# BATTERED WOMAN SYNDROME: EXPERT EVIDENCE IN ACTION

**Hon Justice J Bruce Robertson***

## Introduction

Domestic violence in New Zealand is a scourge which must concern the entire community. Almost half the homicides which come before New Zealand courts are domestic-related.[1] As with the rest of the community, the legal system has struggled to confront the reality and effects of domestic violence. Some of its doctrines have proved unsuitable or inadequate to protect the victims of domestic violence and to deal justly with its consequences.

One respect in which the law is attempting to meet this problem is in the treatment of women who kill or injure their violent spouse. Historically, such women found that the established criminal law defences have been unavailable or unsuccessful. Today, evidence of "battered woman syndrome" is received in various jurisdictions to address this problem. Originally developed in the field of clinical psychology, the syndrome attempts to explain the behaviour of women in violent relationships by identifying symptoms or characteristics typically exhibited by such women.[2] The syndrome has been used in criminal trials both to reshape substantive defences and to explain the behaviour of particular defendants. Some have criticised its use in court and others have questioned the validity of the syndrome altogether.

Evidence about battered woman syndrome is typically admitted under the umbrella of expert opinion evidence. Although the reception of this material is now beyond controversy in New Zealand,[3] other forms of syndrome evidence are of less certain status.[4] Even if expert evidence on a particular subject is

---

* BA, LLB (Otago), LLM(Virginia), Hon LLD(Otago), one of Her Majesty's Judges. Justice Robertson was a Teaching Fellow in the Otago Law Faculty in 1968 and was a part-time Lecturer from 1969 to 1985.

I wish to acknowledge the substantial contribution of Matthew Harris, BA, LLB(Hons)(Auckland), one of the Judges' Clerks, in the research for and preparation of this paper. I am also grateful to Elisabeth McDonald, Faculty of Law, Victoria University of Wellington, who commented on the paper in draft.

1 Some relevant statistics are noted in Seuffert, "Battered Women and Self-Defence" (1997) 17 NZULR 292.

2 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154, 171. The syndrome does not suggest that all women will react in the same way, or even similarly, to domestic violence. The risk that a jury might be left with that impression is noted infra at note 53 and accompanying text.

3 *R v Oakes*[1995] 2 NZLR 673, 675; *R v Guthrie* (1997) 15 CRNZ 67, 70.

4 A vivid example is repressed memory syndrome: see Freckelton, "Repressed Memory Syndrome: Counterintuitive or Counterproductive?" (1996) 20 Crim LJ 7; C J Robertson, "Fantasy or Phenomenon? The Repressed Memory Debate" Unpublished LLB(Hons) dissertation, University of Otago, 1996. Other syndromes making an appearance are rape trauma syndrome, child sexual abuse accommodation syndrome and premenstrual syndrome.

admissible, the manner in which the expert's testimony can be used remains a critical issue. Admitting evidence of battered woman syndrome and other scientific techniques or theories not previously a feature of criminal trials raises significant questions about the judge's function in determining admissibility. The criteria for admitting such novel forms of evidence are unclear, both in New Zealand and elsewhere. The debate over the admissibility of syndrome evidence illustrates the difficulty of the judges' task, as in individual cases they seek to do justice to all manner of people "without fear or favour, affection or ill-will."[5]

## The Law of Self-Defence in New Zealand

To appreciate the rationale for admitting evidence of battered woman syndrome it is necessary to examine the established criminal law defences potentially available to a woman who kills or injures her violent spouse. To a large extent the facts of a case will determine whether self-defence, provocation,[6] duress, necessity or diminished responsibility[7] is apposite. In New Zealand, as in Canada, attention has focused on self-defence and the basis upon which it is available to women who strike back at their abusers. This paper focuses upon self-defence, but reform in this area will point the way to appropriate reform of other defences.[8] Underpinning the use of each defence is the premise that a woman who kills or injures her violent spouse may be justified in law.

Self-defence in New Zealand is defined in the Crimes Act 1961 in the following terms:[9]

> 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.

*Adams on Criminal Law* notes that the section "reflects the commonsense notion that a person who is attacked may defend himself or herself, and will be legally justified in repelling force with force."[10] The defence is crafted to exclude from its ambit excessive force or retaliatory attacks. Section 62 of the Crimes Act 1961 provides that any person authorised by law to use force will be criminally responsible for any excess force used. The purpose of this area of the law is to

---

5 Judicial oath, provided for in New Zealand by the Oaths and Declarations Act 1957, ss 18 and 22 and Second Schedule.

6 For writing on this area see Wasik, "Cumulative Provocation and Domestic Killing" [1982] Crim LR 29; Edwards, "Battered women who kill" [1990] New LJ 1380; Bandalli, "Battered wives and provocation" [1992] New LJ 212; Glanville Williams, "Domestic provocation and the ivory tower" [1992] New LJ 381; Nicolson & Sanghvi, "Battered Women and Provocation: The Implications of *R. v. Ahluwalia*" [1993] Crim LR 728.

7 The debate over the appropriateness of diminished responsibility will not play a significant part in developments in New Zealand because the doctrine has not been embraced by our legal system.

8 See, eg, Martinson, MacCrimmon, Grants & Boyle, "A Forum on *Lavallee v R*: Women and Self-Defence" [1991] UBC Law Review 23, 25-36.

9 Crimes Act 1961, s 48.

10 Robertson (ed), *Adams on Criminal Law* (1992 looseleaf) CA48.02.

ensure the minimisation of harm by striking a balance between the harm prevented and the harm inflicted.[11]

Self-defence has both subjective and objective elements. The subjective element requires the jury to consider the circumstances as the accused believed them to be, whilst the objective element requires the jury to assess whether the force used in self-defence was reasonable.[12] In judging the reasonableness of the force, courts have traditionally required there to be an immediacy of life-threatening violence, or at least the perception of it, to justify the killing of another in self-defence.[13] This is a reflection of how strongly weighted our legal system has been in favour of the sanctity of human life.

Whilst few would question such an emphasis, the traditional understanding of what amounts to imminent peril is unsuited to self-defence in the context of domestic violence. In *R v Lavallee*, Wilson J in the Supreme Court of Canada explained how the requirement of imminent peril typically operates:[14]

> 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 ... one can always take the opportunity to flee or to call the police.

As Wilson J explained, women who kill their abusers frequently do not do so in circumstances which fit into the "paradigmatic" case. Many women take action to protect themselves in advance by a surprise attack,[15] arm themselves before being attacked,[16] or kill during a lull in violence in the course of a battering incident.[17] A woman may kill her abuser as he turns to leave a room,[18] while he sleeps,[19] or by poisoning him.[20] The traditional interpretation of what is "imminent" is suited to one-off encounters between people of roughly equivalent size and strength. Some adjustment is needed if this requirement is to be an appropriate standard to assess the conduct of battered women.

---

11 Ashworth, *Principles of Criminal Law* (1991) 113.

12 *R v Wang* [1990] 2 NZLR 529, 534. Compare the Canadian Criminal Code, RSC, 1985, C-46, s 34(2) which requires the accused's apprehension of death or grievous bodily harm to be reasonable.

13 The Court of Appeal has held that this is not a requirement of law, but a question of fact and degree. Nevertheless, it has been used to exclude self-defence from a jury: *R v Wang*, ibid.

14 [1990] 1 SCR 852, 876.

15 *R v R* (1981) 28 SASR 321.

16 *R v Hill* (1981) 3 A Crim R 397.

17 *R v Lavallee* [1990] 1 SCR 852.

18 *R v Lavallee*, ibid.

19 *R v Wang*, supra n 12; *R v Kontinnen*, Unreported, South Australian Supreme Court: quoted in Sheehy, Stubbs & Tolmie, "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 Crim LJ 369, 383.

20 *R v Oakes*, supra n 3.

The requirement for reasonable force does not preclude the possibility that a pre-emptive strike may qualify as self-defence.[21] Nevertheless, the woman who kills her attacker is particularly vulnerable under the orthodox requirements of self-defence if a period of time elapses between a threatened or actual attack by her abuser and her taking action.[22]

The law of self-defence can be sufficiently flexible to overcome these difficulties. It requires little innovation to apply the requirement of imminence more appropriately. Trial judges can instruct juries that the effect of prolonged exposure to unpredictable spousal abuse must be taken into account in judging whether the woman perceived that an attack was imminent; and that her intimate knowledge of the deceased may put her in a position to judge the inevitable onset of an attack before it becomes obvious to others. However, it is well recognised that battered women who kill their spouses face obstacles which a modification to legal doctrine cannot overcome. Admitting evidence of battered woman syndrome is a response to these additional hurdles.

**Battered Woman Syndrome**

The theory of battered woman syndrome was propounded by clinical psychologist Dr Lenore Walker. Dr Walker conducted extensive research into the effects of domestic violence on women, publishing the results of her work in two influential books.[23] The basis of Dr Walker's syndrome is a cycle of violence. The theory states that there are three distinct phases in a recurring battering cycle: first, "tension building"; secondly, the "acute battering incident"; and thirdly, "loving contrition".

In the first "tension building" phase there is a gradual escalation of tension between the couple. The batterer engages in verbal abuse and other hostile behaviour.[24] There may be incidents of violence, but they are usually minor and are not extreme or explosive. Through this stage the woman often tries to placate the man, and may succeed for a while. Eventually the tension between the two becomes acute, finally culminating in the second phase, the "acute battering incident". This is a sudden, uncontrolled release of tension by the batterer who unleashes a barrage of verbal and physical aggression which can leave the woman severely shaken and injured. In the third phase, the batterer becomes contrite and frequently tries to placate the woman with promises that the abuse will not occur again. At least in the early part of the relationship, the woman will often hope or believe he will change.[25]

---

21 *R v Wang*, supra n 12 at 535.

22 See, eg, *R v Wang*, supra n 12 at 536.

23 Dr Walker's theory was first articulated in *The Battered Woman* (1979). In *The Battered Woman Syndrome* (1984) Dr Walker set out the result of empirical research designed to test the theories propounded in her earlier work.

24 Males are by far the most frequent perpetrators of domestic violence. See Seuffert, supra n 1, note 2.

25 Dr Walker describes this cycle in *The Battered Woman Syndrome* (1984) at 95-96; quoted by Wilson J in *R v Lavallee*, supra n 17 at 878-880; and by Freckelton & Selby, *Expert Evidence* (1993) 1-3335f.

Dr Walker defined a battered woman as one who has been through this cycle at least twice.[26] Sadly, many battered women experience the cycle repeatedly, with the violence escalating in frequency and severity on each successive cycle.[27]

A critical feature of Dr Walker's theory is the concept of "learned helplessness" which is used to explain why so many battered women do not leave the relationship. Dr Walker observed that exposure to random and unpredictable spousal violence brings about a "psychological paralysis" which immobilises the woman, rendering her passive and unable to improve her situation or to escape. Kinports has described learned helplessness in this way:[28]

> A woman who finds herself involved in such a relationship falls into a depression-like state of "learned helplessness". She learns that her husband's violence is unpredictable and that no correlation exists between her conduct and his abusive behaviour. The violence is unavoidable, she can do nothing to pacify her husband and prevent the beating. The battered woman's inability to control the situation leads to feelings of fatalism. She perceives her husband as omnipotent and believes there is no way for her to escape or improve her life.

The concept of "learned helplessness" originated with the work of Dr Seligman whose experiments with animals demonstrated that exposure to painful stimuli from which there is no escape can render animals passive, helpless and unable to escape even when given the opportunity.[29] Dr Walker's use of this concept has been the subject of criticism. In particular, the validity of extrapolating from Dr Seligman's experiments with dogs a theory for understanding the behaviour of women in violent relationships has been questioned.[30]

The phenomenon which Dr Walker has explained as "learned helplessness" has also been labelled "traumatic bonding". This theory originated with the work of psychologist and lawyer Charles Ewing.[31] Ewing's theory draws on similarities in the relationship between hostages and captors, battered children and their parents, concentration camp prisoners and guards, and between battered women and their batterers. He concludes that there are two features common to these relationships: the first is the extreme dependency created by the power imbalance in the relationship; and the second is the intermittent periods of abuse, which alternate with periods during which the more powerful person acts in a "more normal and acceptable fashion".[32] Because battered women have developed a traumatic bond with their batterers, they are said to be "psychologically unable to leave".[33]

---

[26] *The Battered Woman* (1979) xv.

[27] See Seuffert, supra n 1 at 302.

[28] Kinports, "Defending Battered Women's Self-Defense Claims" (1988) 67 Oregon Law Review 393, 398.

[29] Seligman, *Helplessness: On Depression, Development, and Death* (1979) 21f.

[30] Some criticism of this aspect of Dr Walker's work is noted in Freckelton & Selby, supra n 25 at 1-3336.

[31] Ewing, *Battered Women Who Kill* (1987).

[32] Ewing, ibid at 19-20, quoted in *R v Lavellee*, supra n 17 at 886-887. See also *Ruka v DSW* supra n 2 at 172-173 per Thomas J.

[33] Ewing, ibid.

Whatever label one adopts to describe the phenomenon, there can be no doubt many battered women remain with their abusers and often profess to love them. Research has shown that others in the community who have no experience of the debilitating effects of unpredictable spousal violence can assume that a woman who remains in a battering relationship is the author of her own misfortune.[34] Removing that misconception is one function of syndrome evidence in criminal trials.

**Battered Woman Syndrome as Expert Evidence**

Although battered woman syndrome was not initially developed for use in court, its potential application to criminal trials was soon obvious.[35] Sometimes referred to as "syndrome evidence", this type of material was first used in the United States in the 1970s. In the last decade or so syndrome evidence has featured more frequently not only in the United States, but also in Canada, Australia and New Zealand.

Syndrome evidence is a form of expert evidence, usually given by forensic psychologists and, less often, forensic psychiatrists, about certain forms of behaviour which are said to be indicative of stresses suffered by particular classes of persons.[36] The evidence can either focus on the behaviour of the victim or purport to explain the assailant's behaviour. Of the various syndromes identified to date, battered woman syndrome has attracted the most attention in the legal academic community, with a plethora of articles spawned on the subject.

Freckelton & Selby offer the following explanation of how battered woman syndrome is employed in criminal trials:[37]

> Battered woman syndrome evidence is expert evidence that attempts to give an insight into the effects of long-term domestic violence upon a victim's reaction to threats, provocation and physical or mental cruelty from their assailant. It is used to assist in the defences of self-defence, provocation and duress to explain why a victim of domestic violence would react in a way that another person from a more "normal" domestic environment would not — why she might perceive danger or threats where others might not; why she might perceive them as being more imminent or threatening than others might; or why she might succumb to pressure when others might stand firm.

As these commentators indicate, expert evidence of the syndrome has a variety of uses. It has been shown to have potential to establish a perception of imminence

---

34 See Seuffert, supra n 1 at 294-295 and references noted therein.

35 Dr Walker claims that by 1986 she had been called as a forensic expert in 96 cases of battered women who had turned on their abusers: Walker, "A Response to Elizabeth Schneider" (1986) 9 Women's Rights Law Report 223, 224.

36 Freckelton & Selby, supra n 25 at 1-3331.

37 Ibid at 1-3332.

38 *R v Oakes*, supra n 3; *R v Wang*, supra n 12; *R v Lavallee*, supra n 17.

39 *R v Ahluwalia* [1992] 4 All ER 889.

in relation to self defence,[38] the presence of "cumulative" provocation and a relevant "characteristic",[39] a climate of coercion and duress,[40] and even the presence of "a relationship in the nature of marriage".[41]

In criminal trials, evidence of the syndrome is admitted primarily to disabuse jurors of misconceptions they may have about the nature of domestic violence and its effect on women exposed to it.[42] Legally, there is no "duty to retreat" in this country,[43] and a woman does not abrogate her right to self-defence if she remains in the house.[44] The reality is that, in spite of the legal position, women are often condemned by "popular mythology" about domestic violence.[45] Those myths are that a woman who has stayed in a battering relationship cannot have been beaten as badly as she claims, or else remains in the relationship out of a masochistic enjoyment of it.[46] It is unfortunate these myths persist despite the prevalence of domestic violence which would suggest a greater level of community understanding.

A case which has substantially influenced New Zealand courts is the decision of the Supreme Court of Canada in *R v Lavallee*.[47] Ms Lavallee was accused of murdering her partner by shooting him in the back of the head as he left their bedroom. Delivering the leading judgment of the Court, Wilson J explained why evidence of battered woman syndrome should be admitted:[48]

> How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why should a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beats 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 woman syndrome'. We need to understand it and help is available from trained professionals.

The learned Judge found that the mental state of the accused at the time she pulled the trigger could not properly be understood without an appreciation of the cumulative effect of the brutality she had endured throughout the relationship.

---

40 *R v Runjanjic* (1991) 53 A Crim R 362; *R v Witika* [1993] 2 NZLR 424.

41 *Ruka v DSW*, supra n 2.

42 *R v Lavellee*, supra n 17; *R v Guthrie*, supra n 3; McDonald, "Defending Abused Women: Beginning a Critique of New Zealand Criminal Law" (1997) 27 VUWLR 673, 676.

43 Approximately half the states of the United States require that an opportunity to retreat be taken before a person is justified in taking human life. In New Zealand, there is no such duty, although certain passages in the Court of Appeal's judgment in *R v Wang*, supra n 12, could be interpreted as shifting the law in this country towards such a duty: see Seuffert, supra n 1 at 313-316.

44 Wilson J emphasised this important point in *R v Lavallee*, supra n 17 at 888.

45 Ibid at 873.

46 Ibid at 872-873; Seuffert, supra n 1 at 294-295 and references noted therein.

47 [1990] 1 SCR 852.

48 Ibid at 871-872.

Her Honour summarised the principles upon which she regarded expert testimony as admissible in such cases as follows:[49]

1. Expert testimony is admissible to assist the fact-finder in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of the lay person.
2. It is difficult for the lay person to comprehend the battered wife syndrome. It is commonly thought that battered women are not really beaten as badly as they claim, otherwise they would have left the relationship. Alternatively, some believe that women enjoy being beaten, that they have a masochistic strain in them. Each of these stereotypes may adversely affect consideration of a battered woman's claim to have acted in self-defense in killing her mate.
3. Expert evidence can assist the jury in dispelling these myths.
4. 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.
5. Expert testimony pertaining to why an accused remained in the battering relationship may be relevant in assessing the nature and extent of the alleged abuse.
6. 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 the jury in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life.

Many of the factors Wilson J identified as justifying the use of expert evidence to assist juries dealing with battered women have been recognised as applicable in New Zealand.[50] *Lavallee* has been hailed by many as a landmark decision for women, but some commentators have expressed reservations about the use of battered woman syndrome in court.[51]

One of the most commonly expressed concerns is that the involvement of experts can reinforce stereotypes and popular myths that the expert's evidence should assist in dispelling. Some commentators assert that domestic violence is presented as rare and beyond the experience of ordinary people if its nature and effects are related by an expert witness.[52] Judges are aware that for some jurors cases of this nature awake painful memories of events from their own lives; but other jurors are confronting the reality of domestic violence for the first time and may struggle to make sense of the evidence presented at trial without guidance from an expert.

---

49 Ibid at 889-890.

50 The fourth point in Wilson J's summary is relevant to a requirement of the Canadian Criminal Code and is not applicable in New Zealand.

51 Eg, Martinson, MacCrimmon, Grants & Boyle, supra n 8; Sheehy, Stubbs and Tolmie, supra n 19.

52 Sheehy, Stubbs and Tolmie, supra n 19.

Further criticism is levelled at the "medicalisation" of violence against women.[53] In New Zealand the expert witness is usually a psychologist or, less often, a psychiatrist. The paradigm of women's experiences in battering relationships is described as a "syndrome": a "condition" from which the battered woman suffers. Elisabeth McDonald has expressed this criticism of the syndrome as follows:[54]

> The main concerns [with battered woman syndrome] are that rather than an abused woman being presented as "a normal, reasonable person, caught in irrational circumstances, responding as any reasonable person would", as a sufferer of a syndrome she is represented as mentally unstable.

Proper direction from the trial Judge is required to ensure the expert's testimony does not shift the focus of the trial to the psychological condition of the woman. Counsel must avoid well-meaning attempts to mould a woman's story to fit contemporary learning about patterns of behaviour exhibited by battered women. No jury should be left with the impression there is something about the woman's testimony which cannot be trusted without expert testimony. The goal should be for the accused to tell her own story. Expert testimony may help the jury draw appropriate conclusions from the woman's story, but should not overshadow it. One judge has already warned that defining the syndrome too closely could lead to its overly rigid application.[55] Dropping the epithet "syndrome" might help reduce the focus on individual women's psychological state. As Thomas J said in *Ruka v DSW*, it may be preferable to speak simply of the battering relationship.[56]

Another significant criticism of battered woman syndrome is the focus of "learned helplessness" on why the woman did not leave. Legally, a woman does not disentitle herself to any legal defence simply by remaining or by failing successfully to leave an abusive relationship. Moreover, too great a focus on a woman's "psychological inability" to leave a battering relationship would fail to give adequate weight to the many environmental factors which may prevent her from leaving. These could include lack of job skills and employment prospects, children to care for, and difficulties in obtaining affordable housing. Victims of domestic violence often have difficulty accessing the practical support necessary to leave a relationship. The police and other public agencies can only be of limited assistance in alleviating these problems. Fear of retaliation by the man is another major factor in many women remaining in the relationship. Any presumption that the violence ends if a woman leaves the relationship would

---

53 Martinson et al, supra n 8 at 51f.

54 McDonald, supra n 42 at 676.

55 *Ruka v DSW*, supra n 2 at 173.

56 Ibid. See also McDonald, supra n 42 at 677-678: "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 problems rather than individual pathology should be admissible. ... Evidence which may be of more assistance is that which focuses 'on the defendant's circumstances and alternatives rather than her psychological state.'"

be ill-founded. Many women continue to face the prospect of violent abuse, sometimes fatal,[57] soon after leaving the relationship.[58]

Freckelton has queried the legitimacy of transplanting syndromes from their therapeutic context into the courts to exculpate their sufferers from criminal conduct.[59] Although he does not deny the legitimacy of the syndromes in a therapeutic context, he asserts that the inferences sought to be drawn from their use in court are ideologically alluring but "scientifically dubious."[60] Freckelton further points out that any explosive reaction by a woman to a threat she perceives is not part of the battered woman syndrome. The syndrome simply describes the effects of the lifestyle experienced by a woman who is the subject of repeated domestic violence and from which she cannot easily remove herself.[61] At present the syndrome relies on the application of other defences to affect an outcome for the battered woman. Freckelton argues there would be no need for syndrome evidence if the test for self-defence did not insist on "supposedly objective notions of ordinariness and reasonableness" in judging whether a woman who resorts to violence was justified in doing so.[62]

In a recent paper, Elisabeth McDonald referred to the possibility of developing a defence of "self preservation" to meet some of the criticisms of battered woman syndrome:[63]

> This defence would be available to any woman who caused the death of a person with whom she had a familiar 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.

For advocates of this reform the advantage of this defence over battered woman syndrome is that the focus shifts from the psychological condition and behaviour of the abused woman to the behaviour of the batterer. If the batterer fits the "profile" the woman's response may be viewed as understandable or excusable.

Despite significant criticism of battered woman syndrome and of its use in court, I suggest on balance we are better off with such evidence (admitted with

57 See, eg, Kampmann, "The Legal Victimization of Battered Women" (1993) 15 Women's Rights Law Reporter 101, 102.

58 One testament to this fact is the prevalence of legislative attempts to protect such women. See, eg, the Long Title to the Domestic Violence Act 1995, which states that the Act is "to provide greater protection from domestic violence". The Act extends to persons who "have been" in a domestic relationship and hence is not restricted to women currently in a domestic relationship.

59 Freckelton, "Contemporary Comment: When Plight Makes Right - The Forensic Abuse Syndrome" (1994) 18 Crim LJ 29.

60 Ibid at 30.

61 Ibid at 32.

62 Ibid at 42. Cf *R v Wang*, supra n 12 at 535 where the Court said, "We are satisfied that no ordinary reasonable person who knew the kind of man that the husband was and of his threats to his wife and sister and blackmail of her family, would, while he was unarmed and in a drunken sleep, have believed it necessary to kill him. The defence of self-defence was therefore not open."

63 McDonald, supra n 42 at 689.

careful and proper direction) than without it. It is regrettable that a development intended to counteract prejudicial stereotypes of battered women might be perceived as reinforcing them.

**Evidence of Battered Woman Syndrome in New Zealand Courts**

The willingness of some Canadian and US jurisdictions[64] to extend self-defence to situations where battered women have killed their sleeping spouses, or killed them in circumstances where the victim does not pose an objective imminent threat to their life or safety, has not yet occurred in New Zealand. Whilst there is no doubt evidence of battered woman syndrome is admissible in this country,[65] self-defence is usually not available in such circumstances.

In *R v Wang*[66] the Court of Appeal held that self-defence was not open to the jury because the accused was free to seek protection in other ways. The Court endorsed the trial Judge's ruling that to allow a jury to consider self-defence when the accused was under no immediate threat or danger and had other courses open to her would be "close to a return to the law of the jungle".[67] Relying on the requirement of imminence, the Court was not persuaded that any reasonable person in the accused's position could have believed it necessary to kill him in self-defence:[68]

> In our view what is reasonable under the second limb of s 48 and having regard to society's concern for the sanctity of human life requires, where there has not been an assault but a threatened assault, that there must be immediacy of life-threatening violence to justify killing in self-defence or the defence of another.

Pre-emptive action will therefore not be justifiable as self-defence unless the accused faced immediate danger which could only be avoided by taking instant action. If the circumstances are such that no reasonable jury could entertain a reasonable doubt on the point, the defence should be withdrawn from the jury.[69]

In *R v Oakes*[70] the Court of Appeal accepted that expert evidence on battered woman syndrome was relevant to the accused's anticipation of the imminence of an attack and of its severity. The evidence could provide a background to the accused's circumstances and answer any suggestion that she should simply have left the victim. The court took a similar view in *R v Xhou*[71] where, on facts similar to those in *Wang*, the accused was acquitted of attempted murder.[72]

---

64 *R v Lavallee*, supra n 17; *State v Norman* 366 SE 2d 586 (1988).

65 *R v Gordon* (1993) 10 CRNZ 430; *R v Oakes*, supra n 3; *R v Guthrie*, supra n 3.

66 [1990] 2 NZLR 529.

67 Ibid at 535. It should be noted that at trial the defence case was not based upon battered woman syndrome. In *Jahnke v State* 682 P 2d 991 (Wyo 1984) at 997 the court said that the defendant's argument, if accepted, "would amount to a leap into the abyss of anarchy".

68 Supra n 66 at 539.

69 *R v Ranger* (1988) 4 CRNZ 6, 9; *R v Wang*, supra n 66 at 535.

70 [1995] 2 NZLR 673.

71 *R v Jai Fong Xhou* (Unreported, HC Auckland, T 7/93, 8 October 1993, Anderson J). In summing up, the trial Judge described the syndrome to the jury as "a sociological

In a recent paper Nan Seuffert argued that while New Zealand self-defence law combined with battered woman syndrome evidence may be useful in some cases to respond appropriately to the desperate attempts of some battered women to protect themselves from their abusers, it is unlikely to facilitate the appropriate application of the law in all of these cases.[73] This area of law is still developing in New Zealand, as it is elsewhere. A recent case in which it appears a jury accepted that a woman who killed her spouse could have been acting in self-defence is instructive about the present stage of development.

*Non-conviction in a homicide: R v Manuel*

Luciana Manuel was charged with murdering her de facto partner, William Reti, by stabbing him in the neck.[74] Ms Manuel and Mr Reti had been partners for approximately 10 years in a relationship characterised by considerable violence. Late in September 1996 they visited Rotorua and stayed at the house of a couple with whom they were friends. Throughout the afternoon and early evening of 27 September both were drinking heavily and consuming pills. Ms Manuel fell asleep on a couch in the living room and awoke to find Mr Reti discussing her with their male host. She began arguing with Mr Reti, and as the argument became more heated Mr Reti punched her in the face. At this point the other man decided to "leave them to it" and went off to a bedroom to join his girlfriend. Shortly after this Ms Manuel picked up a knife from the kitchen bench and stabbed Mr Reti in the neck. She immediately tried to resuscitate him but shortly realised he was dead. A police officer was called to the scene. As he attempted to render assistance to Mr Reti he discovered the handle of a rake in the deceased's left hand.

When interviewed by the police, Ms Manuel admitted stabbing Mr Reti but denied she intended to kill him. In describing the violence which was a feature of the couple's relationship, she claimed that most of the violence was perpetrated by Mr Reti but admitted she sometimes used violence in return.

Prior to her trial, defence counsel signalled that Ms Manuel would defend the charge on the basis that she lacked murderous intent and had acted in self defence. The defence of provocation would be raised in the alternative. To support both defences, counsel proposed to call expert testimony on battered woman syndrome. This was to come from two experts, one a psychiatrist, the other a psychologist. The nature and form of the experts' testimony was the subject of a direction from the trial judge.

As to the form of the evidence, defence counsel sought to have both experts read reports prepared at counsel's instruction prior to the trial and have them

---

phenomenon that sees women ... in particular in relationships with dominant men who physically abuse them and then stay in the relationship whereas one would often think that people who are in an abused situation would leave the relationship ...[C]haracteristic of the phenomenon is the fact that [the relationship] continues when logic should say that it be terminated".

72 See Robertson (ed), *Adams on Criminal Law*, above, CA48.09A.

73 Seuffert, supra n 1. The current state of the law in this country is outlined in *Adams*, ibid.

74 *R v Manuel* (High Court Rotorua, T7/97, 19 September 1997, Robertson J).

produced as exhibits. The trial judge rejected this on the basis that it would be wrong in principle to permit the evidence of particular witnesses to be in a form available for the jury in the jury room while the evidence in cross-examination and other relevant material was not also available.[75]

As to the scope of the evidence which the experts should be permitted to cover, it was held that expert evidence on battered woman syndrome was admissible primarily because it might assist members of the jury analyse evidence as to what occurred in light of the accused's experiences of continual domestic violence. In a ruling on admissibility the trial judge held that the experts could comment on other evidence available to the jury and express conclusions which, in their opinion, followed from that. However, he was adamant they could not express opinions or conclusions based on information which they had gained outside of the court and for which there was no evidential foundation. This in effect meant that the reception of expert testimony as to whether the accused suffered from battered woman syndrome was dependent upon her giving evidence.

Ms Manuel testified to an unhappy childhood, in which she had witnessed regular physical violence by her father inflicted on her mother, sisters and brothers. Her relationship with Mr Reti, she said, began well but was soon marked by incidents of violence. She said he would use his fists and sometimes weapons (including a spade, chair, and beer bottles), to inflict injuries upon her, usually in the form of cuts and bruising. She told of occasions when he would put a knife to her throat and threaten to kill her. She said she had been too scared either to call the police or to seek medical attention for the injuries she suffered. After each episode of violence Mr Reti would say he was sorry, write letters of apology and promise to obtain counselling assistance, but he never did.

When asked by counsel why she stayed with him, the accused answered, "[C]os I loved him and I wanted to grow old with him." She hoped he would change, but he did not. Ms Manuel said she did not know what triggered the violence (alcohol was often a factor) but she could recognise when an argument was about to degenerate into a situation of physical violence. Socialising was difficult because Mr Reti did not like her talking to other men in public. Ms Manuel told the jury she had low self esteem, was frightened of Mr Reti and frequently blamed herself for their arguments and the violence. After she had been with him for two years she started to fight back when they argued, but, she claimed, only if someone else was around.

As with other cases of domestic violence, the jury was confronted with evidence of a pattern of violence, much of which was not independently supported. In this case, the jury had the benefit of testimony from others who had witnessed Mr Reti inflicting violence upon Ms Manuel. There was also graphic testimony from Ms Manuel's daughter, who recalled episodes of violence she had witnessed as a young child. Whilst these witnesses could support Ms Manuel's story generally, many of the specific incidents to which she referred took place in the privacy of the couple's home.

---

[75] Transcripts of evidence are not made available to the jury during the trial or once they have retired. If the jury wishes to hear evidence again, it is read back to them from the transcript.

The jury heard expert evidence from Dr Ratcliffe, a clinical psychologist. She described in detail the battering relationship and its usual effects on the female victim. She asserted that physical violence towards women is best understood as a syndrome that has a natural history, well recognised signs and symptoms and an established set of guidelines for diagnosis and intervention. Dr Ratcliffe outlined three distinct phases of a battering cycle, in line with the cycle of violence first articulated by Dr Walker.

Defence counsel invited Dr Ratcliffe to explain why so many women remain in violent relationships. In response she testified that there is often no violence towards the woman at the outset; usually it occurs only after strong emotional ties have developed between the couple. The woman often believes the man's apologies and hopes he will change. Eventually the point is reached where the woman is not confident she can survive without her violent partner, and indeed is often faced with threats of serious violence or death if she were to leave.

When asked about the effects of this violence, Dr Ratcliffe said that women "change in personality"; that they take on the role of the victim and are often depressed and unable to act as they become more vulnerable to any kind of stress. These symptoms Dr Ratcliffe described as leading to the "condition" of learned helplessness. In addition to psychological responses to violence, Dr Ratcliffe described at length the physical effects on the body as it struggles to cope with the stress. She asserted that women in violent relationships were susceptible to Post Traumatic Stress Disorder, which she described as "a response of the human nervous system to being in a situation of profound and uncontrollable fear and being unable to remove yourself from it." Battered woman syndrome is the variety of Post Traumatic Stress Disorder which women in violent relationships suffer.[76]

After Dr Ratcliffe had described the effects of violent relationships on women generally, counsel asked for her opinion whether Ms Manuel "suffered" from battered woman syndrome. Dr Ratcliffe described Ms Manuel as a "classic case" for the syndrome. She referred at length to notes she had taken while Ms Manuel had been giving evidence, noting consistencies between that evidence and the syndrome as she had outlined it. At the end of this section of her evidence, counsel asked Dr Ratcliffe whether Ms Manuel was in fact suffering from battered woman syndrome. Dr Ratcliffe answered in the affirmative.

To refute the accused's claim that she had been acting in self-defence[77] the Crown sought to introduce evidence of violent episodes in which Ms Manuel was the aggressor. At the conclusion of her evidence-in-chief, the Crown indicated that it wished to cross-examine Ms Manuel on her criminal record. Defence

---

[76] Dr Walker argued that Post-Traumatic Stress Disorder comes closest to describing battered woman syndrome, although she acknowledges that the criteria may not be specifically tailored to measure the entire collection of psychological symptoms that constitutes battered woman syndrome. See Freckelton, supra n 59 at 32.

[77] Once there is sufficient evidence for self-defence to be put to the jury it is for the Crown to prove that the accused person was not justified in the force used to protect himself or herself. It is not for the person raising the defence to establish that the amount of force was reasonable in the circumstances, and that the force used was justified: *R v Robinson* (1987) 2 CRNZ 632.

counsel vigorously opposed that course, arguing there had been no attack on the prosecution case which, ordinarily, would be necessary to justify that material coming before the jury.

The accused's evidence was a distressing and graphic chronology of a relationship in which she was subjected to continual violence. Together with the expert evidence, which at that point was yet to be called, her evidence painted a bleak picture of the character and behaviour of the deceased. Central to the defence case was the contention that her conduct was a justifiable reaction to the years of violence she had suffered at the hands of the deceased, and hence the attack was not unprovoked or retaliatory.

The judge concluded that justice could not be served without allowing evidence of Ms Manuel's prior convictions (some involving serious violence) to be available to the jury. Evidence of this nature did not preclude the defence raising battered woman syndrome. Indeed, there is research which suggests that violent responses on the part of the woman are a reaction to the man's violence.[78]

Defence counsel's objection to this evidence is consistent with critics' assertions that a jury may be more sympathetic to the plight of some battered women than others. Shaffer expressed the difficulty in this way:[79]

> 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 ... The more a woman may have displayed anger or aggressive tendencies ... or have demonstrated autonomous behaviour in other spheres of her life, the more risky a defence based on battered woman syndrome may become.

The principal incidents of violence on Ms Manuel's part occurred in May 1994. The police had been called to a domestic dispute in Thames and found Ms Manuel and her brother arguing with Mr Reti. In the presence of the officers Ms Manuel's brother put Mr Reti to the ground and, while he was lying there, Ms Manuel had kicked Mr Reti three times in the head. A week later the officers were called to another dispute between the accused and the deceased where, again in the presence of the officers, Ms Manuel kicked Mr Reti. In the event, Dr Ratcliffe touched upon the responses of women in such situations, suggesting they were consistent with the syndrome. This assertion is supported by other literature.[80]

---

78 In *The Battered Woman Syndrome* (1984) at 30, Dr Walker notes that women may sometimes "react to men's violence by striking back, but their actions are generally ineffective at hurting or stopping the men. They may be effective in controlling the level of the man's violence against them"; quoted by Wilson J in *Lavallee*, supra 17 at 887, where the learned Judge noted that Ms Lavallee had in the past pointed a gun at her abusive partner.

79 Schaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R v Lavallee*" (1997) 47 University of Toronto LJ 1, 14 and 25; quoted in McDonald, "Battered Woman Syndrome" [1997] NZLJ 436, 437.

80 Supra n 78.

In summing up to the jury on this aspect of the case the judge first pointed out that battered woman syndrome is not a defence in itself, but could be relevant to the jury's determination as to whether the accused was acting in self-defence or whether provocation was available:[81]

> We have had a great deal of evidence and a great deal of discussion about "battered women's syndrome" in this case. Counsel have both told you (and told you correctly) that "battered women's syndrome" is not a defence to anything. It is a factor which is relevant to be considered by you in determining whether a person has acted in self-defence ... whether intent has been proved and whether the Crown have excluded the possibility of provocation.

The judge emphasised that whatever the expert's view, it was for the jury to satisfy itself that Ms Manuel suffered from the syndrome before considering the effect of the syndrome on their determination of the issues of self-defence, intent and provocation:[82]

> A "battered woman" has no right to kill or injure any more than any other person. The fact that a woman does suffer from "B.W.S." is not in and of itself (ie the syndrome) [a] justification for the commission of a crime. But where it exists (and that is a matter for you, not just for Dr Ratcliffe, but a matter for you as to whether it has been proven to exist in this case) the woman's actions (that is Ms Manuel's actions) and her culpability for them must be weighed and assessed in the light of contemporary knowledge of that syndrome and its effect on the mind and on the will. So it is the effect which the syndrome has... which is what you will have to have regard to in respect of self-defence and intent and provocation.

Because the case was defended primarily on the basis of self-defence, evidence of battered woman syndrome was most relevant to the question whether the force was reasonable in the circumstances as Ms Manuel believed them to be. The judge said:[83]

> [A] woman who is suffering from the syndrome may genuinely perceive danger earlier than others and may perceive a threat as being more serious than others might see it. And the reasonableness of her response is to be judged in the light of her perception.

He summarised the jury's task on this aspect of the case in this way:[84]

> So what you are going to have to do is to decide on the basis of all the evidence you have heard whether it is more probable than not that this woman was suffering from "B.W.S". Then if she was, what effect (if any) that had on her perception of the position which she was in and her response in light of her perception.

---

81 Summing Up of Robertson J, 19 September 1997, 9.
82 Ibid.
83 Ibid 9-10.
84 Ibid 10.

Later in the summing up the judge addressed the relevance of the syndrome to the defence of provocation although on the evidence he suggested this was an unlikely application.

The jury deliberated for approximately five hours before returning a verdict of not guilty of either murder or manslaughter. Under our system we do not know specifically how a jury reached its verdict but as trial Judge, my observation and assessment led me to conclude that the jury was not satisfied, on the totality of the evidence, that the Crown established the accused was not acting in self defence. Lack of murderous intent or provocation would have required a verdict of guilty of manslaughter but not guilty of murder.

*How Far Can The Expert Go?*

In *R v Manuel*, the expert witness stated unequivocally her opinion that the accused suffered from battered woman syndrome. Some commentators have criticised the propriety of expert witnesses moving from generalities (aimed at correcting misapprehensions on the part of the jury) to proffering their opinion on the extent to which particular defendants conform to those generalities.[85]

The Court of Appeal addressed this issue in *R v Guthrie*.[86] John Guthrie was accused of committing serious sexual offences against his former partner and of threatening to kill her. The Crown wished to call a psychologist to give evidence describing the symptoms and effects of battered woman syndrome. In a pre-trial ruling on admissibility the judge said:

> It is not proposed that she give evidence as to her opinion that the complainant suffers from the syndrome. If it is limited in that way then, as I understand it, trial counsel no longer objects to its admissibility.

In the course of a subsequent appeal the judge's approach that the expert's evidence should be limited in this way was in issue. The Court of Appeal expressed the purpose of admitting expert evidence as follows:[87]

> The issue which required explanation was why a person in the position of this complainant would continue with the relationship if she was being subjected to various assaults, attacks and violations. What is perceived to be a predictable response was not occurring. The expert testimony was to indicate how this apparent inconsistency may occur and whether her behaviour was consistent with the syndrome. We do not accept that this can be characterised as merely bolstering credibility. It is better described as providing the jury with additional material upon which it could make an intelligent assessment of the total evidence.

---

85 Freckelton, supra n 59 at 43-44.

86 (1997) 15 CRNZ 67. See McDonald, "Battered Woman Syndrome" [1997] NZLJ 436.

87 Ibid at 72.

On the critical issue of the proper scope of the expert's testimony the Court differed from the trial judge's assessment and noted:[88]

> [I]t would have been better in the particular circumstances of this case for the expert to have expressed a view as to whether the behaviour alleged (if proved) was consistent or inconsistent with the BWS. Ultimately it would have been a matter for a jury to determine, but the jury would have benefited from an expert opinion on the point. The restriction to only a generalised discussion of the topic was less helpful than it could have been.

A properly-instructed jury should be in no doubt that whether a person's behaviour is consistent with battered woman syndrome is a matter for them to decide. Nevertheless, the criticisms noted above raise significant questions about the role of experts in criminal trials. Many developing scientific techniques and theories, of which syndrome evidence is an example, have potential application in criminal trials. The principles which determine the admissibility of such material are a current topic of debate.

**Expert Evidence Generally**

Evidence of battered woman syndrome is admitted under the rubric of expert evidence. As it is the Judge's function to determine whether expert opinion should be admitted, the criteria which govern that determination are critical. Novel forms of scientific evidence can pose a difficulty because the court must evaluate the validity or helpfulness of the science in question. The range of topics on which psychologists and psychiatrists are able to give evidence presents these difficulties most acutely.

Experts are featuring in modern litigation with "unparalleled frequency".[89] In recent years a number of decisions have focused upon the potentially prejudicial nature of expert scientific, psychiatric and psychological evidence and have advanced the contention that evidence on specialised fields of endeavour that cannot be described as "areas of expertise" ought not to be admitted.[90] The issue has assumed some importance in the criminal law where expert evidence is now received on subjects as varied as fingerprinting, the use of seat belts, the causes of traffic accidents, voice identification, stylometry evidence, polygraph evidence, and DNA profiling. These categories will continue to expand. Courts in Britain, Canada, Australia and New Zealand have all struggled to identify criteria for admitting or rejecting evidence of new scientific theories or techniques.

The rules relating to the admissibility of opinion evidence, and expert opinion evidence in particular have been closely examined in recent times.[91] A recurring

---

88 Ibid at 71.

89 C M Nicholson QC, "Expert Evidence" in Eichelbaum (ed), *Mauet's Fundamentals of Trial Techniques* (NZ ed 1989) 120.

90 Freckelton & Selby, supra n 25. See further *R v B* [1987] 1 NZLR 362, 367 per McMullin J; 370 per Somers J; *R v Accused* [1989] 1 NZLR 714, 720-721.

91 New Zealand Law Commission, Preliminary Paper No 18, *Evidence Law: Expert Evidence and Opinion Evidence: A discussion paper* (1991). In Australia see Report No 26 of the Law Reform Commission (Commonwealth) *Evidence* (1985).

criticism, both in New Zealand and overseas, is that the traditional rules are insufficiently flexible to enable courts to take advantage of new techniques which may be helpful. The problems associated with admitting syndrome evidence, and the legitimate use of such evidence, provide a good illustration of the problems which can arise.

### Admissibility of Expert Evidence

Writing to Lord Lytton in 1877, Lord Salisbury spoke of experts in the following terms:[92]

> No lesson seems to be so deeply inculcated by the experience of life as that you never should trust experts. If you believe the doctors, nothing is wholesome: if you believe the theologians, nothing is innocent: if you believe the soldiers, nothing is safe. They all require to have their strong wine diluted by a very large admixture of insipid common sense.

There is more than a little of Lord Salisbury's sentiment to be found in the rules governing the admissibility of expert opinion evidence. In his work, *A Treatise on the Law of Evidence*, Taylor described the testimony of skilled witnesses as that which "least deserves credit with a jury".[93] The practice of hearing evidence from experts is centuries old,[94] but judicial suspicion of expert evidence persisted.[95] Today, judges are more open-minded, but caution is still evident.[96]

The starting point in respect of all evidence is that it be relevant to an issue before the court.[97] Even if the evidence satisfies that requirement, it will be inadmissible if there is another legal rule requiring its exclusion. At common law the general rule is that witnesses may not express opinions when giving evidence. A properly-qualified expert is excused compliance with this rule and may give evidence in the form of opinions or inferences. Expert witnesses are thus granted a latitude not generally accorded to lay witnesses because their

---

92 Letter to Lord Lytton, 15 June 1877; in Lady Gwendolen Cecil, *Life of Robert, Marquis of Salisbury* (1921-32) vol. 2, ch. 4, quoted in *The Oxford Dictionary of Quotations* (4th ed 1992).

93 In the 3rd ed 1858 at 69, Taylor said, "[p]erhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These gentlemen are usually required to speak, not to facts but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them".

94 See *R v B* [1987] 1 NZLR 362, 367 per McMullin J.

95 In *Lord Abinger v Ashton* (1873) LR 17 Eq Cas 358, 373, Sir George Jessel MR said, "in matters of opinion I very much distrust expert evidence, for several reasons".

96 For a more recent expression of the dangers of wrongly admitting expert evidence see *Murphy v R* (1989) 167 CLR 94, 130-131 per Dawson J.

97 *R v Wilson* [1991] 2 NZLR 707, 711 per Fisher J. See also Rule 401 of the United States Federal Rules of Evidence which defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determintaion of the action more probable or less probable than it would be without the evidence".

expertise is on a matter which is beyond the knowledge or experience of the trier of fact.

Because an expert's opinion may have a significant bearing upon the outcome of the litigation, rules have evolved to ensure that those opinions are offered by reputable people following recognised disciplines of knowledge. The courts have also been sensitive to any trend that could result in experts usurping the tribunal of fact's function of deciding what occurred and what inferences should be drawn.

The rules regulating the admissibility of expert opinion evidence are usually grouped under a number of heads which are in practice closely related. The first condition for the admissibility of expert opinion evidence is that the expert must be properly qualified. At common law an expert witness is one whose specialised knowledge or training will be helpful to the judge or jury.[98]

The "ultimate issue" and "common knowledge" rules are both intended to ensure the expert does not usurp the jury's function. The ultimate issue rule attempts to prevent an expert from addressing the ultimate issue the jury is required to decide. If applied too narrowly the rule is overly restrictive and consequently in practice it is not rigorously enforced.[99] The common knowledge rule ensures that an expert is not called to give information within the ordinary person's knowledge or experience.[100] Evidence of battered woman syndrome is occasionally attacked under this head.

The New Zealand Law Commission has criticised both the common knowledge and ultimate issue rules.[101] Both rules exclude the subject-matter of the expert's evidence without regard to its reliability or value to the trial. Consequently, they can unduly limit the reception of evidence which might otherwise add to the understanding and knowledge of the jury or judge.[102] The Commission advocates the abolition of both rules and proposes that in their place a general power to exclude prejudicial, unhelpful or misleading evidence is sufficient to safeguard the interests the rules currently protect.[103]

In the Law Commission's *Draft Evidence Code*[104] a witness may offer expert opinion evidence if that evidence will:[105]

> substantially help the court or jury to understand other evidence in the proceeding or to ascertain any fact that is of consequence to the determination of the proceeding.

There is specific provision that expert opinion evidence is not inadmissible by reason only that it is about an ultimate issue to be determined in a proceeding or a matter of common knowledge.[106] If the opinion evidence is about an ultimate issue, the court must "have regard to the risk of inappropriate weight being placed on such evidence by the jury."

---

98 *R v Turner* [1975] 1 QB 834; *R v Moore* [1982] 1 NZLR 242.
99 *R v Howe* [1982] 1 NZLR 618, 628.
100 *R v B* supra n 94.
105 Ibid, Clause 18(1).
106 Ibid, Clause 18(3).

**Expert Scientific Evidence**

Courts are frequently faced with questions about the validity of new forms of scientific evidence and the usefulness of the particular technique or theory. It is the trial judge's task to sort out the helpful science from the unhelpful. How is that sorting exercise to be carried out? In England it appears the question is one of assessing probative value; but in other jurisdictions there have been attempts to carry out the sorting exercise by imposing additional criteria for admissibility.[107] The most well-known of these is the *Frye* test.

In *Frye v United States*[108] the defendant attempted to introduce the results of a predecessor to the modern polygraph. The court held the evidence inadmissible because physiological and psychological authorities had not by that stage accepted the new technique. In a passage well worn by quotation the court said:

> Just when a principle crosses the line between the experimental and the demonstrable stages is difficult to define. Somewhere in this twilight zone, the evidential force of the principle must be recognised, and while the courts will go a long way in admitting expert testimony deduced from a well-recognised 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.

This "general acceptance" test became the governing law in many US federal courts. The *Frye* test has not been expressly adopted in New Zealand, although the Court of Appeal has invoked a formula which unmistakably draws on *Frye*. In *R v B* the Court stated that "the subject matter to which the expert opinion relates must be a sufficiently recognised branch of science at the time the evidence is given".[109]

The *Frye* test has been the subject of general criticism. In the United States it spawned litigation about whether a technique had achieved "general acceptance", an issue quite separate from its probative value in the particular case. The New Zealand Law Commission criticised the *Frye* test because it tends to exclude scientific evidence which may be reliable even though it has not yet been accepted by the scientific community.[110]

In the United States the Supreme Court has discarded the *Frye* test in favour of a broader approach focusing on a judicial determination of both the soundness of the proposed expert testimony and its usefulness in assisting the trier of fact. In *Daubert v Merrill Dow Pharmaceuticals*[111] the issue before the Court was whether the *Frye* test had been superseded by the US Federal Rules of Evidence. In addition to determining that issue,[112] the Court identified a number of factors

---

107 Robertson & Vignaux, *Interpreting Evidence: Evaluating Forensic Science in the Courtroom* (1995) 202.

108 293 F 1013, 1014 (1923).

109 *R v B* [1987] 1 NZLR 362, 367; see also *R v Accused* (1989) 4 CRNZ 193, 198.

110 Supra n 101 at 18.

111 (1993) 125 L Ed 2d 469. For comment see Odgers & Richardson, "Keeping Bad Science Out of the Courtroom - Changes in American and Australian Expert Evidence Law" (1995) 18 NSWLJ 108.

112 The Court decided the Federal Rules of Evidence had supplanted the *Frye* test.

relevant to deciding whether scientific testimony should be allowed to go before a jury. Emphasising that the inquiry must necessarily be flexible, relevant factors were:

(a) whether the theory or technique can be, and has been, tested;

(b) whether the technique has been published or subjected to peer review;

(c) whether actual or potential error rates have been considered; and

(d) whether the technique is widely accepted within the relevant scientific community.

Under the Federal Rules of Evidence scientific, technical or other specialised evidence may be given if it will "assist the trier of fact to understand the evidence or to determine a fact in issue".[113] If the Law Commission's proposed rule for admissibility of expert evidence is adopted,[114] the decision in *Daubert* will be useful in this country.

In *R v Calder*,[115] Tipping J drew on *Daubert* to determine the admissibility of a novel scientific technique. Ms Calder was accused of murdering her former de facto partner by poisoning him with acrylamide. Defence counsel objected to the Crown introducing results of tests carried out by a forensic toxicologist on samples of the man's hair. After reviewing the approaches taken in other jurisdictions and the Law Commission's Preliminary Paper, Tipping J concluded that before expert evidence can be put before the jury it must be both relevant and helpful:[116]

> To be relevant the evidence must logically tend to show that a fact in issue is more or less likely. To be helpful the evidence must pass a threshold test which can conveniently be called the minimum threshold of reliability. This means the proponent of the evidence must show that it has a sufficient claim to reliability to be admitted. If this threshold is crossed the weight of the evidence and its probative force can be tested by cross-examination and counter evidence and is ultimately a matter for the jury.

Tipping J recognised that a test which requires "a sufficient claim to reliability" is very general, but, as he pointed out, the test does have a desirable flexibility.

Applying these tests to the evidence of psychologists and psychiatrists is not easy. The law of evidence draws no specific distinction between psychological evidence and more traditional forms of scientific evidence. Nevertheless, the tests propounded to date are most suited to the classical sciences. Indeed, in *R v Calder* Tipping J acknowledged the authorities concerning expert psychological evidence in child sexual abuse cases raise different issues.[117]

There is evident in some courts' approach to novel forms of psychological and psychiatric evidence a trepidation borne of the inability of those sciences to

---

[113] US Federal Rules of Evidence, Rule 702.

[114] See text accompanying n 104 supra.

[115] Unreported HC Christchurch, T154/94, 12 April 1995, Tipping J.

[116] Ibid at 7.

[117] Ibid at 6.

yield results with mathematical precision. Thus in *R v B* the Court of Appeal said:[118]

> [A]s child psychology grows as a science it may be possible for experts in that field to demonstrate as matters of expert observation that persons subjected to sexual abuse demonstrate certain characteristics or act in peculiar ways which are so clear and unmistakable that they can be said to be concomitants of sexual abuse.

The Court then proceeded to exclude the evidence on the basis that it did not "demonstrate in an unmistakable and compelling way and by reference to scientific material that the relevant characteristics are signs of child abuse."[119] There may be no reason to challenge the result in that case, but, as one commentator pointed out, there is a difficulty in the Court's reasoning. It is the assumption "that psychology is a classical science and that human behaviour can be explained in scientific terms in the sense that given causes will always have given effects and that given behaviour is always explained by a given cause."[120] Psychology is most unlikely to "grow" in the manner suggested in the above passage, but that does not mean such opinions should not be admissible. In a commentary on *R v B*, Mr Bernard Robertson noted both these points and then went on to say:[121]

> These are matters which go to weight rather than relevance. If the defence had proper notice and if the jury are properly directed then it is submitted that they should be capable of assessing the weight to give the evidence. If it is argued that such evidence will unduly influence the jury then we must reassess our views of juries. ... In this case the witness stated that the behaviour exhibited was consistent with previous sexual abuse. Of course it could also be consistent with other problems and the jury need guidance as to how to assess the probabilities.

This approach can apply equally to expert evidence on battered woman syndrome.

Some would argue that if the *Daubert* tests were to be applied strictly to battered woman syndrome the courts would either have to refuse to accept evidence about the syndrome or exercise extraordinary caution with regard to it.[122] I am satisfied that is an extreme position. In dealing with a matter of major social consequence and importance the courts must be attuned to domestic reality and should be prepared to hear what experts have to say. It appears that the preponderance of contemporary scientific opinion is in favour of a recognition of the syndrome and accordingly in my view evidence about BWS should be received and evaluated.

---

118 Supra n 94 at 368 per McMullin J; see also *R v Accused* [1989] 1 NZLR 714.

119 *R v Accused*, ibid at 720.

120 Robertson, "Expert evidence in child sex abuse cases: a comment" [1989] NZLJ 163, 165.

121 Ibid at 32.

122 Freckelton, supra n 59 at 44-47; Goodyear-Smith, "Letter: Re Battered Woman's Syndrome [1997] NZLJ 436-438" [1998] NZLJ 39.

As with any expert testimony, the courts will be cautious to ensure that those who claim to be experts are in fact equipped with the necessary and relevant expertise. Judges must ensure that counsel in leading this evidence restrict the experts to matters which properly fall within the rubric of expert opinion. Many of the problems which could arise in this area can be avoided if the quality of the experts is maintained and counsel brief their experts on what the law will permit them to do. The usurpation of a trial process by experts is not the fault of the experts but arises from a lack of professional skill and discipline on the part of those who tender the evidence.

The touchstone will remain that juries decide cases on the basis of the totality of the evidence. With material about battered woman syndrome (as with any other expert testimony) the jury is only entitled to use it if a factual foundation is otherwise established. Even where that happens it is still a matter for the jury to decide what weight or value they give to that evidence, just as it will make that assessment about all the other testimony in the case.

We in the law should not be hide-bound or unreceptive to the possibilities for doing better justice with proper assistance from the scientific and medical community. Domestic violence is a problem of major proportion. The community must be responsive and reactive to deal with its insidious and draining influence. The courts have an equal obligation to ensure that in those cases in which domestic violence or its consequences are factors, every available assistance is utilised to ensure that the best possible justice is delivered.