respectively.

7.3.2.2 Australian Capital Territory, Northern Territory, New South Wales,
South Australia and Tasmania

In the Australian Capital Territory, the Northern Territory, New South Wales, South Australia and Tasmania there is no requirement that the attack must have commenced.⁵¹ In *Barton v Armstrong* the plaintiff alleged an assault after being threatened over the telephone.⁵² The evidence indicated that the defendant was a person in authority over the plaintiff and that the plaintiff had a general fear of the defendant. Thus, when the defendant telephoned the plaintiff and threatened him with serious violence, the plaintiff feared the threat.⁵³ In dealing with the question of whether the conduct of the defendant constituted an assault, Taylor J held that threats uttered over a telephone in such circumstances could not be 'properly categorised as mere words'.⁵⁴ The court found that the words and the circumstances could put a reasonable person in fear of later physical violence and that this could constitute an assault 'although the victim does not know exactly when that physical violence may be applied.'⁵⁵ Explaining further he noted:

Some threats are not capable of arousing apprehension of violence in the mind of a reasonable person unless there is an immediate prospect of the threat being carried out. Others, I believe, can create the apprehension even if it is made clear that the violence may occur *in the future, at times unspecified and uncertain*. Being able to immediately carry out the threat is but one way of creating the fear of apprehension, but not the only way.⁵⁶

Continuing, Taylor J held that in deciding whether or not there was an assault, the court would have to consider the circumstances and, most materially, the

⁵¹ Bronitt and McSherry above n6 at 305.

⁵² *Barton v Armstrong* [1969] 2 NSW 451.

⁵³ Ibid.

⁵⁴ Above n52 at 455.

⁵⁵ Ibid.

⁵⁶ Ibid.

effect on the victim's mind of the words or action – and not whether the defendant actually had the intention or means to follow it up.⁵⁷

In *Zanker v Vartzokas* the facts were that the accused had accepted a lift, and then demanded sexual favours from her.⁵⁸ When the complainant refused, the accused had refused to allow her to leave the vehicle and threatened, 'I am going to take you to my mate's house. He will really fix you up.'⁵⁹ White J noted, 'The threat in the circumstances put her in such fear that she opened the door and leapt out on to the roadside.'⁶⁰

At the trial *a quo* the magistrate said:

[The complainant] was, no doubt, afraid that she would be detained by the defendant and that at some time in the future she would be subjected to an assault, probably a sexual assault. That fear was real. It was induced by the words and actions of the defendant. It was the defendant's intention to induce it, but it was not, in my judgment, a fear of immediate violence.⁶¹

Based on the fact that the threat of harm was not immediate, the magistrate thus dismissed the complaint.⁶² On appeal, White J acknowledged that in cases of assault '[g]enerally speaking, the authorities refer to the immediacy or imminence of the feared physical violence.'⁶³ However, referring to *Barton v Armstrong* he held that in this case too, the complainant reasonably believed 'in the defendant's intention and power to inflict violence in due course with the help of his "mate".'⁶⁴

In finding that there was an assault on the complainant, White J held:

⁵⁷ Ibid.

⁵⁸ *Zanker v Vartzokas* (1988) 34 A Crim R 11, at 11. From the facts of the case, it is clear that the complainant and the accused were strangers.: at 11.

⁵⁹ Above n58 at 12.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Above n58 at 17.

... her fear was a continuing fear induced by his original words in a situation where he 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, the gist of assault, ever present in the victim's mind.⁶⁵

Referring to *Zanker v Vartzokis* Leader-Elliot notes that whilst the court referred back to the condition of imminence, it appeared to take the view that 'relative to an assault, conduct would satisfy the old element of imminence if it were established that the attack, set to occur at some uncertain time in the future, was *inevitable*, to the extent that the victim had no reasonable means of preventing it from occurring.⁶⁶ Interestingly, the standard of 'inevitability' was again raised by the Victoria Law Commission,⁶⁷ and by Yule who notes that such an amendment of the law would best accommodate the lived experience of victims of domestic violence.⁶⁸

In *Tassone* (unreported) the accused shot her sleeping husband after he had assaulted and raped her. The evidence was that he was a violent man and that this was not an isolated incident of abuse. The accused testified that she was terrified of the extreme and unpredictable violence of her husband, that she had tried (unsuccessfully) to leave him on a number of occasions, and that she believed that she would never be able to get away from him. She testified further that the rape had 'upped the ante' in the sense that it demonstrated a new level of violence towards her. In his instruction to the jury, however, the judge demonstrated a clear bias in favour of the view that a sleeping aggressor could not present a 'threatened assault' against which a woman could be defending herself. In his instruction, he stated, '[This case] will be very likely to be beyond the outer limit [of self-defence], but I say my inclination is to leave it to the jury.'⁶⁹

⁶⁵ Above n 58 at 18.

⁶⁶ I Leader-Elliot 'Battered But Not Beaten: Women Who Kill in Self-Defence' 1993 15 *Sydney Law Review* 403, at 453.

⁶⁷ Victoria Law Reform Commission: *Defences to Homicide: Final Report* above n4 at 59.

⁶⁸ Yule above n4 at 18.

⁶⁹ J Stubbs and J Tolmie 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' 1999 23 *Melbourne*

The jury, however, found that even though her husband had not verbally threatened her before he fell asleep, the general and ongoing threat that he presented to her, demonstrated by his past behaviour, was sufficient to justify a finding that she had acted in self-defence.⁷⁰ In supporting the decision in *Tassone* the Queensland Government Taskforce Report emphasised that the acquittal was justified 'on the basis of the on-going threat represented by the constant abuse.'⁷¹ In *Secretary* the Supreme Court of the Northern Territory was clear that there was no specific requirement of 'imminence' (or a 'temporal connection', *per* Mildred J) in the law.⁷² Thus, the court in *Secretary* found that even a pre-emptive strike would satisfy the criteria for self-defence were it found that 'the accused believed on reasonable grounds that it was necessary to so act.'⁷³

7.3.2.3 Queensland and Western Australia

In Queensland and Western Australia the Codes refer specifically to 'defence against an assault'.⁷⁴ However, a complete reading of the *Criminal Code Act* 1899 (Qld) and *Criminal Code Act* 1913 (WA) makes it clear that the reference to 'assault' also includes threats of violence.⁷⁵

Thus, in *Keith* the Queensland Court of Appeal acknowledged that antecedent threats could give rise to a circumstance of self-defence; however, the court emphasised that the threats must have been made within a reasonable time of

University Law Review 708, at 734 referring to the unreported decision of *Tassone* Supreme Court of the Northern Territory, 20 April 1994.

⁷⁰ *Ibid.*

⁷¹ Above n24 at 3. The Taskforce commented that in assessing the question of reasonableness, especially in the so-called non-confrontation cases, a truer position of the law would be to regard the battered woman as defending herself 'against the cumulative effect of the last assault, plus the numerous previous assaults by the batterer.': at 4.

⁷² *Secretary* (1996) 107 NTR 1 at 7. In *casu* the accused shot and killed her sleeping aggressor after he fell asleep after terrorising her, assaulting her, and threatening her with further harm when he awoke.

⁷³ Above n72 at 10-11.

⁷⁴ Section 248 *Criminal Code (WA)* 1913 is not materially different from the provisions in section 271 *Criminal Code (Qld)* 1899.

⁷⁵ See *Criminal Code (Qld)* ss 245, 271, and 272, *Criminal Code (WA)* ss 222, 248 and 249. See also above n22 at 146; and *Morgan v Colman* (1981) 27 SASR 334 at 337.

the defensive action.⁷⁶ *In casu* it was held that the trial judge had been correct in refusing to accept evidence of death threats against the accused made by the deceased three years previously and then repeated about eight months before the accused shot his victim allegedly in self-defence.⁷⁷

In *Phillips*, Barwick CJ confirmed:

[An assault in the common law sense of the word] necessarily involves the apprehension of injury or the instillation of fear or fright. It does not necessarily involve physical contact with the person assaulted⁷⁸

More recently, *Stjernqvist* (unreported) makes a very important statement particularly in cases involving intimate partner homicide. In *casu* the jury acquitted an accused on the basis of self-defence when she shot her husband in the back as he walked away from her. In instructing the jury, the trial judge made it clear that the assault against which the accused was mounting the defence was to be found in the general nature of the relationship and particularly in the threats the deceased had made to the accused over a period of years, rather than in any specific action he had taken on the day in question.⁷⁹

The Supreme Court of Western Australia applied a similar interpretation to the condition of imminence and in *Beckford* noted that where an attack was imminent (but not yet commenced), the accused would certainly have been justified in taking pre-emptive action.⁸⁰

⁷⁶ *Keith* [1934] St. R. Qd 155 discussed in Gray above n10 at 128.

⁷⁷ *Ibid.*

⁷⁸ *Phillips* (1971) 45 ALJR 467, at 472.

⁷⁹ Above n69, at 735 referring to the unreported decision of *Stjernqvist* Cairns Circuit Court, 18 June 1996.

⁸⁰ *Beckford* [1987] 3 WLR 611 at 619. See also *Conlon* (1993) 69 A Crim R 92 which confirmed this approach.

7.4 CONDITIONS RELATING TO THE DEFENCE

7.4.1 The Accused's Belief and Defensive Action

7.4.1.1 Victoria

In *Zecevic v DPP (Vic)* the court established the requirement that the accused must have had a belief based on reasonable grounds that the force applied was necessary.⁸¹ In explaining the condition, Tolmie notes that two features of evidence are vital. Firstly, she refers to the 'nature of the threat' faced by the accused at the time of acting and points out that this would involve an assessment of the violence threatened by the deceased at the relevant time, as interpreted in the context of the aggressor's past violent behaviour towards the accused. Secondly, Tolmie stresses the importance of the evaluation whether the accused had alternative courses of action available to her to deal with the threat.⁸² In amplification she states that '[c]learly if she [the accused] was able to perceive realistic alternatives to lethal self-help then her actions were not "necessary" to defend herself.'⁸³

In interpreting the rule of necessity, Bronitt and McSherry maintain that the force used in relation to the threat or attack must be reasonably necessary (as opposed to a minimum necessary response).⁸⁴ They comment that this was also the intention of the court in *Zecevic* wherein, although the court did not expressly state any preferred rule with regard to the element of necessity, the court did endorse the legal principle established in *Palmer* namely that:

It is both good law and good sense that [the accused] may do, but may only do, what is reasonably necessary. ... [However,] if there has been an attack so that defence is reasonably necessary it will be recognised

⁸¹ Above n13 at 654, 661, 666, 681, and 683.

⁸² J Tolmie 'Pacific-Asian Immigrant and Refugee Women Who Kill their Batterers: Telling Stories that Illustrate the Significance of Specificity' 1997 19 *Sydney Law Review* 472, at 477.

⁸³ *Ibid.*

⁸⁴ Bronitt and McSherry above n6 at 308; and Bradfield above n6 at 202.

that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action.⁸⁵

Summarising the legal position, it is submitted that in dealing with this condition the courts are required to determine firstly, what the accused believed was necessary (this is a subjective assessment); and secondly, whether there were reasonable grounds to warrant such a belief (this will be an objective assessment).

In considering a further specimen of personal circumstances to which the courts will have regard, the court in *Wills* acknowledged that 'all physical features of the situation and of the action of the accused man involved' should be given consideration;⁸⁶ whilst in *Hector* the court recognised a somewhat narrower rule namely that the nature of the relationship between the parties (which was alleged to have been violent) as being of relevance.⁸⁷ In support of these decisions, Findlay notes that personal circumstances such as 'ongoing victimisation through violence' are always relevant and may influence both the subjective and objective evaluations.⁸⁸

In *Osland's case* the facts were as follows: the accused and her son were charged with the murder of her husband (and the boy's step-father).⁸⁹ The evidence of the accused and her son was that during the many years that they had lived with the deceased, he had been a tyrannical and violent man. The evidence of the appellant was that the accused's violence and her fear of it continued up until the day he died.⁹⁰ The facts were that the accused and her son worked out a plan to murder the deceased and get rid of his body. They dug a hole in the garden and during the evening meal, the accused mixed sedatives into the deceased's dinner. When the sedatives took effect and the deceased retired to sleep, the son hit him over the head with an iron pipe in the presence of

⁸⁵ *Palmer* [1971] AC 814 at 831-2. See also above n13 at 654 (*per* Mason CJ) and at 661 and 665 (*per* Wilson, Dawson and Toohey JJ).

⁸⁶ *Wills* [1983] 2 VR 201 at 212.

⁸⁷ *Hector* [1953] VLR 543 at 544.

⁸⁸ M Findlay *Problems for the Criminal Law* (Oxford University Press, Victoria: 2001) 277.

⁸⁹ Above n50.

⁹⁰ Above n50 at 172.

the accused. The accused and her son then took the body and buried it in the hole that they had dug earlier. The mother and son then made out that the deceased had 'disappeared'.⁹¹ On the facts, the son was acquitted of murder but the mother was convicted of murder.⁹² She appealed the decision to the Victoria Court of Appeal which upheld the conviction. She then appealed to the High Court of Australia. In her defence, the accused claimed that the deceased had been violent and that she had feared him. Both mother and son gave evidence of the brutality of the deceased and the fact that he had during the day prior to the decision to kill him threatened to kill the son if he did not leave the house.⁹³

In their dissenting judgment, Gaudron and Gummow JJ noted specifically the relevance of battered woman syndrome evidence in the context of self-defence. In considering the issue, the judges remarked:

BWS evidence, specifically the heightened arousal or awareness of danger that such a woman might possess may be directly relevant to self-

⁹¹ Ibid.

⁹² Ibid.

⁹³ In *Osland* the accused did not succeed in her defence.: See above n50 *per* McHugh, Kirby and Callinan JJ; Gaudron and Gummow JJ dissenting. In specifically looking at the evidence presented by the accused regarding her violent relationship with the accused, Kirby J in *Osland* notes, 'Self-defence may indeed be relevant to a case where an abusive relationship is established by the evidence. Such evidence may assist the jury to understand, as self-defensive, conduct which on one view occurred where there was no actual attack on the accused underway but rather a genuinely apprehended threat of imminent danger sufficient to warrant conduct in the nature of a pre-emptive strike.': at 220. However, in understanding such cases, Kirby J noted further that in the latter instances what was required was that immediately before the fatal attack, the alleged abuser must be seen to have made some attack of threat of attack. The judge clarified, however, that '[t]he significance of the perception of danger is not in its imminence. It is that it renders the defensive force used necessary and justifies the defender's belief that he or she had no alternative but to take the attacker's life.': at 221. Considering the instruction to the jury, Kirby J was satisfied that the jury had been properly advised and had still come to the conclusion that the appellant's conduct was 'pre-meditated and effected with a calm deliberation and detached reflection rather than reasonably necessary to remove further violence threatening her with death or really serious injury.': at 221. In summing up the approach of the Australian courts to the evidence, Callinan J found that in dealing with cases such as *Osland*, which involved allegations of battered woman syndrome, the judge was required to give due weight to the expert evidence presented and the jury was also required to consider such evidence in assessing the factual realities of the case.: at 243. In reviewing the jury instruction and the findings, the judge was satisfied that the trial judge had 'moulded his directions to accord with the facts of the case before the court. ... In the end, it was for the jury to decide whether the deplorable conduct of her husband as recounted by her had actually occurred and whether, in the circumstances, it justified the response of the appellant. It was open to the jury to accept or reject the contentions of the appellant and of the psychologist on these matters. Their verdict of guilty in her case strongly suggests that this is what the jury did.': at 244.

defence, particularly to the question whether the battered woman believed that she was at risk of death or serious bodily harm and that her actions were necessary to avoid that risk.⁹⁴

It is the writer's view that the dissenting judgment is especially important for its acknowledgement of the relationship between battered woman syndrome and self-defence. However, Stubbs and Tolmie are more critical of the judgment pointing out that a fundamental limitation is the fact that it focuses on battered woman syndrome as only explaining the subjective elements of self-defence. They comment that Gaudron and Gummow JJ appear to suggest that:

... BWS assists the court in understanding the personal or idiosyncratic – the 'subjective' responses of battered women who suffer from the syndrome – rather than explaining the effect that circumstances of violence might have on the responses of ordinary or reasonable women.⁹⁵

Whilst the comment of Stubbs and Tolmie is fair, especially regarding the court's failure to present a more comprehensive judgment on the subject, it is suggested that it could not have been the intention of the court to limit the battered woman syndrome evidence only to the subjective belief of the accused. This view is supported by the fact that in dealing with the use of expert evidence in cases of battered women, the judges themselves specifically acknowledged that expert testimony to explain the history of a particular relationship would assist the court in understanding the reasonableness of the belief (and allied conduct) of the accused.⁹⁶

In his judgment, and specifically with reference to battered woman syndrome, Kirby J in *Osland* commented that the purpose of introducing such evidence was 'to show how a victim's actions in taking lethal self-help against the abuser were reasonable in the extraordinary circumstances which the victim faced.'⁹⁷

⁹⁴ Above n50 at 185.

⁹⁵ Above n69 at 725.

⁹⁶ Above n50 at 185. In fact, Stubbs and Tolmie actually also admit this fact of the judgment.: above n69 at 725 fn79.

⁹⁷ Above n50 at 215.

Referring to and applying the law as set out in the Canadian case of *Malott* [1998] 1 S.C.R. 123 as persuasive authority, he noted that such evidence was integral to the assessment of ‘whether, in the evidence, the particular accused believed on reasonable grounds that there was no other way to preserve herself or himself from death or grievous bodily harm than by resorting to the conduct giving rise to the charge.’⁹⁸ In looking at all the facts of the case and the nature of the relationship between the accused and the deceased, Kirby J referred to the ‘significance’ of the accused’s perception of danger as being relevant to assessing whether the defensive force used was really necessary and justified the defender’s belief that she had no alternative but to take the attacker’s life.⁹⁹ Stubbs and Tolmie thus suggest that the approach of Kirby J is preferable to that of Gaudron and Gummow JJ in that it more directly acknowledges that evidence of battered woman syndrome is relevant to the objective leg of the test of self-defence.¹⁰⁰

In underscoring the importance of the social framework and the various circumstances that the court will consider, Scutt nevertheless cautions against drawing the conclusion that the overall test for assessing the accused’s belief and consequent defensive action has become purely subjective – she emphasises

⁹⁸ Above n50 at 217-8.

⁹⁹ Above n50 at 221. On the evidence before it, the court found that the behaviour of the accused was pre-meditated and the conviction was confirmed. The further specific evidence before the court summarised by Callinan J was that:

- (i) two witnesses testified (and there was evidence to this effect) that well before the killing the accused had sought to solicit their services to kill the deceased;
- (ii) the appellant’s claims of fear of the deceased did not match statements that she had made to independent third parties. In these conversations the accused had admitted to leading an independent life from the accused, going out alone with her friends, and nowhere in the statement transcripts did she refer to sustained abuse from the deceased; and
- (iii) the appellant, in her evidence, did not make any suggestion of particular words or deeds which may have triggered the killing. Her evidence was simply that it was ‘more of the same’. (Whilst the son gave evidence of the abuse suffered by him and the accused on the night of the killing, the accused did not do the same.): above n50 at 235.

Thus, concluded Callinan J, ‘... this was a pre-planned killing in which the participants had, pursuant to that plan, dug a grave, rendered the deceased comatose by drugging his food, discussed the method of executing the “kill” and then ruthlessly carried it out. Such pre-planning, it was said, was the antithesis of self-defence ...’: above n50 at 234-5.

¹⁰⁰ See above n69 at 726.

that the test is clearly not what the accused honestly, even if unreasonably, believed.¹⁰¹ The overall test is an objective test with subjective elements.

Crenshaw re-iterates the relevance of taking cognisance of the individual experiences of the accused. In her argument she urges further that particular note be taken of the 'different hierarchies of oppression [that] interact in a person's life to produce unique experiences.' However, she warns against the trap of developing stereotypes.¹⁰²

Cognisant of the seriousness of the problem of domestic violence facing the country and the difficulties confronted by victims of abuse in the courtroom, the Victoria Law Reform Commission gave specific consideration to the question whether a new defence should be introduced with regards to women who kill abusive partners.¹⁰³ However, deciding against this approach, the state rather opted for a modification of the existing law.¹⁰⁴ A new provision was introduced which takes note that where family violence is involved a person may have reasonable grounds for believing that their conduct is necessary to defend themselves even if responding to harm that is not immediate.¹⁰⁵ Evidence which was considered relevant included (but was not limited to) the history of the relationship; the cumulative effect of domestic violence; social, cultural, or economic factors; general nature of relationships that involve violence; and the psychological effect of violence.¹⁰⁶

7.4.1.2 New South Wales

In New South Wales the requirement is that the accused has a belief that force was necessary and a reasonable response to the circumstances as s/he perceives them to be. In *Dziduch*, the court confirmed that the proper instruction to a jury dealing with a case of self-defence was for them 'to consider the whole

¹⁰¹ JA Scutt *Women and the Law* (The Law Book Company, New South Wales: 1990) 417.

¹⁰² K Crenshaw 'Mapping the Margins: Identity Politics, Intersectionality, and Violence Against Women' 1991 43 *Stanford Law Review* 1243, at 1245.

¹⁰³ Victoria Law Reform Commission, *Defences to Homicide: Final Report* above n4 at 66.

¹⁰⁴ *Crimes Act* 1958 (Vic), section 9AE.

¹⁰⁵ Above n104, section 9AH.

¹⁰⁶ *Ibid.* Victoria is the only state to have specifically enacted legislation in this regard.

of the circumstances' in which the accused found himself.¹⁰⁷ In *Hickey* the New South Wales Supreme Court was presented with the following facts: The deceased had been abusive towards both the accused and their children, especially when he was intoxicated.¹⁰⁸ At the time of the killing, the accused was living apart from the deceased. However, on the day in question, the accused had taken their children to visit with their father.¹⁰⁹ However, after some time spent drinking and after the accused refused to allow the children to stay overnight, the deceased became violent.¹¹⁰ The evidence was that he threw the accused onto the bed, headbutted her and tried to strangle her.¹¹¹ The deceased then stopped his assault, sat up on the bed and turned his back on the accused. At this point the accused grabbed a knife and fatally stabbed the deceased.¹¹² The question was whether it could be found that the accused believed that it was necessary to kill the deceased and whether such a belief could be said to have been based on reasonable grounds. On the facts, the jury found that this was so and acquitted the accused. In arriving at its decision, the jury took particular notice of the history of the relationship between the parties and the violent assault which occurred immediately before the killing.¹¹³

In *Conlon*, heard by the Supreme Court of New South Wales, the prosecution argued that the decision as to whether there were reasonable grounds for any belief on the part of the accused that it was necessary to do in self-defence what he did, was a purely objective one.¹¹⁴ The court disagreed. Relying on *Zecevic v DPP (Vic)* the court found that the belief which had to be reasonable was the belief of the accused and not that of the reasonable hypothetical person in the position of the accused.¹¹⁵ Thus, the court added, 'the assessment as to whether the accused's belief was based on reasonable grounds means that account must be taken of those personal characteristics of this particular accused which might affect his appreciation of the gravity of the threat which he faced and as to the

¹⁰⁷ *Dziduch* (1990) 47 A Crim R 378 at 380 (CCA NSW).

¹⁰⁸ *Hickey* (1992) 16 Crim LJ 271, at 271.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Above n108 at 272-3.

¹¹⁴ *Conlon* above n80. See also *Hawes* (1994) 35 NSWLR 294.

¹¹⁵ *Conlon* above n80 per Hunt CJ at 98.

reasonableness of his response to that danger, ...¹¹⁶ In *casu*, in considering the personal circumstances of which note should be taken, the prosecution argued that 'voluntarily induced intoxication through the consumption of alcohol or drugs should not be taken into account as such a personal characteristic because ... to do so would entitle those whose perceptions are mistaken by reason only of such intoxication to kill with impunity.'¹¹⁷ Again rejecting the argument, the Supreme Court held:

No judgment of an Australian court ... given since *Zecevic* has been found which insists that such a characteristic should be excluded from this assessment. ... [Accordingly,] the voluntarily induced intoxication of the accused [should be taken into account] in so far as it may have affected either his appreciation of the gravity of the threat which he faced or the reasonableness of his response to that danger.¹¹⁸

In *Hawes* the Supreme Court of New South Wales took a similar approach to *Conlon* confirming that it was the belief of the accused, based on the circumstances as the accused believed them to be, which had to be reasonable – and not the belief of the hypothetical person in the position of the accused.¹¹⁹ The test thus appears reasonably well settled as a hybrid objective and subjective assessment.

In *Chhay*, the accused was charged with the killing of her husband who she claimed had been habitually violently abusive towards her.¹²⁰ The accused raised self-defence (and, in the alternative, provocation) to the charge of murder

¹¹⁶ *Conlon* above n80 at 99.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.* In New South Wales self-defence will not be available to a defender in circumstances where she was mistaken as a result of self-induced intoxication. This has been specifically legislated against in section 428F of the *Crimes Act* 1900 (NSW). See also section 1 of the *Criminal Code Act* 1983 (NT) above n10. Referring specifically the recognition of intoxication, Leader-Elliott agrees with the more sympathetic and more realistic approach to intoxication when self-defence is in issue.: above n66 at 448.

¹¹⁹ Above n114 at 306.

¹²⁰ *Chhay* (1994) 72 A Crim R 1 at 2. See also above n80 where Tolmie discusses the unreported trial judgment (*Chhay* Supreme Court of New South Wales, Criminal Division, 24 August 1992).

that was brought against her. The Supreme Court of New South Wales found her guilty and sentenced her to twelve years imprisonment, to serve a minimum term of six years.¹²¹ She successfully appealed the conviction and sentence before the Court of Criminal Appeal, New South Wales. The Appeal Court *per* Gleeson J found that the trial judge had erred in his instructions to the jury both in respect of self-defence and provocation defences especially when explaining the element of temporal proximity.¹²² In his judgment at the trial, Slattery AJ advised the jury that ‘... the crucial matter is what happened at the time of the killing.’ However, Gleeson J accepted the argument of counsel for the appellant that this was ‘too narrow a basis’ and the jury should rather have been instructed that there was an issue for them to consider ‘even if they were satisfied beyond reasonable doubt that, at or immediately before the time of the killing, there was no attack upon the appellant by the deceased.’¹²³

However, before the case was re-heard, the accused pleaded guilty to manslaughter, and the plea was accepted by the prosecution and the accused was accordingly sentenced to a term of eight years imprisonment, to serve a minimum of four.¹²⁴

Tolmie argues that a real and possible reason for the accused to have lied to the police may have been embedded in the accused’s life history and experience; yet

¹²¹ Above n120 at 2.

¹²² Above n120 at 14.

¹²³ Above n120 at 6.

¹²⁴ Above n82 at 476. The facts of the case were detailed in the judgment of the trial court, which was not reported. The writer has taken the facts from the summary presented by Tolmie – see above n82. According to Tolmie’s representation, The facts indicated that after the killing, the accused told the police that she and her husband had been attacked by robbers. She later confessed to her attorney that she had killed her husband. Her version was that her husband had come at her with a meat cleaver. She had ducked, grabbed his legs (causing him to trip) and then grabbed the cleaver from where he had dropped it and attacked him, to prevent him from killing her. However, the psychiatrist who testified for the defence during the sentencing stage of the case testified that during their consultations the accused had told him that she had killed her husband whilst he was asleep, and that she had done so in response to his earlier violent behaviour.: above n82 at 478. Her version of the events (as told to the psychiatrist) was that on this occasion she had identified two things that were different in his behaviour when compared to his other abusive outbursts. Firstly, he made death threats against her and the children and secondly, he had made the threats whilst holding a knife. She believed that there was an escalation to his violence and that there was now a real probability of harm to herself and her children.: above n82 at 478.

her history was never actually presented to the court.¹²⁵ Tolmie also points out that the accused had lived in Cambodia under circumstances when executions and torture, especially of the capitalist class from which the accused came, were rife. The people soon learned to hide their histories and their family backgrounds, as a means of protecting themselves. The accused was forced to marry a man chosen for her by the state. She and her husband later fled Cambodia and sought refugee status in Australia. The state and its representatives were never seen by the accused as protectors.¹²⁶ Tolmie concludes that the court in considering the case of *Chhay* completely overlooked this aspect of her reality.¹²⁷

Another aspect that the court emphasised was the lack of evidence to corroborate the claims of the accused. As discussed in Part One of this study, research into intimate violence has shown that it is not uncommon for the abuser to assault his victim in private, and on parts of the body where the bruising does not show or cannot be seen. Confirming this fact in her relationship with the deceased and explaining the lack of witnesses, the accused's evidence to the court was that the deceased had always attacked her when there was no one around to assist her and she was vulnerable.¹²⁸

Also, it is recognised in the literature on family violence that the shame and embarrassment of being an abused wife, the social standards and the family loyalties often prevent the victim from confiding in people.¹²⁹ Tolmie supports this comment noting that these values are particularly entrenched in the cultural teachings of Asian families 'where the individual represents the family [and] guilt and shame assume a different meaning. The Asian concept of "loss of face" implies that the entire family clan loses respect and status in the community when

¹²⁵ Ibid.

¹²⁶ Above n82 at 479-81

¹²⁷ Tolmie notes:

If anything, the judge tended to discount or minimise the significance of the accused's recent history by telling the jury that it was relevant only to her state of mind when she killed the deceased. ... [A]ny sympathy or prejudice they might personally feel towards her [should be] put aside as she had now placed herself under the protection of the Australian legal system.: above n82 at 482. See also above n102 at 1249.

¹²⁸ Above n82 at 486.

¹²⁹ See Part One below.

an individual is shamed. ... This places a severe burden on the individual to keep harmony and order, and to minimise any conflicts and problems which could bring guilt and shame to the family.¹³⁰ This makes it more difficult for the victim and reinforces the feeling of being trapped in the violent relationship.

7.4.1.3 Queensland and Western Australia

In Queensland and Western Australia, the requirements of the defence are firstly that the accused had a reasonable apprehension of death or grievous bodily harm. Under this requirement, Kenny notes that in determining whether the fear of the accused was reasonable, one must evaluate such apprehension against that of a reasonable person. The test is thus objective.¹³¹

In *Keith* Web J held that whilst the test was the objective standard of the reasonable person, a court was always required to take proper cognisance of the circumstances and position of the accused.¹³² However, he also pointed out that 'the test is not retrospective in perpetuity' and that the courts will always require 'a reasonable *nexus* between the alleged defensive action and the prior conduct of the victim.'¹³³ In *Muratovic* there was evidence of prior violence to the accused by the victim and a threat made six days before the killing incident, which the trial judge had refused to admit, the Court of Criminal Appeal, Queensland allowed the appeal and ordered a new trial, recognising that the jury was entitled to consider the evidence as to the previous threats and assaults to show the nature of the final attack and the accused's apprehension concerning it.¹³⁴ Similarly, in *Masters* the Court of Criminal Appeal, Queensland again held that evidence of the accused's belief about the violent character of his victim and evidence of the basis upon which that belief had been founded was admissible as going to the issue of the accused's belief that he faced a threat of death or grievous bodily harm and the reasonableness thereof.¹³⁵

¹³⁰ Above n82.

¹³¹ Above n8 at 233. See also *Muratovic* [1967] Qd R 15 at 28 followed in *Lawrie* [1986] 2 Qd R 502.

¹³² *Keith* [1934] St. R. Qd. 155 at 169. See also Gray above n10 at 128.

¹³³ Above n132 at 169-70.

¹³⁴ *Muratovic* above n131 at 19-20.

¹³⁵ *Masters* (1986) 24 A Crim R 65. See also *Ellem* (1994) 75 A Crim R 370 at 373-4.

The second requirement under the law of Queensland and Western Australia in cases of unprovoked assault and a lethal act of self-defence is that the accused had a belief, on reasonable grounds, that the force used was necessary and he or she could not otherwise have preserved him or herself from death or grievous bodily harm.

The first aspect of this condition is the belief by the defender that the force used was necessary and that she could not have preserved herself by any other means. In *Keith* the court was of the opinion that the factors to be considered went beyond the immediate engagement between the attacker and the accused and the weapon that the attacker may have showed.¹³⁶ The court was also required to take into account any previous conduct by the attacker for example any prior acts of hostility towards the accused.¹³⁷ Web J noted that ‘the apprehension of the latter would naturally be grounded on the knowledge he possessed of such manifestations and declarations.’¹³⁸

In *Marwey* the accused had fatally stabbed his victim and was charged with murder. In dealing with the plea of self-defence and specifically this requirement, the trial judge instructed the jury as follows:

¹³⁶ Above n132 at 177.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.* However, despite taking cognisance of the previous threats and utterances of the deceased, the Appeal Court dismissed the appeal finding that there was a remoteness between the alleged defence of the accused and the previous conduct of the deceased. In *casu*, there was evidence that there had been an ongoing relationship of hostility between the accused and the deceased. However, the judge refused to admit evidence of the deceased’s assaults on other persons as well as statements made by the deceased some eight months prior that he (the deceased) intended to kill the accused. On the day in question, the accused claimed that his bull had strayed on to the property of the deceased and he went onto the deceased’s property to retrieve his animal. He had a shotgun with him in case he needed to shoot the animal. Whilst on his mission, the accused was confronted by the deceased who advanced towards him. The accused claimed that the deceased was bigger and stronger than him and that he was afraid of the deceased. The accused shot the deceased, fatally wounding him. The accused appealed against the decision of the trial judge to exclude the further evidence of the deceased’s conduct and threats.

A critical question is what is reasonably necessary. Of course, you take into account all the circumstances [but i]n the ultimate result ... it is all a question of what is reasonable in the circumstances,¹³⁹

The question before the Supreme Court of Queensland was whether the inclusion of the objective qualification that the defence 'should be reasonably necessary' constituted a misdirection to the jury. The Supreme Court upheld the appeal and held that the appropriate question should be: Was the belief of the accused based on reasonable grounds?¹⁴⁰ O'Regan criticises the instruction of the court *a quo* as it obviously 'incorporated into the second paragraph a test of objective necessity.'¹⁴¹ In both *Muratovic* and *Marwey* the courts were clear that the level of force used will be justified if the accused believed, on reasonable grounds, that the force was necessary to make an effective defence.¹⁴² Confirming the application of the law, McPherson JA held in *Gray* that it was the existence of an actual belief to that effect that remained the critical and decisive factor.¹⁴³ The courts have agreed that the provisions of the *Codes* refer to the former. Thus, in *Gray* the court noted that in the case of s 271(2) the test will concern itself with the defender's actual state of mind and the assessment is 'at least, in part, subjective. The defender must believe that what he is doing is the

¹³⁹ *Marwey* (1977) 138 C.L.R. 630 at 633-4. In outlining some of the circumstances that the jury could consider, Barwick CJ noted that on the one hand the jury would have to take note of the seriousness of the weapon used by the accused (a knife), whilst on the other hand they would have to balance whether they accepted that this was the only weapon available to the accused in the circumstances in which he claimed to have found himself. The judge also reminded the jury to take note of the 'stormy atmosphere' during the attack and the speed of the assault.: at 633-4. See also above n24 where the taskforce confirmed that the use of lethal force requires that the accused be confronted with a threat of death or serious bodily injury.: at 14.

¹⁴⁰ Above n139 at 635-6 and 637.

¹⁴¹ RS O'Regan *New Essays on the Australian Criminal Codes* (The Law Book Company Limited, Sydney: 1988) 87. See also above n8 at 234 where Kenny confirms that there 'is no requirement for a test of reasonableness to be applied to the amount of force which may be used by the accused.'

¹⁴² *Muratovic* above n131 at 19 and above n139 at 636-7. See also *Gray* (1998) A Crim R 593 at 593-4. The confusion in the *Marwey case a quo* may have arisen from the fact that in Queensland and Western Australia the *Codes* distinguish between non-lethal defence and lethal defence. In the former instance, the Code provisions require that the force used be 'reasonably necessary' – section 271, para 1 *Criminal Code Act 1899 (Qld)* and section 248, para 1 *Criminal Code Act 1913 (WA)*, but in the latter instance, the reference is only to force that is 'necessary'.

¹⁴³ Above n142 at 593.

only way he can save himself or someone else from the assault.¹⁴⁴ There is no additional requirement that the force used be, objectively speaking, necessary for the defence.¹⁴⁵

In interpreting the provisions of the *Codes*, the courts have drawn a clear distinction between the two interpretations namely, a 'belief, on reasonable grounds' of the amount of force to be used; and a belief that the force was 'reasonably necessary'.¹⁴⁶ Bronitt and McSherry agree noting that the law does not require a consideration 'of what a reasonable or ordinary person would have believed, but rather, what the accused him or herself might reasonably have believed in all the circumstances.'¹⁴⁷ The second element of the requirement is the requirement that the belief that the force used was necessary must be based on reasonable grounds. This aspect of the requirement imports an objective assessment into the enquiry.¹⁴⁸

In applying this second requirement to a case involving domestic violence, Stubbs and Tolmie applaud the court in *Stjernqvist* for demonstrating 'a sophisticated understanding' of the issues.¹⁴⁹ In *casu* in considering the necessity of the action of the accused, the court acknowledged the reality of the abusive relationship and analysed the violence which the accused faced in terms of a general overall threat that she lived with, rather than evaluating her experiences with the deceased as a series of isolated instances of violence with periods of calm in between.¹⁵⁰

According to Derrington J, in analysing the circumstances of the accused, he was forced to take cognisance of the demands being placed on the accused namely,

¹⁴⁴ Above n142 at 598.

¹⁴⁵ Ibid.

¹⁴⁶ Kenny notes that had the Code provisions stipulated a requirement that the accused believe that the force was 'reasonably necessary', an honest and reasonable but mistaken belief by the accused would still have permitted her to rely on self-defence.: Above n8 at 236. However, this is not the statement of either Code.

¹⁴⁷ Bronitt and McSherry above n6 at 308.

¹⁴⁸ Above n8 at 234.

¹⁴⁹ Above n69 at 739.

¹⁵⁰ Ibid.

to remain in the situation of abuse and violence or leave and then be subjected to the threat of being killed by her aggressor.¹⁵¹

The duty to retreat

None of the Australian states place a specific duty upon an accused to retreat from an attack. However, Kenny notes that whilst this may not be explicitly stated in sections 271(2) of the *Criminal Code Act 1899 (Qld)* or 248 of the *Criminal Code Act 1913 (WA)*, the use of the word 'otherwise' in the provisions 'may be wide enough to include the question of the accused's retreat from the scene as a possible alternative to using force.'¹⁵² Thus, Kenny expresses the opinion that if the accused had an opportunity to retreat reasonably available to her, 'the jury may find that the belief in the necessity to use the force in fact used may not be based on reasonable grounds.'¹⁵³ In considering the use of the word 'otherwise', the Supreme Court of Western Australia in *Srekovic* held that the use of the word "Otherwise" required a consideration by the court of whether the accused had, on the facts of the case, an alternative reasonable available to him that would equally protect him from the danger with which he was being confronted.¹⁵⁴

O'Reagan confirms that from the case law it would appear to follow 'that if the accused applied such force instead of retreating when he had an opportunity to do so he would lose the protection of this section. He could have preserved himself "otherwise" than by acting as he did.'¹⁵⁵

¹⁵¹ Ibid. The importance of the judgment by Derrington J is supported by the research of Hunter who concluded from her study that magistrates appeared generally to be looking 'for a recent incident' and that their general focus was on 'incidents rather than patterns of abusive behaviour'.: R Hunter 'Narratives of Domestic Violence' 2006 28 *Sydney Law Review* 733, at 756. Hunter goes further to note that the consequence of this approach of understanding the violence in terms of 'decontextualised physical incidents' is that magistrates 'often did not understand why women continued to be fearful of the defendant even after they had separated from him or may not have seen him for some time.': at 756-7.

¹⁵² Above n8 at 234.

¹⁵³ Ibid.

¹⁵⁴ *Srekovic* [1973] WAR 85 at 89. See also *Johnson* [1964] Qd R 1; and *Muratovic* above n131 at 19-20 where the principle was re-iterated and seems to have become fixed in the Australian law.

¹⁵⁵ Above n141 at 83. See also above n139 at 636-7 *per* Barwick CJ.

It is thus arguable that sections 271(2) and 248 of the Queensland and Western Australia Codes respectively impose a higher obligation than the common law and the requirements of the other Code jurisdictions. Heed should, however, be paid to the comment of the Queensland Supreme Court in *Johnson* which cautioned that ‘the jury should be warned against being wise after the event and they must consider the matter from the point of view operative on the accused’s mind in the stress of the moment.’¹⁵⁶

7.4.1.4 Northern Territory

In respect of the law of self-defence in the Northern Territory it must be noted at the outset that the *Criminal Code Act 1983 (NT)* does not distinguish between provoked and unprovoked attacks, as is the case in Queensland and Western Australia.¹⁵⁷ The requirements of self-defence in the Northern Territory are covered in the *Criminal Code Act 1983 (NT)* in sections 27 to 29 under the broad rubric of ‘justifications’. Section 29 deals specifically with justifications in situations of self-defence. It is, however, read with sections 27 and 28.¹⁵⁸

The provisions of sections 27 and 28 require that the force used must not be unnecessary force. ‘Unnecessary force’ is defined in the provisions as:

force that the user of such force knows is unnecessary for and disproportionate to the occasion or that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion.¹⁵⁹

Thus, Gray notes that in carrying out its onus, the prosecution may prove beyond a reasonable doubt either (i) that the user of force subjectively knew that the force used was unreasonable; or (ii) that an ordinary person, in her

¹⁵⁶ *Johnson* above n154 at 13.

¹⁵⁷ Above n10 at 133.

¹⁵⁸ Above n10 at 127.

¹⁵⁹ Section 1 *Criminal Code Act 1983 (NT)*.

circumstances, would have considered the forced used unnecessary or disproportionate.¹⁶⁰

In defining a person 'similarly circumstanced', section 1 of the *Code* leaves the determination widely open providing only that it should not be a person 'voluntarily intoxicated'.¹⁶¹ In providing a measure of guidance, Gray expresses the opinion that the test for 'reasonable grounds' which is applied under the common law will also be appropriate in considering sections 27 and 28.¹⁶²

According to section 29(1) a person who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act. In order for the act to fall within the ambit of 'defensive conduct' section 29(2)(a) [as amended by Amendment No 75/91, section 3] provides that the person must believe the conduct is necessary for certain purposes (which include *inter alia* defence of himself or another person). This requirement is a subjective assessment. Reading section 29(2)(a) further, one notes that under such circumstances, the defender is further entitled to use lethal force or force necessary to cause grievous bodily harm.

The objective analysis of the defendant's conduct is contained in section 29(2)(b) which requires that the conduct is a reasonable response in the circumstances as the person reasonably perceives them. Thus, the accused must have a reasonable belief of the threat posed and the force used in response must also be reasonable.¹⁶³ Gray notes that this provision will be similar in its interpretation

¹⁶⁰ Above n10 at 127.

¹⁶¹ Section 1 *Criminal Code Act* 1983 (NT).

¹⁶² Above n10 at 128.

¹⁶³ Above n10 at 133. See also the Report of the Law Reform Committee of the Northern Territory *Self Defence and Provocation* above n43 at 29. The amendment of the *Criminal Code Act (NT)* 1983 by *Criminal Code (NT) Amendment Act 27* of 2001 (see www.nt.gov.au/dcm/legislation/current.html - accessed on 7 December 2008) has extended the interpretation of conduct in self-defence in the Northern Territory. Previously, justification for lethal force in self-defence fell under section 28(f) of the *Criminal Code (NT)* which applied only 'where the nature of the assault being defended is such as to cause the person using the force reasonable apprehension that death or grievous bodily harm will result.' [my emphasis] Gray notes that the requirement that the defendant be acting against as 'assault' requires a reference to section 187 of the Code where 'assault' is defined. According to the section: 'Assault' is '(a) the direct or indirect application of force to a person without his consent ...; or (b) the attempted or threatened application of such force where the person attempting or threatening it has an actual or

and application to that contained in the common law which requires 'that the accused believe upon reasonable grounds that it was necessary in self-defence to do what he or she did'.¹⁶⁴ Thus, in determining the reasonableness of the accused's belief, the jury will be able to take cognisance of circumstances including the victim's prior conduct, the relationship between the parties, and all facts within the knowledge of the accused.

Thus, summing up the rule, the requirement is that the accused's belief must be based on reasonable grounds as s/he reasonably believed given her/his circumstances. Bronitt and McSherry stress that it is important to recognise that 'the requirement that the accused's belief be made on reasonable grounds does

apparent present ability to effect his purpose is evidenced by bodily movement or threatening words.' [my emphasis]: above n10 at 130.

This provision caused controversy in *Secretary* where the accused was charged with murder after she had shot her sleeping husband: above n72. The facts were that they had had an eight year relationship during which the deceased had mentally, physically and emotionally abused the accused and their children.: at 99. The accused had sought legal protection and had even made efforts to leave the deceased.: at 99. On the night of the fatal shooting, the deceased had made specific threats against the accused which caused her to fear for her life.: at 100. When the deceased fell asleep, the accused took one of the deceased's guns and shot him.: at 100.

The question that the court had to decide was whether it could be said that the accused had been defending herself against an 'assault' given that there was clearly no direct or indirect application of force at the time of the killing – as required by section 187 of the *Code*. The court was prepared to accept that there was a threatened application of such force but it remained highly questionable whether the deceased could be said to have had the actual or apparent present ability to carry out the threat. There was no doubt, however, that the deceased had the ability to carry out the threat at a future date when he awoke. It was this that gave rise to the reasonable apprehension of death or grievous bodily harm and it was this threat against which the accused was defending herself.: at 103.

The court found *per* Angel J: 'There was a threat to apply force at a future stated time. The threat was never withdrawn. At the time the threat was uttered there was an ability (actual or apparent) to carry out the threat when the stipulated time came. On the facts, short of being disabled from effecting the threat, whether by pre-emptive strike or the accused's flight or otherwise, the deceased's ability to carry out the threat continued.': at 98. Mildred J confirmed that in his view it remained open to the jury to conclude that the threat was not withdrawn when the accused fell asleep. 'I see no reason why the assault should have been regarded as spent merely because the deceased was temporarily physically unable to carry out his threat.': at 104. Gray is, however, adamant, (and the writer agrees) that the interpretation of the court was not congruent with the *Code* provision of the time.: above n10 at 131. However, Gray notes that given that the plight of battered women had already received acknowledgement under the domestic law and in other Commonwealth jurisdictions, the Court of Criminal Appeal was forced 'into a somewhat artificial interpretation of the terms of the Code, in order to do justice to this case. However, this problem is now resolved after the Code was amended.

¹⁶⁴ Above n10 at 132.

not mean a consideration of what a reasonable or ordinary person would have believed, but rather, what the accused him or herself might reasonably have believed in all the circumstances.¹⁶⁵

7.4.1.5 South Australia and Tasmania

In South Australia the *Criminal Code (SA)* differs somewhat from the previous provisions discussed in that it expressly includes the requirement of proportionality as a condition of self-defence. The *Criminal Code (SA)* provides that an accused may use force if she believes that force is necessary and reasonable for a defensive purpose; and the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.¹⁶⁶ In Tasmania the *Criminal Code (Tas)* as amended by the *Criminal Code Amendment (Self-Defence) Act 1987* states - similar to the *Criminal Code (SA)* - that 'A person is justified in using in defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use.¹⁶⁷ The *Criminal Code (Tas)*, however, makes no reference to the requirement of necessity stating only that the accused should have a belief that the force is reasonable to use.¹⁶⁸ In explaining the Tasmanian law in *Walsh*, Crawford J noted that the enquiry was both a subjective and objective one.¹⁶⁹ In defining the subjective component, the court identified two questions namely (i) whether the accused was acting in defence of himself when he used the force in question; and (ii) what were the circumstances as he believed them to be which should be taken into account for purposes of the objective assessment.¹⁷⁰ In explaining the objective component of the test, the court said that the question to be asked was: Was the force used, in the

¹⁶⁵ Bronitt and McSherry above n6 at 300. The authors of the Report of the Law Reform Committee of the Northern Territory *Self Defence and Provocation* above n43 also emphasise that in self-defence the focus is not on intent but rather on whether the response was reasonable in the perceived circumstances.: at 29.

¹⁶⁶ Section 15 *Criminal Law Consolidation Act (SA) 1935* as amended by the *Criminal Law Consolidation (Self-Defence) Amendment Act 1987*. See also *Howe* [1958] 100 C.L.R. 448 at 456-61.

¹⁶⁷ Section 46 *Criminal Code (Tas)*.

¹⁶⁸ *Ibid.*

¹⁶⁹ Bronitt and McSherry above n6 at 294 citing the unreported decision of *Walsh* 19 August 1993, Supreme Court, Tasmania A68/1993.

¹⁷⁰ *Ibid.*

circumstances as he believed them to be, reasonable to use?¹⁷¹ The issue of reasonableness thus pertains to the question of whether the force that was used was reasonable in the circumstances as the accused believed them to be.

Clearly, both South Australia and Tasmania require only that the accused's belief about the threat be honest - and not reasonable.¹⁷² According to Bronitt and McSherry the focus is on the accused's belief about the need for force and reasonableness of the force, rather than on whether or not the accused's belief was based on reasonable grounds (as appears to be the requirement in the other jurisdictions).¹⁷³ They believe that the requirements for self-defence in South Australian and Tasmanian law are more subjective as there is no objective evaluation of the accused's belief as to whether the force used was reasonable: rather, 'the objective factor goes [only] to the necessity and the reasonableness of the force used ...'¹⁷⁴

7.4.2 The Duty to Retreat

Bradfield notes that in most of the Australian jurisdictions there is no separate legal requirement that an accused should retreat before attempting to defend himself.¹⁷⁵ As discussed above, an exception to the norm may be read into the provisions of the *Codes* in Queensland and Western Australia.¹⁷⁶ However, in all other jurisdictions whether or not the accused could have and should have retreated from the situation of harm is not a separate requirement of self-defence but rather another one of the factors of which the courts will take cognisance when assessing whether the conduct of the accused was reasonably necessary.¹⁷⁷ In *Howe*, endorsing the view of the Court of Criminal Appeal of South Australia, the High Court of Australia was clear that it was not a correct instruction to the jury to advise that self-defence would be an inappropriate

¹⁷¹ *Ibid.*

¹⁷² Above n10 at 133.

¹⁷³ Bronitt and McSherry above n6 at 301.

¹⁷⁴ *Ibid.*

¹⁷⁵ Bradfield above n6 at 217. See also Bronitt and McSherry above n6 at 302; *Howe* above n171 at 460 and 448; and above n72 at 9.

¹⁷⁶ See fn152.

¹⁷⁷ Bronitt and McSherry above n6 at 302; Bradfield above n6 at 149; and above n10 at 133.

finding in circumstances where the jury was satisfied that the killing in self-defence had taken place when the accused had not retreated as far as possible, having regard to the attack.¹⁷⁸ In his judgment Dixon CJ stated:

The view which the Supreme Court has accepted is that to retreat before employing force is no longer to be treated as an independent and imperative condition if a plea of self-defence is to be made out. ... Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, he may stand his ground, and that if he kills him, he has not exceeded the bounds of lawful self-defence.¹⁷⁹

7.4.4 A Consideration of the 'Circumstances of the Accused' and the Need For and Role Of the Expert Witness

7.4.4.1 General Rules of Admissibility of Expert Evidence

The rules regarding the admissibility of expert evidence in Australia were summarised by King CJ in *Bonython*.¹⁸⁰ The court held that expert evidence would be admissible with respect to a relevant matter about which ordinary persons are:

[not] able to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience in the area' and which constitutes the subject 'of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience.'¹⁸¹

More simply stated, the requirements are that firstly, the opinion of witnesses possessing particular skill is admissible whenever the subject matter of inquiry is

¹⁷⁸ *Howe* above n166 at 460.

¹⁷⁹ *Howe* above n166 at 462-3.

¹⁸⁰ *Bonython* (1984) 38 SASR 45. See also *Clark v Ryan* (1960) CLR 486, at 491. The rule set out in *Bonython* has been evenly followed in *Murphy* (1989) 167 CLR 94 at 111; and *Farrell* (1998) 72 ALJR 1292 at 1295; and above n50 at 184.

¹⁸¹ *Bonython* above n180 at 46-7.

such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; and secondly, before the question of whether a topic is a fit subject for expert evidence is considered, it must first be accepted that there is a scientifically accepted body of knowledge concerning the subject in question.¹⁸² This was reiterated in *Runjanjic and Kontinnen* where the court held (referring specifically to the battered woman syndrome) that '[a]n essential prerequisite to the admission of expert evidence as to the battered woman syndrome is that it be accepted by experts competent in the field of psychology or psychiatry as a scientifically established facet of psychology.'¹⁸³ In *C*, however, whilst accepting the general rules in relation to the admissibility of expert evidence, the Supreme Court of South Australia warned that courts should always 'exercise great caution in expanding the area of expert evidence.'¹⁸⁴ The court noted that such caution is necessary in order to safeguard the integrity of the trial process and to protect the capacity of courts and juries to discharge their fact-finding functions from being overwhelmed by a mass of expert evidence on topics which could be judged without the assistance of such evidence.¹⁸⁵

¹⁸² *Clark v Ryan* above n180 at 491. Stated otherwise Hocking refers to the requirements as follows: (i) the legitimacy of the field of expert endeavour; (ii) the relationships between the opinions and the specialised knowledge; and (iii) the person's study, training and experience.: BA Hocking 'A Tale of Two Experts: The Australian High Court Takes a Cautious Stand' 2000 64 *The Journal of Criminal Law* 245, at 252.

¹⁸³ *Runjanjic and Kontinnen* (1991) 56 SASR 114 at 119. Bradfield, however, suggests that this requirement might actually present a real danger for the future viability of BWS evidence. She notes, 'Although there has been general judicial acceptance of BWS evidence in Australia, commentators have been increasingly critical of the theoretical foundations of BWS and have suggested that it is not sufficiently scientifically validated to be appropriately employed in the forensic context in Australia.': R Bradfield 'Understanding the Battered Woman Who Kills her Violent Partner – The Admissibility of Expert Evidence of Domestic Violence in Australia' 2002 9 *Psychiatry, Psychology and Law* 177, at 190.

¹⁸⁴ *C* (1993) 60 SASR 467 at 474.

¹⁸⁵ *Ibid.* Thus, Hocking notes, courts must be wary of accepting expert testimony where the ultimate conclusion is based on inferences. Rather, states Hocking, the expert opinion must be formulated in such a way 'that it is unequivocal as to the facts upon which the opinion is based, and [then] as to the inferences that are drawn from the facts.': above n182 at 253.

7.4.4.2 The Use of Expert Evidence in Cases of Domestic Violence

As far as expert evidence on battered woman syndrome is concerned the court in *Runjanjic and Kontinnen* was aware of the problems of the expert usurping the fundamental fact-finding role of the jury. However, the court also recognised that:

some human situations or relations, or the attitudes or behaviour of some categories of persons, may be so special and so outside the experience of the jurors, or of the court if it is the trier of facts, that evidence of methodical studies of behaviour or attitudes in such situations or relations, or of the attitudes or behaviour of those categories of persons, may be admissible.¹⁸⁶

In dealing with intimate violence and battery specifically King CJ came to the conclusion that the situation of habitually battered women was truly outside the realm of ordinary experience.¹⁸⁷ Thus, he acknowledged that:

a just judgment of the actions of women in those situations requires that the court or jury have the benefit of the insights which have been gained.¹⁸⁸

Specifically, supporting the decision of King CJ, Legoe J concurred that in cases involving battered women, expert evidence would:

- (a) assist the jury to properly evaluate the effect of the violence on the ensuing conduct of the appellants; and
- (b) eliminate the risk of the appellants being condemned 'by popular mythology about domestic violence.'¹⁸⁹

¹⁸⁶ *Runjanjic and Kontinnen* above n183 at 121.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.* In considering the question of admissibility, the court noted that it would not be sufficient to simply argue that the ordinary juror 'would have no experience of the situation of a battered woman' because 'jurors are constantly expected to judge of situations, and of the behaviour of people in situations, which are outside their experience.': at 120.

¹⁸⁹ *Runjanjic and Kontinnen* above n183 at 123.

Furthermore, of particular importance, the court identified that the evidence of the expert would be especially relevant to understanding why many women who otherwise appeared to be of strong character did not leave the abusive environment.¹⁹⁰ Taking all this information into account, the court concluded that the exclusion of expert evidence by the trial court had vitiated the trial.¹⁹¹

The decision in *Runjanjic and Kontinnen* regarding the admissibility of expert evidence on battery appears to have been followed in all subsequent Australian states.¹⁹² In *Osland* evidence of battered woman syndrome was presented by the expert, Dr Byrne, a clinical and forensic psychologist.¹⁹³ In explaining the relevance of expert testimony in cases involving intimate violence, Dr Byrne specifically pointed out the areas where the ordinary person may experience confusion when encountering the experiences of a battered woman.¹⁹⁴ For example, Byrne noted that an ordinary person would very likely reason that if the woman concerned did not report the violent and abusive behaviour or stayed in the relationship, it could not have been one involving violence or abuse – or, at least, not violence or abuse of the severity claimed.¹⁹⁵ Byrne remarked further that apart from reactions bearing upon the credibility of the accused person's account of the relationship, the ordinary person was not likely to be aware of the heightened arousal or awareness of danger which battered woman may experience. In considering the requirements of self-defence, expert evidence on heightened arousal to danger would be especially relevant to the question whether the accused believed that she was at risk of death or serious bodily harm and that her reaction was necessary to avoid that risk.¹⁹⁶

¹⁹⁰ *Runjanjic and Kontinnen* above n183 at 120.

¹⁹¹ *Runjanjic and Kontinnen* above n183 at 122.

¹⁹² See J Stubbs and J Tolmie 'Race, Gender, and the Battered Woman Syndrome: An Australian Case Study' 1995 8 *Canadian Journal of Women and the Law* 122.

¹⁹³ Above n50.

¹⁹⁴ *Ibid* at 185.

¹⁹⁵ Interestingly, this was precisely the point made by the prosecution regarding the relationship between the accused and the deceased, her husband.: *Runjanjic and Kontinnen* above n183 at 185.

¹⁹⁶ Above n50 at 185.

7.4.4.3 The Nature of the Expert Evidence that Will Be Admitted in Cases of Domestic Violence

Craven notes that prior to *Runjanjic and Kontinnen*, in which the South Australian Court of Criminal Appeal admitted expert evidence of the battered woman syndrome for the first time, women who committed offences in the context of a violent relationship were very limited to the nature of evidence that they could adduce at their trials.¹⁹⁷ According to the traditional rules, the only evidence that the expert could raise was in respect of ‘facts of relevance, not contextual factors.’¹⁹⁸ Craven notes thus that for battered women who sought to rely on self-defence, it was not possible for the expert to raise issues regarding the circumstances of the accused which would challenge the traditional stereotypes of battered women who kill self-defence or explain why simply leaving the abuser was not an option.¹⁹⁹

In *Runjanjic and Kontinnen*, at the trial, the defence sought to introduce the evidence of a clinical forensic psychologist of twenty years experience on the subject of the battered woman syndrome. The trial court refused the application on the grounds that the test for duress was ‘objective and that expert evidence on the state of mind of the appellants was therefore irrelevant.’²⁰⁰ On appeal, King CJ rejected the argument noting:

I do not think it is a sound basis for excluding the evidence. In the first place it ignores the subjective aspect of the test. Even if the evidence had no bearing on the objective aspect, it would be relevant to the question whether the wills of these appellants were in fact overborne.²⁰¹

¹⁹⁷ Z Craven ‘Battered Woman Syndrome’ 2003 *Australian Domestic & Family Violence Clearinghouse* 1, at 5.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Runjanjic and Kontinnen* above n183 at 120.

²⁰¹ *Ibid.* In his judgment, King CJ stated unequivocally that whilst the evidence may have been admitted in support of duress, it would be equally relevant to provocation and self-defence: at 122. He stated, ‘I can see no distinction in principle between the admission of expert evidence of the battered woman syndrome on the issues of self-defence and provocation and on the issue of duress.’: at 122.

Further King CJ held that the evidence presented by the expert was not intended to explain the particular responses of the appellants but rather to provide an indication of what would be expected of women generally, 'that is to say, women of reasonable firmness, who should find themselves in a domestic situation such as that in which the appellants were.'²⁰² The approach adopted by the Appeal Court was thus that the test would remain objective but that the expert would provide a general understanding of the lived reality of women living with violence. Specifically setting the parameters for admissibility of the expert's evidence, the court referred to *Transport Publishing Co Pty Ltd v Literature Board of Review* (1956) 99 CLR 111 in which King CJ held:

[B]efore opinion evidence may be given upon the characteristics, responses or behaviour of any special category of persons, it must be shown that they form a subject of special study or knowledge and only the opinions of one qualified by special training or experience may be received. Evidence of his opinion must be confined to matters which are the subject of his special study or knowledge. Beyond that his evidence may not lawfully go.²⁰³

Craven emphasises that the expert's role is never to proffer an opinion on the guilt or innocence of the accused but rather to assist a jury understand the social environment in which domestic violence occurs.²⁰⁴

In *Runjanjic and Kontinnen* specific consideration was given to the question whether the admissibility of expert evidence on battered woman syndrome could be regarded as prejudicial for effectively putting the victim of the accused on trial as a batterer. The argument for this hypothesis was that it deflects the attention of the jury from the unlawful conduct of the accused.²⁰⁵ In unambiguously settling the issue, Legoe J quoted from an article by Bauman who noted:

²⁰² *Runjanjic and Kontinnen* above n183 at 120.

²⁰³ *Transport Publishing Co. Pty Ltd v Literature Board of Review* (1956) 99 CLR 111 at 119.

²⁰⁴ Above n197 at 7.

²⁰⁵ *Runjanjic and Kontinnen* above n183 at 125.

... the probative value of [expert] testimony clearly outweighs the prejudicial impact. Testimony concerning the defendant's identity as a battered wife, if established, may have a substantial bearing on her perception and behaviour at the time of the killing. ... If a defendant is not allowed to present expert testimony on the battered wife syndrome, she is denied the right to put on evidence in support of a claim of self-defence. The right of an accused to put on a defence is so fundamental that it must tip the scales in favour of the probative value of the proffered testimony over its potentially prejudicial impact.²⁰⁶

In *Osland*, in detailing the nature of the evidence that could be presented by the expert, the court held that the expert could testify to issues relevant to questions such as:

1. why a person subjected to prolonged and repeated abuse would remain in such a relationship;
2. the nature and extent of the violence that may exist in such a relationship before producing a response;
3. the accused's ability, in such a relationship, to perceive danger from the abuser;²⁰⁷ and
4. whether, in the evidence, the particular accused believed on reasonable grounds that there was no other way to preserve herself or himself from death or grievous bodily harm than by resorting to the conduct giving rise to the charge.²⁰⁸

The trial court in *Osland* thus allowed the expert to testify to the characteristic patterns of behaviour of women in abusive relationships, and the characteristic reactions on the part of women in those relationships. In *casu*, the accused also

²⁰⁶ MA Baumann 'Expert Testimony on the Battered Wife Syndrome' 1983 27 *St Louis University Law Journal* 407, at 434. See also above n183 at 125 where Legoe J noted, 'I think this [issue] well answered, and answered well for South Australia, by an article by Baumann.'

²⁰⁷ See also *Osland* where the court found that BWS evidence might assist the court understand the battered woman's heightened awareness of danger and explain why she believed she was at risk of grave bodily harm and that her actions were necessary to avoid that danger.: above n50 at 185.

²⁰⁸ Above n50 at 217-8.

testified in person. After the expert for the defence had had sight of the record of her evidence-in-chief and been present in court when the accused was cross-examined, the expert testified further in general terms about the typical features of battered woman syndrome and gave case specific evidence linking the accused's own testimony to the general patterns of behaviour.²⁰⁹

Bradfield recognises the role of the expert witness in cases of self-defence and domestic violence. However, she notes a concern that the courts have focussed on battered woman syndrome as the signature marker of all victims of intimate violence and the evidence of the expert is, accordingly, particularly directed at assisting the court understand BWS. Yet, she notes, '[i]n relation to self-defence, evidence of the history of the accused's relationship with her violent partner is relevant and admissible and, by relying on battered woman syndrome, there is a 'failure to elicit at trial the experience and effects of living a life of *being* abused.'²¹⁰

7.4.4.4 The Qualifications of the Expert in Domestic Violence Cases

With specific reference to the qualification of an expert, Brennan J in *Murphy* summarised the general law as follows:

The object is to be sure that the question to the witness will be answered by a person who is fitted to answer it. His fitness, then, is a fitness to answer on that point. He may be fitted to answer about countless other matters, but that does not justify accepting his views on the matter in hand
...²¹¹

With particular reference to cases involving domestic violence, Stubbs and Tolmie state that given that battered woman syndrome is treated as a pathology

²⁰⁹ Above n50 at 219.

²¹⁰ Bradfield above n183 at 178.

²¹¹ *Murphy* above n180 at 12.

by medical science,²¹² it necessarily focuses on the mind of the accused. Accordingly, the purpose of admitting expert testimony is to assist the court understand a woman's perceptions and actions in situations of intimate violence and be relevant to the understanding of the woman's state of mind, at the time the crime was committed.²¹³ Thus, notes Craven, the expert evidence of BWS is presented in a clinical light by either a psychiatrist or a psychologist and the social aspects of her lived reality are not emphasised.²¹⁴

7.5 CONCLUSION

The law of self-defence in Australia is a combination of subjective factors (that is, what the accused believed at the time of the killing) and objective assessments (that is, whether the belief was based on reasonable grounds and specifically in South Australia and Tasmania, whether the amount of force used was reasonable). The individual elements of the defence have been specifically interpreted by the case law in each of the states and territories.

²¹² See Chapter 3 and the discussion on battered woman syndrome and its specific inclusion of BWS in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R and DSM-IV)* (published by the American Psychiatric Association, Washington: 1987).

²¹³ Above n69 at 716. See also above n197 at 7.

²¹⁴ Above n197 at 7. See also Bradfield above n183 at 180. In *Osland*, referring to the reliance of the accused upon battered woman syndrome, Kirby J sent out a further specific caution regarding the constraints linked to using the battered woman syndrome. Referring to the *dictum* of Thomas J in *Ruka v Department of Social Development* he noted:

There is a danger that in being too closely defined, the syndrome will come to be too rigidly applied by the Courts. Moreover, few aspects of any discipline remain static, and further research and experience may well lead to developments and changed or new perceptions in relation to the battering relationship and its effects on the mind and will of women in such relationships.: Above n50 at 214. See also *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 at 173.

Similarly, Bradfield notes that if the focus were on the personal experience of the abused (as opposed to BWS) this would widen the pool of potential experts to include *inter alia* doctors, nurses, social workers, as well as family members who may have witnessed the violence or saw the consequences.: Bradfield above n183 at 178. Bradfield also notes that testimony of the latter group of persons will not infringe the rules of evidence 'as the trend of recent authority suggests that expertise can be gained from experience [rather than a course of study].: at 191.

The writer notes the intention of the court not to be limited to the battered woman syndrome as the character marker for all battered women. However, in *Osland* the court acknowledged that as it was the appellant who had specifically raised battered woman syndrome in the first instance, it was 'now too late in the case to adopt any change of course.': above n50 at 214.

The courts in Australia appear to have followed a robust approach when dealing with the requirements of self-defence.²¹⁵ This approach is especially noteworthy with regard to the element of temporal proximity, especially in cases involving family violence and homicide. Similarly, in evaluating the elements of reasonableness and necessity, the courts have been forceful in acknowledging the circumstances of the accused as being directly relevant to such an assessment, with Victoria taking a bold step of making specific provision for victims of family violence.²¹⁶ The courts have, however, always left the issue of the weight and relevance of the factors presented to the jury to decide.

From the limited reported case law involving domestic violence, it would appear that where the requirement of objective reasonableness is raised, the standard used remains that of the reasonable person, and no provision is made for the yardstick to be the reasonable battered woman or even the reasonable woman.²¹⁷ Confirming this approach in *Osland* Kirby J commented:

As evidence of the neutrality of the law it should avoid, as far as possible, categories expressed in sex-specific or otherwise discriminatory terms. ... Such categories tend to reinforce stereotypes. They divert application from the fundamental problem which evokes a legal response to what is assumed to be the typical case. ... However, unlike conception and

²¹⁵ Specifically with regard to self-defence, as Bartal notes:

Traditionally, abused women were denied the opportunity of having self-defence put before the jury. The main stumbling blocks were those of imminence, a duty to retreat, proportionality, and lawfulness of the threat. In this regard, Bartal notes that the importance of the *Zecevic* decision is that these principles no longer have the status of legal principle but are only factors which are to be considered when deciding on whether the conduct was necessary and in the circumstances reasonable.: BF Bartal 'Battered Wife Syndrome Evidence: The Australian Experience' 1998 1 *The British Criminology Conferences: Emerging Themes in Criminology – Selected Proceedings* at www.britsoccrim.org/vol1/003.pdf 4 [accessed on 12 June 2008].

²¹⁶ See above n4 at 66. See also *Lock* (1997) 91 A Crim R 356 which contains a stirring and explicit acknowledgement that a relationship of violence is a highly relevant context for the assessment of an accused's claim to have acted in self-defence.

²¹⁷ Above n50 at 183-4.

childbirth, there is no inherent reason why a battering relationship should be confined to women as victims.²¹⁸

Finally, in contemplating reasonableness specifically and the homicidal act of the battered woman, Leader-Elliot makes the cogent point that '[d]eadly force used in self defence is excused when it is reasonable to say that no-one – neither the aggressor nor the disinterested observer – is entitled to ask her for a further sacrifice of her own interests to those of the aggressor. If the law demands more, requiring unreasonable sacrifices, it forges a compact of complicity with the aggressor.'²¹⁹ Furthermore, the case law appears to agree that the courts no longer regard proportionality as a requirement of self-defence.²²⁰

With regard to self-defence and battered women specifically, it would appear that there has been a ready acceptance of battered woman syndrome by the Australian courts.²²¹ In line with this recognition, the cases of *Runjanjic and Kontinnen* and *Osland* have both admitted expert testimony to assist the court to understand the circumstances and lived realities of an accused. In *Runjanjic and Kontinnen* the court accepted the evidence of the expert to indicate specifically the general trends of conduct that might be expected from women in relationships of habitual violence but King CJ made it clear that the expert would not be explaining the particular responses of the appellant.²²² However, in *Osland* the court went even further and allowed the expert to express an opinion on the accused's perception of danger from her abuser and also admitted testimony

²¹⁸ Above n50 at 211-2 (*per Kirby J*).

²¹⁹ Above n66 at 437-8.

²²⁰ However, Bronitt and McSherry caution that lethal self-defence will not be available against every attack.: Bronitt and McSherry above n6 at 300. They note that where lethal force is used in defence, the evidence should establish that the attack involved a serious assault including threats of death or serious bodily harm (see above n22 at 146), rape or sexual assault (see above n13 at 666-7; *Lane* above n45 at 451 and *Walden* (1986) 19 A Crim R 444, at 446) and continuous acute pain (see above n66 at 437-8; *Zikovic* (1985) A Crim R 396 at 401; and above n27 at 447). See also Bradfield above n6 at 201.

²²¹ Above n69 at 720.

²²² *Runjanjic and Kontinnen* above n183 at 120. An interesting issue that was raised in *Runjanjic and Kontinnen* was whether the whole issue of expert evidence on battered woman syndrome did not deflect from the realities of the issues on trial and effectively place the deceased on trial as a batterer.: *Runjanjic and Kontinnen* above n183 at 125. Legoe CJ was adamant in refuting this argument and took the view that the right of the accused to present a defence is so fundamental to the law that it outweighs any perceived potential prejudice.: *Runjanjic and Kontinnen* above n183 at 125.

from the expert as to whether, based on the evidence presented, it could be said that the accused believed on reasonable grounds that she had no alternate means available to her to protect herself other than to kill her abuser.²²³ Stubbs and Tolmie are, however, rather critical of the ready recognition for BWS by the Australian courts commenting that of the paucity of judicial discussion has been a lack of reported case law on the subject which has made it 'difficult for lawyers, judges and academics alike to analyse legal developments and to put information about relevant decisions to use in legal argument.'²²⁴ Specifically, they note:

Although this ready acceptance of BWS in Australian courts may have had positive outcomes for some defendants, it has resulted in an impoverished jurisprudence. ... Australia still lacks a leading judgment ... which addresses these issues at a comprehensive and sophisticated level.²²⁵

Bradfield is also critical of the adoption of battered woman syndrome as the yardstick for all victims of domestic violence. She advocates for a broader framework which takes cognisance of the the nature and effected of battery noting that such an approach will allow for better recognition of the complexity of the woman's life – 'that women may be abused but fight back, that women may simultaneously love and fear their partner, ... that women may previously have left and then returned ...'.²²⁶ She points out:

In arguing that a woman killed her violent partner in self-defence, this diversity needs to be communicated so that the [court] can reconcile the woman's act of agency with her claim that she was seriously abused and that her response was reasonable.²²⁷

²²³ Above n50 at 218.

²²⁴ Above n69 at 721. See also above n215 at 9; and Bradfield above n183 at 180.

²²⁵ Above n69 at 721.

²²⁶ Bradfield above n183 at 186.

²²⁷ Ibid. Schuller and Rzepa also note that the battered woman syndrome is 'more suggestive of an irrational and emotionally damaged woman than one responding reasonably to the circumstances in which she finds herself. In short, instead of providing a framework for viewing the woman's actions as justifiable given her situation, her actions are contextualized within a framework of dysfunction.': RA Schuller and S Rzepa 'Expert Testimony Pertaining to Battered Woman Syndrome: It's Impact on Jurors' Decisions' 2002 26 *Law and Human Behaviour* 655, at 657.

Despite the courts ready acceptance of battered woman syndrome, in responding to the assertion by the Crown that battered woman syndrome should be treated as a separate defence in the Australian law, Callinan J in *Osland* was unequivocal in his rejection of the argument stating explicitly:

The submission for the appellant that this Court should adopt a new and separate defence of battered woman syndrome goes too far for the laws of this country. There is no such separate defence in Australia.²²⁸

In summing up the approach of the Australian courts to cases involving domestic violence, Bartal suggests that the case law indicates that within the judiciary there is sympathy for, although perhaps not complete understanding of, the abused woman who faces trial.²²⁹ However, she warns that the courts need to be

²²⁸ Above n50 at 243 (*per* Callinan J). In support of his approach, Callinan J referred to the persuasive foreign authority of Thomas J in *Ruka v Department of Social Welfare* where the learned judge stated:

The syndrome, where it is found to exist, is not in itself a justification for the commission of a crime. It is the effects of the violence on the battered woman's mind and will, as those effects bear on the particular case, which is pertinent. It is not, therefore, simply a matter of ascertaining whether a woman is suffering from battered woman's syndrome and if so, treating that as an exculpatory factor. What is important is that the evidence establish that the battered woman is suffering from symptoms or characteristics which are relevant to the particular case.: above n214 at 173-4.

In *Secretary Mildred J* also rejected battered woman syndrome as a separate defence under the criminal law. In substantiating his judgment, the judge held that '[t]he focus is not on the accused's status as a battered wife; it is on the question whether the force was not unnecessary force, and whether the threats which constituted the assault, having regard to the history of the relationship, were such as to cause the accused reasonable apprehension that death or grievous harm will be caused to her in the future if she did not act in the way she did.: above n72 at 9. See also L Hancock 'Aboriginality and Lawyering: Problems for Justice for Aboriginal Defendants' 1996 2 *Violence Against Women* 429, at 437; S Beri 'Justice for Women Who Kill: A New Way?' 1997 8 *Australian Feminist Law Journal* 113, at 123; and E Sheehy, J Stubbs and J Tolmie 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' 1992 16 *Criminal Law Journal* 384-7 and 394.

²²⁹ Above n215 at 8.

cautious about taking the sympathy element too far for '[t]here is no right to take the life of a person because their conduct is outrageous or despicable. Courts must be careful not to ... suggest that self-help in eliminating the problem of the battering male is legally acceptable.'²³⁰

²³⁰ Ibid.

PART THREE: CONCLUSION

CHAPTER EIGHT

RECOMMENDATIONS

8.1 INTRODUCTION

This Chapter is structured using the same sub-headings as those contained in Chapter Four: the South African Law of Self-Defence. The intention behind utilising this format is to facilitate effective analysis and enable efficient recognition of the issues being targeted.

Acts of self-defence have, historically, inclined themselves towards a strong gender bias and Mather makes the specific point that women who have fought back in self-defence have traditionally been considered ‘unwomanly’ or ‘malelike’, biologically or genetically defective, or simply maladjusted.¹ ‘The notion of a violent female [was particularly threatening to society] since violence is antithetical to traditional concepts of “feminine” (*sic*).’² Snodgrass is of the opinion that such a value framework still exists to a greater or lesser extent and comments that the trend has been for women who were found guilty of killing to be sentenced to harsher punishments than their male counterparts found guilty of the same offence or to be found guilty of a more serious offence as compared to men who killed.³ With regard to intimate violence, Angel points out further that historically a woman was rarely given the opportunity to claim legal self-defence if she killed her abuser. As a result of this factual reality, the battered woman who killed their abusers would rely on a plea of mental impairment and criminal incapacity.⁴ It is submitted that, today, with the prevalent social and legal

¹ VM Mather ‘The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony’ 1988 39 *Mercer Law Review* 545, at 561.

² *Ibid.*

³ JL Snodgrass ‘Who Are We Protecting: The Victim or the Victimizer?’ 2002 33 *McGeorge Law Review* 249, at 250.

⁴ DJ Sonkin (ed.) *Domestic Violence On Trial: Psychological and Legal Dimensions of Family Violence* (Springer, New York: 1987) xix.

development, there should be no need for women accused of murder to fall back upon mental incapacity to excuse their conduct.

As noted in the preceding Chapters,⁵ a distinction is made in criminal law between defences which may constitute a justification for otherwise criminal conduct and defences which may be applied to excuse such criminal behaviour. South Africa, Canada and Australia have all sought to retain this distinction in the law.⁶ Self-defence in these three jurisdictions falls under the rubric of the justification defences, which excludes unlawfulness. The U.S.A., on the other hand, does not maintain this distinction in the law and has conflated the defences of excuse and justification. Thus, in the U.S.A., in deciding the issue of self-defence, the courts apply a more general normative standard of 'reasonableness'.⁷ The immediate question that demands a response is: Which approach is the better one to follow?

This question was argued by the defence in the recent South African case of *Engelbrecht*.⁸ In *casu* the defence argued for a deviation from the current rule of the common law in favour of a looser 'self-standing ground of justification or excuse applied to the facts of this case unshackled by the values informing other defences developed in different contexts for different reasons.'⁹ The basis for the argument was that such an approach would 'develop the law in a manner consistent with the *Constitution of the Republic of South Africa Act 108 of 1996*' in that the defence, as proposed, would simply hold the accused to the standard of reasonableness and negate the blameworthiness of her conduct in appropriate

⁵ See Chapters Four, Five, Six, and Seven.

⁶ Although in referring to the Canadian law, Stuart notes pertinently that 'the classification of ... self-defence as a justification or an excuse is not clear-cut.' For example, he indicates that a justification based on a reasonable belief (which is one of the conditions of self-defence in several jurisdictions) is, in reality, better classified as an excuse.: DR Stuart *Canadian Criminal Law* (Carswell, Toronto: 1982) 379. For further discussion on the issue insofar as South Africa, Canada and Australian law are concerned, see Chapters Four, Six and Seven.

⁷ See Chapter Five generally and specifically GP Fletcher 'The Individualization of Excusing Conditions' 1974 *Southern California Law Review* 1269, at 1269-1309. See also *Leidholm* 334 N.W.2d 811, 814-5 (N.D. 1983).

⁸ *Engelbrecht* 2005 2 SACR 41 W.

⁹ *Ibid* at 53.

circumstances.¹⁰ This approach clearly takes much of its character from the rules of self-defence prevailing in the U.S.A. where justification and excuse are considered under a single axiom of reasonableness. The defence in *Engelbrecht* proposed a firmer application of the ‘normative theory of culpability’ and explained it as being applicable ‘[w]here an accused has an awareness of unlawfulness, criminal capacity and intention but commits an act in circumstances under which the law could not expect a reasonable person to have acted differently.’¹¹ Consequently, argued the defence, the accused should be found not blameworthy and excused from her conduct.¹²

The court did not accept the argument presented and, it is submitted, this was the correct approach to take for the following reasons. Firstly, Fletcher notes that to obfuscate the boundaries between justification and excuse means that wrongfulness and blameworthiness are subsumed under the same enquiry and this makes it difficult to demarcate between fundamentally different perspectives of liability.¹³ Secondly, with regard to the argument that the approach advanced by the defence in *Engelbrecht* would reflect a ‘development’ in the law, the concern is that the argument, in law, seeks only to excuse – as opposed to justify – the conduct of the battered woman accused. Consequently, even if the

¹⁰ Above n8 at 52. This argument was supported by the *amicus curiae* appointed in *Engelbrecht* who argued ‘that the Court need not confine itself to assessing Mrs Engelbrecht’s conduct in the light of established defences but need only assess Mrs Engelbrecht’s actions according to the “legal convictions of the community” test which should be driven by the values underlying and embodied in the Constitution.’: above n8 at 52. It is submitted that in addition to the reasons cited in the discussion that follows in the body of the text, the argument of the defence is not supported for the fact that it appears to support the argument for a separate defence for battered women. For a further discussion on the issue, see section 8.3.1.2 below.

¹¹ Above n8 at 52. See also CR Snyman *Criminal Law* (Butterworths, Durban: 2002) who discusses the distinction between the ‘normative theory of culpability’ and the ‘psychological theory of culpability’: at 146 and 143 respectively. Snyman notes that the positive law applies the psychological approach, viewing blameworthiness from the accused’s perspective; whilst he personally favours the normative theory, which is a more value-based judgement.: at 146 and 150-157, specifically at 156.

¹² *Ibid.*

¹³ GP Fletcher ‘The Right and the Reasonable’ 1985 98 *Harvard Law Review* 949, at 962. Mousarakis presents a worthy note in explaining, however, that in separating justification and excuse one should not make the error of believing that there is, thus, no room for the reasonable person standard under the test for justification. He explains that under justification, the norm of the reasonable person is always very relevant to indicate the course of action that should be regarded in the circumstances as legally permissible. (Under the excuse defence the reasonable person standard is used to enquire whether the accused is fairly expected to stand up to the pressure of the circumstances and refrain from acting wrongfully.): G Mousourakis ‘Justifications and Excuses in the Criminal Law’ 1998 2 *Stellenbosch Law Review* 165, at 178.

defence is successful, the conduct is nevertheless regarded as unacceptable. In specifically dealing with this issue, Crocker states:

Although both excusable and justifiable self-defense fully pardon the defendant from criminal liability, an important ideological distinction separates the two. Society holds an excusable act to be wrong, but tolerates it because of the actor's state of mind. ... Society perceives a justified act of self-defense as correct¹⁴

Crocker continues:

Unlike excuse, justification posits the *act* as right, and therefore not condemnable; the substance of the deed rather than the person's state of mind is at issue.

Whether society justifies a woman for taking a man's life while defending herself or excuses her for thinking she was worth defending is crucial for battered women.¹⁵

Thirdly, a consideration of specific legal authorities indicates that a distinction between justification and excuse is conceptually possible and should be maintained in the South African law,¹⁶ especially it is submitted if the law is to be seen as an instrument contributing to social policy goals. Thus, it is urged that as a starting premise, the South African law continues to view self-defence as a justification for the conduct being assessed: in other words, unlawfulness is excluded.

¹⁴ PL Crocker 'The Meaning of Equality for Battered Women Who Kill Men in Self-Defense' 1985 8 *Harvard Women's Law Journal* 121, at 130-1.

¹⁵ *Ibid* at 131.

¹⁶ See FFW Van Oosten 'Case Comment: *S v Van Antwerpen* 1976 3 SA 399 T' 1977 1 *De Jure* 179, at 181; Fletcher above n13 at 962-3; W Le Roux 'Obedience to Illegal Orders: A Closer Look at South Africa's Post-Apartheid Response' 1996 17 *Obiter* 247, at 256; and JMT Labuschagne 'Die Proses van Dekonkretisering van Noodweer in die Strafbereg: 'n Regsantropologiese Evaluasie' 1999 1 *Stellenbosch Law Review* 56, at 64 and 68.

As evidenced from the discussions in the preceding Chapters, the traditional elements of self-defence can present a number of complex and controversial legal hurdles for a battered woman charged with murder. Many battered women who attempted to claim self-defence after killing their abusive partners have found that their cases failed because their claims could not be made to coincide with the parameters of traditional self-defence laws. However, having regard to the definitional requirements of self-defence in South Africa and comparing them with the requirements for self-defence in the U.S.A., Canada and Australia, one may reasonably state that the doctrinal framework of the South African law is sound. Having committed to such a statement it must be added that it is also imperative that South African courts adopt a flexible approach to the application of the stated requirements, particularly in (i) interpreting the elements of imminence and necessity and (ii) taking cognisance of the circumstances of the accused.¹⁷

In summarising the basis of the law of self-defence, Snyman notes that two theories have been identified for the existence of private defence: the protection theory and the upholding of justice theory.¹⁸ In terms of the former, the emphasis is on the individual and her right to defend herself against an unlawful attack; and under the latter theory the underlying idea is that people acting in private defence perform acts whereby they assist in upholding the legal order.¹⁹ Thus, it is submitted that, at a more general level, if the courts lean more towards the protection theory coupled with a preparedness to allow the evidence of experts on the dynamics of battery,²⁰ it will assist in ensuring fairness and justice for victims who kill their abusers.

¹⁷ Similarly, Sheehy, Stubbs and Tolmie confirm that '[i]n most cases, battered women on trial for murder of their abusive partners, have difficulty in getting the circumstances surrounding their killings realistically appraised by the agents of the criminal justice system.': E Sheehy, J Stubbs and J Tolmie 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' 1992 *Criminal Law Journal* 369, at 394.

¹⁸ CR Snyman 'Two Reasons for the Existence of Private Defence and their Effect on the Rules Relating to the Defence in South Africa' 2004 17 *SACJ* 178, at 189.

¹⁹ *Ibid.*

²⁰ See Chapter Four, Five, Six, and Seven.

8.2 THE ELEMENTS OF SELF-DEFENCE AND RECOMMENDATIONS FOR THE SOUTH AFRICAN LAW

8.2.1 The Attack Must Have Been Unlawful

In defining 'unlawful' Snyman states:

“Unlawful” means “contrary to the community’s perception of justice or equity or the legal convictions of the community.”²¹

In determining an unlawful attack, the legal jurisdictions studied are *ad idem* that the attack is constituted not only by an actual attack but also by a threat of violence. With regard to threatening conduct, this may be either direct threats of harm or implicit behaviour signalling harm. For a battered woman, it is submitted that, at the very least, threat of harm to her physical integrity and dignity is always part of her lived reality. This experience of the battered woman has been specifically acknowledged in the South African case law in the judgment of Satchwell J in *Engelbrecht*.²²

In *Engelbrecht* Satchwell J noted emphatically that ‘the “unlawful attack” against which [the accused] defends herself or others may be one individual incident of abuse, a series of violations or an ongoing cycle of maltreatment.’²³ The definition adopted by Satchwell accords with the definition of domestic violence contained in section 1 of the *Domestic Violence Act* 106 of 1998.

A question that bears consideration is the constitutional right to life and the issue of whether or not an unlawful attack against one’s person or property creates a legal entitlement for the attacked party to take the life of another in defence of his or her person or property. The question that must be clarified is whether the latter conduct is, in fact and law, not unconstitutional?

²¹ Above n18 at 195; see also CR Snyman *Criminal Law* (Lexis Nexis, Durban: 2008) 98.

²² Above n8 at 133.

²³ [my emphasis] Ibid. In setting out this rule, Satchwell J confirmed that the court in *Engelbrecht* would not be relying on the battered woman syndrome as the marker for all battered women but that it would be looking independently at the nature and effects of intimate violence in evaluating the conduct of the accused.: at 133.

Section 11 of the *Constitution of the Republic of South Africa*, 1996 states plainly:

11 Life

Everyone has the right to life.

In establishing the rules of self-defence and the right to kill in defence of oneself, the question that has been raised is what emphasis should be placed upon the interests of the (original) aggressor? Ashworth's response is that '[t]here is little to commend the view that a criminal loses all his civil rights when he commits any offence.'²⁴ However, he does go on to add that 'someone who makes a murderous attack on another must forfeit his right to life if this appears to be the only way in which the victim's life can be preserved.'²⁵

The right to life was considered in the landmark decision of *Makwanyana*.²⁶ In *casu*, the Constitutional Court was vested with the specific task of making a determination as to whether the death sentence was in conflict with the provisions of the Constitution.²⁷ At the outset, it is recognised that the court in *Makwanyana* was dealing particularly with the issue of capital punishment by the state and its constitutionality in light of the entrenched rights to life and dignity contained in the Bill of Rights.²⁸ It is this background which distinguishes the decision of the court in *Makwanyana* from any judgment where a life is taken in self-defence.

It is submitted, in dealing with killing in self-defence, the right to life arguments under the South African law may be argued and summarised as follows: It is clear that the Constitution, 1996 unequivocally recognises the right to life in section 11. Despite the fundamental nature of the right, section 7(3) provides for

²⁴ AJ Ashworth 'Self-defence and the Right to Life' 1975 34 *Cambridge Law Journal* 282, at 288.

²⁵ *Ibid.*

²⁶ *Makwanyana and Another* 1995 2 SACR 1 CC.

²⁷ At the time, the court was called upon to interpret section 9 (and section 11) of the interim Constitution – *The Republic of South Africa Constitution* 200 of 1993. However, the provision of the right to life in section 9 and the ruling of the court remain apposite to the right to life as contained in section 11 of the final Constitution – *The Republic of South Africa Constitution* 108 of 1996.

²⁸ The interim Constitution of the Republic of South Africa, 1993 – Chapter 3.

such right to be limited to the extent that such restriction may be shown to be reasonable and justifiable in an open and democratic society espousing the values of human dignity, equality and freedom.²⁹ In dealing with the issue of the limitation of fundamental rights, the court in *Makwanyana* recorded that what would be construed as reasonable and justifiable as required by the Constitutional provision would stand to be determined by weighing up the competing values and a balancing of the different interests.³⁰ In seeking guidance on interpreting 'justifiable', the court relied *inter alia* on the Canadian case of *Oakes* in which the Supreme Court held:

... in order to meet this requirement a limitation of a Charter right had to be directed to the achievement of an objective of sufficient importance to warrant the limitation of the right in question, and that there had also to be proportionality between the limitation and such objective.³¹

Thus, having clearly stated its views regarding the sanctity of life, the court also found that '[t]he rights vested in every person by [the Bill of Rights in] the Constitution are subject to limitation ...'³² In dealing deliberately with self-defence as one of the instances when such a limitation could be justifiable, the court held that:

Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. ... To deny the innocent person the right to act in self-defence would deny that person his or her right to life. ... The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty.³³

²⁹ *The Constitution of the Republic of South Africa* 108 of 1996 – section 36.

³⁰ Above n26 at 43.

³¹ Above n26 at 43-44.

³² Above n26 at 54.

³³ Above n26 at 55.

This is an important distinction that needed to be made. It is arguable that had the court in *Makwanyana* remained silent, it could have led to the ludicrous charge that a killing in self-defence could not be justified for being contrary to the spirit of the Constitution. Such an argument would clearly contradict the principles of individual autonomy and the provision of equality contained in the Bill of Rights, making it appear that an aggressor's rights were being given precedence.³⁴ At this point, the *dictum* of Edeling J in *Mokgiba* bears recall namely, that where an accused can demonstrate that s/he was confronted with a reasonable fear of threatened danger, s/he is entitled by law to use all force and all means to protect against the threat – even if it could result in the death of the perceived aggressor.³⁵ *In casu*, the court was satisfied that there could be no obligation upon the accused to wait until the attack had commenced prior to retaliating.³⁶ As Ashworth also notes, 'on practical grounds a liberty to use force in self-defence is essential if members of society are not to be put at the mercy of the strong and unscrupulous.'³⁷ This idea is supported by Snyman who states that under private defence, '[i]t is the attacker who must bear the risk [of death or injury], because it is he or she who initiated the whole set of events by resorting to unlawful aggression or threats of aggression against the defender.'³⁸

This approach has also been adopted in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950).³⁹ Article 2 makes explicit provision for the rule that '[e]veryone's right to life shall be protected by law'.⁴⁰ However, it continues with the addition that a deprivation of life shall not be regarded as a contravention of Article 2 'when it results from the use of force which is no more than absolutely necessary (a) in defence of any person from unlawful violence ...'⁴¹ None of the authorities already cited appears to disagree.

³⁴ *The Constitution of the Republic of South Africa* 108 of 1996 - section 9.

³⁵ *Mokgiba* 1999 1 SACR 534 O, at 550.

³⁶ *Ibid.*

³⁷ Above n24 at 283.

³⁸ Above n18 at 191.

³⁹ *Human Rights in International Law Basic Texts* (Council of Europe Press, Strasbourg: 1998) 159.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

In considering the deceased's right to life in *Ferreira*, Howie P noted:

Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women. It also, therefore, means having regard to an abused woman accused's constitutional rights to dignity, freedom from violence and bodily integrity that the abuser has infringed.

It is also necessary ... that in weighing up the process due weight be accorded to the fact that the offender has taken the extreme step of depriving the abuser of his constitutional right to life.⁴²

Thus, in reviewing the relevant provisions of the *Constitution of the Republic of South Africa Act*, 1996, the arguments of the court in *Makwanyana* and the other cited authority, one can state with a reasonable degree of certainty that insofar as self-defence is concerned, whether the 'choice of evils'⁴³ doctrine or the 'autonomy of individual rights' dogma - as outlined by Burchell⁴⁴ - is applied, killing in self-defence will be justifiable: provided that there is compliance with all the specified conditions of the defence.⁴⁵ Thus, whilst it is not expected that a court rules that in making an attack, the attacker completely forfeits his/her right to life, a defender should not be punished for protecting him-/herself against an act of harm or a threat of harm.

8.2.2 The Attack Must Have Been Imminent

In South Africa the condition of imminence under the law of self-defence has been authoritatively acknowledged.⁴⁶ In the U.S.A. temporal proximity is also a condition of self-defence with some of the states referring to the requirement of imminence of harm whilst others prefer the stricter requirement namely, that the

⁴² *Ferreira and Others* 2004 2 SACR 454 SCA, at 469.

⁴³ Ashworth speaks of the 'choice of lives' rule: above n24 at 289.

⁴⁴ J Burchell *Principles of Criminal Law* (Juta, Lansdowne: 2005) 231.

⁴⁵ See also above n21 at 110 fn55.

⁴⁶ See Chapter Four.

harm or threat of harm must be 'almost immediate' before the conduct of the accused will be justifiable in self-defence.⁴⁷ The condition of imminence has proved to be one of the more controversial questions in cases of self-defence. This has been especially noticeable in cases involving intimate violence and the so-called non-confrontation self-defence cases.

In dealing specifically with the non-confrontation cases, many battered women charged with the murder of their intimate partners have testified that they 'killed their abuser while he was sleeping because they honestly believed that he would kill them when he awoke'.⁴⁸ However, the South African law on self-defence does not recognise 'an honest belief in the imminence of danger' as being sufficient for the purpose of self-defence and justifying the accused's conduct.⁴⁹ The test for imminence under the South African law requires that a *reasonable person* in the circumstances of the accused would have believed that death or serious bodily harm was imminent. Whilst the test is subjective to the extent that the control person is placed in the same circumstances as the accused, the question which the court must ultimately decide is whether the woman reasonably believed that her sleeping (or otherwise incapacitated) victim was about to harm or kill her. The same question arises in the case of women who react and kill their partners some time after an abusive episode has lapsed. Under the traditional interpretation of the condition, it may be said that in such circumstances, at the time of the killing, the woman was not under imminent threat from her abuser as the danger had passed.

The traditional requirement of imminence in self-defence has its historic basis in a once-off violent confrontation between strangers of the male sex and in the situation where the assailant and victim lead separate lives.⁵⁰ In the domestic

⁴⁷ See Chapter Five. Interestingly, the public international law of the U.S.A. has completely shed the demand for temporal proximity between a threat and a retaliatory offensive under the public law of self-defence acknowledging that to require otherwise would give rise to grave injustices.: See S Wallace 'Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense' 2004 71 *The University of Chicago Law Review* 1749, at 1771.

⁴⁸ See Chapter Six.

⁴⁹ An honest belief will be considered under putative self-defence which may have the concomitant result of excusing the conduct of the accused. See above Chapter Four fn 127 for a discussion of putative self-defence in South Africa.

⁵⁰ Willoughby unreferenced in *Lavallee* (1990), 55 C.C.C. (3d) 97 at 115 (S.C.C.).

relationship, however, the victim shares a home with her adversary, and there is no coming together for a moment, followed by separation shortly thereafter, as is the case of assault between strangers. Thus, in the case of the abused woman, who is unable to predict with any certainty the time of the next assault, she is always in danger of death or serious bodily injury. It is submitted that the conclusion expressed variously by Scales, Ewing and Eber that, from the battered woman's point of view the danger is always imminent, is correct.⁵¹ The fact of her lived reality is that the threat of violence is ever-present and the attack always remains on foot.

Recognising the inherent unfairness in the historic basis and the traditional application of the condition of imminence in cases of self-defence,⁵² the Canadian and Australian laws of self-defence have no such condition: Rather than focussing on the question of temporal proximity between the attack and the defence, the law and courts have merely questioned whether the defensive response was necessary and reasonable in the circumstances.⁵³

⁵¹ AC Scales 'Feminists in the Field of Time' 1990 42 *Florida Law Review* 95, at 112; CP Ewing *Battered Women Who Kill: Psychological Self-Defense as a Legal Justification* (Lexington Books, Massachusetts: 1987) 48; and LP Eber 'The Battered Wife's Dilemma: To Kill or Be Killed' 1981 32 *Hastings Law Journal* 895, at 929.

⁵² In also lending his support for the view that the historic interpretation of self-defence fails to taken into account the new circumstances created by intimate violence and battery, Willoughby notes that support for the traditional imminence requirement stands, primarily, on two legs: (a) because the threatened harm is not absolutely certain to occur, the defendant should not be allowed to react prematurely in applying deadly force against a threat that may not yet exist or even materialise; and (b) there must be no reasonable alternative means of avoiding injury or harm that was being threatened.: MJ Willoughby 'Rendering Every Woman Her Due: Can A Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?' 1989 38 *University of Kansas Law Review* 169, at 184-5. However, he too recognises that the first leg assumes an unfamiliar assailant whose behaviour is not known to the accused.: at 184. Willoughby continues to state that the battered woman's position is distinguishable in that she not only knows her assailant but also has a good idea of his behaviour and knows that the threatened harm is certain to occur. With regard to the second leg, it has been noted that escape from the abusive environment is, in most cases, not a feasible alternative, and 'may also be sentencing her to "murder by instalment", because any attempt on her part to flee is likely to be unsuccessful and will [inevitably] provoke further violence from her battering husband when he awakes.': at 187. See also Chapter Two. Furthermore, it should be recognised that requiring her to leave the place of abuse means, in many instances, that the law is expecting her to flee her own home – an obligation not imposed upon other defenders.

⁵³ Above n50 at 115. See also *Pétel* (1994), 87 C.C.C. (3d) 97; *Cinous* (2000), 143 C.C.C. (3d) 397 (Que. C.A.); and *Secretary* (1996) 107 NTR 1.

The research on domestic violence shows that in assessing the requirement of imminence, what is often relevant is evidence that might distinguish the past and prior threats and acts of abuse by the abuser from the act which immediately preceded the accused's lethal reaction. Studies demonstrate that the victims of habitual violence often become attuned to patterns of violence from their partners and are able to interpret certain conduct to indicate an imminent attack or a more serious attack.⁵⁴ Walker confirms that a woman who is a victim of domestic violence is often so finely in touch with the behaviour of her abuser that any sudden change in the pattern of violence may correctly indicate to her that the situation has altered and that the threat will, on the occasion in question, be carried out and that her death is imminent.⁵⁵ Thus, the response of a victim of abuse is often based on her greater acuity in detecting danger from an abusive partner.

Somewhat differently but equally relevant, Jacobson *et al* found that after the experience of a single act of severe battery, some victims of domestic violence became 'hyperalert' to possible violence and perceived any implied or low level act of violence as potentially a reasonable and imminent threat to her and responded accordingly.⁵⁶ Jacobson *et al* express the view that such a reaction is not unreasonable, given the fact that in an abusive relationship, (i) it is always the abuser who determines the extent of the violence; and (ii) the victim seldom has any means of knowing how far he will go and when he will stop.⁵⁷ The National Institute of Justice (U.S.A.) also confirmed the conclusion of 'hyperalertness' to violence and recorded that in cases where the abuser had made threats to kill his

⁵⁴ 'Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials' U.S. Department of Justice NCJ 160972 May 1996 or <http://www.ncjrs.org/txtfiles/batter.txt> 24 [accessed 21/10/2001]. Also above n14 at 127.

⁵⁵ LE Walker *Terrifying Love: Why Battered Women Kill and How Society Responds* (Harper Row, New York: 1989) 105-6. See also A Browne *When Battered Women Kill* (Free Press (Macmillan), London: 1987) 129. Emphasising this point Crocker states, 'A subtle gesture or a new method of abuse, insignificant to another person, may create a reasonable fear in a battered woman.': above n14 at 127.

⁵⁶ N S Jacobson, J M Gottman, J Waltz, R Rushe, J Babcock, and A Holtzworth-Munroe 'Affect, Verbal Content, and Psychophysiology in Arguments of Couples with a Violent Husband' 1994 62 *Journal of Consulting and Clinical Psychology* 982.

⁵⁷ Husbands who participated in the programme which formed the basis of the study by Jacobson *et al* admitted that once the violence began, there was nothing that the woman could do to stop it. Even strategies such as wife withdrawal produced a continuation of the violence rather than a suppression of it. The researchers concluded that, in a very real sense, women seem to have little recourse when it came to stopping the fight once it had commenced: above n56 at 986.

spouse, and she perceived this outcome as inevitable, the passage of time from the threat could, in fact, actually serve to aggravate her fear.⁵⁸ Even in cases where she may have overcome the battering and evoked her internal coping mechanisms since the threat was made, any renewed indication that the batterer was willing to act out the threat could trigger the full intensity of her fear reaction.⁵⁹ Thus, in cases where the threat appears not to have been immediate (or imminent), a woman's history of being battered is especially vital to understanding her belief of the dangerousness of her situation and its likely outcome.⁶⁰

It is important to bear in mind that in situations of non-confrontational self-defence, the battered victim is not claiming 'I am abused and therefore I have a right to kill my abuser': rather, her response is that 'because of the history of violence in this relationship, I was sensitive to cues from the abuser that made me believe that I was in imminent danger'.⁶¹

In the U.S.A. where the condition of imminence is an express requirement of self-defence, some of the legal authorities have been clear about the need to jettison the condition of imminence from the law. They argue variously that the condition of imminence should be replaced, in law, by an assessment focussing on the reasonableness and/or necessity of the accused's conduct (like the law in Canada and Australia).⁶² Adopting a contrary position Rittenmeyer maintains that avoiding the requirement of imminent present danger introduces a clear violation of existing principles of criminal law for it appears to bestow 'upon the abused wife the unique right to destroy her tormentor at her own discretion.'⁶³ Arguments such as the uncertainty of the threatened harm ever occurring, and

⁵⁸ Above n54 at 22.

⁵⁹ Ibid. See also RJ Patterson and RWJ Neufeld 'Clear Danger: Situational Determinants of the Appraisal of Threat' 1987 101 *Psychological Bulletin* 404, at 405.

⁶⁰ EP Stuart and JC Campbell 'Assessment of Patterns of Dangerousness with Battered Women' 1989 10 *Issues in Mental Health Nursing* 245; see also above n68 at 20.

⁶¹ MA Douglas 'The Battered Woman Syndrome' in D J Sonkin (ed.) *Domestic Violence On Trial: Psychological And Legal Dimensions Of Family Violence* (Springer Publishing Co., New York: 1987) 58-9.

⁶² AS Burke 'Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman' 2002 81 *North Carolina Law Review* 211, at 273.

⁶³ SD Rittenmeyer 'Of Battered Wives, Self-Defense and Double Standards of Justice' 1981 9 *Journal of Criminal Justice* 389, at 390.

the fact that even if the harm did materialise, its effects remain unsure form the basis of the latter opinion.⁶⁴

Veinsreideris is of a similar mind and speaking specifically to the issue of imminence and the 'blurring of the edges of self-defence law' by the courts and legal commentators when dealing with battered women who attack their partners in situations of non-confrontation, he cautions that such subtle manipulation and change of the substantive law of self-defense, while possibly desirable to achieve just results in this narrow context will lead to undesirable results in other contexts.⁶⁵

Under the South African law, the courts have adopted a flexible application of the condition of imminence. This approach was repeated in *Engelbrecht* where, in deciding the issue, the court bound itself to a proper understanding of the lived reality and circumstances of a victim of domestic abuse.⁶⁶ Accordingly, in light of the approach that has been followed by the courts generally and specifically the court in *Engelbrecht*, the writer sees little need to recommend change to the South African law with regard to the prevailing condition of imminence.⁶⁷

⁶⁴ Ibid. See *Schroeder* 261 N.W.2d 759 (Neb. 1978); and also JW Roberts 'Between the Heat of Passion and Cold Blood: Battered Woman's Syndrome as an Excuse for Self-Defense in Non-Confrontational Homicides' 2003 27 *Law and Psychology Review* 135, at 155. However, one questions whether, given the environment of the abusive relationship, any person could reasonably argue that when the abuser walks away after threatening to kill his partner, that threat is, in fact, withdrawn.

⁶⁵ME Veinsreideris 'The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women' 2000 149 *University of Pennsylvania Law Review* 613, at 624. In formulating his warning, Veinreideris he was thinking specifically of the abuse of the law in situations of prisoner violence and prison homicides.: at 628-632.

⁶⁶ Above n8 at 134 and 146.

⁶⁷ If, however, there was a need to make a proposal for amendment, the writer subscribes to the approach adopted by the Australian common law jurisdictions namely that a specific condition of imminence be deleted from the legal requirements of self-defence and the issue be simply 'whether the accused had a belief based on reasonable grounds that the defence was necessary.': See RA Rosen 'On Self-Defence, Imminence and Women who Kill their Batterers' 1993 71 *North Carolina Law Review* 371, at 375-6; and also Chapter Seven. This view is also endorsed by the Canadian Supreme Court in *Lavallee* above n50 where the court stated clearly that imminence was not the only means of determining whether an abused woman had any other alternatives available to her in defending herself against the unlawful attack.: at 115. See also *Pérel* above n53 at 97 and *Cinous* above n53 at 129. If such a proposal were to be followed, it would to be done by way of specific appropriate legislation. In this vein Wolhuter proposes that if it is found that the legal requirements of self-defence have been satisfied, 'a gender-sensitive approach necessitates the eschewal of the requirement of imminence, and the infusion of the criterion of the reasonable person with an awareness of the structural power dynamics that underpin domestic violence.': L

However, the writer is cognisant that other provincial divisions are not bound by the decision of the Witwatersrand Local Division and the interpretation adopted in *Engelbrecht* cannot be taken as settled law. However, it is respectfully submitted that, generally and specifically with regard to cases involving domestic violence, subsequent courts would serve the law best were they to follow the approach established in *Engelbrecht*. In dealing with all cases, the courts must be alive to the need to give accurate and incisive attention to the circumstances of the accused.

In *Mogohlwane*, in evaluating the condition of imminence in self-defence, Schabort J drew an interesting analogy with the law of spoliation. Citing *Mans v Loxton* Schabort J held:

... if the recovery is *instanter* in the sense of still being a part of the *res gestae* of the act of spoliation then it is a mere continuation of the breach of the peace which already exists and the law condones the immediate recovery, but if dispossession has been completed, ... then the effort at recovery is ... not done *instanter* or forthwith but is a new act of spoliation which the law condemns.⁶⁸

In cases of victims of battery and intimate violence, the entire lived experience of the victim is one of abuse. This is the *res gestae* of the abusive relationship. It is submitted that because the actual physical violence may be episodic or cyclical cannot deny the fact that the fear of harm, over which she has no control, is always present. It is thus further submitted that each act of violence by the abuser is not a new act of violence but is part of the *res gestae* of the abusive relationship and a continuation of his reign of terror over his victim.

This fact is of critical importance when assessing the condition of imminence in cases involving domestic violence.

Wolhuter 'Excuse them though they know what they do – the distinction between justification and excuse in the context of battered women who kill' 1996 9 *South African Journal of Criminal Justice* 151, at 165.

⁶⁸ *Mogohlwane* 1982 2 SA 587 T, at 591.

8.2.3 The Defence Must Have Been Necessary

In defining this condition of self-defence, Snyman states:

The execution of the defensive act must be the only way in which the attacked party can avert the threat to her rights or interests.⁶⁹

An issue that has been raised in cases of victims of domestic abuse charged with murder is whether killing the abuser was, in fact, necessary and the only reasonable alternative. In light of the research and literature on the subject, it is submitted that for many victims of abuse, killing the abuser is the only means out of the abusive environment.⁷⁰ In *Engelbrecht* this proved to be the vexed issue with both assessors finding that, in fact, the accused had acted unreasonably as she had failed to give the police service an adequate opportunity to assist her.⁷¹ Despite the questionability of the factual finding, the application of the rule is in keeping with the authority of Snyman who states:

The present rule merely means that the threatened person may not summarily take the law into her own hands if the usual legal remedies afford her adequate protection.⁷²

In answering the question: 'Was the defensive act necessary?', it is again essential that the courts take cognisance of all the relevant contextual factors that characterise the circumstances of the accused. These include a history of the abuse and the accused's fear of the abuser; the accused's emotional and/or financial dependence on her partner; her age and the availability of economic and emotional support; the faith and religious beliefs of the accused; her race, ethnicity, culture, and class; her fear for her children; the existence of mental or physical disabilities; and any indication of substance abuse by the abuser or a

⁶⁹ Snyman above n21 at 107.

⁷⁰ See above n52 at 186

⁷¹ Above n8 at 157.

⁷² Snyman above n21 at 107.

criminal record.⁷³ However, a caution is noted with regard to making a purely objective assessment of the accused's circumstances, as such an evaluation could lend itself to a finding that the average person would have had adequate opportunity to remove herself from the harmful environment.⁷⁴

The research indicates that women in violent and abusive relationships are rarely free to leave the relationship at their will.⁷⁵ This reality must also be reflected in the court's interpretation of the position of the accused and the assessment of whether self defence was necessary.⁷⁶ Sebok notes that in understanding the context of the battered woman's homicidal act, one has also to consider the *options* available to her.⁷⁷ Firstly, could the accused have stopped the aggressor with less than lethal force?; secondly, could the accused have used the legal and criminal justice options?; and thirdly, could the accused have fled the scene of aggression without retaliating to the threat of harm.⁷⁸ Prosecutors often raise this last issue to show the unreasonableness of the accused's conduct. Sebok explains that if flight were possible and if it were reasonable for the accused to believe that fleeing were possible, not overly burdensome, and would stop the

⁷³ S Buel 'Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct' 2003 26 *Harvard Women's Law Journal* 217, at 279. See also Stubbs and Tolmie 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' 1999 23 *Melbourne University Law Review* 709, at 746. See also Chapters Two and Three.

⁷⁴ The relevance of the testimony of the expert witness is also apposite in this regard for the expert will be able to assist the court to make an informed situational analysis of the circumstances of the accused and to understand and appreciate her lived reality.

⁷⁵ See Chapter Three

⁷⁶ It is respectfully submitted that the rigid application of the rule in *Mnguni* 1966 3 SA 776 T does not incline itself to a fair application of the law in cases involving domestic abuse and violent relationships. See rather the statement on the law by Snyman who comments that it is not feasible to formulate the relationship which must exist between the attack and the defence in precise, abstract terms. According to him, the furthest that one is entitled to generalise, is to require that there should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place.: Snyman above n21 at 109-111. See also *Trainor v The State* [2003] 1 All SA 435 (SCA), at 439 where the statement of the law by Snyman was approved.

⁷⁷ AJ Sebok 'Does An Objective Theory of Self-Defense Demand Too Much?' 1996 57 *University of Pittsburgh Law Review* 725, at 728.

⁷⁸ *Ibid.*

aggressor (now the deceased), then the accused has no right to claim self-defence.⁷⁹ Snyman states similarly:

A question which has often arisen ... is whether a person who is attacked must flee, if at all possible, in order to ward off the attack. Although the courts have not yet unequivocally decided that there is a duty to flee in the circumstances, it would nevertheless seem as if they do in principle recognise such a duty.⁸⁰

However, Snyman's own view on the subject is that under the South African law there is no duty to retreat or flee from an attack or the environment of harm especially where the harmful environment is one's home.⁸¹ The courts must be watchful not to introduce the duty to retreat in cases involving domestic abuse simply because they do not understand the experience of the victim of domestic violence. In evaluating the defence in this situation, the relevant questions are (i) whether, at the moment of the killing, it was reasonable for the accused to believe that the abuser would inflict grievous or deadly injury and (ii) whether it was reasonable for her to believe that flight was impossible or overly burdensome, or would not prevent the envisaged harm.⁸² The test is thus not whether it was physically possible for the accused to flee, but whether it was reasonable for the accused to fail to flee. In cases of abused women, research indicates that there are numerous reasons why flight would not provide her with permanent respite. Many women who are subject to domestic violence have remarked that their abusers have often threatened them that they would be unsafe anywhere in the community if they even attempted to leave and research has identified that these are not idle threats.⁸³ Thus, it may be argued that when assessing whether the defence was necessary, the courts must be cognisant of the fact that perceptions of reason differ and are influenced by the confluence of various factors reflecting the situational experiences of the accused. In reaching a final decision, the court

⁷⁹ Ibid.

⁸⁰ Snyman above n21 at 108 and he cites as authority for this proposition *Zikalala* 1953 2 SA 568 A, at 571-2, *Patel* 1959 3 SA 121 A, at 123, *Dougherty* 2003 2 SACR 36 W, at 50 and above n76 at 779. (Note, however, that Snyman does not support the decision in *Dougherty* above.)

⁸¹ Snyman above n21 at 108.

⁸² Ibid.

⁸³ See Chapters Two and Three.

must always place itself completely in the shoes of the accused.⁸⁴ However, it is stressed that support for her conduct must come from the woman herself, in her spontaneous, self-initiated description of the events that preceded her action against the abuser.⁸⁵

8.2.4 There Must Be A Reasonable Relationship Between the Attack and the Defensive Act

In terms of the South African law 'a certain balance' between the defensive act and the original attack is required.⁸⁶ However, proportionality in respect of (i) the nature of the interest threatened and the interest impaired; or (ii) the means used by the attacker and the attacked party; or (iii) the value or extent of the injury threatened by the attacking party and that inflicted by the defender, is not required.⁸⁷ In applying this rule, cognisance should be taken of how the accused interpreted the situation. It is submitted that the approach of the Australian law which looks to an understanding of the mental processes affecting the mind of the accused at the time of the incident,⁸⁸ is especially apposite and relevant. Factors which could be taken into consideration involve balancing (i) the behaviour of the alleged attacker, (ii) the dangerousness of the situation, and (iii) the resources available to the claimant, for responding to that threat.⁸⁹ Furthermore, the comparative size, strength and fighting skills of the abusing partner and victim are always relevant when coming to an objective determination of the existence of a threat. Crocker notes that women's lack of self-defence training, coupled with socialisation processes that decry aggression by women, may also mean that women perceive danger differently, sooner and more frequently than men.⁹⁰ Consequently, if the woman is to mount a real defence,

⁸⁴ Although there is a growing awareness of domestic violence and the dynamics of battery, expert evidence should be presented to assist in placing the court 'in the shoes of the accused'.

⁸⁵ J Blackman 'Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill' 1986 9 *Women's Rights Law Reporter* 227, at 236.

⁸⁶ Snyman above n21 at 109.

⁸⁷ Snyman above n21 at 109-111.

⁸⁸ Buel above n73 at 278.

⁸⁹ See RJ Patterson and RWJ Neufeld 'Clear Danger: Situational Determinants of the Appraisal of Threat' 1987 101 *Psychological Bulletin* 404, at 416.

⁹⁰ Above n14 at 127.

she will, more often than not, have to resort to the use of weapons in protecting herself.

This fact needs to be acknowledged especially when dealing with the so-called non-confrontation self-defence cases. Evidence should be offered to enable the court to consider the woman's conduct as reasonable, rather than hysterical, irrational or insane.⁹¹ Under the law, what is reasonable is often determined by the perceptions, beliefs and understanding of the court. In this regard, Fiora-Gormally notes that battered women who approach the court for redress are often required to deal with a system that mirrors the male-dominated, male-orientated legacy of our social past.⁹²

In assessing the reasonableness of the conduct of the accused against the attack from the victim, the courts in all the studied jurisdictions have taken account of the circumstances and experiences ('social framework evidence'⁹³) of the accused for, as Crocker suggests, 'a battered woman should not have to be judged under a standard that did not include her experience.'⁹⁴ Furthermore, the fact that the abused victim knows her aggressor intimately must make a difference – knowledge of her abuser's prior conduct will usually enable a victim of domestic violence to measure the force necessary for self-defence on subsequent occasions. Snyman also confirms that under the South African law the reasonableness of the relationship between the attack and the subsequent defence will be a factual determination that should be judged casuistically in light of the circumstances in which the events took place.⁹⁵ In light of the above, the writer makes no proposal for any amendment to the South African law in this regard. It is the writer's view that a flexible application of the requirements of self-defence (which takes proper notice of the circumstances and lived realities of the accused) will equitably accommodate a battered woman charged with killing an abusive partner.

⁹¹ Above n14 at 130.

⁹² N Fiora-Gormally 'Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?' 1978 2 *Law And Human Behaviour* 133, at 164.

⁹³ Stubbs and Tolmie above n73 at 711.

⁹⁴ Above n14 at 131.

⁹⁵ Snyman above n21 at 109.

8.3 THE TEST FOR SELF-DEFENCE

‘Would a Reasonable Person in the Circumstances of the Accused have so Acted?’⁹⁶

8.3.1 ‘A Reasonable Person’

The research indicates that in identifying a standard for reasonableness in cases involving domestic violence, three options have presented themselves namely (i) to base the test in an enquiry as to whether the accused meets the standard of the battered woman syndrome as defined by Walker; (ii) to individualise the test to the extent of comparing the accused to a reasonable battered woman; or (iii) to evaluate the conduct of the accused against that of the reasonable woman (as opposed to reasonable person. The standard of the reasonable person has not commended itself to any of the authorities.)

8.3.1.1 The Battered Woman Syndrome

In the U.S.A., Canada and Australia the courts have adopted a narrow interpretation when dealing with cases involving domestic violence specifically referring to the battered woman syndrome as a mechanism through which to introduce evidence about intimate violence and its effects.⁹⁷ However, it is noteworthy that in all three jurisdictions, despite the courts adhering to the marker of battered woman syndrome as the character of all battered women, they have not implemented battered woman syndrome as a separate defence: Rather, the courts have applied the characterising traits of battered woman syndrome to

⁹⁶ Snyman above n21 at 113.

⁹⁷ Wallace notes that the initial response of the feminist movement to get judges and legislatures to acknowledge the pandemic of intimate violence and to get them to recognize battered women’s actions as reasonable, was to fight for the recognition of battered woman syndrome.: above n47 at 1755. However, soon many of the same protagonists realised the fallacy of the plan for, whilst battered woman syndrome addressed the evidentiary issues, there were more fundamental practical problems being created for example, stereotyping of the victims and pathologising the problem. Today the research shows that greater favour is attributed to the consideration of the effects of battering.

explain and understand the conduct of the accused within the conditions of the law of self-defence.⁹⁸

In South Africa in *Engelbrecht* the court took a wider approach when dealing with the issues of domestic violence, demonstrating (it is submitted) an acute awareness of the literature around the subject of battered woman syndrome and partner violence. In *casu*, the court made reference to the 'effects of battery' without pigeonholing the accused into the straitjacket of the battered woman syndrome. It is submitted that *Engelbrecht* has provided a sound platform for the law and it is recommended that the South African courts, when confronted with cases involving domestic violence, continue to consider 'the nature and effects of battery' - as opposed to battered woman syndrome - when dealing with such cases. This is not intended to suggest that battered woman syndrome should never be introduced to the courts. However, what is proposed is that it not be viewed as the standard for all battered women.

Thus, in order to properly utilise the knowledge of the expert and gain optimal value, the expert's role should be focussed on providing an understanding of the nature, effects and dynamics of battery. It is not the function of the expert to attempt to shoehorn all accused victims into the stereotype of a battered woman according to the battered woman syndrome described by Walker. In this regard the writer agrees with Posch that gender inequality is a main factor in violence against women and, therefore society should understand battered woman syndrome as the gender issue that it is and not as a psychological classification in which women are viewed as weak or needy.⁹⁹

Admittedly, the South African courts have not yet had to specifically consider the issue of battered woman syndrome as a separate defence. However, it is

⁹⁸ For a fuller discussion, see Chapter Five, Chapter Six (specifically *Lavallee* above n50 at 126 and *Malott* [1998] 1 S.C.R. 123 at 140), and Chapter Seven (specifically *Osland* (1998) 159 ALR 170 at 243).

⁹⁹ P Posch 'The Negative Effects of Expert Testimony on the Battered Women's Syndrome' 1998 6 *Journal of Gender and the Law* 485, at 492. See also M Reddi 'Battered Woman Syndrome: Some Reflections on the Utility of this "Syndrome" to South African Women Who Kill Their Abusers' 2005 3 *South African Journal of Criminal Justice* 259, at 264; and A Pieterse-Spies 'A South African Perspective on Battered Women Who Kill Their Abusive Partners' 2006 69 *THRHR* 309, at 313.

submitted that when the issue arises (and it certainly will in the near future), the approach of the South African courts should be to follow the international trend of rejecting battered woman syndrome as a separate defence under the criminal law. The South African criminal law has an established set of defences and, it is submitted, the conduct of the battered woman can be brought and properly justified under the existing defences. There is no defensible argument that can be made for a separate defence called battered woman syndrome.

8.3.1.2 A Reasonable Battered Woman

It is submitted that the standard of the reasonable battered woman creates an individualised standard for battered women that can result in the perpetuation of stereotypes for battered women. As seen from the previous discussions, attempts to mould victims of abuse into a pre-determined set of character traits can often work against women who are victims of domestic violence but fail to fit the mould.¹⁰⁰ A single norm of the 'reasonable battered woman' cannot be recommended given the diversity of social, economic, personal, and maybe even psychological issues that impact on the life of a battered woman. Battered women are not a homogenous group of actors – rather they are individuals, each with their own lived realities. Burke confirms the importance of treating and judging the accused woman as a rational actor and determining the reasonableness of her conduct in light of her '*objective* individual circumstances' and not from some 'psychologically-individualized perspective.'¹⁰¹

8.3.1.3 A Reasonable Woman

To ensure that the proper weight is given to the circumstances of the accused, the standard against which the conduct of the battered woman must be judged is that of the reasonable woman in the social framework of the accused.¹⁰² Endorsing the view expressed in *Malott*, Satchwell J recognised that women's

¹⁰⁰ J Bosworth 'The Trouble with Battered Women's Syndrome' 1996 11 *Adelphia Law Journal* 63 and DL Faigman and F Wright 'The Battered Woman Syndrome in the Age of Science' 1997 39 *Arizona Law Review* 67.

¹⁰¹ Above n62 at 218.

¹⁰² Above n8 at 136.

experiences in relation to self-defence may well be different to that of their male counterparts.¹⁰³ For example, gauging this aspect in relation to the specific condition of imminence, Crocker writes that given the socialization processes that many women experience, and their 'lack of physical defense training' and an environment that 'equates femininity with weakness' means that 'women may perceive danger sooner and more frequently than men.'¹⁰⁴ This re-enforces the notion that the perspectives of women must specifically inform the objective standard of reasonableness.¹⁰⁵ Acknowledging the argument of Kirby J in *Osland* for a 'sex neutral standard',¹⁰⁶ it is submitted that, as is evident from a reading of the literature and case law, when dealing with a battered woman, the test cannot be 'what would provoke an ordinary reasonable person' because, it is suggested, the latter would not have the subjective knowledge and awareness of the accused. Gillespie notes further that the reasonable person has been described as one who is not frightened or provoked to violence by mere threats; does not use a weapon unless one is being used against him; and does not indulge himself in cowardly behaviour such as lying in ambush or sneaking up on an enemy unawares.¹⁰⁷ The reasonable person does not panic at what, in all likelihood, may be an idle threat from his adversary. 'But,' says Kampman, 'the battered woman is painfully aware of just how willing her adversary' is to carry out his threat.'¹⁰⁸

In responding to whether the reasonable woman standard will not defeat the equality arguments, Crocker is categorical that '[w]e cannot pretend that a woman's sex is irrelevant to or can be separated from her actions; nor can we pretend that she is not part of a culturally defined group.'¹⁰⁹ Boyle notes more emphatically:

¹⁰³ Ibid.

¹⁰⁴ Above n14 at 127.

¹⁰⁵ Above n8 at 136.

¹⁰⁶ *Osland* above n98 at 211-2.

¹⁰⁷ CK Gillespie *Justifiable Homicide – Battered Women, Self-Defense and the Law* (Ohio State University Press, Columbus: 1989) 99.

¹⁰⁸ ME Kampmann 'The Legal Victimization of Battered Women' 1993 15 *Women's Rights Law Reporter* 101, at 111.

¹⁰⁹ Above n14 at 152.

While gender is an inefficient proxy for other, more functional classifications, I do not think it will advance the cause of equality to pretend that human beings, or social problems, are gender neutral.¹¹⁰

In seeking to provide a checklist of evidence that will set a competent yardstick for proving reasonableness in cases involving domestic violence and self-defence, it is recommended that the enquiries raised by Stubbs and Tolmie be used as a starting point. These questions include:

What was the nature and extent of the violence she suffered in the relationship?

How many times had she called the police and with what result?

How had she tried to enlist the protection of the criminal justice system or other agencies and what was the result?

How many times had she tried to leave?

If she returned, what were the factors that influenced her decision?

Did she have a safe and affordable place to go?

Was it reasonable to expect her to be the one to leave the family home?

How had he responded to her efforts to protect herself in the past?

Had he intimated what he might do to her in the future?

Was there anything about her cultural circumstances that made it particularly for her to detach from him, negotiate the relationship or seek outside help?¹¹¹

It is submitted that the answers to these questions will provide a strong basis from which to assess whether the requirement of reasonableness can be satisfied. Further, it is consciously reiterated that in understanding the experience and lived reality of the accused, the courts must strive for a proper understanding of the battered woman's physical and social construct and the

¹¹⁰ C Boyle 'The Battered Wife Syndrome and Self-Defence: Lavalley V. R.' 1990 9 *Canadian Journal of Family Law* 171, at 175.

¹¹¹ Stubbs and Tolmie above n73 at 712 fn5. See also MA Dutton 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' 1993 21 *Hofstra Law Review* 1191, at 1202.

history of her relationship with the abuser.¹¹² This is supported by Crocker who notes that neither the reasonable battered woman standard nor the reasonable person standard will achieve this intention. She argues further that, in fact, the battered woman stereotype is just as unacceptable as the reasonable man stereotype for, in both cases, whilst the court may enquire into the specific circumstances, perspectives and experiences of the accused, in both cases the courts also continue to perpetuate and rely upon stereotypes.¹¹³

8.3.2 A Consideration of the ‘Circumstances of the Accused’ and the Need For and Role Of the Expert Witness

8.3.2.1 The Use of Expert Evidence in Understanding the Act of the Accused

Notwithstanding the growing awareness of the subject-content of domestic violence, it is submitted that the complete experience and circumstances of the victim remains beyond the comprehension of the lay person. Accordingly, it is suggested that there remains a compelling argument for the continued involvement of experts on the subject when a case is presented before the court. First, and most importantly, expert evidence on the effects and dynamics of battery will explain not only the necessity for the accused’s conduct but also the reasonableness thereof. (It is certainly not proposed that the expert be allowed to usurp the function of the court in determining reasonableness but, it is submitted, the opinion of the expert may assist the court in reaching its decision. Secondly, it is acknowledged that there are many reasons why a victim of domestic violence will remain in an abusive relationship.¹¹⁴ In the courtroom, expert evidence will be vital to a proper understanding of why the victim would have stayed in the relationship and eventually resorted to the murder of her

¹¹² Snyman is clear that such an enquiry is acceptable under the South African law and in referring to the objective standard (albeit for negligence), he notes that ‘the objective character of the test is subject to particular qualifications or exceptions.’ One exception that he specifically defines is the rule that the reasonable person should be placed *in the circumstances* in which the accused found himself at the critical moment. This rule, states Snyman ‘amounts to a certain degree of individuation or subjectivity of the test.’: CR Snyman *Criminal Law* (Butterworths, Durban: 2002) 218.

¹¹³ Above n14 at 137.

¹¹⁴ These have been comprehensively canvassed above in Chapters Two and Three.

abusive partner. The expert will assist to dispel the myths and stereotypes that attach to domestic violence and battered women. Without the expert evidence, there is the real probability that the effects of domestic violence will pass without proper weight being given to the exigencies of the accused's reality and the accused will have difficulties demonstrating the reasonableness of and the justification for her behaviour.

All the jurisdictions surveyed in this study have acknowledged the integral role of the expert in cases involving domestic violence. However, there is no unanimity as to the nature of the evidence that the expert should be allowed to present. Some jurisdictions have allowed only general evidence on domestic violence; whilst others have readily permitted case specific testimony and even allowed the expert to link the conduct of the accused with the dynamics of battery, as agreed by the experts in the field.¹¹⁵ Further, specific jurisdictions have permitted the expert to present an opinion on the issues for decision. With regard to the latter, the courts in Canada have been adamant that such evidence is not admissible; the academic writers and the courts in the U.S.A. do not have a unanimous understanding of the law, but the Australian High Court in *Osland* took a firm view and allowed the expert to express himself directly on the issue of reasonableness. The South African law has also been generally responsive to allowing an expert to present an opinion on the ultimate issue for decision for as the court held in *Mngomezulu* '... there can be no objection to the witness expressing an opinion on the facts in issue if this is done to assist the court.'¹¹⁶ Significantly, however, in *Engelbrecht* Satchwell J was adamant that the expert should not be permitted to decide the issue of the reasonableness of the conduct of the accused 'as this was the function of the court.'¹¹⁷ It is submitted that the approach in *Engelbrecht* is unnecessarily restrictive and should not be followed: rather, the approach in *Mngomezulu* and *Ruto Flour Mills (1) v Adelson* is supported namely, that where the opinion of the expert would be of 'appreciable

¹¹⁵ See Chapters Four, Five, Six, and Seven. This approach was clearly followed in both *Ferreira* (above n42) and *Engelbrecht* (above n8), the two South African cases dealing with domestic violence, murder and self-defence.

¹¹⁶ *Mngomezulu* 1972 1 SA 797 A, at 799. See also *Ruto Flour Mills (1) v Adelson* (1) 1958 4 SA 235 T, at 237.

¹¹⁷ Above n8 at 56. See also *Mngomezulu* above n114 and *Ruto Flour Mills (1) v Adelson* above n114.

assistance' in aiding the court to reach a conclusion on the issue of reasonableness, that opinion should be received by the court.¹¹⁸ It will then still be the function of the court to exercise its discretion on whether or not to accept the opinion presented by the expert¹¹⁹ - and reach its own conclusion on reasonableness based on the evidence before it.¹²⁰

Specifically regarding the experts being permitted to express an opinion on the reasonableness of the accused's conduct, it is further submitted that given that objective reasonableness is still determined by having regard to the circumstances of the accused, the remark of Wilson J in *Lavallee* namely, that fairness and the integrity of the trial process demands that the court have the opportunity to hear the views of the expert is appropriate in summing up the argument.¹²¹ McColgan also reinforces the view that expert evidence is very relevant to a determination of the reasonableness of the conduct of the accused for, she states, 'the relative scarcity of female killers has resulted in a paradigmatically male idea model and this, together with the incompatibility of aggressive force with stereotypical femininity, means that the apparently gender neutral concept of reasonableness is actually weighted against the female defendant.'¹²² Becker concurs noting that a factor aggravating the crime when a battered woman kills her partner is that:

[n]ot only does a battered woman on trial for killing her abusive spouse face this historic acceptance of wife-beating by the legal system, she also confronts the social stereotypes of womanhood that may be held by the judge. ... A woman who commits a violent act against her husband threatens the [decision-maker's] sense of order and security because, by destroying the family unit, she repudiates her natural role as a caring, nurturing mother/wife. Furthermore, the [decision-maker's] own

¹¹⁸ See *Mngomezulu* above n154 and *Ruto Flour Mills v Adelson (1)* above n149.

¹¹⁹ See above n92 at 99-100.

¹²⁰ See Chapter Four fn180.

¹²¹ *Lavallee* above n50 at 126.

¹²² A McColgan *Women Under the Law: The False Promise of Human Rights* (Longman, Essex : 2000) 202. This was specifically recognised in *Lavallee* (above n50) by Chief Justice Dickson in admitting expert evidence to counter the commonly held beliefs that battered women are not really beaten as badly as they claim, otherwise they would have left the relationship; or that women enjoy being beaten, that they have a masochistic strain to them.

conceptions of the family as a safe, healthy environment may lead them to deny the existence of violence altogether. Rather than believe the woman, the [decision-makers will] choose to believe their own stereotype.¹²³

As Stubbs and Tolmie note, the role of the expert is to offer 'broad social framework evidence to provide the context within which to understand the issues in a given case.'¹²⁴ In this way, the expert may support the accused's claim that she acted reasonably. They note further:

Such evidence is not so much directed at the question "was the accused a battered woman?" and "did she suffer from learned helplessness?" but rather, "what was the nature of the threat she faced?".¹²⁵

Lastly, given the experience of the expert – as defined by Conrad¹²⁶ - there is much to commend an approach that will allow the expert to present an opinion on the issue for decision. The ultimate pronouncement will, however, remain with the court, which may choose to reject the opinion of the expert.¹²⁷

Another controversial issue which emerges is the admissibility of expert opinion in cases where the accused has not testified. In *Lavallee* the prosecution argued that the opinion of the expert would be of no value in such cases as there was no basis upon which to peg the information presented.¹²⁸ The court, however, agreed to admit the evidence but held that the independence of proof upon which the opinion is based will affect the weight that the court will give to the

¹²³ D Bricker 'Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners' 1993 58 *Brooklyn Law Review* 1379, at 1402.

¹²⁴ Stubbs and Tolmie above n73 at 711.

¹²⁵ Stubbs and Tolmie above n73 at 712.

¹²⁶ AF Conrad 'The Use of Victim Advocates and Expert Witnesses in Battered Women Cases' 2001 30 *The Colorado Lawyer* 43, at 47.

¹²⁷ PJ Schwikkard, A St Q Skeen and SE van der Merwe *Principles of Evidence* (Juta and Co., Lansdowne: 2001) 81. Under the South African law of evidence, the expert may give an opinion but he or she is also required to provide the grounds for the opinion presented. The court can then decide objectively whether or not to accept the opinion. See also *Nieuwoudt* 1990 4 SA 217 A, at 238.

¹²⁸ Above n50 at 104.

testimony.¹²⁹ This approach is clearly reflected in the South African law of evidence¹³⁰ and was followed in *Ferreira*.¹³¹

On a more practical note, it is submitted that admitting expert evidence at the trial is only the first step. The second issue is for the judicial officers to be open to acknowledging the opinions presented by the experts. Magistrates and judges (despite their office) are ordinary members of society and, as such, have their personal views on the subject of domestic violence. It is not impossible for entrenched misconceptions to find their way into the courtroom. Given the acknowledgment that domestic violence is an endemic problem in South Africa, lawyers should be aware of the effects and dynamics of domestic violence. This will not derogate from the need for expert testimony in cases involving domestic violence: it will simply provide a stronger platform from which the expert will be able to operate.

In conclusion to the issues raised and recommendations submitted in respect of expert evidence in cases involving intimate homicide against a setting of domestic violence, a proposal that may be generally relevant in cases of

¹²⁹ See above n50 at 132-3.

¹³⁰ CWH Schmidt and DT Zeffert *Evidence* (Butterworths, Durban: 1997) 32-3; and Schwikkard, Skeen and Van der Merwe above n122 at 89-90. See also *M* 1991 1 SACR 91 T.

¹³¹ Above n42. In supporting the view that the expert, particularly a psychiatrist, should be permitted to testify even though the accused may not have, Wardle also notes that ‘the psychiatrist has an ability to separate truth from fiction that should be taken into account by the rules of evidence. On a very basic level, this argument really amounts to a suggestion that the psychiatrist’s experiences in dealing with people should be acknowledged.’: P Wardle ‘R. v. Abbey and Psychiatric Opinion Evidence: Requiring the Accused to Testify’ 1984 17 *Ottawa Law Review* 116, at 129. Wardle continues with his proposition noting that ‘we may have to conclude that the [psychiatric expert] will not usually be fooled. The psychiatrist has more than just his experience with people against which to measure the accused’s statements ...’: at 129. For a fuller discussion of Wardle’s view, see above Chapter Six. However, Grant, sounds a significant note of caution about the implications of hearing the experiences of battered women through the words of the experts, particularly psychiatrists, rather than the words of the woman. She argues that such an approach tends to reinforce the medical nature of the problem and has the potential to medicalise the woman’s experience of domestic violence.: I Grant ‘The “Syndromization” of Women’s Experiences’ 1991 25 *U.B.C. Law Review* 51, at 51. Using the example of the legal trend in the U.S.A. Grant continues to note that in many American cases ‘the focus has been on expert testimony describing the passive, victimized aspects of the woman, her “learned helplessness”, rather than on the circumstances which might explain the homicide as a necessary choice to save her own life.’: at 54. She further warns that adopting such an approach may have the unintended consequence of focussing ‘not on whether the woman acted reasonably but rather on how “battered women” are supposed to respond to repeated abuse and on whether the accused was truly suffering from “battered woman syndrome”.’: at 54.

domestic homicide is that given the seriousness of the alleged offence and the penalty that the accused risks and in many instances, the complexity of the case, the parties should regard retaining experts in preparation for trial as an imperative necessary to fulfil the Constitutional requirement of the accused's right to a fair trial.¹³² In many instances, the expert is appointed specifically to give evidence in court – and this is often because of financial constraints attendant upon using an expert for longer periods of time. However, proper pre-trial preparation will limit contestations in the courtroom between the expert witness for the prosecution and the expert witness for the state. This, in turn, will minimise the greater confusion that may be created by differing expert views and enable the expert witnesses to fulfil their role of assisting the court.¹³³

8.4 CONCLUSION

In South Africa, the law of self-defence is well-defined. However, the issue demanding a response in the context of the battered woman accused of murder is: Does the law in its current formulation and application respond to 'developments in the community's perception of justice or equity or the legal convictions of the community'?¹³⁴ The short answer is "no" but, it is submitted, the conditions constituting the definition of the law of self-defence (i) read with the proposed re-modelling and (ii) applied to the construct of the lived reality of victims of domestic violence, can provide justice and fairness in cases of battered women who kill their abusers and claim self-defence. This conclusion is

¹³² See above n123 at 44.

¹³³ As Meintjies-Van der Walt points out, 'The dilemma of conflicting expert opinions has in South Africa resulted in courts being unable to rely on expert evidence.': L Meintjies-Van der Walt 'Decision-makers' Dilemma: Evaluating Expert Evidence' 2000 13 *SACJ* 319, at 320-1. This problem is not novel to South Africa. Meintjies-Van der Walt points out in a separate publication that in bias in favour of the party by whom the witness is employed 'has through the ages been the most frequent judicial criticism levelled against expert witnesses.': L Meintjies-Van der Walt 'Cross-examination of Expert Evidence' 2001 396 *De Rebus* 22, at 24. In support of this statement she cites an Australian survey in which over a quarter of the Australian judges reported that they had encountered bias in expert evidence 'often' and two-thirds stated that they had 'occasionally' encountered bias on the part of experts.: L Meintjies-Van der Walt 'Cross-Examination of Expert Evidence' n130 at 24. Meintjies-Van der Walt comments that this problem is overcome in some inquisitorial systems where experts are expected to solve disagreements among themselves, ...': L Meintjies-Van der Walt 'Decision-makers' Dilemma: Evaluating Expert Evidence' above n130 at 321.

¹³⁴ Above n8 at 54.

supported by Snyman who is in favour of broadening the field of application of self-defence in certain circumstances.¹³⁵

Labuschagne also proposes that:

Against the principle of legality as contained in section 35(1)(1) of the South African Constitution our courts can for the sake of justice, and meaningful sentences and in preventing an abuse of the criminal law ... widen the current definition of self-defence.¹³⁶

Thus, it is submitted, the proposals for a reasonable, flexible application of the conditions of self-defence as set out in the preceding Chapters generally and in this Chapter specifically respond to the call made by Satchwell, Snyman and Labuschagne. Insofar as the battered woman facing a charge of murder is concerned, the conditions of self-defence - as revised - will be more responsive to the averments that the accused might have reasonably perceived the danger, that it was rational for the accused to feel the threat of imminent danger when she acted despite that fact that her abuser may have been incapacitated at the time, that it was necessary for her to use a deadly weapon under circumstances in which a man or non-battered woman might not, and that her actions are reasonable and not hysterical and inappropriate. Whether or not the accused acted in self-defence must remain an objective assessment tempered to take cognisance of the circumstances and experiences of the accused. Lastly, courts must recognise the value of expert witnesses in cases involving battered women. The untutored mind will find it difficult to assimilate why the defendant would have remained in the violent relationship and never sought assistance, may be keener to accept the myth that the accused remained in the relationship either because the violence was not as severe as she later claims or because she actually

¹³⁵ Above n21 at 102.

¹³⁶ [my translation] Labuschagne above n16 at 57. Schuller *et al* also take the view that with reference to the law of self-defence in Canada and Australia, the focus is not on the inadequacies of the law: rather, the focus of the courts has been to take notice when assessing 'necessity' of the 'allegedly different perceptions of battered women' (as opposed to the inadequacies of the existing self-defence laws for battered women's experience): RA Schuller, BM McKimmie and T Janz 'The Impact of Expert Testimony in Trials of Battered Women Who Kill' 2004 2 *Psychiatry, Psychology and Law* 1, at 2. However, as stated previously by the writer, this approach has no place in the South African law of self-defence.

enjoyed the violence, and could be sceptical of the assertion that the accused was too afraid to leave or that she did not recognise the relationship as an abusive one. The expert will explain the dynamics and effects of battery on a victim of abuse and negate the myths and stereotypes and assist the court to regard that accused as a reasonable, rational person.

Noteworthy regarding the aforementioned set of recommendations is the fact that the proposals made are not only relevant to women in situations of domestic violence – the writer suggests that the principles set out would be equally applicable in any case involving an accused charged with murder where there was evidence of prior abuse or an ongoing threat of violence. The proposals in this Chapter emphasise the accused's background and circumstances, including experiences of abuse, if any, and the impact they may have had on the accused's belief at the time of the alleged criminal act (particularly, the belief that there was an imminent risk of serious bodily injury or death and the belief that retaliatory force was necessary). Likewise, many of the factors will also be relevant in assessing the reasonableness of the beliefs in a manner that ensures that the law responds to the community's perception of justice or equity or the legal convictions of the community.¹³⁷

¹³⁷ See also *Self Defence Review Final Report* July 11, 1997 – modified 4 April 2008 – submitted to the Minister of Justice of Canada and Solicitor General of Canada <http://www.justice.gc.ca/eng/dept-min/pub/sdr-eld/2.html> 3.

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TITLE:

“Self-defence as a Ground of Justification in Cases of Battered Women Who Kill Their Abusive Partners”

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LL.D

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Professor S Lotter

SUMMARY:

The dissertation outlines a comprehensive background to the endemic scourge of domestic violence, with further consideration being given to an understanding of domestic violence and the recognised characteristics of an abuser and the victim of intimate violence. The study focuses on the heterosexual domestic relationship and is restricted to a situational construct of the aggressor being the male partner in the relationship. The study reflects on *inter alia* the socio-economic and psycho-social dynamics that are pertinent in an abusive domestic relationship and the impact of these factors on the conduct of the abuser and the victim. This assessment is considered to be an important base for the further research as it clearly positions the circumstances of the victim of the abuse. The study then proceeds with an in-depth examination of the law of self-defence in South Africa with a specific emphasis on the application and understanding of the law and the situations under which the act of killing the abuser may be justified under the law. A comparative study is conducted with the U.S.A, Canada and Australia and the legal lessons that would be relevant for the South African law are highlighted. The importance and impact of expert evidence in cases involving battered women who kill their abusive partners is stressed; given that the lived reality of a battered woman is often not well understood by the ordinary person, which include members of the judiciary. The test of the battered woman syndrome is specifically interrogated as a comparative standard for the conduct of the battered woman and rejected. The research emphasises the importance of understanding the action of the battered woman against the standard of a reasonable person in the circumstances of the accused. Finally, the dissertation positively concludes on possible application of self-defence as a justification in cases of battered women who kill their abusive partners.

KEY WORDS/PHRASES:

- domestic violence
- intimate partner violence
- battered woman syndrome
- intimate partner homicide
- self-defence
- imminent danger
- inevitability of harm
- lived reality/circumstances of the victim of violence
- expert evidence and domestic violence