G Using Sexist Language

This form of gender bias covers much more than what I have heard Dr Sheilah Martin QC describe as pronoun envy. However, the use of inclusive or gender neutral pronouns is an essential first step in avoiding gender bias.

- Many women lawyers have commented on the fact that they have to announce themselves in court as either Ms, Miss or Mrs, when male counsel just say their surnames, and that if they introduce themselves as Ms, some Judges and opposing counsel seem to deliberately call them Miss throughout the proceedings.
- Another fairly common example we have heard is of Judges greeting counsel as "Gentlemen" when women counsel are present.
- A woman at a Family Court mediation reported that the Judge called her "Mum" throughout when, as she said, "I am most certainly not his mother" and added

> To me this was belittling, especially when they command respect for their own position, ie we call them Sir, Your Honour.

- Some women lawyers count body language as sexist language, referring to Judges who roll their eyes when they or women witnesses are speaking, or who stare at women counsels' legs.

VI CONCLUSION

At the AIJA Equality and Justice conference in October 1995,[46] one of the presenters listed six prerequisites for avoiding gender bias. They are these:

1 Be aware of the law's historical approach to women.

2 Be aware of the facts about women's position in society.

3 Have an understanding of the meaning of equality.

4 Be aware of gender myths and stereotypes.

5 Be prepared to question your own perspectives and values.

6 Have an empathetic understanding of people from a different background and having different experiences from your own.[47]

Obviously, the Judicial Seminar on Gender Equity provides a unique opportunity for New Zealand Judges to explore the meaning of each of those vitally important matters.

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46 Held at Ballarat for Judges and Magistrates of the State of Victoria.

47 Professor M Neave, oral commentary on session of conference.

This contribution to the discussion has focused on women's experiences in the legal profession, and in court, in order to highlight how gender counts, as it does in society generally, to women's detriment. What has not been explored here are the socially constructed factors other than gender - particularly of minority ethnicity, disability, and sexuality - which cause wide disparities in the experiences of different groups of women and which also, free of gender's stigma, disadvantage large numbers of New Zealand men in their dealings with this country's social systems. The comments made to the Law Commission during its consultations in the Women's Access to Justice project, especially by Maori women, suggest that the above list of prerequisites for avoiding gender bias could, with appropriate amendments, form the basis of future seminars which explore the effects of those other socially constructed factors upon New Zealanders' perceptions of and participation in our justice system.

DEFENDING ABUSED WOMEN: BEGINNING A CRITIQUE OF NEW ZEALAND CRIMINAL LAW

*Elisabeth McDonald**

The role of abuse in the lives of women who offend has been an issue in a number of recent high profile cases. This article considers the application of a number of defences to cases of violent female offending and concludes that the substantive law does not adequately address the abusive context in which women, as opposed to men, commit criminal acts.

I INTRODUCTION

> [T]here is a major problem confronting women who seek to rely on...criminal defences. It is that these defences have been developed through a long history of judicial precedents on the basis of male experiences and definitions of situations. Consequently female defendants whose experiences and definitions fall outside these male-inspired defences are confronted with the prospect of either failing to plead them successfully or having to distort their experiences in order to fit them into the defences.[1]

It is now recognised that most women kill for different reasons than men.[2] It is also argued, although perhaps not so widely accepted, that women also offend for different

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1 S Yeo "Resolving Gender Bias in Criminal Defences" (1993) 19 Monash LR 104. See also I Leader-Elliott "Battered But Not Beaten: Women Who Kill In Self Defence" (1993) 15 Sydney LR 403, 405: "The policies which shaped the modern law of self defence and provocation developed without reference to the very different patterns of homicide when men are killed by women."

2 "When men kill their wives they are often separated from them and the dispute is related to issues of exclusivity and child custody. Women rarely kill over sexual jealousy or following termination of the relationship and the killing is nearly always preceded by a high degree of violence." C Wells "Battered Woman Syndrome and the Defences to Homicide: Where to Now?" (1994) 14 Legal Studies 266. See also: E Hore, J Gibson and S Bordow *Domestic Homicide*

reasons.[3] The impact of abuse (sexual, violent, psychological) and poverty on women's lives is gradually being considered in the context of the criminal law. Women have long been participants in the criminal justice system as complainants, victims/survivors of abuse, but the argument that abuse may also contribute to female offending is a recent one.[4]

Abuse and poverty may also combine to place financial pressure on women to break the law in order to provide for their family - the recent cases of *Ruka v DSW* [5] and *DSW v Te Mounanui*[6] are compelling examples of this dynamic. The economic position of women[7] (especially those providing for children) together with the prevalence of sexual and violent abuse of women by men they know[8] place women, including Maori women,[9] under gender specific pressures which arguably lead women to offend in different ways and for different reasons than men.

In this article I discuss whether and how the current substantive New Zealand criminal law acknowledges the prior abuse of women offenders by examining the operation of the

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(Family Court of Australia, Research Report 3, 1996); P Easteal *Killing the Beloved: Homicide Between Adult Sexual Intimates* (Australian Institute of Criminology, Canberra, 1993) and K Polk "Lethal Violence as a Form of Masculine Conflict Resolution" (1995) 28 Aust and NZ J of Criminology 93.

3 E Sommers *Voices from Within: Women Who Have Broken the Law* (University of Toronto Press, Toronto, 1995).

4 "We understand that a history of battering, previously invisible, can now be seen in women's criminal conduct in a wide variety of circumstances, and that many women who are in jail on charges that are seemingly unrelated to battering have been battered." E Schneider "Resistance to Equality" (1996) 57 Uni of Pitt LR 477, 489-90.

5 "The abuser generally exerts not only physical control but financial and social control also. Women in these relationships are frequently kept without money, are not allowed friends, and are forbidden to move outside the house without the knowledge of the dominant party." [1997] 1 NZLR 154, 171. For further discussion of this case see E McDonald "A Relationship in the Nature of Marriage: *Ruka v Department of Social Welfare* [1996] NZLJ 423.

6 [1996] DCR 387, 392.

7 J Morris *Women's Access to Justice: He Putanga Mo Nga Wahine Ki Te Tika - Justice is Not Blind to the Effects of Gender* (New Zealand Law Society, Conference Papers, Vol 1, Dunedin, 1996) Volume 1, 9, 10-11.

8 For example, see the statistics in N Seuffert "Lawyering for Women Survivors of Domestic Violence" (1996) 4 Waikato LR 1 and the recent findings in: A Morris *Women's Safety Survey 1996* (Victimisation Survey Committee, Wellington, 1997).

9 Maori woman are also eleven times more likely than non-Maori women to be convicted of a "non-traffic" offence - see J Paulin and E Siddle *Responding to Offending by Maori: Some Criminal Justice Statistics* (Criminal Justice Policy Group, Ministry of Justice, 1996) 38 (Draft containing provisional results).

defences of provocation, self defence, automatism and insanity.[10] I argue that the criminal law does not reflect an appropriate understanding of the dynamic of abuse and its effects on women's lives and women's offending and that the understanding of judges and juries is unnecessarily limited by the current use of expert evidence. I conclude that, because women's experiences of sexual and physical abuse contributes to their offending in gender-specific ways, the criminal law should be amended or interpreted in a way that acknowledges the effects of such abuse as it acknowledges the principal excuses for "male" offending. Some examples of proposed reform are also discussed.

II WOMEN WHO KILL THEIR ABUSERS

> Most 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.[11]

Abused woman in New Zealand have killed their abusers. Whether such killings should be viewed by the law as "justified" (in self defence) or "excusable" (as provoked) or punishable as intentional killing is a debate that has split the profession and the public.[12]

The issue that has been the focus of the debate has been the relevance of the context of abuse to the case against the woman offender and her punishment. In recent years, the effect of this context of abuse has been introduced into the trial as expert evidence of the so called "battered woman syndrome" (BWS).

A The Role of Expert Evidence of "Battered Woman Syndrome"

Expert evidence concerning BWS has been admitted by New Zealand courts as relevant to a number of different issues, including the perception of imminence in relation to self-

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10 For discussion of the role of abuse and the defence of compulsion see: E McDonald "Women Offenders and Compulsion" [1997] NZLJ 402.

11 S Osthoff, Director of the National Clearinghouse for the Defence of Battered Women (USA), cited in M Hooper "When Domestic Violence Diversion is No Longer an Option: What to do with the Female Offender?" (1996) 11 Berkeley Women's LJ 168, fn 33. Note also an Australian study which concluded that possessiveness is a major feature of male violence, whereas in six out of the seven cases in which a woman had killed her male partner there was evidence that the woman had acted in self protection against a violent and abusive partner. See K Polk and D Ranson "The Role of Gender in Intimate Homicide" (1991) 24 Aust and NZ J of Crim 15.

12 See for example, F Wright "Self Defence and the Classification of Defences" (1992) 7 AULR 127, 136ff and R Schopp, B Strugis and M Sullivan "Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse" [1994] Uni of Illinois LR 45.

defence[13] and the presence of "a relationship in the nature of a marriage."[14] Expert evidence describing the syndrome has been admitted because it has been argued it is beyond the common understanding of the jury[15] and that it will therefore assist the jury in understanding why the woman behaved in a certain way, behaviour which may otherwise be contrary to expectations.[16] This is sometimes referred to as "counter-intuitive" evidence. For example, it is argued in support of admitting such evidence that many people do not understand why woman do not leave an abusive relationship, and jurors may attempt to explain this by categorising the woman as either someone who enjoys being beaten, or a liar who has exaggerated the extent of the abuse.[17] It may therefore be of considerable assistance to a woman's defence for the jury to be educated about the effects of abuse, to know that men threaten and pursue their absent wives, and that the option of leaving home is neither emotionally or economically straightforward.[18]

Although it is undoubtedly useful for juries to be educated in this way, there has been much criticism of the reliance on evidence of BWS as a way of explaining the dynamics of abusive relationships.[19] The main concerns are that rather than an abused woman being presented as "a normal, reasonable person, caught in irrational circumstances, responding as any reasonable person would",[20] as a sufferer of a syndrome she is represented as mentally unstable. The indicators of the syndrome may also not be present in the conduct of many abused women, which may then deny them a defence and their abuse may not be used to explain or excuse their actions. The fact that a woman may not "fit" the profile of a battered woman as defined by the syndrome may also be used against women who are victims, rather than offenders. Such an approach was taken in the criminal trial of OJ

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13 *Oakes* [1995] 2 NZLR 673; *Wang* [1990] 2 NZLR 529.

14 *Ruka*, above n 5.

15 See generally L Etlinger "Social Science Research in Domestic Violence Law: A Proposal to Focus on Evidentiary Use" (1995) 58 Albany LR 1259.

16 AM Montgomery "*State v Riker*, Battered Women Under Duress: The Concept the Washington State Court Could Not Grasp" (1996) 19 Puget Sound LR 385, 397-398; I Freckleton "When Plight Makes Right - The Forensic Abuse Syndrome" (1994) 18 Crim LJ 29, 40 and 48.

17 K O'Donovan "Law's Knowledge: The Judge, the Expert, the Battered Woman and Her Syndrome" (1993) 20 J of Law and Society 427, 430.

18 C Wells, above n 2, 274.

19 See for example E Sheehy, J Stubbs and J Tolmie in "Defending Battered Woman on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 Crim LJ 369; Celia Wells, above n 2.

20 M Dowd "Dispelling the Myths about the 'Battered Woman's Defence': Towards a New Understanding" (1992) 19 Fordham Urb LJ 567, 574.

Simpson. The defence called an expert witness to support their argument that Nicole Brown Simpson did not suffer from BWS therefore she was not a battered woman which (arguably) made it less likely that OJ, allegedly her abuser on previous occasions, had killed her.[21]

As noted more recently, a significant local difficulty with inappropriate use or undue reliance on syndrome evidence is that:[22]

> BWS evidence interacts with cultural, gender stereotypes with the result that women who kill abusers now have to fit within an "abused woman" straightjacket. This corresponds to a stereotype of a white, middle-class woman and stresses passivity, docility and helplessness. It excludes the experience of Maori women...whose experience of abuse is also shaped by racism.

Marewa Glover, for example, argues against the general applicability of the description of BWS, having found in her work with Maori women that abuse by male partners was constant rather than cyclical and took the form of a downward spiral.[23]

Recent Canadian research into the validity of these feminist concerns over the reliance on expert evidence of BWS by women defendants also concluded:[24]

> Women with alcohol or drug problems, who use profane language, or who are involved in illegal activities may thus have less success using the battered woman syndrome, not because their self-defence claims are less valid, but because juries may be less likely to view them as deserving battered wives.

It is argued that for there to be appropriate reliance on the effects of battering there should no longer be references to a "syndrome" and expert explanations in terms of social

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21 M Griffith "Battered Woman Syndrome: A Tool for Batterers?" (1995) 64 Fordham LR 141.

22 S Beri "Justice for Women Who Kill: A New Way?" (1997) 8 Aust Fem LJ 113, 123. See also J Stubbs and J Tolmie "Race, Gender and the Battered Woman Syndrome: An Australian Case Study" (1995) 8 Can J of Woman and the Law 122.

23 S Beri *Justice for Women: A submission in support of a review of cases of women who are in New Zealand prisons for offending which relates to abuse* (Women's Justice Service, Christchurch, 1997) 19.

24 M Schaffer "The Battered Woman Syndrome: Some Complicating Thoughts Five Years After *R v Lavallee*" (1997) 47 University of Toronto LR 1, 14.

problems rather than individual pathology should be admissible.[25] This was acknowledged recently by Thomas J:[26]

> [W]hile the syndrome represents an acute form of the battering relationship...it is probably preferable...to avoid reference to it and to speak simply of the battering relationship. 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 the will of women in such relationships... *It is not, therefore simply a matter of ascertaining whether a woman is suffering from battered woman's syndrome and, if so, treat 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.*

Evidence which may be of more assistance is that which focuses "on the defendant's circumstances and alternatives rather than her psychological state."[27] Counsel should also seek to introduce "background evidence about the prevalence of violence, the economic dependency of women and their expected roles as home and family makers."[28]

A different approach to the kind of evidence which is introduced to help a jury understand the situation and mental state of a battered woman may also respond to arguments that BWS is not an appropriate subject for expert evidence[29] and prevent the use

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25 K Budrikis "Note on *Hickey*: The Problems with a Psychological Approach to Domestic Violence (1993) 15 Sydney LR 365.

26 *Ruka*, above n 5, 173-174 (emphasis added).

27 Sheehy et al, above n 19, 394 (emphasis added). See also Leader-Elliott, above n 1, 418: "The simplest and most nearly accurate explanation of a woman's choice to remain may be found in her belief that her life in that relationship, and the relationship itself, is still worth defending. There is no reason to assume...that she stayed because she was psychologically incapable of leaving or that her choice to remain was irrational or pathological."

28 C Wells, above n 2, 275. This is also the argument made more recently by M Raeder - see "The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence" (1996) 67 Uni of Colorado LR 789.

29 I Freckelton "When Plight Makes Right - The Forensic Abuse Syndrome" (1994) 18 Crim LJ 29; "Battered Woman's Syndrome - Dangerous Myth or Reality?" *The Evening Post*, Wellington, New Zealand, 20 November 1996.

of BWS in other contexts to establish that a woman was not abused, because she was not diagnosed as having the syndrome.[30]

A recent study with mock jurors, however, found that there was no significant difference in terms of verdict choice or juror judgments when the presented expert testimony discussed "battered woman syndrome" rather than "social agency". The study concluded however that "the more important aspects of the testimony for jurors is *the information provided about the limited choices confronting battered women* in their attempts to end the abuse." [31] This finding emphasises the desirability of introducing evidence about the effects of abuse in a way that does not require women to meet a certain standard or diagnostic criteria.

Although the role of abuse has been acknowledged in a number of New Zealand cases, it has usually occurred solely through the use of expert evidence of BWS. The limitations of expert evidence concerning BWS is therefore apparent in much of the case law dealing with defences, which is discussed in the following sections.

B Representations of Woman-Abuse in the Law of Self Defence

Apart from lack of intent, involuntariness and insanity, the only complete defence to murder is self defence. It is unknown whether any woman in New Zealand who has killed her batterer has been acquitted on the grounds of self defence.[32] The argument has certainly been made in a number of high profile cases, the most recent being *R v Oakes*.[33] The issue in these cases, where the defence has either been unsuccessful or has not been put to the jury, is whether the killing was "reasonable" in the circumstances. The question is familiar: is it justifiable for a battered woman who is not in "immediate" danger of death or grievous bodily harm to kill her batterer rather than leave to avoid certain death (as she perceives it) at some later time?

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30 The difficult issues raised in the debate concerning the use of expert evidence concerning BWS are usefully illustrated by the most recent Court of Appeal case to discuss the admissibility of such evidence: *R v Guthrie*, Unreported, 18 June 1997, Court of Appeal, CA 387/96.

31 R Schuller and P Hastings "Trials of Battered Woman Who Kill: The Impact of Alternative Forms of Expert Evidence" (1996) 20 Law and Human Behaviour 167, 183. For further discussion on the helpful use of expert testimony see M Raeder "The Better Way: The Role of Batterers' Profiles and Expert 'Social Framework' Background in Cases Implicating Domestic Violence" (1997) 68 Uni of Colorado LR 146.

32 Self defence was successfully relied on by a battered woman in an attempted murder case: *R v Zhou*, Unreported, 8 October 1993, High Court, Auckland Registry, T 7/93. For commentary on this case see N Seuffert "Battered Women and Self Defence" (1997) 17 NZULR 320.

33 Above n 13.

The arguments are well-traversed. For the woman it is argued that (relying on the wording of section 48 of the Crimes Act 1961)[34] in the circumstances as she believed them to be (that he would kill her when he woke up,[35] in the morning, or some time soon[36]) she had no reasonable alternative to avoid her own death (or the death of her children) than to kill him, by means of a "pre-emptive strike". For the Crown it is argued that it is unreasonable to kill him when it is possible to retreat, by going to the police, to a neighbour, to a Women's Refuge or simply to sleep.[37] To date, the Crown has had the best of the argument. The Court of Appeal has affirmed that to allow women in these situations to rely on self-defence is to "return to the law of the jungle."[38]

Although the prevailing opinion (at least in New Zealand)[39] has the appeal of valuing the batterer's life it does fail to acknowledge what women's groups, women's advocates and provocation case law has been indicating for some time: that the most dangerous time for an abused woman is the three months after she has left the relationship.[40] Killing or violence in this time is known as "separation homicide" or "separation assault."[41] Most studies establish that the batterer stalks, harasses, attacks and sometimes kills his ex-partner in

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34 Section 48 provides: Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be it is reasonable to use.

35 *Wang*, above n 13.

36 *Oakes*, above n 13, 678.

37 *Wang*, above n 13, 534.

38 *Wang*, above n 13, 535. "In particular, though [the Court of Appeal] made no reference to its decision in *Wang*, the *Oakes* Court seems to have retreated from its uncompromising approach in the earlier case." K Dawkins "Criminal Law" [1996] NZLRev 31, 47.

39 In Australia and Canada, imminence has been construed more liberally - see the recent case of *Secretary* (1996) 20 Crim LJ 223, 224. "[T]he accused could legally defend herself against a threat of future harm, provided that the threat itself was current... [A] sleeping aggressor could have a 'present ability'...to execute a threat he had made prior to falling asleep."

40 "The evidence and other material put before the Court strongly suggests that a battered woman is at greatest risk when she leaves or attempts to leave the relationship." *Ruka*, above n 5, 163.

41 Sheehy et al, above n 19, 394. "Separation homicide" is far too common. One Australian study found that in nearly half of the wife killings, the woman had either left or was in the process of leaving when she was killed. Wallace *Homicide: The Social Reality* (NSW Bureau of Crime Statistics and Research, 1986) 112. See also Leader-Elliott, above n 1, 403 and F Manning *Self Defence and Provocation: Implications for Battered Women Who Kill and for Homosexual Victims* (NSW Parliamentary Library Research Service, Briefing Paper No 33/96) 7-8.

75% or more of all cases.[42] The inability of the courts to recognise and validate the abused woman's perception of the "imminent" danger amounts to a serious gap between the experience of women and the operation of the criminal law. It is only more recently that one judge of the Court of Appeal has acknowledged that a battered woman may be "bound to [a] relationship by fear resulting in a psychological paralysis"[43] so that the only way to avoid being killed is to kill.

The significant issue in relation to battered women and self defence is the credibility of the woman. Given that section 48 contains a subjective inquiry (in the circumstances as she believes them to be), when a woman kills a man rather than be killed it *must* be justified and reasonable. Although the Court of Appeal in *Wang* agreed with the trial judge that "no ordinary reasonable person...would...have believed it necessary to kill", therefore apparently making the finding that the objective limb of the section was not satisfied, the Court failed to give adequate weight to the subjective limb - "in the circumstances as she believed them to be". If an abused woman believes that there is no alternative but to kill in order to prevent her death or the death of her child then her actions *must be reasonable*. Such a fact scenario must be covered by section 48, and the section, as worded rather than as interpreted, would clearly allow for such an outcome. That the Court of Appeal upheld a decision not to allow self defence to even be considered by the jury indicates that there was no real acceptance of the woman's story and of her belief.[44] It is because of this credibility "gap" that evidence to enable the Court and the jury to assess the sincerity of that belief is essential.[45] Evidence can assist the jury to understand how well an abused woman can predict the behaviour of an abuser and therefore be in the best position to know whether the threats are likely to be acted on.[46]

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42 See for example, BJ Hart "The Legal Road to Freedom" in M Hansen and M Harway (eds) *Battering and Family Therapy* (Sage Publications, Newbury Park, California, 1993). For some Australian statistics see E Hore, J Gibson and S Bordow *Domestic Homicide* (Family Court of Australia, Research Report No 13, 1996).

43 *Ruka*, above n 5, 183.

44 *Wang*, above n 13.

45 An Australian study demonstrates the gap between law and reality: "[I]t is significant that...the situations in which the women found themselves were not considered by their lawyers as justifying a plea of self defence. This attitude stands in strong contrast to that of the women concerned, who viewed the homicides as acts of self preservation". Manning, above n 41, 15.

46 "[I]t has been suggested that a battered woman's knowledge of her partner's violence is so heightened that she is able to anticipate the nature and extent (though not the onset) of the violence by his conduct beforehand." *R v Lavallee* (1990) 1 SCR 852, 880 (cited in *Oakes*, above n

One commentator has argued that a battered woman's perception of imminence may be also more understandable if one:[47]

> view[s] the battered woman as a hostage who is told she would be killed the next day and then strangles a sleeping guard in an effort to escape. The perception of the reality of this threat gained over time is thus accepted as sufficiently imminent to justify the use of whatever force is necessary to achieve freedom.

The importance of this particular inquiry (into the woman's perception of imminence) is clear. Advocates for battered women in such a position should endeavour to get admitted as much of the context of the offence as is possible, whether this is through direct evidence or expert opinion. The importance of this kind of evidence has been recognised by the Court of Appeal in *Oakes*:[48]

> It will be apparent that the syndrome has its greatest relevance to the defence of self-defence, where the test is whether the force used is reasonable in the circumstances as the accused believes them to be...A woman suffering from the syndrome may genuinely perceive danger earlier than others would, and a threat of more serious harm than others might see. The reasonableness of her response is, in accordance with the section, to be judged in light of her perception.

Despite this statement, however, the Court of Appeal went on to hold that there was no misdirection even though there was only one brief reference to BWS in the trial judge's direction to the jury, and that was in relation to provocation. The impact of this omission has been noted:[49]

13, 676). See also E Schneider "Describing and Changing: Women's Self-Defence Work and the Problem of Expert Testimony on Battering" (1986) 9 Women's Rights Law Reporter 195, 222.

47 Above n 20, 580.

48 Above n 13, 676. As Suzanne Beri notes, however, the emphasis on BWS in the judgment may mean the decision "may not benefit woman who kill abusive partners who are not 'diagnosed' as having BWS at the time of the killing." Above n 22, 120.

49 Above n 32, 322. See also Dawkins above n 38, 47: "All the same, it seems more than slightly precarious for the court to accept, on the one hand, the important explanatory effect of defence evidence to the contrary but then, on the other, to approve a direction that failed to leave that to the jury on two of the central issues in the case." ; and J Finn "*Oakes*: Case and Comment" (1995) 19 Crim LJ 291, 293: "It [the relevance of BWS to self defence] was a live issue, perhaps the most important live issue, in the trial. To say that this did not matter because the jury might not have taken a view of the evidence favourable to the defence is, with respect, wrong. Trial judges have an obligation to put to jurors the vital evidence on the major issues before them; appellate courts have a duty to see that this is done."

> [T]he crucial relevance of the entire context of abuse to Oakes' perception of the circumstances and therefore the reasonableness of a pre-emptive strike in self-defence was not clarified for the jury by the judge...[T]he jury may not have had any information on the reasonableness of a pre-emptive strike in the circumstances as Oakes believed them to be and the relevance of battered woman syndrome to those circumstances. Therefore it seems unlikely that the jury could have grasped the relevance of Oakes' and the expert's testimony as to [her] fear on the night of the killing and her possible perception, due to her ability to predict the abusive acts of Gardener, that he would kill her that night.

The Court of Appeal also stated that battered woman's syndrome "could provide a motive for murder",[50] a "remarkable" statement which is "contrary to all of the evidence given in the case, and other cases, about the nature of the effects of battered woman syndrome."[51] The decision has prompted this comment from a male academic:[52]

> Many writers have long suggested that the law and the courts alike do not provide fair trials for women who kill their abusers. Despite its statement of principle as to the effects of battered woman syndrome, the judgment in *Oakes* will do nothing to dispel their fears.

The final portion of the Court of Appeal judgment in *Wang* also reflects lack of understanding about the impact and effects of abuse. The Court approved the following comments of the sentencing Judge:[53]

> I find it disturbing that even at this stage, long after the event, *you should still say that you really felt that you had no option but to kill your husband*...[T]here seems to me to be an absence of any real contrition that you took your husband's life. I think that this gives some insight into the degree of deliberation involved in your actions.

With respect, it appears wholly consistent with the appellant Xiao Jing's version of the events and her belief in the imminence of harm that she "should still say [she] had no option but to kill [her] husband." This statement seems to reflect the trial judge's disbelief of her story and it appears that she is to be punished twice for thinking something so incredible. First, by not allowing her belief to be considered by the jury as making out a claim of self defence (that would be a "return to the law of the jungle"), and secondly, by treating her belief as an aggravating element in sentencing her for manslaughter (provocation having

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50 Above n 13, 683

51 Finn, above n 49, 293.

52 Finn, above n 49, 293.

53 Above n 13, 541 (emphasis added). This rationale was cited with apparent approval by the Court of Appeal and was seemingly not an issue for Wang's counsel.

been accepted by the jury). *Wang* is a striking example of how a failure to understand or accept women's reality impacts on the possibility of a just result. The case also demonstrates that expert evidence on the generality of BWS alone does not adequately inform judges and jurors of the relevant effects of abuse.

C *Is Woman-Abuse Provocative?*

> Historically, [provocation as a defence] developed to excuse male murder of women, prompted by a threat to male control over women's sexuality, and/or a threat to male possession and ownership of women in heterosexual relationships.[54]

> Only in more recent years have courts begun to recognise, haltingly and uncertainly, the possibility that resentment against continuing cruelty, abuse or exploitation might rank as the equivalent, in exculpatory effect, of jealous rage prompted by real or imagined infidelity.[55]

> While currently offering the most hope for battered women...provocation is a defence which is premised upon and perpetuates male notions of violence.[56]

Provocation has been relied on more successfully than self-defence, both here[57] and overseas,[58] by battered woman who have killed. The interpretation and application of section 169 of the Crimes Act 1961,[59] which codifies this partial defence to murder has not,

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54 Beri, above n 22, 121. See generally: E McDonald "Provocation, Sexuality and the Actions of 'Thoroughly Decent Men'" (1993) 9 Women's Studies Journal 126; S Edwards "The Gender Politics of Homicide" in *Sex and Gender in the Legal Process* (Blackstone Press Ltd, London, 1996) 393ff; V Nourse "Passion's Progress: Modern Law Reform and the Provocation Defence" (1997) 106 Yale LJ 1331; I Leader-Elliott "Passion and Insurrection in the Law of Sexual Assault" in N Naffine and R Owens (eds) *Sexing the Subject of Law* (Sweet & Maxwell, Sydney, 1997) 149.

55 Leader-Elliott, above n 1, 405.

56 D Nicolson and R Sanghvi "More Justice for Battered Women" [1995] New LJ 1122, 1124.

57 *Wang*, above n 13.

58 A Young "Conjugal Homicide and Legal Violence: A Comparative Analysis" (1993) 31 Osgoode Hall LJ 761.

59 Section 169 provides:
(1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.
(2) Anything done or said may be provocation if -
(a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and
(b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

however, been clear or consistent. The difficult case law[60] on this section has arguably not helped battered women who have tried to have their actions excused under this provision.

The particular difficulties for battered women who seek to rely on the defence is satisfying the two legal requirements. First there must be an identifiable provocative act which occurs immediately before the killing.[61] Secondly, the killing must occur while the offender is in the heat of passion.[62] These are sometimes referred to as the objective requirement (that there was an objectively provocative act) and the subjective requirement (that as a result of that provocation, the offender did in fact lose self-control).[63]

Although the immediacy requirement has been interpreted less strictly when it seems apparent that the provocation has been "re-kindled" by another act,[64] it seems apparent that women will usually kill an abuser after a long history of abuse, rather than one specific incident.[65] In the case of battered women who kill their abusers, there will normally not be one sufficiently provocative "act"[66] (that is, an act that would cause an ordinary person to lose the power of self control). Further, battered women will often not kill in the heat of the moment, but after some time, when the batterer is asleep or drunk.

The lack of a sufficiently provocative act has been addressed by women's advocates in two ways. First, by arguing that although an ordinary person may not lose self control over the particular act (which may be, for example, throwing the dinner at the wall), in the context of an abusive relationship this may well be enough to "provoke" a battered wife. This argument is supported by the treatment of battered woman syndrome as a

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60 Note the contradictory comments of the Court of Appeal in *McCarthy* [1992] 2 NZLR 550 while trying to clarify the approach in *McGregor* [1962] NZLR 1069. See also B Brown "Provocation Reconstructed: the McArthyisation of *McGregor*" [1993] NZ Recent LR 329; G Stanish "Whither Provocation?" (1993) 7 AULR 381 and most recently G Orchard "Provocation - Recharacterisation of 'Charactersitics'" (1996) 6 Cant LR 202.

61 S Tarrant "The 'Specific Triggering Incident' in Provocation: Is the Law Gender Biased?" (1996) 26 WALR 190.

62 S Tarrant "Something is Pushing Them to the Side of their Own Lives: A Feminist Critique of Law and Laws" (1990) 20 WALR 573, 594.

63 It has recently been stated by JC Smith that evidence of BWS is "now relevant to both the objective and subjective tests." [1997] Crim LJ 760.

64 *R v Taaka* [1992] 2 NZLR 198.

65 D Nicolson and R Sanghvi "Battered Woman and Provocation: The Implications of *R v Ahluwalia*" [1993] Crim LR 728, 730; S Tarrant "Provocation and Self Defence: A Feminist Perspective" (1990) 15 Alt LJ 147, 150.

66 Which can include words or conduct, or presumably an absence of either.

"characteristic" which should be taken into account when judging the nature of the act.[67] The second approach is to treat all the abusive acts together as the provocation, relying on the concept of "cumulative provocation."[68]

In order to satisfy the requirement of a "sudden and temporary" loss of self control, advocates have argued that battered women are more likely to experience a slow build up of fear, despair and anger and they will usually act on this when the abuser is not able to fight back. This delay, which the law has treated as a "cooling down" period has historically denied many women access to the defence.[69] Although the defence has been successfully used by battered woman, especially in England,[70] it remains unclear to what extent this gendered response to violence (provocation) has been accepted:[71]

> The stricture of sudden and temporary loss of self-control...still exerts itself as the most formidable obstacle on the minds of the jury and the issue of whether the battered fearful woman...can avail herself...of a slow burn as opposed to an explosion of rage is yet to be determined.

In relation to provocation, as with self defence, it is important that the jury receive enough information about the situation and experience of the (battered) woman in order to make informed decisions about the elements of the offence and the reasonableness of the woman's response:[72]

> [I]nformation on battered women is not concerned with their capacity for self- control but rather with their response patterns when gravely provoked by their batterers. Without such information, there is a danger of jurors concluding that ordinary women behaving in the way the defendant did were in possession of their self-control. This would be the result of adhering solely to a male model of response patterns which views a time-lag from the

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67 Nicolson, above n 65, 733.

68 "We find it difficult to exclude provocation in such a setting of a close human relationship in which there can be a buildup, over a period, of emotions, and a further incident can cause feelings of both parties to run high and trigger a loss of self control." *R v Pita* (1989) 4 CRNZ 660, 665-666.

69 J Greene "A Provocation Defence for Battered Women Who Kill?" (1989) 12 Adel LR 145, 158.

70 Edwards, above n 54, 410; S Edwards "From Victim to Defendant: The Life Sentence of British Women" (1994) 26 Case Western Res J of International Law 261, 290.

71 S Edwards and C Walsh "The Justice of Retrial?" [1996] New LJ 857, 858 (commenting on the Sara Thornton re-trial).

72 S Yeo "Sex, Ethnicity, Power of Self-Control and Provocation Revisited" (1996) 18 Sydney LR 304, 316.

> provocative incident as constituting a regaining of self-control, having the opportunity to select a weapon and to attack the deceased in stealth as clear signs of being in possession of self-control, and so also with appearing calm during and after the act of killing. *Yet, these are all typical response patterns of ordinary women when deprived of their self-control. Additionally, they are responses which fall within the realm of normality and therefore deserving of societal compassion.*

The last two sentences of this quote further illustrate the apparently contradictory arguments that defence counsel need to make in the case of women who rely on provocation. The traditional application of the section requires demonstration of a loss of self-control yet the final violent response of a battered woman is often understandable and justifiable without more. However, women risk serious penalties if they do not attempt to satisfy the existing defences. Because of the difficulty abused women have in establishing the elements of the traditional defences and the fact that the defences do not acknowledge that their responses "fall within the realm of normality", there have been strong arguments for legislative reform. Two such proposals are outlined below.

Although the previous discussion has been primarily concerned with the availability of provocation to battered women who kill their batterers, women may of course kill to protect their children from abuse. In an abusive relationship, the children will also invariably be abused as well, even if they are "merely" witnesses to the abuse.[73] It is unclear, however, whether the abuse of children alone would be a sufficiently provocative act to enable a woman to rely on the defence. Although most would agree that sexual abuse of your child would be (or should be) sufficient provocation in law, the one case (*Brown*) where a woman sought to rely on her belief in abuse (her heightened sensitivity to this was due to her own abuse) resulted in a murder verdict.[74]

Brown can be usefully compared to *R v Campbell*,[75] where the provocation (an ambiguous but possibly homosexual advance) triggered a flash-back to earlier childhood abuse causing the male defendant to lose control and kill. There are arguable factual differences between the cases yet the basis of the claim is very similar. In *Brown*, however, it appears little was made of the cumulative effect of the events leading up to the killing, and yet the lengthy time frame which probably denied her the defence is wholly consistent with

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73 T Pocock and F Cram "Children of Battered Women" (1996) 4 Waikato LR 77; J Nemeth Stimson and B Lee Ciyou "Representing the Abused Spouse in Child Custody Litigation" (1995) 9 American J of Family Law 113, 119: "[R]esearch done to date clearly indicates that witnessing domestic violence may be as harmful to children as actually being abused themselves."

74 *R v Brown* Unreported, 11 April 1995, Court of Appeal, CA 93/94.

75 [1997] 1 NZLR 16.

a gendered response to ongoing abuse, seemingly not addressed by the proper authorities. In *Campbell* the frenzied, instantaneous killing to a far less objectively provocative act,[76] satisfied the traditional application of the provision. There is, however, clearly an issue of equality when a woman who believes her child has been sexually abused (in part because of her own history of abuse) cannot make out a defence of provocation, yet a man (also abused as a child) who kills because a hand on his knee causes him to relive the abuse, can rely on the partial defence.

The case of Pauline Brown illustrates the need for specific responses to women's offending, rather than requiring women to fit within existing defences. Two recent reform proposals addressing the position of abused women are discussed in the next section.

III LAW REFORM OPTIONS CONCERNING ABUSED WOMEN WHO KILL

> [T]he way forward for battered defendants remains either through development of the existing law on self defence or through a specific legislative defence.[77]

> [T]he killing of a private tyrant is...a morally justified act.[78]

The previous discussion has examined the difficulties for women when attempting to rely on defences developed to respond to excusable male offending. As many women's groups believe that battered women who kill to protect themselves or their children from certain death or serious bodily injury should not be punished, there have been several proposals developed to achieve this outcome within the criminal law. Although the proposals vary in substance, they are consistent in recommending that there should be complete defence available to women in such situations[79] - that is, their actions should be viewed as "justified" (like self defence) rather than "excused" as a recognition of human frailty (like provocation).

The 1987 Report of the South Australia Domestic Violence Council recommended that "a new complete defence be created which can be [relied] upon by a defendant charged with murder where the elements of such defence are a proven history of serious personal violence

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76 "On the appellant's account the advance, if such it was, could fairly be described as mild or tentative." Above n 75, 26.

77 Above n 56, 1124.

78 J Maslow Cohen "Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?" (1996) 57 Uni of Pitt LR 757.

79 The self preservation defence, as discussed below, has actually been put forward as a partial defence as a political tactic rather than what is probably appropriate. See Beri, above n 22, 118.

by the deceased against the accused or against any child or children of the accused's household."[80]

In 1994 the Western Australian Task Force on Gender Bias, established by the Chief Justice of Western Australia, David Malcolm, recommended that a new defence be created to take account of the reality of the lives of women who kill abusers, so that "conduct is carried out by a person in self defence if the person is responding to a history of personal violence against herself... or another person and the person believes that the conduct was necessary to defend...herself or that other person against the violence."[81] This formulation is, however, very similar to section 48 of the New Zealand Crimes Act 1961, the requirements of which have been difficult for women to satisfy because of how the courts have assessed their belief in imminence of harm and necessity.[82]

A more particularised defence has been proposed in England,[83] Australia[84] and in New Zealand:[85] a defence of "self preservation". This defence would be available to any woman who caused the death of a person with whom she had a familial or intimate relationship and who subjected her to racial, sexual and/or physical abuse to the extent that she believed there was not protection or safety from the abuse and is convinced that the killing is necessary for self preservation.[86] As Suzanne Beri says:[87]

> [This] defence would be an important acknowledgement of the seriousness of male abuse of women and the real and serious effects on women's lives...[I]t would establish a necessary distinction between killing in response to a threat to esteem, power, control and possession

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80 Cited in Manning, above n 41, 22.

81 Cited in Manning, above n 41, 22.

82 A woman's belief in necessity is usually assessed by external "appropriate" prior responses. This formulation leaves it unclear about how it will be satisfied - for example, how much previous violence does there have to be? Must the woman have tried to leave or seek help first? If so, how many times? Such uncertainty has historically worked against women.

83 By the London based Rights of Women Organisation (see Beri, above n 22, fn 2).

84 In submissions to the Australian Law Reform Commission, as reported in *Equality Before the Law: Justice for Women* (ALRC 69, Sydney, 1994) 277.

85 Proposed by the Women for Justice for Women Trust, based in Christchurch. As reported by Beri, above n 22, 113, they have received no response to their petition.

86 Above n 22, 114. Women for Justice for Women Trust is also proposing an extension to this to apply when women are acting to protect their children, or when a number of family members may act together to kill the abuser of them all (fn 11).

87 Above n 22, 124.

> (characteristic features of homicides [of women] committed by men) and killing arising from, and out of, a history of prolonged abuse and fear of future abuse (which tend to characterise homicides [of men] by women).

In a more recent proposal,[88] the acknowledgement of male abuse of woman is taken further - it is the "tyrannical" behaviour of the man that would justify his killing:[89]

> The condition that is necessary to the maintenance of a regime of private tyranny is that the life of at least one person who lives or formerly lived in the same household with the tyrant be subject to his domination and control in respect to such objectively important elements of everyday life that a reasonable member of society would not ordinarily consent to live under the same terms and conditions and would not view the consent of any other person to live under such circumstances as the rational exercise of choice...[T]he structure of private tyranny...is analogous...to voluntary slavery. It is not a subject to which the idea of consent lends any justificatory distinction.

Under this model, the focus of the inquiry is the behaviour is the "tyrant", not that of the abused woman. It is he who must fit the profile and then her response may be treated as understandable/excusable. This would also be the correct analysis of a hostage situation which seems the appropriate analogy, rather than the traditional legal analysis which requires the woman to be battered enough and to have tried hard enough to leave before her criminal actions may be excusable.

Either of these reform options are unlikely to be adopted in New Zealand in the near future, given that they recommend special treatment for women and require a significant shift in emphasis of the criminal law. That such a shift in emphasis may already be overdue is further illustrated by the treatment of women who seek to rely on the defences of insanity of automatism when they offend as the result of abuse. These cases are discussed in the next section.

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88 Above n 78.

89 Above n 78, 763.

IV ABUSE WHICH RESULTS IN OTHER OFFENDING

A Automatism Caused by the Trauma of Abuse

Automatism as a defence to a criminal charge has been relied on in New Zealand courts,[90] although it is extremely rare for automatism to be argued in a murder trial.[91] There is some criticism of its use in the criminal law - it is argued that the legal concept of involuntariness is at variance with psychological and neurological knowledge,[92] and that the crimes that can be committed by an unconscious will are very limited.[93] In terms of the legal issues, it is still somewhat unclear whether a claim of automatism is relevant to the voluntary aspect of the act (which denies the actus reus of the offence) or whether it operates to support a claim that the act was not intentional. In any event, if successfully made out, (sane) automatism should result in an acquittal.[94] The most significant issue is whether the cause of the "dissociative" state is external (when the automatism would be treated as sane) or internal (when insanity would be the appropriate defence).[95] The distinction is significant for an accused, both in terms of outcome and the burden of proof.[96]

Automatism was, however, relied on in the Western Australian case of *Falconer*.[97] In this case Mary Falconer, a 50 year old woman, shot her husband. She had no recollection of fetching the gun or firing it (she was in a dissociative state). The issue at trial was whether she intended to kill him. She was separated from her husband and had a non-

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90 *Burnskey v Police* (1992) 8 CRNZ 582.

91 Some form of "involuntariness" was, however, argued (unsuccessfully) on appeal after the Campbell retrial: *R v Campbell* (Unreported, 11 August 1997, Court of Appeal, CA 441/96).

92 EM Coles and D Jang "A Psychological Perspective on the Legal Concepts of 'Volition' and 'Intent'" (1996) 4 J of Law and Medicine 60.

93 "I take it as given that no man can find himself unwitting in the act of intercourse - ie, that penetration is an act which can not be done accidentally or by mistake." Pickard "Culpable Mistakes and Rape: Relating Mens Rea to the Crime" (1980) 30 Uni of Toronto LJ 75, 76. See also *Daviault* (1995) 93 CCC (3d) 21.

94 For a useful discussion on this topic see J Thompson "Post Traumatic Stress Disorder and Criminal Defences" (1991) 21 WALR 279 and "The Defence of Automatism" in RD Mackay *Mental Condition Defences in the Criminal Law* (Clarendon Press, Oxford, 1995) 1.

95 WJ Brookbanks "Criminal Law and Procedure" [1993] NZ Recent L Rev 44, 45; E McDonald "Acquittal for the Intoxicated Automaton?" [1993] NZLJ 44.

96 T Jones "Insanity, Automatism and the Burden of Proof on the Accused" (1995) 111 LQR 475.

97 The decision of the High Court of Australia is reported in (1990) 65 ALJR 20. See also P Aimes Fairall "Voluntariness, Automatism and Insanity: Reflections on *Falconer*" (1993) 17 Crim LJ 81.

molestation order against him. There was a significant history of violence and abuse. He was facing charges of incest and Mary also thought he may well have abused a 7 year old girl in her care. Just before the killing he sexually assaulted Mary and taunted her that no-one would believe her allegations of sexual abuse. He then went to grab her by the hair. She panicked and remembers nothing more until she was standing by his body with her discharged rifle in her hands.

The defence sought to raise the issue of involuntariness based on non-insane automatism. Evidence was presented in a voir dire from two psychiatrists. Both testified that she was sane at the time of the killing, although subject to a profound mental disturbance produced by psychological shock. The trial court refused to admit the medical evidence. On appeal the High Court of Australia held that the psychiatric evidence was wrongly excluded and the case was ordered to be re-tried, although the Court was divided on whether automatism caused by a psychological blow should be treated as insanity - the central problem remaining the difficulty of "distinguishing between a sound or healthy mind and a diseased mind."[98] On this issue Mason CJ stated:[99]

> the difficulty [lies]in choosing between the reciprocal factors - the trauma and the natural susceptibility of the mind to affectation by psychological trauma - as in the case of the malfunction. Is one factor or the other the cause or are both to be treated as causes? To answer this problem, the law must postulate a standard of mental strength which, in the face of a given level of psychological trauma, is capable of protecting the mind from malfunction...That standard must be the standard of the ordinary person: if the mind's strength is below that standard, the mind is infirm; if it is above that standard, the mind is sound or sane. *This is an objective standard which corresponds with the objective standard imported for the purpose of determining provocation.*

This reference to a mind of ordinary firmness again raises the issue of the application of such a standard.[100] If judges and juries do not understand how a person of "ordinary" firmness might respond as a result of constant abuse, how can their judgement about their mental state be fair (and objective)? In the words of Professor Robin West: "with the exception of Vietnam veterans, no white heterosexual man I have ever known knows what it feels like to be afraid *all of the time*. But many women - and there are many battered

98 Mackay, above n 94, 60.

99 Above n 97, 30 (emphasis added).

100 For a discussion of the relevance of age and ethnicity to the objective standard, see S Yeo "Power of Self-Control in Provocation and Automatism" (1992) 14 Sydney LR 3.

woman - know what it means to define oneself in such a way as to make it possible to live with the truth that tomorrow you may die."[101]

Finally, there are other (evidential) difficulties with the defence of automatism for battered women who kill which have been cogently outlined by Stella Tarrant:[102]

> [A] difficulty [also] arises where automatism is based on a dissociative state and severe domestic violence because of the tension between the evidence which supports the defence and the elements of the defence itself. Along with insanity, non-insane automatism is the ultimate statement of irresponsibility, or an unwilled, and in one sense unintended, act. An automaton does not will or, relevantly, want events to occur. Yet the evidence supporting a woman's claim of dissociation in this context is evidence suggesting, precisely, that she *would* want retaliation, that she would will and want harm to occur to the person she attacked. Thus the structure of the defence encourages a perception of her as a liar or as manipulating the facts - and if the abuse occurred and she did not harm she must surely be mad. The dichotomy between criminality and insanity becomes clearer.

B Reliance on Insanity by Abused Women

Recent case law concerning women who have offended in a disassociated state as a result of abuse indicates that insanity rather than automatism should be considered. The New Zealand cases on point over the last two years however, have not accepted either defence.

In 1989 in England a 23 year old stabbed a woman with a pen knife (causing a small puncture wound) in the course of a robbery. When first seen by the police, she was leaning against the victim's car saying "I'm ill, I'm ill". In front of the police she also mistook the woman she had assaulted for a man. On being arrested she was described as passive and indifferent and could only recollect some of the events. Subsequently a medical examination revealed that she had been violently raped three days prior to the offence and had not told anyone. A psychiatrist diagnosed that after the rape she was suffering from post traumatic stress disorder (also known as rape trauma syndrome) and was in a dissociative state and the offences had been committed during a psychogenic fugue. It was held that this, if accepted, would amount to sane automatism as the state had been caused by an external factor and the defence should be put to the jury.[103]

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101 R West "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" (1987) 3 Wisconsin Women's LJ 81.

102 S Tarrant "A New Defence in Spouse Murder?" (1992) 17 Alt LJ 67, 69.

103 *R v T* [1990] Crim LR 256.

More recently in New Zealand,[104] a young woman set fire to a house occupied by two men who had raped and sodomised her while she was living in India (essentially as their prisoner). Although the sexual abuse had happened some time previously, her attack on the men's house seems to have been triggered by a fight with her boyfriend.[105] In this case, however, her psychiatrist said that although she had developed post traumatic stress disorder, the offence was a product of a severe, disabling mental disorder that "substantially compromised her ability to know and understand the nature, quality and wrongfulness of her acts."[106] The case then turned on whether the District Court had jurisdiction to make a treatment order under section 118 of the Criminal Justice Act 1985, clearly accepting that the facts made out a claim of insanity rather than non-insane automatism. Insanity was not accepted as a defence however, and the woman was later sentenced to five years' imprisonment - a sentence that is seemingly excessive compared to sentences for similar offences.[107]

Another case concerning a woman with a similar history of abuse was heard by Ellis J in March 1997.[108] Susan Simms appealed her conviction for intentionally damaging five cars by scratching them as she walked past them. She claimed she was legally insane at the time. The trial judge had held that she had not established that she was "labouring under a disease of the mind."[109]

The expert psychological evidence offered on appeal indicated that Susan was suffering from "a borderline personality disorder and from post traumatic stress disorder"[110] brought about by the sexual abuse she suffered as a young person and the loss of her mother. Her aggression in the past, observed during hospital visits to receive treatment for her drug and alcohol addiction, was directed at any male person who tried to offer her assistance. She had always apologised for her behaviour afterwards saying that she had a blackout and no memory of her behaviour. It was accepted by the psychologist that most people would have blacked out on the amount of alcohol and medication she had taken.

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104 *Police v Travers* [1996] DCR 671.

105 Above n 104.

106 Above n 104, 675.

107 See Beri, above n 23, 55.

108 *Simms v Police* Unreported, 5 March 1997, High Court, Wellington Registry, AP 8/97.

109 Above n 108, 2.

110 Above n 108, 6.