Runjanjic v R[1]

Runjanjic v R is a significant case, concerning the common law rules regarding the admission of expert opinion evidence, for a number of reasons: it is the first time in which evidence regarding the 'battered woman syndrome' has been considered by an Australian court; it provides a useful discussion of the disputed common knowledge limitation to the admission of expert evidence, and of the *Frye* test for determining "new fields of expertise". This case has fuelled an interesting controversy amongst Australian legal writers regarding the benefits and dangers inherent in the use of battered woman syndrome evidence.[2]

The Facts

The appellants, Runjanjic and Kontinnen, both had a sexual relationship with a man named Hill, which was marked by Hill's dominance of and violence towards them. Hill put both of them to work as prostitutes designated as "No 1" and "No 2". Runjanjic, Kontinnen and Hill jointly lured the victim, a woman named Hunter, to Hill's property in order that Hill might violently interrogate Hunter about some allegedly stolen property. Hunter was detained and severely beaten.

Runjanjic and Kontinnen were convicted at trial on charges of false imprisonment and causing grievous bodily harm with intent.[3] The defendants had raised the defence of duress and counsel for the defence had sought to call a Mr Fugler, a clinical forensic psychologist of 20 years experience, to give evidence on the battered woman syndrome. However, the trial judge ruled that such evidence was inadmissible.

The defendants successfully appealed to the South Australian Court of Criminal Appeal on the grounds that the trial judge had wrongly refused to admit expert evidence on the battered woman syndrome.[4]

The Battered Woman Syndrome

The battered woman syndrome describes the result of an abusive relationship between a woman and her aggressive mate.[5] The syndrome identifies a

1 *Runjanjic v R, Kontinnen v R* (1991) 53 A Crim R 362.

2 See Stubbs, J, "Battered Woman Syndrome: An Advance for Woman or Further Evidence of the Legal System's Inability to Comprehend Women's Experience" (1991) 3 *CICJ* 267; Easteal, P W, "Battered Woman Syndrome Misunderstood?" (1991) 3 *CICJ* 356; Stubbs, J, "The (Un)Reasonable Battered Woman? A Response to Easteal" (1991) 3 *CICJ* 359; Yeo, S, "Case and Comment: *Hickey*", Forthcoming, August 1992, *Crim LJ.*

3 Hill was not convicted as he had died suddenly before the trial. The appellants alternatively claimed that Hill's violence was unanticipated by them.

4 They also appealed unsuccessfully on the grounds that the verdicts were unsafe and unsatisfactory. King CJ rejected this appeal, holding that there was a considerable body of evidence from which the jury could reasonably infer that both Runjanjic and Kontinnen had willingly cooperated with Hill.

5 This syndrome has at times been referred to as the battered wife syndrome. Thar, A E,

pattern of severe physical and psychological abuse inflicted upon the "battered woman". Dr Lenore Walker, the pioneer of this area of psychology, broke down this pattern of abuse into a three stage cycle of violence.[6] The cycle begins with a tension building stage characterised by minor abuse. This is followed by an acute battering stage, characterised by explosions of brutal violence. The cycle ends with a period of loving respite, characterised by calm and loving behaviour by the batterer, coupled with his pleas for forgiveness.

The battered woman does not leave her abuser, nor does she reach outside the home for help, for a combination of reasons. First, the loving respite stage of the cycle of violence reaffirms the woman's hope that her mate's behaviour will change.[7] Secondly, the woman is psychologically paralysed as a result of her inability to predict or control the occurrence of the acute outbreaks of violence. Walker termed this inability to act as "learned helplessness".[8] Thirdly, feelings of dependence, including financial dependence; feelings of guilt; the presence of children in the relationship; a belief that the police are unable to protect her and the fear of reprisal from the batterer force her to stay and remain silent. The battered woman lives with a sense of constant fear coupled with a perceived inability to escape the situation.[9]

Relevance

The fundamental rule governing the admissibility of any evidence is that it be relevant. That is the evidence must render the existence of the fact in issue more or less probable.[10] In *Runjanjic* the trial judge took the view that evidence regarding the battered woman syndrome was not relevant to the facts in issue, and was therefore inadmissible. The trial judge held that since the test for the defence of duress was objective, the expert evidence of the state of mind of the appellants was irrelevant.

In the Court of Criminal Appeal, King CJ[11] disagreed with the Trial Judge's finding on three grounds.[12] First it ignored the subjective aspect of the defence of duress as laid down in *R v Brown*.[13] That case held that the defence of duress exists, when the otherwise criminal acts are committed not out of choice, but because the will of the accused is overborne by threats of death or serious physical injury in such circumstances that the will of a person

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"The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis" (1982) 77 *Northwestern ULR* 348 at 350.

6 Walker, L, *The Battered Woman* (1970) at 55-65; see above n5 at 350.

7 Above n5 at 351.

8 Above n6 at 43. This phenomenon of learned helplessness, was supported by electric shock experiments conducted on dogs by Martin Seligman; see above n6 at 45-46.

9 Above n5 at 351.

10 *Wilson v R* (1970) 44 ALJR 221 at 221 per Barwick CJ; Waight, P K, & Williams, C R, *Evidence: Commentary and Materials* (1990) at 1.

11 The leading judgment in the Court of Criminal Appeal was handed down by King CJ, with whom Legoe and Bollen JJ agreed.

12 Above n1 at 368 per King CJ.

13 *R v Brown* (1986) 43 SASR 33.

of reasonable firmness might be overborne.[14] Since Mr Fugler was to give evidence as to whether the wills of the accused were in fact overborne, such evidence would be relevant to the first part of *Brown's* test.

The second ground of disagreement was that the trial judge's decision to exclude Mr Fugler's testimony overlooked "an important thrust of the proffered evidence". The evidence of the battered woman syndrome would have mainly concerned the responses of woman in general who found themselves in the appellants' situation. Therefore the evidence would have assisted the court in assessing the objective aspect of the test in *Brown*, that is whether women of reasonable firmness would have succumbed to the pressure to participate in the offences.[15]

Thirdly the proffered evidence would be relevant to the precondition to the *Brown* duress test, that the accused should not have failed to avail themselves of an opportunity which was reasonably open to them to render the threat ineffective.[16] The Chief Justice believed that the evidence of learned helplessness would have served to explain why these women, and even a woman of reasonable firmness, did not escape the situation rather than participate in the criminal activity.[17]

The Prerequisite for Admissibility — The Frye Test?

King CJ stated that an essential prerequisite to the admission of expert evidence as to the battered woman syndrome was that it be accepted by experts competent in the field of psychology or psychiatry as a scientifically established facet of psychology.[18] This appears to be a direct reference to the controversial "*Frye* test" . In *Frye v United States*[19] the District of Columbia Circuit Court held that expert testimony will only be admitted if it has crossed the line from the experimental to the demonstrable. It passes this line when the thing from which the deduction is made is sufficiently established to have gained general acceptance in the particular field in which it belongs.[20]

There is authority in Australian case law that before evidence of expert opinion is admitted it must be demonstrated that there is a "field of expertise".[21] This concept of a field of expertise is a great deal wider than *Runjanjic*'s prerequisite of general acceptance by a community of experts. It is unclear whether the judgments, which refer to a "field of expertise", implement the *Frye* doctrine.[22] What is clear, however, is that the New South

14 Id at 37.
15 Above n1 at 368 per King CJ.
16 Above n13 at 39.
17 Above n1 at 368.
18 Id at 366.
19 *Frye v US*, 293 F 1013 (1923).
20 Id at 1014.
21 *Eagles v Orth* [1976] Qd R 313 at 320-21; *Transport Publishing Co Pty Ltd v Literature Board of Review* (1956) 99 CLR 111 at 119; *R v McHardie and Danielson* [1983] 2 NSWLR 733 at 763; See Freckelton, I, "Novel Scientific Evidence: The Challenge of Tomorrow" (1987) 3 *A Bar R* 243 at 246-47.
22 Freckelton, above n21 at 247.

Wales Court of Appeal in *R v Gilmore*[23] was aware of the *Frye* doctrine and used words reminiscent of the *Frye* Test.[24]

This prerequisite for admissibility is at odds with the widely held view that the expertise in question must concern a topic or topics which are accepted by the courts as being susceptible to the acquisition of expertise extending beyond that possessed by the average tribunal of fact.[25] The former view requires acceptance by the community of experts, the latter concerns the judge's finding as to the reliability and utility of the evidence.

The *Frye* test has been the subject of a great deal of debate in the United States. The supporters' of the *Frye* test argue that the test may well promote a degree of uniformity of decision;[26] eliminate the time consuming hearings on the validity of innovative techniques;[27] guarantee that there is a minimal reserve of experts who can critically examine the validity of a scientific determination in a particular case;[28] and that it establishes a method for ensuring the reliability of scientific evidence.[29] Giannelli considers this last argument to be the one on which the test must be based, because the other rationales can be satisfied under other standards.[30]

The difficulties in applying the *Frye* test include identifying the relevant scientific field and determining whether general acceptance in the community has been obtained. Further, the United States courts have been inconsistent in their application of the test. The test has lead to problematic results because it excludes much valuable and reliable scientific evidence. Lastly since it takes some time for the novel techniques to be generally accepted by the relevant community, there is a danger that the courts will lag behind the advances of science.[31]

It is arguable that the problems that this test has engendered far outweigh its advantages.[32] This argument was recognised in the decision not to implement the *Frye* test in the United States' Federal Rules of Evidence, but rather to opt for a test regarding the "helpfulness" and the reliability of the evidence.[33] The Australian Law Reform Commission has also recommended

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23 *R v Gilmore* [1977] 2 NSWLR 935.

24 Freckelton, above n21; In *R v Gilmore* Street CJ, with whom Lee and Apps JJ agreed, quoted with approval the decisions in *US v Baller*, 519 F 2d 463 (1975) at 464 and *Commonwealth (of Massachusetts) v Lykus*, 327 NE 2d 671 (1975) at 678. Both these cases applied the Frye test in determining the admissibility of expert evidence. Street CJ, at 939, regarded *Baller* as of "direct application to the present case" and "that the approach laid down in this case is that which should be regarded as correctly stating the approach to be adopted in this state." See also Ligertwood, A L C, *Australian Evidence*, (1988) at 291-92 and *R v Lewis* [1987] 29 A Crim R 267.

25 Gillies, P, "Opinion Evidence" (1986) 60 *ALJ* 597 at 601.

26 *People v Kelly*, 549 P 2d 1240 (1976) at 1244-45; Giannelli, P C, "The Admissibility of Novel Scientific Evidence, *Frye v United States* a Half-Century Later" 80 *Colum LR* 1197 at 1207.

27 *Reed v State* 391 A 2d 364 (1978) at 371-72; Giannelli, above n26 at 1207.

28 *US v Addison*, 498 F 2d 741 (DC Cir 1974) at 744; Giannelli, above n26 at 1207.

29 Giannelli, id at 1207.

30 Ibid.

31 Id at 1208-28.

32 Id at 1208.

33 Rule 702 of the Federal Rules of Evidence (US); see Freckelton above n21 at 256.

that the field of expertise test, together with its general acceptability criterion should be avoided.[34] Yet, despite all the controversy surrounding its application, the Chief Justice insisted on invoking the Frye test to formulate this prerequisite for admissibility. In doing so he did not even cite the Frye case.

In applying this test, King CJ found that there was a general acceptance of the battered woman syndrome. This finding was based on a perusal of the considerable body of literature published in the United States on the syndrome.[35] This practice, of using published literature to establish general acceptance, was adopted in the case of *People v Palmer*.[36]

This *Palmer* practice is problematic, since the court may not have discovered all the relevant articles on the topic. Many relevant articles may only have been published in technical and scientific, rather than legal journals.[37] Thirteen of the 14 articles referred to by the Chief Justice were supportive of the battered woman syndrome, and its admissibility through expert evidence.[38] However, the cases referred to in the articles do not show such a clear acceptance of the evidence's admissibility, nor do they all agree on a criteria for admissibility of the evidence.[39] Further most of these articles were in fact written by academic lawyers, rather than experts in the fields of psychology or psychiatry. At best they would have only been able to communicate the previously published views of the relevant experts. Therefore the Chief Justice may have based his decision on a range of articles, which was not indicative of the community of experts.

Though Bollen J states that he agrees with the reasoning of the Chief Justice,[40] his decision is even more troubling. Bollen J supports the view that in the right circumstances the expert evidence would be admissible where the "battered wife" raises duress, self-defence or provocation.[41] However, Bollen J goes on to implement the "organised branch of knowledge" test from *Clark v Ryan*.[42] This test is much less restrictive and takes an entirely different form from the general acceptance test used by the Chief Justice.

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34 Australian Law Reform Commission, *Interim Report on Evidence No 26* at 358.

35 King CJ selected for citation those articles that were found to be the most useful. He also quoted from *People (New York) v Torres*, 488 NYS 2d 356 (1985) at 363 and *States (New Mexico) v Gallegos*, 719 p 2d 1268 at 1274. Above n1 at 370. Since the Trial Judge ruled the evidence inadmissible on the grounds of relevance, Mr Fugler was not examined on the point of whether the battered woman syndrome was accepted by experts as a scientifically established facet of psychology, nor any finding was made.

36 *People v Palmer*, 145 Cal Rptr 466 (1978) where the admissibility of gun shot analysis residue evidence was permitted after general acceptance had been established solely through the judicial notice of legal and scientific publications.

37 Giannelli, above n26 at 1217

38 Only the comment "The Psychologist as Expert Witness: Science in the Courtroom" (1979) 38 *Maryland LR* 539 was overly critical of the evidence and its admissibility.

39 See *Burle v State*, 627 P 2d 1374; Thar, above n5 at 357; Freckelton, I, "Battered Woman Syndrome" (1992) 17 *Alternative LJ* 39 at 40; McCord, D, "Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases" (1987) 66 *Oregan LR* 19.

40 Above n1 at 372.

41 Ibid.

42 *Clark v Ryan* (1959) 103 CLR 486; see Magner, E S, "Case and Comment: *Runjanjic Kontinnen*" (1991) 15 *Crim LJ* 445 at 447.

Common Knowledge

The recent High Court decision of *Murphy v The Queen* [43] is said to be authority for the proposition that provided the behaviour on which a jury is called on to assess is outside their experience and knowledge, scientific evidence may be admitted so as to provide the jury with the understanding of the behaviour.[44] Contrary to this proposition, King CJ in *Runjanjic* believed that it would not be sufficient to prove, for the admission of the expert opinion, that the ordinary juror would have had no experience of the situation of a battered woman .[45] Nevertheless, he went on to say 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 jurors, or of the court if it is the trier of facts, that the 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.[46]

The fact that the accused cannot be characterised as an abnormal person or that the evidence relates to the behaviour of normal persons in special situations is not necessarily a bar to the admission of such evidence.[47] King CJ concluded that the tribunal of fact should have had the assistance of the insights which have been gained by the special study on the subject, so as to provide a just judgment of the appellants' actions.[48]

Support for this conclusion was found in the Canadian Supreme Court decision of *Lavallee v The Queen* .[49] In that case Wilson J acknowledged that the average jury member may be inclined to question the accused as to why she did not leave her batterer. This, however, is a social misconception of the situation of the accused.[50] The actions of the battered woman are said to be beyond the ken of the common person. Therefore evidence of Dr Lenore Walker's theory of learned helplessness would assist the tribunal of fact by explaining the actions and inactions of the accused.

This thoughtful commentary as to the status of the common knowledge limitation on the admission of expert evidence is most welcome. It is apparent from this decision, and from the support given to it in *Murphy*,[51] that Australian courts have now adopted the Wigmore approach to this previously inflexible rule. According to Wigmore an expert's testimony would be superfluous unless the witness's skill was greater than the jury's.[52] Prior to *Runjanjic* and *Murphy* it had been thought that expert opinion would be

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43 *Murphy v The Queen* (1989) 167 CLR 94.

44 Byrne, D and Heydon, J D, *Cross on Evidence* (3rd Aust Ed, 1986) at para 29040; above n43 at 430 per Mason CJ and Toohey J.

45 Above n1 at 368

46 Ibid.

47 Ibid, citing Murphy above n43 at 112 per Mason CJ and Toohey J; at 130-31 per Dawson J.

48 King CJ came to this conclusion after reflecting upon the battered woman syndrome literature cited in his footnote.

49 *Lavallee v The Queen* 55 CCC (3d) 397 (1990).

50 See Schneider, E M, "Equal Rights to Trial for Women: Sex Bias in the Law of Self -Defence" (1980) 15 *Harv CR-CL LR* 623 at 629-30.

51 Above n43 per Deane J at 437; per Dawson J at 439.

52 In Chadbourn, J H, (ed), *Wigmore on Evidence* (1978) para 1917-18.

rejected whenever it concerned a matter of general human behaviour.[53] Now, only that expert opinion which does not provide substantial assistance to the jury will be rejected under this limitation.

Bollen J's Caveat

Bollen J concluded his judgment with an interesting caveat regarding the dangers of expert testimony. He considered that the evidence may be held to be inadmissible if the value of the expert testimony is outweighed by counterveiling considerations said to be prejudicial to the accused person.[54] Assuming that Bollen J is discussing considerations that are prejudicial in the accused favour,[55] this statement seems to be a revelation to the Australian law of evidence.[56]

Conclusion

Runjanjic was the first Australian case dealing with the admission of expert opinion evidence regarding the battered woman syndrome. Since *Runjanjic*, battered woman syndrome evidence has been held admissible in two self defence cases that have resulted in the acquittal of the accused.[57] This evidence may also be admitted with respect to the defence of provocation .[58]

While the judgments concisely explain the relevance of the evidence and provide an authoritative discussion regarding the disputed common knowledge rule, they are not without their problems. These problems include the court adopting the *Frye* test as a prerequisite for admissibility without any reference to the *Frye* case nor the disadvantages of its application; King CJ basing his finding of general acceptance on seemingly shaky foundations; and Bollen J, while expressing an agreement with the Chief Justice's reasonings, implementing the broader organised branch of knowledge test. Lastly, the greatest problem arising from this case may well be the introduction into Australian courts of the battered woman syndrome evidence itself.[59]

PAUL GIUGNI

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53 *R v Turner* [1975] 1 QB 834 at 841

54 Above n1 at 372.

55 Since the "counterveiling considerations" referred to by Bollen J work in the accused's favour, it is logical to assume that the prejudice to which he refers is that prejudice which is in the favour of the accused.

56 In Magner, E S, above n42 at 448 it is noted that no such discretion is available in Australia, however the argument is open in the United States.

57 *R v Kontinnen* , unreported, South Australian Supreme Court, 30 March 1992; *R v Hickey*, unreported, Slattery J, New South Wales Supreme Court, 14 April 1992. Both of these cases however merely applied *Runjanjic* in admitting expert opinion evidence regarding the battered woman syndrome without any argument regarding the merits of that decision; see Yeo, above n2.

58 Above n1 at 370 per King CJ.

59 See above n2.