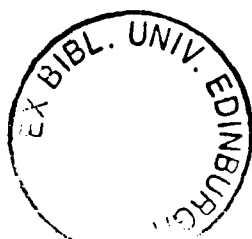


**Legal Defences for Battered Women who Kill:
The Battered Woman Syndrome,
Expert Testimony and Law Reform.**

by

Juliette Casey.

Submitted in satisfaction of the requirements
for the degree of Ph.D
in the University of Edinburgh
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I certify that this thesis is entirely my own work and that no part of it has been published previously in the form in which it is now presented.

I dedicate this thesis to the memory of Emma Humphreys.

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ABSTRACT.

Law's representation of women has long been a source of debate among feminists. In this thesis, I engage with this debate on a number of different levels specifically in the context of battered women who kill. Although three defences are commonly canvassed, self defence, provocation and diminished responsibility, I limit my proposal for reform to the defence of provocation. My particular proposal involves looking at the possibility of combining expert testimony on the battered woman syndrome with the substantive elements of that defence in Britain.

In part one I begin by setting the defence of provocation in its proper doctrinal framework. Thus, in the introduction I argue that provocation is properly conceptualised as a partial excuse. Using Fletcher's theory of the individualisation of excusing conditions, I highlight the limitations of the reasonable man standard which represents the greatest obstacle at the level of the substantive law for battered women who plead provocation. The tension arises out of, on the one hand, the use of an abstract standard and, on the other, the need to include and give proper recognition to individual experiences. I build on this foundation in chapter one where I look at all of the problematic elements of the defence through the lens of advocates practising at the Bar in Scotland. Here I pay particular attention to advocates' attitudes towards using battered woman syndrome evidence in conjunction with provocation. In chapter two I go on to set these problems in the context of a wider feminist critique of the reasons for the lack of fit between law and the experiences of women generally. Negatively, feminists attack law's claim to universality and they locate bias at both the level of law's content and form. Positively, they argue that the experiences of women can only be represented properly once law takes account of the complexity of women's subjectivity. Here I will focus on one way of describing this complexity; separation and connection. I also explore one formative influence on the doctrine of provocation, that of the man of honour, and I highlight some of the code's possibilities for battered women who kill.

The next section comprises three chapters and entails a comparative analysis of the substantive law in England and Scotland on each of the three defences. I go on to suggest that the key difference between how self defence, but more importantly provocation, operates in the two jurisdictions lies in the greater potential for an individualised approach to the reasonableness requirement under English law.

In the final section I begin in chapter six by describing how the syndrome has been used in other jurisdictions and, drawing on these experiences, I suggest how battered woman syndrome expert testimony could be used to help reinterpret the defence of provocation in Britain in a way which would help overcome many of the problems posed by the reasonableness standard. I argue that the correct classification for the syndrome is as a form of post traumatic stress disorder. Thus, conceptualised, the emphasis is placed on the abnormal nature of the stressor which corresponds with the experiences of battered women who are, most commonly, normal women placed in abnormal circumstances of violence. Finally, in chapter seven I shift the emphasis from the substantive to the evidential. Although the solution, which I explore, comes in the form of evidence, the system of evidence, acts to bar its admission. Chapter seven, therefore, focuses on two rules; the ultimate issue rule but more controversially, the knowledge and experience rule. This rule makes the admissibility of evidence on the battered woman syndrome conditional on the jury's lack of knowledge and experience. Here again, feminist criticisms expose the extent to which the experiences of battered women who kill are excluded by law as well as the reality of the extent of the jury's misunderstanding. These criticisms are not as well developed as criticisms of the reasonable man but feminists are beginning to highlight the need to open up this rule to embrace the range and diversity of women's experiences. Although the use of expert testimony on the battered woman syndrome is by no means a widely accepted reform measure I intend here to present a case for its adoption.

INTRODUCTION.

Increasingly the grim reality of the physical and sexual abuse of women within families is being brought to public attention.¹ We are now beginning to come to terms with the fact that women are much more likely to experience violence at the hands of their partners than strangers.² Statistics show that in England and Wales 75 per cent of recorded assaults on women take place in either the victim's or the assailant's home.³ These statistics are mirrored by women's experiences of domestic violence north of the border. In 1993-1994 Women's Aid in Scotland gave support to 25,932 women abused by male partners, which figure represented an increase of over 3,000 from the previous year.⁴

The figures for women who have actually been killed by violence at the hands of their partners are equally distressing. About a quarter of all homicides committed in England and Wales are domestic;⁵ women are more likely to be the victims of homicide than the perpetrators;⁶ and female victims are far more likely to have been killed by their cohabitant or ex-cohabitant than male victims. Statistics reveal that 41 percent of homicides committed in England and Wales where the victim was female the principal suspect was a partner, while this was the case in only 8 per cent of male homicide victims.⁷

These statistics reflect more widely documented feminist findings.⁸ Killing tends to be a male

¹ The Edinburgh District Council Women's Committee 1992 reported that "[d]omestic violence is more common than violence in the street, pub or workplace." Cited in p. 1 of leaflet accompanying Glasgow Women's Aid Annual Report 1995-96.

² Out of a group of 1,500 women who replied to a newspaper survey in Strathclyde Region, almost 50% of women had been frightened by a man they live with because of his behaviour. Cited on p. 1 of leaflet accompanying Glasgow Women's Aid Annual Report 1995-96.

³ HMSO 1993, Table 4A. Cited by Wells, 1994, p. 266. US statistics suggest that up to half of all married women suffer some form of brutality at the hands of their partners. R. Langley and R. Levy, 1977. Cited by McColgan, 1993, p. 508.

⁴ Scottish Women's Aid Annual Report 1993-94. Cited in the leaflet, p. 1, accompanying Glasgow Women's Aid Annual Report 1995-96.

⁵ HMSO, Criminal Statistics, (1989). Cited by O' Donovan, 1991, p. 220.

⁶ Ibid.

⁷ HMSO 1993, Table 4A. Cited by Wells, 1994, p. 266.

⁸ For a critique of statistical evidence see Sue Bandalli's analysis of the statistics relied on by the Home Office in 1991 on the defences available to and the treatment by the courts of men and women in cases of domestic killing. Although the statistics had been interpreted as supporting the view that women who

act.⁹ Although women rarely kill by comparison, they do fear male violence.¹⁰ When women kill, therefore, the danger is that their behaviour will not resemble the male dominated patterns of behaviour, which have come to colour our conceptions of violence and fear.¹¹ This differential has prompted Taylor to conclude that "[F]emale homicide is so different from male homicide that women and men may be said to live in two different cultures, each with its own subculture of violence."¹² This conclusion has been born out by one Australian study into male and female spouse killings.¹³ The results of this study showed that both male and female spouse killings occurred in the context of marital unhappiness and violence, usually inflicted by the husband on the wife. One difference, which emerged from this study, was that men killed their wives after they had been separated from them and usually because of child custody or sexual infidelity. By contrast, women rarely killed over sexual jealousy or, following the termination of the relationship. Instead their killing was nearly always preceded by a high degree of violence, which had in the past been reported to the police.¹⁴

The fact that women can kill in response to violence from their partners, who until recently could lawfully rape their wives,¹⁵ is not new. In a historical account of women who killed their partners, one writer documents that until the middle of the twentieth century, most women who killed their batterers were not prosecuted at all. Those who were, were usually acquitted if they denied the charges and "looked

kill were treated more favourably, Bandalli argues that statistics do not present the complete picture. 1992, pp. 716-409.

⁹ See L. Smith, *Domestic Violence*, Home Office Research Study No. 107, 1989, ch.3. Cited by O' Donovan, 1991, p. 236.

¹⁰ Wells, 1990, p. 127.

¹¹ See O' Donovan, 1991, p. 220.

¹² Taylor, 1986, p. 1681.

¹³ Alison Wallace, 1986. Cited by Wells, 1994, p. 266.

¹⁴ See also Jacqueline Castel, 1990, pp. 231-234.

¹⁵ The marital rape exemption was removed in England by the House of Lords in the case of *R v R* [1991] 4 All ER 481 and in Scotland in the case of *Stallard v HMA*, 1989 SCCR 248. Commenting on the rule in Scotland, which prevented a husband from being prosecuted for the rape of his wife unless he was merely the accessory, Ferguson, 1998, notes that both of these rules were probably copied by Hume from the English writers. p. 21, footnote 9.

like a lady" at the trial.¹⁶ As we will see throughout, the latter half of the twentieth century has witnessed a far more candid approach to cases involving battered women who kill. Now, it is no longer acceptable for these cases to be dismissed without full and proper legal adjudication. On the face of it, this change has impacted negatively on the lives of these women. Unlike their predecessors, as we will discover, many battered women in our times have found themselves serving life sentences for murder. However, in real terms this transparency, in theory at least, affords to women the possibility of speaking out about their circumstances, describing the reasons for their actions, and looking to law for equal representation.¹⁷ As battered women who kill become more and more visible in our court rooms,¹⁸ it now falls on the legal system to consider how best to reflect in legal outcome the background against which these killings take place. However, as I hope to show in this thesis, this window of opportunity remains for the moment only slightly ajar because the comparative relative scarcity of female killers in courts means that these cases are considered at trial by a judge and jury without proper understanding.

The justice and injustice of these cases have been debated for many years in other jurisdictions most notably perhaps in North America and Australia.¹⁹ In these jurisdictions there have been various suggestions for reform, most notably the incorporation into law of expert testimony on the battered woman syndrome; a reform measure which we will examine in more detail throughout this thesis. In the main, the debate has centred around whether this self-help ought to be justified or partially excused. Thus, the three defences most commonly discussed are self defence, which justifies a killing, and provocation

¹⁶ A. Jones 1980, Cited by Walker, Thyfault and Brown, 1982, p. 2.

¹⁷ See, for example the book written by Kiranjit Ahluwalia about her experiences of domestic violence and her treatment at the hands of law, 1997.

¹⁸ Although I will concentrate here on those cases which have received considered judicial attention, that is not to say that these are the only cases involving battered women to have come before the courts. See also cases such as Jane Scotland who received a non-custodial sentence for manslaughter when she killed her husband after twenty-two years of mental torture, physical ill-treatment and the sexual abuse of her daughter; or Pamela Sainsbury who received a two-year suspended sentence for manslaughter on the ground of diminished responsibility from a trial judge who considered that her violent and jealous husband had psychologically paralysed her. Unreported decisions, cited by McColgan, 1993, p, 509. In the case of *R V Rossiter* (1992) 95 Cr. App. R. the sixty-year-old Ethel Rossiter had a verdict of murder substituted for one of manslaughter on the grounds that the judge erred by failing to leave the issue of provocation to be determined by the jury. Russel LJ in the Court of Appeal held that "there was sufficient evidence in the case taken as a whole to demand that that course be taken." p. 333.

¹⁹ See chapter six.

and diminished responsibility which both partially excuse a killing. These three defences have also been the subject of considerable debate here in Britain. Despite the success of reform measures adopted by other jurisdictions, it still seems to be the case that when a British battered woman comes to court on a murder charge, she enters an alien culture, unsympathetic to her experience of violence. The past history of homicide, which has been characterised as primarily a male act, means that judicially created categories have difficulty accommodating her experiences. As we will see, these difficulties are most pronounced at the level of the substantive law in the form of the reasonable man test and, albeit in a slightly different form, are also evident at the level of the law of evidence in the form of the knowledge and experience rule.

In part one of this thesis I will focus on the defence which has been at the centre of controversy in Britain, provocation. I will begin in chapter one with a discussion of how advocates practising at the Bar in Scotland apply the defence in cases involving battered women who kill before going on to explore their opinions on the usefulness of introducing expert testimony on the battered woman syndrome. In chapter two I will take the key problems created by the defence in practice for battered women who kill and explain the reasons for these difficulties from a feminist perspective. In section one, therefore, I will juxtapose practice with theory and consider how the opinions of advocates practising at the Bar correlate with feminist suggestions for reform. I will continue in part two with a comparative discussion of each of the three defences available to a battered woman who kills and I will go on in part three to outline a proposal as to how battered woman syndrome could be incorporated into the defence of provocation in Britain via the law of evidence.

Before doing so, however, I intend to take as a starting point the tension with which our judiciary is faced when administering justice in criminal cases. This tension arises out of, on the one hand, the need to do justice in the individual case at hand and, on the other, the need to protect the interests of society in general. Cases involving battered women who plead provocation are no exception. Indeed this tension can be seen clearly in the English test for provocation where each aspect finds expression. The defence comprises two questions. First, the subjective test which requires proof that the defendant in fact suffered a sudden and temporary loss of self control as a result of the provocation. This test, therefore is an individual-based one. Second, the objective test which allows the defence only in cases where even the reasonable man in the circumstances could have lost control in the circumstances and reacted like the

accused. Under this test, the individual is tested against how the reasonable man could have reacted. This limitation protects the interests of society by preventing every individual who kills while suffering a loss of self control from claiming the partial excuse of provocation. As we will see in section two the courts in England have shifted the balance over the course of the past two decades so that now the objective test is more individualised. On the one hand, this trend has eased considerably the difficulties posed by the reasonableness standard for battered women who kill. However, on the other it has created a considerable degree of resistance among those who see this development in terms of a dilution of the judiciary's duty to protect the public interest, including some of the advocates I interviewed.²⁰ Despite this concession to the individual in English law, this standard still represents the main stumbling block at the level of the substantive law for battered women who kill. As we will see throughout, arguments have been made from different quarters which support and indeed encourage an even more radical concession to the individual in provocation cases. For this reason, I will begin by examining this standard from two very diverse critical perspectives: feminist legal theory and the work of legal theorists, in particular that of George Fletcher who has advanced a theory of individualisation in cases of excuse which in many respects dovetails with feminist suggestions for reform.

²⁰ See chapter two where some of the advocates whom I interviewed considered that this trend would result in the creation of a licence to kill for battered women.

PART ONE.

Cases for the individualisation of the reasonable man in provocation.

Introduction.

The doctrine of provocation was developed by common law judges in order to mitigate the harshness of the mandatory death penalty that was previously invoked in all cases of homicide.²¹ Although the reason which gave rise to doctrine no longer exists, its continued recognition as a partial defence indicates a modern-day empathy with heat of passion killings. What is not so clear, however, is precisely why this attitude exists. As Lord Diplock confessed, in one of the most important decisions on provocation in modern times, the doctrine is something of an anomaly in law.²²

Although this confusion is perhaps not the most hotly debated aspect of criminal law, a number of theorists have directed their minds towards setting each of the defences in the criminal calendar within a coherent doctrinal framework. As we will see throughout, self defence is most often treated as a justification. The essence of the theory of justification is that certain exculpatory circumstances render otherwise criminal acts acceptable to society. As Eric D'Arcy has written "[t]he effect of a *justifying* circumstance is to *justum facere* an (otherwise wrongful) act, so that it becomes good, or at least permissible:lawful."²³ Once these circumstances are identified, any person who commits the act under similar circumstances will also be justified.²⁴ By contrast with justifications, excuses focus on the actor's subjective perceptions rather than the exculpatory circumstances, which are not exclusive to the actor. Here, admittedly the actor has committed a harmful act, which the criminal law seeks to prevent, but due to internal or external pressure, s/he is not deemed morally blameworthy. Unlike justification, therefore,

²¹ Dressler, 1982 pp. 421-427 or Horder, 1992, chapters one and two.

²² *DPP V Camplin*, [1978] 67 Crim. App. Rep. at p. 17. This uncertainty was more recently endorsed by the dissenting judge, Lord Steyn, in the Privy Council decision of *Luc Thiet Thuan V R* [1996] 2 ALL ER 1033.

²³ D'Arcy, 1963, p. 81. Cited by Uniacke, 1994, p. 11.

²⁴ See, for example, Fletcher 1985, p. 976 who argues that the criteria of justification are supposed to function not only *ex post* as decision rules, but *ex ante* as conduct rules. In an ideal world, therefore, everyone who contemplates harmful action could know whether this proposed conduct is rightful. Paul Robinson takes as one example of justified conduct starting a fire in a field to create a firebreak which prevents a town from being engulfed by a forest fire. 1975, p. 278.

the excused act is not acceptable to society. Although there is widespread consensus regarding a general theory of excuse, precisely which defences ought to be categorised as such is a topic of debate.²⁵ In general terms, excuses are rationalised on the basis that one who cannot exercise voluntary choice, whether to obey or violate the criminal law, is not an appropriate subject of criminal punishment. The claim is that but for these circumstances, the actor would not have chosen to violate the law. The act is attributable to circumstances rather than the character of the actor. This inquiry, therefore, oscillates between condemning the act and blaming the actor. In these cases, it is always the actor who is excused, never the act.

On one view of it, the doctrine of provocation could be viewed as a justification.²⁶ In support of this view, McAuley²⁷ argues that the true basis for the defence lies in the contribution of the victim and the fact that this wrongful conduct was the cause of the defendant's violent outburst. Because the killing is in response to the deceased's wrongful conduct, the defence operates to deny that the defendant's actions were entirely wrongful in the first place. He concludes that whereas excuses focus on an actor's internal mechanisms for self control, provocation is more concerned with external constraints on the individual's powers of self control. Taking issue with this classification, Uniacke argues²⁸ that the fact that a successful plea of provocation results in conviction of an offence means that the accused's conduct was legally wrongful. This in itself is sufficient to identify provocation as an excuse. Furthermore, she goes on to argue that while justification can be a matter of degree, conduct described in a particular way is either

²⁵ We saw above, for example, the possibility that self defence could be classed as both justification and excuse. See also Robinson, 1982, p. 242 who categorises provocation as a failure of proof defence. Unlike Dressler Robinson writes that excuse defences consist of a disability causing an excusing condition. 1982, p. 221.

²⁶ Dressler, 1982, points out that were the theory of forfeiture to be applied, then the defence would have to be either complete or non-existent. He argues that the deceased ought to know or does know that it is reasonably foreseeable that a killing occur as a result of his/her actions. Once the provocation is deemed sufficient, therefore, the defendant, on the basis of the forfeiture theory, should logically be acquitted. As he argues such a result jars against moral sensitivity. pp. 455-456.

²⁷ Finbarr McAuley, 1987.

²⁸ 1994, p. 13. Adopting the orthodox view of excuses as involving a wrongdoing she distinguishes those excuses, such as provocation, which leave the wrongdoing intact, and which then focus on the reasons why that wrongdoing occurred, from cases of agent perspectival justification. These latter cases, she argues, can negate a wrong because the well-grounded beliefs held are inconsistent with some mens rea element that is itself a defining characteristic of the wrong in question.

justified or it is not. A particular act cannot be partially justified: it is either permissible or right or it is not.²⁹ This view of provocation seems to hold sway so that the more widely accepted rationale for the defence tends to be that of excuse.

Perhaps the most vehement supporter of this view of provocation is Joshua Dressler who has, on a number of occasions,³⁰ argued persuasively that this is indeed the correct way to view the defence.³¹ Disagreeing with McAuley's assertion that excuses only apply in cases where the actor, because of some disabling factor, could not have met the relevant legal standard, Dressler argues that this concept of excuse is too narrow. He points out that this concept conflicts with the Anglo-American approach, which excuses people, both in law and in our everyday lives, who have the internal capacity for self control, people who could control themselves, but who lacked a fair opportunity to exercise those capacities.³² Thus, he dismisses McAuley's concern that viewing provocation as an excuse runs the risk of pathologising the defence. In the words of Dressler, "provoked killers suffer from no relevant internal disability. They are ordinary people, with ordinary fallibilities and weaknesses."³³ Dressler does concede that in certain cases it is far easier to explain the requirement of wrongful conduct by the intended victim in justificatory terms.³⁴ However, he disagrees with McAuley's assertion that the requirement of wrongful conduct is "scarcely relevant"³⁵ in a conception of provocation based on excuse; being merely concerned with considering the effects of provocation on a defendant's power of self control. Dressler points out that even in an excusing system we are concerned with more than the effects of provocation on the defendant's

²⁹ See chapter three.

³⁰ Dressler, 1982 and 1988. This latter is an article written in response to McAuley, 1987.

³¹ See also Sheldon and McCall Smith, 1992, p. 166 footnote 5, who support the view that the correct way to conceptualise provocation is as an excuse.

³² Dressler, 1988, p. 471.

³³ Dressler, 1988, p. 470.

³⁴ Indeed he notes that some cases can only be explained in this way. In particular there is the early common law rule, which provided that observation of adultery by one's spouse is adequate provocation while observation of unfaithfulness by one's fiancée is not. This was explained in the eighteenth-century cases of *R v Mawgridge* on the grounds that adultery merits a lethal response since it is the "highest invasion of [a husband's] property. I will discuss this case in more detail in chapter four.

³⁵ Dressler, 1988, p. 474.

power of self control. It is true that we do not fully blame a person who partially loses self control but, he points out, only if s/he is not to blame for his/her anger.

Combining both elements, Dressler approaches these killings from the perspective of the universal emotion said to underlie a provoked killing, anger, and the loss of self control which is caused in the actor.³⁶ He argues that the emotion of anger in provocation can cause an involuntariness,³⁷ like that associated with the complete defence of insanity. Provided this anger is caused under circumstances in which the actor cannot be fairly blamed for his anger, if it causes an involuntariness so great that it reduces our choice-capabilities, this makes us less able to respond in a legally and morally appropriate way. In these cases, he argues that our actions ought to be excused. Dressler distinguishes this type of involuntariness from that associated with the plea of duress. Here, the actor can merely point to an undermining of choice-making opportunities. Thus, although the actor may well have killed as a result of duress, because s/he has the capability to make a choice, law requires that s/he die or turn upon the coercer.³⁸

George Fletcher³⁹ has formulated what is perhaps the most comprehensive theory of excuses. He writes that "[t]he excusing conditions of the criminal law are variations of the theme 'I couldn't help myself' or 'I didn't mean to do it.'"⁴⁰ While each of law's excuses covers a range of excusing circumstances,⁴¹ he points out that they nevertheless have limited spheres, which are dictated by the type of circumstances rendering the conduct excusable. Thus, for example, in cases of necessity, the excusing

³⁶ For an early formulation of the defence see East's Pleas of the Crown:

[T]he person killing is supposed to have...received such a provocation as the law presumes might in human frailty heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact: so that the party rather be considered as having acted under a temporary suspension of reason, than from any deliberate malicious motive.(1803), Vol. 1, p. 238.

³⁷ He points out that this conclusion is not a scientific conclusion but one based on moral judgement informed by common experience. 1982, note 299, pp. 463-464.

³⁸ See chapter six where I suggest how this distinction could be applied to better the plight of battered women who plead provocation.

³⁹ 1974.

⁴⁰ Fletcher 1974, p. 1269.

⁴¹ Fletcher focuses particular attention on necessity, duress, insanity, and mistake of law.

circumstances are natural phenomena, while in duress, the excusing circumstance is intimidation by another human being. What unifies all of law's excuses is not the claim that there was no act at all, for in all of these cases the first stage of assessing liability the finding of wrongdoing is still governed by standards of general application. Instead, the claim is that the actor "would [not] choose any such act in itself."⁴² Were it not for these special circumstances then the actor would not have violated the law. The act, therefore, is attributable to special circumstances rather than to the character of the actor. Although the act may violate the law, he argues that because it does not accurately reveal the actor's character, it is unjust to punish him for what he has done.⁴³ Fletcher summarises his theory of individualisation in cases of excuse as follows:

the practice of excusing men for their deeds is interwoven with a felt distinction between condemning the act and blaming the actor. It is always actors who are excused, not acts. The act may be harmful, wrong and even illegal, but it might not tell us what kind of person the actor is. And precisely in those cases in which there is no reliable inference from censuring the act to censuring the actor, we speak of excusing the actor for his misdeed.⁴⁴

Because cases involving excuses involve the secondary consideration of attributing blame to a particular individual, the questions are not about what the rule ought to be but about whether a violation of a rule is fairly attributable to a particular individual. As questions about individuals in unique circumstances, they fall outwith our dominant conception of law, which limits the legal process to defining rules and determining whether they have been violated. Fletcher argues that the test for provocation could be put in an easy question: could the actor have been fairly expected to avoid the act of wrongdoing?⁴⁵ It is true that individualisation does necessarily change the array of circumstances under which similar cases are to be judged in the future. However, Fletcher argues that this is entirely in accordance with the essence of excuse theory. While, the process of justifying conduct is distinct from the world to be judged because it generates new rules by which society is guided, the process of excusing conduct is tied to the world. Excuses do not modify a particular rule. Instead they relate to the subsidiary question whether a

⁴² Fletcher, 1974, p. 1271, citing Aristotle.

⁴³ Fletcher, 1974, p. 1271.

⁴⁴ Fletcher, 1974, p. 1271.

⁴⁵ 1974, pp. 1305-06.

particular individual can be held accountable for violating a rule which remains intact. This process, therefore, requires that the factual background of succeeding cases be altered. Although this, by necessity, injects flexibility into the legal system, Fletcher argues that there is nothing illegal about individualised decision-making. While the act itself may have been physically voluntary, it need not necessarily be morally voluntary, at least in the sense of a voluntary cold-blooded and deliberate murder. Thus, although the individual is not held accountable by reference to a normative standard s/he is subjected to an evaluative standard of voluntariness which appeals to our moral sense of what we may fairly demand of each other under specified circumstances.

Fletcher concedes that there may appear to be a problem relating to the ambiguity about the legal status of excuses (because they only come into play after one posits the illegality of the conduct) but argues that the question of excusing can never be resolved by appealing to criteria of law. He points to what he describes as a "hiatus" in law between norms which prohibit conduct and the broader process of identifying the full range of criteria bearing on liability. In this hiatus, the judgement of liability must be individualised since it is here that the individual and his personal liability for violating a legal norm has to be assessed. Far from being an illegal process,⁴⁶ therefore, the theory of excuses brings what might otherwise be determined by extra-legal discretionary processes, within the law thereby providing a public and visible forum for the process of individualised assessment in the criminal law. Detractors of this theory may regard excuses as infringing the view of law as being instrumental but as Fletcher concludes

[e]xcuses do not express policy goals. They respond to an imperative generated by the defendant's situation. Excuses "are not levers for channelling behaviour in the future, but an expression of compassion for one of our kind caught up in a maelstrom of circumstance."⁴⁷

Of particular importance for our purposes here is Fletcher's argument that this necessity for an individualised approach in cases of excuse is frustrated by the reasonableness standard. Specifically he argues that the proper approach to take when assessing criminal liability is to look, in the first instance, to the objective finding of wrongdoing, governed by standards of general application, and in the second,

⁴⁶ A charge which Fletcher acknowledges could be laid against his theory.

⁴⁷ Fletcher, 1974, p. 1308.

to the subjective attribution of blame,⁴⁸ which has to be viewed in the light of all relevant facts and circumstances of the individual case. However, reasonableness, which he describes as the "ubiquitous modifier,"⁴⁹ allows us to collapse, or flatten, this two-fold inquiry into one. Fletcher's bone of contention is that this lack of articulation has the knock on effect of blurring the boundaries between justification and excuse. Using the example of Herbert Fingarette, Fletcher points out that in cases of duress, which operates as an excuse, the crucial question is whether the defendant's act is "wrongfully made the reasonable thing to do".⁵⁰ However, similarly, the same formula works for self defence where the question becomes whether "[t]he aggressor wrongfully makes it reasonable for the victim of aggression to use force in self defence."⁵¹ Thus, Fletcher shows us that the test allows us to slide between the criteria of justification and excuse by

sweep[ing] within one inquiry questions that would otherwise be distinguished as bearing on wrongfulness or on blameworthiness.⁵²

Because cases of excuse proceed on the basis that a wrongful homicide has been committed Fletcher's argument is that the focus ought to be on the issue of attributing blame, which must be an individual-centered assessment.⁵³ Fletcher locates law's aversion to this individual assessment in the rule-bound essence of the common-law; a failing which he correlates with attitudes such as "flat" thinking.⁵⁴ Again, as we will see throughout,⁵⁵ the English and Scottish systems are very much part of this common law tradition. At one end of the spectrum, this tradition is comfortable with cases of justification. Here law

⁴⁸ Fletcher, 1978, p. 512.

⁴⁹ 1985, p. 962.

⁵⁰ Fingarette, cited by Fletcher, 1985, p. 963.

⁵¹ Ibid.

⁵² 1985, pp. 962-963.

⁵³ Fletcher, 1974.

⁵⁴ Fletcher, 1985, p. 949.

⁵⁵ See part two.

merely has to assess whether a given case fits the criterion and, if not, then it makes an exception. At the other end of the spectrum, in cases of insanity or diminished responsibility, law is equally at ease because it views these cases as being a class apart, falling outside the ordinary jurisdiction of criminal law. Where law is not so comfortable is when asked to deal with questions about individuals in unique circumstances.⁵⁶ It is in these cases that instead of focusing on the individual, law invokes abstract concepts, such as the reasonable man.⁵⁷ As Fletcher put the dilemma "[t]here is simply no single term in the idiom of the common law that helps us focus on the question whether a normal person is responsible for having violated a legal obligation."⁵⁸

Feminists have adopted successfully Fletcher's argument in favour of individualisation as a means of achieving equality for battered women who plead self defence in other jurisdictions.⁵⁹ It is true that judges dealing with provocation cases in Britain are not oblivious to the cruelty which these women have had to endure. Lord Dunpark in the Scottish cases of *HM Advocate V Grieg*,⁶⁰ for example, explained to the jury that

there is evidence before you that the deceased was a drunkard, if you like, not an alcoholic but a drunkard in the general sense, that he was a bully, that he assaulted his wife from time to time and that he made her life a misery.⁶¹

However, he was not in favour of allowing the defence of provocation. More recently in the English case of *R V Howell*⁶² Brooke LJ reduced the sentence of a battered woman convicted of manslaughter by reason

⁵⁶ See generally Glanville Williams 1982, who favours, subject to certain exceptions, keeping open law's list of excuses on the grounds that it enables compassionate treatment of a defendant's predicament in particular circumstances.

⁵⁷ Fletcher considers that the common law lacks a concept such as the German notion of *Zurechenbarkeit* which means attributability or imputability. He argues that this concept would allow for the application of rules as well as showing compassion to the individual accused. 1974, p. 1030.

⁵⁸ 1974, p. 1300.

⁵⁹ See chapter six.

⁶⁰ HC May unrep. 1979.

⁶¹ Cited at p. 527 of Gane and Stoddart, 1991.

⁶² [1998] 1 Cr. App. R. 229.

of provocation on the grounds that it was the duty of the court "to temper justice with mercy."⁶³ Despite this growing recognition for change in Britain, this has not yet been translated fully into a programme for reform.

A purely objective approach to the reasonableness requirement has long been the subject of criticism by other legal reformers, including feminists. Critical jurisprudential writers have long attacked the disparity between the social view of reality and the legal view of reality embodied by abstract concepts. These claims were initiated by legal realists, such as Roscoe Pound, who began by focusing attention on the discrepancy between the legal myth of equality of bargaining power, which was used to justify the notion of equal bargaining power between employers and employees, and the social reality of the patent inequality of these relations. These claims were intensified by the later critical legal theorist movement, which went on to describe not only the manner in which legal abstractions obscure the inequities which exist in social reality but also how these legal abstractions hide and perpetuate these inequalities. These critics argue that law, by abstracting individuals out of their social reality, where they are unique individuals, confers on them a formal equality. However, this formal equality is merely illusory since these individuals are not in reality equal, and, in fact, leads to unjust consequences. The application of an equal scale to unequal individuals can only reinforce and thereby perpetuate already existing inequalities.⁶⁴

When applied to the reasonable man standard in provocation cases involving battered women who kill, O' Donovan and Wildman argue that notions of individual responsibility that are premised upon an abstract notion of legal equality are equally illusory because they are divorced from the social basis of individuality. Thus, the application of this abstract standard operates to create a double injustice. At the level of the individual, this injustice is perpetrated by failing to take the social context in which an individual acts into account when determining his or her moral culpability. However, what is perhaps more insidious is the fact that law, by filtering out the conditions of social inequity, which may have contributed to a battered woman's act of violence, is actually condoning and perpetuating this wrong. The authors advocate that the reasonable man be eliminated altogether; a development which they consider would open

⁶³ Lexis transcript.

⁶⁴ O' Donovan and Wildman, 1981, p. 462.

the way for a complete assessment of the individual's mental state and social reality surrounding the defendant's act. Such a development would benefit not only the plight of battered women but all minority groups not catered for by the standard. They propose a test which they consider would avoid the restrictions of the traditional test while still allowing for the application of community standards of wrongdoing and responsibility as well as the legal expectation that the jury uphold these community standards. They suggest that the jury could be instructed as follows:

[i]n determining whether the killing was done with malice aforethought, you must consider whether, in light of all the evidence in the case, the accused was honestly and understandably aroused to the heat of passion. In determining whether she was understandably aroused to the heat of passion, you must ask yourselves whether she could have been fairly expected to avoid the act of homicide.⁶⁵

Although there have been moves towards adopting a more individualised approach to the reasonableness requirement in England, this trend has been somewhat tentative and not fully exploited in cases involving battered women who kill. As I stated, I intend to show how this could be achieved in part three of this thesis. However, for the moment, I will begin in part one by focusing in more detail on each of the problematic aspects of the defence for battered women who kill and exploring how advocates practising at the Bar in Scotland view one reform option which was pioneered by our American counterparts: the use of expert testimony on the battered woman syndrome.

⁶⁵ O' Donovan and Wildman, 1981, p. 467.

CHAPTER ONE.

Interviews with Advocates.

Introduction.

When I first began to consider the law's treatment of cases involving battered women who kill their partners, there were two cases which were heralded as examples of how law operated unjustly towards women. At that time, Sara Thornton's first appeal had failed while the Court of Appeal had just ordered a re-trial in Kiranjit Ahluwalia's case. However, when it came to considering how these cases were dealt with in Scotland, the only controversial case in this area was the 1979 case of June Grieg where Lord Dunpark allowed reluctantly the issue of provocation to go to the jury. Despite the similarities on paper, which we will see in part two between English and Scots law, Scottish cases seemed to be decided on the less controversial basis of culpable homicide.⁶⁶ Furthermore, the debate among academics as to possible avenues of law reform seemed to be very much confined to what was happening in the courts south of the border.

In England, where there has been a greater level of debate over how the various different elements operate in provocation cases, three key features of the defence have been highlighted by academics as being problematic.⁶⁷ As we saw, the subjective test means that the defendant has to show that s/he suffered a sudden and temporary loss of self control as a result of the provocation. The difficulty which this has created for battered women who kill is that it has excluded cases where women experienced a loss of self control gradually rather than suddenly. The objective test has been the focus of considerable controversy in England where the courts have transformed the test from being purely objective to a more individualised test. As we will see in more detail in chapter five, this has been achieved by means of the doctrine of characteristics which means that now certain characteristics of the defendant can be taken into consideration when assessing the gravity of the provocation to the reasonable person. However, as we will see later later, this more liberal approach has resulted in a confusion, particularly in cases involving

⁶⁶ See for example, the case of *Mary Chalmers* reported in *The Scotsman*, Thursday, July 27 1995 or that of *Agnes Mckenzie* reported in *The Scotsman*, March 29 1995 or *Margaret Lochrie's case* reported in *The Herald*, Tuesday, May 28 1996 or *Alice Gunn* who stood trial on July 25 1996. Lord Hamilton subsequently admonished her before releasing her to rebuild her life.

⁶⁷ See later in chapter five where I discuss in considerable detail the work of Stanley Yeo, 1997, p. 431.

battered women who kill, as to how these characteristics ought to be considered. The final problematic element relates to the response pattern of the reasonable battered woman once she has lost her self control.

My reason for interviewing criminal advocates at the Scottish Bar, therefore, was triggered by the fact that I did not understand from my reading of the text books how these cases in Scotland managed to avoid the controversy which has dogged the English courts or, as one advocate described it, the need to reconcile that which is "written in the books" and that which actually "happens in the field." The controversial concepts which were widely associated with reform measures in England were cumulative provocation and the use of battered woman syndrome expert testimony. Cumulative provocation is a legal creation used to stretch the limits of the immediacy requirement to accommodate the needs of battered women who may not lose their self control after the first act of provocation but who nevertheless live in ongoing conditions of violence. Battered woman syndrome expert testimony is an import from psychology which has been used in other jurisdictions to help reinterpret the elements of self defence. In order to discover how cases involving battered woman syndrome are treated in Scotland I interviewed nineteen advocates⁶⁸ over a two-year period. As we will see here, the results reveal how cases involving battered women are dealt with in Scotland as well as advocates' opinions on how each of the problematic elements operates in practice including their opinions on the usefulness of the concepts of cumulative provocation and battered woman syndrome expert testimony.

The Advocates and their Responses.

In question one I asked advocates to consider whether or not the plea of provocation adequately dealt with cases involving battered women who kill. Although eight advocates considered that the law on provocation in Scotland did not adequately deal with these cases, when questioned in specific terms as to the operation of the plea, I realised that advocates were less concerned with discussing why provocation was/not an appropriate plea as explaining why provocation would rarely be argued at trial in a case involving a battered woman who killed. As the interviews unfolded the reason for the absence of legal and academic debate in Scotland became more apparent. I soon realised that far from being a focus for future

⁶⁸ Of the nineteen advocates interviewed, one was a former procurator fiscal, one was a sheriff, two worked mainly as criminal prosecutors, one was a civil law advocate with a specific interest in criminal law and the remainder worked as criminal defence advocates.

legal contest in this area, provocation was not an area of the law which advocates were keen to contest. This was due to what advocates described as the inherent flexibility in Scots law which they considered obviated the need to challenge the black letter of law. This flexibility is due to a number of different features.

The singlemost important contributor to this flexibility is the practice which allows, where appropriate, the defending advocate and the Advocate-Depute to negotiate a plea. This feature of Scots law was more clearly articulated in advocates' answers to question two on the questionnaire. Here, advocates were asked to give their opinions as to the possible defences which would be available to defendants in two hypothetical cases. These cases were *Thornton* and *Ahluwalia*.⁶⁹ The majority of the advocates⁷⁰ first instinctive reaction was that a Scottish equivalent of *Thornton* would be dealt with on the basis of culpable homicide. Of these advocates, eight considered that the case would be dispensed with by way of negotiation between the Crown and the Advocate Depute and that both sides would agree on a plea of guilty to culpable homicide. In the words of one advocate this is a classic case of culpable homicide where there "is powerful mitigation but where there is a poor absolute defence." According to these advocates, the focus at the sentencing stage would be on the mitigating circumstances such as the history of violence, the fact that she intended only to assault him, the fact that she struck him in the stomach not the heart.⁷¹ These advocates recognised that the narration would present difficulties. In particular, the fact that the accused told her friend prior to the killing that she was going to kill her husband and the fact that she picked up and sharpened the knife while her husband was in a drunken stupor before the actual killing.

The most common feeling among advocates,⁷² therefore, was that the defence would be offered a plea of guilty to culpable homicide by the Crown. This practice which allows for the informal application

⁶⁹ [1992] 1 All ER 306 and [1992] 4 All ER 889.

⁷⁰ 13 advocates considered that the case would be dealt with on the basis of culpable homicide whether by way of a plea or by means of a jury verdict.

⁷¹ For an account of sentencing policy in cases of domestic provocation cases see Horder, 1989, pp. 546-554.

⁷² Nine advocates articulated this view.

of justice seems to produce an almost contradictory result. On the one hand, the overwhelming response of the advocates was that the strict letter of the law on provocation in Scotland ought to be jealously guarded, in particular the immediacy requirement. Like its English counterpart, the requirement that there be a sudden and temporary loss of self control, it is designed to protect against the danger of allowing for revenge killings. However, on the other hand, it was almost as unanimously recognised that not every case involving a delay warranted a murder conviction. Indeed at some level very many of the advocates realised how unrealistic it would be to expect a woman to react immediately to violence at the hands of a stronger aggressor. Despite this realisation, advocates took the approach that "hard cases make bad law," that instead of "tinkering with the law of provocation," these cases ought to be dealt with in what seems to be a secondary system of justice operating at an informal level. According to advocates this system operates to ensure that justice is done in deserving cases.

As we will see in chapter four, the defence which has proved most successful for battered women who kill in England is diminished responsibility. Although both of these methods of disposal on the face of it seem quite diverse, they share in common the fact that under both systems these cases are cast as atypical cases. Fletcher has described the process in terms of the creation of a class apart which fall outside the ordinary jurisdiction of criminal law. As will become evident from our discussion in the next chapter, this method of disposal is merely the consequence of law's bias against women, in particular its inability to deal with battered women by means of its ordinary jurisdiction. Although both systems operate to take these cases out of the realm of murder, to lapse into taking these methods as common practice would not only retard our developing understanding of the effects of domestic violence on women but it would also serve to perpetuate bias against women by failing to give them a place in law's ordinary jurisdiction.

I was told that this possibility for informal justice is due in part to the fact that the Bar in Scotland is a small, tightly knit community which engenders a culture of communication and cooperation among advocates. This spirit can be seen in the procedure for the prosecution of crime. Any solemn prosecution has to be reported by the Procurator Fiscal to the Crown Office which is then examined by one of the thirteen Advocate-Deputes who are appointed for three year periods. The Advocate-Depute may then refer a decision as to how the case will be prosecuted to either the Solicitor-General or the Lord Advocate. The police do not have a direct role in the prosecution of crime in Scotland which means that

decisions as to how cases on indictment are prosecuted are in the hands of the Crown Office. This method of prosecution based on cooperation and consultation is said to ensure that cases are prosecuted with consistency. The flexible approach to the prosecution of crime also operates to allow the Crown, in an appropriate case, on the basis of what is deemed to be in the public interest, to accept a plea of guilty to culpable homicide. This power is frequently exercised in cases involving battered women. Thus, decisions are made by judges once counsel's presentation of all the mitigating circumstances surrounding the case is heard, without challenging the law.

As I explored, it transpired that this flexibility pervaded Scots criminal law. Advocates explained this feature of Scots law by reference to the English system. Unlike the English courts which are bound by precedent, the courts in Scotland are more generally guided by general principles, enunciated by institutional writers and tested against modern societal mores by the jury. In this way, instead of treating cases, which previously were decided as representing a fixed interpretation of the law, cases in Scotland are, by comparison, "flash snap shots and less set in stone." This flexibility inherent in the law allows the Court of Appeal the discretion effectively to change the law on the basis that it is self evidently wrong. Advocates gave the example of the case of *Khaliq V HMA*⁷³ where the High Court of Justiciary, albeit not openly, used its declaratory power to pronounce that the supply of solvents and containers to children for the purpose, which was known to the appellants, of inhaling the vapours of the solvents was equivalent to the administration of the solvents by the users.⁷⁴

However, this flexibility in Scots law does not mean that culpable homicide will be automatically offered to every battered woman who kills. In response to the second set of hypothetical facts in question two, the *Ahluwalia* decision, advocates' predominant feeling was that the case "looks as close to murder" as they had seen.⁷⁵ The general consensus was that if the defence were to have any chance of succeeding, a psychiatrist would have to give expert testimony to the effect that endogenous depression was a recognised psychiatric disorder and relate this testimony to the particular accused.

⁷³ 1983 S.C.C.R. 483.

⁷⁴ For a discussion of the flexibility of Scots criminal law generally, see McCall Smith, *Flexible Rules, in Scots Law into the 21st Century*, 1996, pp. 236-244.

⁷⁵ 13 advocates were of this opinion that this case came very close to the legal definition for murder.

A general consensus of opinion emerged from advocates' responses to the hypothetical facts which were *Thornton* and *Ahluwalia*.⁷⁶ The commonly accepted view was that while both these cases came close to the Scottish test for murder,⁷⁷ of the two cases they thought that a Scottish *Thornton* would have the better chance of avoiding a murder conviction. The reason for this seems to be based partly on the different methods used by each woman when killing her abusive partner. In *Thornton*, because the killing took place in the house and the murder weapon was in the house close to hand, advocates were more comfortable arguing that there was an absence of premeditation and that the case had a "flavour" of a crime less than murder. What distinguished *Ahluwalia* in the minds of certain advocates was the fact that the killing was carried out by throwing petrol on the deceased and igniting him. Advocates considered that this method of killing suggested prima facie the level of mens rea necessary for murder. In the words of one advocate the method of killing in *Ahluwalia* was a "cold and callous" killing deserving of murder while another explained the difference in terms of the risk which the fire posed to neighbours. When pressed on the assumption that a killing with a knife was more consistent with a domestic setting, one advocate suggested that it was rooted in the fact that Scotland did have a strong knife culture and so this is a phenomenon with which the courts in Scotland are familiar.

This interpretation of these two leading cases is surprisingly different from that offered by Donald Nicolson.⁷⁸ By contrast with the advocates' interpretation, Nicolson operates at the level of gender construction, in particular how it determines law's images of battered women who kill. By means of this line of inquiry he goes on to demonstrate how the two English courts passed judgement; a judgement which was completely different from that of the advocates. Although Nicolson's account of the different approaches adopted by the courts in *Thornton* and *Ahluwalia* are very interesting,⁷⁹ what is more instructive is Nicolson's overarching argument that the different approaches are attributable to the judge's

⁷⁶ See question two on the questionnaire for a description of these cases.

⁷⁷ Defined as any wilful act causing the destruction of life, whether intended to kill or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences. Macdonald, 1948, p. 89.

⁷⁸ 1995, pp. 185-206.

⁷⁹ Nicolson describes the different approaches in terms of how the judges used fact organisation and rhetoric.

judgements of Sara Thornton and Kiranjit Ahluwalia as women. Thus, Nicolson argues that because Kiranjit Ahluwalia accorded with all aspects of passive femininity, her actions were constructed as those of someone whose ordeal had transformed what is judicially taken as women's normal state, mental instability, into actual mental illness. As Nicolson summarises

[t]he more passively feminine, the more likely her actions will be attributed to female pathology and the more likely she will be medicalised as mentally abnormal.⁸⁰

He goes on to argue that by complete contrast, the court perceived Sara Thornton as having rejected all aspects of appropriate femininity. As such, she is rendered ineligible for the model of pathology normally attributable to women and instead must be punished for having behaved inappropriately for a woman. Unlike a lot of feminist legal commentary, which has focused on how gender construction has shaped the construction of legal doctrine to exclude the experiences and standpoint of women in general and battered women in particular, this commentary illustrates how gender construction helps determine the narrowness of the images of women who kill. Furthermore, when compared with the advocates' opinions it becomes apparent that they were less concerned with grappling with how to conceptualise these women in law and more concerned with defining the cases by reference to a method of killing which they commonly associated murder or manslaughter. I will return to both of these points later in this section.

In question three of the questionnaire I asked the advocates to speculate on the effect of *Thomson*, a case which we will consider in more detail in chapter five, on future caselaw. There, the defendant sought unsuccessfully to argue that the physical restraint imposed on him by the deceased was the straw which broke the camel's back and caused him to snap. The starting point for advocates was to state the function of the immediacy requirement which is to guard against revenge killings by ensuring that the accused does not have the time to plot a course of action. Any time delay, therefore, is taken as being indicative of an act done in retaliation rather than as a response to provocation. Nine advocates⁸¹ who expressed an opinion were against any attempt to mount a defence strategy based on cumulative

⁸⁰ 1995, p. 202.

⁸¹ One advocate limited his reply to the fact that he did not know how the courts would proceed in the future.

provocation in a case involving a battered woman. The depth of reasons for this lack of favour varied. Some advocates were content to rationalise their disfavour in purely legal terms by repeating the negative ratio of *Thomson* and subsequent decisions while others engaged in a deeper level of policy analysis.

It emerged that a predominant concern among these advocates was that were the law to allow a woman in a domestic situation to point to past incidents of violence endured at the hands of her partner, he would be placed under a death sentence exercisable at her behest. They considered that allowing for the cumulative effect of the violence to be taken into consideration would effectively grant these women "a licence to kill" allowing them the freedom to choose when to kill. One advocate suggested that the very fact that the woman did not lose her self control after severe violence means that she has the ability to retain self control and so ought to leave the relationship before waiting until she actually snaps. Another interpreted this unwillingness to react to severe violence as being evidence of the woman's realisation of the futility of challenging her stronger partner and the formation of her resolve to kill him when he least expected it. This same advocate mused ironically that Scotland can boast the invention of the telephone which was all the more reason for Scottish women to pick up the telephone rather than a knife. He considered that the essence of provocation was a response to an act. Cumulative provocation, by contrast, involves an action rather than a reaction and so is "not true provocation." Another advocate was of the opinion that the operation of this requirement in England was more favourable to a battered woman who killed. In his experience, the courts in England interpreted the sudden and temporary requirement as embodying a cumulative aspect resulting in a sudden snapping. He considered that this interpretation fuses provocation and diminished responsibility rendering the English test very similar to the Scots law test for diminished responsibility.

The responses of those other nine advocates, who were favourable to the use of the notion of cumulative provocation in an appropriate case, seemed to fluctuate between, on the one hand, an approach which favoured an informal recognition of cumulative provocation and, on the other, an approach which would challenge law on a formal basis. The informal approach involved constructing an appropriate case, which they considered would be a case like *Thornton* rather than *Ahluwalia*, in such a way as to place emphasis on the background history of violence in the hope that it could be conveyed to the jury how this could cause a loss of self control in response to what might otherwise be a relatively minor act of violence.

As one advocate said, the challenge would lie in explaining to the jury how the "tumbler overflowed" on this particular occasion causing the woman to snap. These advocates considered that they would use the concept unofficially in practice by loosely terming it provocative behaviour when asking the jury to "see the woman as she was," to recognise the fact that "she has the previous beatings in her mind when she faced him." Those advocates who favoured an open challenge to the law agreed that they would wait for a case resembling *Thornton* rather than *Ahluwalia*.

Although the issue of provocation has been addressed in a number of cases since *Thomson*, the general consensus was that the judgements in *Thomson* very thoroughly analysed the law. However, not every advocate considered that they would be completely fettered by the negative outcome of *Thomson*. As one advocate put it, the Court of Appeal "bottled" the case. He would be prepared, in an appropriate case, to ask a five judge Court of Appeal to reconsider how Scots law viewed the concept of cumulative provocation. Another advocate read the judgements in *Thomson* as indicative of the judiciary's unwillingness to be bound completely by rigid rules and considered that the Court left open the possibility of allowing for cumulative provocation in an appropriate case. This advocate focused in particular on the judgement of Lord Hunter which he interpreted as displaying the flexibility inherent in Scots law. This advocate noted that the judge envisaged the need for law's principles to be reinterpreted by a jury of the accused's peers in the light of modern social mores and pointed to the following passage:

[I] am prepared to assume, for the purposes of the present opinion, that in the past, judges have on occasion left questions of provocation to the jury in cases where the rigid application of principles derived from the institutional writers might be considered offensive to modern public opinion.⁸²

Another advocate attributed the rigidity of modern Scots law to Lord Milligan's statement that the 1957 English Homicide Act did not apply to Scotland because it did not add anything to Scots law. In his view, the test should be any conduct, including words, threats or blackmail, which would cause a reasonable man to lose self control.

Going on the opinion of this sample of criminal advocates it seems that despite the possibility which cumulative provocation holds for battered women who kill, only fifty percent of advocates are likely to run it as a defence. On the one hand, this would seem to suggest that despite efforts, which have been

⁸² p. 460.

successful elsewhere, to create room in law to accommodate these cases, only half of the advocates are persuaded by their merits. On the other hand, those advocates who were favourable to the use of cumulative provocation furthered this creative move by considering the possible ways of incorporating the concept into Scots law.

Question four developed this theme of cumulative provocation. This time instead of asking advocates to speculate generally on how cumulative provocation could be used in Scotland I asked them to consider how the concept has been used in England and the possibility of adopting these arguments in Scotland. Thus, advocates were asked to countenance the possibility of interpreting the time lapse between the last act of provocation and the reaction in terms of it being a "heating up period" rather than a "cooling off period" and Lord Taylor C.J.'s suggestion in *Ahluwalia* that immediacy could, in some cases, be reduced to being an evidential matter. The advocates' responses to this question were quite diverse. The initial overall response was that any attempt to introduce the heating up notion into the Scottish courts would involve an uphill struggle. In the words of one advocate "the Appeal Court wouldn't wear it." Some of the reasons given for this difficulty were that a development along these lines would interfere with the law's immediacy requirement as well as taking away from the flexibility of Scots law by attempting to rigidly define elements of the defence. Another advocate considered that with the development of women's groups, which encourage women to be assertive, law now judges that women have ample opportunity to leave and so are more than ever required to pursue these options. Despite this unanimous acceptance of what the law is, six advocates considered that, as a matter of practice, not everybody behaves according to law's understanding of human behaviour, premised as it is upon an immediate loss of self control. One advocate said that he "could see the argument as a matter of common sense that grievances and hurts get worse with the passage of time" or as another advocate considered "from a lay-person's point of view this intervening period is bound to cause simmering discontent, especially if you are living with them." Of this group, however, only two advocates were in favour of translating what was recognised as being a common way of reacting into law.

Notwithstanding this initial impression of disfavour twelve advocates in total directed their minds to considering how to go about introducing this possibility into Scottish courts. Five considered that this concept may be reluctantly accepted if it were to be introduced formally in court by a psychiatrist

testifying to the effect that this pattern of behaviour was a recognised psychiatric disorder. Another advocate's response straddled a formal and an informal approach. On the one hand, he thought that this concept could be introduced into law by building on the type of argument made in *Thomson* that a relatively minor act of violence could well be "the straw that broke the camel's back" thus allowing for the possibility of there having been a heating up over a period of time. On the other hand, he thought that to run a concept like this safely, the testimony of a psychologist who had interviewed the client would have to be used. On balance, he thought that even using expert testimony, this might "not get you all the way to a defence" and so he would probably only use such an argument as mitigating evidence. Six advocates seemed to see the logic of Lord Taylor C.J.'s suggestion in *Ahluwalia* that the immediacy requirement be considered informally as evidence of loss of self control. One of these advocates said that in an appropriate case he would place emphasis on the reality of the regular pattern of violence which allows a woman to anticipate a future bout of violence. He gave as an example the case where the woman is beaten after every Rangers or Celtic defeat and reasoned that the fear of violence does not diminish with the passage of time. He would try to get the judge to leave provocation to a jury even though there may not have been a fully fledged bout of violence on the occasion of this particular defeat. As another advocate said, such an informal recognition would ensure that justice is done in isolated cases but also preserve law's doctrine from being challenged.

Apart from arguments that this concept would impinge upon the law's immediacy requirement or detract from law's flexibility, there were other reasons for concern advanced by advocates. One advocate's fear was that this concept would in practice come to be applied exclusively to women. This fear was grounded in the "sexist" assumption that women harbour grievances. This assumption was born out by Robert Burns' "sulky sullen dame," Kate, who, while Tam resolved on "getting fou and unco happy," sat at home "[G]athering her brows like gathering storm, [N]ursing her wrath to keep it warm."⁸³ She considered that this type of behaviour, is not gender specific and so ought not to be applied exclusively to women. Another advocate's objection to the concept was that it was too difficult to explain to a jury, in particular the fact that the woman stayed in this relationship of violence. He thought that the age of

⁸³ From the poem Tam o' Shanter.

individual jurors could possibly have a bearing on the outcome of these cases. When speculating as to the view of conservative jurors, he said that he applied the test of his mother-in-law who is extremely sceptical of cases involving battered women and cases involving date rape.

When replying to this particular question, advocates revealed the extent to which by comparison with English law, Scots law is far less willing to go down the road of individualisation. As one advocate explained "courts don't like to try these difficult cases if they can get out of it." Instead, as we saw, they like to deal with these cases informally. On the one hand, this two-tiered system of justice involving this process of filtering out "hard" cases, does appear to afford the Scottish legal community their own unique methods of doing justice. However, on the other hand, it also appears to have the effect of rendering the internal legal doctrine in Scotland far less susceptible to challenge on a daily basis than its English counterpart and, perhaps as a consequence, more objective. It was this aspect of Scots law which was uppermost in the mind of one advocate when he considered the possibility of allowing for cumulative provocation in Scotland. This development, he felt, would threaten the objectivity of the law which, serves to protect the public interest. He felt that the test as it stands is a clear test based on a set of factual circumstances. This involves limiting the inquiry to events of the night in question and is readily understandable by the jury. As he reasoned, the most prized attribute of Scots law is that it treats everybody in the same way. If the law were to move into the realm of cumulative provocation it would then be required to deal with differences. Such a development could operate to the detriment of battered women, in particular Asian women who kill. Were the law to be developed in this way, his fear was that Asian women could be met with stereotypes which would undermine the severity of violence endured by them. The same advocate recognised that the courts in England may have been yielding to the pressure of "P.C." but that attempts to introduce such notions into the Scottish courts would only operate to the detriment of women, a view which he considered was born out by the backlash of P.C. evident in the sentence passed in the June Grieg's case.

Another advocate prized the objectivity of Scots law to the extent that he declared that he "would resist attempts" to render it more subjective "until his dying day". This advocate's comments related to law's treatment of people of different colour rather than sex. He felt that society in Scotland is not divisible into different sections unlike the U.S. where "society is a loose coalition of warring minority interest

groups." Reasoning along these lines, he noted that society in the U.S. is falling apart at the seams. Blindly adopting this course, therefore, would be to take the result of the break down of American society and use it as a cause of the breakdown of British society. Another advocate spoke of this aspect of Scots law in similar terms. He said that the courts in Scotland, in general, were reluctant to apply subjective tests but that in certain cases this was not always a bad thing. He pointed to how the courts in England in 1991 amended their Road Traffic Act 1988 to make it more objective which had the effect of bringing their law in line with the Scottish equivalent.

Questions five and six dealt specifically with the other two problematic elements of provocation: the gravity of the provocation to the reasonable battered woman and her response following the loss of self control. The issue of the gravity of provocation was addressed in question five where I asked advocates to consider whether or not there may be a disproportion in law's treatment of cases where husbands kill after being nagged by their wives and wives, who having endured violence over the course of many years, snap in response to a relatively minor act of violence. This suggestion was vehemently disputed by advocates. The most common response was that nagging behaviour on the part of wives would not secure a verdict of culpable homicide for husbands. In fact, several advocates thought that the law's balance, far from being in favour of men, actually favours women. As one advocate said "if anything [I have] often wondered if any man is safe in the house." Another advocate recognised that the adultery exception evolved as a result of men's experiences but balanced this against the reality that fewer women than men get custodial sentences in murder cases. In a similar vein, another advocate said that in his years of experience at the Bar the only time women are charged with murder is domestic violence cases. In his view, although men use violence more regularly than women, when women do resort to violence invariably it is lethal. As he warned, "a violent woman is a violent creature."

The issue of the woman's capacity for self control was considered in the same question which went on to ask whether there was any merit in the argument that a woman who exercises restraint over a long period is actually behaving more in accordance with the rationale of provocation. The overall response of advocates was to accept the merit in the argument that such women do actually behave more

in accordance with the policy rationale of provocation. One group of advocates⁸⁴ considered that restraint may be behaviour which is more common in women but that this is not something which the law on provocation ought to use against women. As one of these advocates put it, provocation exists in modern times because of the historical development of society which had as its focus gangs of "lads on Sauchiehall Street on a Saturday night." Another advocate termed this image of provocation adopted by the law as the "sudden flare up model." Both recognised that the law was sympathetic to spontaneity and that this type of behaviour accorded more with how men cope with emotional difficulties. Against this, they balanced what they saw as the reality that the person who exercises restraint is the person who has time to devise a strategy to get out of the relationship. Other traits which an advocate attributed to women were "temperateness," "gentleness," "reasonableness." He went on to argue that because law is made by men for white middle class men it does not take differences, like, the fact that women "have a longer fuse" into consideration.

The final question on provocation asked advocates to consider how the third problematic element, the proportionality requirement, operates in cases involving battered women who kill. The response to this question⁸⁵ was unanimous. On paper all advocates recognised that the proportionality requirement does require that the force used in response be measured against that used by the provoker. As one advocate put the dilemma, cases involving battered women are slightly different in that they do not involve "a good square go at the back of the pub." Despite this, every advocate considered that, in practice, account would be taken of the size and strength differentials and that the court would follow a "broad brush approach" in these cases. Seven advocates expressly said that the requirement operated like the proportionality requirement in self defence in that the degree of force used cannot be weighed "in too fine a scale." Two advocates, who had the cases of *Thornton* and *Ahluwalia* in mind, said that whereas the use of a knife against fists would be within the realms of proportionality in provocation, burning a partner to death would fall outwith the requirement. Another took the view that although the requirement may appear on paper to operate to the detriment of women, in practice, the reality is that once there is an immediate

⁸⁴ Five advocates considered this phenomenon.

⁸⁵ Question six.

threat of serious violence, women are in a far stronger position when pleading provocation than men. With a woman, the courts are alive to the reality that "it is never going to be a fair fight." Another advocate said that a woman's response would have to be based on her perception of the danger which would involve taking into account the years of violence suffered at the hands of her aggressor. Two advocates expressed the view that the rule was completely illogical. As one said, it merely amounted to "intellectual gobbledegook." They considered that, by definition, with provocation cases there is a disproportionate amount of force used and that this is one of the factors which distinguishes it from self defence. They thought that the test should be whether or not there was a loss of self control at the time of the killing and that the force used was a secondary consideration. Another advocate suggested that the degree of force used could be a matter taken into consideration at the sentencing stage while the other considered that excessive force proved rather than disproved the loss of self control.

In question eleven I asked whether or not advocates were familiar with another controversial reform measure: the battered woman syndrome.⁸⁶ Three advocates said that they were not familiar with the testimony while ten had heard of its existence. Continuing with the theme of expert testimony quite a diversity of responses were given as explanations for the reluctance, if any, of the Scottish courts to introduce expert testimony, including that on the battered woman syndrome.⁸⁷

The most commonly advanced reason for the reluctance was based on law's perceived difference between psychiatry and psychology. The general view of these advocates⁸⁸ was that psychologists were not experts and that psychology was not an exact science. Advocates explained that psychiatry is perceived as being closer to acceptable medicine and so therefore has gained a limited acceptance. While psychiatrists are not considered in the same light as doctors who can testify in concrete terms "yes there

⁸⁶ Six advocates, for different reasons, did not reply to this question.

⁸⁷ Two advocates were of the opinion that there was not a reluctance to use expert testimony of any variety in Scotland. One reasoned that this was because the mere admission of evidence does not automatically mean that it will be taken into consideration by the jury as the judge can, at a later stage, simply direct the jury to disregard the testimony. The same advocate considered that expert testimony is most frequently used in courts, not in the form of allowing the jury to hear an expert opinion as to the facts, but by judges when convicting, as a sort of a make-weight device protecting against the danger of appeals at a later stage.

⁸⁸ This category comprised eleven advocates.

is a bruise, yes there is a cut," they nonetheless are experts who can, with the backing of medical authority, link cause and effect in cases involving mental illnesses. Psychologists, on the other hand, can only testify in more general terms about personality disorders and behaviour modification. This level of generality produces vague testimony such as a child has characteristic traits of a victim of sex-abuse. As one advocate put it, the reason for the exclusion of psychological expert testimony on scientific grounds is because it cannot be subjected to repeated testing by different psychologists to produce exactly the same result and therefore is not scientifically verifiable. The most psychologists can do is to give a personal opinion which cannot be repeated by another to produce exactly the same results.⁸⁹

Another reason for law's reluctance to introduce expert psychological testimony was the perceived detrimental effect it could have on law. On this issue, advocates were concerned about not only tilting the balance of justice in favour of the individual but they were even more concerned by the suggestion that psychology could be used to achieve this result. As advocates explained, unlike the law, psychology does not treat everybody in the same way. Were the courts in Scotland to allow psychologists into court "apologising for special interest groups" then it would not be long before the court in Scotland were on the same slippery slope as that created by the courts in America where every kind of "victim syndrome" is recognised.⁹⁰ In a related vein, another advocate considered the worse case scenario that psychology could completely usurp law's domain, a fear which as we will see in chapter seven is very evident at the level of the law of evidence. As this advocate explained "psychology was a growth industry" and, as such, psychologists are not content to operate within their own discipline but also seek to "play in our park." One manifestation which he gave of the infiltration of psychology was in corroboration cases where experts were used and taken as automatic corroboration for the accused's version of events. This fear is exasperated by the fact that psychology more so than any other discipline, embraces a huge diversity of conflicting opinions and as such is perceived as an inaccurate science. To permit its use would mean allowing knowledge which may be the accepted wisdom of today but which may not necessarily be the accepted wisdom of tomorrow, to gain a foothold in law. One advocate advised

⁸⁹ One advocate dismissed psychologists by referring to them as being "jumped up social workers, ju-ju men" who speak a lot of "mumbo jumbo American psycho-babble."

⁹⁰ Two advocates expressed this opinion.

that it might be more prudent for Scottish courts not to utilise science "on the cutting edge" but to wait until it is properly developed before allowing it to influence the law. Another objection was that psychologists do not have honest professional opinions but often slant their testimony to favour the prosecution.⁹¹ In a similar vein, two advocates thought that psychology by definition often prevents discovery of the truth. Psychology merely helps to explain an individual's mind, focusing on an individual's perception. Unlike law, therefore, it is not concerned with the elicitation of the objective truth. The danger which these advocates envisaged was that a psychologist would be allowed to give testimony in court having been duped by women who had been telling lies.

Other advocates suggested that the reason for the reluctance of the Scottish courts to allow for the introduction of expert testimony related to the lack of tradition in Scottish courts of dealing with expert testimony.⁹² As one advocate put it "the courts in Scotland are conservative and take the view that if they did not use expert testimony of this variety in the eighteenth-century then they can not use it now." He referred in particular to another type of case, identification cases, which he considered were notoriously difficult to get right. Although the use of experts in these cases is now more commonly accepted, initially their use was met with distrust on the part of the judiciary. Another advocate explained that this reluctance is due to the fact that because Scots law is principle bound, it takes more time to evolve and absorb new ideas. Finally, another advocate said that her reluctance was due to the fact that experts rarely work in the best interests of her client because they often weaken their position between the consultation and their appearance in court.

Despite this negative attitude towards psychological expert testimony in general, in question thirteen I asked advocates to consider one possible use to which expert testimony could be put. Here, advocates were asked their views on whether or not the slow burn theory could be used to explain a delay if it were supported by expert testimony. Of the advocates who answered this question,⁹³ three were particularly in favour of this idea. The more general response was one of "scepticism;" that it would add

⁹¹ One advocate expressed this view.

⁹² Four advocates expressed this opinion. One suggested that it was part of a general Scottish dislike of persons who put themselves forward as intellectuals.

⁹³ Two dismissed any possibilities for development based on their general distrust of psychology.

nothing more to what Scottish judges and juries informally take into consideration on a daily basis. Another concern⁹⁴ was that a development along these lines ought not to be gender specific. As one advocate said, instinctively she did not like the idea of a rule which drew a distinction between men and women. Another advocate thought that "it would be a hell of a struggle" in Scottish courts but that, in an appropriate case, he would be prepared to make such an argument on the basis of a particular woman's reaction rather than as part of a claim that, in general, battered women react in this way. Two advocates envisaged that, in the future, expert testimony would play a greater role in Scottish courts. As one advocate put it, as one "shakes up the tree of knowledge," experts will increasingly be used to aid law's reinterpretation of its existing principles.

I will look in more detail at the implications of the advocates' responses for battered women who kill in the conclusion to this section but for the moment I would like to highlight two related aspects of Scots law to which, as we will see in the next chapter, feminists have long objected. The first is the "prized possession" of Scots law, its objectivity. This trait of Scots law is evident in the way in which these cases are most commonly disposed of by means of negotiation between advocates on the fringes of law as well as the general unwillingness of advocates to consider cumulative provocation on the grounds that it opens law up to considering differences. In view of this approach, it is perhaps not all that surprising that when asked to consider how a *Thornton* or an *Ahluwalia* would be considered in Scotland, advocates were more concerned about the method used by the defendants to carry out the killing as an indicator of their culpability rather than attempting to construct a legal image of a battered woman who kills. While this approach in the short-term will avoid controversy, because these cases are not tested against law's defences, in the long-term the result will be a legal system whose laws are no better informed about the different experiences of battered women who kill. In the next chapter, I intend to explore how feminists have engaged with law, particularly the law of provocation, including an analysis of a forgotten influence on the law of provocation, the man of honour.

⁹⁴ Three advocates expressed this opinion.

CHAPTER TWO.

Feminism and Law.

Introduction.

The difficulties which law presents for women have long been the cause of feminist agitation. As we will see in part one of this chapter, over the course of the past forty years feminism has secured from law many advantages which had previously been denied to women. Initial feminist efforts to engage with law were limited to ensuring that existing law be applied equally to men and women without challenging its essence or formulating any distinct notion of what it is to be a woman. Recent attempts at reform have developed to produce more radical critiques of law. Instead of explaining bias against women by reference to factors which operate externally to law, as did their predecessors, these feminists located bias in law's very form and content. Even more radical was their goal to tailor positively law to meet women's different needs and to force a recognition of women's different subjectivity. Of central importance in this context have been attempts at collating into a unified theory features which distinguish women's experiences of living as women from the different experiences of men. As I will show here, one way of describing the differences has been in terms of "separation" and "connection." While this dichotomy may accurately account for the different experiences of certain men and women, as we will see, it is no longer descriptive of how all men and all women interact. In fact, in this chapter, I will also show the shortcomings of such an essentialist approach to this classification as it operates in relation to battered women who plead provocation.

Limiting such an analysis to the law of provocation, as it currently stands, would explain quite comprehensively the location of the various different forms of bias and how they operate to the detriment of women. However, when viewed from an historical perspective, this type of analysis merely scratches the surface of the complex problem of bias against women. For this reason, I intend, in part two, to focus on one unique moment in history 1707 when the case of *R V Mawgridge*⁹⁵ was decided. This case is notable not only for its cataloguing of four categories of provocation deemed to be sufficient for the invocation of the defence but also because it is a case which lies on the cusp of changing emphases within

⁹⁵ 9 St. Tr. 61, S.C. Kelyng, J 117 at 1107.

the law of provocation. This case best illustrates both the older "honour"-inspired bias and the more modern forms of bias which operates against women in provocation. Underlying this shift was the notion of the man of honour as studied by Jeremy Horder. Although this theory seems to represent yet another source of bias, in that it is obviously male-centered, if the man of honour were to be reincarnated and reinterpreted in the light of an anti-essentialist feminist theory, it could be used to buttress feminist concerns as to many of the problems which the defence poses for battered women who kill.

PART ONE:GENERAL DISCUSSION OF FEMINISM.

British Feminist Jurisprudence.

The history of the struggle which preoccupied modern feminism this century was very much prefigured by the eighteenth-century work of Mary Wollstonecraft. She utilised extensively the classical liberal notion of equality as originally derived from the social contract theorists of Locke and Rousseau. Her site of struggle was the very basic right to participate in public life (albeit for the sake of being better wives and mothers) and was therefore primarily concerned with not only the issue of equality with men but the broader issue of rationality as a universal basis of equality. Thus, at the level of theory, the general capacity to reason came to determine entry into public life rather than older exclusive notions of privilege or property. Modern feminists in the late nineteen sixties and early nineteen seventies formulated their arguments on this classical liberal notion of equality as articulated by Wollstonecraft. However, they soon came to realise that despite having long since acquired the basic right to participate in public life, this right had very little substantive meaning. Held writes that

[A]s women began to look at all the ways they did not enjoy equality, glaring inequalities leapt into view. When women tried to enter the professions, they found the doors to medical school or law school either completely closed to them or only open a sliver...Advancement in these professions was blocked either by blatant hostility or outright barriers.⁹⁶

Even when women did manage to acquire the same type of work as men they frequently did not receive the same payment which a similarly situated man would have received had he been doing the same job. It went without saying that women were not paid for work done in the family home and, perhaps more insidiously, the assumption was that women, unlike men, could not at once maintain a career and a family

⁹⁶ Held, 1989, pp. 215-217. cited by Brown 1993, p. 153.

but had to choose one or the other. The struggle with which "first phase feminists," were preoccupied was similar to that of Wollstonecraft some two centuries before. Both feminist movements sought to achieve formal equality in the public domain. For Wollstonecraft, the aim was to secure the vote for women, whilst first phase feminists sought to achieve equality in the workplace. This struggle, when directed towards the legal domain, can be characterised by two genres of feminist analysis of law. The first is often termed the "women and" work and the second is the problem of male bias.

The first approach with the benefit of hindsight constituted a moderate reform measure aimed at including rather than challenging. It merely sought to ensure that law's existing categories and concepts be applied to women as well as to men without ever challenging their substance. One such example in point is the test used in labour law of the male comparator. This test was applied in the Irish case of *Siobhan Long* which was taken to the Irish Employment Tribunal.⁹⁷ In this case, the employment officer used the "sick male comparator" to justify refusal of a job to a pregnant woman. The differential treatment of this pregnant woman was justified on the basis that a sick male would be treated similarly. On this analysis, before women could be conceptualised by law, they had to be cast in terms applicable to men. Thus, in order to justify refusing a job to a pregnant woman, the female condition of pregnancy was equated with an illness which is not gender specific. This trend towards redefining women's experiences can also be seen less dramatically in cases involving battered women who kill. Because law cannot conceptualise these cases in terms of what is normal behaviour, they are removed into anomalous categories either as involving mental illnesses, or exceptional cases which are best dealt with through informal means.⁹⁸

The second genre associated with a first phase feminist analysis operates to attack legal bias against women at the level of the application of law. This genre has been best articulated by Sachs and Wilson.⁹⁹ The authors locate the initial source of law's bias in its personnel, the judiciary. Thus, the

⁹⁷ *Long V Quinnsworth Ltd. EE/5/1988*. For a helpful commentary on this case see Curtin, 1988, p. 326.

⁹⁸ See again chapter one where most advocates considered that cases involving battered women who kill are dealt with by informal means.

⁹⁹ Sachs and Wilson, 1984.

essence of their claim of legal bias is not premised upon any fundamental flaw in the actual law itself. Instead, by adopting Marxism and feminism they argue that the late-eighteenth-century and early nineteenth-century judiciary, as members of the upper middle classes, in order to preserve a common male interest, were willing to enter into alliances with the industrial bourgeoisie and the professional classes. The presumption made by the authors was that of two different spheres. On the one hand a sphere of advantage unified by male interest and on the other hand a sphere of disadvantage unified by female interest.¹⁰⁰ This advantage is then perpetuated by the male dominated judiciary by means of their interpretative discretion which they use against women. Although Sachs and Wilson addressed the problem of women's struggle to gain access to public life, their failure to mount a challenge against the actual mechanisms by which law was generated dilutes the strength of their argument to the point where it becomes a moderate criticism of law, akin to those made by legal realists.¹⁰¹

By largely restricting its sphere of influence to the public domain,¹⁰² law reinforces this distinction between the public and the private which has the effect of insidiously discriminating against women. Although law may have responded to women's arguments that they be afforded entry in to the public domain, the other half of the same sphere is left largely unregulated. This is the private sphere of the family or sexuality which has historically been the preserve of women. The successes and failures of first phase feminist challenges to law have been summarised by Naffine:

[A] distinguishing feature of the first phase is its tendency to accept, and approve, law's own account of itself when it is not dealing with women. Law is seen therefore to be essentially a rational and fair institution concerned with the arbitration of conflicting rights between citizens. The problem with law is that it has not yet developed full and effective public rights for women. It was once overtly discriminatory. Today it indirectly denies women rights by constituting a subordinate, domestic role for them in the private sphere...the present character and outlook of law are largely left intact. The prevailing ideal is accepted that law should be (and can be) impartial and reasoned. The objection is to the failure of law to adhere to its own professed standards when it invokes discriminatory laws and practices. That is the objection to bad law.¹⁰³

¹⁰⁰ Brown, 1991, p. 433.

¹⁰¹ See again the introduction to part one.

¹⁰² While this, on the one hand, does mean public law relating to relationships between the state and individuals it will be taken here to relate specifically to the public world of employment or the market place.

¹⁰³ Naffine, 1990, pp.3-4. cited by Brown, 1991, p. 429.

As Naffine's comment indicates, feminist criticisms of law are not limited to legal realist criticisms but extend to questioning this bias in favour of men in the public sphere. The advantage which is bestowed on men in the public sphere is due, in part, to the particular conception of human-kind employed by law. This conception of human-kind was individualism which, as Robert Nozick wrote, is the "root idea" which underlies modern legal theory.¹⁰⁴ According to this theory, law proceeds on the basis that humans are separate from other human beings. Michael Sandel has written of this similar assumption in modern political theory.

what separates us is in some important sense prior to what connects us-epistemologically prior as well as morally prior. We are distinct individuals first, and then we form relationships and engage in co-operative arrangements with others; hence the priority of plurality over unity.¹⁰⁵

According to liberals this "root idea" amounts to an entire subjective experience of human life. This subjective experience means that humans value the autonomy of separation from other individuals, viewing every other separate individual as a potential threat to this autonomy. In extreme cases these others could annihilate the individual, rendering unity a constant threat. Although this root idea, or as Robin West terms it, the "separation thesis," which for her also includes physical separation, underlies law, it did not limit itself to this one "official" liberal account of human subjective experience.

Critical legal theorists,¹⁰⁶ like liberal theorists, also view the individual as materially separate from human association. Thus, *prima facie* these theorists support the view of the autonomy of individuals in the public domain or the market. However, on West's analysis, these theorists present the "unofficial" account of subjective human experience. Instead of celebrating the material state of separation from the rest of human life, which is so prized by liberal theorists, critical legal theorists describe this state as a state of perpetual longing for community, or attachment, or unification, or connection, which is hidden from view by the market. The individual lives in a state of perpetual dread, not of annihilation but of alienation, loneliness and isolation which separation imposes. Thus, while liberal theory presents the dominant official story that humans love autonomy and fear the other, the other half of the story is explained by the

¹⁰⁴ Nozick, 1974, cited by West, 1988, p. 1.

¹⁰⁵ Sandel, 1982, cited by West, 1988, p. 2.

¹⁰⁶ See for example, Unger, 1975 or Kennedy, 1975-76.

weaker unofficial account. According to this story, individuals truly long and struggle to establish some sort of connection with others, to overcome the pain of isolation and alienation which separation engenders.

This ability of law, if only at the level of theory, to countenance diverse accounts of human subjectivity, presented first phase feminists with a distinct window of opportunity to argue for the inclusion of a female voice. Their target of attack was at the level of bias against women in the application of the law. They proceeded to isolate discriminatory practices in the public domain and instigated various different anti-discriminatory measures along the lines of the "women and..." approach. However, the mere factoring in of women did not, in and of itself, produce a marked success. Like Wollstonecraft's efforts in the eighteenth-century, the work of first phase feminists fell short of achieving the goal of substantive equality. The obstacle which continued to render illusive this long awaited equality took the form of the male comparator test, which had not been challenged by these feminists. Not surprisingly, women who sought to bring discrimination in the work-place actions soon encountered extreme difficulty in actually finding a male comparator who carried out the same type of work, both in terms of the actual nature of the work and the basis upon which that work was done. The unforeseen problem which women encountered was that there was latent bias in what, at first glance, appeared to be gender neutral norms. Perhaps even more disturbing was the reality that the application of gender neutral norms on underlying inequality merely served to consolidate and perpetuate that inequality. As has been well documented,¹⁰⁷ the stumbling block of this wave of reform was the acceptance of standards which had been based on the experience of men. In order to achieve equal treatment women either had to assume the stature of a man or be treated as misfits. Various solutions to this dilemma have been advanced by subsequent feminists.

The work of these what may be termed second phase feminists, took the struggle to another level. Two American feminists have dominated modern feminism, Carol Gilligan and Catherine MacKinnon. On the one hand, although Gilligan's work is primarily based on the psychology of ethics, it has been

¹⁰⁷ See, for example, the discussion of the shortcomings of the reasonableness requirement in the introduction to part one.

applied specifically to law by writers such as Frances Heidensohn.¹⁰⁸ On the other hand, there is the more radical work of Catherine MacKinnon, who directly challenges law on a number of different levels and who dismisses first phase feminists as liberal feminists. As we will see, the influence of both of these women's writing in legal theory circles has been and continues to be unparalleled. However, both of these feminists in turn have been subjected to criticism by what has been termed "outside law"¹⁰⁹ feminist theorists such as Carol Smart.¹¹⁰

Very briefly, Smart argues that work such as that of Gilligan and MacKinnon misunderstands the power of law. Using law as they have done to pursue certain goals runs the risk of contributing to the legalization of everyday life, which currently seems to give greater legitimacy to a specific hierarchy of knowledge which subjugates alternative discourses, for example, feminism.¹¹¹ In essence she argues that we might use the legal domain less for achieving law reforms than as a site on which to contest meanings of gender. However, even Smart acknowledges that certain matters are already in the public domain and, as such, cannot be abandoned. Thus, although on the one hand, she recognises that deploying law may be problematic in certain circumstances, on the other, she recognises that it might on occasions be the best resource available. Commenting on Smart's work, Noonan points out that by attributing the fixing of gendered differences solely or even predominately to law, Smart consigns legal discourse to the realm of the metaphysical. More detrimentally for the purposes of Smart's thesis, however, Noonan goes on to point out that this means that Smart "over draws" the power of law in the very move calculated to de-centre it.¹¹² Perhaps most worrying of all, however, is that Smart's approach obscures the potential for reform which focused engagement with law could yield for certain women, most notably for my purposes here, battered women who kill. As Sheila McIntyre has articulated [a]bandoning law altogether is a luxury of theory and/or privilege from the perspective of those long

¹⁰⁸ Heidensohn, 1986, applies the work of Gilligan to the field of Criminal Justice generally.

¹⁰⁹ See for example Noonan, 1996, p. 217.

¹¹⁰ See Smart, 1989 or her more recent work published in 1995.

¹¹¹ Smart, 1995, p. 213.

¹¹² Noonan, 1996, p. 217.

abandoned by reformers and reformism.¹¹³

While it may be true that abandoning law is a luxury unaffordable to reformers it is certainly a luxury which battered women who kill are unable to afford. For both of these reasons, I now intend to look in a little more detail at the possibilities for reform within the law opened to us by the work the two American stalwarts of phase two feminist legal theory.

American Feminist Jurisprudence.

Gilligan's work has been most widely utilised for the account which it offers of a different women's subjectivity. This account is based on conclusions from her observations and empirical comparisons of boys and girls and women and men. She found that the nature of women and girls instead of being adversarial, aggressive, competitive, given to dealing with dispute by invoking abstract rules administered by a neutral third party, tend more towards community, attachment, intimacy and seek to resolve disputes through situationally based, solution-oriented negotiations dominated by an ethos of care. Instead of denigrating these differences, Gilligan seeks to celebrate them. MacKinnon, however, dismisses any attempts to consolidate and celebrate differences as being a wasted exercise. She attributes the very existence of these differences to the fact that they have been produced through women's attempts to fulfil men's expectations. For MacKinnon, therefore, any attempt at celebrating women's differences under the current patriarchal regime would be to merely reiterate male dominance. Her vision of the future for women involves a rather unrealistic departure from everything which has come to be associated with femininity and a discovery of a completely new female subjectivity. Despite these differences, both writers have gone a considerable distance towards making the private, in which matters of sexuality, reproduction, and emotions preside, a central issue which needs to be addressed. As a result of these feminists work, instead of treating the personal as being of secondary importance to public issues, the personal is now the political.

When challenging law, both writers share the general claim that law's masculinity is intertwined with its allegedly neutral notions of objectivity, abstraction and the form of general rules. Brown has succinctly enumerated their common ground. Illustrating the progression from first phase feminists, she

¹¹³ 1994, p. 293.

writes that both authors explode the myth that law's standards are ideals which, if they could be applied neutrally, would not result in bias against women. As Brown writes "these very standards are the locus of masculinity"¹¹⁴ and she illustrates by citing MacKinnon.

When law is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied...the point of view [of male dominance] is the standard for point-of-viewlessness; its particularity the meaning of universality.¹¹⁵

Both Gilligan and MacKinnon go on to locate this bias within the law itself. Again, by contrast with first phase feminists, both were not content to simply locate bias externally, at the point of application by the judiciary, but also in its very definitions. According to this more radical campaign, masculinity is not particularly attached to judges but is actually enshrined in law's internal doctrine. Thus, both feminists argue that an equal application of law would not achieve true equality but would merely result in the judging of women by masculine standards.

Although both critique the masculinity inherent in the very form of abstract and objective legal doctrine, they each challenge this bias in different ways. Gilligan explains this in terms of a bias which is visible at the level of formal rationality. She illustrates this mode of reasoning by contrasting, on the one hand, how women, whom she interviewed, came to the decision to have an abortion and, on the other hand, the traditionally accepted Piaget-Kohlberg schema of stages of moral development. One of the earliest stages on this continuum describes how the individual's self is divided from the general other so that all others are perceived in terms of their being a threat. The individual's concern, therefore, during this first stage is entirely selfish. This stage, in the "natural" order of things, gives way to the more advanced stage where the individual realises that selfish interests can be better achieved by taking into account the needs of others through the use of general rules. Others begin to be conceived in the same terms as the individual, as rights bearers. Concern for others, however, only occurs vicariously in the form of duties which flow from rights. Stage six represents the pinnacle of moral development. Here the individual must be capable of being able to make decisions in accordance with universal principles which apply to all human beings as individual persons. This natural progression was said to typify male development and

¹¹⁴ Brown, 1991, p. 436.

¹¹⁵ MacKinnon, 1983, p. 644, cited by Brown, 1991, p. 436.

corresponds with law's formal rational mode of reasoning.¹¹⁶

Women, did not reach this pinnacle but instead seemed to cluster at an earlier point in the continuum where the self does not with the same ease separate from others making unclear self-other boundaries. At this stage, good behaviour is largely determined by "that which pleases others and is approved by them."¹¹⁷ This interconnection with society makes the making of moral decisions far more complex than merely considering the self or an indirect way of considering the self. Instead of balancing the morality of actions against a standard of rights and autonomy from others, women view the morality of actions against a standard of responsibility to others. As Gilligan writes

[T]he moral imperative... [for] women is an injunction to care, a responsibility to discern and alleviate the "real and recognizable" trouble of this world. For men, the moral imperative appears rather as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfilment.¹¹⁸

What is described by Kohlberg as being a more primitive stage is said to represent typical female behaviour. From descriptions representing how men and women typically behave emerge several opposing dichotomies which apply exclusively either to men or women. Thus, men are portrayed as being competitive and in need of rules to perpetuate and control competition with leadership becoming of paramount importance and, on the other, women who are portrayed as being opposed to competition, preferring instead, co-operation and a general ethic of care.

Gilligan's account of how women are connected to society informs the official story of women's existential lives and corresponds with what West calls the "connection thesis."¹¹⁹ West's thesis is that women's difficulty of separating the self from others is due to women's potential for material connection to life. The cause of this material connection to life is a much disputed one. Certain feminists locate this potential in the biological fact that women give birth and lactate and so, therefore, are naturally nurturant towards their infants. Others object on the grounds that mothering is a role which is learned, while yet

¹¹⁶ See further Weber's break down of the typology of legal decision making, described in Kronman, 1983, in chapter two.

¹¹⁷ Stage three of Kohlberg's moral stages, 1971, cited by White, 1989, pp. 66-68.

¹¹⁸ Gilligan, 1982, p. 100.

¹¹⁹ West, 1988, p. 3.

another explanation, roots this potential in psychological processes which are established in close relationships between young girls and their mothers.

Feminists counter-theme to law's official story, whatever the explanation for this capacity for connection, is that instead of valuing autonomy and fearing annihilation, women value intimacy and fear separation. While this counter-theme does sound like the variation on the theme of law's unofficial story voiced by CLS theorists, it is in fact quite distinct. When contrasted, each account of subjectivity reveals that men and women experience subjectivity in very different ways. Unlike men, women are not separated, prior to being connected epistemologically or morally. Women do not strive for intimacy, it is something which they innately possess. They are connected individuals who have an innate understanding of intimacy and a ready ability to form close relationships. Men, by contrast, as Gilligan summarises, only re-discover this potential for connection later on in life.

The discovery now being celebrated by men in mid-life of the importance of intimacy, relationships, and care is something that women have known from the beginning.¹²⁰

As West develops this account of the connection thesis, unlike women's experiences, the wish for intimacy in men comes from the separated subject. In other words, women do not value love and intimacy because they help to overcome the distinction between the self and nature but rather because love and intimacy express the unity of self and nature within ourselves. She explains that

[T]he intimacy women value is a sharing of intersubjective territory that preexists the effort made to identify it. The connection that I suspect men strive for does not preexist the effort, and it is not a sharing of space; at best it is an adjacency.¹²¹

There is yet another difference between the dread of alienation which men and the fear of separation which women dread. The fear of separation, for mothers takes the form of separation from one, who is physically and psychically connected, (the infant) and so, on separation, a part of the mother must die. On this view, separation from one's community may cause death but is not of this variety merely being a sorrow over a "first existential state of being."¹²² For men, the longing for attachment is a socially

¹²⁰ Gilligan, 1982, p. 17.

¹²¹ West, 1988, p. 55.

¹²² West, 1988, p. 41.

constructed protective reaction against the natural state of individuation. As West summarises "love, for men is an acquired skill; separation (and therefore autonomy) is what comes naturally."¹²³ For women, however, it is the separation which is socially constructed and the attachment which is natural. Again, as West interprets "[s]eparation, and the dread of it, is the response to the natural (and pleasant) state of connection."¹²⁴

Unlike Gilligan, whose work has been limited to exposing bias in the form of law, MacKinnon engages with law, both at the level of exposing bias in its form as well as its content. The vice-grip with which she holds law to account at the level of its content is perhaps best illustrated in her account of the law on rape. Historically, rape was viewed not as a violation of women but in terms of a violation of the man's property rights.¹²⁵ While these views are no longer accepted, MacKinnon argues that similar views underlie law in modern times. She points to the issue of consent and shows that women, in order to indicate non-consent, are still expected by law to act in a way more appropriate to men by physically resisting. Thus, even in a crime which is more often perpetrated against women than men, women are expected to take on some of men's characteristics before the commission of a crime can be proved. More generally, MacKinnon objects to the fact that the very essence of the crime of rape, genital penetration, is premised upon a male norm of sexuality.¹²⁶

When speaking to the form of reasoning which is adopted by law, MacKinnon makes a more cynical argument than Gilligan. MacKinnon argues that the form of law positively hides the masculine content of the law.¹²⁷ Despite appearing abstract at the level of legal doctrine, legal requirements, such as imminent danger in the context of self defence or sudden and temporary loss of self control in the context of provocation, when traced back to their origins, have only become requirements because they have been abstracted from male situations such as those involving a bar-room brawl or the discovery of a wife in the

¹²³ West, 1988, p. 41.

¹²⁴ West, 1988, p. 41.

¹²⁵ See, for example, Susan Estrich, 1986.

¹²⁶ MacKinnon, 1987, *Sex and Violence: A Perspective*, chapter seven.

¹²⁷ See generally, 1987, *Difference and Dominance: On Sex Discrimination*, chapter two.

act of adultery. Thus, instead of being blatantly biased against women, exemplified by its derogatory views of women, now, law, by means of these seeming neutral techniques, legitimately discriminates against women. Although not considered initially, women are now expected to conform to male behaviour before law can recognise that they did in fact act in self defence or that they were provoked.¹²⁸

Unlike Gilligan, who sought to reconstruct an image of what is to be female, MacKinnon rubbishes any notions of femaleness as they now exist on the basis that they are merely images of male objectification. In this respect, MacKinnon is as destructive as Gilligan is constructive. To illustrate how second-hand women's sexuality actually is, she begins by invoking what she considers to be the most powerful theory of domination that exists, Marxist theory. In her own words "[s]exuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away".¹²⁹ As Brown comments this analogy with Marxism affords MacKinnon a two-fold coup. In the first instance, by transposing Marxism to the level of sexuality she has succeeded in making radical feminism the only true feminism. In the second instance, Brown continues that whereas previously feminism and Marxism merely overlapped in areas such as reproduction, now they "overlay"¹³⁰ each other so that reproduction becomes like production. Not content with the strength of these analogies, MacKinnon goes even a stage further by equating feminism with Marxism thereby demolishing completely any notion of femininity which women may consider as belonging to them. Combining two accounts of the notion "object," she begins by outlining how women, treated as sex-objects, corresponds with the commodification of the worker's labour in Marxist materialism and then goes on to argue that because women have not been authors of the objectification process, women's own notion of themselves is not in fact theirs, since it is merely a subjectivity projected onto them by men.

Just as the work of critical legal scholars may be viewed as an unofficial underside of law's official theme, the accounts of women's subjectivity presented by radical feminists, such as MacKinnon, may be viewed as an unofficial underside of feminist's official counter-theme as represented by Gilligan.

¹²⁸ Brown, 1991, p. 439.

¹²⁹ MacKinnon, Cited by Brown, (1991) p. 440.

¹³⁰ Brown, (1991) p. 440.

Although MacKinnon's work probably represents the most powerful critique of how the law, and indeed how men view women, she is not the only feminist¹³¹ to have objected to the official story told by cultural feminists. Unlike cultural feminists, instead of celebrating women's potential for connection by valuing intimacy and fearing separation as the consequent harm, radical feminists view this potential for connection as being the source of women's debasement, subjugation and pain. The unofficial story told by certain radical feminists, therefore, is that privately women long for individuation and dread invasion and intrusion. This unofficial story, in the late 1960s, was told in terms of the oppressive consequences for women of the physical condition of pregnancy. One such account was told by Shulamith Firestone who viewed the threat which pregnancy poses for women, not in terms of oppression for women stemming from men's fear of pregnancy, but purely in terms of what the actual state of pregnancy and wide-ranging consequences mean for women. For Firestone, an unwanted pregnancy is disastrous but even a wanted pregnancy and motherhood are intrusive, being an assault on the physical integrity and privacy of the body. Women's descriptions of unwanted pregnancies¹³² support Firestone's contention. One such woman spoke of the gender specific nature of the fear of the assault on her individuated being

I was furiously angry, dismayed, dismal, by turns. I could not justify an abortion on economic grounds, on grounds of insufficient competence or on any other of a multitude of what might be perceived as "legitimate" reasons. But I kept being struck by the ultimate unfairness of it all. I could not conceive of any event which would so profoundly impact upon any man. Surely my husband would experience some additional financial burden, and additional "fatherly" chores, but his whole future plan was not hostage to this unchosen, undesired event. Basically his life would remain the same progression of ordered events as before.¹³³

By contrast, other women who could make positive decisions to have abortions spoke in terms of freedom.

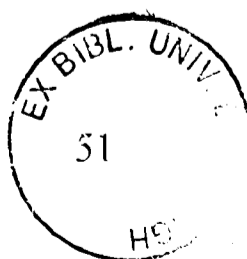
I was not glad that I was faced with an unwanted, unplanned pregnancy, however, I am glad that I made the decision to have an abortion. The experience was a very positive one for me. It helped me learn that I am a person and I can make independent decisions. Had I not had the abortion I would have probably ended up a single mother struggling for survival and dealing with a child that I was not ready for.¹³⁴

¹³¹ See, for example, Shulamith Firestone, 1970.

¹³² These descriptions were collected in the Thornburgh amicus brief which was filed by the National Abortion Rights Action League, NARAL Amicus Brief, Thornburgh V. American College of Obstetricians and Gynaecologists, nos. 84-495 and 84-1379

¹³³ NARAL amicus brief, p. 29.

¹³⁴ NARAL Amicus Brief, p.29.



Radical feminism in the 1990s has applied the same critique to sexual intercourse and argued that intercourse whether consensual or non-consensual, like pregnancy, blurred the boundaries between self and other thus constituting an invasion of the self's physical integrity. Andrea Dworkin described the extent of the invasion in drastic terms reducing the experience of intercourse to an invasion of privacy and freedom with which women have learned to cope through making powerlessness and self-annihilation erotic.¹³⁵

Thus, following the analogy, the official feminist story is that women value intimacy, aspire to the ethic of care and fear separation, while the unofficial feminist story is that women crave physical privacy, loathe the intrusion which comes in the wake of intimacy and secretly aspire to sexual celibacy. This story told by radical feminists, therefore, diametrically mirrors that told by critical legal theorists' claim that humans, meaning men, long for attachment and fear alienation whereas radical feminists claim that women long for individuation and fear intrusion. Both theories, do, however, share common ground in that individuals according to both theories are perceived as having to deny their private longings in order to be accepted by the dominant culture. Both radical feminism and liberalism, it is true, do view the other as a potential threat. However, the threat posed by the other to the man of law is the threat of annihilation whereas the threat posed to women of fetal and sexual invasion is a fear of being occupied from within rather than being annihilated from without.

PART TWO:FEMINISM, HONOUR, AND PROVOCATION.

Introduction.

Feminist theory has clearly developed over the course of the past forty years to expose the extent of bias in law as well as considering how women could be positively represented by law. Although this mode of analysis offers numerous possibilities for a future reconciliation of the needs of women and law generally, it has two main shortcomings. First, even the wider breath of human experiences afforded by the separation/connection distinction, on occasions, such as in cases involving battered women who kill, cannot adequately describe the complexity of the subjectivity of these women. Second, when applied to provocation, without reference to the history of the defence, these developments ignore a very significant

¹³⁵ NARAL, pp.137-8.

version of bias. This hitherto unexplored source of bias comes in the form of the man of honour. I will here focus on three different aspects of provocation which illustrate bias informed by the declining honour theory as well as bias informed by more modern influences. On the one hand, the proportionality aspect of provocation and the reasonableness standard which both contain honour-inspired bias and, on the other hand, the emergence of a new emotional component in the case where a spouse is caught in the act of adultery which was imbued with masculinity. As we will see, the honour theory at once confirms at the level of the theoretical the extent of law's bias against women but also contains possibilities, which, if reincarnated, could buttress feminist attempts to infuse actically provocation with a female dimension. The high water mark of the man of honour's influence on law can be seen in the 1707 case of *R V Mawgridge* when the original four categories of provocation were first set in place.

Honour and the Original Four Categories of Provocation.

Historians have traced the influence of the concept of honour on English morality and politics from medieval times up until the late nineteenth century.¹³⁶ This concept of honour was propagated by honour theorists who advised men on how best to live as men of honour. During the early modern period, some honour theorists drew a distinction between what was called "acquired honour" and "natural honour."¹³⁷ Acquired honour was honour in the Aristotelian sense of a reward for great deeds secured through the practice of virtue. It is the latter conception of honour, however, which is the more important for the purposes of this discussion of the man of honour. Horder defines the essence of natural honour as being premised on

the good opinion of others founded in the assumption that the person honoured by the good opinion was morally worthy of such esteem and respect.¹³⁸

While acquired honour had positively to be earned, natural honour was established negatively provided one had not failed in any principle virtue, particularly courage. Natural honour required that one be treated with respect. As Horder explains

¹³⁶ Andrew, 1980, p. 409 ff, cited by Horder, 1992, p. 25, fn. 13.

¹³⁷ Kelso, 1929, p. 98, cited by Horder, 1992, p. 25 fn. 14.

¹³⁸ Horder, 1992, p. 26.

[T]o treat a man with irreverence, disdain, or contempt, or to poke fun at him or accuse him (even in jest) of failing in point of virtue, was accordingly, to fail to treat him with respect; it was to undermine or disregard the supposition, at the heart of natural honour, that he was not deficient in any principal virtue.¹³⁹

Those men who took their natural honour seriously were called men of honour. A failure to treat a man of honour with the requisite respect was considered an affront meriting retaliation. Retaliation served to demonstrate that a man was not cowardly and so the man of honour was not expected to retaliate reluctantly but was positively expected to resent the affront and to retaliate in anger. So precise was this code of honour that honour theorists set out what kind of angry retaliation was appropriate for a particular kind of affront. Romei prescribed that:

[T]hey...that intreate of Combate...have set it down for a certaine rule that injury in words is taken away by the injury of deed, and that a lie is falsified with a boxe on the eare, or any blow with what else thing soever, they alleging this proposition for a maine, unto which no answer can be made, that one injury, by another greater than that is taken away, and that the injury of deeds is greater than that of words.¹⁴⁰

In other words it was incumbent upon the man of honour to retaliate once natural honour was offended. A failure to retaliate was in itself viewed as a dishonourable act and a failure of virtue. This applied, not only to oneself, but also to those deemed to fall within one's protection.

Horder argues that it was this conception of honour which informed the original four sets of circumstances which were regarded as provocative conduct by the law. Although law never fully endorsed the man of honour theory, these factual circumstances gradually came to receive judicial recognition and were eventually given the stamp of approval in the early eighteenth century landmark decision of *R v Mawgridge*. A killing in these circumstances was deemed to be the correct thing to do and law, therefore, treated the killing as being justified. One category of sufficient provocation was that which involved seeing a friend, relative, or master being attacked. The first of this series of cases concerned a dispute over a game of bowls at Great Marlow in Kent. Coke held that a man who hit another with a bowl was guilty only of manslaughter since this act was carried out "upon a sudden motion in revenge of his friend."¹⁴¹ Another

¹³⁹ Horder, 1992, p. 26.

¹⁴⁰ Romei, 1597, p. 151, cited by Horder, 1992, p. 27.

¹⁴¹ Anonymous unreported case, cited by Horder, 1992, p. 31.

relationship which was influenced by the man of honour was a father-son relationship. In *Royley's Case*¹⁴² a father, who beat his son's attacker to death, was found guilty of manslaughter on the ground that the father was provoked "at the sight of his son's blood."¹⁴³ The later case of *Cary*¹⁴⁴ shows that this relationship extended to include a kinsman. As Stephen described it

A. and B. were fighting in a quarrel. C., A.'s kinsman, casually riding by and seeing them in a fight and his kinsman one of them, rode in, drew his sword, thrust B. through and killed him. Coke C.J., and the rest of the court agreed that this is clearly but manslaughter in [C.].¹⁴⁵

The man of honour can be seen underlying a second category of provocation, that of a man seeing another man unlawfully deprived of his liberty. In the case of *R V Hopkin Huggett*¹⁴⁶ John Berry, the press master, was pressing men into Service for wars against the Dutch. This practice was greatly resented by those communities living near the ports from whom most of these men were taken. When Berry was passing through Smithfields, Huggett demanded that he display a warrant for this activity. Unhappy with Berry's response to the request, Hugget and his party drew upon their swords and attacked Berry and his party. Berry was killed in the ensuing fight by Hugget. It was held by eight of the twelve judges that

[I]f a man be unduly arrested or restrained of his liberty by three men, altho' he be quite himself, and do not endeavour any rescue, yet this is a provocation to all other men of England, not only his friends but strangers also for a common humanity sake, as Lord Bridgman said, to endeavour a rescue.¹⁴⁷

This particular case was subsequently confirmed by Holt C.J. in *Mawgridge* who explained that Hugget's actions were motivated by "compassion" for those who are "injuriously treated, pressed, and restrained of [their] liberty."¹⁴⁸ The judge's reasoning was that

when the liberty of one subject is invaded, it effects all the rest: it is a provocation to all people,

¹⁴² (1612) 12 Co. Rep. 87, cited by Horder, 1992, p. 32.

¹⁴³ Cited by Horder, 1992, p. 32.

¹⁴⁴ 1616.

¹⁴⁵ Stephen, 1877, p. 221.

¹⁴⁶ (1666) Kel. 59.

¹⁴⁷ p. 60, cited by Horder, 1992, p. 33.

¹⁴⁸ pp. 1114-1115, cited by Horder, 1992, p. 34.

as being of ill example and pernicious consequence.¹⁴⁹

Horder notes that this category of provocation developed directly out of, and by analogy with, the first category. In the first category involving an attack on one's friend, lord or relative, the attack, to the man of honour, would be the same as an attack on himself and would demand to be avenged, whatever the justice of the attack. However, according to this second category, involving an infringement on the liberty of another, the determining criterion, was the injustice being done to another Englishman. The uniting point, therefore, for both sets of circumstances, was the fact that both circumstances represented for the man of honour a duty to undertake a dramatic rescue in the cause of justice, to show loyalty for those under "their honourable protection."¹⁵⁰ Mandeville explained this sentiment when he wrote that the man of honour was expected to protect "his Friend, his Relation, his Servant, his Dog, or any thing which he pleaseth to take under his Honourable Protection."¹⁵¹

The third category of provocation is that of the grossly insulting assault. Two examples of what in law amounted to such an assault can be seen in *Lanure's Case*¹⁵² and in *Buckner's Case*.¹⁵³ In the former, the affront occurred when one pedestrian, took, at the expense of another, a position by the wall adjoining the street in order to avoid being splashed by passing coaches and to be protected by the overhang from waste which was, at the time, thrown from windows. Hale, commenting on this case, wrote that if there is jostling then this is capable of amounting to provocation of sufficient gravity to secure a reduction from murder to manslaughter. In the latter case, the victim and a friend went to Buckner's house to secure payment of a debt which Buckner owed to the victim. Upon entering the house, the friend took a scabbard which was hanging from the wall and stood guard by the door thus preventing Buckner from escaping. The victim and Buckner exchanged words which resulted in Buckner drawing a knife and stabbing the victim

¹⁴⁹ p. 1115.

¹⁵⁰ Mandeville, (1714:181), Cited by Horder p. 34.

¹⁵¹ Horder, 1994, comments that Mandeville's claim, 1714, p. 181, is probably made "tongue in cheek," p. 34.

¹⁵² (1642) 1 PC 455

¹⁵³ (1641) Style 467.

to death.

The important point in both cases is that it is not just the gravity of the provocation in and of itself which makes the difference (such an interpretation would give a virtual licence to kill in the sixteenth and seventeenth centuries) but the intentional abuse of the man of honour which constitutes an affront. If the man of honour is intentionally jostled and thrust from his position by the wall or if one is unlawfully and intentionally imprisoned in his own home, then the man of honour is not only not condemned but condoned for his actions.

The law was never willing to endorse totally the man of honour's perception of an affront. In *Mawgridge*, for example, Holt C.J. held that mere words or affronting gestures were not sufficient to reduce murder to manslaughter. By contrast, Mandeville wrote that the true man of honour was meant to "suffer no Affront, which is a term of Art for every Action designedly done to undervalue him."¹⁵⁴ Although the law was not prepared to allow for mitigation on the basis of mere insulting gestures it did recognise the importance of a deliberately insulting physical trespass. This legal differential treatment between the sufficiency of words and actions to constitute provocation still exists in Scots law¹⁵⁵ today. By contrast, English law has broadened the test so that now words can constitute provocation. As we will see, this has resulted in a more individualised approach to the reasonableness standard.

Finally the fourth category of sufficient provocation is that of catching a man in the act of adultery with one's wife. The first case which recognised this as being sufficient provocation was *Manning's Case*.¹⁵⁶ The judges of the King's bench held that

[I]t was but manslaughter, the provocation being exceeding great, and...there was no precedent malice.¹⁵⁷

This view was reiterated almost one hundred years later in the crystallising case of *R V Mawgridge*. This one-hundred-year time lapse, far from altering the law's view of a killing upon catching a man in the act

¹⁵⁴ Mandeville, 1714, p. 180, cited by Horder, 1992, pp.37-38.

¹⁵⁵ Furthermore, in Scotland, the law is that an action has to be an assault.

¹⁵⁶ (1617) 1 Vent. 158.

¹⁵⁷ pp. 158-9, cited by Horder, 1992, p. 39.

of adultery with one's wife rendered it even more emphatic. By 1707 the court in *Mawgridge* appears almost apologetic for the fact that the killing of another man on discovery of adultery did not amount to lawful killing but was still manslaughter.

Fourthly, when a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of the man, and adultery is the highest invasion of property...If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter. So is the law though it may seem hard, that the killing in the one case should not be as justifiable as the other.¹⁵⁸

As well as being expected to follow this code, which determined how the man of honour was expected to react in certain situations, the man of honour was also expected to feel and act on anger in an appropriate way. This most exacting conception of anger was, what Horder terms, "anger as outrage."¹⁵⁹

The Man of Honour, Anger as Outrage and Reason.

The philosophical conception of anger which influenced the evolution of the man of honour in the early days and, as we have seen, consequently the developing substantive law, was Aristotle's conception of anger which Horder terms anger as outrage. According to this theory, following provocation the virtuous man of honour properly experienced anger internally which was then correctly translated into an appropriate external response. This perfect balance was achieved through Aristotle's conception of the virtues and the controlling influence of reason. Aristotle defined what he meant by a virtue as involving a

moral virtue since it is this which is concerned with feelings and actions, and these involve excess, deficiency and a mean. It is possible, for example, to feel fear, confidence, desire, anger, pity, and pleasure and pain generally, too much or too little; and both of these are wrong. But to have these feelings at the right times on the right grounds towards the right people for the right motive and in the right way is to feel them to an intermediate, that is to the best degree; and that is the mark of virtue.¹⁶⁰

Aristotle connects the virtue "praotes" with the feeling of anger which Horder translates as meaning "eventemperedness." Thus, this virtue meant that the man of honour could only be angered for the right reason, to the right extent, and at the right time, all of which regulatory influences were relative to him.

¹⁵⁸ p. 158.

¹⁵⁹ Horder, 1992, p. 42.

¹⁶⁰ Aristotle, 1953 and 1984, 1106b 16-23, cited by Horder, 1992, p. 44.

Thus, the man of honour cannot on a whim become angry but has to discriminate between occasions which warrant anger and those which do not. Furthermore, anger has to be experienced to a particular degree. Any tendencies towards excesses of anger must be curtailed but correspondingly any tendencies "in the direction of gentleness and readiness to be reconciled"¹⁶¹ must be overcome. The temporal regulation operates to lengthen the time span during which anger may be experienced by the short-tempered and to shorten it for the bitter. Finally, the experience of anger must be judged by standards which are "relative to us"¹⁶² which involves assessing both the character and occupation of the person experiencing anger.¹⁶³

After the virtuous person experiences anger appropriately according to these tests, he then has to look to the further controlling influence of reason. Thus, the anger has to be filtered through reason before this passionate desire for retaliatory suffering can be realised. Reason, therefore, mediates the apparent injustice and the desire for retaliatory suffering so that the desire is not a reflex response to the simple perception of injustice¹⁶⁴ and is no more than the apparent injustice. Horder defines reason as the ability to make "an accurate moral judgment of wrongdoing."¹⁶⁵ Thus, in the even-tempered person, it is only when a correct judgement of wrongdoing is made that the blood can be allowed to heat. The following desire for retaliatory suffering then accurately reflects the judgement of wrongdoing. This is what Aristotle wrote is "to be angry in the manner, at the things, and for the length of time, that reason dictates."¹⁶⁶

An accurate judgement of wrongdoing is thus translated by the virtuous man into a correct way of acting in anger. Just as the virtuous man must make a correct judgement of wrongdoing, so too must he make a correct moral judgement of the right amount of retaliation to inflict. Again reason plays a key

¹⁶¹ Aristotle, 1953 and 1984, EE 1222a 7-10, NE 1125b 30 and EE 1222b 1-3, cited by Horder, 1992, p. 45.

¹⁶² Aristotle, EE 1222a 7-10, NE 1125b 30, and EE 1222b1-3, cited by Horder, 1992, p. 45.

¹⁶³ Horder, 1992, on this point implies that one might typically expect that a Bishop would be restrained whilst a boxer, on the other hand might be expected to react more violently. p. 45.

¹⁶⁴ Horder, 1992, p. 60.

¹⁶⁵ Horder, 1992, p. 60.

¹⁶⁶ Horder, 1992, p. 61.

role which allows the virtuous man to accurately translate the feeling of anger into an action which "matches"¹⁶⁷ their response to the wrongdoing perpetrated by the wrongdoer.

According to Horder, the influence of this conception of anger on the law is evident in the case of *R V Mawgridge*. The case arose out of an "affront"¹⁶⁸ addressed by one John Mawgridge to a woman-friend of the deceased, a man called William Cope. According to the case report Mawgridge "threatened"¹⁶⁹ the woman and "used reproachful language"¹⁷⁰ to her.¹⁷¹ Cope took it upon himself to "protect"¹⁷² the woman and asked Mawgridge to desist. Mawgridge refused and demanded satisfaction. Cope refused to fight on the grounds that it was not the right time or place to settle such matters and asked that Mawgridge be more civil or that he leave the room. Mawgridge, proceeded as if he were about to leave but instead grabbed a glass bottle full of wine, stood on a table, and threw it at Cope striking him on the head. Cope then took another bottle which he threw at Mawgridge. Without allowing Cope time to draw his sword, Mawgridge ran him through.

The question was whether Mawgridge murdered Cope or whether Cope's act of throwing the bottle at Mawgridge could be counted as being provocation sufficient to reduce murder to manslaughter. Holt C.J. held that this was not a case which warranted provocation. The judge held that Mawgridge's act of throwing the bottle manifested a "malicious design"¹⁷³ which was further supported by Mawgridge's immediate action of drawing of his sword. Thus, Mawgridge neither experienced nor expressed anger appropriately. By contrast, Cope's actions were probably assessed by reference to the honour theory as arising out of a duty to protect a woman, which in this case was rightly tempered by restraint, to the point where he acted appropriately and was thus justified and lawful.

¹⁶⁷ Horder, 1992, p. 62.

¹⁶⁸ p. 1108.

¹⁶⁹ p. 1108.

¹⁷⁰ p. 1108.

¹⁷¹ Holt C.J. said that Mawgridge's behaviour was "rude and distasteful," p. 1110.

¹⁷² p. 1108.

¹⁷³ p. 1111.

Holt C.J. referred to another case,¹⁷⁴ which involved a degree of provocation but where the defendant failed to display the virtue of retributive justice in accordance with the mean. Here a woodward caught a boy stealing wood. He tied the boy to the horse's tail, struck the horse, which galloped off dragging the boy behind it. Holt C.J. recognised that the stealing of the wood amounted to some provocation but that the act of the woodward was an act of cruelty amounting to murder. He held that:

[i]f a man shall see another stealing his wood, he cannot justify beating him, unless it be to hinder him from stealing any more, (that is) that notwithstanding he be forbid to take any he doth proceed to take more, and will not part with that which he had taken. But if he desists, and the owner woodward pursues him to beat him so as to kill him. It is murder.¹⁷⁵

Put in terms of retribution and the doctrine of the mean, it could be said that the departure from the mean in point of retributive justice was so great that provocation was negated.

If a reaction in such circumstances produced a deliberate infliction of fatal violence which went slightly beyond the mean, the law would nonetheless afford the protection of provocation. Horder points to the case of *R V Devlin*¹⁷⁶ as a modern example of a case in which anger as outrage was in issue. In the 1988 case, Devlin had been involved in a long standing dispute with his neighbour. His neighbour had frequently flooded Devlin's flat by letting his bath overflow. On the sixth occasion, Devlin lost his temper, ran upstairs and began to beat his neighbour with the leg of the chair. His neighbour asked "well I'm bleeding-now are you satisfied?" to which Devlin replied "[N]o you're going to die." He beat his neighbour to death and was sentenced to five years imprisonment for manslaughter upon provocation. Horder analyses the case in terms of Devlin's loss of temper which was based on a judgment of wrongdoing. The fact that he ran up the stairs with the leg of the chair illustrates his desire for retaliatory suffering. Devlin's final words to the victim, "no you are going to die" shows that there was a judgment of appropriate response.¹⁷⁷ Horder argues that the law still accommodates this conception of anger

¹⁷⁴ *Halloway's Case* (1629) Cro. Car. 131.

¹⁷⁵ Cited in Mawgridge, p. 1113.

¹⁷⁶ *Daily Mirror* Aug. 4 1988.

¹⁷⁷ Horder, 1992, p. 67.

although, as we will see in chapter five, the English case of *Duffy*¹⁷⁸ defined the conception of anger underlying the law in more modern terms, anger as loss of self control.

The Man of Honour, Anger as Loss of Self Control and Passion.

This second conception of anger focuses more on the inner workings of the mind of the person provoked. It involves a new understanding of the law's analysis of both the feeling and the expression of anger. Central to this is a different understanding of the relationship between reason and the passions. On this view, reason is subjected to the controlling influence of passion. This changing relationship can be seen as early as the case of *R V Mawgridge*, where despite the predominant influence of the outrage model of anger, typically subjecting passion to reason, Holt C.J. considered that a man who found his wife in the act of committing adultery would be positively expected to react violently because "jealousy is the rage of a man."¹⁷⁹

Aristotle himself realised that not everybody experienced anger in the same way as the exemplary virtuous man.¹⁸⁰ The "akrates," or the quick tempered, because of their impetuosity, were disposed to mishearing reason and, therefore, making an excessive judgement of wrongdoing. As Aristotle describes it, here:

[A]nger seems to listen to reason to some extent, but to mishear it, as do hasty servants who run out before they have heard the whole of what one says, and then muddle the order...so the anger by reason of the warmth and hastiness of its nature, though it hears, does not hear an order, and springs to take revenge. For reason or imagination informs us we have been insulted or slighted, and anger, reasoning as it were that anything like this must be fought against, boils up straight away...Therefore anger...obeys reason in a sense...for the man who is incontinent in respect of anger is in a sense conquered by reason.¹⁸¹

The way in which the akrates felt anger came to influence the law's conception of anger in the eighteenth and nineteenth centuries. Thus, the akrates became the norm. Instead of using such images as "reason

¹⁷⁸ [1949] 1 All ER 932.

¹⁷⁹ p. 1115.

¹⁸⁰ Directly beneath the virtuous man of honour was the self controlled man. This man, despite having made an excessive judgement of wrongdoing had the ability to correct this incorrect judgement by listening to reason so that a correct judgement of appropriate response was then made which lead to an appropriate retributive response.

¹⁸¹ Aristotle, 1953 and 1984, 1149a 24-3b, cited by Horder, 1992, p. 81.

[being] in the saddle,"¹⁸² law came to adopt "the ungoverned storm metaphor."¹⁸³ This new relationship was described in the *Walter's Case*¹⁸⁴ as

the passions and the desires associated with them, such as the desire for retaliatory suffering. temporarily eclips[ing] the power of reason to control them and to hold sway within the soul unbridled or ungoverned.¹⁸⁵

Holder argues that this second Aristotelian conception of anger accords with the modern law's understanding of the conception of anger underlying the defence of provocation in a number of different respects. Because of the temporary eclipse of reason which yields to passion, the response to a real or imagined insult is immediate which leads to a hasty reaction, which is often an over-reaction. Thus, as the early case of *R V Oneby*¹⁸⁶ the question as to whether the time between the provocation and the response served to cool passion had already assumed central importance. There the question was whether the defendant was acting under "such a passion as for the time deprives him of his reasoning faculties" or whether there has been "a sufficient time for passion to subside, and for reason to interpose."¹⁸⁷

This flood of passion impels the person provoked to act on that anger. Holder argues that Hobbes' account of anger in action most closely resembles this conception of anger in action by the early modern law.¹⁸⁸ Anger, according to Hobbes, is beyond the control of rationality or moral judgment. For him the desire for retaliatory suffering, which follows the judgment that one has been wronged, is aroused by a chain of physical reactions caused by the operation of an external object upon the senses which in turn

¹⁸² Holder, 1992, p. 72.

¹⁸³ Used in the case of *Walters* (1688) 12 St. Tr. 113, cited by Holder, 1992, p. 74.

¹⁸⁴ (1688) 12 St. Tr. 113.

¹⁸⁵ Holder, 1992, p. 74. This shift in emphasis towards unbridled passion can also be seen in the commentaries of the institutional writers. East, for example, wrote that "[T]he party killing is supposed to have taken all the advantages in the heat of blood over the person slain; but to have received such a provocation as the law presumes...that the party may rather be considered as having acted under a temporary suspension of reason, than from any deliberate malicious motive. East 1 PC 238, cited by Holder, 1992, p. 76.

¹⁸⁶ (1727) 2 Ld RAYM. 1485, 1496.

¹⁸⁷ Cited by Holder, 1992, p. 82.

¹⁸⁸ Holder, 1992, p. 82.

causes a reaction in the brain or heart. As he wrote:

[T]he cause of sense, is the external body, or object, which presseth the organ proper to each sense...which pressure, by the mediation of the nerves, and other strings and membranes of the body, continued inwards towards the brain and heart, causeth there a resistance, or counter-pressure, or endeavour of the heart to deliver itself, which endeavour, because outward seemeth to be some matter without. And this seeming...is that which men call sense.¹⁸⁹

Hobbes' account, therefore, is very one-dimensional; based on perception or factual criteria rather than a moral judgement or evaluative criteria. In order to determine whether or not one was angry, an observer would have to ascertain in the first instance under what circumstances, either through instinct or conditioning, one normally responds by becoming angry and in the second instance, whether the subject had recently perceived these circumstances as existing. According to Hobbes, once one has been conditioned to feel anger in certain circumstances, on perceiving the existence of those circumstances, the subject is led through a physical process to a feeling of anger. The fact that reason has been displaced from its seat means that the motivation to react cannot be principled and the individual is subjected to a strong desire creating a compulsion to act.

Neither is the freedom of willing or not willing, greater in man, than in other living creatures. For where there is appetite, the entire cause of appetite hath preceded; and consequently, the act of appetite could not choose but follow, that is, hath of necessity followed.¹⁹⁰

This type of an analysis of anger can be seen translated into legal terms in the case of *R V Kelly*.¹⁹¹ The defendant, in this case, suspected his lover of having an affair with another soldier and so shot her with his musket. Rolfe B. held that

if a man were to find his wife in the act of committing adultery, and to kill her, that would only be manslaughter because he would be supposed to be acting under an impulse so violent that he could not resist it.¹⁹²

The law on provocation has been refined in a number of different ways since early nineteenth century so that it is not totally subjective warranting a complete excuse. However, both the influence of the man of honour and the corresponding conceptions of anger, fuelled by reason and passion, continue to influence

¹⁸⁹ Hobbes, 1651, Lev. 61, cited by Horder, 1992, p. 79.

¹⁹⁰ Hobbes, 1642, DC, cited by Horder, 1992, p. 83.

¹⁹¹ (1848) 2 C.& K. 814.

¹⁹² p. 815, cited by Horder, 1992, p. 84.

the law in modern times.

Feminism, Honour and Provocation in Mawgridge's Adultery Category.

As we have already seen, *Mawgridge* straddles the shift away from the objective honour-based code, which required a correct reasoned response to the provocation, towards a more subjective emotional notion of provocation, which allowed greater freedom to the expression of anger. Both of these influences are identifiable in *Mawgridge*. The strictness of the code of honour is embodied in Romei's warning to men of honour to utilise a mode of retaliation which corresponded with the nature of provocation given. Thus, one example of the code, which is a kind of formalisation of anger as outrage, is that a lie may be falsified with a box on the ear.¹⁹³ The influence of the code can be seen in Holt C.J.'s fourth category of provocation when he held that men of honour would be positively expected to retaliate in anger upon the discovery of a wife in the act of adultery with another man. The judge spoke of adultery in terms of it being "the highest invasion of property."¹⁹⁴ In other words, what was of paramount concern for law was the protection of the man's sense of self worth, of which a woman's sexual fidelity was a part. Both the old code and its "new" subjective form can be interrogated from a feminist perspective.

First phase feminists have challenged the masculinity which is clearly visible in this category of provocation. At its very inception, this category of provocation most clearly identifies the audience to which the defence of provocation was designed to play. This audience was a male audience whose conception of self worth was defined in terms of possession of a woman's sexual fidelity as property. Not only was law unable to conceptualise women in their own right but actively underwrote their inferior position vis-a-vis her husband. Such a woman's consent to sex was always assumed and considered as part of her duty as a wife. In many ways, women are now no longer seen by the law in terms of their being part of their man's property. Despite these changes in the law, the finding of a partner in the act of adultery still warrants the protection of the defence of provocation. (Although the defence is now beginning to be applied to women).

This form of derogatory bias against women tends to operate in our times at a more insidious

¹⁹³ Romei, 1597, p. 151, cited by Horder, 1992, p. 27.

¹⁹⁴ p. 1115.

level and can still be readily seen in the form of biased judicial attitudes. This point is born out by Lord Morris in *Camplin*.¹⁹⁵ There the Law Lord, when seeking to imagine what a woman would find provocative spoke, not, for example, of finding her man in adultery but, rather, imputations against her own chastity. The asymmetry of the adultery category lives on. In view of this continuing problem which a male dominated judiciary presents for women, it may not simply be a coincidence that one of the most insightful decisions in the area of battered women who kill was handed down by a woman, Madame Justice Wilson, in the Canadian case of *R V Lavallee*,¹⁹⁶ a decision which I will discuss in more detail in the next chapter.

This honour-based code yielded to a more subjective emotional approach where reason was dictated to by passion. As early as 1707 Holt C.J.'s judgement in *Mawgridge* hints at this shift. There, the judge spoke of the same adultery category of provocation in terms of "jealousy" being "the rage of a man."¹⁹⁷ This transition from a rigid code of practice to the unpredictability of emotional response does, at first glance, appear to tend towards arguments made by cultural feminists. These arguments favour celebrating women's differences to men, one of which is women's greater ability to operate at the emotional level. Here, it would seem the law recognises men's "feminine side," their emotions. However, on closer inspection, it becomes apparent that the judge did not have the emotions of men and women in mind when he handed down this decision. Rather he defined this introduction of emotion in terms exclusive to men. Thus, instead of this development being a coup for women, it transpires that this is yet another example of bias against women. The bias is articulated by second wave feminists when they speak of law's indifference towards women, clearly visible here in its masculine monopoly of emotion.

Far from being a concern of historical interest only, this indifference towards women's emotions can be seen in modern times again, in the context of adultery. The psychiatrist, Tov-Ruach, in the 1980s, wrote in the following way about the relevance for men of women's sexual fidelity:

[M]en who live...in a world of endless judgement and comparison...a world in which a person's

¹⁹⁵ [1978] 2 ALL ER 168.

¹⁹⁶ (1990) 1 S.C.R. 852.

¹⁹⁷. p. 1115.

self-esteem is always at stake in every encounter-suffer jealousy in a special way...if a man's wife sleeps with somebody else ...He will be compared, he will be judged in that one place where he was secure, most vulnerable because most himself. What, after all...is possession, possession of?...The fantasy is that [sex] may give possession of the person...But why should sexual relations be thought to be the key to such extraordinary power? It is because it is thought to be, and sometimes actually is, an assurance of unconditional, unjudgemental attentive acceptance.¹⁹⁸

Although women, in the nineteen eighties may no longer be seen in terms of men's chattel there still appears to be something unique to men about a woman's sexual fidelity. Tov-Ruach, writing two centuries after *Mawgridge*, spoke in terms which were similar to Holt C.J. He articulates a little more visibly what is still latent in 1707. For both Holt C.J. and Tov-Ruach the constancy of a woman's sexual fidelity constituted a possession for her man. However, in 1707, this notion of possession was only just beginning to be invested with a new dimension of emotional responses. Thus, the emotion of jealousy, which is only part of how Holt C.J. conceived sexual fidelity in 1707, has, by the 1980s, become pivotal. Although the law on provocation today does apply to women, the investment of its emotional basis with a masculine content may be part of one of the biggest obstacles which the defence poses for women, the immediacy requirement. Provocation is a legal concession to the frailty of "human" emotion provided these outbursts occur immediately after the last act of provocation.¹⁹⁹ Whilst this form of emotion may accurately describe how certain men react when provoked, case-law has shown that for many battered women who kill this description is inaccurate. Thus, even when the law appears closest to a feminist account of female subjectivity, it is loaded with bias against women.

Feminism, Honour and Proportionality.

Second-phase feminists broke new ground when they exposed the reality that masculinity was inherent in the very form and content of the law. One such target of second-phase feminist objections has been the proportionality requirement in provocation, in particular how it operates to the detriment of battered women who kill, by presuming that the two parties are of equal size and strength. This form of inequality was recognised by Madame Justice Wilson in *Lavallee*²⁰⁰ when she held that applying this

¹⁹⁸ Tov-Ruach, 1980, pp. 582-3, cited by Horder 1992, p. 193.

¹⁹⁹ Although there has been a recognition in recent times that women may not necessarily react in this way, see, for example *Ahluwalia* the immediacy requirement still remains the test in law.

²⁰⁰ (1990) 1 S.C.R. 852.

requirement to women would be "the equivalent of sentencing a woman to death by instalment."²⁰¹ Highlighting law's bias against women in this manner has resulted in a considerable degree of success. However, when approached from a historical perspective, the man of honour, in particular the virtue of retributive justice, we are provided with the basis for a more radical critique of the proportionality requirement.

The virtue of retributive justice, as well as imposing a positive obligation to retaliate in certain circumstances, also required that the man of honour respond in the correct manner. A correct response meant that only as much force as was just in the circumstances be used but it also demanded the more exacting requirement that the relative strength or weakness of the man of honour's opponent be taken into consideration. Both of these elements were required in a case which we have already discussed, *Halloway's Case*,²⁰² in which a woodward caught a boy stealing wood, tied the boy to a horse's tail, struck the horse which galloped off dragging the boy behind it. Holt C.J. recognised the existence of a degree of provocation but held that the act of the woodward was an act of cruelty in the face of such minor provocation from a weaker boy.

Despite the partial displacement of the honour-based theory of retributive justice by the Hobbesian account of anger, modern law has retained the notion that only proportionate force be used, making the man of honour less of a relic and more of a reality in modern times. This ghost could provide feminists with an opportunity to change the method of attack on the proportionality aspect of provocation. Thusfar, feminist critiques have been limited to emphasising what the reality of the proportionality requirement actually means for a battered woman who kills. This has involved explaining how, when viewed in the context of a violent relationship where she has invariably come off second best in the past, even minor provocation could spark fear and cause a battered woman's slow burning anger to explode resulting unfortunately in death. While this type of critique is beginning to result in a reconceptualisation of law to accommodate the needs of battered women who kill and, as such is furthering the feminist ideal of negating bias and broadening law's image of women generally, this strategy can only indirectly

²⁰¹ p. 883.

²⁰² (1629) Cro. Car. 131. This was subsequently approved of in *Mawgridge* (1707).

comment on the unacceptability of male violence against women. A revival of this code of honour would shift the debate from explanations about women's behaviour to expectations required of men. More radically, the potential the theory could be harnessed to impose a code of behaviour on men which would require them to desist from using violence against women who are physically less strong. Thus used, the code could form the basis for a more widespread campaign for social reform of violence against women. While this strategy runs the risk of paternalising battered women, the reality for these women who come to courts is that they are physically less strong than their abusers. Furthermore, the long-term result of such a strategy would be the reinstatement of a code of behaviour on men which would render them accountable for their use of violence against women.

Feminism, Honour, and Reasonableness.

Law's reasonableness standard in provocation is understood to have universal applicability in that it fixes a standard for behaviour by reference to general societal standards against which the individual's act is measured. As we will see in more detail in part two, this test has posed considerable problems for battered women who kill. Second phase feminists explain that although the standard may appear like a neutral abstraction, in reality, it is imbued with masculinity.²⁰³ Recent developments in provocation have been aimed at contextualising this test via the characteristics of the accused and have resulted in a considerable degree of success for battered women who kill which, as we will see in the next chapter, could help law to counteract its bias against women.

This "male-centered standard," which is the reasonableness requirement, is very much premised on the notion of the separated man of law. This was clearly signalled in the case of *Mawgridge* where law was solely concerned with men of honour and more recently in the adultery category where the masculine bias deriving from the honour theory is deeply seated. It is perhaps therefore not all that surprising that women have had to become an add-on feature rather than a formative influence. Despite this masculinity, the honour theory has the diversity to accommodate an existence which is other than the separated individual. In fact, the honour theory jostles a notion of the individual who is both separated and

²⁰³ Whether one defines problems with law's form in Gilligan-terms as being relating to its mode of reasoning or in MacKinnon terms as hiding the bias in the content of law, underlying each theory is the notion of an individuated man of law.

connected.

Of paramount concern to the man of honour was the need to preserve the individual's sense of self worth. This strand of the theory, is undoubtedly very individualistic, based upon the premise that everybody is a stranger. Threats to an individual's sense of self worth were posed by a stranger in a public place, whether a fight detected by a kinsman riding by or the jostling for a position by the wall in the street. This concern for self worth in these cases was so overwhelming that in cases where it was threatened, its protection necessitated violent retaliation. Law's official story, based on the "separation thesis," is also predicated on the assumption that individuals value their own personal autonomy of separation from other individuals but view other separate individuals as a potential threat to this autonomy which could, in the worst possible scenario, amount to annihilation. Modern law has taken this notion of self worth premised upon the individual who is pitted against the stranger in public. Thus, in the self defence case of *R V Duffy*,²⁰⁴ for example, the court held that a woman was justified in using reasonable force not because it was to defend her twin sister, who was being attacked, but on the grounds that "there is a general liberty as between strangers to prevent a felony."²⁰⁵

On the other hand, the honour theory also embodies a notion of self worth based on a community inspired sense of loyalty to a lord or kinship, where the stranger is an outsider. This can be seen in cases where the use of force was allowed when protecting a lord, master or relative. Instead of having the threat to an individual's sense of self worth as its primary concern, this aspect is informed by entirely different concerns such as loyalty and attachment. In these cases, the sentiment captured was a community banded together against a common enemy. Another variation which shows shades of a threat to a connected self is the adultery case. Although individual-based in many respects, (as we saw, the judge considered that adultery amounted to "the highest invasion of property,") he also considered that the man of honour was connected to a family so that adultery was also viewed as a robbery of "a man's posterity and his family."²⁰⁶ Honour theorists viewed with similar disfavour a threat to self worth in one's own home.

²⁰⁴ [1967] 1 QB 63.

²⁰⁵ p. 67.

²⁰⁶ p. 1115.

Buckner's Case was just such a case involving an attempt to secure payment of a debt and an intentional imprisonment of a man in his own home. It may well be that this case involved a double threat. On the one hand, there was the actual threat to Buckner's self worth constituted by the exchange of words between the victim who was attempting to secure payment of a debt. On the other hand, was the less obvious insult of invading and holding Buckner a prisoner in the sanctity of his own home. This concession to genuine attachment or loyalty seems to be at odds with West's account of law's official story but does seem to correspond with law's unofficial story as described by critical legal theorists who describe the state of separation from the rest of human life in terms of a state of perpetual longing for community, or attachment, or unification, or connection.

Although law is indisputably influenced by the honour theory, it has privileged that aspect which relates to separation, taking on with ease the notion of the separated individual, while leaving behind the notion of the connected individual. Law's limitation creates fundamental problems for battered women who kill. One of the law's biggest concerns in these cases is why the woman did not leave the battering relationship as soon as the battering started. Gilligan's work explains how women easily form relationships and readily bridge the self-other divide preserved by men. This analysis sounds remarkably like the explanations which women who remain in battering relationships give. According to these women, many do so out of an almost unfathomable attachment for the man who regularly beats them and perhaps a more understandable love for her children. The woman lives in the hope that by sacrificing her needs, or her self, she will keep the family together for her children's sake.

However, even this potential for connection inherent in both the honour theory and the official feminist account of female subjectivity may not completely explain these cases. It is very difficult to reconcile this degree of intimacy and ability to form attachments with the killing of a partner who has shared very many intimate experiences. Furthermore, while battered women may indeed have this inherent ability to form relationships and value for intimacy, in very many cases, women in these situations do not fear separation from an abusive spouse. In fact, in several cases these women have attempted to escape only to be brought back again and punished even more for having attempted escape. Indeed, it is to this often overlooked reality of the battering relationship that Martha Mahoney directs her attention. Her

specific reform strategy is, as we will see in more detail in chapter five, the notion of separation assault. However, she also addresses the “blurring of borders”²⁰⁷ which connection causes for women in battering relationships, specifically mothers, and which goes a considerable distance towards explaining the difficulty experienced by these women when they decide to leave. As she explains

[T]he wearing repetitious labour of motherhood becomes part of the cycle of survival in ways we have had trouble recognizing. The constant work and need create a wearing down of the self, an erosion of borders that represents not confusion but exhaustion- a thirst for solace and protection as well as individuation.²⁰⁸

The reality of these cases is probably that an essentialist approach to women which views them as being either separated or connected individuals cannot explain their subjectivity. Although the official story of value for intimacy and connection is true, the unofficial feminist account adds another dimension which, when combined with the official story, more accurately explains the subjectivity of battered women who kill. Still recognising the unique ability of women to form relationships, radical feminists recognise that this ability can be detrimental for women to the point where women long for the individuation traditionally associated with men. Indeed, for many women in relationships with abusive men, they do not live the story of cherished intimacy told by cultural feminists because this often takes the form of violent forced sexual intercourse which is abusive and intrusive. Instead these women desperately long for the freedom to be alone or, as Christine Littleton has termed it, the possibility for “safe connection.”²⁰⁹

Because law has used the notion of the separated individual as the basis for the reasonableness standard, it cannot hope to comprehend the complexity of degrees of separation and connection which women negotiate in every day life. When battered women kill, the tension between these apparent opposites is stretched to breaking point. The honour theory at one point in the evolution of the doctrine of provocation, infused law with conflicting notions of the individual as being both separated and connected. This potential, which once existed in law and which allowed for recognition of different notions of legal subjectivity, seems to be precisely what feminists are arguing for in cases involving

²⁰⁷ 1991, p. 21.

²⁰⁸ Mahoney, 1991, p. 21.

²⁰⁹ Littleton, 1989, pp. 49-53.

battered women who kill, particularly in relation to the reasonableness standard. Later in this thesis I will show how law could be infused with such a competing account of the subjectivity of battered women who kill with the assistance of expert testimony on the battered woman syndrome and how the notions of separation and connection could be applied directly to explain the tension which battered women experience between staying in an abusive relationship and leaving. Before doing so, however, I now intend to pause and to draw together the various different strands of the thesis which we have explored thusfar.

CONCLUSION TO PART ONE.

The man of honour reveals a deeper chasm of bias at the formation of the doctrine of provocation which, as we saw, did not have the needs of women in mind, much less the needs of battered women who kill. Despite this limitation, the man of honour nonetheless contains distinct nuggets of possibilities for reform. Indeed, perhaps surprisingly in view of the extent of bias, as I will show here, the theory could be resurrected to provide battered women with a two-fold strategy for reform encompassing each of the elements which prove problematic. Thus, while my reason for exhuming the man of honour is a very specific one, this potential, albeit hidden in the recesses of the doctrine, is there to be harnessed. Indeed, it may well be the case that researchers in the future will exploit more fully the doctrine's potential but for the moment, I intend to limit my findings to each of the elements of provocation which prove problematic for battered women who kill. While this interpretation of the doctrine is indisputably at odds with how the doctrine operated originally and, although my interpretation is a selective one, the aim of my thesis is to open up as many different options for battered women pleading provocation as possible. Thus, as I said, I will also take the opportunity at this juncture in the thesis to collate all the different perspectives for reform which we have explored thusfar.

The first strategy would be to develop the less restrictive loss of self control model which yields more to the subjectivity of emotions. This model would open the door to challenging law's selective interpretation of the emotion of anger as a masculine experience which was initiated in *Mawgridge*. The continuation of this bias can be seen in our courts today in that battered women pleading provocation are expected to react in anger immediately after the last act of provocation. While this way of expressing emotion may be common among certain women, it has operated to exclude battered women from the scope of law. Thus, the purpose of a development along the lines of this strategy would be to infuse law with another way of experiencing the emotion of anger, or, expressed as a metaphor, combining the notions of separation and connection. I will go on in part three to outline how such such a strategy could be translated in our times from the theoretical to the practical with the assistance of expert testimony on the battered woman syndrome.

Second, women could unite along battle-lines set in place by the objective honour-based code.

Although this code generally speaking does take as its cornerstone the model of the separated individual, it also embraced the model of the connected individual. Again, as we will see in more detail later in part three, this possibility at the level of the theoretical could be exploited in practice to accommodate the very different experiences of battered women. First, when addressing the issue of assessing the gravity of the provocation to the reasonable battered woman, perhaps not surprisingly the four categories of provocation as outlined in *Mawgridge* do not take us very far. Although the law has evolved considerably since then, this issue is still problematic for these women. Thus, like the issue of the factual loss of self control what is required here is the infusion of law with different experiences. As we have seen, at the level of the theoretical, Fletcher has argued for an individualised approach to the reasonableness requirement in cases of excuse which has to a degree been put into practice by law. However, this aspect of the law still poses problems for battered women who kill for another reason, which we will discuss in more detail in the next section, namely why these women do not leave their abusers. Here the separation/connection dichotomy could be implemented literally to explain the subjectivity of these women which as we will see is torn between separation and connection.

Perhaps less obtrusively, the objective code of honour holds considerable potential for battered women in so far as the difficulties with the proportionality requirement are concerned. Bringing the code of honour back to life in this respect would have the effect of regulating the behaviour of men so that they would be required to take into account the fact that women are physically less strong than they. While this strategy may sail dangerously close to resembling the patriarchal society so long objected to by feminists, in cases where women are consistently beaten by their partners, comparative physical weakness is a reality which they have to negotiate in their everyday lives. This does not mean that they never fight back or that by nature they are passive and submissive. Indeed as we will explore in more detail in chapter six, battered women are negotiating constantly how best to manage their abuser's violence. Furthermore, because this model is premised on the importance of a public acknowledgement of virtuous behaviour it does seem to accord with concerns voiced by battered women that society should expect men to behave appropriately and to punish violent and abusive men who fail to meet this standard.

Battered woman syndrome is a form of expert testimony which in actual fact could speak to both

subjective and objective components of provocation. The aim is to inform about the subjectivity of these women as well as seeking a public acknowledgement that a killing in cases of domestic abuse must be partially excused. In many respects the honour theory has created the room within the doctrine of provocation for a successful infusion of this testimony into law. In so far as the aspects of the honour theory, as an original influence on the doctrine of provocation, accord with feminist aims as well as Fletcher's theory of individualisation, it could be reincarnated by feminists as a make-weight for its aims in modern times. Indeed in chapter six, I will explore how the testimony could be used in connection with the modern defence of provocation to overcome the problems posed for battered women who kill.

There is one other grouping whose perspectives on these reform measures we have not as yet analysed; those advocates whom I interviewed. Beginning with the immediacy requirement, as we saw, advocates were adamant as to the need for spontaneity embodied by this requirement. Despite this insistence, they were divided evenly on the appropriateness of using the concept of cumulative provocation in an appropriate case. Those advocates who favoured an informal approach, as opposed to those who were in favour of challenging law, saw the possibility of developing Scots law in a case resembling *Thornton*. They considered that they would place emphasis on the background history of violence in the hope that they could convince a jury that "the tumbler overflowed" on this particular occasion and caused the women to snap.

Notwithstanding this possibility, in general, advocates were not receptive to the idea of extending this concept to explain how the delay between the last act of provocation and the response could really be a heating up period rather than a cooling down period. Furthermore, they considered that any attempts to introduce expert testimony to substantiate the slow burn theory would be viewed with scepticism. Thus, although there was a recognition of the shortcomings of the "sudden flare up model" of provocation and the need to set the killing in the context of a violent relationship, this was not coupled with a willingness to develop law any further than this notion of cumulative provocation and did not extend to using evidence as to the slow burn theory.

When addressing the issue of the gravity of provocation, advocates denied vehemently that men were treated more favourably by law and indeed they went on to say that the opposite was probably more

accurate. Advocates also recognised the merit in the argument that a battered woman who exercises restraint over a long period of time is actually behaving more in accordance with the policy rationale of the doctrine of provocation, but, again, in general, this was not seen as a factor which could be used positively to benefit battered women. Although there was a recognition that on paper the proportionality requirement does not fit these cases because "they do not involve a good square go at the back of the pub," in practice, it seems that account is taken of the size and strength differentials. Thus, while advocates recognised that there may be a different way of perceiving and reacting to provocation, this difference was not seen as warranting a change to law. However, unlike the insistence on preserving the immediacy requirement, advocates were less concerned about rigidly applying the proportionality requirement in these cases.

On the basis of these responses, it seems that despite feminist explanations of bias underlying law and despite feminist attempts at imbuing law with a different legal subjectivity, practitioners in general were unpersuaded by their merits. When addressing the issue of how women may experience and react to provocation, advocates gave a limited recognition to the need for differences. Instead, their perception was that they could deal with these differences in practice without specifically adopting feminist solutions.

This reluctance to change the law does not mean that these cases are dealt with more harshly in Scotland. As we saw, advocates have their own method of bringing law's quality of mercy²¹⁰ to bear on these cases. This mercy is dispensed by means of their informal system of justice which is flexible enough for these cases to be disposed by means of a plea in mitigation negotiated by the Advocate-Depute and counsel for the defence. The perceived advantage of this system is that it retains the purity and objectivity of Scots law. For this reason, advocates assured me that there was no bias in the application of the law in Scotland, that there was no need to go down the road of individualisation and that this is just one example of how women are actually privileged by law.

While this account at one level has the potential of achieving a just result, at another level, it could be said that it merely serves to obscure the reality of these cases. As I outlined at the beginning, my goal was to explore the possibility of incorporating women's experiences within the body of law on an

²¹⁰ Taken from Portia's speech in the Trial Scene in *The Merchant of Venice* by Shakespeare.

equal footing with those of men rather than merely treating women as outsiders. Dealing with these cases informally is just another means of factoring them out of the ordinary jurisdiction of the criminal law so that their reality is still hidden. I will go on to argue later that a more ingenuous way of approaching these cases would be to follow the English lead and use expert testimony on the battered woman syndrome; a possibility which I will examine in part three.

Although the majority of advocates interviewed had heard of the existence of the syndrome, only a very small number were particularly favourable to the use of expert testimony. The most commonly advanced reason for the reluctance to introduce expert testimony, including that on the battered woman syndrome, was that psychologists are not experts and psychology is not an exact science. However, as I will argue in part three, the concept of battered woman syndrome has been affirmed and refined since it was initially coined by Lenore Walker in the nineteen-seventies and is now used in other jurisdictions in connection with a variety of different defences.

Despite all of these possibilities for reform which exist as a reality in other jurisdictions and which exist at the level of the theoretical among feminists, it seems that the advocates I interviewed at the Scottish Bar were content that their own system operated justly in cases involving battered women who kill. On the one hand, this approach means that these cases are rarely treated as murder cases and so the controversy which was generated by *Ahluwalia* and *Thornton* in England is avoided. However, on the other hand, this approach excludes the possibility of intervention of any kind since these cases are decided behind closed doors between the advocate depute, the advocate for the defence and later at the sentencing stage by the judge. Advocates assured me that this approach yields a just result in most cases and indeed this may well be the case. However, no system is without its shortcomings and it would seem that a full and open debate as to how these cases fit within the criminal defences to murder would be a better way of proceeding. Although feminists have formulated various different proposals for reform, it seems that the distance between theory and practice in Scotland is still quite considerable and that these cases in the short-term at least will be dealt with by traditional means.

Despite this overall negative tendency among advocates to push the boundaries of reform, I will turn in part two to a comparative analysis of each of the three defences available to a battered women who

kills in Britain and in part three I will show how expert testimony on the battered woman syndrome could be used in connection with the defence of provocation to improve the plight of battered women who kill. Although this shift in focus may assume the appearance of an entirely different mode of analysis, the theme of individualisation will re-emerge; this time as a practical reality rather than as theoretical ideal. Before focusing on this trend in the context of provocation, I now intend to begin by looking in more detail at the first defence available to a battered woman who kills: self defence.

PART TWO.

A Comparative Analysis Of Each Of The Three Defences In Britain.

Introduction.

In addition to the defence of provocation, the other two possible defences available to a battered woman who kills are self defence²¹¹ and diminished responsibility. As we will see, diminished responsibility involves assessing a mental disorder which is peculiar to the killer and so like provocation it also falls within the rubric of excuses.²¹² Although the concepts of provocation and diminished responsibility are sometimes merged,²¹³ they make concessions to different types of human weakness. Provocation makes a concession on the basis that anger is a universal human condition which is different from that which normal humans experience. As Dressler writes

[D]iminished capacity is an effort to reduce punishment because the actor is not like all humans, whereas heat of passion reduces punishment because the actor is, unfortunately, like most humans.²¹⁴

Although we will look again at the concept of excuse in the next chapter when we will explore diminished responsibility in a little more depth, in this chapter I intend to focus on the defence of self defence. Although self defence is now commonly treated as a justification; a fact which as we will see in chapter six was crucially important for feminist reformers in cases involving battered women who kill, it too was treated initially as an excuse rather than a justification.²¹⁵

²¹¹ In England the defences of public and private defence are also used as answers to charges of assault, false imprisonment and other offences against the person. In Scotland the defence is available to persons accused of assault and, as a matter of judicial practice, is applied less strictly in these cases.

²¹² Like provocation, it is not a complete excuse but merely a partial excuse.

²¹³ This is a familiar occurrence under the US Model Penal Code and in Britain. For a criticism of this approach see Nigel Eastman 1992, p. 8. or Dressler, 1982 pp. 459-460.

²¹⁴ Dressler, 1982, pp. 459-460.

²¹⁵ The defence evolved from the thirteenth century plea of self defendendo which was treated as an excuse.

CHAPTER THREE.

Self defence.

Introduction.

Three moral theories are often posited today in cases of justifiable homicide. The first is the rights theory which states that it is sometimes morally justifiable to enforce a legal and moral theory by taking the life of another. The second is the lesser interest or the superior interest theory which deems conduct justifiable when it can be shown that, by balancing the interests at stake in a case, the outcome constitutes a lesser evil than that which would have occurred if the actor had desisted and, finally, the forfeiture theory provides that a person, by his voluntary wrongful conduct, can forfeit his right to life.²¹⁶

Perhaps the most comprehensive account of justification theory as it applies to self defence comes from Suzanne Uniacke who argues in favour of a unitary right to self defence.²¹⁷ Certain writers have claimed²¹⁸ that choosing the lesser evil is really a confession of having acted wrongly and therefore an excuse.²¹⁹ Countering such suggestions Uniacke points to three features of moral justification which help to distinguish justification from excuse. First, she notes that while the lesser evil may be undesirable in itself, it need not necessarily be wrongful when all morally relevant aspects have been taken into consideration. Thus, she argues that justification is a threshold concept which involves an overall judgement about whatever is said to be justified. Once a particular act acquires this quality, it is then graded within this framework. At this level, the second feature of justification involves drawing a distinction between a weaker standard of justification, which renders the act merely permissible in the

²¹⁶ Dressler, 1988, p. 477.

²¹⁷ In his review article Horder, 1995, wrote that "[i]t would be no exaggeration to suggest that this original and rigorously argued book will prove to be the most significant contribution yet to jurisprudential thinking about the theoretical foundations of, and limits to, valid pleas of self defence." p. 431.

²¹⁸ See Teichman for example, 1986, p. 103. Cited by Uniacke, 1994, p. 12.

²¹⁹ The argument runs that not only does one have to make an excuse for making the wrong decision, for choosing the greater evil but also for making the right one, for choosing the lesser evil.

circumstances²²⁰ and a stronger standard, which permits it to be considered as having been the right act. Finally, the third feature of justification allows the act to be categorised either in an objective sense, from a fully informed perspective, or from the perspective of the agent in the circumstance, allowing for a mistaken belief, which Uniacke terms agent-perspectival justification.²²¹ Believing that criminal defences ought to be closely aligned with moral evaluations of acts and agents, Uniacke argues that agent perspectival justification could be either a moral justification or a complete legal excuse, depending on the perspective from which the act is evaluated. Thus, for Uniacke, although agent-perspectival justification can be morally justified, it can never be legally justified.

Uniacke's central thesis is that there is a positive right of self defence²²² which is grounded in what is morally distinctive about justified self defence: force used in self defence against an unjust immediate²²³ threat²²⁴ resists, repels, or wards off the infliction of unjust immediate threats.²²⁵ However, this positive right does not derive from the aggressor's culpability but from the fact that s/he is an unjust immediate threat.²²⁶ She argues that use of legitimate force in self defence is not within the scope of the

²²⁰ Uniacke argues that certain permissible acts can be the wrong thing to do all things considered. 1994, pp. 14-15.

²²¹ Uniacke, 1994, p. 17. However, allowing for the possibility of agent-perspectival justification or reasonable putative self defence runs counter to certain concepts of justification, such as that advanced by Fletcher and as we will see in chapter five, Rosen, 1986. Fletcher maintains that positive rightness, not simply permissibility, and objective rightness are necessary features of justification. According to his interpretation, therefore, reasonable putative self defence is, without qualification, a legal excuse. Thus, although Uniacke agrees that the general characterization of self defence as a justification is essentially correct, she warns that this classification is not entirely straightforward.

²²² For Uniacke this right extends to the right to defend others. 1994.

²²³ Questioning whether this requirement means that Uniacke's analysis is more stringent for battered women pleading self defence in cases when the deceased was off guard than that suggested by the Law Commission's proposals, which did not make any reference to this requirement, Horder concludes probably not. He writes that the imminence of threat is probably one of those factors taken into account in deciding whether the use of force was necessary. I argue that this is the case in chapter three. 1997, p. 442.

²²⁴ For Uniacke this includes culpable and non-culpable, active and passive unjust immediate threats. 1994.

²²⁵ Uniacke, 1994, p. 192.

²²⁶ Uniacke's interpretation differs from how Scots law operated originally to refuse the defence to a defendant who started a fight.

rule killing is wrong because an unjust aggressor is not wronged by the use of such force even if s/he is killed by it.²²⁷ On this basis, she claims that killing an unjust aggressor is a recognised exception to the general prohibition of homicide. However, this presumed moral right is not unlimited.

As we will see in more detail below, the moral limits are reflected in the two essential elements of the defence: necessity and proportionality. Traditionally, the standard in judging these matters has been the objective standard of what was reasonable in the circumstances. Although Uniacke favours allowing for agent-perspectival justification in the case of putative self defence,²²⁸ she warns that this should only be allowed provided the standard required of the accused on each of three counts is reasonable from the accused's perspective. Two of these are the requirements of necessity and proportionality and the third is the agent's belief about the existing circumstances.²²⁹ Recently this latter standard has been lowered in England so that now the standard of the accused's honest belief is taken to be sufficient.²³⁰ Uniacke's objection is that this development,²³¹ allows for an honest unreasonable belief to constitute a complete acquittal and therefore undermines self defence as a justificatory defence.²³²

²²⁷ Uniacke, 1994, p. 28.

²²⁸ This, however, as we saw above, does not legally justify an act but merely excuses it.

²²⁹ See also in chapter three, the additional requirement in Scots law, the obligation to retreat where possible.

²³⁰ This change is largely due to the thinking that an accused's honest belief that s/he was not acting unlawfully is sufficient to negate the mental element of crimes of violence including murder. Criticising this thinking, Uniacke points out that an unlawful intent is not necessarily an intent to act unlawfully: an unlawful intent being simply the necessary mens rea of the offence and in cases of crimes of violence is merely a substantive question as to whether or not the mens rea requires the intention to inflict unlawful force. 1994, p. 43.

²³¹ Uniacke describes two developments. The first is the extension of the plea of self defence to putative self defence against lawful conduct and the second is the adoption of a subjective test in relation to the belief about existing circumstances. Because this latter development is very much a feature of English law, I intend to consider Uniacke's criticisms of this development here. 1994, p. 37-47.

²³² Uniacke's view is that the fact that a homicide would have been justified had the circumstances been as the accused believed them to be, is not itself a justification of the act. She considers that the possibility of excusing such conduct, either wholly or entirely depends on the degree to which an agent is responsible and culpable for holding this belief and for acting on it. 1994, p. 45. A related difficulty is that now differential standards operate within the same defence: a subjective standard in the case of the Accused's belief and, against that background, an objective standard as to the necessity and the reasonableness of the force used. This difference has been rationalised on the basis that a subjective standard is appropriate in matters of fact while an objective standard is preferable in matters of value. However, as Uniacke points out even this distinction is not entirely accurate since the judgement that a particular degree of force was

There is a further limitation on this presumed moral right to self defence, which Uniacke argues²³³ has not been properly explored and is often misrepresented. This limitation comes in the form of a theory of forfeiture. Although forfeiture of rights is commonly associated with both culpability and punishment, Uniacke does not argue that an unjust aggressor is penalised.²³⁴ Instead she rationalises this concept on the basis of a specified right to self defence. Her account is premised on the view that the right to life is not possessed equally by each person simply qua human. Instead, as with other important human rights such as liberty or privacy rights, it is conditional on our conduct. The condition relevant to the justification of self defence is that we not be an unjust immediate threat to another person. Thus, in cases of justified self defence, the person, against whom force is used, constitutes an unjust immediate threat. The justification of self-preference in cases of self defence is therefore based on the "moral asymmetry"²³⁵ between the parties. The specification of the scope of the unqualified right to life is a right which ceases when we become an unjust immediate threat to the life or proportionate interest of another.²³⁶

One critic of the theory of forfeiture is Fletcher.²³⁷ Drawing on a very wide concept of forfeiture

necessary to resist a particular (believed) threat is a judgement pertaining to a matter of fact. Uniacke, 1994, p. 46.

²³³ 1994, p. 194.

²³⁴ Uniacke would presumably therefore disagree with the rationale for the concession previously afforded in Scotland to an innocent party against an felon. See further chapter three.

²³⁵ Uniacke, 1994, p. 229.

²³⁶ Uniacke, 1994, p. 229. What is interesting in this regard is the fact that Uniacke includes passive threats in the category of unjust threats provided the threat sufficiently resembles an assault. A detailed analysis of this possibility is outside the scope of this work but it could be utilised to further the claim of a battered woman who pleads self defence in an appropriate case. Commenting on Uniacke's use of the notion of forfeiture, Horder writes that she uses it merely as an analytical device and that it ought not to be interpreted as meaning that forfeiture is irrevocable. He writes that forfeiture is not permitted because the aggressor forfeits his rights. The correct way of viewing this notion is to consider that for the time during which the aggressor is posing an unjust threat, a gap opens up in one's right not to be harmed, that instantly closes the moment one ceases to pose such a threat. 1995, pp. 437-438.

²³⁷ Another critic is Dressler who argues that the theory is both over-and under-inclusive. On the one hand, it is underinclusive, for example, in the case of an insane aggressor. Although the defence of self defence permits the killing of an insane aggressor, this type of a killing cannot be rationalised under a forfeiture theory based on choice because the victim's aggression was not freely willed. On the other hand, the theory would apply to forfeit an aggressor's right to complain when another party attempted to kill him, even when such a killing was unnecessary. However, lethal self defence does not result in acquittal when the person attacked can avoid his own death by means other than the taking of life. Dressler, 1982 p. 454.

that includes forfeiture by decree,²³⁸ he points out that forfeiture originally operated in cases involving an outlaw who had forfeited his right to life. This doctrine provided that all felonies resulted in the forfeiture of the felon's property and life. The reasoning is that the would-be felon or the fleeing felon, by choosing to act in an anti-social manner, forfeited his right to life or his right to complain. Because the act of killing was considered the act of a law-abiding citizen, the felon lived at the mercy of others, even those unaware of his status as outlaw. By contrast, a killing in self defence has to be justified with the proper intention and with knowledge of the circumstances which would justify the conduct. For Fletcher, this difference makes the analogy between aggressors and outlaws implausible. Uniacke takes issue with this line of reasoning on a number of grounds; one of which stems from her more complex account of justification and excuse which, as we saw here, extends the range of what can be justified beyond actual self defence, which is objectively and positively right, to allow for agent-perspectival justification.²³⁹

THE LAW ON SELF DEFENCE IN SCOTLAND.

Historical Introduction.

In Scotland, the defence of self defence is entirely determined by the common law requirements that the danger be imminent, that the accused retreat where possible and that only proportionate force be used. Although the common law in England has been over-laid by statute, which has had the effect of subsuming the common law defence within a more general defence with a private and a public dimension, as we will see, the influence of the common law is still apparent. The essence of the common law defence, now the private right to self defence in England, is that force is legally permissible when defending oneself or another²⁴⁰ against an unjustifiable attack. Thus, the law justifies the taking of another person's life but

²³⁸ Uniacke argues that forfeiture is nowadays more narrowly defined in terms of a right lost or a penalty paid due to some crime or fault; a concept which she argues can be readily extended to the right to life. Uniacke, 1994, p. 201.

²³⁹ Although, on one view of it, Uniacke's thesis does broaden the category of justification, she also considers that sometimes broader moral considerations, such as benevolence or the equal rights of unoffending persons who may be adversely affected, ought to be taken into consideration before one exercises one's right to self defence. Uniacke, 1994.

²⁴⁰ See in the Scottish context the case of *Jones V HMA* 1989 S.C.C.R. 726 where Lord Justice-Clerk Ross held that "[S]elf defence covers the situation where a man in order to defend his own person from or in defence of persons other than himself." See also *HMA V Carson* 1964 S.L.T. 21. More recently, in the case of *Fitzpatrick V H.M. Advocate* 1992 S.L.T. 796 the defence was available to an accused who had come to the assistance of a third party even though he need not have become involved and could have

only as a last resort, when it is necessary to preserve one's own life or that of another. The conflict underlying this defence, therefore, centres around the right to life.²⁴¹ Once the defence has been successfully made out, and the jury is satisfied that the accused killed in order to preserve life against an unjustifiable attack, the accused is acquitted. While self defence could produce the best possible result for a battered woman by ensuring her acquittal, it has not been the most commonly utilised defence in Britain.

Historically in Scotland, a person could kill when it was necessary to preserve life, to prevent rape and, in some circumstances, to preserve his own property. The inclusion of both of these latter situations were justified by Hume on the ground that

[t]he householder is entitled to assume that the intruder intends to commit murder, rape, hamesucken, or to set fire to the house, all dangers which go beyond a mere threat to property.²⁴²

There was one exception to the necessity requirement which automatically entitled the use of lethal force; cases where an innocent man had to defend himself against a felon. By contrast with cases which merely involved a quarrel, where the victim could only use minimum force for his own safety, these cases afforded far greater scope to the person being attacked. Hume justified this leniency on the grounds of the innocent man's lack of blame in the face of a felon and explained that

[s]uch a man being innocent of all blame, has no duty to try to escape from the assault, but is rather called on, instantly, and without shrinking, to stand on his defence, that the assailant may not continue to have the advantage of him, but be straight away deterred from the prosecution of his felonious purpose. He is entitled to suppose the worst of his attacker, and even though the assailant give back on the resistance, yet still the innocent party is not for this obliged immediately to desist (while it may be only a feigned retreat, or to call his associates); and...he may pursue nevertheless, and use his weapon, until he be completely out of danger.²⁴³

As we will see in the following chapter, this distinction caused considerable confusion in Scots law between self defence and provocation. There appear to be two considerations which operated to influence

retreated from the situation. In view of this breadth, Ferguson, 1991, p. 47 suggests that the more accurate description of the defence is that which has been adopted in England, private defence.

²⁴¹ Although Lord Keith in *Doherty* 1954 J.C. 1 referred to danger to "life or limb," it is generally accepted among writers on Scots law that this must be taken to imply only that the threat must be of at least serious bodily harm such that an accused would be unable to determine at the time whether the danger did not involve the threat of death. See, for example, Ferguson, 1990, p. 50 or McCall Smith and Sheldon, 1992, p. 129.

²⁴² Cited by Gordon, p. 753.

²⁴³ Cited by Gordon, pp. 751-752.

this concession in favour of the innocent victim. First, the felon, by his actions, has broken the law and as a consequence has forfeited his right to law's protection. Second, the innocent citizen who kills a felon in self defence is acting as an officer of the law, in which capacity he is doing more than defending himself, but is also administering justice. Although the modern law on self defence in England, as laid down in the 1967 Act, has included this public aspect of the defence, it no longer appears in modern Scots law.

The Modern Law On Self Defence.

Like the public aspect of the defence, the distinction between self defence in a quarrel and self defence against a felon is no longer important in modern Scots law.²⁴⁴ Now, the fact that the accused may have committed the first assault will not automatically exclude the plea. If the distinction performs any function in modern times, it is only to suggest that the jury should regard the innocent accused defending himself against a felon more favourably than the accused who himself was the robber.²⁴⁵ The modern defence is more concerned with preserving life in cases where there has been an unlawful attack.²⁴⁶ Although Lord Keith in *Crawford V HMA*²⁴⁷ did list resistance to a housebreaker as being one of the occasions which could warrant the invocation of the defence of self defence, he added that Macdonald's view limiting self defence to "personal danger" as opposed to "patrimonial loss"²⁴⁸ is probably more accurate of modern self defence.²⁴⁹ Rape of a woman is possibly the one remaining exception to the

²⁴⁴ See the case of *Burns V HMA* 1995 S.L.T. p. 1090 commented upon by Dingwall, 1995, pp. 416-418. McCall Smith and Sheldon, 1992, also support this view. pp. 132-133.

²⁴⁵ Gordon suggests that this might be a residual function. p. 759

²⁴⁶ McCall Smith and Sheldon, 1992, write that the defence is not available to one who defends himself against lawful arrest or against any other application of lawful force by officers of the law. p. 132.

²⁴⁷ 1950 J.C. 67.

²⁴⁸ Cited by Gordon, p. 762.

²⁴⁹ McCall Smith and Sheldon, 1992, write that in principle the use of moderate force to prevent damage to one's property or to prevent it being stolen, as where one might push away a thief who tries to steal one's wallet, should be acceptable. However, they write that the use of moderate force which causes death in defence of property ought to attract the defence. p. 133.

defence's main objective.²⁵⁰ *McCluskey V HMA*²⁵¹ provided that this exception does not extend to allowing for the defence in cases where a man kills in order to prevent being sodomised. Lord Justice-General Clyde explained that

[w]here an attack by an accused person on another man has taken place and where the object of the attack has been to ward off an assault upon him it is essential that the attack should be made to save the accused's life before the plea of self defence can succeed. For myself, I would be slow indeed to suggest that people in this country are justified in taking life merely because their honour is assailed by someone else.²⁵²

Although this discrepancy has attracted the criticism of several leading writers in Scotland, it was followed in the case of *Elliot V HM Advocate*.²⁵³ McCall Smith and Sheldon consider that it appears "outdated and illogical to allow killing to prevent one form of non-consensual penetration but not another,"²⁵⁴ Jones and Christie point to the "clear discriminatory inconsistency in the law,"²⁵⁵ while Ferguson²⁵⁶ speculates that the decision "give[s] room for doubting the propriety of the exception in favour of people who kill to prevent rape."

The defence's rationale, premised on the necessity for preservation of life, is preserved by the three elements to the defence which the law strictly requires before the accused can be acquitted. In order to come to terms with how the defence operates generally and in cases involving battered women, I now intend to outline the case-law which has developed around each of these elements.

Imminent Danger.

The notion of imminence means that unless the accused had acted against his assailant, the assault

²⁵⁰ Ferguson, 1990, writes that the exception also presumably justifies A in killing not only B, who is attempting to commit rape on D, but also C, a woman who is assisting B, when it is necessary to do so. p. 52.

²⁵¹ 1959 J.C. 39.

²⁵² p. 43.

²⁵³ 1987 S.C.C.R. 278.

²⁵⁴ McCall Smith and Sheldon, 1992, p. 131.

²⁵⁵ 1996, p. 159.

²⁵⁶ 1990, p. 53.

would have occurred immediately.²⁵⁷ A killing following a threat to life in the future, therefore, will not attract the defence. There are three key cases which illustrate how the imminence requirement operates in practice in Scotland. They are *HMA V Kizilevicius*,²⁵⁸ *Owens V HMA*²⁵⁹ and *HMA V Doherty*.²⁶⁰ *Kizilevicius* involved looking behind the closed doors of number 18 Durward Street, Lochore, Fife and, in particular, to the fear and abuse which had been endured for twenty five years by the wife and family of the deceased. On the day of the killing, a quarrel had erupted between the deceased and his wife, which was reported to the police and which resulted in the deceased being charged with a breach of the peace. Later that night, a violent scene ensued between the deceased and his son, the accused, over the deceased's abuse of his wife earlier that day. The deceased reached for a poker which prompted the accused to hit him twice over the head with a flat iron. The accused then went into the scullery only to be followed by the deceased with the flat iron in his hand, threatening to split the accused's head open. After a struggle the accused succeeded in getting hold of the iron and dealt the deceased several blows with the implement, one of which was fatal. Some of these blows were administered while the deceased was trying to rise from the corner of the room where he had fallen. When directing the jury on the issue of self defence, and in particular the imminence requirement, Lord Jamieson warned that before they could acquit the accused, they must be satisfied that

[he] was in imminent and immediate danger of his own life...and...that he must have had reasonable grounds for apprehension for his own safety.²⁶¹

It was not sufficient therefore that although at one time the accused's life had been in danger, at the time the fatal blow was administered the danger had passed. Lord Jamieson cited with approval Hume's example on this point. This example involved a man who attacked another with his sword only to find that the assailed had drawn his own sword to defend himself. If then the original assailant either breaks his sword or becomes disarmed, the assailed is not entitled to run the disarmed man through because he, at

²⁵⁷ Jones and Christie, 1996, p. 153.

²⁵⁸ 1938 J.C. 60.

²⁵⁹ 1946 J.C. 119.

²⁶⁰ 1953 J.C. 1.

²⁶¹ p. 62.

this point, is no longer in imminent danger of his life. The question which the judge left for the jury in *Kizileviczius* was whether or not the accused, when he administered the fatal blow to his father, who was injured in the corner of the room, was in imminent danger. On the facts of the case the jury held that he was not.

The prelude to the killing in *Owens* involved an argument between the appellant and the deceased because of noise made by the appellant when coming back into the house in the early hours of the morning. There was conflicting evidence as to where the killing actually took place. According to the evidence of the deceased's paramour she thought that the killing took place in the bedroom. The appellant's story was that, after an insulting remark, the deceased stood on the bed and appeared to him to be holding a knife in his right hand. The appellant left the room and went into the lobby but could not open the door from the lobby into the street. A fight ensued during which the appellant took a knife from his coat, which he used as an ordinary eating utensil, and stabbed the deceased. The trial judge began his direction to the jury as follows:

If he (the appellant) was completely wrong in thinking [that] there was an object of a dangerous sort in Falconer's hand when he sprang out of bed and there was no such object, then any attack by Falconer following him into the lobby would not have justified the use of a lethal weapon.²⁶²

This statement, it was held, was a misdirection as to the essential elements of self defence. Lord Justice-General Normand held that mistake was consistent with the defence.

In our opinion self-defence is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds. Grounds for such belief may exist though they are founded on a genuine mistake of fact. In the present case, if the jury had come to the conclusion that the appellant genuinely believed that he was gravely threatened by a man armed with a knife but that Falconer actually had no knife in his hand, it would, in our opinion, have been their duty to acquit, and the jury ought to have been so directed.²⁶³

This ruling has been endorsed by cases such as *Crawford V HMA*²⁶⁴ where the court emphasised the requirement of reasonableness. There the court held that "when self defence is supported by a mistaken belief rested on reasonable grounds, that mistaken belief must have an objective background and must not

²⁶² p. 125.

²⁶³ p. 125.

²⁶⁴ 1950 JC 67.

be purely subjective or of the nature of an hallucination."²⁶⁵ More recently, the court in *Jones v HMA*²⁶⁶ held that self defence is justifiable if "reasonably apprehended."²⁶⁷ McCall Smith and Sheldon²⁶⁸ draw attention to the case of *Meek and Others v HMA*²⁶⁹ which allowed a defence of unreasonable error in rape and note that it might also have been taken as allowing unreasonable error in the context of self defence.²⁷⁰ As we will see below, developments along these lines have been adopted by the English and Australian courts.²⁷¹ These writers²⁷² argue that a similar development could be incorporated into Scots law on the grounds that a person who acts under genuine, though unreasonable, error is as morally blameless as one who draws an erroneous, but still reasonable conclusion. Similarly, Ferguson²⁷³ agrees that not allowing for an unreasonable error may appear to be somewhat severe but points out that it is applied by the courts in order to minimise the risk of juries being gullible enough to believe outrageous assertions of error made by accuseds.²⁷⁴

Finally the case of *Doherty* involved hearing evidence from three different witnesses all of whom had been trying to steal a number of items from Glasgow Corporation. Although each story varied

²⁶⁵ p. 71.

²⁶⁶ 1990 SLT 517.

²⁶⁷ p. 525. See also *McCluskey v HM Advocate* 1959 J.C. 39 at 40 where Lord Strachan held that the defence was available to an accused to ward off danger "which was actually threatened or danger which might reasonably be anticipated" by the accused.

²⁶⁸ 1992, pp. 130-131. See also Ferguson, 1990, p. 54.

²⁶⁹ 1982 S.C.C.R. 613.

²⁷⁰ For a dissenting view, see Uniacke, 1994, pp. 45-46.

²⁷¹ Although reasonableness was still required by the High Court in *Zecevic v DPP Of Victoria* (1987) 71 ALT 641. See below.

²⁷² 1992, p. 131.

²⁷³ 1990, p. 54.

²⁷⁴ Ferguson, 1990, p. 54.

slightly,²⁷⁵ the basis of the testimony was that Cairns (the deceased) swung a hammer and tried to hit Doherty (the panel). At some point in the struggle, a third man, McNulty gave Doherty a bayonet so that he could defend himself. When referring to the imminence requirement, the judge noted that in the panel's favour was the fact that he was threatened by a hammer. He judge reminded the jury that

there must be imminent danger to the life of the accused, to the person putting forward this defence; there must be imminent danger to his life and limb.²⁷⁶

However, he did go on to say that the panel had been handed the bayonet and told to defend himself which, to the judge, suggested a duel. If this was indeed the case, the judge told the jury, that this would have to militate against the panel. As he said "you cannot start up a duel with another man and then say, but I killed him or injured him in self defence."²⁷⁷

The imminence requirement, in general, therefore, requires that the deceased must pose a threat of at least serious bodily harm before a killing can be justified.²⁷⁸ As *Owens* demonstrates, although the requirement is broad enough to encompass a mistaken belief, before it can be accepted, the jury must be satisfied that it is based on reasonable grounds. The requirement, therefore, presumes a violent setting which causes the accused to reasonably fear for his life and rules out a pre-emptive strike.

Duty To Retreat.

All of these three judgements also included discussions of the duty to retreat requirement. This duty was, directly in point in the case of *Doherty*²⁷⁹ Lord Keith explained to the jury that

if the person assaulted has means of escape or retreat, he is bound to use them. If he has these means, then it is not necessary in self defence to stand up against the other man and in retaliation use a lethal weapon against him. He could defend himself by escape, which is really just another way of ridding yourself of the danger.²⁸⁰

²⁷⁵ The evidence ranged from that of Moffat, who testified that he thought Doherty thrust the bayonet into Cairn's eye, to that of McNulty, who testified that Doherty hit Cairns one blow on the head over the right eye to that of Doherty, who said that Cairns walked or ran into the bayonet.

²⁷⁶ p. 4.

²⁷⁷ p. 5.

²⁷⁸ Advocates similarly were of the opinion that this element, in order to be fulfilled, required that there be some form of physical assault. See chapter three.

²⁷⁹ 1954 J.C. 1.

²⁸⁰ p. 5.

Lord Keith pointed out that the panel was not actually "cornered"²⁸¹ in this case. On the contrary, the judge found that he

had friends around him whom you may think...might have helped him or dissuaded Cairns or disarmed Cairns, and again you might think he had a means of retreat. He had an open door to this stair behind him, the stairs down the yard, and certainly there does not seem to have been any attempt to make an escape by the door or to get his companions Moffat and McNulty, or anything of that sort.²⁸²

Hence Doherty's defence failed because it was found that he could have retreated.

The requirement was not at issue in *Owens* because the appellant left the bedroom, went into the lobby from where he could not retreat because the door from the lobby to the street was locked. It would appear, therefore, that the appellant probably fulfilled the requirement in this case. Although the law requires that there be some indication of unwillingness to proceed violently, it does not require super-human efforts. Hume's interpretation of the law is still generally adopted. In his words

[t]hough the party ought to retire from the assault, [that] this is always said under provision, that he can do so without materially increasing his own danger, or putting himself at an evident disadvantage with respect to his own defence: As if he have to retire down a dark or steep staircase, or by passages better known to the invader than to him.²⁸³

The duty to retreat requirement was also one of the issues examined in a considerably older case, that of *HMA V McAnally*.²⁸⁴ The case arose out of a violent encounter between the panel and his father. According to the evidence of a neighbour, one Elizabeth Dollan or Williamson, the deceased took his son by the hair of his head and pushed him up against a wall outside their house which made the the panel "weakly like."²⁸⁵ The father then struck the panel twice with a rack-pin, took aim for a third time, at which point the witness thought that the father would kill the son, but missed. The father continued pursuing the son, shouting oaths to the effect that he was going to kill him. The panel, who had a poker in his hand, either flung the poker at his father or, a blow struck by the father, caused it to fly out of his son's hand. Lord McKenzie warned the jury that before they could return a verdict of self defence "it must be proved

²⁸¹ p. 5.

²⁸² p. 5.

²⁸³ Hume, i, p. 229. Cited by Gordon, p. 759.

²⁸⁴ (1836) 1 Swin. 210.

²⁸⁵ p. 213.

that there was no other mode of escape."²⁸⁶ Lord McKenzie doubted that the requirement was fulfilled and asked

[B]ut do the circumstances amount to this? Here was the father, a man with one arm, striking his son in an open close. Was there anything to prevent his wresting this weapon from his father, as he had before done with the poker. Or is there anything to show, that he could not have saved his life by flight? The question is, -was it necessary, in order to save his own life, that he should hurl the poker at his father?²⁸⁷

The duty to retreat requirement, therefore, perhaps best illustrates the tension underlying the defence of self defence. On the one hand, lethal violence is legally permissible but only in cases of last resort. If retreat is possible, then this course of action must be followed before the infliction of violence. On the other hand, however, if retreat is not possible without further increasing the danger to life, then lethal violence in order to preserve life is permissible.

Proportionality.

The classic case of self defence, therefore, involves a life-threatening attack which necessitates, in order to preserve that life, a response sufficiently severe to repel that force. In the case of a homicidal attack, killing the aggressor is deemed to be a response which is proportionate to the force used. An accurate assessment of this requirement, therefore, involves weighing, not the eventual death against the danger to life, but the more concrete test of the degree of violence used by both parties. This test has come to be known as the proportionality requirement. The leading authority on this issue is the case of *HM Advocate V Doherty*²⁸⁸ where Lord Keith explained the requirement in the following terms to the jury:

For instance if a man was struck a blow by another man with the fist, because there is no real proportion at all between a blow with the fist and retaliation by a knife, and, therefore, you have got to consider this question of proportion between the attack made and the retaliation offered.²⁸⁹

The judge, however, went on to add a rider which is similar to that which operates in the context of the duty to retreat requirement in that both humanise the law. The particular concession here is that

[y]ou do not need an exact proportion of injury and retaliation; it is not a matter that you weigh in too fine scales...Some allowance must be made for the excitement or the state of fear or the

²⁸⁶ p. 217.

²⁸⁷ pp. 217-218.

²⁸⁸ 1954 J.C. 1.

²⁸⁹ p. 5.

heat of blood.²⁹⁰

Had all the other elements of the defence been construed in the panel's favour, then the use of a bayonet against the threat of a hammer might have been considered proportionate since Lord Keith was of the opinion that the jury would realise that "a hammer was a very dangerous thing to be threatened or attacked with."²⁹¹

*Fenning V HM Advocate*²⁹² was a case which explored the outer realms of the proportionality requirement. Here, the cause of death was repeated blows to the head by an air rifle or similar object followed by striking the deceased's head and face against a stone. The trial judge directed the jury that for the defence to be established there had to have been no cruel excess of violence on the accused's part. By contrast with other cases, which weigh the violence used by both parties, in this case the appeal report does not make mention of the violence used by the deceased but instead concentrates on that used by the accused. It appears that because of the severity of the force used by the accused, the presumption is that the accused could not have been acting in self defence which changes the test from one which balances the violence used by both parties to one which focuses on the violence used by the accused.

Lord Cameron held that

[I]t is, however, clearly the duty of the judge to explain to the jury that the benefit of the defence is lost where the force used to repel the attack is excessive, and in my opinion where, as here, the language [of the law] is precise and positive and the degree of excess characterised which will elide the defence is specifically stated to be "cruel," then it is not mandatory for the judge to illustrate by examples the meaning of these words.²⁹³

Although the law in Scotland does require that only proportionate force be used, this requirement is not fixed in stone. The law does appear to allow for a certain degree of excess in circumstances of excitement or fear or heating of the blood.²⁹⁴ However, the Scottish judiciary has gone to great pains to warn of the existence of a point at which excess becomes cruel excess. It is at this point that a case loses the character

²⁹⁰ pp. 4-5.

²⁹¹ p. 5.

²⁹² 1985 J.C. 76.

²⁹³ p. 81.

²⁹⁴ *HM Advocate V Doherty* 1954 J.C. pp. 4-5.

of a self defence case and takes on that of murder.

Jones and Christie²⁹⁵ address specifically how self defence in Scotland applies to cases involving women, who have been physically and sexually abused over a long period of time, and who eventually kill in the absence of an attack on the particular occasion in question. They outline two possible scenarios. The first is where the man is killed as a pre-emptive move, while not posing a threat, for example, when he is asleep. The authors consider that such a killing is, as a matter of principle, difficult to justify. As they argue, such a man, albeit violent, is still entitled to the same legal protection as any other victim of a would-be-self-defender and cannot be taken as losing his right to life through being violent on other occasions. Furthermore, they point out that the biggest difficulty, which such a woman would encounter in law, is the imminency requirement. The authors go on to highlight a second possible scenario; where a woman may misinterpret an innocent movement on the part of the man as an attack which endangers her life. The writers posit that in such cases, a woman will want to rely on the fact that she has been battered over time to support the reasonableness of her erroneous view that she was about to be attacked, which takes the debate into the realms of evidence.²⁹⁶ While an accused can lead evidence concerning the victim's general character cases such as *HMA V Fletcher*²⁹⁷ and *Brady V HMA*²⁹⁸ have held that it is not competent to lead evidence of specific acts of violence alleged to have been committed by the deceased in the past. This rule has, however, been overcome in cases such as *HMA V Kay*;²⁹⁹ a case which involved a killing of an abusive husband by his wife. Lord Wheatley admitted evidence of assaults upon her by the deceased on five previous occasions as relevant to her claim that she reasonably believed her life to be in danger on the occasion in question. Although this case was a "very special case"³⁰⁰ since the evidence was introduced primarily as a matter of fairness because the indictment labelled that the accused had

²⁹⁵ 1996, p. 158.

²⁹⁶ For a more detailed discussion of the difficulties posed by battered women at the level of the law of evidence, see later chapter seven.

²⁹⁷ (1846) Ark. 171.

²⁹⁸ 1986 J.C. 68.

²⁹⁹ 1970 S.L.T. (Notes) 66.

³⁰⁰ Per Lord Justice-Clerk Ross in *Brady V HMA* 1986, J.C. 68 at p. 74.

demonstrated malice towards the deceased on previous occasions, it may well be the case that as a matter of practice, it is overcome.³⁰¹

It is interesting to note that while all of the main text book writers point to the discrepancy between the exception which allows a woman to kill in order to prevent a rape but which is not available to a male victim of a homosexual attack, the only text book writers to explore the possibility of affording a battered woman the defence of self defence, are negative as to its viability.³⁰² In questions seven to nine on my questionnaire I asked advocates to consider the possibility of invoking the defence of self defence in cases involving battered women who kill.

Question seven asked advocates to consider whether or not the rationale for the defence of self defence would be broad enough to encompass cases involving battered women who kill. The reply to this question and question nine, which asked whether or not advocates thought that the defence of self defence could be successfully applied to cases where battered women kill, was, according to all advocates subject to the existence of the three elements of the defence.

Of the sixteen advocates who replied to question seven, five thought that the rationale for the defence was not broad enough to encompass cases involving battered women who kill. Two of these advocates thought that the imminence requirement would prove the fatal obstacle to these cases. As one explained, the rationale for the defence of self defence is not, as I had suggested in the questionnaire, based on the necessity to protect life or the prevention of serious bodily injury, but, instead, is premised upon there being a lack of mens rea on the part of the "attacker." His view was that, in these cases, women are not defending themselves unless there is "a direct attack." The advocate went on to explain what he meant by likening deceaseds killed by the women they battered to a hypothetical German football supporter struck by a Scottish supporter after his team had scored. When asked to explain the attack, the Scottish supporter said that it was not because he was excited about the goal but because of what the Germans did to Clyde Bank during the War. This advocate reasoned that allowing a battered woman to

³⁰¹ See later the case of *HMA V McNab* High Court, August 30, 1995, unreported where it appears that this rule was relaxed.

³⁰² Jones and Christie, 1996, do point out that in the event that self defence is not available, there is still the possibility of a verdict of culpable homicide rather than murder in the basis of cumulative provocation. p. 158.

plead self defence without a direct attack would also mean having to exonerate the Scot who hit the German. Two other advocates who doubted the appropriateness of self defence in these cases did so on the basis of the requirement that there be no means of escape or retreat which, they considered, would not be satisfied if the woman could have escaped through the back door. The final advocate in this category considered that none of the elements would be satisfied in these cases.

The more common response was that the defence could, in an appropriate case, be invoked successfully.³⁰³ One advocate expressed the view that self defence was a more appropriate option in cases involving battered women than provocation partly on the basis that provocation is "fraught with difficulties" but also because of the more favourable result produced by using the defence. By contrast, another thought that while the rationale for self defence is probably broad enough, because it completely exonerates, he felt that it may not always be appropriate in these cases. The more appropriate defence, for him, was provocation, which merely attempts to put more flexibility into the system. Another thought that a judge would be more disposed to leaving provocation to a jury in these cases than any other case involving a close relationship. Despite the fact that all of these advocates were adamant that the three elements to the defence must be made out, they did not dismiss out of hand the appropriateness of the defence to deal with these cases. What seemed to distinguish these advocates from those five already mentioned, was not a different understanding of the law or its operation, but rather a willingness to consider how these bars could be interpreted in the light of an appropriate case involving a battered woman. Notwithstanding this difference of opinion as to the appropriateness of self defence when dealing with battered woman who kill, there was little to separate the advocates' responses as to how the three requirements operate in practice.

Of the sixteen advocates who replied to question eight, which asked how the no means of escape requirement operated in practice, fifteen were of the view that it was a rule of law while one thought that, although it was not a rule of law, it was required in practice. When applied to cases involving battered women who kill advocates opinions varied. One advocate expressed the opinion that "no self respecting woman would stand and take the abuse," while another recognised the difficulties which women could

³⁰³ The remaining eleven advocates considered that the defence could be appropriate and some went on to consider how.

encounter. In some cases, he understood that women simply may not realise that there is another option to violence and abuse, such as getting a divorce, while in others, he considered that a woman living on Morningside road may not want to admit to her neighbours that she is being beaten by her partner. Another advocate suggested that the rule ought to be relaxed in certain cases involving battered women, while another considered that, in practice, it operates with enough flexibility to deal justly with all these cases.

The second part to question eight asked advocates to consider a proposal accepted by the English C.L.R.C. which allowed for an imperfect defence of self defence allowing for the possibility of a manslaughter verdict in cases where excessive force was used even though there was no mistake of fact. The majority of advocates³⁰⁴ agreed that excessive force, regardless of whether or not there was a mistake of fact, would not automatically take the case outwith the realms of self defence. It was only when cruel excess was used that the accused would lose the protection of the defence of self defence. This distinction is drawn based on the facts of the case before the court. Illustrating how this operates in practice, one advocate, spoke of a case where seven stab wounds were inflicted but which, on the facts, was not considered as having crossed the boundary to cruel excess. Although advocates recognised that in strict law the case of *Fenning*³⁰⁵ separated the notions of self defence and provocation, seven considered that, even when the force used was excessive, this should not preclude a defence advocate from going to a jury on the basis of a "menu," including self defence, while being prepared to accept culpable homicide.

The third part of this question asked about the operation of the imminence requirement in Scotland. The general view was that the requirement demanded the danger to be upon the accused; that there would have to be something more than a prediction of violence before this requirement could be met.³⁰⁶ Thus, there was disagreement among advocates as to whether or not a threat could satisfy this requirement but all agreed that a physical confrontation or an advancing attacker would satisfy the requirement.

³⁰⁴ Thirteen advocates expressed this view.

³⁰⁵ 1985 J.C. 76.

³⁰⁶ However, two advocates did envisage the possibility of arguing that a woman, who had been subject to violence in the past, could in an appropriate case, kill a sleeping husband and get a culpable homicide verdict.

The final question related to the reasonableness standard and asked whether or not it was subjective enough in Scotland to encompass a battered woman's honest but mistaken belief in the necessity of using the degree of force actually used. Ten advocates thought that the reasonableness standard was probably broad enough to encompass these cases, two advocates were unsure, one advocate thought that the concept was an inappropriate one to use in connection with the degree of force used and was more suited to the issue as to whether or not there was a mistaken belief in the actual attack. The response of the remaining advocates returned to a theme already discussed, that of the seeming preference of Scots law for objectivity. As one advocate commented, although the law on self defence in Scotland is more subjective than the law on other defences, he felt that it still retained its objectivity to the extent that before an honest but mistaken belief could succeed, it have to be supported by objective danger. This, he felt, would preclude cases involving battered women. Another advocate, rather than speaking in terms of reasonableness, which he considered as being "too fluffy," preferred instead to speak in more concrete terms such as cruel excess. His reason seems to be that reasonableness is itself a concept too subjective to be used with effect in the courts and in this particular context he preferred to use the familiar Scots law touchstone of cruel excess. In his view, once there is an attack, the belief in the degree of force actually used can only be conveyed by the woman because her partner is dead. To allow for a reasonableness test in this context, he felt, would be to create an unfair advantage for the woman whose story cannot be contradicted.

Advocates who considered that self defence could be applied successfully to cases involving battered women suggested that there were a number of factors which could be used to create flexibility within the scope of the defence itself. The first of these was a widespread recognition of the fact that these killings take place against a background of long term violence which, they thought, had to influence the woman's perception of danger and consequently the operation of the three elements to the defence. They considered that their first task would be to "paint the picture" for the jury, emphasising the "collateral issues" especially the previous incidents of violence. In relation to the no means of escape requirement, I was told that the judge could be persuaded to advise the jury to take account of all the circumstances, including the reality of the woman being overcome ever before she got to the door. Some advocates thought that the woman's knowledge of her partner's violent behaviour could well influence the

interpretation of the imminence requirement in court but that this would be a matter which would have to be brought out in evidence. In relation to the final element, the degree of force used, advocates were aware that these cases involve panic situations and so account must be taken of the heat of the moment.

Despite the positive response of the advocates when asked to consider the possibilities of the defence for cases involving battered women who kill, as we saw, it is not the most commonly used defence. As we will go on to see next the same is true of how the defence operates south of the border.

THE LAW ON SELF DEFENCE IN ENGLAND.

Historical Introduction.

Just as Hume prioritised the claim of an innocent victim who killed a felon over the claim of a man who killed during the course of a quarrel, the early English writers also ranked different factual situations in order of priority. Coke, Hale and their successors, distinguished between three different factual situations. The first comprised cases where a defendant attacked another with malice aforethought or engaged in a duel with him, with a like intent. Such a defendant was viewed least favourably of all three. In fact, such a defendant would never be entitled to the defence of self defence. By contrast, a defendant who entered into a fight upon a sudden quarrel without malice aforethought³⁰⁷ would generally only be excused but could, in certain, cases be justified on grounds of self defence. The third situation was where the defendant was the innocent victim of a felonious attack. The defendant, in this case, was entitled to succeed in his plea of self defence. Not only does the identification of this situation correspond with the Scottish approach but Hale also advocated that it be treated in the same way. He argued that the duty to retreat requirement be displaced in the case of a thief who assaults

a true man abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant and it is not felony.³⁰⁸

As with the Scottish approach, the concept of blame appears to lie at the heart of these English cases. The least favoured situation could be explained in terms of the defendant being completely to blame because he was the aggressor. As such, he is precluded from invoking the protection of self defence even though at the time of killing he had retreated "to the wall" and was unable to escape with his own life

³⁰⁷ Killing in this type of situation was known as homicide upon chance-medley.

³⁰⁸ Cited by Smith and Hogan, 1965, p. 234.

except by killing. Were such a defendant to undergo a change of mind and make it clear to the other party that he was no longer in danger, which the other party ignored, this could then entitle the defendant to kill. This change in the source of violence can perhaps be seen in terms of a transferral of blame from the defendant to the other party. The second intermediate stage in terms of blame allowed for the plea of self defence only when the defendant could prove that he was disinclined towards violence by retreating as far as he could with safety and that he killed through necessity in order to avoid immediate death. The defendant in the third situation was treated as being completely blameless and, therefore, automatically entitled to succeed in his plea of self defence.

Hale also argued in favour of displacing the duty to retreat requirement in cases, which are perhaps better classified in our times as falling within the scope of the public aspect of the defence. He argued that the requirement ought to be relaxed in cases where "ministers of justice [were] being attacked in the execution of their office," as, for example, a gaoler being attacked by a prisoner.³⁰⁹ The reason for this exception was that such persons were "under a more special protection in the execution of their office than private persons."³¹⁰ This concern with the public aspect of the defence preempts the modern law's combination of the public and private aspects of the defence which, as we will see, includes the arrest and prevention of crime.

The Modern Law On Self Defence.

The modern law is to be found in a number of different sources. Defence of the person, whether one's own or that of another, is still regulated by the common law, defence of property is now regulated by the Criminal Damage Act 1971, and section 3 of the Criminal Law Act 1967 speaks to the arrest and prevention of crime. The right of private defence, therefore, still exists at common law but if, and in so far as it differs from section 3, it has probably been modified.³¹¹ The key element underpinning both pieces

³⁰⁹ Cited by Smith and Hogan, 1965, p. 234.

³¹⁰ Smith and Hogan, 1965, p. 234.

³¹¹ Smith and Hogan, 1996, p. 263.

of legislation is the use of reasonable force³¹² in defence of public or private interests. Public and private defence is therefore a general defence to any crime of which the use of force is an element or which is alleged to have been committed by the use of force. Although section 3 does not make a particular reference to the right of private defence; it being concerned with the use of reasonable force in defence of certain public or private interests, acting in defence of one's own person usually involves the prevention of crime and so the provisions of the Act now cover both public and private aspects of the defence.³¹³

Section 3 provides that

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large. (2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.

Thus, the common law rules on self defence which

have a somewhat antique ring, having been formulated in an age when men wore swords and it appears that sudden affrays were liable to break out with fatal results³¹⁴

seem to have disappeared from English law. The law can now be restated in a simplified version which allows such force to be used as is reasonable in the circumstances as the accused believed them to be³¹⁵ whether reasonably or not.³¹⁶

The Criminal Law Revision Committee, the authors of section 3, explained when the use of force is reasonable.

No doubt if a question arose on clause (sect. 3), the court, in considering what was reasonable

³¹² The case of *Blake V DPP* [1993] Crim. LR 221 further elucidated what is meant by force. Demonstrating against the Iraq war, D wrote with a felt pen near the Houses of Parliament. He was charged with criminal damage and argued that his act was justified by section 3. The court held that his act was not sufficient to amount to the use of force within the meaning of the section. Smith and Hogan, 1996, p. 263 point to the oddity resulting from the section; the defence might not have been ruled out on this ground had the D used a hammer and chisel.

³¹³ Smith and Hogan, 1996, p. 263 point out that the connection between the defence of private defence and the prevention of crime was made even before the enactment of section 3, see the case of *Duffy* [1967] 1 QB 63 where the court held that a woman was justified in using reasonable force when it was necessary to do so in defence of her sister, not because they were sisters, but because "there was a general liberty as between strangers to prevent a felony."

³¹⁴ Smith and Hogan, 1965, p. 233.

³¹⁵ This applies to cases of self defence and defence of others.

³¹⁶ Smith and Hogan, 1996, p. 259.

force, would take into account all the circumstances, including in particular the nature and degree of force used, the seriousness of the evil to be prevented and the possibility of preventing it by other means; but there is no need to specify in the clause the criteria for deciding the question. Since the clause is framed in general terms, it is not limited to arrestable or any other class of offences, though in the case of very trivial offenses it would very likely be held that it would not be reasonable to use even the slightest force to prevent them.³¹⁷

Smith and Hogan further refine the concept and write that it cannot be reasonable to cause harm unless it was necessary to prevent the crime or effect the arrest and, when the evil which would result from a failure to prevent the crime or effect the arrest is so great that a reasonable man might consider himself justified in causing harm to avert the evil.³¹⁸ Despite the open-ended nature of the test,³¹⁹ for a time, the jury did not receive much by the way of clarification from the judiciary. In equally vague terms, Lord Diplock held that the question for the jury is

[A]re we satisfied that no reasonable man (a) with knowledge of such facts as were known to the accused or [reasonably] believed by him to exist (b) in the circumstances and time available for reflection (c) could be of the opinion that the prevention of the risk of harm to which others might be exposed if the suspect were allowed to escape, justified exposing the suspect to the risk of harm to him that might result from the kind of force that the accused contemplated using.³²⁰

Writing about this issue in 1879, the Criminal Law Revision Commissioners distinguished between necessity and proportionality; a distinction which, as we will see, has recently acquired a new significance.

Having stated the right to use force in public or private defence, they added:

yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from, the force used, is not disproportioned to the injury or mischief which it is intended to prevent.³²¹

³¹⁷ Cmnd. 2659, Para 23, Cited by Smith and Hogan, 1996, p. 261.

³¹⁸ Smith and Hogan, 1988, p. 262, Edition Eight.

³¹⁹ As Smith and Hogan remark "[t]he whole question is somewhat speculative." They pose but do not answer the question as to whether it is reasonable to kill or to cause serious bodily harm in order to prevent, for instance, rape; an issue which as we have already seen, is more clearly resolved in Scots law. 1996, p. 262, Edition Eight.

³²⁰ Reference under s. 48 A of the Criminal Appeal (Northern Ireland) Act 1968 (No. 1 of 1975) [1976] 2 All ER 937 at 947 per Lord Diplock. In light of *Gladstone Williams* and subsequent cases, Smith and Hogan point out that the direction should be read as if "reasonably" were omitted. 1996, p. 262, Edition Eight.

³²¹ Cmd. 2345, 11.

Although this distinction has long been recognised, prior to the *Gladstone Williams* decision³²² there was no need to distinguish between the two elements since both were matters for the jury. They had to ask themselves, was the force used, in our judgement, both necessary and proportionate to prevent the harm which the defendant had reasonable grounds to believe was threatened? The landmark case of *Gladstone Williams*³²³ concerned an appellant, who came of the assistance of a black youth, who was being assaulted by another for taking a woman's handbag.³²⁴ Skinner C.J. relied on the judgement of *Kimber*³²⁵ and held that the appellant's honest belief in the unlawfulness of the aggressor's behaviour was sufficient to justify his actions. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is irrelevant. This test, therefore, is now a subjective one, which the jury must decide on the basis of the defendant's belief as to the necessity of using force, and has been repeatedly applied in the Court of Appeal³²⁶ and by the Privy Council in *Beckford V R*.³²⁷ To a much lesser extent, the Privy Council in the earlier case of *Palmer*³²⁸ had also acknowledged the importance of taking the accused's mental state into consideration when deciding whether or not the use of force was reasonable:

[I]f there had been an attack so that defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.³²⁹

³²² [1984] 78 Cr. App. Rep. 276.

³²³ *Gladstone Williams* reaffirmed *DPP V Morgan* [1976] AC 182 and *Kimber* [1983] 3 All ER 316. In the case of *R V Ashbury* 1986, Crim. L.R. pp. 258-260 the court considered that the WILLIAMS remarks as to the defendant's honest belief was merely obiter. However, the test was followed in the case of *R V Fisher* 1987, Crim. L.R. pp. 334-336.

³²⁴ This other, one Mason, by way of explanation said that he was bringing the youth to the police station. However, it subsequently emerged that this was a lie.

³²⁵ [1983] 3 All ER 316.

³²⁶ See, for example, *Ashbury* [1986] Crim. LR 258; *Jackson* [1985] RTR 257; *Fisher* [1987] Crim. LR 334.

³²⁷ [1987] 3 All ER 425.

³²⁸ [1971] AC 814.

³²⁹ pp. 831-832.

Although the *Williams* principle has stood the test of time, a considerable degree of confusion was introduced into the law on the proportionality requirement in the case of *R v Scarlett*.³³⁰ There the Court of Appeal quashed a conviction for a manslaughter conviction against a publican who was alleged to have used excessive force, Beldam L.J. held that

we can see no logical basis for distinguishing between a person who objectively is not justified in using force at all but mistakenly believes he is and another who is in fact justified in using force but mistakenly believes that the circumstances call for a degree of force objectively regarded as unnecessary.³³¹

Indeed this point seems to be quite logical and has met with a degree of approval. Knapman, for example, points out that there is no distinction in principle between cases where D's error is, on the one hand, supposing that any force is used and on the other, as to how much force is justified. As she points out, if the defendant honestly, but quite wrongly, believes that he is being attacked, he has a defence if he uses only such force as would be justified if the imagined attack were real. On the other hand, if the defendant is in fact being attacked, so that he is entitled to use some force, but uses greater force than the actual attack justifies because he mistakenly believes his attacker is armed with a knife, he is to be judged as if the attacker were so armed. Here again, it seems right to consider it immaterial that the defendant mistakenly used excessive force.³³²

However, the Court's ruling as to the proportionality requirement went much further than either of these two scenarios for Beldam L.J. went on to hold that

[the jury] ought not to convict him unless they are satisfied that the degree of force used was plainly more than was called for by the circumstances as he believed them to be, and, provided he believed the circumstances called for the degree of force used, he is not to be convicted even if his belief was unreasonable.³³³

The effect of this aspect of the ruling is to apply an entirely subjective test as to proportionality. As Knapman points out, the *Palmer* test, which held that the defendant's belief was evidence as to the degree

³³⁰ [1993] 4 ALL ER 629.

³³¹ p. 636.

³³² Knapman, 1994, p. 290.

³³³ p. 636.

of force used, is now elevated to the point where it is a substantive defence.³³⁴ Highlighting further the difference between *Palmer* and this approach, Parish³³⁵ notes that Lord Morris's statement in that case was made before *Williams* and *Beckford* and was made in the context of a person who was being attacked, not one who mistakenly believed that he was being, or was about to be, attacked.

It seems that there have been two further developments in the area. However, instead of clarifying the law, they merely serve to consolidate the already existing confusion. The first is the case of *R V Owino*³³⁶ which restored the objective test to proportionality. Relying on *Scarlett* it was argued that the judge failed to state that the test of proportionality was subjective. Dismissing the appeal, the Court of Appeal held that it is not the law that a person is entitled to use any degree of force s/he believed to be reasonable, however unfounded the belief. This decision was seen as confirming the law as set out by Lord Lane C.J. in *Williams* which is that a man may use such force as is objectively reasonable in the circumstances as he subjectively believes them to be. The second is the current specimen direction on self defence,³³⁷ which has been indorsed by the Judicial Studies Board and which restores the subjective test in proportionality. This direction suggests two questions. First, did the defendant believe, or may he honestly have believed, that it was necessary for him, to defend himself; secondly, having regard to the circumstances as the defendant believed them to be, was the amount of force used reasonable.³³⁸ Parish³³⁹ criticises the specimen direction primarily for losing sight of the legal principle at stake. As he points out,

³³⁴ 1994, p. 290.

³³⁵ Parish, 1997, p. 202.

³³⁶ [1996] 2 Cr App Rep 128.

³³⁷ May, 1996, 47.1. For an account of the different reports of the various bodies which have addressed this issue see Knapman, 1994, pp. 291-292.

³³⁸ The exact wording of the direction is as follows:

You should bear in mind that a person who is defending himself cannot be expected, in the heat of the moment, to judge the exact amount of defensive action which is necessary. The more serious the attack [or threatened attack] upon him the more difficult his situation will be. If, in your judgment, the defendant believed or may have believed that he had to defend himself and did no more than what he honestly and instinctively thought was necessary to do so, that would be very strong evidence that the amount of force used by him was reasonable. Cited by Parish, 1997, p. 202.

³³⁹ 1997, pp. 201-204.

a person who acts in genuine self defence has no need of the subjective test, while the danger is that such a lax approach leaves the way open for a "thug's charter."³⁴⁰ He urges us to remind ourselves that "[t]he law is in place to protect the weak from the strong, not to excuse the strong simply because they believe they are weak."³⁴¹

The approach of English statute-based law, therefore, appears to be directly at odds with that of its Scottish common law counterpart. The contraflow created by the two systems runs from, on the Scottish side, an insistence on the three objective legal elements, from which the jury can then infer the accused's mens rea, to an English system which asks the jury to look in the first instance to the accused's mental state before deciding whether or not reasonable force had been used. Furthermore, as we saw, it seems that the old common law requirements have been completely displaced. Although the common law requirements may not be as obvious as their Scottish counterparts, they do, however, seem to exert some degree of influence in the English courts.

Ashworth sets this issue in context. Writing in 1975, he highlighted the fact that the criminal law, since the enactment of legislation, was "passing through a difficult phase"³⁴² where criminal law judges and leading academic writers debated as to how best to achieve the proper balance between certainty and flexibility in law. Thus, on the one hand, even after the passing of the 1967 Act,³⁴³ courts continued to lay down the law in terms of rights and duties, while on the other, academics were writing of an abandonment of references to duties in favour of a general standard of reasonableness. Unlike other commentators at the time, who advocated a complete abandonment of the traditional rule-and-exception approach in favour of an open-textured approach, Ashworth drew attention to the prudence of adopting an intermediate approach which he terms "the method of legal principles."³⁴⁴ He argued that these principles would not be hard-and-fast in their application. Neither would they be limited to a given number. Instead, their main

³⁴⁰ p. 201.

³⁴¹ Parish, 1997, p. 203.

³⁴² Ashworth, 1975, p. 284.

³⁴³ Ashworth, 1975, p. 285. notes that in the period between 1967 and 1975 in not one of the appellate decisions reported was there a mention of section 3 as being relevant.

³⁴⁴ Ashworth, 1975, p. 292.

function would be to guide decision-making rather than to dictate a particular result,³⁴⁵ thereby allowing for both discretion and consistency of policy. He advocates using five principles, which were receiving judicial support at the time, as a guide in future decision making. These principles have, at their core, the old common law requirements.³⁴⁶

Thus, while the law in both jurisdictions, at face value, does not seem to have very many points of connection, this outward appearance may disguise a hidden similarity in practice. Smith and Hogan further endorse this possibility, at least in relation to the duty to retreat requirement. Although section 3 does not speak of the requirement, Smith and Hogan,³⁴⁷ also envisage a role for this concept. They are of the opinion that while there is no longer a requirement that one retreat; it is now simply a matter to be taken into account in deciding whether it was necessary to use force and whether the force was reasonable.³⁴⁸ However, they go on to argue that if the only reasonable course is to retreat, then to stand and fight must be to use unreasonable force.³⁴⁹

I now intend to very briefly discuss how the old common law requirements used to operate in practice in English courts, partly for reasons of historical interest, in order to discover how they compared with Scots law before the enactment of the 1967 Act, but also in view of the influence which they could still continue to exert in practice in English courts today.

Imminent Danger.

³⁴⁵ Ashworth, 1975, p. 292.

³⁴⁶ These principles were, first that a person threatened with attack ought to avoid conflict if reasonably possible and that a person under attack ought to withdraw if reasonably possible. Second, the principle that an individual does not forfeit his liberty to use force in self defence by remaining in, or even going to, a place where he knows he may be attacked. Third, the principle that the amount of force used must always be reasonably proportionate to the amount of harm likely to be suffered by the defendant. Fourth, the principle that the law of self defence should be strictly construed against a person unlawfully in possession of a weapon. Fifth, the principle that the law of self defence should be construed generously in favour of an innocent victim of a sudden attack, but construed strictly against an individual whose own fault has contributed to the show of violence. Ashworth, 1975, pp. 293-301.

³⁴⁷ Smith and Hogan, 1996, pp. 263-264.

³⁴⁸ Smith and Hogan, 1996, pp. 263-264.

³⁴⁹ Smith and Hogan, 1996, p. 264.

The nineteenth century case of *Smith*³⁵⁰ involved a drunken brawl in a mews between the deceased, one James Chaplin, and George Smith, a soldier of the Coldstream Guards. When looking at the requirement that the danger be imminent, the judges of Old Bailey held that a defence of self defence could only succeed if it could be shown

that defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life or to protect himself from such serious bodily harm as would give rise to a reasonable apprehension that his life was in immediate danger.³⁵¹

Thus, as with modern Scots law,³⁵² the necessity to use force to protect life, judged from the objective perspective of the accused's reasonably held belief, formed the essence of the imminence requirement as it existed in England prior to the enactment of the 1967 statute.

English and Scots law converged around the imminence requirement in another way in *Colin Chisam*.³⁵³ Counsel for the appellant argued on appeal that the trial judge erred in law by not asking the jury to consider the appellant's belief in the imminence of the danger from both the objective and subjective perspectives. The trial judge had limited his direction to asking the jury to consider whether the appellant had subjectively honestly believed that a member of his family was in imminent danger thereby ignoring the objective test which requires that this belief be based on reasonable grounds. Parker C.J. held that the trial judge, by asking the jury to consider the subjective question, whether or not the prisoner honestly believed that the danger was imminent, had in fact asked the question which was the

³⁵⁰ (1837) 8 CAR & P 160.

³⁵¹ p. 162.

³⁵² See *Kizileviezius* 1938 J.C. 60 and *Doherty* 1953 J.C. 1. above.

³⁵³ [1963] 47 Cr. App. Rep. 130. The facts of the case required that the Court of Appeal look at a disagreement which developed one night between the appellant and six other youths, including one Tait. The tension began when these youths passed the appellant's house at midnight playing a transistor radio and making noise. A verbal exchange took place between the appellant and the youths which led the youths to move away from the appellant's house. When the group was about eighty yards away, the appellant got a Winchester rifle and fired two shots, one of which hit Tait but did not result in immediate death, and the other hit another young man. Following this incident three young men in the party returned to the appellant's house and broke in. A fight ensued, after which, Tait collapsed and died. The appellant argued that the two shots, which were fired earlier on in the night, were fired in the air and were not intended to wound. It was further argued that the fatal injuries incurred by Tait were as a result of Tait becoming impaled upon a sword-stick, rather than the earlier gunshot wound, which the appellant had used to protect himself and his family against the imminent danger which the intruders threatened.

more favourable question from the point of view of the prisoner. The Court found that the question as to whether or not this honest belief was based on reasonable grounds never arose. Although the question was not directly in issue, Parker C.J. cited with approval the Scots law case of *Owens V H.M. Advocate*³⁵⁴ (which we discussed above) on the need for an honest belief to be based on reasonable grounds. There, it will be remembered, the Lord Justice General, Lord Normand, ruled that in order to satisfy the imminence requirement the jury would have to find that the panel's belief had to be based on objective reasonable grounds.³⁵⁵ Prior to the enactment of the 1967 statute, therefore, there appears to be little difference between the operation of the imminence requirement in Scotland and in England. Both jurisdictions required that the honest belief of the accused be based on objective reasonable grounds.

This requirement that the danger be imminent is very often linked to the question of duty to retreat. One such example is the 1882 case of *Beatty V Gillbanks*³⁵⁶ and another, similar but more contemporaneous example, is the 1972 case of *R V Field*.³⁵⁷ In the older case, the question before the court was whether or not it was an offence for the Salvation Army to march through the streets of Weston-super-Mare knowing that they would be opposed in a riotous and tumultuous manner by the "Skeleton Army."³⁵⁸ In other words, the question was did the Salvation Army's knowledge of the danger of attack by the Skeleton Army impose on it a duty to retreat. The Divisional Court held that there could be no duty to retreat in these cases since the Salvation Army were engaged in a lawful activity. It held that there was no authority for the proposition

that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act.³⁵⁹

³⁵⁴ 1946 S.C.(J) 119.

³⁵⁵ Lord Normand went on to hold that the panel's belief could include a belief founded on a genuine mistake of fact provided that it too was based on reasonable grounds.

³⁵⁶ (1882) 9 Q.B.D. 308.

³⁵⁷ [1972] Crim. L.R. 435.

³⁵⁸ p. 436.

³⁵⁹ *Ibid.*

A similar ruling was handed down by the Court of Appeal in the case of *R V Field*.³⁶⁰ The facts of the case concerned a relationship between the appellant and the deceased which was characterised by a great deal of "bad feeling."³⁶¹ Despite the fact that the appellant was warned on two occasions that the deceased and a number of other were looking for him, he remained out of doors. This bad feeling eventually came to a head and resulted in the deceased and another attacking the appellant who fatally wounded the deceased with a knife. The criminal division held that

[i]t was not the law that a man could be driven off the streets and compelled not to go to a place where he might lawfully be because he had reason to believe that he would be confronted by people intending to attack him. No duty to retreat could arise until the parties were at any rate within sight of each other and the threat to the person relying on self defence so imminent that he was able to demonstrate that he did not mean to fight. Although it was a matter of degree; no one was obliged to get out of the way of possible attackers.³⁶²

Duty To Retreat.

Prior to the 1967 Act, therefore, the duty to retreat was a strict legal requirement which was qualified by the right to stand fast in defending one's home.³⁶³ The effect of the change made by the 1967 Act on this requirement can be seen in the case of *R V McInnes*.³⁶⁴ There, a fracas developed between the appellant (a member of the greasers gang) and the deceased, Philip James Reilly, a member of a rival group (the skinheads) at a fair.³⁶⁵ The appeal was based on a number of grounds among which was the

³⁶⁰ [1972] Crim. L.R. 435.

³⁶¹ p. 435.

³⁶² pp. 435-436.

³⁶³ See, for example, *Hussey* (1942), 18 Cr App R 160.

³⁶⁴ [1971] 3 ALL ER 295.

³⁶⁵ There was conflicting evidence as to which side actually started the fight. According to the appellant, after an incident which involved jostling with one of the skinheads, they then appeared in large numbers, armed with weapons, and shouted abuse at the greasers. The appellant said that he had no desire to fight or to use the knife which he had been carrying. Again, according to the appellant, the events which precipitated the killing began when the deceased jumped on the appellant's back and put an arm around his neck. The appellant felt something cold on his neck which he, at the time, thought could have been a knife. The appellant chucked the deceased over his back and when the deceased rose to his feet a series of punches were thrown which resulted in the deceased going down on one knee. From this position the deceased threw dirt in the eyes of the Accused. The Accused then drew his knife, warned the deceased not to come any closer and stood with the knife held at his hip. The appellant testified that the deceased "went daft," p. 298. "jumped him" p. 298. and then fell straight onto the knife. In his statement to the police, the appellant said that he "let him..." [the deceased] "have it." p. 296.

insistence of the trial judge in his direction to the jury that the defence of self defence could only be available if the party killing had retreated as far back as he could, or as far as the fierceness of the assault would permit him.

Edmund Davies C.J. considered that the trial judge had overstated the importance of the need to retreat and cited with approval the ruling in *R V Julien*.³⁶⁶ There the court held that

[i]t is not, as we understand it, the law that a person threatened must take to his heels and run...but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal; and that that is necessary as a feature of the justification of self defence is true, in our opinion, whether the charge is a homicide charge or something less serious.³⁶⁷

Thus, although the issue of retreat is no longer treated post-1967 as a strict rule of law in England, the question of retreat does appear to be important as evidence of the accused's unwillingness to engage in violence but for the necessity to use force in the circumstances.

Proportionality.

As we saw above, section 3 allows for the use of such force as is reasonable in the circumstances; whether this standard is an objective or subjective standard still seems to be a point of debate. Although the approach is different from the Scottish approach, in that *Palmer* envisaged that the subjective could be evidence of the objective rather than the other way around, the concept of weighing the force used in response against that offered is still pivotal. As with a Scottish accused,³⁶⁸ therefore, an English accused is not required to "weigh to a nicety" the exact amount of force used in response.³⁶⁹

A slightly different variation on this test was imported from Australia into English law and held sway for some time. This concept originated in the Australian case of *McKay*,³⁷⁰ a case which concerned

³⁶⁶ [1969] 2 ALL ER 858.

³⁶⁷ p. 843.

³⁶⁸ Lord Keith in *Doherty* held that the force used in retaliation is not a matter which has to be "weigh[ed] in too fine scales." pp. 4-5.

³⁶⁹ This interpretation was applied by Geoffrey Lane J when he allowed quite considerable force to be used to prevent an obstruction of the highway by a violent and abusive driver. He held that "[I]n the circumstances one did not use jewellers' scales to measure reasonable force." *Reed V Wastie* [1972] Crim LR 221.

³⁷⁰ [1957] VR 560.

the use of excessive force in the arrest of a felon and the defence of property, and was approved by the High Court of Australia in *Howe*.³⁷¹ There the court held that

[w]here the plea of self-defence to a charge of murder fails only because the death of the deceased was occasioned by the use of force going beyond what was necessary in the circumstances for the protection of the accused or what might reasonably be regarded by him as necessary in the circumstances, it is, in the absence of clear and definite decision, reasonable in principle to regard such a homicide as reduced to manslaughter.³⁷²

Lord Morris of Borth-y-Gest, giving judgement for the Council in *Palmer* declined to follow *Howe*. Instead the judge followed the decision of the West Indian Federal Supreme Court in *De Freitas V R*;³⁷³ a development which was followed by the Court of Criminal Appeal in the case of *R V McInnes*.³⁷⁴ In *PALMER* the judge held that there was no half-way-house in law such as that envisaged by this development.

[i]f the prosecution have shown that what was done was not done in self defence then that issue is eliminated from the case. If the jury considers that an accused acted in self defence or if the jury are in doubt as to this then they will acquit. The defence of self defence either succeeds so as to result in an acquittal or it is disapproved in which case as a defence it is rejected.³⁷⁵

Although the Privy Council in *Palmer* considered that English law would not benefit from such a hybrid concept, the English CLRC later approved of the concept in principal. The concept further found approval in a subsequent Australian case, *Viro V R*.³⁷⁶ There, the High Court decided to follow *Howe* in preference to *Palmer*. Mason J suggested that in self defence cases, juries should be directed in accordance with six propositions which he considered best accorded with acceptable standards of culpability.³⁷⁷

³⁷¹ (1958) 100 CLR 448.

³⁷² Cited in the headnote to the case.

³⁷³ (1960) 2 WLR 523.

³⁷⁴ [1971] 1 W.L.R. 1600.

³⁷⁵ p. 1088.

³⁷⁶ (1978) 141 CLR 88.

³⁷⁷ These propositions were as follows. The last two refer specifically to the defence of excessive self defence.

1.(a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or about to be made upon him.

(b) By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

Notwithstanding the success of the concept in Australia, it was short-lived as the High Court in *Zekevic V DPP For Victoria*³⁷⁸ surprisingly rejected the defence because of the complexity which had arisen from the Court's attempt to state the law in a form which took account of the onus of proof.³⁷⁹

More recently, the House of Lords in the case of *R V Clegg*³⁸⁰ addressed this issue. Here, a soldier who was on duty in Northern Ireland fired four shots at a car which was stolen. The judge accepted that the first three shots had been fired in self defence but held that the fourth, which killed, was not fired in self defence as the car had already passed the check point and had proceeded down the road. One of the arguments raised by counsel for the defence to bolster the claim that this was a case of excessive self defence was that the law in Scotland allows a verdict of culpable homicide in such cases. Furthermore, Counsel pointed³⁸¹ to the House of Lords Select Committee Report on Murder and Life Imprisonment³⁸² which recommended that there should be a qualified defence of excessive force in self defence, and argued that adopting this would bring the law of England and Wales into line with the law of Scotland. The Court, however, was not persuaded by these arguments and found support in Lord Cooper's caveat in *Crawford*

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2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self defence arises.
 3. If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.
 4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.
 5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder depending on the answer to the final question for the jury—did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?
 6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter. Cited by Yeo, 1988, pp. 350-351.

³⁷⁸ (1987) 61 ALJR 375. For comments on *Zekevic* in particular and excessive self defence in particular see Yeo, 1988 or Lanham, 1988, p. 239.

³⁷⁹ See further Yeo, 1988, pp. 354-355.

³⁸⁰ [1995] 1 All ER 334.

³⁸¹ p. 342.

³⁸² HL, paper (1988-1989) No. (78-I), para 89.

*V HMA*³⁸³ where the judge went to considerable pains to emphasise the-all-or-nothing nature of the defence of self defence. Counsel also cited a passage from Gordon, in particular a case where a soldier who used a degree of excessive force was entitled to plead the lesser charge of culpable homicide provided the excess was not gross.³⁸⁴ However, this argument was also rejected³⁸⁵ on the grounds that it fell into one of Scotland's unofficial categories of culpable homicide, which was inapplicable in the English context in cases, such as the one at hand, which involved a murder charge. Thus, the House of Lords removed the doctrine of excessive force from English law and brought the law on this point in line with Scotland, Australia, Canada and the West Indies.³⁸⁶

Despite the undoubted differences between Scots law and English law, it does seem to be the case that the law in both jurisdictions is not so unlike as to be completely irrelevant when cited by way of argument in the other jurisdiction. Changing the focus slightly, I now intend to turn to examine some of the general problems posed by the defence for battered women who kill as well as outlining certain solutions which have been advanced.

Problems with Self Defence and Certain Solutions.

Self defence often appears to be the most attractive defence for a battered woman who kills her partner for a number of different reasons. Not least of these reasons is the fact that battered women who kill very often speak in the language of self defence. These women speak in terms of finding themselves trapped in abusive relationships to the point where the choice becomes either to "kill or be killed."³⁸⁷ The defence's potential for these cases has not been lost on some of the more progressive text book writers such

³⁸³ 1950 SLT 279 at p. 281.

³⁸⁴ Gordon, p. 765.

³⁸⁵ For a critical commentary on this case and the demise of excessive force used in self defence see J.C.S., 1995, p. 418. Recognising that allowing the appeal would have involved changing the law in an area of particular sensitivity and public importance, J.C.S. points out that this has been done in the past, for example in the abolition of the marital rape exemption. Professor Smith, 1996, pp. 269-270, still envisages a role for the doctrine in appropriate cases which do not deserve to be treated as murder cases.

³⁸⁶ p. 343.

³⁸⁷ *State V Stewart*, 243 Kan. 639, 653, 763 P. 2d 572, 582, 1988.

as Lacey, Wells and Meure.³⁸⁸ Despite the seeming suitability of the defence, its use in Britain is very much the exception rather than the rule.³⁸⁹ In fact, even in the United States where the lobby for battered women who kill was founded on the suitability of the defence, a cursory glance through some of the leading cases shows that a straightforward application of the law has very often served to exclude these cases from the protection of self defence.

Martha Mahoney³⁹⁰ reviews a number of cases which highlight this unfortunate phenomenon. In the cases of *State V Stewart*³⁹¹ and *State V Norman*³⁹² battered women who killed their sleeping partners were denied the protection of the defence of self defence because the courts considered that these women were not in imminent danger.

The marriage between Peggy and Mike Stewart was an abusive and a violent one to the point where her life on several occasions had been threatened. On one such occasion, the deceased shot the appellant's cats and then held the gun to her head, threatening to shoot. She underwent treatment for schizophrenia which involved taking medication. Far from helping her to deal with this condition, the deceased tampered with the medication, forcing her to take too much at times and to do without at other times. The appellant ran away to her daughter's house who had her admitted to a mental hospital. However, she later agreed to leave the hospital with the deceased. When questioned at trial as to her reasons for going back to their home, she said that the hospital did not provide the medical help she needed. Once at home the violence escalated and reached a new level of ferocity. The deceased warned her that "if (she) ever ran away again (he) would kill her".³⁹³ He forced her to have oral sex several times with such force that the inside of her mouth was badly bruised. He repeatedly told her how much he preferred other women. The appellant soon after found bullets and a loaded gun which frightened her

³⁸⁸ 1990, see in particular pp. 256-303.

³⁸⁹ See chapter three where certain Scottish advocates whom I interviewed supported this assertion.

³⁹⁰ 1991.

³⁹¹ 763 P. 2d (Kan. 1988).

³⁹² 366 S.E. 2d 586 N.C. Ct. App. 1988, revd., 378 S.E. 2d. 8 (N.C. 1989).

³⁹³ p. 86.

because the deceased had promised to keep his gun unloaded. She hid the gun. The deceased started to make remarks about the future indicating that "she would not be there long and could not take her things where she was going,"³⁹⁴ which the appellant interpreted as meaning that she would soon be dead. The abuse ceased for a brief period while the deceased's parents came to visit but soon afterwards he forced her to have oral sex again. This time, as the deceased slept, Peggy heard voices telling her "kill or be killed."³⁹⁵ She found the gun which she had hidden earlier and shot her husband while he slept. The Kansas Supreme Court held that the jury was not entitled to an instruction on self defence as the appellant was not in imminent danger when she shot her sleeping husband. The majority ruled that she could have left as she had access to the car keys. The court held that

[u]nder such circumstances, a battered woman cannot reasonably fear imminent life threatening danger from her sleeping spouse.³⁹⁶

The *Stewart* court distinguished three earlier cases which allowed for a broader interpretation of imminence. These cases were *State V Hundley*³⁹⁷ *State V Osbey*³⁹⁸ and *State V Hodges*.³⁹⁹ This broader interpretation, which, as we will see was also allowed in the Scottish case of *McNab*,⁴⁰⁰ freed the court to examine the context in which the killing occurred and to take into consideration the history and gradual build up of violence within a relationship as well as the immediate acts of the batterer. Despite these other approaches and despite, as Mahoney puts it, "a factual background that strongly suggested an expanded contextual approach was relevant,"⁴⁰¹ *Stewart* marks an endorsement of the narrow approach which

³⁹⁴ p. 86.

³⁹⁵ p. 86.

³⁹⁶ p. 86.

³⁹⁷ 693 P 2d. 475 (Kan 1985). In this case the wife shot her husband in the motel room to which she had moved after leaving him.

³⁹⁸ 710 P.2d. 676 (Kan. 1985). The wife in this case insisted on a separation after a violent marriage. The husband changed his mind about moving out and said to a friend that he had put too much time into his wife's house and that "it would either be him or her".

³⁹⁹ 716 P. 2d 563.

⁴⁰⁰ An unreported decision of the High Court in Glasgow in August 1995 which I attended.

⁴⁰¹ p. 85.

equates imminence with immediate danger.

Mahoney advances a solution which could enable the courts to give effect to a broader contextual approach. She refers to this as "separation assault." Separation assault describes how many women are prevented from separating from men by the frequent assaults made on their efforts to separate. These women are often held as prisoners or prevented from leaving by one means or another. Because this concept describes an assault which is perpetrated over a period of time, it allows for the history of past violence to be taken into consideration, in particular the fact that the woman, on a number of occasions tried to retreat, or to leave the abusive relationship. As one writer explained, for these women

[h]omicide is a last resort, and it most often occurs when men simply will not quit. As one woman testified at her murder trial, "It seemed like the more I tried to get away, the harder he beat me." Gloria Timmons left her husband, but he kept tracking her down, raping and beating her; finally when he attacked her with a screwdriver, she shot him.⁴⁰²

Once the significance of past attacks are fully appreciated, it then becomes easier to understand how the woman feared imminent death and believed that killing was necessary in order to save her life.

This concept of separation assault, particularly the reality that the woman was not free to leave the relationship, was, to some extent, recognised by the dissent in *Stewart*. The majority, by holding that there was no imminent threat to the appellant, ignored the imprisoning effect of the deceased's bringing her back from another State, after her effort to separate, and his threat to kill her if she left again. By contrast, the dissent developed an analogy drawn by the Kansas Supreme Court in *Hundley* between battered women and hostages or prisoners of war. It considered that a hostage who killed an armed guard when he inadvertently dropped off to sleep would be justified since he was not free to leave and in danger of being killed. Mahoney argues⁴⁰³ that the similarity between the hostage and the battered woman lies in the fact that the woman in an abusive relationship is not free to leave and that the violence is sometimes so extreme as to constitute a threat to life.

Another possible solution to the difficulties presented by the law for battered women was successfully advanced in *Hodges*. It took the form of expert psychological testimony on the battered woman syndrome. I will examine this possible solution in more detail in chapter five of this thesis. Here

⁴⁰² Ann Jones, Cited by Mahoney, 1991, p. 83, fn. 372.

⁴⁰³ Mahoney, 1991, p. 87.

the wife had continually left her husband but he pursued her each time and brought her back. On one occasion he had beaten her until she became unconscious and left her in a wood. She divorced him but they reunited after thirteen years because he promised that he had changed. The beatings started again, she left, he brought her back, she eventually gave up trying to leave him and shot him. The expert testimony was introduced to "help dispel the ordinary layperson's perception that a woman in a battering relationship is free to leave at any time."⁴⁰⁴ Again, the imminence requirement proved to be the stumbling block in *State V Norman*.⁴⁰⁵ There the North Carolina Supreme Court, reversing the decision of a Court of Appeal, held that a woman who shot her sleeping husband was not entitled to a jury instruction on self defence on the grounds that there had been no imminent danger to life. John Thomas Norman had beaten his wife Judy, thrown objects on her, put out cigarettes on her skin and broken glass on her face. He forced her to prostitute herself daily and ridiculed her to both family and friends. He called her a dog, forced her to bark like a dog, eat pet food out of dishes and sleep on the floor. He deprived her of food for several days at a time and often threatened to kill her. She had left him several times but he always found her, brought her home, and beat her. The thirty six hours before the killing were characterised by extreme violence and abuse which escalated after the deceased was arrested for drunken driving. This violence took many forms involving beatings and on one occasion he put out a cigarette on her chest. Likewise, the abuse varied from refusals to eat food that her hands had touched to refusals to let her eat. At its most extreme the abuse extended to threats to "cut off her breast and shove it up her rear end."⁴⁰⁶ The defendant had eventually swallowed a bottle of "nerve pills."⁴⁰⁷

The defendant attempted to extricate herself from the relationship on a number of occasions. She went to the mental health centre to discuss the possibility of committing her husband. When confronted with this possibility, her husband said that he would cut her throat before he would allow himself to be committed. She then went to apply for welfare benefits but her husband again foiled the attempt by

⁴⁰⁴ Cited by Mahoney, 1991, p. 89, p. 567 of the judgement.

⁴⁰⁵ 366 S.E. 2d 586 (N.C. Ct. App. 1988), revd., 378 S.E. 2d. 8 (N.C. 1989).

⁴⁰⁶ Mahoney, 1991, p. 90.

⁴⁰⁷ Mahoney, 1991, p. 90.

interrupting the interview and taking her home. He continued to beat and abuse her until she finally shot him with the gun which her mother had put in her purse for protection. The North Carolina Supreme Court held that

all of the evidence tended to show that the defendant had ample time and opportunity to resort to other means of preventing further abuse by her husband. There was no action underway by the deceased from which the jury could have found that the defendant had reasonable grounds to believe either that a felonious assault was imminent or that it might result in her death or great bodily injury. Additionally, no such action by the decedent had been underway immediately prior to his falling asleep.⁴⁰⁸

Again, the narrow interpretation of the imminence requirement served to exclude from consideration much of the violence, fear and abuse which had been endured as well as the previous efforts to escape. Her attempt at securing welfare benefits could perhaps be construed as her most positive attempt to render herself independent. The majority's finding that there was no imminent danger was very much based on the understanding that the defendant was not a captive. The dissent was more alive to this possibility and adopted the strategy of calling an expert witness who compared the defendant to a brainwashed prisoner of war. She was described as a

woman incarcerated by abuse, by fear and by her conviction that her husband was inescapable and invincible...Mrs. Norman didn't leave because she believed, fully believed that escape was totally impossible. There was no place to go...[S]he had left before, he had come and gotten her. She had gone to the Department of social services. He had come and gotten her. The law, she believed the law could not protect her, no one could protect her, and I must admit, looking over the records, that there was nothing done that would contradict that belief.⁴⁰⁹

Justice Martin, who dissented, interpreted the imminence requirement in a more favourable way. He found that on the basis of the evidence a jury could have held that the defendant had acted in self defence. He wrote that the jury could have found that

[t]he defendant believed that her husband's threats to her life were viable, that serious bodily harm was imminent, and that it was necessary to kill her husband to escape that harm...[a] juror could find defendant's belief in the necessity to kill her husband not merely reasonable but compelling.⁴¹⁰

In the English context, Wells suggests a number of possible solutions. She considers that the common law may still be applicable and/or guiding the way in which law is interpreted. Addressing the

⁴⁰⁸ Cited by Mahoney, 1991, p. 91.

⁴⁰⁹ Mahoney, 1991, p. 92, p. 17 of the judgement.

⁴¹⁰ Cited by Mahoney, 1991, p. 92, p. 20 of the judgement.

duty to retreat requirement, she proposes⁴¹¹ that a combination of the exception to the requirement, which allows for the right to stand fast in defending one's home, and the approach of the Court of Appeal in *Field*⁴¹² where the Court held that there is no duty to avoid places of danger, could be combined to benefit battered women who kill. Similarly, she considers that the *Palmer* proviso in relation to proportionality is equally full of potential. As we saw, it does not require that the force be measured to a nicety and allows for the honest and instinctive belief of the actor to be taken into consideration. Despite the broader criterion of section 3, reasonable in the circumstances, even with concession to subjectivity made in *Williams*, Wells considers that a variety of different problems still exist for the jury. She points to two specific problems with this approach.⁴¹³ One is the difficulty inherent in asking a jury to apply a generalised standard of reasonableness to a situation whose existence they find hard to acknowledge which she argues could prevent the woman's retaliatory actions from being fairly considered. The second related problem is that the concept of reasonable force by a woman is not a familiar one in a society in which aggression is seen as mainly a male phenomenon. I will return to this theme of juror knowledge and experience in chapter seven.

Although self defence is rarely used in these cases in Britain, the defence was used successfully in a recent Scottish case. In *HMA V Margaret McNab*⁴¹⁴ each of the defences's three elements was directly in point.⁴¹⁵ The evidence tendered at trial revealed that the three year relationship between the panel, Margaret McNab, and the deceased, Alan Earl, was characterised especially in latter times, by domestic unrest and violence. The violence was such that complaints were frequently made to the police resulting in the deceased being charged with breach of the peace. At trial, Mrs. McNab's eldest son, Paul, testified that he had seen the deceased being violent towards the panel on fifteen to twenty occasions and that he had often had to come to the assistance of his mother. This violence ranged from the throwing of mugs,

⁴¹¹ 1990, p. 127.

⁴¹² 1972 Crim LR 435.

⁴¹³ Wells, 1990, p. 128.

⁴¹⁴ A decision of the High Court in Glasgow in August 1995 which I attended.

⁴¹⁵ For another view of this case see, Connelly, 1996, pp. 215-217.

ashtrays and dinners to more severe violence. It had been admitted in evidence⁴¹⁶ that the panel had sustained several injuries. Because of damage done to her ribs, the panel had to take coproxamol. More seriously was the injury to her leg which was initially caused by the deceased and worsened when the deceased, knowing this leg to be damaged, jumped on it. This injury resulted in hospital treatment. The panel and the deceased often separated during times of unrest. Despite owning the house, the panel often left, always taking her youngest son Steven, and stayed with a friend. At trial, this friend testified that during the course of the three years, the panel had sought refuge in her house more than twelve times. She also told the court that before returning to her house the panel often 'phoned home to check the mood of the deceased. The evidence of this witness further revealed the extent of the violence. She testified that what looked like a knife mark on the wall of the living room could have been the result of an incident, related by the panel to the witness, when the deceased had threatened the panel with a knife.

The events leading to the fatal stabbing began in the afternoon of May 5 1995 when the panel was discharged early from hospital, a stay which was necessitated by the injury to the panel's leg sustained at the hands of the deceased. When the panel discovered that she did not have keys to her house she decided to look for the deceased and found him in the pub. An argument ensued between the deceased and the panel because the deceased had told friends that the panel had been taking coproxamol. This disclosure embarrassed the panel and she subsequently left the pub. When the deceased returned to the house a violent row broke out. Such was the panel's fear that she 'phoned a friend of the deceased, in the hope that his presence would help to relieve the tension. This friend testified that the couple were arguing about money and the fact that the deceased had told their friends that she had been taking coproxamol. He stayed for approximately ten minutes after which time he thought that the atmosphere was better.

The panel's youngest son, Steven, was also in the house on the night in question. He had been sent out by the panel to get fish and chips for his tea and was told that the deceased would be gone when he got back. However, the argument continued to the point where Steven was so afraid that he 'phoned for the police, a course of action which he had often adopted in the past. Steven testified to the fact that the panel continuously asked the deceased to leave and to 'phone when he was sober. Equally she offered to

⁴¹⁶ By way of establishing the general violent background to this case.

leave but he did not want them to separate. The site of the argument changed from the living room to the kitchen. The panel testified that the deceased was facing her with his two hands on either side of the door frame. He reminded her that she did not have "her precious gay boy to save [her] tonight"⁴¹⁷ (meaning her son Paul). In a statement given to the police later on that night, Steven said that his mother was in the kitchen with her back to the fridge and her hand on a knife saying "don't make me, I'll end up killing you".⁴¹⁸ The panel then stabbed the deceased with a knife after which the deceased kicked a lamp in the hall as he was leaving the house and collapsed on the street outside.

Later on that night when the panel was taken to the police station where she was tended to by a police officer after she fainted. This officer testified that the panel said that she did not mean to hurt the deceased, that she was just trying to keep him off, but that he had hands like shovels, one hit and she was at the other side of the room. This discrepancy in size was also noted by the defence advocate, Ruth Anderson, who referred to the panel as "a tiny wee woman"⁴¹⁹ and noted that whereas the panel was four foot ten inches who weighed eight stones the deceased was five foot eleven inches who weighed between twelve and a half to fifteen stones.

In her final submission, Advocate Anderson related the facts of the case to the defence of self defence. Anderson began with the imminence requirement and suggested to the jury that the panel did have a reasonable apprehension of death. This reasonable apprehension was based on her past experiences of violence at the hands of the deceased and the fact that her son who normally came to her assistance was not in the house that night. The defence advocate went on to argue that the duty to retreat requirement had been fulfilled by the panel. The panel was effectively "barricaded"⁴²⁰ by the deceased who stood with his hands preventing her from retreating. When speaking of this requirement, even the Advocate-Depute, Mrs Valerie Stacey, conceded that "the law does not look for heroes"⁴²¹ meaning that the law would not have

⁴¹⁷ Taken from my own notes of the trial.

⁴¹⁸ Taken from my trial notes.

⁴¹⁹ Taken from my trial notes.

⁴²⁰ Taken from my own notes of the trial.

⁴²¹ Taken from my own notes of the trial.

required the panel to incur a further risk to life by remaining in the house at that point. On the issue of proportionality, Anderson did realise that although the force, which resulted in the death of the deceased, was of a minor degree it was fatal. However, she went on to remind the jury that they had to decide on the basis of events as they happened on the night of May 5 1955 and not as if they happened in the High Court of Justiciary. Anderson urged the jury to acquit the panel and to return her to her family. The jury by a ten to five majority agreed with the defence and found the panel not guilty. Advocate Anderson showed how the three elements to the defence can be extended to encompass domestic violence cases. The element which proved most problematic in this case, and indeed in the U.S. case-law already examined, was the requirement that the danger be imminent. The strategy adopted by Anderson when proving imminence was to inform the jury as to the background history of violence, allowing the jury to decide its effect on the mind of Mrs McNab.

One of the proposals submitted by the pressure group Rights of Women to the Royal Commission on Criminal Justice in January 1992 was the adoption of a new partial defence of self preservation. This proposal was not accepted. Although not cast in gender specific terms, it was envisaged that it would apply mainly in cases involving women and children who are victimised by sexual and domestic violence. The essence of the proposed defence was that a person who kills a partner or some one in a familial or familiar intimate relationship; who has subjected them to continuing⁴²² sexual and/or physical abuse and intimidation to the extent that they honestly believe that they have reached a point at which there is no future, and no protection or safety from the abuse, and are convinced that they will not continue to live while the aggressor is alive⁴²³ ought to be afforded a partial defence. It was envisaged that the jury would hear evidence, from the woman herself, with or without corroboration, to the effect that the defendant acted in preservation of self and that a judge would then pass sentence using his/her discretion in the same way as currently happens in relation to other manslaughter verdicts.

⁴²² Rights for Women suggested that this be defined as several assaults on different occasions.

⁴²³ Rights for Women also advocated a number of subsections to allow for the following situations: first a person acting in the protection of a child being subjected to abuse; second a child or young person acting in the protection of a mother or sibling being abused, as in the case of a child or young person victimised by sexual abuse acting to prevent the abuse being carried on to a sibling; and finally, a household, or family members, acting together against a household/family member who is abusing all of them.

Yet another solution to these difficulties was proposed by Professor Ewing. Ewing's thesis is very much of the experimental variety and has not gained widespread acceptance even in the United States where the introduction of expert psychological testimony is quite commonplace. Ewing argues that even when a U.S. court adopts the strategy of admitting expert psychological testimony on the battered woman syndrome, the battered woman's claim to have killed in self defence does not sit easily with the traditional doctrine of self defence. He argues that women who face repeated physical abuse should be justified in using deadly force even during non-violent periods to repel extremely serious psychological injury caused by the abuse. Ewing's claim is that certain types of mistreatment can inflict psychological injury by compromising the integrity of the victim's selfhood. He says that this mistreatment can reduce victims

to a psychological state in which their continued physical existence will have little if any meaning or value. Whatever one chooses to call this state-"life without feeling alive", "partial death", or simply utter hopelessness-the net result...is a life hardly worth living.⁴²⁴

He goes on to say that for these victims, sometimes the only way of averting what reasonably appears to be the threat of psychological destruction is to actually destroy the source of their psychological injuries. In other words, for Ewing, this "feeling of utter hopelessness" is the psychological equivalent of death. He believes that this new formulation would eliminate completely the problems posed by the defence for battered women.⁴²⁵

Catherine Jo Rosen⁴²⁶ advances a solution which may be in keeping with the comparatively more individualised approach to self defence in England than in Scotland. This solution draws from the theoretical debate as to the importance of the distinction between justification and excuse in criminal law. She notes that categorising the defence as a justification means that the elements ought to be rigidly adhered to so that every case is assessed on the basis of the same objective standard. Very often battered women use deadly force in self defence under external circumstances where their act is not objectively reasonable. She argues that the defence ought to be returned to its original theoretical basis as an excuse in all cases. Viewing the defence in this way would allow recognition for the harm done to society but

⁴²⁴ Ewing 1990, p. 587.

⁴²⁵ For criticisms of this approach see, for example, Talbot, 1988 or Morse 1990.

⁴²⁶ 1986, p. 56.

allow for the fact that the conduct results from a woman's understandable inability to choose an alternative course of action due to overwhelming internal or external pressures.

Despite the undoubted potential in the law of self defence to incorporate cases involving battered who kill, this possibility has not been exploited to any great affect in England. Ironically the defence has been successful in the more objective common-law Scottish jurisdiction which may indicate that the willingness to interpret the law in the context of domestic violence is more important than content of the law itself. Before discussing the already mentioned strategy of using battered woman syndrome expert evidence as one possible avenue of reform, I now intend to continue by considering the second possibility available to a battered woman who kills: diminished responsibility.

CHAPTER FOUR.

Diminished Responsibility.

Introduction.

The second possibility available to a battered woman who kills her partner is diminished responsibility.⁴²⁷ As with provocation, this plea is available to an accused who did actually have the mens rea for murder but, owing to the presence of mitigating circumstances, is partially excused and convicted of the lesser crime of voluntary manslaughter in England and voluntary culpable homicide in Scotland. As we saw, in the context of provocation, it is the accused's loss of self control which mitigates a murder charge. Correspondingly, the essential element necessary for mitigation in a diminished responsibility case is mental abnormality short of insanity.⁴²⁸

Unlike attempts to bring women's experiences of living with cumulative violence within the scope of self defence or provocation, the defence of diminished responsibility has, on number of occasions, fitted.⁴²⁹ While this approach may be appropriate in certain cases involving battered women, to treat it as the only solution to cases involving battered women who kill would not serve to achieve true equality for battered women in the long term.⁴³⁰ By definition, the plea prevents women from claiming to have acted as a legal subject responsible for her actions. Instead of focusing on the cumulative nature of the violence and the appropriateness of response, the focus is shifted to the woman's mental state. While such an

⁴²⁷ For a general overview of issues raised when law and psychiatry and psychology converge see Allen, 1987, Rose, 1985, Haslam, 1817, Alexandar and Selesnick, 1966, Donnelly, 1982, Whitlock, 1963, Watson, 1985, Wily, 1962, Rose, 1962, Prins, 1980.

⁴²⁸ For an analysis of how the defences of provocation and diminished responsibility inter-relate see Mackay's analysis and discussion of fourteen cases where the defences were pleaded concurrently. 1988, pp. 411-423.

⁴²⁹ This is true of court's treatment of these cases in both Scotland and England.

⁴³⁰ A different view was expressed during interviews which I conducted with advocates at the Scottish Bar. One advocate, who was particularly concerned about the future of these cases, expressed the view that diminished responsibility was the most appropriate defence. His view was that just as equality for women in the workplace may require special treatment in the form of positive discrimination, equality for women in law may also require a special defence. He believes that diminished responsibility allows for the mental state peculiar to a woman who has been battered to be labelled. He considered that although the label attracts the attention of the court, it need not have connotations of mental abnormality but could instead be used to indicate in more general terms how responsibility could be diminished.

approach may enable an individual woman to excuse her action, albeit running the risk of incarceration, this approach, does nothing to further the understanding of battered women as a group or, more generally, the legal subjectivity of all women. In fact, by labelling these women as crazy, law runs the risk of perpetuating the injustice done to these women by refusing to adjudicate upon the reality of violence which dominates their lives.

Alive to this danger, in question ten I asked advocates to consider whether or not there was a need to develop the law on self defence and provocation any further given that diminished responsibility had been successfully invoked in a number of these cases.⁴³¹ The general response was to say that diminished responsibility was a special area of law which, along with provocation, is often used in negotiated pleas. Its uniqueness, however, lies in the fact that, in order to plead diminished responsibility, a psychiatrist has to be introduced to testify or, more generally, to state in a report, that the accused is suffering from a recognised psychiatric disorder. The overall opinion of the advocates who answered this question⁴³² was that diminished responsibility ought not to be used as a general "catch-all." In fact, as we will see below, the attitude to the usefulness of diminished responsibility among these advocates was very divided.

As we will see throughout, the doctrine of diminished responsibility has a much longer history in Scotland than does its English counterpart. Leniency towards mental weakness can be found in Scots law as early as the mid-seventeen hundreds while the defence of diminished responsibility has only recently been introduced into the English courts by section 2 of the Homicide Act 1957.⁴³³ Despite the

⁴³¹ See below.

⁴³² Four advocates for different reasons did not answer this question.

⁴³³ Further comparisons between how the defence operates in both jurisdictions can be found at the level of procedure. Smith has noted that a considerable number of Scottish verdicts of guilty of culpable homicide where diminished responsibility has been pleaded to reduce the quality of the crime have been majority verdicts. By contrast, because the practice in England is to require a unanimous jury verdict, a retrial is necessary in cases where the whole jury cannot agree to accept or reject the defence. Thus, Smith opines that in this respect the English system is less suitable than the Scottish system. Common to both jurisdictions is the fact that the accused assumes the onus of proving diminished responsibility on the balance of probabilities. Equally, the question of sentencing in both jurisdictions is a matter for the discretion of the trial judge. In England, the judge can bestow a prison sentence, or a probation order or a hospital order depending on what it considers to be appropriate while in Scotland, the judge has the additional freedom to make a guardianship order.

leniency towards mental weakness, which so characterised Scots law, the doctrine is now applied restrictively in Scotland to the point where evidence of mental illness seems to be required.⁴³⁴ Three years after the passing of the Act in England Lord Goddard CJ similarly directed a jury that the test was "not quite mad but a border-line case."⁴³⁵ However, this test has been displaced in favour of a more relaxed approach so that now English courts seem to apply the defence in a greater variety of cases than do the courts in Scotland, including, as we will see, cases involving battered women who kill.

THE LAW ON DIMINISHED RESPONSIBILITY IN SCOTLAND.

Historical Introduction.

Although the concept of diminished responsibility was beginning to take form in 1699⁴³⁶ it did not firmly take root in the Scottish courts until the nineteenth century.⁴³⁷ During that century, diminished responsibility was used as a mitigating factor in a variety of different cases. In the early days, it was recognised that certain cases of mental weakness should be dealt with by way of a conviction followed by a jury recommendation to mercy. The case of *Robt. Bonthorn*⁴³⁸ provides an early example of this practice.

There the jury found that

the intellects of the pannel are most remarkably weak, irregular and confused, and therefore recommended him to the mercy of the Court.⁴³⁹

The charge against Bonthorn was that of being a smuggler and of having had contraband goods. These goods were seized by a revenue-officer. By way of revenge, Bonthorn was charged with having pushed the revenue-officer over a precipice and onto the sea shore which resulted in the officer breaking his thigh bone and sustaining other injuries. The pannel was leniently dealt with by being "twice whipped at

⁴³⁴ See below the leading authority in the area, *HMA V Savage* 1923 J.C. 49 as reaffirmed by *Connelly V HMA* 1990 J.C. 349. See later, however, McKay's criticism of this interpretation, 1994, pp. 170-171.

⁴³⁵ *Spriggs* [1958] 1 QB 270 at 276.

⁴³⁶ See later Sir George Mackenzie's recognition of the need to find a place in law for mental conditions which fell short of insanity.

⁴³⁷ See T.B. Smith, 1962, pp. 241-251.

⁴³⁸ (1763) Hume, i. 38. cited by Gordon, p. 386.

⁴³⁹ Cited by Gordon, p. 386.

different places of the country where he dwelt, and for a sum of damages and expenses."⁴⁴⁰ Hume's approval of this practice, even when the jury had not specifically made a recommendation to mercy, is to be found in the later case of *Jas. Cummings*. Cummings killed a fellow-soldier while under the influence of melancholia and drink and was acquitted on the grounds of insanity. Hume disapproved of treating drunkenness in the same way as insanity and thought that a better solution would have been to recommend him to the royal mercy. He wrote that

[I]t may be questioned, whether, under the whole circumstances of this case, it would not have been a more correct and a more salutary judgement, to convict him of the murder, and recommend him to the royal mercy.⁴⁴¹

In cases where an accused had been charged with a capital offence, this method of doing justice was put on a more formal basis by requiring that the jury make a recommendation to mercy. Thus, in the case of *John McFadyen*⁴⁴² Lord Cowan explicitly directed the jury that

the safest verdict would probably be one of guilty, accompanied by such recommendation as the undoubted weakness of the pannel's intellect might appear to them to justify.⁴⁴³

As with cases such as Robert Bonthorn, the essence of this practice was mitigation rather than exoneration.

Alison explained this practice ought to be adopted

[I]f it appear from the evidence that the pannel, though partially deranged, was not so much as to relieve him entirely from punishment, the proper course is to find him guilty; but on account of the infirmity of mind, which he could not control, recommend him to the royal mercy.⁴⁴⁴

There are a number of other non-capital cases which were decided in the mid-nineteenth century in which diminished responsibility was used as a mitigating factor. One such case was *Dorothea Pearson Or Rodgers*.⁴⁴⁵ Here the accused was charged with the theft of a seven-week-old baby, Robert Hayman, from its mother in Glasgow and was found guilty with a unanimous recommendation to the merciful

⁴⁴⁰ (1763) Hume, i. 39.

⁴⁴¹ (1810) Hume, i. 40, cited by Gordon, p. 386.

⁴⁴² (1860) 3 Irv. 650.

⁴⁴³ Cited by Gordon, p. 387.

⁴⁴⁴ Alison, i. 652, cited by Gordon, p. 387.

⁴⁴⁵ (1858) 3 Irv. 105, cited by Gordon, p. 387.

consideration of the court. When considering sentence in the High Court, Lord Ivory heard the Crown enquiry into the state of the prisoner's mind and concluded that, although her temperament was strange and morbid, there was nothing to suggest that she was of unsound mind.⁴⁴⁶ The judge was influenced by several factors including the fact that the panel was the wife of an "honest and industrious"⁴⁴⁷ tradesman in Glasgow whereas the child was the illegitimate son of a seventeen-year-old Irish girl who seemed to be happy that the child be cared for by another.⁴⁴⁸ While the judge did not consider that the panel was suffering from insanity, he did consider that "the circumstances rendered her whole proceeding very little intelligible."⁴⁴⁹ Aware that the charge was a very serious one, which in other circumstances would attract a severe punishment, the judge was "more and more of the opinion that the minimum sentence which the court can impose...would be the most fitting in the present case."⁴⁵⁰ Accordingly, he sentenced the panel to two months imprisonment.

It was only during the latter part of the nineteenth century that diminished responsibility began to develop as a doctrine. It developed largely in the context of murder and was influenced almost exclusively by one judge, Lord Deas.⁴⁵¹ In all these cases, the accuseds showed tendencies towards mental weakness but did not meet law's strict test for insanity. Yet any feelings of natural justice would have been gravely offended at the imposition of the death penalty. To remedy this shortcoming in law, Lord Deas

⁴⁴⁶ p. 107.

⁴⁴⁷ p. 108.

⁴⁴⁸ p. 108.

⁴⁴⁹ p. 108.

⁴⁵⁰ p. 108.

⁴⁵¹ Gordon points out that this judge presided in six of the nine cases between 1867 and 1882, p. 388. Commenting on the association between Lord Deas and the doctrine of diminished responsibility Lord Keith, 1959, writes that this leniency was somewhat out of line with the judge's character and went on to suggest that the reason for the success may be due to the fact that "as a man of the soil he was more receptive to new ideas than the more sophisticated and educated judges of his time. He was the son of a small farmer in Fife and made his way at the Bar and to the Bench by his own unaided grit and determination."p. 112. Lord Keith later described some of the judge's other virtues "[s]till be it also set down to his credit that he often manifested a singular kindly consideration for respectable men and good-looking women who did not belong to the criminal classes and who had been landed in the dock by one sudden explosion of passion or by one false step."p. 113.

allowed for the invocation of the intermediate category of offence, culpable homicide, which took the case out of the realm of murder and allowed the judge to impose a suitable sentence giving what weight he considered appropriate to the mental state of the accused. This development was built on the practice which, as we saw, required the jury to make a recommendation to mercy on grounds of mental weakness. The only difference was that now the jury was directed to return a verdict of culpable homicide enabling the judge to give due consideration to the mental state of the accused.

The first and most famous of these cases was *Alex Dingwall*.⁴⁵² Dingwall was charged with the capital offence of murdering his wife. He and his wife were lodging on the night of the 31st of December 1866 in Stonehaven. In his Declaration, the accused stated that after returning to the house, he and his wife had argued over a pint bottle of whisky and money which he believed she had hidden. The accused had had about nine glasses of whisky that day. Despite remembering everything which occurred before and after the fatal stabbing, the accused could not remember with "any distinctness"⁴⁵³ anything about the actual killing itself. The possibility of countenancing the plea of intoxication was raised but dismissed on the facts.⁴⁵⁴ Lord Deas noted that although the accused had had a great deal to drink "he was habitually accustomed to it."⁴⁵⁵

The issue of insanity was raised and produced conflicting evidence. On the one hand, there was the evidence of Mrs. Fyffe, the co-owner of the house, who testified that she thought the accused "was at all times not quite right."⁴⁵⁶ This view was supported by the medical evidence of Dr. Howden, the medical superintendent of Montrose Asylum.⁴⁵⁷ However, the weight of medical evidence supported the different

⁴⁵² (1867) 5 Irv. 466.

⁴⁵³ p. 471.

⁴⁵⁴ Mr Fyffe, the co-owner of the house, testified that the Accused was speaking quite sensibly and did not appear to be intoxicated, p. 476.

⁴⁵⁵ p. 476.

⁴⁵⁶ p. 472.

⁴⁵⁷ However, this expert did not have a long-standing relationship with the accused and had, in fact, only recently examined him. It transpired that the expert's opinion was based on a number of inaccuracies. For example, he was influenced by the false fact that the accused had placed himself voluntarily in a Lunatic Asylum. In reality, this was merely a boarding-house where the accused had complete freedom

view that the accused was not insane. Eight expert witnesses, who had been medical attendants of the accused at various different stages, were of this view. Lord Deas was also influenced by the fact that both Mr and Mrs Fyffe treated the accused after the killing as a sane man.⁴⁵⁸ He considered that focusing on the issue of insanity "plac[ed] the case upon a false issue."⁴⁵⁹ He directed the jury to consider the possibility of culpable homicide, which he defined as murder with extenuating circumstances, although not of the variety which would warrant an acquittal on the ground of insanity. The judge identified a number of grounds which would justify a verdict of culpable homicide, one of which was the mental state of the accused.

1st, The unpremeditated and sudden nature of the attack; 2d, The prisoner's habitual kindness to his wife, of which there could be no doubt, when drink did not interfere; 3d, There was only one stab or blow; this, while not perhaps like what an insane man would have done, was favourable for the prisoner in other respects; 4th, The prisoner appeared not only to have been peculiar in his mental constitution, but to have had his mind weakened by successive attacks of disease. It seemed highly probable that he had had a stroke of the sun in India, and that his subsequent fits were of an epileptic nature. There could be no doubt that he had had repeated attacks of delirium tremens, and if weakness of mind could be an element in any case in the question between murder and culpable homicide, it seemed difficult to exclude that element here...The state of mind of a prisoner....might be an extenuating circumstance, although not such as to warrant an acquittal on the ground of insanity.⁴⁶⁰

The doctrine was more specifically defined in terms of mental weakness in *HMA V John McLean*.⁴⁶¹ There the panel was found guilty of theft by housebreaking.⁴⁶² The case came before the court by the more indirect route of a conviction with a recommendation to leniency because of his "weak intellect."⁴⁶³ The panel had spent two years in the Royal Lunatic Asylum in Aberdeen before he succeeded

to come and go as he pleased and to purchase unlimited supplies of drink. p. 478.

⁴⁵⁸ The accused replied to Mr Fyffe's question "[w]hat's ado?" by saying "[I]t's murder, Mr Fyffe" and Mrs Fyffe remarked was that "certainly [he] was a blackguard."p. 476.

⁴⁵⁹ p. 477.

⁴⁶⁰ pp. 479-480.

⁴⁶¹ (1876) 3 Couper 334.

⁴⁶² Gordon considers that this crime was probably still a capital offence but had by this time ceased to attract the death penalty, p. 386.

⁴⁶³ p. 334 of the judgement.

in escaping. His condition deteriorated during this time.⁴⁶⁴ The Lord Justice-Clerk certified the case for sentencing to the High Court. The doctor's report stated that the panel was not insane but that he was an imbecile, who had been weak-minded from childhood, and who would never cease to be weak-minded. The attack of mental disorder suffered by the accused while in the Asylum further added to his imbecility, leaving him with his general weak-minded disposition. His physical and mental weakness, combined with his varying mental state and the fact that insanity was hereditary in his family, contributed to the doctor's opinion that this medical disorder could possibly re-occur in the future. Lord Deas was called on to propose the sentence.⁴⁶⁵ The judge considered that it was appropriate for him to take mental weakness into consideration when passing sentence whether or not there had been a recommendation to leniency. He held that a prisoner, without being insane in the legal sense

may yet labour under that degree of weakness of intellect or mental infirmity which may make it both right and legal to take that state of mind into account, not only in awarding the punishment, but in some cases, even in considering within what category of offences the crime shall fall.⁴⁶⁶

Thus, Lord Deas considered that the court had a general power to consider mental factors in mitigation of punishment generally as well as a specific power in murder cases to reduce murder to culpable homicide on the grounds of mental weakness.

There were two other important cases presided over by Lord Deas which copperfastened the *Dingwall* principle. In the first of these, *Andrew Granger*⁴⁶⁷ was accused of stabbing a police constable, James Fraser, to death. For some days prior to the killing the panel had been drinking heavily. He left his home, near Beaulay, early on the morning in question to travel to Inverness. The defence argued that the panel ought to be acquitted on the grounds of insanity as a result of delirium tremens. Lord Deas was in no doubt that the panel was indeed suffering from delirium tremens but considered that it was for the jury

⁴⁶⁴ In fact he spent a full year in the refractory ward.

⁴⁶⁵ The case of *John Tierney* (1875) 3 Couper 152 was decided a year before *McLean* but it did not refer to *Dingwall*. Counsel for the Crown did, however, raise the question of diminished responsibility which was left to the jury. p. 388-389.

⁴⁶⁶ p. 337.

⁴⁶⁷ *Andrew Granger* (1878) 4 Couper 86.

to decide whether or not the panel's delirium tremens was severe enough to amount to insanity. No evidence emerged during the trial to suggest that the panel was insane and although Lord Deas directed the jury as to the possibility of insanity, he did not consider that it was the only option available. He also allowed for the possibility that

a weak or diseased state of mind, not amounting to insanity, might competently form an element to be considered in the question between murder and culpable homicide.⁴⁶⁸

He likened this case to that of *Dingwall* where the panel's mind had been weakened by a variety of causes, including repeated attacks of delirium tremens. The judge left it open to the jury to return a culpable homicide verdict as part of the greater charge of murder. The following day, Lord Deas sentenced the panel to penal servitude for five years.

In the second of these cases the prisoner was charged with stabbing of his wife in the region of her heart with a boning knife.⁴⁶⁹ The evidence before the court was that the prisoner was a quiet man when sober but was very violent and jealous when drunk. He drank very heavily during the period when his wife was in confinement awaiting the birth of their baby. His wife had asked that friends desist from supplying him with alcohol which caused him to become angry. He wished that she were dead and said that he would dance at her wake.⁴⁷⁰ At his wife's request, he was locked out of their house during her confinement, which was a further source of aggravation. The defence argued that the panel was insane at the time of committing the offence. This was borne out by the fact that he had borrowed two boning knives from the butcher; one of which he intended for use on his wife while he intended to kill himself with the other. It was further submitted in evidence that the panel suffered from delusions; he spoke to his sister just before the killing and told her that he had seen a relative who had been dead for some time. His suspicion of his wife's infidelity proved to be a figment of his imagination. Added to these recent indications of the panel's deteriorating mental condition was the fact that he had spent time in a mental hospital on account of insanity brought on by intemperance.

⁴⁶⁸ p. 103.

⁴⁶⁹ *Thos. Ferguson* (1881) 4 Couper 552.

⁴⁷⁰ p. 554.

Lord Deas did allow the jury to consider the question of insanity but reminded them that "mere weakness of mind is not insanity."⁴⁷¹ He pointed out that the effect of weakness of mind could be to reduce a charge of murder to culpable homicide as laid down in *Dingwall*. The judge took the opportunity to rehearse the essence of the doctrine. He said that it

was founded on a principle of natural justice, which recognised a distinction between what in other countries, equally enlightened as our own, was termed murder in the first and in the second degree, and which under our own humane system we could act upon better and more conveniently by the distinction between murder and culpable homicide. The undoubted fact that under an indictment for murder a verdict might be returned of culpable homicide, although not alternatively libelled, of itself sufficiently proved that we had in our law the principle...It was, however, a principle which required great care and discretion in its application.⁴⁷²

Even on the more relaxed basis of weakness of mind, the judge considered that it was much more difficult to apply *Dingwall* in this case. He pointed to the fact that the accused in *Dingwall* was kinder to his wife than was the prisoner in this case and that the killing there occurred during a moment of irritation whereas the killing in this case showed signs of great ferocity and force.⁴⁷³ The jury declined to apply the doctrine of diminished responsibility in this case opting instead for the older course of a verdict of guilty with a recommendation to mercy on account of being a man of weak mind.⁴⁷⁴

In *HM Advocate V Robt. Smith*⁴⁷⁵ the *Dingwall* principle was again applied, this time by a judge

⁴⁷¹ p. 557.

⁴⁷² p. 558.

⁴⁷³ There was expert testimony which showed that the force used was so great that the knife "went through the body almost to the other side." p. 559.

⁴⁷⁴ Lord Deas also presided in two other cases, *Helen Thomson Or Brown* (1882) 4 Couper 596 and *Francis Gove* (1882) 4 Couper 598 where the only mitigating factor in both cases was mental weakness. In the former, the panel was charged with the crime of having murdered her two-year-old illegitimate son by placing him head downwards in a butter-kit filled with water. This killing followed a visit by the panel to the Fife and Kinross Lunatic Asylum where her mother "raged" p. 596 at her and said that "it was she (the daughter) who had put her there. p. 596. The jury returned a verdict of culpable homicide and Lord Deas sentenced her to seven years' penal servitude. The latter involved a killing of a father by a son. Lord Deas noted that the "common sense judgement of the associates and friends of the panel" p. 599 was just as valuable as the evidence of medical men. One expert described the panel as being "an aggravated egotist." p. 599. According to the panel's niece he was "queer" p. 598 and his brother testified that he could not say he "was daft." p. 598. The jury returned culpable homicide and Lord Deas sentenced the prisoner to fourteen years penal servitude.

⁴⁷⁵ (1893) 1 Adam 34.

other than Lord Deas, Lord McLaren.⁴⁷⁶ The accused worked as a farm servant in Kincardine. He was disliked by his fellow farm-servants who regularly abused him verbally and generally treated him as a "pariah with whom they would hold no association."⁴⁷⁷ On the day on question, one of his fellow workers "booed" the accused. The deceased, George McCondach, then joined in this abusive behaviour. The accused went straight into his house, brought out two loaded guns, one of which he fired and killed the deceased. Lord McLaren asked the jury to

drive the popular notions of insanity from their minds, because a man might not be expected to be different from other men and at last exhibit his insanity by some violent and desperate deed.⁴⁷⁸

This case involved a form of weakness of mind which, to the ordinary lay-person, may not distinguish the accused as being different from other men but which nonetheless was a mental abnormality.⁴⁷⁹ The judge invoked the *Dingwall* principle, which he interpreted in the following way:

[N]ow if it were the law that a state of mental disturbance brought on by a man's own fault, by his own intemperance, going to the length of producing a physiological disturbance of the brain, might to that extent excuse him, it seems to me that the same result must follow when the disturbance of the mental equipoise was not due to a man's own fault, but to his being subjected to a system of incessant persecution.⁴⁸⁰

In addition to being notable as a case involving a judge other than Lord Deas, this case is also distinctive because it marks an attempt by a judge to define what was meant by diminished responsibility in terms more specific than weakness of mind. Although Lord McLaren did speak of a mental disturbance and a mind being displaced, he also spoke in the language of insanity by requiring a physiological disturbance of the brain which may be hidden from ordinary lay-people. Although it is unclear what Lord McLaren

⁴⁷⁶ The jury returned a verdict of guilty of culpable homicide and the accused was subsequently sentenced to penal servitude for life. Lord MacLaren also presided in another case involving diminished responsibility: the child murder case of *Abercrombie* (1896) 2 Adam 163 at p. 166. There the judge held that "[i]t is a perfectly legitimate topic of consideration that according to the evidence the act was done immediately after delivery, and apparently without premeditation, at a time when the woman would be experiencing acute physical suffering when she was alone and without assistance, and had apprehensions as to the disclosure of her condition." Cited by Smith, 1962, p. 243.

⁴⁷⁷ p. 51.

⁴⁷⁸ p. 47.

⁴⁷⁹ He suggested that "the man's mind was displaced from its balance by the long course of provocation and exclusion from the society of his comrades." p. 50.

⁴⁸⁰ p. 50.

meant by a physiological disturbance, this attempt to limit the effect of the doctrine preempts the sceptical attitude of courts towards the doctrine in modern times.

The Modern Law On Diminished Responsibility In Scotland.

Twentieth-century case law, with a few exceptions,⁴⁸¹ has tended to adopt the more restrictive approach of Lord McLaren. Earlier this century, the scepticism towards the doctrine was based on the perception that diminished responsibility exculpated the offender. Like insanity, the reason was on grounds of mental abnormality but unlike insanity, diminished responsibility allowed the accused to avoid a murder verdict without the risk of incarceration in a criminal lunatic asylum for an indefinite period. It is true that the accused is exculpated in diminished responsibility cases but this is merely a device to avoid the harshness of the death penalty until 1957 and thereafter the mandatory life sentence.⁴⁸² The real function, which Lord Deas envisaged for the doctrine, was to mitigate sentence. The importance of taking account of diminished responsibility as a mitigating factor when sentencing was reiterated recently in the case of *Strathearn V HMA*.⁴⁸³ The accused had repeatedly stabbed the deceased who had been convicted of sexually assaulting the accused's ten-year-old son. There was psychiatric evidence that the assault on the accused's son had caused the accused to suffer from post-traumatic stress disorder which affected the accused when he killed the deceased. The jury returned a verdict of culpable homicide on the ground of diminished responsibility and the judge imposed a sentence of eight years imprisonment. On appeal, counsel argued that the trial judge had not attached sufficient weight to the mental state of the appellant and relied on the case of *Kirkwood V HMA*.⁴⁸⁴ There Lord Justice General Normand held that

[t]he mental weakness, or weakness of responsibility, is regarded by our law as an extenuating circumstance, and it has effect as modifying the character of the crime, or as justifying a modification of sentence, or both. When the jury has, under the presiding judge's direction, given effect to this extenuating circumstance by reducing the crime from murder to culpable homicide, the judge has still to consider whether it should have further weight when he is imposing sentence. There is no more delicate and difficult judicial duty than that of giving proper effect

⁴⁸¹ See for example, *HMA V Graham* (1906) 5 Adam 212 where Lord Justice-Clerk Macdonald directed the jury along the lines of Lord Deas in *Dingwall*.

⁴⁸² Gordon, p. 383.

⁴⁸³ 1996 S.L.T. p. 1171.

⁴⁸⁴ 1939 S.L.T. 209.

to all the relevant circumstances which fall to be considered in imposing punishment, and the delicacy and difficulty of the task is much increased in cases of this kind.⁴⁸⁵

Relying on *Kirkwood*, the High Court agreed that the trial judge's approach to sentencing was to some extent flawed. Accordingly, the appeal was allowed and a sentence of seven year's imprisonment was substituted.

The more restrictive approach of the courts in more recent times seems to be rooted in a fear that allowing medical theories too much freedom would be to subordinate trial by jury to trial by psychiatrists⁴⁸⁶ and would result in too much leniency to accuseds.⁴⁸⁷ The early twentieth-century case of *HM Advocate V Aitken*⁴⁸⁸ illustrates the beginning of this shifting trend. There Lord Stormmouth Darling would only accept diminished responsibility if it was severe enough to resemble insanity and considered that something amounting to a brain disease would meet this test. In his direction to the jury he told them of the existence of a

rule of law...to the effect that there might be a degree of insanity, not sufficient to destroy criminal responsibility, and yet sufficient to modify the quality of the crime...It could only be applied if a jury were satisfied that there was something amounting to brain disease.⁴⁸⁹

This developing distrust has been further entrenched on several occasions since *Aitken*. The flexibility to consider mental states which *Dingwall* had inscribed into the law in the nineteenth century was definitively curtailed by the locus classicus on modern law, *H.M. Advocate V Savage*.⁴⁹⁰ The accused, an eccentric, was charged with the murder of one Jemima Grierson. Evidence was tendered which demonstrated that he often drank to excess and that he had received an injury to his head which

⁴⁸⁵ p. 211.

⁴⁸⁶ See later *Carraher V HMA* 1946 J.C. 108.

⁴⁸⁷ McCall Smith and Sheldon, 1992, list four main psychiatric categories which are most commonly raised in the criminal context. These are functional psychoses, including affective disorders and schizophrenic illnesses; neurotic conditions; personality disorders, including anti-social personality disorder or psychopathy; and mental illness of organic origin. These latter conditions are based on physical abnormalities or changes in the body which affect the functioning of the brain.

⁴⁸⁸ (1902) 4 Adam 88.

⁴⁸⁹ p. 94.

⁴⁹⁰ 1923 J.C. 49. It seems that this was the first case to use the term diminished responsibility.

contributed to his eccentric behaviour. Lord Justice-Clerk Alness directed the jury that

there may be such a state of mind of a person, short of actual insanity, as may reduce the quality of his act from murder to culpable homicide is so far as I can judge from the cases cited to me, an established doctrine in the law of Scotland. It is a comparatively recent doctrine and as has been said at least twice from the bench to a jury, it must be applied with care. Formerly, there were only two classes of prisoner-those who were completely responsible and those who were completely irresponsible. Our law has now come to recognise in murder cases a third class ...who, while they may not merit the description of being insane, are nevertheless in such a condition as to reduce the quality of their act from murder to culpable homicide.⁴⁹¹

Although the need to recognise cases which fell short of mental abnormality was recognised as early as 1695 when Lord Mckenzie wrote that the law should

by the rule of Proportions, lessen and moderate the Punishments as such, as though they are not absolutely mad, yet are Hypochondrick and Melancholly to such a Degree, that it clouds their Reason.⁴⁹²

And, although this need was being informally responded to throughout the course of the seventeenth-century until it was eventually formalised in *Dingwall* in 1867, Lord Justice-Clerk Alness directed the jury that giving effect to mental weakness was a comparatively recent doctrine. Again, overlooking the essence of the doctrine, the judge considered that diminished responsibility went to the "quality of the act" rather than a mitigating factor when sentencing. More detrimental to the development of the doctrine, however, was Lord Alness' definition which restricted the courts to considering a state of mind "short of actual insanity."⁴⁹³ The judge went on to outline the test which still represents the law on diminished responsibility in Scotland.⁴⁹⁴ He said that there must be some

[A]berration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility...And I think one can see running through the cases that there is implied...that there

⁴⁹¹ p. 50.

⁴⁹² Mackenzie, I, 1, 7, 2, cited by Gordon, p. 386.

⁴⁹³ See above.

⁴⁹⁴ See also the case of *Muir* 1945 J.C. 46 at pp. 48-49 where Lord Clyde spoke of a mental state "of such inferior responsibility that his act should have attributed to it the quality not of murder but of culpable homicide." Similarly Lord Sands referred to "partial insanity, which is that weakness or great peculiarity of mind which the law has recognised as possibly differentiating a case of murder from one of culpable homicide." Cited by Smith 1962, p. 245.

must be some form of mental disease.⁴⁹⁵

This definition has the approval of both Lord Cooper and Lord Normand. It was followed by Lord Cooper in *HM Advocate V Braithwaite*⁴⁹⁶ and by Lord Normand in *Carraher V HM Advocate*.⁴⁹⁷ The earlier case involved a killing of a wife by a husband after a quarrel. Lord Justice-Clerk (Cooper) considered that the *Savage* formula gave an "explicit"⁴⁹⁸ and "clear"⁴⁹⁹ statement of the sort of thing the jury had to look for and isolated key features of this case which made the test appropriate; "weakness of intellect," "aberration of mind," "mental unsoundness," "partial insanity," "great peculiarity of mind" and the like.⁵⁰⁰

Carraher was a Full Bench case which ruled that persons suffering from a psychopathic personality disorder⁵⁰¹ cannot plead diminished responsibility.⁵⁰² Lord-Justice General (Normand) excluded this condition on the basis that

[t]he Court has a duty to see that trial by judge and jury according to law is not subordinated to medical theories; and in this instance much of the evidence given by the medical witnesses is, to my mind, descriptive rather of a typical criminal than of a person of the quality of one whom the law has hitherto regarded as being possessed of diminished responsibility.⁵⁰³

⁴⁹⁵ p. 51.

⁴⁹⁶ 1945 J.C.

⁴⁹⁷ 1946 J.C. 108.

⁴⁹⁸ p. 57.

⁴⁹⁹ p. 57.

⁵⁰⁰ Professor Weihofen writing of Lord Cooper's summary in *Braithwaite* was of the opinion that it was "somewhat amorphous and even circular, for it seems to say only that he is not to be held fully accountable if he was not accountable." Cited by Gordon, p. 394.

⁵⁰¹ This is a clinical condition which includes persons who, from early childhood or early youth, show all the gross abnormality in their social behaviour and emotional reaction, and who do not, as a rule, show enough insanity to be certifiable as insane. Broadly speaking, it is a condition in which there is an inability on the part of the person affected to adapt himself to the ordinary social conditions. It is usually less than certifiable insanity and it is associated with emotional instability, Gordon, p. 116. For an English equivalent which Lord Keith 1959, pp. 116-117 referred to see *R V Matheson* [1958] 1 W.L.R. 474.

⁵⁰² Commenting on this case Ferguson notes that although *Carraher* is binding on trial judges, it has been ignored by the Crown when it has seemed appropriate to do so provided the State hospital is prepared to make a bed available. 1990. p. 64.

⁵⁰³ p. 117.

He firmly resisted any moves designed to broaden the defence by regarding the plea as being "anomalous"⁵⁰⁴ and one which "should not be extended or given wider scope than had hitherto been accorded to it in the decisions."⁵⁰⁵ Despite T.B Smith's view this decision was without prejudice to the possibility of accepting in future verified medical evidence of psychopathic personality disorder, the law has not yet been extended to include this condition.⁵⁰⁶ This decision, therefore, has the effect of not only preventing a person suffering from a psychopathic personality disorder from pleading diminished responsibility but also of preventing any conditions which were unknown in 1946 from being considered by the court. Thus, the wheel has turned a full circle so that what was initially a flexible concept, to be used by way of mitigation, is now a strictly defined concept.

As I noted already, this restrictive approach can be explained in part by the fear that allowing expert testimony in court as a matter of common practice would be to replace trial by jury with trial by psychiatrists. In *Braithwaite* the court rather disparagingly said that it had heard a "great many technical terms of psychotherapy."⁵⁰⁷ Similarly, Lord Cooper told the Royal Commission on Capital Punishment that

[A]t the time of the *Carraher* judgement the lawyers had become alarmed at a flood of psychological or psychiatric evidence introducing, or attempting to introduce, as new special defences all kinds of psychological and mental abnormalities with names which were unknown to us and to the man on the street...It was in reaction to that, I think, that the *Carraher* decision was pronounced.⁵⁰⁸

This resistance, however, has not been limited to these few cases. The courts have not taken any of the several opportunities presented to it to restore the doctrine with the flexibility it once had and indeed have on several occasions repeated that the reason for the scepticism is due to a fear that psychiatry will unduly favour criminals. In the case of *HMA V Blake*⁵⁰⁹ Lord Brand applied the doctrine in a non-murder cases

⁵⁰⁴ p. 117.

⁵⁰⁵ p. 118.

⁵⁰⁶ Smith 1962, p. 247.

⁵⁰⁷ p. 56.

⁵⁰⁸ R.C. Evidence of Lord Cooper, Q. 5468.

⁵⁰⁹ 1986 S.L.T. p. 661.

and directed the jury that if diminished responsibility were established by the accused who was charged with attempted murder, the appropriate verdict would be assault.⁵¹⁰ However, he warned that

[a] man is not of diminished responsibility unless there is abberation or weakness of mind. There must be some unsoundness of mind bordering on but not amounting to insanity. There must be some sort of mental illness. Any slight departure from the normal make up of a man will not do. One must distinguish between something in the nature of a mental disease and a vicious tendency, between the mentally sick and the morally bad.⁵¹¹

Although the court in *Connelly V HM Advocate*⁵¹² approved of the *Savage* formula, it did appear to be more receptive than previously decided cases to the possibility of introducing modern scientific knowledge into the court. The appellant was convicted in the High Court of Justiciary in Glasgow of the murder of Walter Stewart Webb. The defence had argued that the murder conviction ought to be reduced to one of culpable homicide based on diminished responsibility. Psychiatric reports relating to the appellant's mental make-up had been introduced by both sides. There was undisputed evidence to the effect that the accused had had a deprived childhood being, for all intents and purposes, abandoned by both parents. He had been admitted to a psychiatric hospital on one occasion after he had attempted to gas himself. A month later he visited the casualty department of Glasgow Royal Infirmary after bruising his forehead by butting it against the wall. On both occasions the appellant had been depressed but when he was treated at hospital his depression was regarded as being situationally determined and there was no evidence of mental disorder.

Counsel for the Crown called two psychiatrists to give evidence, Dr. Melvill and Dr. Baird, both of whom had examined the appellant. Dr. Antebi appeared for the defence. All three psychiatrists drew a distinction drawn between mental disorders and conditions which fall short of mental disorders. Dr. Baird regarded that, as a psychiatrist, he was only competent to express a view on responsibility when it was related to a mental disorder but not on an issue which related to an accused's personality. He opined that on the one hand, mental disorder was something which had at the root of it damage to the mind while

⁵¹⁰ Although cases such as *HMA V Cunningham* 1963 JC 80 and *Brennan V HMA* 1977 SLT 151 have confined the doctrine to murder cases, pointing to *Blake*, Ferguson argues that diminished responsibility is a relevant plea for all criminal charges. 1990. p. 62. See also *Miller V HMA* 1987 GWD 7-216.

⁵¹¹ p. 662.

⁵¹² 1990 J.C. 349.

on the other, personality disorder was just a question of categorisation of personality.⁵¹³ Although Dr. Baird was of the opinion that the appellant suffered from emotional deprivation and had a disturbed and immature personality evidenced by his inability to settle, he could not say that there were psychiatric grounds to show diminished responsibility. Similarly, Dr. Melville drew a distinction between an "impeded personality development"⁵¹⁴ and a mental capacity or mental handicap. Dr. Antebi for the defence testified that although the appellant did not suffer from a mental illness he did suffer from hallucinations and a type of personality which, when put under stress, would make him more irresponsible than he was innately. Although Dr. Antebi realised that there was no evidence of mental illness, he considered that the appellant's responsibility was diminished; a conclusion which he could not, however, base on psychiatric evidence.⁵¹⁵

Lord Caplan at trial limited diminished responsibility to cases involving a "degree of mental impairment bordering insanity" and considered that personality disorders are not, in and of themselves, sufficient to found a successful plea of diminished responsibility.⁵¹⁶ Counsel for the appellant argued on appeal that the case law from *Savage* to *Braithwaite* to *Blake* to *Carraher* ought to be re-examined. Counsel's particular argument was that Lord Alness's definition in *Savage* ought to be read as four alternatives and not cumulatively. Thus, he argued the test would allow for an "aberration or weakness of mind," or "mental unsoundness," or "a state of mind bordering on though not amounting to insanity," or finally "a mind so affected that responsibility is diminished from full responsibility to partial

⁵¹³ p. 352.

⁵¹⁴ p. 353.

⁵¹⁵ Lord Caplan at trial reported Dr Antebi's testimony as follows: "The appellant has told him that in the past he has hallucinated and heard whispers but Dr Antebi could not confirm that this had ever occurred. He would say that the responsibility of the appellant was at the time of the offence diminished but he did not feel that Connelly's judgement was so disturbed for him to be able to say that Connelly was at the time suffering from a mental illness. Independently of the incident the Appellant was irresponsible anyway. This is part of his personality. If under stress he becomes even more irresponsible. His whole life is a mess. In cross-examination Dr Antebi conceded that he was not able to support the sort of irresponsibility he was referring to on psychiatric grounds. He accepted that there was no question of any degree of mental disorder. He also accepted that all criminal activity could be described as irresponsible." p. 353.

⁵¹⁶ p. 351.

responsibility." If this were the case then the evidence of Dr. Antebi would be sufficient to fulfil the last part of the test.⁵¹⁷ Lord Hope, however, dismissed the appeal holding that this particular section of *Savage* when read alone was the least helpful description as it was "so obviously tautologous."⁵¹⁸ He said that

[t]he passage must be read as a whole with all its elements, and it must be read together with the remark at the end that running through all the cases one can see that there must be some form of mental disease. In my opinion it is the presence or absence of that particular characteristic, which has itself been variously described, which marks the borderline between what is acceptable and what is not.⁵¹⁹

He considered that the concept of diminished responsibility has been defined in terms which are sufficiently elastic and flexible enough to avoid the dangers of rigidity while at the same time preventing the doctrine from abuse.⁵²⁰ However, Lord Hope then went on to cite with approval the remark of Lord Justice-General (Normand) in *Carraher* to the effect that

[T]he court has a duty to see that trial by judge and jury according to law is not subordinated to medical theories.⁵²¹

There have been two other cases decided more recently which further approved the *Savage* formula. The first of these was *Martindale V HM Advocate*.⁵²² The appellant appealed against his conviction of murder on the ground that the trial judge had erred in law in withdrawing the verdict of culpable homicide from the jury. Two Crown psychiatrists gave evidence that there was no evidence of mental illness or mental disease or mental disorder which was necessary for a plea of diminished responsibility to succeed. Dr Ritson, for the defence agreed but he also gave evidence that the appellant was "impaired in his judgement."⁵²³ He explained that the appellant had been sexually abused as a child which meant that his behaviour was out of keeping with his usual personality. Although he had engaged

⁵¹⁷ p. 357.

⁵¹⁸ p. 358

⁵¹⁹ p. 358.

⁵²⁰ As he held "I should have thought that a greater knowledge and understanding of the human mind has made it somewhat easier for the concept in its present form to be applied." p. 358.

⁵²¹ p. 357.

⁵²² 1992 SLT 1093.

⁵²³ p. 1095.

in violence in the past, his very extreme reaction on this occasion was stimulated, not only by the incident at the time, but by the unresolved anger which he related to his childhood experience of being sexually assaulted.⁵²⁴ He considered that the appellant was suffering from diminished responsibility; while not insane, the appellant was "in a very disturbed frame of mind, such that his normal judgement was impaired."⁵²⁵ When crossexamined on this point, the witness said that although the appellant had lost self control he was not suffering from a mental disorder or mental illness. However, in re-examination he agreed that the appellant was in a state of mind which was bordering on mental disease or mental unsoundness at the time of the crime. When the trial judge sought clarification of this answer the psychiatrist replied that the appellant's responsibility was somewhat diminished in the sense he had described but that he was not suffering from a recognised form of mental disorder. Counsel for the defence conceded that the high water mark of this case was when Dr. Ritson agreed that at the time of the crime the appellant was in a state of mind bordering on mental disease or mental unsoundness but argued that this was sufficiently close to the borderline. Rejecting the argument, Lord Justice-Clerk (Ross) held that

[h]aving regard to the high water mark of Dr. Ritson's evidence we are satisfied that he cannot be regarded as having described the appellant as having any mental disorder or mental illness or mental disease. No doubt he made the remark about his state of mind bordering on mental disease or mental unsoundness, but it is not sufficient that the case can be described as one which is approaching the border. There is, as the Lord Justice General described in *Connelly*, a borderline and in the present case the simple point is that the appellant's case was on the wrong side of that borderline.⁵²⁶

Finally, there is the case of *Williamson V HMA*.⁵²⁷ Counsel for the appellant in this case argued that the trial judge had taken too narrow a view of the evidence and of the law as expounded and restated in *Connelly V HMA*. Although it was the unanimous view of four psychiatrists that there was no evidence of mental illness or disease, counsel pointed out that the jury were entitled to accept parts of the medical evidence adduced, and stressed three features of that evidence which, he argued represented the high water mark from the appellant's point of view. One of the psychiatrists (Dr. Craig) had expressed the view that

⁵²⁴ According to the appellant he had been subjected to a sexual assault by the deceased.

⁵²⁵ p. 1095.

⁵²⁶ p. 1095.

⁵²⁷ 1994 SLT 1000.

the appellant would benefit from treatment. The second (Dr. Antebi) expressed the view that the appellant suffered from mental disorder, while the third (Dr. Clark) considered that his state of mind was so disturbed that he was bordering on insanity at the time of the killing.⁵²⁸ Counsel recognised that *Connelly* had precluded personality disorders from being considered in diminished responsibility cases. However, he pointed out that while Dr. Antebi in that case was not prepared to say that the accused's responsibility was diminished on psychiatric grounds, in this case, the same witness expressed the view that the appellant was suffering from mental disorder.

Directing attention specifically to the law, counsel isolated two passages from the opinion of the Lord Justice General in *Connelly V HMA*. The first was the judge's opinion that the concept of diminished responsibility has been defined in terms which are sufficiently elastic of flexible to avoid the dangers of rigidity while at the same time preventing the doctrine from abuse. Counsel for the appellant argued that the judge's approach in the present case had lacked this flexibility and was unduly rigid. Rejecting the argument, the court held that they were not persuaded that the Lord Justice General intended to suggest that the test, as laid down by Lord Justice Clerk Alness in *Savage*, should be applied flexibly. In fact, the court held that the *Savage* criteria are precise and must be met before diminished responsibility can be made out but that they are readily applicable in our times having regard to the greater knowledge and understanding of the human mind which psychiatrists now have. Secondly, counsel pointed to that passage of the opinion where the Lord Justice General required evidence of a mental disorder or a mental illness or disease. Counsel argued that "a mental disorder" and a "mental illness or disease" were disjunctive so that the test for diminished responsibility could be met if there was expert medical evidence to the effect that the accused's mental condition amounted to either a mental disorder or, a mental illness or disease. Since one of the psychiatrists in the present case had described the appellant as suffering from a mental disorder, he argued that it would have been open to the jury to hold that the test for diminished responsibility had been satisfied. Here again, the court disagreed with the argument and held that the two expressions do not express alternatives but refer to the same thing. In any event, in this case the mental disorder was manifested only by abnormally aggressive or seriously irresponsible conduct. It was the

⁵²⁸ These opinions were not expressed collectively by all the psychiatrists.

appellant's very abnormal personality which enabled the diagnosis of mental disorder. The court held that this was insufficient to satisfy the test as laid down in *Savage* and reaffirmed in *Connelly*.

Thus, the decision of Lord McLaren to restrict the doctrine to cases involving a physiological disturbance was indeed prophetic. What started out in the Scottish courts as a doctrine to give the courts a degree of flexibility when dealing with cases of mental weakness seems now to be confined to conditions of mental illness. Shiels points out this irony when he remarks that despite their best efforts not to subordinate law to medical theories, courts now require that there be evidence of mental illness.⁵²⁹ Colin McKay,⁵³⁰ however disagrees with this narrow interpretation of law and points out that there have been cases where a learning disability or brain damage, which are not the same as mental illness, have been accepted as sufficient for the defence of diminished responsibility. Furthermore, he notes that the case of *Braithwaite* referred to weakness of intellect as a possible ground and that the trial judge in *Williamson* included organic brain damage as an alternative to mental weakness. On the one hand, McKay reconciles these cases with *Williamson*, on the other he shows us a possible way around this narrow definition. Although the court said that mental disorder meant the same as mental illness or disease, he points out that it did not construe mental illness and disorder disjunctively. The concept of mental disability, therefore, is a wider concept than mental illness. McKay goes on to note that this interpretation is consistent with the Mental Health (Scotland) Act 1984 which defines mental disorder as mental illness or mental handicap, however caused or manifested. Agreeing with Dr Chiswick, McKay calls for a fundamental review of the criminal justice system and mental disorders.

In view of the restrictive approach of the courts in Scotland, it is perhaps not surprising that the defence has not been used in cases involving battered women. Speaking of these difficulties advocates said that while the test for insanity is clear and in practice poses few difficulties, as one goes further down the scale to diminished responsibility, it is extremely difficult to prove and indeed difficult for advocates to understand. One advocate went as far as saying that "diminished responsibility doesn't exist as an objective category in Scots criminal law. Everybody poo-poops diminished responsibility because the test is too

⁵²⁹ 1994, p. 154.

⁵³⁰ 1994, p. 170.

high."

Despite these difficulties five advocates considered that diminished responsibility could be developed to accommodate these types of cases. One of these advocates thought that diminished responsibility, more than any other legal option, does allow for the exploration of background circumstances and so could be used profitably in these cases. Another considered that expert testimony on the battered woman syndrome could be further developed to open up this defence in Scotland, while another said that the experiences of women who kill, as recounted to her in consultation, very much resembled a condition where responsibility has been diminished. These women described themselves to her as being "demeaned" and "worthless." In her opinion, if diminished responsibility could be developed in such a way as to accommodate these cases and bestow, in an appropriate case,⁵³¹ a non-custodial sentence, then the defence could be appropriate. Recognising the danger of treating women more so than men as being in need of medical treatment, which she considered was evidenced by the willingness to give women tranquillisers when in prison, she went on to say that these cases should not automatically be treated as cases involving women of unsound mind. In her opinion, these women are not abnormal but because of the abuse suffered over the years at the hands of their partners, they have come to feel demeaned and worthless. Because this condition only lasts until such time as the abuse is discontinued, she suggested that perhaps the abusive partner ought to be labelled as being mentally unsound rather than the woman.

This advocate went on to enumerate the advantages of this plea. First, a woman who has spent up to one hundred days in custody, during which time she may have been sedated and subjected to several interviews with strangers, does not need the additional worry of a murder trial. Thus, a plea to culpable homicide is a welcome option partly because it avoids a murder trial but also because, in her experience, women in this situation often feel culpable. Culpable homicide can operate as a half-way house attributing culpability but allowing the woman to be released to continue raising her children. Of the two other advocates who considered that diminished responsibility contained potential for these cases, one thought that very much of the defence's difficulty could be removed were the onus of proving diminished

⁵³¹ Taking in to account the reality that the woman, if released, would not be a danger to society.

responsibility to be shifted to the Crown while the other thought that a solution involving something between a hospital order and a prison sentence was needed and advocated the establishment of a Royal Commission to advise the legal establishment on how best to proceed.

In question fourteen on the schedule I asked advocates to consider whether the Scottish courts would be more likely to use expert testimony in the future in connection with diminished responsibility rather than provocation or self defence. Although two advocates considered that diminished responsibility would be the defence most likely to be used in the future, advocates repeated the caveat that diminished responsibility is extremely difficult to prove in practice. They said that before battered woman syndrome expert testimony could be accepted in connection with diminished responsibility, it would have to be classed as a recognised psychiatric disorder.⁵³² One advocate considered that in his experience "diminished responsibility is not a player in these cases" and that provocation or self defence is more appropriate. The general approach of the remaining three advocates was based on their distrust of the testimony itself. As one prosecutor put it "the Crown would look long and hard at battered woman syndrome expert testimony."⁵³³

⁵³² Eleven advocates expressed this view. Two advocates for different reasons did not answer this question.

⁵³³ Despite the apparent initial doubt as to the likelihood of either the introduction of the testimony or its use in relation to diminished responsibility, some advocates went on to consider the possibilities. On the plus side, it was noted that both the defence and the testimony required the use of experts and that there was a similarity between the defence and the concept, which we will examine in more detail later, of "learned helplessness." Another reason advanced for this defence rather than any other was, unlike provocation and self defence, which involve objective considerations, diminished responsibility focuses on the accused's subjective state of mind and so necessitates the introduction of an expert to help the jury to interpret these hidden mental processes.

One advocate thought that the testimony could be used in connection with both provocation and diminished responsibility. Because the testimony is such highly emotive evidence, he thought that it would command the jury's attention and so help their understanding of life in a battering relationship. He felt that provocation would probably be the more attractive of the two; diminished responsibility being more esoteric. Furthermore, he considered that in any relationship involving a man and a woman there are going to be irrational feelings which may not necessarily be abnormal as required by diminished responsibility. Another advocate favoured generally the limited introduction of experts but based his objection to testimony on the battered woman syndrome on the grounds that it would create a separate defence for battered women which in turn would foster an expectation of sympathetic disposals in these cases. In keeping with the importance of informal justice, certain other advocates saw a limited informal role for the testimony. Here the feeling was that it could be introduced to help the jury to understand the background circumstances. One thought that the evidence could possibly be used as background evidence to educate an Edinburgh jury which may not be able to associate with the influence of economic pressures in a battering relationship while two others envisaged that it could be used as background evidence which

As I will now show, English law is not this restrictive and although the law is comparatively speaking quite recent, it encompasses a far wider range of cases than does its Scottish counterpart, including as we will see, cases involving battered women who kill.

THE LAW ON DIMINISHED RESPONSIBILITY IN ENGLAND.

The Modern Law On Diminished Responsibility In England.

The possibility of importing the Scottish doctrine of diminished into English law was mooted on two separate occasions in England before it was finally adopted by section 2 of the Homicide Act.⁵³⁴ The first was by the Royal Commission on Capital Punishment,⁵³⁵ which first explored the possibility of recommending the incorporation of the doctrine.⁵³⁶ The second was when the Army and Air Force Acts of 1955 were being debated at the Bill stage. On this occasion, the proposal, which was rejected, was that servicemen could be tried under Scots law in order to enable them the benefit of the defence of diminished responsibility. By 1956 the Government's attitude had changed. Both the Lord Chancellor and the Home Secretary spoke positively about the introduction of the doctrine into England. Once introduced, the Attorney General stated that "what we have done is to adopt and adapt the Scottish law of diminished responsibility in cases which do not amount to insanity."⁵³⁷

The law on diminished responsibility in England, therefore, has nothing like the history of its Scottish counterpart. Section 2 of the Homicide Act 1957 specifically affords the defence to someone suffering from mental abnormality of mind at the time of the killing.⁵³⁸ Unlike Scotland, the defence in

would help the jury to assess the woman's mental state at the time of the killing.

⁵³⁴ For an interesting commentary on the disorders which he most commonly encountered see generally Walker, 1973, pp. 139-165. These were the schizophrenics, the subnormals, affective disorders and a miscellaneous category including such disorders such as puerperal psychosis, senile dementia and in one case general paralysis of the insane.

⁵³⁵ {{ 407-413 of the Report. Cmd. 8932, cited by Smith 1957, p. 354.

⁵³⁶ However it erroneously believed that the doctrine in Scots law was restricted to murder cases. See Smith, 1957, p. 354.

⁵³⁷ H.C. Debates, Vol. 560, col. 1254; November 15, 1956, cited by Smith, 1957, pp. 354-355.

⁵³⁸ In the case of *R v Campbell* [1997] Crim. L.R. it was held that the defence is not available as a defence to a charge of attempted murder.

England has always been specific to murder. Section 2 enacts that

(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.(3) A person who, but for this section would be liable, whether as principal or accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

The defence has been successfully pleaded in cases as diverse as mercy killers, deserted spouses of disappointed lovers who killed while in a state of depression, persons with chronic anxiety states and battered women who kill.⁵³⁹ I will discuss how the defence has operated in cases involving battered women who kill in the next section.

Unlike the law in Scotland, which as we saw, now seems to require proof of mental illness, the English courts adopted the defence as a corrective to the M'Naghten rules.⁵⁴⁰ Thus, the relationship between diminished responsibility and insanity in England resembles more that envisaged by Lord Deas in Scotland in the late nineteenth-century. Indeed Smith and Hogan point out that Scots law on insanity⁵⁴¹ appears to be wider than the M'Naghten rules but that diminished responsibility is now interpreted more favourably to the accused in England than in Scotland.⁵⁴² This interpretation seems to be borne out by the case of *Byrne*⁵⁴³ where it was held that diminished responsibility is broad enough to encompass an irresistible impulse; a condition which, for many years, has struggled in vain, to gain recognition from the law of insanity. The rationale underlying diminished responsibility, therefore, is one based on moral

⁵³⁹ Smith and Hogan, 1996, p. 221.

⁵⁴⁰ Smith and Hogan explain that people who are actually insane in the "broad popular sense" may well be outside the narrow scope of the M'Naghten Rules but caught by the broader defence of diminished responsibility. 1996, p. 220. Analysing critically the Butler-C.L.R.C. proposal to reform the defence, Griew, 1988 recognised that it was an honest attempt at achieving clarity in the law. However, he concludes that section 2 is so badly worded that it can be made to work by a continued relaxed approach to its interpretation together with the use of expert evidence. See also, Smith 1957, who pointed out that unlike the English approach, the courts in Scotland do not regard the defence as a corrective to the M'Naghten Rules on insanity, p. 355 and Meakin, 1988 who argues that diminished responsibility ought to be viewed as a general defence that allows for individualistic justice which seeks to understand human nature and afford the opportunity to help rather than punish the weak.

⁵⁴¹ See, *HMA V Kidd* 1960 JC 61 or *Brennan V HMA* 1977 SLT 151.

⁵⁴² Smith and Hogan, 1996, p. 220.

⁵⁴³ [1960] 44 CAR 246.

responsibility. Thus, a man whose impulse is irresistible, bears no moral responsibility for his act because he has no choice; whereas a man whose impulse is more difficult to resist than that of an ordinary man bears a diminished degree of moral responsibility for his act.⁵⁴⁴

The defence operates around three key elements. First, there must have been an abnormality of mind at the time of the killing before a murder charge can be reduced to one of manslaughter. Second, the mental abnormality itself can take three different forms. It can arise from a condition of arrested or retarded development of mind, or any inherent causes or be induced by disease or injury. Finally, the mental abnormality has to substantially impair responsibility for the act or omission which causes the killing.

The facts of the case of *Byrne* were that a young woman had been strangled and her body was mutilated after death. Evidence was tendered to the effect that the defendant, from an early age had been subject to perverted violent desires. All three defence witnesses agreed that the appellant was a sexual psychopath, that he suffered from abnormality of mind and that such abnormality of mind arose from a condition of arrested or retarded development of mind or inherent causes.⁵⁴⁵ The impulses were said to be of a degree which was stronger than sexual impulses which he found very difficult to resist putting into practice. The act of killing the girl was done under such an impulse or urge. Lord Parker C.J. held that

"[a]bnormality of mind", which has to be contrasted with the time-honoured expression in the M'Naghten Rules "defect of reason," means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgement whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts, which must include a consideration of the extent of his ability to exercise will power to control his physical acts.⁵⁴⁶

Thus, the roaming condition of irresistible impulse was subsumed into the law of diminished responsibility. Although the judge reiterated the fact that medical evidence is important, he went on to emphasise that this is a question for the jury which is not bound to accept the evidence if there is other

⁵⁴⁴ Smith and Hogan, 1996, p. 220.

⁵⁴⁵ p. 250.

⁵⁴⁶ p. 252.

material before them from which in their judgement a different conclusion may be drawn.⁵⁴⁷ The role of the expert, however, does take precedence when determining the etiology of the abnormality of mind.⁵⁴⁸

Relying on *Byrne* the appellant in *R V Brown*⁵⁴⁹ argued that the expression "abnormality of mind" should be refined by stating the elements involved in the expression "mind." The recommendation of the Judicial Studies Board was that a judge should say that "mind" included perception, understanding, judgement and will. Without that, the appellant argued, there was a danger a jury might equate abnormality of mind with mental illness or insanity. While the court considered it desirable to supplement the statutory definition along the lines approved of in *Byrne*, it decided that these dangers were averted in the present case, first by the lay evidence as to the appellant's behaviour and medical evidence as to his state of mind and secondly, by the way in which that evidence was summed up by the judge. On the facts, therefore, the court held that although their attention may not have been specifically drawn to it, the jury must have directed their minds to the perception, understanding, judgment and will of the appellant, as effectively as if a *Byrne* direction had been given. Accordingly, the appeal was dismissed.

The issue of what constitutes an abnormality of mind was also raised by the Court of Appeal in the case of *R V Tandy*⁵⁵⁰ specifically a mental abnormality induced by disease. On the day in question, the appellant drank 9/10s of a bottle of Vodka. That evening she strangled her daughter after the child said that she had been sexually interfered with at home and wanted to live with her grandmother. The judge's summing up of the conflicting evidence was attacked on three grounds. First, it was said that while the medical evidence was that there might have been a compulsion to drink, at least after the first drink, and that it was the cumulative effect of the drink actually consumed that caused the advanced state of intoxication at the time of the killing, the judge removed the question of compulsion after the first drink

⁵⁴⁷ p. 253. See also *Gittens* (1984) 79 Cr. App. R. 272.

⁵⁴⁸ In the case of *Terry* [1961] 2 ALL ER 569 the court further refined *Byrne* and held that "in the light of [the interpretation that this court put on the section in *Byrne*] it seems to this court that it would no longer be proper merely to put the section before the jury but that a proper explanation of the terms of the section as interpreted in *Byrne* ought to be put before the jury. p. 574.

⁵⁴⁹ 1993 Crim. LR. p. 961.

⁵⁵⁰ (1987) 87 Crim App Rep 45. See Cowen's case report and the commentary by Professor Smith, 1988, pp. 308-310.

from the consideration of the jury. Secondly, he had also removed from the jury's consideration the evidence of one doctor that it was the alcoholism alone which had produced her abnormal state of mind which substantially impaired her responsibility for her acts. Thirdly, he had removed from the jury's consideration the issue which the Court of appeal in *Fenton*⁵⁵¹ said could arise; an abnormal state of mind caused by a person's craving for drink.

Relying on the *Byrne* definition of abnormality of mind, Watkins L.J. pointed out that although normal human beings drink frequently to excess, they do not suffer from abnormality of mind within the meaning of the phrase in section 2 (1) of the Act. On the facts of the case, it was for the appellant to show that she was suffering from an abnormality of mind at the time of the strangulation, that the abnormality of mind was induced by disease, namely the disease of alcoholism and that the abnormality of mind induced by the disease of alcoholism was such as substantially impaired her mental responsibility for her act of strangling her daughter.

The court went on to say that this test for the disease of alcoholism can be fulfilled in two cases. First, if it can be shown that the alcoholism had actually damaged the brain as a result of long-term drinking causing a gross impairment of judgement and emotional responses at the time of the killing. Second, if the accused could no longer resist the impulse to drink so that the drinking had become an involuntary act. However, the test for ability to resist only applies to the taking of the first drink. To hold otherwise would be to attribute the abnormality of mind at the time of killing to the mere fact of having drunk to excess rather than to an inability to resist taking the first drink which then led to the taking of several others.⁵⁵² Similarly, in order for a craving for drink or drugs in itself to produce an abnormality of mind within the meaning of the act, the craving must be such as to render the accused's use of drink or

⁵⁵¹ (1975) 61 Cr. App. R. 261 at 263.

⁵⁵² Professor Smith points out that the question at issue at the time of committing the offence does not relate to getting drunk but to the killing. The question at this stage, therefore, is the defendant's ability to understand and to refrain from the act of killing, not the ability to refrain from alcohol. As Professor Smith comments if the effect of the alcohol upon the defendant's mind is such that his mental responsibility for the act of killing is diminished, this must equally be so, whether the first drink was taken voluntarily or involuntarily. The mental abnormality at the time of the act is the same. However, in cases where the taking of the first drink was involuntary the killing is induced by disease and is therefore a defence while in cases where the first drink was taken voluntarily, it is not induced by disease, but simply by drinking, and, therefore, is no defence. 1988, p. 310.

drugs involuntary. On the facts therefore, it was found that there was no material misdirection and the appeal was dismissed.⁵⁵³

One of the questions before the court in the case of *R V O'Connell*⁵⁵⁴ was whether "injury" in section 3 was capable of being construed as to apply to the effect of Halcion, a sleeping drug which had been consumed by the appellant. The court held that there was no possibility of a defence of diminished responsibility having affected the outcome of the trial. One of the factors which influenced the court was that the drug could be absorbed and eliminated rapidly by the body, so that within six hours of injection its effects on the brain, not counting the possibility of withdrawal symptoms, have worn off. Effectively, therefore, the effect of this drug is the same as the effect of alcohol. Thus, the court took the opportunity to re-state its view that it could not have been the intention of Parliament that the transient effect of drink or drugs should be regarded as capable of causing injury giving rise to abnormality of mind within the heading of "injury."⁵⁵⁵

*Lloyd Sanderson*⁵⁵⁶ directly addressed the issue of what was meant by abnormality of mind arising from an inherent cause. The appellant had a stormy relationship with his girlfriend and suspected deception. On the evening in question a violent argument developed between them in her mother's flat. The appellant killed the deceased by hitting her one hundred times with a wooden implement.⁵⁵⁷ The Court of Appeal held that the jury should have been directed to consider the evidence of Dr. Coid, a consultant psychiatrist, relating to the appellant's paranoid psychosis under the heading of abnormality of mind arising from an inherent cause. The psychiatrist was of the opinion that the appellant was suffering from a paranoid psychosis at the time of killing which substantially impaired his mental responsibility for his acts at that time. The paranoid psychosis, which caused the appellant to form incorrect and abnormal

⁵⁵³ See also case comment, anon, 1989.

⁵⁵⁴ [1997] Crim. L.R. p. 683.

⁵⁵⁵ In his commentary on the case Professor Smith points out that whether the transient effect of alcohol or any other drug is an injury within the meaning of section 2 is a question of law. Furthermore, he believes that the court's opinion is right in principle. 1997, p. 684.

⁵⁵⁶ (1994) 98 Crim. App. Rep. 325.

⁵⁵⁷ This was either a stave, a cricket bat or a hockey stick.

beliefs about people, although it may have been exacerbated by his drug taking, had already affected his mind before he took the drugs. The cause of the psychosis was the appellant's violent family background coupled with a troubled relationship between both his natural father and later his step-father and him.

Although the issues were not directly in point in the case of *Lloyd Sanderson*, the court did express a view on what was meant by the phrase "induced by disease or injury" and "arrested or retarded development of mind." On the former, the court reasoned that since Parliament deliberately refrained from attributing disease or injury to the mind, by also including inherent causes, it must have intended that induced by disease or injury encompassed "organic or physical injury or disease of the body including the brain."⁵⁵⁸ Again, although not directly in point in that case the trial judge explained that a condition of arrested or retarded development of the mind applied to people who were mentally subnormal and who have been born with this condition.

Although there has not been a great deal of case law as yet on precisely which conditions are embraced by the notion of abnormality of mind, it appears that only the heading "arrested or retarded development of the mind" requires that there the abnormality be organic. Although the other two headings, "induced by disease or injury" and "inherent causes," both have scope for including a mental abnormality which is functional rather than organic, the inherent causes aspect appears to more directly cover a mental abnormality which is functional in nature.⁵⁵⁹

The question as to the degree of impairment necessary also arose in *Byrne*.⁵⁶⁰ Here again, the court held that the jury could legitimately differ from the opinion of doctors since "the step between 'he did not resist his impulse' and 'he could not resist his impulse' is, as the evidence in this case shows, one which is incapable of scientific proof."⁵⁶¹ Thus, problems which, according to the state of medical knowledge at that time were scientifically insoluble, were left to the jury to be decided "in a broad

⁵⁵⁸ p. 336.

⁵⁵⁹ See also Cowley, 1995, pp. 61-62.

⁵⁶⁰ [1960] 44 CAR 246.

⁵⁶¹ p. 253.

common-sense way."⁵⁶²

The trial judge in *Regina V Lloyd*⁵⁶³ also considered the issue of "substantial impairment" and directed the jury that the word

[s]ubstantial need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired, and, if so, was it substantially impaired?⁵⁶⁴

According to the medical evidence the defendant was suffering from mental abnormality, but none of the doctors would go so far as to say that his mental abnormality substantially impaired his mental responsibility, although all of them said that his mental responsibility was impaired to some extent, and that it was not trivial or minimal.⁵⁶⁵ Counsel for the appellant argued that substantially could mean one of two things: it could mean that the impairment was real and not illusory, or it could mean that it was of considerable amount. Furthermore, he argued that the judge should have assisted the jury by helping them as to its meaning which in his opinion was that it meant "real" or "not trivial."⁵⁶⁶ Since the doctors had said with one voice that the impairment here was not minimal, was not trivial, he concluded that the defence of diminished responsibility was made out.⁵⁶⁷ The court, however, found that it was wholly unable to accept that submission⁵⁶⁸ on the grounds that the word "substantially" was obviously inserted in the Act with a view to carrying a meaning. Instead of counsel's proposed test, it looked to *Byrne* and cited with approval the test laid down by Finnermore J in *R V Simcox*.⁵⁶⁹ There the judge held that

[t]here is no scientific precise test. That cannot be and never can in human conduct, otherwise

⁵⁶² p. 253. See also *Walton V R* [1978] 1 ALL ER 542.

⁵⁶³ [1967] 1 Q.B. 175.

⁵⁶⁴ p. 176.

⁵⁶⁵ See also in the case of *Campbell* (1986) 84 Cr App Rep 255 at 259 where the court held that a mere vulnerability to impulsive tendencies and consequently impulsive acts falls short of the test.

⁵⁶⁶ p. 177.

⁵⁶⁷ p. 180.

⁵⁶⁸ p. 180.

⁵⁶⁹ *The Times*, February 25, 1964.

we should not need juries or anybody, and if you will allow me to say so, I think you should look at it in a broad common-sense way and ask yourselves, having heard what the doctors have said, having made up your minds about it, knowing what this man did, knowing the whole story, 'Do we think, looking at it broadly as common-sense people, there was a substantial impairment of his mental responsibility in what he did? If the answer to that is 'yes,' then you find him not guilty of murder but guilty of manslaughter. If the answer to that is 'no,' there may be some impairment, but we do not think it was substantial, we do not think it was something which really made any great difference, although it may have made it harder to control himself, to refrain from crime, then you would find him guilty as he is charged in the only charge to the indictment!⁵⁷⁰

More recently, in his commentary on the case of *R V Mitchell*⁵⁷¹ Professor Smith notes that the court declined to hold that it was necessary for the judge to direct the jury about the meaning of the word "substantially" using the *Lloyd* test. Instead, he writes that these meanings do no more than tell a jury that "substantially" means "substantially" which they should be able to work out for themselves.⁵⁷²

Diminished Responsibility In Britain As A Solution To The Problems Posed By Battered Women Who Kill.

In view of the diversity of cases which have been decided under the defence in England and the scope which it affords to conditions which are not just organic in nature, it is perhaps not surprising that diminished responsibility has been the most successful of the three possible defences for battered English women who kill. Ironically, in view of the doctrine's history in Scotland, as we will see in more detail in later, at least one court in Scotland has objected to the use of expert testimony on the battered woman syndrome to support a plea of diminished responsibility.

The two cases which have attracted the most publicity in England were Kiranjit Ahluwalia where diminished responsibility formed the basis for her release in 1992, and Sara Thornton where diminished responsibility together with provocation contributed towards her release in 1996. Despite their initial challenge to the law on provocation, both cases when retried, sounded more of diminished responsibility than provocation. In *Ahluwalia*, the Court of Appeal considered that the appeal was "on stronger

⁵⁷⁰ pp. 180-181 of *Lloyd*.

⁵⁷¹ [1995] Crim. L.R.

⁵⁷² The other argument made in the case was that the judge had wrongly invited the jury to consider the two elements in section 2(1) of the Homicide Act 1957, abnormality of mind and substantial impairment of mental responsibility in the wrong order, or at least allowed them to do so. This argument was dismissed on appeal, the court holding that it was not the law that the elements of an offence or defence must always be considered in the order in which they are set out in the section. See Percival, 1995, p. 506.

ground"⁵⁷³ when based on diminished responsibility. The new evidence which was overlooked at the initial trial and, which in part formed the basis for the appeal, was the expert's opinion⁵⁷⁴ that the appellant was suffering from endogenous depression at the time of the killing. This evidence when combined with the evidence of neighbours as to the appellant's "strange behaviour"⁵⁷⁵ after lighting the fire warranted the ordering of a retrial. The outcome of this retrial was the acceptance of a plea to diminished responsibility by the prosecution so the issue of diminished responsibility was not dealt with in any depth.

Since both provocation and diminished responsibility were left to the jury in the "tortuous inquisition"⁵⁷⁶ which was Sara Thornton's case, the basis for the verdict is unclear. It seems, however, that diminished responsibility was the main basis. Passing sentence, the judge held that her responsibility for the killing was diminished by an abnormality of mind and, were he sentencing her to provocation, the sentence would have been the same.⁵⁷⁷ Mr Justice Scott Baker directed the jury to consider the accused's personality disorder in the context of the history of violence thereby recognising the importance of cumulative provocation. However, the personality disorder was not discussed in the context of provocation. Instead it was deemed to be serious enough to come within the definition of abnormality of mind in section 2 of the Homicide Act 1957. The disorder included vulnerable attention-seeking behaviour, histrionic personality, past suicide attempts, slashed wrists on one occasion, her throat on another. Emphasis was placed on the fact that she spent time in a hospital under the Mental Health Act 1983 following an occasion when she had been found wandering in the streets without her clothes holding a teddy bear.⁵⁷⁸ According to the evidence of Dr. Glatt, who was an authority on alcoholism, this would have been "horrendous enough"⁵⁷⁹ for a person of normal fortitude but would have been unbearable for

⁵⁷³ p. 899.

⁵⁷⁴ The expert was a recognised medical practitioner for the purposes of the Mental Health Act 1983.

⁵⁷⁵ p. 900.

⁵⁷⁶ Susan Edwards and Charlotte Walsh, 1996, p. 857.

⁵⁷⁷ Cited by Edwards and Walsh, 1996, p. 857.

⁵⁷⁸ Edwards and Walsh, 1996, p. 858.

⁵⁷⁹ Cited by Edwards and Walsh, 1996, p. 858.

a person suffering from a personality disorder.

After a legal wrangle of over three years in the case of *Ahluwalia* and six years in the case of *Thornton*, the law finally settled on the defence of diminished responsibility as a solution to the problems which the cases presented to the courts. The fact that these cases have found a haven in the law must be a more just solution than a murder verdict. However, the suitability of describing these cases as involving women of unsound mind is a question which still attracts a great deal of controversy, even from within the ranks of the judiciary itself.⁵⁸⁰ Lord Steyn, for example, in the case of *Luc Thiet Thuan V R*⁵⁸¹ was not content to allow diminished responsibility to be used as a general catch-all if it meant not challenging the law on provocation in an appropriate case. Some of these cases may indeed lie somewhere on the borderline between provocation and diminished responsibility. Indeed certain others may embody more a flavour of self defence. The challenge which these cases present to the law is to find in every case an appropriate resting place. This involves assessing each individual case on its own merits as it comes to court. Each legal option is separate from the other. While diminished responsibility, in certain cases, may be appropriate, in certain others it may not.⁵⁸² The law on provocation has come a considerable distance since the time of Sara Thornton's first appeal. Instead of fearing future developments and retreating into existing legal categories, the law ought to allow for a continued development, never underestimating the capacity of the law to facilitate change when justice demands change.

Despite the seeming justice of this solution, it is not a coincidence that both of these cases took such a long time to be recognised by the law and that when law did eventually recognise these cases, it treated both, not as provocation cases, which they started out as, but as cases involving abnormalities of mind. This apparent inability to deal with these cases as killings in self defence or killings while suffering from a loss of self control has been explained by feminists in terms of a more general problem which law has when dealing with women. I intend to discuss some of these general concerns in part three as well as

⁵⁸⁰ I will examine other criticisms advanced by feminists in chapter six.

⁵⁸¹ [1996] 2 ALL ER 1033.

⁵⁸² As Lord Steyn held, diminished responsibility does not "cover the whole field of significant mental attributes which may affect provocation". p. 1055.

examining one possible solution to these problems which is gaining recognition in England: the introduction of expert testimony on the battered woman syndrome. Before doing so, however, I now intend to focus attention on the defence with which I am most concerned in this thesis: provocation.

CHAPTER FIVE.

Provocation.

Introduction.

The third possible defence available to a battered woman who kills is provocation. The essence of provocation, in both England and Scotland, is that the accused must have killed while suffering from a loss of self control caused by provocation. A successful plea of provocation operates in murder cases to reduce a charge from one of murder to a lesser charge of voluntary culpable homicide in Scotland and voluntary manslaughter in England. In both jurisdictions, therefore, although the accused may have killed intentionally, the loss of self control operates as a mitigating circumstance sufficient to take the case out of the realm of murder and into the less serious category of criminal homicide. Underpinning the defence in both jurisdictions is the common law. The defence of provocation in Scotland is still governed by the common law while the common law defence in England has been modified by section 3 of the Homicide Act 1957. This Act has changed the law on provocation in England in many respects which I will discuss throughout. Some of these changes markedly distinguish English law from Scots law; insulting words, for instance, since the passing of the Act can be counted as provocative behaviour in England, while Scots law does not recognise verbal provocation.⁵⁸³ The most significant change which the Act has precipitated is to change the focus from an objective-based inquiry to one which is more subjective than objective.

THE LAW ON PROVOCATION IN SCOTLAND.

Provocation and Self Defence.

Hume and Alison, writing in the eighteenth century, wrote about the plea of culpable homicide in very flexible terms. For Hume, this result was sometimes achieved on the basis of unjustifiable self defence, either because the accused could have escaped or because he started the quarrel⁵⁸⁴ whereas, in other cases, it was achieved on the different basis of provocation. Similarly, Alison described the plea of

⁵⁸³ However, see the case of *Rutherford V HMA* 1997 S.C.C.R. 711 below and the commentary by Ferguson 1998, pp. 20-21.

⁵⁸⁴ Hume, i 223, 232. Like Hume, Alison also wrote of the possibility of allowing for unjustifiable self defence. However, he limited its applicability to cases which involved an excessive reaction, cited by Gordon, p. 767.

culpable homicide on a combined basis of provocation and self defence. He wrote that persons who were "provoked"⁵⁸⁵ and "persons who were placed in circumstances of real or supposed danger"⁵⁸⁶ ought to be treated in the same way. He argued that there is a duty to exercise self control in both cases and a verdict of culpable homicide must be returned in cases where the requisite control had not been exerted or where there was a belief that the danger was not real. What may have been a pragmatic way of ensuring that justice was done in the eighteenth century, whether on the basis of imperfect self defence or provocation, has proved problematic for courts in modern times.

One controversial question with which courts in the twentieth century have been required to deal, relates to the conceptual basis and consequent verdicts associated with each of these defences. Did the fact that the defences were intertwined in the eighteenth century mean that self defence could now be capable of being a plea in mitigation and provocation an exculpatory plea? This question was answered in the affirmative in the case of *HMA V Kizileviczius*,⁵⁸⁷ at least in respect of the mitigatory potential of self defence. There, Lord Jamieson distinguished between three pleas which were open to the accused; self defence leading to an acquittal, self defence leading to a conviction of culpable homicide and provocation leading to a conviction of culpable homicide. The judge held that before the second option could mitigate a murder charge to one of culpable homicide, the accused would have to have feared for his life and have acted in heat and without thought.

This confusion existed in the law until the case of *Crawford V HMA*⁵⁸⁸ where the law formally distinguished between self defence and provocation. *Crawford* ruled that the difference lies in the fact that the defence of self defence is a special defence, which requires a special plea,⁵⁸⁹

⁵⁸⁵ Alison, i. 92, cited by Gordon, p. 768.

⁵⁸⁶ Alison, i. 92, cited by Gordon, p. 768

⁵⁸⁷ 1938 J.C. 60 at 63.

⁵⁸⁸ 1950 J.C. 67.

⁵⁸⁹ Jones and Christie, 1996, p. 149 inform us that the term "special defence" refers to at least four identifiable defences, alibi, incrimination, insanity, and self defence. This means that the accused is not allowed to state these defences unless a written plea has been lodged at least ten days before the trial, where the accused is cited for trial before a High Court, or at or before the first diet, where the accused is cited for trial before a sheriff-and jury-court, except where s/he is able to satisfy the court that there was

whereas, provocation is not a special defence as it is always available to the accused by way of a plea in mitigation. This distinction was reaffirmed in the case of *Fenning V HM Advocate*.⁵⁹⁰ The appellant appealed to the High Court of Justiciary against the charge of murdering one Paterson on two grounds. First, he argued that the presiding judge, when dealing with the defence of self defence, had failed to direct the jury that the defence could still operate to reduce a charge of murder to one of culpable homicide if he was satisfied that the appellant had used unnecessary force or had continued to use violence after the danger had passed. Second, he argued that the judge had erred in failing to direct the jury that, when considering the plea of self defence, they should have made allowance for the appellant's excitement and fear at the moment of the attack on him. Lord Cameron cited with approval the dictum of Lord-Justice-General Cooper in *Crawford* where the distinction was made on the basis that self defence was a special defence whereas provocation was merely a plea which was always available to the accused. The judge in *Fenning* added that provocation and self defence could be distinguished on yet another basis; the distinct factual circumstances underpinning each defence. Provocation, he held, is

a plea which can only properly arise for consideration once the jury have reached a conclusion on the "special defence" and rejected it. Once that decision has been made, then and only then, does the plea of "provocation" become a legitimate matter for consideration, and in considering that plea it is for the jury to consider, of new, in light of the directions given by the presiding judge, the whole evidence bearing upon the issue of homicide. The issue of self-defence and the issue of "provocation" are not entirely different in substance and effect, but their solution is dependent upon quite distinct and distinguishable factual circumstances, and are not matters for concurrent consideration.⁵⁹¹

The law's official delineation, therefore, is that the function of self defence is to exculpate, whereas, provocation merely operates by way of a plea in mitigation. However, in practice, Scottish practitioners⁵⁹² informally use provocation in a similar way to Hume and Alison and allow for culpable homicide on the basis of provocation in cases of unjustifiable self defence. These cases, in modern times, take such forms as the use of force which was excessive but not cruelly excessive. In this respect Scots

cause for his/her not having done so.

⁵⁹⁰ 1985 J.C. 76.

⁵⁹¹ p. 79.

⁵⁹² See again chapter one where advocates whom I interviewed confirmed that this practice still exists in Scotland in modern times.

law comes very close to the Australian concept of excessive self defence,⁵⁹³ which as we saw, also operates to reduce murder to manslaughter. This practice seems to be in accordance with the general practice in Scots law, which allows for a reduction from a murder charge to one of culpable homicide, by anything which shows an absence of mens rea. Lord Thomson in his charge to the jury in *HM Advocate v Byfield And Others*⁵⁹⁴ told the jury that the act of the accused fell short of murder but did not warrant the defence of self defence because there was a way of escape which could and should have been taken. However, he held that it was still open to the jury to apply the principle of provocation on the basis that

[W]ell he shouldn't have done what he did but it is not murder and in circumstances of that kind the verdict would be culpable homicide. It is sometimes said that this arises from an application of the principle of provocation and you can apply that to this case too. It comes in a way to the same thing.⁵⁹⁵

Macdonald's description of the law on provocation, as reaffirmed in *HMA v Kizileviezius*⁵⁹⁶ appears to have been adopted as the basis of the modern law of provocation in Scotland. Macdonald wrote that the essence of the defence is as follows:

[B]eing agitated and excited, and alarmed by violence, I lost control over myself and took life, when my presence of mind had left me, and without thought of what I was doing.⁵⁹⁷

The essence of the defence is loss of self control of the variety when

someone...is so provoked by the deceased that he sees red, and determines on the spot that he will "swing for the bastard," like the husband who kills his wife's paramour on hearing of their adultery.⁵⁹⁸

Although loss of self control still remains an essential element of provocation, Macdonald's description has been refined in a number of ways. There are a number of other requirements, which I will now discuss, which must be met before a plea can be successful.

⁵⁹³ A concept which we encountered in chapter three and which Gordon p. 769 uses as a comparison. See again the cases of *McKay* [1957] VR 560 and *Howe* (1958) 100 CLR 448.

⁵⁹⁴ Glasgow HC Jan 1976 unrep.

⁵⁹⁵ Cited by Gordon, pp. 16-17.

⁵⁹⁶ 1938 J.C. 60, 1938 SLT 245.

⁵⁹⁷ JHA Macdonald, 1984, p. 94.

⁵⁹⁸ Gordon, p. 771.

The Nature of the Provocation.

There has been considerable debate in Scotland as to what exactly constitutes provocation in law. It seems to be unanimously accepted, by the law and legal writers⁵⁹⁹ that a serious assault can constitute provocative behaviour. However, it is more difficult to find a definitive view on the legal position relating to provocation, which is less physical, such as a minor assault, or verbal provocation.⁶⁰⁰ The concept of serious assault has been interpreted by the Faculty of Advocates⁶⁰¹ to mean "real" or "physical" injury. All of the main institutional writers⁶⁰² have limited what can legally count as provocation to a physical injury and have excluded insulting words, disgusting behaviour, such as throwing the contents of a chamber pot over a man's face,⁶⁰³ and minor assaults from counting as sufficient to ground a successful plea of provocation. Gordon believes that Scottish judges probably would allow provocation to go to the jury on the basis of a minor assault. While this expansion could help to define provocation as a doctrine separate and distinct from self defence, the widely held fear is that the concession would lead eventually to the opening up of provocation to encompass insulting words or gestures.

The traditional approach of Scots law was not to allow insulting words or disgusting conduct to count as provocation. This stance is based on the view that "[s]ticks and stones may break your banes, but words will never hurt you."⁶⁰⁴ Despite this view, there have been a number of cases where conduct not

⁵⁹⁹ Such as Gordon, pp. 770-771; Ferguson, 1990, p.57; Jones and Christie, 1996, p. 193; McCall Smith and Sheldon, 1992, p. 167.

⁶⁰⁰ McCall Smith and Sheldon, 1994, p. 167 reconcile the confusion, which we will consider in more detail later, by stating that whether or not conduct short of an assault can be considered to be provocation depends entirely upon the trial judge's view as to its seriousness.

⁶⁰¹ R.C. Evid. of Faculty of Advocates, Q. 5662-5663, cited by Gordon, p. 771.

⁶⁰² Such as Hume, i, 239, Burnett, 14, Alison, i, 12, Macdonald, 94, cited by Gordon pp. 770-771. Hume, for example, wrote that "no provocation of words, the most foul and abusive or of signs or gestures, however contemptuous or derisive soever, is of sufficient weight in the scale. p. 93, cited by McCall Smith and Sheldon, 1994, p. 167.

⁶⁰³ Wm. Aird (1693) Hume, i. 248. Cited by Gordon, p. 777.

⁶⁰⁴ Gordon, p. 777.

amounting to an assault was accepted as potentially provocative.⁶⁰⁵ In the case of *Stobbs V HM Advocate*⁶⁰⁶ for example, on the basis that the case involved a murderous assault,⁶⁰⁷ Lord Cowie left the issue of provocation to the jury since the deceased gave a "rough hint" that he would tell the accused's wife that he had been unfaithful.⁶⁰⁸ However, some seven years later, in the case of *Cosgrove V HM Advocate*⁶⁰⁹ Lord Cowie handed down a different verdict. Despite defence counsel's argument that an unrepentant confession of indecent adultery to acquaintances, taking any reasonable view of the matter, would shock an ordinary person into losing self control, Lord Cowie agreed with Lord Sutherland and Lord McDonald and held that words of abuse or insults or such things as smirking were not enough to constitute provocative behaviour sufficient to ground a plea of provocation.⁶¹⁰ The definition of provocation as written by Macdonald was endorsed together with his gloss that

[w]ords of insult, however strong, or any mere insulting or disgusting conduct, such as jostling, or tossing filth in the face, do not serve to reduce the crime from murder to culpable homicide.⁶¹¹

Recognising that the law on provocation in this regard is different from that in England, the court declined to follow the English approach on the grounds that the plea there is based on statute and is not part of the common law in Scotland. This, therefore, appears to be the case despite the fact that Lord Milligan was vehemently against the application of sect. 3 of the English Homicide Act, which as we will see, allows

⁶⁰⁵ Jones and Christie, 1996, p. 194 surmise that the rules for provocation are less strictly applied in cases of assault than they are in homicide cases and point to cases such as *Ensign Andrew Monro* (1700) Hume, i, 334, n. 2 or *Alexander Lockhart Hume* i, 337 and *James McEwen* (1838) Bell's Notes 91 where insulting words and in the latter a newspaper article, which was libellous of the accused's mother, were permitted to adduce evidence of provocation in alleviation of assaults.

⁶⁰⁶ 1983 SCCR 190. See also *Berry V HM Advocate* 1976 SCCR Supp. 156 and *Graham V HM Advocate* 1987 S.C.C.R. p. 20.

⁶⁰⁷ See further in the commentary on this case 1983, S.C.C.R. p. 199 the author points out that the defence seem to have argued that there could be provocation if the assault itself was not intended to kill or be reckless as to death. However, as was noted in the commentary, on this basis, there would be no need to rely on provocation since there can be no murder anyway.

⁶⁰⁸ In his charge to the jury Lord Cowie did distinguish between a mere "rough hint" and a "threat" to tell yet he nevertheless left the issue of provocation to the jury. p. 199.

⁶⁰⁹ 1990 S.C.C.R. 358.

⁶¹⁰ p. 360, upholding the decision of the trial judge.

⁶¹¹ Cited at p. 361 of the judgement.

for "things done or said" to count as provocative conduct, not on the grounds that it contradicted existing Scots law principles but on the grounds that it could not add anything new to the law in Scotland. Whatever the exact reason for the difference, commentators have emphasised that "[s]cots law is strong enough and flexible enough to achieve by itself a result which required legislation in England."⁶¹²

Ferguson opposes Gordon's suggestion that the law makes concessions in favour of allowing a minor assault to constitute provocative behaviour. He points to *Thomson V HM Advocate*⁶¹³ where the accused was convicted of stabbing his former business associate eleven times. He pleaded provocation on the basis that the deceased had defrauded the accused, threatened him with unjustifiable legal action and proposed to give the accused nothing for his share of the business. When confronted, the deceased laughed and restrained the accused as he tried to leave. The Appeal Court isolated two possible sources of provocation, evidence as to the unfair business dealings or the minor assault when the accused was restrained, and held that, whether looked at together or individually, they were insufficient to allow the jury to consider provocation. Lord Hunter, recognised that there did seem to be a general relaxation of the strict requirements of provocation and pointed to cases involving adultery or cases involving the issue of cumulative provocation (which I will discuss in the next section and which included *Thomson* itself) but he did not make a concession in favour of the minor assault. He held that

[T]aking what he himself deponed as the high water mark of any evidence of provocation, I am of opinion that it falls well short of reducing what he did from murder to culpable homicide....Moreover any alleged assault upon him by the victim....was of an exceedingly minor, and indeed almost technical character.⁶¹⁴

There is one exception to the physical assault rule, the adultery exception. This exception was originally applied only to the case of discovering a spouse in the act of adultery.⁶¹⁵ It has, however, been extended to cover two other variations. It was first extended in cases such as *HM Advocate V Hill*,⁶¹⁶ to

⁶¹² 1990 S.C.C.R. p. 362.

⁶¹³ 1985 SCCR 448. A case which was distinguished by the *Cosgrove* court.

⁶¹⁴ p. 285.

⁶¹⁵ See for example. Hume, i, 245 who regarded this as a "peculiar" case. Burnett, 53, Alison i, 113, Macdonald, 97, cited by Gordon 775.

⁶¹⁶ 1941 JC 59.

include a confession of adultery. This concession was not made on the basis that a confession of adultery is a form of verbal provocation but rather that the "discovery of adultery"⁶¹⁷ by means of a confession may be taken as equivalent to the "finding in adultery."⁶¹⁸ These cases do not involve insulting or threatening remarks but do require an element of surprise which causes the accused temporarily to lose control. The second extension was brought about by a case where a husband found his wife in bed with her lesbian paramour *HM Advocate V Callander*.⁶¹⁹ There, Lord Guthrie allowed for this case to be brought within the scope of the exception on the basis that lesbianism, like adultery, constituted a serious infringement of the duty of a wife.⁶²⁰

The possibility of allowing for provocation in cases involving a confession of adultery by a cohabitee was approved of by Lord Hope in the case of *McKay V HM Advocate*⁶²¹ although, on the facts of the case, the appeal was dismissed because the appellant knew that his partner had had other relationships during an unsettled period in their relationship which coincided with the time of conception. Counsel for the defence had argued that the remark to the appellant that he was not the father of a child ought to have been treated in the same way as if they had been married to each other at that time and, as if she had been telling him that the child was the result of an act of adultery. Lord Hope agreed in principle with this line of development holding that

it seems to me that it reflects the development of law and practice in regard to cohabitation outside marriage since the exception was first recognised.⁶²²

He went on to note that the rationale for the adultery exception, as laid down in *Hill*,⁶²³ was not so much the fact or discovery of adultery but the fact or the discovery of infidelity. This essence was not present

⁶¹⁷ Gordon, p. 775.

⁶¹⁸ Gordon, p. 775.

⁶¹⁹ 1958 S.L.T. 24.

⁶²⁰ This case was subsequently approved of by *McDermot V HM Advocate* 1976 JC 8.

⁶²¹ 1991 S.C.C.R. 364.

⁶²² p. 367.

⁶²³ *HM Advocate V Hill* 1941 JC 59.

in *McKay* because the accused knew of the other relationships which had been formed during the unsettled period. The exception was further extended in the case of *HMA V McKean*⁶²⁴ where Lord MacLean admitted the plea when a panel was informed that her lesbian lover had been sharing a bed with the male deceased. He considered that the plea ought to be available to "homosexual couples who live together and are regarded by the community as partners bound together by ties of love, affection and faithfulness."⁶²⁵

A more recent case which built on this line of authority was *Rutherford V HMA*.⁶²⁶ Here, the accused killed his estranged girlfriend, with whom he had previously cohabited for about twelve years, after she told him on two occasions of her unfaithfulness. In the first revelation, the deceased confessed to an affair with a lorry driver, with whom she had twice had sexual relations but said that she now wanted to end the relationship. Although the accused was angry, he did not react violently at that time. However, two days later, as the accused was trying to effect a reconciliation, the deceased laughed at him, called him "a spineless bastard," "a total waste of space," said that she "had been screwing that guy for months right underneath [his] nose"⁶²⁷ and gave no indication that the relationship with the lorry driver was over. At trial, the advocate-depute submitted that the evidence at best amounted to provocation by insult which could not warrant a verdict of culpable homicide due to provocation. Lord Nimmo-Smith questioned the accused about his reaction to the second revelation and tried to ascertain whether the accused reacted because the information was insulting or because the deceased's tone was designed to humiliate or because the content of the information revealed that she was in a longstanding relationship with this lorry driver. The accused's evidence allowed for all three possibilities. Lord Nimmo-Smith withdrew the defence of provocation from the jury because the accused at one point in the evidence said that he felt humiliated⁶²⁸ by what was said. In any event, there had been a delay after the first disclosure, which as will see next, is generally viewed as a bar to the defence. The judge felt that to allow the defence in this case would be to

⁶²⁴ 1997 JC 32.

⁶²⁵ p. 33.

⁶²⁶ 1997 S.C.C.R. 711.

⁶²⁷ p. 713.

⁶²⁸ p. 718.

hold that provocation in the law of Scotland was no different from provocation under English law, which as we saw allows for things done or said to constitute provocation. Furthermore, once there is some evidence of what was done or said, the jury must then be allowed to consider whether it was such as to cause a reasonable man to lose self control and react as the accused did. The judge considered that it was not open to him to decide whether "it was in any event time for the law of Scotland to reach the same point."⁶²⁹

I have reached the conclusion that there was not present that element of discovery which would bring the accused within the [adultery] exception as I have attempted to outline it. I could find no passage of his evidence which properly interpreted by a reasonable jury could, in my opinion, lead them to the view that on his account, what he was describing was not his reaction to insults and humiliation but his reaction to being informed of an adulterous relationship. This is regardless of whether he had already been informed of it earlier.⁶³⁰

Although the Court of Appeal did not express an opinion as to the different approaches between English and Scots law, the High Court substituted a verdict of culpable homicide. Lord Justice-General Rodger, giving judgement for the court, held that there was evidence, which the jury could have accepted to the effect that, on the occasion when he killed her, the deceased gave the appellant "fresh information which cast a new light on her infidelity."⁶³¹ The second revelation was "a substantially different account which suggested that the affair had been much more extensive and that it was indeed continuing"⁶³² and which could have caused a reaction of sudden and overwhelming indignation which was separate from any reaction to the original account. The judge went on to hold that although the tone of remarks may well have been humiliating, they also conveyed information as to the duration of the relationship which could constitute provocation.

In such as case we consider that the issue of provocation should be left to the jury if there is evidence on which they would be entitled to hold that the accused killed as a result of what he was told rather than simply as a result of any insults or humiliating remarks which may have been made.⁶³³

⁶²⁹ p. 715.

⁶³⁰ pp. 712-713.

⁶³¹ p. 719.

⁶³² p. 719.

⁶³³ p. 720.

Although Lord Justice-General Rodger did not go as far as English law and allow for insults and humiliating remarks in this limited context of adultery to constitute provocation, this decision does seem to bring Scots law closer to English law in a number of important respects. In the first instance, the decision reiterates that the issue of provocation is very much a jury question and that the trial judge should be very cautious in withdrawing the question from the jury. Second, the judgement seems to allow for the possibility that insults and/or humiliating remarks, which indicate the extent of the infidelity, be counted as contributing causes of the accused's reaction. Indeed this would seem to reflect accurately the accused's account of how he felt after hearing of the infidelity for the second time. Criticising these distinctions, Ferguson⁶³⁴ asks whether this possibility means that if both the information conveyed and the humiliating and/or insulting nature of the remarks can be operating on the accused at the time, the preponderant cause has to be the information disclosed? In other words, to what extent can insulting and/or humiliating remarks themselves contribute to causing the loss of self control? Pointing to another possible inroad made by this case into the discovery of adultery exception, Ferguson⁶³⁵ asks whether the decision allows for a second disclosure, which is different, but not more extensive to be sufficient? In view of, what we will see is the similarity in approach between Scots law and English law in cases of adultery, this case might encourage the courts in Scotland to consider adopting the approach of the courts in England. Indeed, Ferguson⁶³⁶ suggests that this similarity serves to call into question the reluctance of Scots law to consider verbal provocation as sufficient.

A final point to make about the nature of provocation is that Scots law does not require that the serious assault has to be committed by the deceased on the accused before it can count as provocative behaviour excusing a killing.⁶³⁷ But it does recognise that an accused may be provoked by an assault

⁶³⁴ 1998, p. 20.

⁶³⁵ 1988, p. 20.

⁶³⁶ 1998, p. 21.

⁶³⁷ Professor Smith in this context suggests that Iago's statements to Othello could rank as provocation since they gave him information regarding Desdemona's adultery which then led him to kill her while suffering from loss of self control as a result of discovering her adultery. 1957, p. 130, cited by Gordon, p. 780.

committed by the deceased on another.⁶³⁸

Delay.

Another crucial requirement of provocation, which has caused considerable controversy, particularly in cases involving battered women who kill, is that which relates to immediacy. This requirement demands that the accused react immediately after the provoking incident. Any delay between the provocation and the response, therefore, is taken as contradicting the suggestion of loss of self control which forms the essence of the plea. This requirement is premised on the understanding that humans react to provocative behaviour by seeing red,⁶³⁹ suddenly flaring up and killing while deprived of their self control. It is this requirement which has presented the greatest bar to the development of what has become known as cumulative provocation. Martin Wasik defines cumulative provocation as being

a course of cruel or violent conduct by the deceased, often in a violent setting, lasting over a substantial period of time, which culminates in the victim of that conduct...intentionally killing the tormentor.⁶⁴⁰

Although battered women who kill have described their actions in terms of having been provoked to the point of losing self control, the law has difficulty recognising their defence of provocation. Women, who have been subjected to long-term violence by the deceased, often speak in terms of their resilience to retain self control being eroded over time.⁶⁴¹ Thus, instead of reacting under the influence of a red anger, this anger may perhaps better be described in terms of a white anger. While they may not kill immediately after the first violent assault, the effect of continuous abuse eventually culminates causing a loss of self control, not necessarily immediately after a violent encounter but very often some time after a relatively minor triggering incident. However, because of the limitations of the immediacy requirement, which

⁶³⁸ Gordon, p. 781. See also a case recorded by Hume *McGhie* (1791), Hume I, 246 where the accused pleaded successfully provocation when his father was subject to a violent attack by the deceased in his presence. Cited by Ferguson, 1990, p. 60.

⁶³⁹ See Macdonald's definition earlier. However for criticisms of this assumption see below.

⁶⁴⁰ Wasik, 1982, p. 29. Wasik is in favour of dealing sympathetically with battered women who plead cumulative provocation and grounds his argument in the justificatory element in the defence. He argues that this approach allows for attention to be firmly focused on the course of conduct of the eventual defendant.

⁶⁴¹ See later Lord Gifford's argument in *R v Thornton* [1992] 1 All ER 306.

focuses on the last act of provocation, law has struggled to find provocative behaviour which could excuse a killing. On this view, both the nature of the provocation and the degree of force used in response,⁶⁴² would appear to be inconsistent with law's requirements. The concept of cumulative provocation seeks to remove the veil and to allow law to look beyond the events, which immediately preceded the killing, so that the act of killing can be viewed in the context of years of escalating violence and abuse and a gradual erosion of self control. In cases involving battered women who kill, this concept shares with strategies previously mentioned in relation to self defence, the aim of contextualising the law.

Cumulative provocation was addressed on a number of occasions in Scotland in different contexts.⁶⁴³ The case of *Crawford V HM Advocate*⁶⁴⁴ concerned a father-son relationship. There had been a family quarrel the previous night which was still a source of annoyance to the father. He twice ordered the son, using strong language and threatening gestures, to go to his room. This mode of behaviour was usual for the father but, on the appellant's own admission, his father had only ever struck him on one occasion. On the provocation issue, the Lord Justice-General Cooper did place emphasis on the cumulative effect, which years of living in an unhappy family environment, largely caused by the father's aggressive behaviour, could have on a child. He held that

I assume, in the appellant's favour that the culpability of his action falls to be reduced because of his physical and mental state, coupled with the provocation which the jury may have been entitled to infer from his unhappy home life.⁶⁴⁵

Although the issue of cumulative provocation formed only part of the holding in *Crawford* because the judge was also influenced by the appellant's diminished responsibility, the case did open the door to considering the possibility of introducing the concept of cumulative provocation into Scots law.

⁶⁴² As with the defence of self defence, this is termed the proportionality requirement. I will discuss how this requirement operates in relation to provocation in the next section.

⁶⁴³ See Gordon's commentary on cumulative provocation where he notes that prior knowledge of adultery was taken as disqualifying the claims in the cases of *HMA V Hill* 1941 J.C. 59 and *HMA V Callander* 1958 S.L.T. 24 which we discussed earlier.

⁶⁴⁴ 1950 JC 67.

⁶⁴⁵ p. 71.

The second case to speak to this issue was *HM Advocate V Grieg*.⁶⁴⁶ June Grieg was charged with the murder of her husband. The deceased was a heavy drinker and was very often violent towards the accused, who left regularly the matrimonial home and, on this occasion, only returned home a week before the killing. On the evening in question, the deceased was not violent towards the accused but did "nag." The accused killed by striking the deceased a blow while he was sitting in a chair. Lord Dunpark reiterated how crucial the immediacy requirement was in Scots law stating that provocation requires that the provoking conduct must immediately precede the killing and be of such a threatening nature as to deprive the accused momentarily of self control. The judge put the case to the jury as follows:

[N]ow, there is evidence before you that the deceased was a drunkard, if you like, not an alcoholic but a drunkard in the general sense, that he was a bully, that he assaulted his wife from time to time and that he made her life a misery. But, hundreds, indeed thousands of wives in this country, unfortunately, suffer this fate. The remedy of divorce or judicial separation or factual separation is available to end this torment. But, if, one day the worm turns, if I may use that phrase, not under the immediate threat of violence but by taking a solemn decision to end her purgatory by killing her husband, and by doing that very thing, is she not guilty of murder?...If...you can find evidence, which I frankly cannot, that the accused was provoked in the sense in which I have defined it, you could return a verdict of guilty of culpable homicide.⁶⁴⁷

The jury did, in fact, find that the accused was not guilty of murder but found her guilty of the lesser crime of culpable homicide. Contrary to the opinion of the judge, it seems that the jury believed that the accused, after years of violence, lost her self control, despite the ostensibly trivial nature of the provocation, and reacted by killing her husband.⁶⁴⁸

We already considered the case of *William Campbell Thomson V HMA*⁶⁴⁹ when discussing the nature of the provocation. Of greater significance for our purposes in this thesis, was the court's discussion of cumulative provocation. The appellant was a plumber who entered into a business arrangement with the deceased whereby they joined forces to run a business called Culture Kitchens. The defence argued

⁶⁴⁶ HC May, Unrep, 1979.

⁶⁴⁷ Gane and Stoddart, 1991, p. 527.

⁶⁴⁸ McCall Smith and Sheldon, 1992, point out that battered women are not morally guilty to the same extent as those who kill for gain or for some other base motive. While they recognise that the doctrine of provocation, like that of diminished responsibility, provides a means of curtailing the rigours of the law in this area, they doubt its efficacy. p. 169.

⁶⁴⁹ 1985 S.C.C.R. 448.

that the appellant had been defrauded by a man whom he trusted (the deceased), that he had been threatened with unjustifiable legal action following which he then agreed to sign away his business to the deceased. This transfer was done on the basis that the appellant would retain certain materials and equipment which he would use to later resume business on his own. The appellant did entertain doubts about the deceased's integrity which were confirmed at a meeting between him and the deceased when he sought to renege on the deal. As the appellant got up to leave, the deceased physically restrained him. Counsel for the appellant described this physical restraint, as "the proverbial last straw which broke the camel's back,"⁶⁵⁰ which caused the appellant to "snap"⁶⁵¹ and stab the deceased eleven times.

Lord Justice-Clerk found that the history of the business dealings was not sufficiently immediate to support provocation, since the appellant had been aware of the situation which had arisen for a number of days. In fact, the appellant had described himself as feeling "pretty relaxed,"⁶⁵² as thinking that "everything was OK,"⁶⁵³ "normal"⁶⁵⁴ on the morning of the killing which the court interpreted as meaning that the prior business dealings were no longer affecting the appellant's self control. On the facts of the case, the judge held that

[T]he defence of provocation will not avail the accused, if the fatal acts are done at such a distance of time after the injury received as should have allowed the mortal resentment to subside, or with such weapons, or in such a manner, as indicates a desire for unmeasured revenge.⁶⁵⁵

The accused failed on both the immediacy and proportionality requirements in this case. The judge held not only did the delay operate to prevent the accused from successfully pleading provocation but it provided the court with weighty evidence of his intention to kill.

[I]ndeed, far from supporting a plea of provocation, the evidence of the breakdown in the business relations, and the appellant's belief that he was being cheated, would provide a clear

⁶⁵⁰ p. 456

⁶⁵¹ p. 458.

⁶⁵² p. 457.

⁶⁵³ p. 457.

⁶⁵⁴ p. 457.

⁶⁵⁵ *Thomson* p. 457, citing *Alison's Principles* p. 8.

motive for murder. In all the reported cases, where provocation has been allowed to be considered by the jury, there has been some element of immediate retaliation to provocative acts. In the present case, that element is absent.⁶⁵⁶

The judge did, however, at an earlier point in the judgement recognise that

[E]ven allowing for the fact that the law on provocation has been developing, there is no doubt that a number of cases reported on this issue are difficult to reconcile with the statements of Hume, Alison and McDonald.⁶⁵⁷

Included among these difficult cases were *Crawford V HMA*⁶⁵⁸ and *HMA V Grieg*.⁶⁵⁹ The Lord Justice did not express an opinion on these cases, but reaffirmed the decision of the trial judge to withdraw the question of provocation from the jury on the grounds that

it is not necessary in this appeal to reach any concluded opinion on the soundness of the views expressed by the trial judges in these cases in relation to the facts which obtained in each particular case. Nor is it necessary or desirable to attempt to define comprehensively all the circumstances in which a plea of provocation may prevail to the effect of reducing murder to culpable homicide. All that requires to be considered is whether the facts of the present case were sufficient to entitle the jury to consider provocation.⁶⁶⁰

Although *Thomson* was first taken as authority for the view that cumulative provocation is not recognised by Scots law,⁶⁶¹ Ferguson writes that it is nonetheless relevant to consider the whole conduct of the deceased prior to his death; an approach which was not followed by the Appeal Court in *Graham V HM Advocate*.⁶⁶² The case involved a domestic dispute where, during the course of the final quarrel the deceased came at the appellant with a knife. The appellant took the knife from the deceased, said "[d]on't ever do that again to me, wee man" and jabbed the deceased with it. Although counsel for the defence argued that the deceased's threat to use the knife constituted provocation, the court was influenced by the fact that at the time the killing took place, the deceased was not armed and it was the appellant who held

⁶⁵⁶ p. 458.

⁶⁵⁷ p. 457.

⁶⁵⁸ 1950 JC 67

⁶⁵⁹ HC May, Unrep, 1979.

⁶⁶⁰ p. 457.

⁶⁶¹ Ferguson, 1990. p. 59.

⁶⁶² 1987 S.C.C.R. 20.

the knife.⁶⁶³

More recently *Parr V HMA*⁶⁶⁴ also ruled out the possibility of cumulative provocation in a case which concerned a very tempestuous relationship between the accused and his mother. The background to the incident in question was that the accused had been in two failed relationships before moving back to live with his widowed sixty-five-year-old mother. These failures were a considerable source of concern for the mother. Both son and mother had drink problems, which exacerbated, what Lord Hope described as, a "tendency to mutual criticism."⁶⁶⁵ During the course of arguments, the mother often threw articles at the accused and slapped him on the face. The accused admitted that on one occasion he had been convicted of a minor assault, due to his having punched his mother. On the morning of the killing, the accused and his mother had another row, this time over money, which the accused had borrowed from her the day before. At about 6.00 in the evening another row broke out, after which the accused went to the Royal British Legion Club, where he stayed for an hour and a half before returning home. Later that evening a next door neighbour testified to having heard a thud which came from the mother's bedroom. The accused went back to the Royal British Legion Club where he told a man that he had just killed his mother. There was undisputed medical evidence that the mother had been killed by about eight blows to the head with a blunt instrument. A hammer was later found concealed under the cushions of the settee in the livingroom.

The appellant described to the police his final row with his mother, who had also been drinking, in the following terms:

[M]e and my mother had a blow out and I went over the top. I just went off my head as she was throwing stuff at me and rabbit, rabbit, rabbit. I ca'd her heid in with a fucking hammer, that is

⁶⁶³ In the commentary on the case the writer supports the argument that the evidence of what led up to the blow was highly relevant and necessary in order to establish the accused's state of mind and whether the circumstances were such as to allow the plea of provocation. Disagreeing with the Court of Appeal, the writer argues that "[p]rovocation is about unjustified retaliation, and a person who kills the victim he has disarmed is entitled to plead provocation if he did so while in the heat of the moment occasioned by relevant provocation." 1987, S.C.C.R. p. 24.

⁶⁶⁴ S.L.T. 1991 208.

⁶⁶⁵ p. 209.

about the size of it. I did it in her bedroom. She is a venomous bugger. I ken what I've done.⁶⁶⁶ At trial, he explained that he had the hammer in his hand because he had been repairing a metal strip which held down the carpet. His mother, on hearing the noise, called him into her room. The accused testified that he thought his mother had thrown something at him, although he could not remember what, or if it had actually hit him. Furthermore, he said that he and his mother had been "going on"⁶⁶⁷ for some time previously, and that the night of 19 May was the last straw and he lost his head.

Defence counsel argued that a simple analysis of the events of the night in question would not adequately account for the provocation to which the accused had been subjected over the course of many years. Counsel pointed out that the accused had been subjected to continuous provocative behaviour over the course of time when his mother threw objects at him and nagged him repeatedly. This behaviour

had worn him down to the point where he was likely to lose control of himself, as happened on this occasion when he just happened to have a hammer at hand.⁶⁶⁸

Lord Hope held against the accused for reasons similar to those given by Lord Justice-Clerk in *Thomson*. In the first instance, the mother's violence towards the accused was only ever "of a sporadic and minor nature"⁶⁶⁹ and so the accused's act of killing his mother was disproportionate to this provocation. In the words of the judge, there was not a "sufficient relationship in kind and degree between what the mother said and did and the blows which were struck by the appellant."⁶⁷⁰ But second, even at its most extreme, this violence could not be the cause of the accused's loss of control because the delay in reacting served to break the connection between the provocation and his response. In Lord Hope's words

[T]here was no suggestion on the evidence in this case that the arguments in the past, although frequent, were sustained at such a pitch for there to have been no such interval. The events of the day in question, although they involved renewed arguments, were not of that character either. Indeed, immediately before the fatal incident the appellant was engaged in carrying out a repair to the house. There was no suggestion in the accounts of the incident which the appellant gave...that he had been provoked to act as he did because of his mother's conduct in the past.

⁶⁶⁶ p. 209.

⁶⁶⁷ p. 209.

⁶⁶⁸ p. 210.

⁶⁶⁹ p. 210.

⁶⁷⁰ p. 210.

Furthermore there was no compulsion on him to go on living in his mother's house, yet he chose to do so and to put up with her despite the arguments which occurred.⁶⁷¹

The concept of cumulative provocation, therefore, has had quite a checkered history since its introduction into Scottish courts. Although the same concept has been invoked in all these cases, only one case, that of June Greig, seems to have involved the degree of violence envisaged by Martin Wasik. There, Lord Dunpark recognised that the accused had had a "miserable existence." She was the subject of continued abuse at the hands of the deceased, who was a drunkard and a bully, who assaulted his wife and made her life such a misery that he turned it into a purgatory on earth. Thus, while the Scottish legal establishment appears to be familiar with the concept of cumulative provocation, its use of the concept in cases involving "threatening gestures," "a physical restraint," or "sporadic and minor violence" seems to have undermined its potential for doing justice in cases of real and extreme violence. Perhaps a result of this misconception is the fact that, even when the judges extended the time-frame, they still looked for a single really serious provoking event rather than looking to the whole course of the conduct and its effect on the accused. As we will see, this approach differs from that adopted by the English courts, which focuses more on the individual's loss of self control and recognises that in the face of continuous violence anger can gradually accumulate and erupt in response to relatively minor provocation. The real disappointment with the indiscriminating use of the concept in Scotland is the fact that the court in *Thomson* recognised that the law of provocation was not set in stone and that it may need to be tested in the light of society's sense of justice. Lord Hunter held that

I am prepared to assume, for the purposes of the present opinion, that in the past, judges have on occasion left questions of provocation to the jury in cases where the rigid application of principles derived from the institutional writers might be considered offensive to modern public opinion.⁶⁷²

The fact that there is a discrepancy between society's sense of justice and law's sense of justice is evidenced by the outcome in *Greig* where the jury did actually disagree with Lord Dunpark's opinion that there was no evidence of provocation upon which the jury could return a verdict of culpable homicide. This discrepancy has also been recognised by legal writers such as Gane and Stoddart. They argue that

⁶⁷¹ p. 210.

⁶⁷² p. 460.

a person who, over a period of time, exercises restraint and self control but who finally snaps arguably shows greater concern for the policy of the law than a person who, faced with one provocative act, reacts with violence. At very least, the defendant in a cumulative provocation situation is deserving of the same consideration as a defendant who reacts with violence to one provocative act.⁶⁷³ Despite the seeming validity of arguments, such as this, Scots law, for the present, continues to bar these claims.

Thus, there is not, as yet, a legal concept which allows women, who describe their actions in terms of a loss of self control, to plead successfully provocation. Despite its false start, the notion of cumulative provocation, narrowly conceptualised in terms of a sustained course of cruel and violent conduct, could readily be salvaged to explain the continuing influence of past violence on self control and used in conjunction with the opening left by Lord Hunter in *Thomson* for a relaxation of strict legal requirements in deserving cases.

Proportionality.

Provocation's third requirement is that the retaliation must not have been grossly excessive. Although there must be a degree of equivalence between the mode of retaliation and the provocation, by definition with provocation there is some disproportion since if the deceased's intention had been murderous, the appropriate option would be the defence of self defence.⁶⁷⁴ In the case of *Smith V HM Advocate*,⁶⁷⁵ Lord Justice-General Cooper directed the jury on this issue as follows:

[a] blow with the fist is no justification for the use of a lethal weapon. Provocation in short, must bear a reasonable relation to the resentment which it excites.⁶⁷⁶

The issue of proportionality was a major stumbling block in *Thomson V HM Advocate*.⁶⁷⁷ Lord McDonald held that the most that could be said about the minor assault in that case was the fact that the deceased

⁶⁷³ Gane and Stoddart, 1980.

⁶⁷⁴ Hume, i, 335 explained the requirement as follows: "the person assaulted must keep within the bounds of an allowable resentment, the application is matter of common sense; and little is to be derived from any thing that books can teach on the subject. Cited by Jones and Christie, 1996, p. 193.

⁶⁷⁵ February 1952, unreported High Court of Justiciary.

⁶⁷⁶ Cited by Gordon, p. 772.

⁶⁷⁷ 1986 S.L.T. 281.

pulled the appellant as he was about to leave. He held that

[A] minor assault of that kind, whether or not one also takes into account the history of the business dealings, is clearly insufficient to found a plea of provocation which would palliate the taking of the deceased's life by stabbing.⁶⁷⁸

The proportionality requirement in Scotland, therefore, is an objective test which looks for a reasonable relationship between the provocation and the force used in response. This insistence on an objective requirement has attracted some criticism in Scotland. Ferguson, points out that, to a large extent, the requirement is unnecessary because the law does not recognise provocation other than by serious assault. He argues that it is difficult to understand the need for a reasonableness test when it is also accepted that the degree of retaliation should not be measured in too fine scales.⁶⁷⁹ Furthermore, in the case of *Lennon V HM Advocate*⁶⁸⁰ counsel for the accused argued that this objective test creates an illogical tension in the law by requiring, on the one hand, that there be a loss of self control, but, on the other, only allowing for a loss of self control which would leave the person provoked with enough self control to determine a measured reasonable response. In other words, Counsel for the accused requested that the court approach the issue of proportionality from the perspective of the reasonable person who had lost self control rather than that of the reasonable person who was in total control.

The Lord Justice-General, Lord Hope, dismissed the argument because he deemed it to be "unsound"⁶⁸¹ and held that the accused had used a cruel excess of force which law prohibited. The judge held that in cases involving provocation, the issue is approached by looking to the gravity of the crime and then regarding the proportionality requirement as an objective legal requirement which has to be fulfilled before the plea of provocation can be used in mitigation. He held that

[T]he sole purpose of the plea (of provocation) is to reduce the quality of the act from the crime of murder to one of culpable homicide...cruel excess, or a gross disproportion between the provocation offered and the retaliation by the accused, will bar the plea because in that situation

⁶⁷⁸ p. 284.

⁶⁷⁹ 1990, p. 60.

⁶⁸⁰ 1991 S.C.C.R. 611

⁶⁸¹ p. 614.

it can be of no effect.⁶⁸²

Thus, instead of allowing for the fact that the accused had lost control to influence the degree of force used in response, Lord Hope looked first to the gravity of the crime and then considered whether provocation could operate to mitigate the crime. At this stage, law is concerned primarily with testing the equivalence of force used; loss of self control is merely a secondary consideration. By contrast with the objective approach of the Scottish courts, which only allows provocation to mitigate a murder charge when the objective elements are fulfilled, Counsel for the appellant's argument in favour of a subjective approach to provocation, based on loss of self control, resembles the English court's approach to provocation since the passing of the 1957 Homicide Act. Although the extent of this trend towards subjectivity has not yet been fully determined by the English courts, the influence of the Act on the old common law has been revolutionary. I now intend to outline how the English law on provocation operates as well as indicating the particular problems posed for battered women who kill.

THE LAW ON PROVOCATION IN ENGLAND.

Prior to the passing of the 1957 Homicide Act in England the common law on provocation was stated in the case of *R V Duffy*⁶⁸³ where the Court of Criminal Appeal regarded, the trial judge's, Devlin J, direction as "classic."⁶⁸⁴ He defined provocation as

some act or series of acts done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.⁶⁸⁵

Section 3 of the Homicide Act assumes the existence of and amends⁶⁸⁶ the common law in a number of very important respects which, taken together, have had the effect of rendering the law on provocation more subjective than its Scottish counterpart. Section 3 provides:

⁶⁸² p. 614.

⁶⁸³ [1949] 1 All ER 932.

⁶⁸⁴ p. 933.

⁶⁸⁵ p. 932.

⁶⁸⁶ Smith and Hogan, 1996, p. 361.

[W]here on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self control, the question whether the provocation was enough to make the reasonable man do as he did shall be left to be determined by the jury; and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on the reasonable man.

This section is set within the framework of a two-fold test. In the first instance the jury is required to consider "was the defendant provoked to lose his self control?" This is a subjective question concerning the facts. Smith and Hogan write that when considering the subjective condition the jury are entitled to consider

[A]ll the relevant circumstances; the nature of the provocative act and all the relevant conditions in which it took place, the sensitivity or otherwise of the defendant and the time, if any, which elapsed between the provocation and the act which caused death.⁶⁸⁷

In the second instance the jury is asked to consider "was the provocation enough to make a reasonable man do as he did?" This is the objective component of the test.

The Homicide Act changed the common law in three key areas.⁶⁸⁸ First, it changed what could count as provocative behaviour in law. Prior to 1957 the English common law, like modern Scots law, restrictively limited what could be considered as provocative behaviour to some form of violent act as well as certain objectively defined legal categories. Since the passing of the Act, this limitation has been lifted so that now things said alone, regardless of categories, may be sufficient provocation, if the jury is of the opinion that they could have provoked a reasonable man. Second, the importance of the reasonable relationship rule, or the proportionality requirement in Scotland, has been diminished by making it an issue which the jury rather than the judge has to decide. Whereas previously an English judge could direct a jury that "[f]ists may be answered with fists but not with a deadly weapon,"⁶⁸⁹ now it is the jury which decides whether the answer with a deadly weapon could in fact be the act of a reasonable man. The third change dovetails with the more lenient interpretation as to what can count as provocation. Whereas previously the judge instructed the jury as to the characteristics of the reasonable man, who, prior to 1957 was normal

⁶⁸⁷ Ibid, p. 364.

⁶⁸⁸ For a commentary see P. English, 1970, p. 249.

⁶⁸⁹ *R V Duffy* [1949] 1 All ER p. 933.

in mind as well as body, in the wake of the Act it is the jury rather than the judge which determines these relevant characteristics.

Although the Homicide Act has substantially altered the law on provocation, the older common law elements still retain a place within the new statutory framework and emerge to pose problems for battered women who kill. Partly because of their continuing importance in England but also because of the similarities between the law in the two jurisdictions, I intend to place each of these elements in the context of the statutory law on provocation.

The Nature of the Provocation.

As with the law today in Scotland, the law in England prior to the 1957 statute was clear that words without some form of physical assault were not sufficient to constitute provocative behaviour. Just as the Scottish courts consider that "[S]ticks and stones may break your banes, but words will never hurt you,"⁶⁹⁰ English courts were of the opinion that hard words break no bones. Like Scots law, English law did make an exception in favour of a husband who discovered a spouse in the act of adultery. This exception has the approval of Blackstone who wrote that killing in such a case was "the lowest degree of [manslaughter]"⁶⁹¹ and as such ought to be leniently punished. This sympathy is also to be found in case-law going as far back in time as the case of *Manning* in the seventeenth century.⁶⁹² There, the Court directed that the accused's hand be burned but only lightly, because there could not be a greater provocation than finding one's wife in the act of adultery.⁶⁹³ However, Viscount Simon, in *Holmes V DPP*⁶⁹⁴ construed this exception in a more limited way than modern Scottish courts by refusing to recognise a confession of adultery as constituting provocative behaviour which could be recognised by the law. Instead he viewed the confession as being the equivalent of mere words. The judge went on to

⁶⁹⁰ Cited by Gordon p. 777.

⁶⁹¹ Blackstone, Commentaries, Vol. iv, p. 192.

⁶⁹² (1671) T. Raym. 212.

⁶⁹³ p. 112 of the volume.

⁶⁹⁴ [1946] A.C. 588.

approve of the decision in *R V Palmer*⁶⁹⁵ where the court refused to allow a man who was merely engaged to be married to plead provocation when he discovered of the second liaison between his betrothed and another man. Again, this stands in contrast to modern Scots law. Lord Hope in *McKay V HM Advocate*,⁶⁹⁶ it will be remembered, did allow for the possibility of extending provocation to cover co-habitees despite not being married.

The other type of case which was recognised in English law was the finding by a father of a man committing sodomy on his son. In *R V Fisher*⁶⁹⁷ it was not the father who found the deceased with his son "in a state which left no doubt of their being in the act of committing an unnatural offence"⁶⁹⁸ but the landlord. Park J was of the opinion that had the prisoner actually seen the act being committed, then this case could be decided in accordance with cases where a husband found his wife in the act of committing adultery. However, he felt that the law could not be extended to allow for the return of a manslaughter verdict when the father did not actually see the act.⁶⁹⁹ In the later case of *Harrington*⁷⁰⁰ Cockburn C.J. contemplated extending this line of authority to allow provocation to a father who witnessed his son-in-law committing a violent assault upon his daughter but he did not decide the point.

The 1957 Act abandoned this restrictive interpretation in favour of the broader test of "things done or said." In *Doughty*⁷⁰¹ a father, who had been caring for both his newly born child and his wife was allowed by the Court of Appeal to plead provocation as a result of the baby's crying on the basis of it being "a thing done". In the more recent case of *R V Acott*⁷⁰² it was held that it was not enough to argue that the

⁶⁹⁵ [1913] 2 K.B. 215.

⁶⁹⁶ 1991 S.C.C.R. 364.

⁶⁹⁷ (1837) 8 C & P 182.

⁶⁹⁸ p. 453 of the volume.

⁶⁹⁹ The jury, however, disagreed with the judge and returned a verdict of manslaughter on the grounds, one presumes, that the prisoner had been provoked.

⁷⁰⁰ (1866) 10 Cox. C.C. 370.

⁷⁰¹ [1986] 83 Cr App Rep. 319.

⁷⁰² [1996] Crim LR (Sept) 664.

appellant's loss of control may have been caused as a result of some unidentified words or actions. On appeal, the issue was that the judge should have left the question of provocation to the jury allowing for the possibility that the accused "boiled over"⁷⁰³ as a result of an underlying resentment towards his mother. The judges held that before provocation can be left to the jury there must be some evidence of what was said or what was done to provoke the killing. This evidence would usually have to be direct but could also be inferential as where the deceased was heard to say that he intended to taunt the accused.⁷⁰⁴ Were the court to allow for provocation in this case it was recognised that the jury would be placed in the impossible position of trying to apply the objective test of the reasonable man to unknown words or actions.

Another feature of the defence at common law was that the nature of the provocation was limited to acts done by the deceased to the accused, *R V Duffy*.⁷⁰⁵ Thus, the general rule was that evidence was not admissible of acts done by third parties or to third parties. Because of section 3, the only question is whether the evidence is relevant to the issue relating to the accused's loss of self control.⁷⁰⁶ Thus, the judge's direction in the adultery cases of *R V Davies*⁷⁰⁷ to the effect that only the wife's conduct to the exclusion of her lover's could be taken into account is, now, in the light of section 3 considered incorrect. The logical equivalent of this relaxation, one which has always existed in Scots law, involves allowing for third party provocation. This came to fruition in the case of *R V Pearson*⁷⁰⁸ where it was held that the older son was entitled to rely on the father's ill-treatment of his younger brother when pleading provocation.

Although section three has broadened considerably the scope of what can be taken to count as provocation, mere circumstances, whatever their effect, cannot be taken in law as excusing murder. Thus, an Act of God cannot be considered as "something done" within the meaning of section 3 of the Act.⁷⁰⁹

⁷⁰³ p. 664.

⁷⁰⁴ p. 665.

⁷⁰⁵ [1949] 1 ALL ER 932.

⁷⁰⁶ Smith and Hogan, 1996, p. 363.

⁷⁰⁷ [1975] QB 691.

⁷⁰⁸ [1992] Crim LR 193.

⁷⁰⁹ Smith and Hogan, 1996, p. 363.

Delay.

The English equivalent to the Scottish immediacy requirement is taken from the *Duffy* direction that there be a sudden and temporary loss of self control.⁷¹⁰ Both jurisdictions shared a common reason for this strict insistence which was based on the need to guard against revenge killings.⁷¹¹ Deciding that a battered wife ought not to be afforded the defence of provocation, Lord Devlin⁷¹² outlined the English rationale for the strict insistence as follows:

[c]ircumstances which merely predispose to a violent act are not enough. Severe nervous exasperation or a long course of conduct causing suffering and anxiety are not by themselves sufficient to constitute provocation in law. Indeed, the further removed an incident is from the crime, the less it counts. A long course of cruel conduct may be more blameworthy than a sudden act provoking retaliation, but you are not concerned with blame here-the blame attaching to the dead man...it does not matter how cruel he was, how much or how little he was to blame, except in so far as it resulted in the final act of the appellant. What matters is whether this girl had the time to say: "Whatever I have suffered, whatever I have endured, I know that Thou shalt not kill."...[C]ircumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect and that would negative a sudden temporary loss of self control which is the essence of provocation.⁷¹³

Both English and Scottish requirements,⁷¹⁴ therefore, are designed to ensure that the defendant did not have time to think and form a desire for revenge in the period between the final act of provocation and the response. Despite the difference in formulation, the effect of the law in both jurisdictions, until recently,⁷¹⁵ was to focus the court's attention on the events which immediately preceded the killing thereby disregarding the effect of the prior history of violence. Unlike the law in Scotland, the courts in England have been most often asked to consider this question in the context of domestic violence cases.

⁷¹⁰ This requirement was rigidly applied in early cases such as *R V Whitfield* (1976) 63 Cr. App. R 39 at 42 and *R V Ibrams* (1981) 74 Cr App R 154 at 159-60.

⁷¹¹ As we saw earlier, Alison considered that a delay would "allow[ing] the mortal resentment to subside...[and indicate] a desire for unmeasured revenge.

⁷¹² Whose decision was approved by Lord Goddard in the Court of Appeal.

⁷¹³ p. 932.

⁷¹⁴ Harrison, 1994, commenting on one point raised in the provocation case of *R V Richens* (1994) 98 Cr App R 43 points out that though loss of self control meant more than loss of temper, it is not necessary that the defendant should be in a state like an automaton. pp. 161-162.

⁷¹⁵ See below.

In the case of *R V Thornton*⁷¹⁶ the appellant had been in a relationship with the deceased for just over two years and had been married for less than a year. The relationship was characterised by very heavy drinking, particularly on the part of the deceased, and violence which necessitated police intervention. The week-end before the killing the appellant attended a sales conference at which she confided in a friend that she was going to kill her husband. On the Sunday of the same week-end, a row broke out between the appellant and the deceased during which the deceased threatened to hit the appellant with a guitar. The appellant pointed a knife towards the deceased and threatened to kill him. Later on that day, the appellant gave the deceased an overdose of mogodon tablets and then called the doctor saying that the deceased was suicidal. Her explanation was that she wanted to have her husband committed. This incident caused further violence which reached a climax when the deceased threw a chair through the kitchen door. The deceased continued to drink on Monday and on Tuesday another row broke out during which he told the appellant that she would have to leave the house. The appellant again told her friend that she was going to carry out her threat to kill her husband.

Later that day the appellant went out for a drink to the local pub and when she returned to the house she found the deceased lying on the couch. The appellant testified that she tried to persuade her husband to come to bed but that he called her a whore saying that she had been out selling her body and that if she had been with other men he would kill her. The appellant then said that she went into the kitchen looking for her husband's police truncheon to protect herself in case he became aggressive but, finding a knife, she picked it up, sharpened it and then went into the sitting room where the deceased was still lying on the sofa. He refused to accompany her upstairs to bed and said that he would kill her while she was asleep. She then sat on the edge of the sofa, raised the knife and slowly brought it down towards his stomach. The deceased did not ward off the knife and it entered his stomach. The appellant told the police immediately after the killing that she wanted to kill the deceased and urged the medics to let him die. She later said that she did not mean to kill him but only to frighten him. When questioned, she admitted that

⁷¹⁶ [1992] 1 All ER 306. For a critical feminist commentary on this case see MacNeill, 1991, pp. 7-14. When discussing cases involving battered women who kill, I do recount the facts of the case in some detail. My reason for so doing is to set firmly these cases in their social context of violence and abuse to women.

he did not hit her that night but that he did say he would kill her.⁷¹⁷

Lord Gifford⁷¹⁸ argued that the jury could have interpreted the judge's use of sudden and temporary as meaning that they should not take into account any circumstances but those which immediately led up to the stabbing. On this analysis, the only behaviour which could be construed as being provocative were the deceased's verbal taunts and threats. Counsel began by arguing that the legal concept of provocation did not require the loss of self control to be sudden and that such a requirement had been incorporated into the law by a too literal interpretation of the words used by Lord Devlin in his summing up to the jury in *Duffy*. He argued that the phrase was incompatible with the broader provision of the Homicide Act which required that "*everything* both done and said"⁷¹⁹ be taken into consideration and that it was inappropriate

in the case of reaction by a person subjected to a long course of provocative conduct, including domestic violence, which may sap the resilience and resolve to retain self control when the final confrontation erupts.⁷²⁰

The Court of Appeal refused to accept this argument holding instead that the phrase sudden and temporary loss of self control was one which the jury understood as safeguarding against the danger of revenge killings. Consequently, the fact that the trial judge had referred to everything that was done "on this night" was not taken as reducing "the whole picture, the whole story"⁷²¹ to which the jury had to direct their minds and so the appellant's argument failed.⁷²² However, there was an inroad made into the *Duffy* ruling

⁷¹⁷ His exact words were "I'll fucking kill you" at p. 310.

⁷¹⁸ See also the comment on the case where the writer agrees with Lord Gifford that provocative behaviour over a long period of time may add greatly to the credibility of the defence, provided it culminated in a sudden explosion. Furthermore, the writer recognises that the advantage of this approach could explain why an incident, perhaps trivial when considered in isolation, caused a loss of self control. 1992, p. 55.

⁷¹⁹ Emphasis added.

⁷²⁰ p. 313.

⁷²¹ p. 312 of *Thornton*.

⁷²² In a commentary on this case the writer considers that the real defect in the law is the mandatory penalty of life imprisonment for murder. In cases, such as this, where there are "weighty mitigating circumstances" the writer believes that it is wrong that the judge should be unable to take them into account and that it is regrettable that the government did not act on the report of the Select Committee of the House of Lords on Murder and Life Imprisonment (H.L. Paper 78-1

in this case. Although this concession did not impact on this particular case, the court did hold that such acts of cumulative abuse might be considered by the jury as part of the context or background against which the accused's reaction to the provocation had to be judged.⁷²³

This issue of sudden and temporary loss of control was also addressed in the *R V Ahluwalia*.⁷²⁴ The appellant⁷²⁵ had entered into an arranged marriage with the deceased. From the very outset, she had been subjected to abuse at the hands of her husband. There was ample evidence at the trial to support this history of abuse; several incidents of violence were recorded in her doctor's notes, she was hit on the head with a telephone and thrown to the floor and she was pushed by the deceased when she was pregnant with their first child. On another occasion, she suffered a broken finger. In 1983 the appellant obtained a court injunction to restrain the deceased from hitting her. Three years later, the deceased tried to run her down at a family wedding. Following a bout of violence, during which the deceased threatened her by holding a knife to her throat, the appellant obtained a second court injunction. Despite these legal interventions, the deceased continued to be abusive towards his wife. The violence intensified during the course of the month which preceded the killing. The appellant's doctor testified that he had found bruising on her body. On another occasion, the deceased knocked the appellant unconscious as well as giving her a broken tooth and swollen lip which injuries necessitated the appellant being off work for five days. She also discovered that the deceased had been having an affair with another woman which was a further source of taunts. A letter, which the appellant wrote to the deceased begging him to come back and promising that she would try to be a better wife, was introduced as evidence of her low self esteem. Among other things, the appellant promised that she would not drink black coffee or eat green chili, that she would put on weight, that she would not go to the family wedding, that she would leave all her

(1989).[1992] p. 56.

⁷²³ Beldam LJ held that "[i]t is within the experience of each member of the court that in cases of domestic violence which culminate in the death of a partner there is frequently evidence given of provocative acts committed by the deceased in the past, for it is in that context that the jury have to consider the accused's reaction." p. 314. Thus, this already seems to be an advancement from Devlin L's position which focused more on the events preceding the final act.

⁷²⁴ [1992] 4 All ER 889. For a useful synopsis of the case see Cowley, 1993, pp. 169-171.

⁷²⁵ See further Ahluwalia and Gupta, 1997.

friends.⁷²⁶

On the night in question, the appellant tried to talk to the deceased about their relationship. Instead he threatened to beat her the following morning if she did not pay the 'phone bill and threatened to burn her face with an iron. Shortly after 2.30am she went outside, poured about two pints of petrol into a bucket and lit a candle from the gas cooker.⁷²⁷ She brought a kitchen glove to protect herself from the petrol, and a stick. She then went upstairs and into the deceased's bedroom. She threw in the petrol, lit the stick from the candle and threw it into the room. The deceased then ran to the bathroom to immerse himself in the bath which the appellant had coated with caustic soda. The appellant went to dress her younger son and neighbours described her as standing at a ground-floor window with a "glazed expression."⁷²⁸

One of the arguments made on appeal was that the trial judge's direction to the jury asking them to look for a sudden and temporary loss of self control was incorrect. Mr Robertson, like Lord Gifford, argued that this *Duffy* requirement was incorrect in the wake of the 1957 Act. Furthermore, he argued that this requirement was unsuited to the type of situation such as that with which the court was dealing in this case. Relying on expert evidence which was not before the trial judge, counsel argued that women who have been subjected frequently to violent treatment over a period of time may react to the final words or act by a "slow burn"⁷²⁹ rather than an immediate loss of self control. In other words, instead of viewing the time lapse between the provocation relied upon and the fatal act as a period during which a conscious desire for revenge was formulated, counsel argued that it be viewed as a period during which the appellant suffered a "slow burn reaction"⁷³⁰ which eventually culminated in a loss of self control. On the facts of the

⁷²⁶ p. 892.

⁷²⁷ Noting the evidence of premeditation, Tom Rees points out that this does not always preclude the possibility of a sudden explosion and remarks on the willingness of judges to leave the defence to the jury where there was evidence of provocation. 1993, p. 64.

⁷²⁸ p. 893.

⁷²⁹ p. 896. See also the commentary on *Ahluwalia* [1993] Crim. L.R. pp. 63-65 where Rees notes the acceptance of the slow burn concept resulting in a sudden explosion and a strong reaction.

⁷³⁰ p. 896.

case, therefore, when placed against the entire history of violence, the time lapse between the deceased's behaviour, his refusal to speak about the relationship indicating that it was over, his threat to use the hot iron on her and his threat to beat her the next morning if she did not provide him with the money was, in reality, a period during which the appellant underwent a slow burn reaction which culminated in a loss of self control.

Lord Taylor of Gosforth, on the one hand, reiterated the importance of the phrase holding that it

encapsulates an essential ingredient of the defence of provocation in a clear and readily understandable phrase. It serves to underline that the defence is concerned with the actions of the individual who is not, at the moment when he or she acts violently, master of his or her own mind.⁷³¹

However, on the other hand, he did go on to say that while in some cases a delay "may wholly undermine the defence of provocation"⁷³² it did not necessarily do so. The issue, he held, "depends entirely on the facts of the individual case and is not a principle of law."⁷³³ The Judge, therefore, did refuse Mr Robertson's "bold"⁷³⁴ assertion that the law in the wake of the '57 Act was incorrect but nonetheless allowed for the possibility of a delayed reaction with the proviso that the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it was that the prosecution would negative provocation. In other words, the judge reduced the element from being a strict matter of law to being merely one item of evidence to be used in deciding whether the appellant was deprived of her self control when she committed the final act. Now, it seems that the words sudden and temporary imply only that the act must not be premeditated.⁷³⁵ It is the loss of control which must be sudden which does not have

⁷³¹ p. 895.

⁷³² p. 896.

⁷³³ p. 896.

⁷³⁴ p. 894.

⁷³⁵ See further Yeo, 1991, who points to the liberal interpretation given to this requirement by the Australian courts in cases such as *R V Hill* [1980] 3 A Crim R 397 and *R V R* [1981] 4 A Crim R 127. He explains that the Australian courts have liberally interpreted the suddenness requirement by recognising how a series of relatively minor provocative incidents when viewed cumulatively could constitute serious provocation and by allowing for provocation even when there was a delay between the final provocative act and the killing. pp. 1200-1201.

to mean immediate.⁷³⁶

The benefits of efforts made in *Thornton* and *Ahluwalia* were reaped in *R V Humphreys*.⁷³⁷ Lord Justice Hirst recognised that the appellant had "a very unhappy family background."⁷³⁸ When the appellant was about five her parents separated and she went to live with her mother and her step-father in Canada. However, both were alcoholics and the appellant herself from a very early age took drugs, drank too much alcohol and was sexually promiscuous. In 1983 she returned to England and for a while lived with her father and step-mother before going to live with her grandmother. However, in August 1984, at the age of sixteen, the appellant left home and went to work as a prostitute. Shortly afterwards she met Trevor Armitage, the deceased, and went to live with him. The deceased had a predilection for younger girls, had several convictions for violence, was a drug addict and was known to the vice squad as a result of his activities. The appellant continued to work as a prostitute whilst living with Armitage. Initially they had a sexual relationship but shortly after they first met, he beat her and she lost any emotional feelings she had towards him. The appellant spent time in prison between Christmas and the New Year 1984-1985 and, while she was away, the deceased began to live with another young girl. In addition to her personal circumstances, the appellant herself had a strong tendency to seek attention which was exemplified by her frequent attempts to slash her wrists.

A witness at the trial testified that on February 24 1985 she saw the appellant in a bar and described her as being "very lonely, depressed and desolate."⁷³⁹ The following day, the deceased, his son and a number of their friends left a bar with the appellant. The deceased remarked that they would be

⁷³⁶ Smith and Hogan, 1996, p. 365. See also the cases of *Pearson* [1992] Crim. L.R. 193 and *Baillie* [1995] Crim L.R. 739 In the former the two defendants had armed themselves in advance with the fatal weapon and the killing was a joint enterprise. While in the latter the defendant took a gun from the attic and drove to the deceased's house, an act which Farmer 1995, p. 740 points out requires a high degree of control, before he shot him. Cooling time, therefore, did not negative the defence in either case since in both provocation was left to the jury.

⁷³⁷ Case number 86/0202/D3, now reported in [1995] 4 ALL ER 1008. In what may well be a precedent for battered women convicted of murder, Emma Humphreys is now taking a negligence action against the original instructing solicitors.

⁷³⁸ p. 2 of the transcript, p. 1011 of the judgement.

⁷³⁹ p. 4 of the transcript, p. 1011 of the judgement.

alright for a gang-bang tonight."⁷⁴⁰ On arriving back to the house, after another trip to a different bar, the appellant went upstairs and turned on the radio. When the deceased left to drive his son home, the appellant went down to the kitchen and took two knives from a drawer fearing that she would be beaten again. She then cut both of her wrists with a knife. When the deceased arrived home, the appellant was sitting on the landing with a knife in her hand. The deceased went past her into the bedroom where he undressed and, with only his shirt on, came and sat next to her on the landing. She said that she had the impression that he wanted sex and was prepared to force himself on her. The deceased then taunted her about not having made a very good job of slashing her wrists. This incident was relied upon as having been the trigger which caused the appellant to lose her self control. The appellant stabbed the deceased with a blow of the knife which went through his heart and liver.

Dr. Michael Tarsh, a consultant psychiatrist, described the appellant as

a girl of abnormal mentality with "immature and explosive and attention-seeking traits," the last trait referring to the tendency to wrist slashing.⁷⁴¹

He diagnosed her as suffering from

mildly abnormal mood swings and abnormal impulsiveness and he thought faced with a series of stresses, she was likely to lose her self control against the background of this ambivalent relationship with Armitage, a mixture of love and loathing, whatever it was, if then, having cut her wrists she was jeered at he thought that she could explode.⁷⁴²

Furthermore, in cross-examination Dr. Tarsh said that he thought that

she lost control completely because of the interplay of a provocative situation, abnormal personality from considerable unhappiness and alcohol⁷⁴³

and his opinion was that if the abnormal personality had been taken away, the killing would not have happened.

Lord Hirst L.J. rejected counsel's argument that the trial judge's direction shut out from the jury's consideration the build-up which cumulated in the killing. However, the judge went on to hold that the trial

⁷⁴⁰ p. 4 of the transcript, p. 1011 of the judgement.

⁷⁴¹ p. 6 of the transcript, p. 1012 of the judgement.

⁷⁴² p. 6 of the transcript, p. 1012 of the judgement.

⁷⁴³ p. 6 of the transcript, p. 1012 of the judgement.

judge ought to have guided the jury in analysing "the various strands of provocation at the successive stages" of the relationship;⁷⁴⁴ "a mere historical recital, devoid of any analysis or guidance,"⁷⁴⁵ was not sufficient.⁷⁴⁶ Lord Hirst did recognise that the "tempestuous"⁷⁴⁷ relationship between the appellant and the deceased was a "complex story with several distinct strands of potentially provocative conduct building up until the final encounter."⁷⁴⁸ When examining this relationship the judge took into account the long-term history of violence, the cruelty which he said was represented by the beatings, the continued encouragement of prostitution and the breakdown of the sexual relationship. When looking at the events of the night in question, Hirst LJ seems to have found three instances of provocative conduct on the part of the deceased towards the appellant. During the first part of the night there was the drunken threat of the gang-bang. Then there was the potentially provocative conduct of the deceased when he appeared in an undressed state, presenting the threat of unwanted sex. Finally there was the verbal taunt which was the crucial trigger causing the appellant to lose self control.

Although the sudden and temporary aspect of the loss of self control requirement was tested in *Thornton*, it was not until the *Ahluwalia* decision that the Court of Appeal allowed for its extended definition in the light of cumulative provocation cases which was eventually put into practice in *Humphreys*. This lenient approach accords with the act's general tendency towards the subjective, with its emphasis on the importance of the individual's loss of self control, as well as the particular provisions of the subjective requirement which envisage taking into account subjective considerations such as "relevant circumstances," "the nature of the provocative act," "relevant conditions," "sensitivity of the defendant at the time," and finally the "time.. which elapsed" between the last act of provocation and the

⁷⁴⁴ p. 26 of the transcript, p. 1023 of the judgement.

⁷⁴⁵ p. 1023 of the judgement.

⁷⁴⁶ This argument was based on *R V Stewart* (Unreported June 27 1994) where Stuart-Smith L.J., giving judgement for the court, held that in cases where the judge must leave the issue of provocation to the jury he "should indicate to them, unless it is obvious, what evidence might support the conclusion that the Appellant lost his self control."p. 26 of the *Humphreys* transcript, p. 1023 of that judgement.

⁷⁴⁷ p. 27 of the transcript, p. 1023 of the judgement.

⁷⁴⁸ p. 27 of the transcript, p. 1023 of the judgement.

response.⁷⁴⁹ This tendency towards the subjective has been endorsed more recently in the Court of Appeal's second hearing of Sara Thornton's case, *R V Thornton (No 2)*.⁷⁵⁰ Although the case was not decided by the Court of Appeal, as it went back to be retried, Lord Taylor C.J. considered that expert testimony on the battered woman syndrome could be relevant to the subjective issue of loss of self control by "forming an important background to whatever triggered the actus reus."⁷⁵¹ He was of the opinion that the testimony could help the jury to understand how a defendant who had endured years of abuse could suddenly lose self control, on the "last straw"⁷⁵² basis after only a minor incident.⁷⁵³

Proportionality.

The law on the proportionality requirement is stated in its pre-1957 form in the case of *Mancini V DPP*.⁷⁵⁴ There the killing occurred in the context of an on-going feud between Mancini, the appellant, and one Fletcher. The main bone of contention between the two related to the fact that Mancini had excluded Fletcher from a club called the Palm Beach Bottle Party. The evidence relied on at trial was given by the doorkeeper who testified that Mancini, when he saw Fletcher and his friend Distleman entering the club, went across to Fletcher and seized him by the neck or the top of the coat. Distleman then

⁷⁴⁹ See, for instance, the comment on *R V Thornton*, where the writer criticises Beldam LJ's remark that the direction to the jury in *Davies*, which allowed them to take account of the "whole course of conduct of [the deceased] right through the turbulent year of 1972" was "too generous." The author considers that the remark can be justified only if no reasonable jury could have thought that the course of conduct had no effect on the defendant at the flashpoint." Although everything both done and said" must be limited to what is relevant, everything which may in fact have contributed to the accused's loss of self control is relevant. 1992, pp. 54-56.

⁷⁵⁰ [1996] 2 All ER 1023.

⁷⁵¹ p. 1030. Although J.C.S. expresses reservations on what this case had to say in relation to the objective inquiry post LUC, a case which we will consider later, he writes that the personality disorder and battered woman syndrome are clearly capable of being relevant evidence so far as the subjective test for provocation is concerned. 1996, p. 598.

⁷⁵² p. 1030.

⁷⁵³ As we will see below, although the majority in *Luc Thiet Thuan V R* [1996] 2 ALL ER 1033 did not refer specifically to *Thornton* (No. 2), which was decided after the oral hearing in *Luc*, their rejection of the *McGregor* influence on the objective test caused them effectively to reject *Thornton*. However, it seems that this only relates to the objective test, which suggests that the Council may have approved of the ruling on the subjective issue. Lord Steyn in his dissenting judgement specifically approved of *Thornton* (No. 2).

⁷⁵⁴ [1941] 3 ALL ER 272.

went to Fletcher's aid, seized Mancini's shoulder or arm and aimed a blow at him. Mancini drew out a dagger and severed one of Distleman's main arteries from which he died shortly afterwards. The main argument on appeal was that although the judge had properly directed the jury as to self defence he did not properly direct them as to the possibility of allowing for provocation. This argument was rejected on the grounds that Mancini used a degree of force which was disproportionate to that used against him. Viscount Simon L.C. based his judgement on the jury's rejection of self defence. This rejection meant that the jury did not believe the appellant's allegation that he heard a voice threatening to knife him and that Distleman then came at him with an open penknife. Once this possibility was excluded, the only possible source of provocation was that Distleman came at him with his bear fists. Mancini's mode of retaliation, a 7-inch-long dagger with a double-edged blade, a sharp point and sharp sides, in response to fists was deemed to be disproportionate and operated to bar his defence of provocation. The House of Lords explained this requirement in the following terms:

it is of particular importance...to take into account the instrument with which the homicide was effected, for to resort in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.⁷⁵⁵

This approach resembles the approach of the Scottish courts in that the proportionality requirement is treated as an objective legal requirement which must be fulfilled before the defence of provocation can be established. Similar arguments to those made by Counsel for the appellant in *Lennon*⁷⁵⁶ have also been made in England where, despite the act's concern with the accused's loss of self control, they have nonetheless produced a similar result. The act requires that the jury has to consider both the subjective issue, did accused *lose his self control?* and the objective issue, was the provocation enough to make the reasonable man *do as accused did?*⁷⁵⁷ However, to ask the jury to consider whether a reasonable man in full control of himself would have done what the accused did, would have the logical effect of eliminating the defence from the law by dismissing the fact that the accused lost self control.

⁷⁵⁵ p. 277.

⁷⁵⁶ See above.

⁷⁵⁷ Emphasis added.

Despite this contradiction the Privy Council, whose decision is not binding on British courts, held in *Phillips V R*⁷⁵⁸ that the average man who loses self control does react by using only such force as is proportionate to the provocation.

The average man reacts to provocation according to its degree with angry words, with a blow of the hand, if the provocation is gross and there is a dangerous weapon to hand, with that weapon.⁷⁵⁹

The only difference between England and Scotland in the wake of the '57 act appears to be that it is now the jury, rather than the judge, which determines whether the response was the act of a reasonable man, which does reverse *Mancini* but only on the narrowest of grounds. The CLRC has recommended, more radically, that this tension between the objective and the subjective be resolved in favour of the subjective. In its view the question for the jury should be whether, on the facts as they appeared to the defendant, the provocation can reasonably be regarded as a sufficient ground for the loss of self control leading the defendant to react against the victim with murderous intent, and that, in answering the question, the defendant should be judged with due regard to all the circumstances, including any disability, physical or mental, from which he suffered.⁷⁶⁰ This test, as I will show, corresponds with similar solutions to the tensions between the objective and the subjective which have emerged in the more general objective requirement.

The Reasonableness Test.

The reasonableness test constitutes the objective requirement of a successful provocation defence. Not only must the jury believe that, as a matter of fact, the provocation led the accused to lose self control, the subjective test, but also that it would have had the same effect on the reasonable man, the objective test. Thus, the test involves an evaluative question as to whether an accused is deserving of mitigation by measuring his or her reaction to the provocation against that of the hypothetical reasonable person. The reasonable man test is premised on the standard of the even-tempered man. On the one hand, the test safeguards against bad-temperedness by penalising the bad-tempered man from indulging his propensity

⁷⁵⁸ [1969] 2 AC 130.

⁷⁵⁹ p. 137.

⁷⁶⁰ Cited by Smith and Hogan, 1996, pp. 374-375.

to lose his temper.⁷⁶¹ While, on the other, it allows the accused's loss of self control to be considered from his or her perspective in the circumstances rather than the basis of the reasonable man sitting in the calm atmosphere of a court.⁷⁶²

The reasonable man did not appear in England until *Welsh*⁷⁶³ where Keating J told the jury that if there was evidence of provocation

then it is for the jury whether it was such that they can attribute the act to the violence of passion naturally arising therefrom, and likely to be aroused thereby in the breast of a reasonable man.⁷⁶⁴

Prior to the '57 Act the reasonable man was initially dealt with by the courts as an objective legal construct, that is, without imbuing him with any particular characteristics. In the early days of the reasonable man test, judges instructed the jury that the reasonable man was normal in mind and body. Thus, in *Alexandar*⁷⁶⁵ it was held that the trial judge had rightly refused to allow provocation to go to the jury in the case of an accused who was mentally deficient. This holding was reaffirmed in the later case of *Lesbini*⁷⁶⁶ where the Court of Criminal Appeal decided that the reasonable man did not suffer from defective control and want of mental balance.⁷⁶⁷ In, what is the most oft cited case in this line of authority, *Bedder V DPP*,⁷⁶⁸ the House of Lords reiterated the view that the reasonable man was normal in body by directing the jury to consider the effect which a prostitute's taunts of sexual inadequacy would have had

⁷⁶¹ Gordon considers that this concern with the bad-tempered man diverts attention away from what ought to be the focus of attention, the infliction of punishment in respect of an wrongful act. p. 782.

⁷⁶² Gordon, p. 783.

⁷⁶³ (1869) 11 Cox CC 336.

⁷⁶⁴ p. 338.

⁷⁶⁵ (1913) 9 Cr App Rep 139.

⁷⁶⁶ [1914] 3 KB 1116.

⁷⁶⁷ For another case in this line of authority see *Smith* (1915) 11 Cr. App. Rep. 81 where it was held that the fact that the defendant was seven months pregnant was irrelevant when considering her culpability for killing a two-and-a-half year old child by hitting her over the head with a broom.

⁷⁶⁸ [1954] 2 All E.R. 801.

on an ordinary person, not on a man who was sexually impotent.⁷⁶⁹

Although not as controversial as it is in England, the reasonable man test has generated a degree of controversy in Scotland. Gordon questions whether a fundamental standard of even-temperedness exists at all and points out that an "even-tempered healthy average Scotsman"⁷⁷⁰ may not necessarily react in the same way to an anti-semitic insult as Jewish person who survived Belsen. Similarly, Turner⁷⁷¹ objects to treating the reasonableness test as an objective standard of self control and suggests that it ought to be used as a way of testing the truth of the accused's statement that he lost control. He argues that viewing the test in this way would allow for the degree of punishment which should be inflicted on the particular accused to be the primary focus rather than the objective rightness of what was done. The test has also been criticised because of its failure to take into consideration factors which may be personal to particularly sensitive groups. Thus, the shortcoming in this respect is that instead of dealing with the reasonable impotent man in a case in which the accused is impotent, it deals with the man on top of a "bus in Sauchiehall Street."⁷⁷²

Professor Smith has written that the Scottish courts would not have produced an outcome like *Bedder*. In his view

[i]n Scotland it *may* be competent to consider factors which make the particular accused more sensitive to certain forms of insult than would the ordinary Scotsman-as, for example, taunts regarding religion, race, colour or physical deformity.⁷⁷³

Smith has since gone on to suggest that Scots law ought to look at the alleged provocation to some extent with the eyes of the accused but that a wholly subjective approach need not be accepted. He suggests, as

⁷⁶⁹ The same strict adherence to this objective standard can be seen in the case of *McCarthy* [1954] 2 Q.B. 105 where the court held that the defendant who, after an unwanted homosexual advance, "went raging," was not entitled to have the jury consider the fact that he was excitable because of having drink taken and so more likely to lose self control if provoked. Cited by Smith and Hogan, Third Edition, p. 239.

⁷⁷⁰ p. 784.

⁷⁷¹ Russell on Crime, 1964, 534.

⁷⁷² Gordon, pp. 783-784.

⁷⁷³ Smith, 1957, p. 130.

an interim measure, that the jury be directed to consider the loss of self control as a question of fact.⁷⁷⁴ Doubting the viability of this proposal, Gordon points out that if the question is one of fact, then adopting a subjective approach is necessary. Such an approach brings with it the difficulty of deciding which features of the case ought to be regarded as sufficiently special to be taken into account.⁷⁷⁵ One solution which was adopted in the case of *James Berry* was to judge the sufficiency of provocation by reference to the retaliation. Thus, the jury were asked to consider whether the retaliation was what might be expected of "an ordinary average sort of person, carried away by rage and excitement."⁷⁷⁶ As we will see, the case of *R V Camplin*⁷⁷⁷ was the first case to interpret the reasonableness test in England after the passing of the act. Although *Camplin* has been acknowledged in Scotland, and, although the influential approach of the New Zealand courts⁷⁷⁸ has been discussed,⁷⁷⁹ the Scottish courts have never considered the potential problems posed by the objective test.

Despite being retained by the '57 act, the reasonable man test has changed almost beyond recognition in the past thirty years. This change is due, in part, to the fact that the judiciary's power to dictate to the jury what the characteristics of the reasonable offender were⁷⁸⁰ but it is due primarily to the inclusion of insulting words. Together these changes have resulted in a move towards the subjective even when applying the objective test. Thus, the law post '57 has witnessed a move away from case-bound typical fact situations which were objectively determined, as we saw beginning with *Welsh* towards a consideration of how the verbal provocation affected the particular person to whom it was addressed. Such an assessment, by definition, involves a personal inquiry accounting for the reason why the particular individual was insulted. In order to come to terms with this personal dimension, it became necessary for

⁷⁷⁴ Smith, 1957, p. 143.

⁷⁷⁵ Gordon, p. 785.

⁷⁷⁶ Court of Criminal Appeal, Oct, 1976, unrep, cited by Gordon, p. 785.

⁷⁷⁷ [1978] 2 ALL ER 168.

⁷⁷⁸ See later the case of *R V McGregor* [1962] NZLR 1069.

⁷⁷⁹ See Gordon p. 786.

⁷⁸⁰ This had the effect of overruling *Bedder*.

the English courts to look beyond the objective requirement and to take into account the particular characteristic of the accused, which was the object of the provocation.

*R V Camplin*⁷⁸¹ initiated a debate, which still divides the judiciary in the 1990s, centring on which of the accused's characteristics could be taken into consideration for the purposes of determining reasonableness and how they ought to be considered. At trial, the defendant claimed that he had been bugged against his will. When the deceased laughed at him, the defendant was overcome with shame whereupon he lost his self control and killed the deceased with a chapatti pan. The trial judge, dismissing defence arguments that the jury ought to be asked to consider the effects of provocation on a reasonable boy of fifteen, directed that the objective test entailed examining the effect of the provocation on a reasonable man rather than a reasonable boy. The Court of Appeal held that this was a misdirection. Distinguishing *Bedder* from *Camplin*, the court held that unlike being impotent, youth is not a personal idiosyncrasy or physical infirmity. Quite the contrary, far from being deviations from the norm, youth and the immaturity, which naturally accompanies youth, are norms through which everybody must pass. The House of Lords dismissed the Director's appeal, not on the narrow basis of an isolated concession to age, which is sufficiently universal to be taken into consideration, but on the broader basis of the greater concession to the individual allowed by section three. The Lords were influenced by the fact that under the Act, words alone may be sufficient provocation. They reasoned that this increased diversity as to what can count as sufficient provocation, must, correspondingly, involve an examination of how the words or insult affected the particular individual. As Lord Diplock held

[t]o taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however equable his temperament, if the facts on which the taunt is founded are true.⁷⁸²

On the basis, therefore, the House decided that the *Bedder* principal could no longer be followed. However, the Lords did not consider that this undermined the rationale for the objective test. As Lord Diplock pointed out this development still left in place the aim of the test which was to prevent

⁷⁸¹ [1978] 2 All ER 168. For a helpful account of the effect of *Camplin* on ethnicity see Coss, 1992, pp. 62-65.

⁷⁸² pp. 173-174.

a person relying on his own exceptional pugnacity or excitability as an excuse for loss of self control.⁷⁸³

Just as age was sufficiently universal to be considered so too was sex. Lord Simon's view was that what might be considered provocative behaviour when directed towards a woman may not necessarily be provocative when directed towards a man.⁷⁸⁴ Similarly, Lord Diplock held that

[T]he judge should state what the question is using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the age and sex of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also would react to the provocation as the accused did.⁷⁸⁵

Since *Camplin*, there have been a number of differing approaches to this issue of relevant characteristics. One influence on subsequent case-law came from a New Zealand case, which actually predated *Camplin*, *R V McGregor*,⁷⁸⁶ and which was first adopted by the English court of Appeal in the case of *R V Newell*.⁷⁸⁷ In *McGregor* the court was concerned with interpreting the New Zealand statutory definition of provocation as laid down in section 169 (2) of the Crimes Act 1961. The act provided that "Anything done or said may be provocation if-

(a) In the circumstance 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."

Justice North, considering what was meant by this qualification to the concept of an ordinary person and, in particular, the power of self control of the ordinary person, based his conclusion on the use of the words "but otherwise." The judge pointed out that the act required a consideration of a person having the power

⁷⁸³ p. 173.

⁷⁸⁴ Lord Simon's contribution was that imputations against chastity would be more provocative when directed towards a woman than to a man.

⁷⁸⁵ p. 175.

⁷⁸⁶ [1962] NZLR 1069.

⁷⁸⁷ (1980) 71 Cr App R 331.

of self-control of an ordinary person *but otherwise*⁷⁸⁸ having the characteristics of the offender. He argued that it would be wrong to interpret the act as requiring a consideration of a person having the power of self-control of an ordinary person who *in other respects*⁷⁸⁹ had the characteristics of the offender. The judge reasoned that were this latter interpretation to be applied, then the test of the power of self control of an ordinary person would remain unaffected. Although certain characteristics could be taken into consideration, the test would ultimately be determined by reference to an objective test of reasonable self control. This, the judge concluded, could not have been the intention of the Legislature. He held that

[T]he Legislature must be regarded as having in contemplation a person with the power of self control of an ordinary person, but having nevertheless some personal characteristics of his own, which are proper to be taken into account, so that his reaction to provocation is to be judged on the basis whether the provocation was sufficient to bring about loss of self control in an ordinary person who nevertheless possessed as well the special characteristics of the offender.⁷⁹⁰

Included in this category of special characteristics were mental characteristics.

The word "characteristics" in the context of this section is wide enough to apply not only to physical qualities but also to mental qualities and such more indeterminate characteristics as colour, race and creed.⁷⁹¹

However, this inclusion did not mean that the objective test could automatically be displaced in favour of a subjective test. The test involved a more subtle "fusion of these two discordant notions."⁷⁹² The objectivity was provided by Justice North's limitation on what could constitute a relevant characteristic.

[I]t is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man. The characteristic must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and also to have a sufficient degree of permanence to warrant its being regarded as something part of the individual's character or personality...[Furthermore] [T]here must be something more, such as provocative words or acts directed towards a particular phobia from which the offender suffers.⁷⁹³

⁷⁸⁸ Emphasis added.

⁷⁸⁹ Emphasis added.

⁷⁹⁰ p. 1081.

⁷⁹¹ p. 1081.

⁷⁹² p. 1081.

⁷⁹³ pp. 1081-1082. Yeo, 1997, criticises the *McGregor* test and highlights its problems when applied to determine whether a defendant's gender is relevant to the gravity of the provocation. Yeo explains these difficulties on the grounds that North J only meant the test to apply to the power of self control of a reasonable person. pp. 440- 443.

The Court of Appeal in *R V Morhall*⁷⁹⁴ also addressed this issue of relevant characteristics. The Court held that the appellant, who had been taunted about his addiction to glue sniffing, could not rely on this addiction as being a relevant characteristic since it was inconsistent with the concept of the reasonable man. The House of Lords⁷⁹⁵ overruled the Court of Appeal's decision. It held that the term "reasonable man" was used in a special sense in section three of the Homicide Act. In the words of Lord Goff "[t]he function of the test is only to introduce, as a matter of policy, a standard of self-control which has to be complied with if provocation is to be established in law."⁷⁹⁶ All courts were concerned with, therefore, was reasonable self-restraint. Playing down the test devised by North J,⁷⁹⁷ the Law Lords were of the opinion that the reasonableness test could be met by a direction similar to that given by Lord Diplock in *Camplin*.⁷⁹⁸ Furthermore, the House held that when assessing the gravity of the provocation, it may be necessary to refer to the defendant's history or circumstances in which he is placed at the relevant time which do not strictly fall within the description "characteristics"⁷⁹⁹ and that a judge should give the jury directions as to what, on the evidence, is capable of amounting to a relevant characteristic. So, on the facts of this case, the Lords attached importance to the fact that the taunt was directed at a habitual glue sniffer. For the House of Lords, therefore, the reasonable man test was not concerned with reasonable conduct generally but only with introducing as a matter of policy a standard of self control, which has to be complied with before provocation can be established. In other words, the House was of the opinion that the mere fact that a characteristic is discreditable does not necessarily exclude it from consideration. However, the condition of being drunk or being high was a very different consideration for the House of

⁷⁹⁴ 98 Cr App R 108.

⁷⁹⁵ [1995] 3 All ER 695.

⁷⁹⁶ p. 665.

⁷⁹⁷ Although the Lords did not categorically reject the test, they did say that it was to be regarded with caution. p. 667.

⁷⁹⁸ However, the Lords did point out that Lord Diplock's direction ought not to be taken as being the only possible direction. Judges still have the freedom to be able to tailor their direction to the facts of the case before them.

⁷⁹⁹ p. 666 citing *Camplin* in support.

Lords. It rejected emphatically the possibility of allowing for the mere condition of being drunk or high as a matter of policy.⁸⁰⁰

The *McGregor* test was more expressly rejected by Lord Goff when he delivered the majority decision of the Privy Council in *Luc Thiet Thuan V R*.⁸⁰¹ The case itself came before the Privy Council by way of appeal from the Hong Kong Court of Appeal. The appellant was charged with the murder of his former girlfriend. At trial, he argued that he, and his co-accused, had gone to the deceased's flat to collect money which she owed to him. The deceased, whom the accused tied up so that he could interrogate her about her new boyfriend, compared unfavourably the accused's sexual prowess with that of her new boyfriend. The appellant described this as the moment he realised their relationship was over and said he "felt that some heat had popped up into [his] head."⁸⁰² The autopsy revealed that the deceased had suffered multiple stab wounds and asphyxiation. The defence introduced two medical witnesses who testified that the appellant had a form of organic brain problem.⁸⁰³

Counsel for the appellant argued, on the basis of the development precipitated by Justice North in *McGregor*,⁸⁰⁴ that the defendant's mental condition ought to have been considered by the trial judge for the purposes of assessing the objective test in provocation. The Privy Council (Lord Steyn dissented),

⁸⁰⁰ In a commentary on *R V Morhall* JC Smith points out that this distinction can also be made on the basis of legal principle. He notes that alcohol tends to reduce inhibitions and restraints and makes the drunkard more volatile than the sober person, whatever the nature of the provocation. The distinction can therefore be made on the basis that characteristics which diminish one's capacity for self control cannot be considered. Although Smith agrees, in principle, with the distinction between characteristics affecting the accused's capacity for self control and characteristics which affect the gravity of the provocation, or between provocablity and provocativeness, he points out that this is not without its difficulties. In particular, he points to the possible case where a jury might be asked to consider the effect of provocation on a tipsy temperance society member, displaying the level of self control to be expected of a sober person. 1995, pp. 890-892.

⁸⁰¹ [1996] 2 ALL ER 1033.

⁸⁰² p. 1037.

⁸⁰³ Dr. Lee testified that the appellant's ability was notably impaired, especially in the left side of the brain and towards the frontal areas which, the other defence doctor, concluded was indicative of a cerebral brain lesion. The medical witnesses took account of the fact that, after a fall, which rendered the appellant unconscious, the appellant experienced an inability to control impulses after as little as minor provocation; a condition which they said was commonly be found in patients with an organic brain damage involving difficulty controlling impulses. p. 1037.

⁸⁰⁴ See below for the extent of this development.

dismissing the appeal, considered that the English Court of Appeal in *R V Newell*⁸⁰⁵ had erred by "the wholesale adoption without analysis"⁸⁰⁶ of a substantial part of North J's obiter dictum. In particular, the Council objected to the treatment of "purely mental characteristics,"⁸⁰⁷ as relevant characteristics for the purposes of the objective test. The Council regretted the "unhappy influence,"⁸⁰⁸ which the *Newell* decision had on English law, notably affecting cases involving battered women who kill,⁸⁰⁹ but pointed out that the reason for this development in the New Zealand courts was due to the fact that diminished responsibility does not exist as a separate defence there. This rejection of *McGregor* was bolstered by the fact the case had also fallen into disfavour in the New Zealand courts, particularly the judgement of Cooke P in *McCarthy* who considered that section 169 of the new Zealand Act may have had the legislative purpose of introducing diminished responsibility into the limited field of provocation.⁸¹⁰ The Council considered that such a development could not have been the intention of the English Legislature in section three of the Homicide Act, or section 4 of the Hong Kong Ordinance, since both Acts have specific provisions dealing with the defence of diminished responsibility,⁸¹¹ which are generously interpreted by the courts.⁸¹²

⁸⁰⁵ (1980) 71 Cr. App. Rep. 331.

⁸⁰⁶ p. 1043.

⁸⁰⁷ p. 1043.

⁸⁰⁸ p. 1044.

⁸⁰⁹ See below.

⁸¹⁰ pp. 1043-1044 of *Luc*.

⁸¹¹ Lord Goff also pointed to potential difficulties relating to the burden of proof were mental characteristics as such to be considered under the defence of provocation. Under the defence of diminished responsibility, the burden of establishing diminished responsibility rests on the defendant, though it is the civil burden. Were mental characteristics as such to be considered under the defence of provocation, then the danger would be that a defendant who failed to establish diminished responsibility on the basis of the civil burden, with the same evidence, could succeed on the defence of provocation because the prosecution failed to negative, on the higher criminal burden, that the defendant was suffering from a mental infirmity affecting self control which must be attributed to the reasonable man for the purposes of the objective test. p. 1046.

⁸¹² Lord Goff, p. 1046, referred in particular to the possibility of grounding a defence of diminished responsibility on the basis of the defendant's difficulty in failing to control his behaviour; a difficulty which was "substantially greater than that which would be experienced in like circumstances by an ordinary man not suffering from mental abnormality." Smith and Hogan, 1992, p. 2132 referring to *R V Byrne* [1960] 3 All ER 1 at 4.

The Privy Council took as its touchstone the *Camplin* decision and noted that neither the New Zealand Crimes Act 1961 nor *McGregor* had received any mention in the decision of Lord Diplock⁸¹³ or Lord Morris.⁸¹⁴ The Council was of the opinion that the judgements in *Camplin* were so similar to Professor Ashworth's reasoning in an article,⁸¹⁵ which he wrote two years before *Camplin* was decided, that the Lords must have been influenced by this approach. There Ashworth distinguished between characteristics relating to the accused's sensitivity and characteristics which affect the accused's capacity for self control and considered that

individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused's level of self-control should not.⁸¹⁶

The Privy Council, therefore, was of the opinion that the law on reasonableness was correctly stated in *Camplin*. It noted that this distinction had more recently been drawn by the High Court of Australia in *Stingel V R*.⁸¹⁷ On this basis, therefore, the Council ruled that mental infirmity, which had the effect of reducing a defendant's powers of self control below that to be expected of an ordinary person, could not be attributed to the ordinary person for the purposes of the objective test. Smith and Hogan summarise that

"[t]he effect of the opinion in LUC seems to be that any mental abnormality which is capable of founding a defence of diminished responsibility cannot be a relevant characteristic for the

⁸¹³ With whom Lord Fraser and Lord Scarman agreed.

⁸¹⁴ Only Lord Simon expressed the opinion that English law was "substantially the same" as s 169 (2) of the New Zealand Act as explained in *McGregor*. The Council considered that "[t]his imprecise statement cannot...have been intended to suggest that precise guidance as to the interpretation of the English statute could be derived from *McGregor*. p. 1042.

⁸¹⁵ Ashworth, 1976.

⁸¹⁶ p. 300 of the article, cited at p. 1041 of the judgement.

⁸¹⁷ (1990) 171 CLR 312. This distinction drawn between personal characteristics affecting the power of self control of the ordinary person and those affecting the gravity of the provocation was greatly influenced by the dissenting judgement of Wilson J in the Canadian Supreme Court case of *R V Hill* [1986] 1 S.C.R. 313. Furthermore, the same distinction was drawn in the High Court of Western Australia in *R V Falconer* (1990) 65 A.J.L.R. 20 and applied to psychological blow non-insane automatism. The courts in this case relied heavily on the Canadian case of *R V Rabey* [1980] 2 S.C.R. 513 where the same distinction was applied. Cited by Yeo, 1992, pp. 293-296. Although this distinction was designed to achieve a measure of coherence in law, it did not immediately produce this result in Australia. See, for example the divergent approaches of the Australian courts as discussed by Leader-Elliot, 1996, pp. 73-74.

purposes of the defence of provocation, unless the provocation is directed at it.⁸¹⁸

The Lordships confirmed, albeit "as a footnote"⁸¹⁹ that cumulative provocation may still be open to a defendant and allowed for the possibility that this principle could be successfully invoked in cases such as "the battered wife syndrome."⁸²⁰

Lord Steyn based his dissent on the injustice which, he perceived, for women generally⁸²¹ and battered women in particular, arising out of the majority's decision to exclude mental characteristics reducing the defendant's capacity for self control below that of an reasonable person. In cases involving the introduction of expert testimony, he considered the unfairness of the majority's holding, which would allow for its introduction in relation to the subjective inquiry but prohibit it from being considered by the jury when dealing with the objective issue.⁸²²

Arguing in favour of considering mental characteristics as affecting capacity for self control, Lord Steyn looked to the report of the Royal Commission on Capital Punishment, which was presented to Parliament in 1953. The Commission reported society's concern with the harshness of the common law;

⁸¹⁸ p. 371. See, however, Yeo, 1997 who considers that this requirement that provocation be directed at the characteristic is a left over from the now discredited *McGregor* test and, as such, ought to be removed entirely from English law. p. 444. In the last paragraph of LUC (on page p. 1046) Lord Goff allowed for the possibility that the provocation may not always be directed at the characteristic. Although he does not go into any detail, he seems to have allowed for the possibility of a mistaken belief in the connection between the provocation and the characteristic. Were the English courts not to completely eradicate this aspect of the *McGregor* test from law, then this line of argument could be one way of circumventing the test.

⁸¹⁹ p. 1047.

⁸²⁰ p. 1047. Yeo, 1997 points out that the Council's "excessive caution" by not expressly allowing the question whether the principle of cumulative provocation could be successfully invoked in cases involving the battered woman syndrome was "regrettable." Footnote 53.

⁸²¹ He was concerned for women whose post-natal depression rendered them more prone to losing self control and women whose personality disorders made them more prone to losing self control.

⁸²² Commenting on Lord Steyn's judgement, footnote 89 p. 456, Yeo notes that it was Lord Steyn's belief that the battered woman syndrome was a mental abnormality which led him to the conclusion that the evidence would have to be rejected in relation to the objective test. Yeo points out that this assumption is by no means accurate. Indeed, he goes on to argue that expert evidence on the battered woman syndrome could be admitted on the basis that the attitude and behaviour of battered women, albeit possessing normal powers of self control, are so special as to be outside the common knowledge and experience of jurors. I will go on in chapters six and seven to demonstrate how this way of viewing the testimony could be put into practice. 1991, p. 456.

its growing concern that the individual prisoner was not being treated fairly and its desire that "characteristics"⁸²³ "and mental reactions"⁸²⁴ be taken into account when alleviating the harshness of the common law. Although the Commission recommended that the objective test be retained in provocation, it advised the courts to give "weight to factors personal to the prisoner in considering a plea of provocation."⁸²⁵ Just as the majority grounded their decision to exclude mental characteristics as they affected capacity for self control in *Camplin*, Lord Steyn similarly found his justification for including mental characteristics on this basis in that landmark decision. Agreeing with Lord Simon of Glaisdale, who recognised that justice and common sense meant that the law's compassion to human infirmity did not extend to the drunk, the bad-tempered or the over-sensitive, Lord Steyn observed that

there is nothing in the speeches to indicate that only youthfulness could qualify as "human infirmity" under the objective requirement. If their Lordships had in mind such a rigid and artificial *numerus clausus* it would have been quite easy to say so.⁸²⁶

Thus, Lord Steyn found in *Camplin* itself authority for a "sensible interpretation of s. 3 in its contextual sense."⁸²⁷ Such an approach was adopted, in a case which pre-dated the *Newell* influence on English law, *R V Raven*.⁸²⁸ There, the Recorder of London, on the basis of *Camplin*, ruled that the fact that a defendant aged 22 years had a mental age of about nine years was a relevant factor in the objective inquiry. Commenting on the case, Diane Birch recognised that the essence of the reasonableness test requires the jury to put themselves in to the shoes of the accused. Although requiring a jury of reasonable men and women to put themselves into the position of a reasonable 15-year-old may be difficult it involves

⁸²³ Cited at p. 1050 of *Luc Thiet Thuan*.

⁸²⁴ *Ibid.* Emphasis added.

⁸²⁵ *Ibid.*

⁸²⁶ p. 1051. Lord Steyn referred specifically to the sentence taken from the judgement of Lord Simon which did not attract any difference of opinion from the other Lords in *CAMPLIN*. "But it is one thing to invoke the reasonable man for the standard of self-control which the law requires; it is quite another to substitute some hypothetical being from whom all mental and physical attributes (except perhaps sex) have been abstracted." [1978] 2 All ER 168 at 180-181.

⁸²⁷ p. 1052.

⁸²⁸ [1982] Crim. LR 51.

"no greater stretching of the imagination than pretending to be one-legged⁸²⁹ or impotent or a different sex or colour."⁸³⁰ Recognising the greater difficulty involved in putting oneself in the position of a reasonable 22-year-old with a mental age of nine, she concludes that such difficulties are necessary if law is to give meaning to showing "compassion to human infirmity."⁸³¹ Up until the majority opinion in *Luc*, there was never any suggestion that this case was wrongly decided. Despite this recognition of mental characteristics in English law, the Lordships targeted their criticism at the influence of New Zealand cases beginning with *McGregor*, first considered in *R V Tai*,⁸³² and extended in *R V Taaka*⁸³³ and *R V Leilua*.⁸³⁴ In these latter two cases, the New Zealand courts, without explicitly acknowledging a move away from *McGregor*,⁸³⁵ began to allow personalities⁸³⁶ and mental states,⁸³⁷ as such, to be considered, without the North

⁸²⁹ Taken from the case of *Raney* (1942) 29 Cr. App. R 14 where the court held that the effect of kicking away a crutch had to be considered on a reasonable one-legged man.

⁸³⁰ Birch, 1982, p. 51.

⁸³¹ *R V Hayward* (1833) 6 C&P 157 at 159.

⁸³² [1976] 1 NZLR 102. In *TAI* the characteristic in question was the tendency towards a slow build up of passion claimed to be a characteristic of Samoan people.

⁸³³ [1982] 2 NZLR 198.

⁸³⁴ [1986] NZ Recent Law 118.

⁸³⁵ As we saw above, the test proposed by North J was that "[t]he characteristic must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and also to have a sufficient degree of permanence to warrant its being regarded as something part of the individual's character or personality"... and later he said that "[t]here must be something more, such as provocative words or acts directed towards a particular phobia from which the offender suffers.

⁸³⁶ In *Taaka* the accused introduced evidence to show that he had an obsessively compulsive personality, which was directed towards his wife, his child, and the deceased and which rendered him likely to brood for a longer period than a normal person. This mental characteristic meant that the deceased's attempted rape of the accused's wife, some thirteen days earlier, was particularly felt by the accused. The self-control of a normal person might not, therefore, have been enough to restrain him from reacting to the provocation which had been revived by a fight between him and the deceased on the night in question.

⁸³⁷ In *Leilua* the psychologist's report suggested that the appellant was suffering from post-traumatic stress disorder. The application for leave to appeal was dismissed on the facts but the court did accept that PTSD could be a relevant characteristic for the purposes of provocation.

limitation.⁸³⁸ The first Court of Appeal decision to rely on this line of authority was *R V Ahluwalia*,⁸³⁹ which we already discussed in the context of the subjective requirement. One of the arguments on appeal was that the trial judge misdirected the jury when he asked them to consider how a reasonable, educated Asian woman could have responded to the provocation; omitting to mention that being a battered woman was also a relevant characteristic for the purposes of the objective test.⁸⁴⁰ Counsel went on to argue⁸⁴¹ that the violence, abuse and humiliation, which the appellant had suffered over the course of ten years, had affected her personality so as to produce a state of learned helplessness. He concluded that this state was a characteristic, which ought to have been left to the jury to consider as part of the objective test for reasonableness. Although the Court of Appeal recognised that the appellant "had suffered grievous ill-treatment,"⁸⁴² it rejected the appeal,⁸⁴³ not on the basis that battered woman syndrome or post-traumatic stress disorder could not amount to a characteristic but because there was nothing to suggest that the effect of this abuse was to make her "a different person from the ordinary run of [women]" or marked off or distinguished from the ordinary [woman] of the community."⁸⁴⁴ The court went on to hold that had the evidence before the Court of Appeal been adduced before the trial judge, then different considerations may have applied. Although this decision sounds like *McGregor*, as Nicolson and Sanghvi noted in 1993, it

⁸³⁸ Brookbanks, 1986, disapproving of the recognition of diminished responsibility through the defence of provocation, points out these cases have the potential to erode the North safeguard against complete subjectivity in a number of respects. First, he envisaged the danger that conditions which are temporary or transitory could be considered. Second was the danger of losing the requirement that the provocation be directed at the characteristic, thus allowing for mere mental deficiency to be a characteristic, and finally was the effective removal of the time requirement which guards against revenge killings. pp. 416-417,

⁸³⁹ [1992] 4 All ER 889.

⁸⁴⁰ Alternatively, it was argued that the judge ought to have left the list of characteristics open so that the jury could have latched on to this characteristic even if he had not.

⁸⁴¹ p. 897.

⁸⁴² p. 898.

⁸⁴³ Yeo, 1997, criticises this aspect of the judgement on the grounds that having recognised the appellant's experience of protracted physical and emotional abuse, the Court then went on to dismiss it as being irrelevant because its effect fell short of the syndrome. As he writes, this evidence would be highly relevant when evaluating the gravity of the provocation on a normal woman. p. 441.

⁸⁴⁴ p. 898.

is different from that introduced into English by *Newell*⁸⁴⁵ on a number of counts.⁸⁴⁶ By contrast with the court's reluctance to admit fresh evidence in relation to provocation, was its assertive use of its discretion⁸⁴⁷ to admit fresh evidence from a psychiatrist of diminished responsibility. The report, which was overlooked at the initial trial, contained the psychiatrist's opinion that Mrs Ahluwalia was suffering from endogenous depression. The Lord Chief Justice considered that because the case was "most unusual" and "wholly exceptional" it was expedient in the interests of justice to admit this fresh evidence of diminished responsibility and ordered a re-trial on this basis.⁸⁴⁸ In *R V Baillie*⁸⁴⁹ the court of Appeal described this ruling in *Ahluwalia*⁸⁵⁰ as authoritatively establishing the effect of section 3 of the 1957 Act.

The third case in this line of authority is the case of *R V Dryden*.⁸⁵¹ Here, the appellant shot and killed a local authority Planning Officer following a planning dispute concerning buildings erected on his land. The mental characteristics which were at issue in this case were the appellant's eccentricity and highly abnormal obsessional personality. On the facts, the Court of Appeal dismissed the appeal but as Lord Steyn pointed out, the significance of the case is that "what may have been an obiter dictum in

⁸⁴⁵ (1980) 71 Crim. App. R. 331.

⁸⁴⁶ The authors point out that Taylor CJ failed to mention the *McGregor* proviso that the provocation be directed at the characteristic nor did he rule it necessary for a defendant's post-traumatic stress disorder, BWS or other mental or personality condition to be the subject of the provocation before they are attributed to the reasonable person. Furthermore, they note that the judge also failed to disapprove the trial judge's direction, notwithstanding that the deceased directed his provocation at neither the appellant's education nor ethnicity. 1993, p. 732. See also, J.C.S.'s commentary on the case where he points out that the remarks of North J in *McGregor* [1962] N.Z.L.R. 1069 had fallen into disrepute, even at this early stage. 1993, p. 65.

⁸⁴⁷ Nicolson and Sanghvi, 1993, tell us that this discretion is limited in that the Court of Appeal should not use this in such a way which encourages appellants to raise new defences where those originally run proved unsuccessful. Furthermore, it should only allow fresh evidence supporting new issues where such evidence was overwhelming and, if it had been available at trial, where its non-appearance had been due to flagrantly incompetent advocacy. p. 736.

⁸⁴⁸ As Edwards, 1992, p. 1351, notes the ordering of a retrial was "an unprecedented step," it being the first retrial in three years.

⁸⁴⁹ See above.

⁸⁵⁰ [1992] 4 All ER 889.

⁸⁵¹ [1995] 4 ALL ER 987.

Ahluwalia certainly ripened into ratio decidendi in *Dryden*.⁸⁵² Lord Taylor found in favour of the appellant.

We consider that they were features of his character or personality which fell into the category of mental characteristics and which ought to have been specifically left to the jury.⁸⁵³

Rejecting the submission that *Dryden* had been decided per incuriam, Counsel in *R V Humphreys*⁸⁵⁴ argued successfully that the evidence of Dr. Tarsh to the effect that she was a girl of abnormal mentality with immature and explosive and attention-seeking traits, the last trait referring to the tendency to wrists slashing, ought to have been considered for the purposes of assessing the reasonableness test. Counsel accepted that the "explosive trait" could not in itself qualify as an eligible characteristic, since it connoted no more than the appellant lacked normal powers of self control, but argued that the other traits, the attention-seeking and immaturity traits, ought to have been considered, particularly in view of the similarity between the immaturity trait in this case and that in *Camplin*.⁸⁵⁵ Lord Hirst⁸⁵⁶ held that the attention-seeking trait could be regarded as

⁸⁵² p. 1053 of *Luc*.

⁸⁵³ p. 998.

⁸⁵⁴ [1995] 4 All ER 1008. For a helpful account of both *R V Humphreys* and *R V Dryden* see Harrison, 1996, pp. 180-181 highlighting the difficulties in identifying precisely which characteristics the jury can consider and which can be ignored.

⁸⁵⁵ In his commentary on *R V Humphreys* [1995] 4 All ER 1008 J.C.S. reviews the case-law including a discussion of *Luc Thiet Thuan V R* [1996] 2 All ER 1033. He posits the question "who is right in principle?" Lord Steyn and the Court of Appeal who liberally allowed for mental characteristics to be taken into consideration or the majority in LUC affirming the House of Lords decision in *R V Morhall* [1995] 3 All ER 659. On the basis of the former he remarks that a jury may well wonder whether there is any difference between an eccentric and highly abnormal obsessional personality and an explosive one, especially when the personality is being advanced as the reason why the defendant blew up. Although he agrees that Lord Steyn's decision may represent an improvement in law because it virtually eliminates the distinction between the subjective and the objective tests, he considers that it is hard to see how it could be the law. p. 434.

⁸⁵⁶ Criticising the decision of the Court Horder, 1996, points out that the provocation given by the deceased directly related only to one of these characteristics, namely the attention-seeking trait. He considers that while the court may have meant the other characteristic, the immaturity trait, to be considered as increasing the gravity to her of the effect of all the cumulative provocation in the case, it ought to have pointed this out. As he reasons, a jury needs to be told that immaturity for one's age, as opposed to youth itself, cannot be allowed to affect the general standard of self control to be expected of the defendant. Thus, in his opinion, those with a mental age less than their actual age should plead diminished responsibility. pp. 37-38.

a psychological illness or disorder which is in no way repugnant to or wholly inconsistent with the concept of the reasonable person. It was also a permanent condition... which was abnormal and therefore set the appellant apart. Furthermore, it was clearly open to the jury to conclude that the provocative taunt relied upon as the trigger inevitably hit directly at this very abnormality and was calculated to strike a very raw nerve.⁸⁵⁷

Finally the case of *R V Thornton* (No. 2)⁸⁵⁸ reappeared before the Court of Appeal by way of a referral from the Secretary of State⁸⁵⁹ on the basis of new medical evidence. This evidence raised for consideration two characteristics which it was suggested the appellant possessed at the material time, namely her personality disorder and the effect upon her mental make-up of the deceased's abuse over a period of time. Counsel for the defence argued that had the further evidence been led at trial, the jury would have had to be directed to consider whether a reasonable woman with these two characteristics might have lost her self control and done as the appellant did. In particular, counsel argued that although at the trial there was medical evidence that the appellant's personality disorder was relevant to the defence of diminished responsibility, there was none to suggest that the characteristic was relevant to provocation. He pointed out that Beldam LJ, giving judgement on the first appeal, considered that had the psychiatrists held the view that this characteristic made it more likely that following the verbal insult, the appellant would have given way to impulsive tendencies or aggression, this characteristic may have been significant in assessing the loss of self control. Counsel went on to argue that clarification of the case-law on the issue of relevant characteristics since the first appeal further cast doubt on the basis for the jury's verdict. Lord Taylor C.J. held that the syndrome might have affected the defendant's personality so as to constitute a significant characteristic relevant to the objective test. In view of this fresh evidence and the clarification of the law, doubt was cast on the jury's verdict and a retrial was ordered.⁸⁶⁰

⁸⁵⁷ p. 24 of the transcript, p. 1022 of the judgement.

⁸⁵⁸ [1996] 2 ALL ER 1023.

⁸⁵⁹ Pursuant to section 17 of the Criminal Appeal Act 1968.

⁸⁶⁰ In his commentary on this case, Professor Smith, 1996, notes that the addition of these two characteristics seems to abandon the notion of the reasonable or ordinary person but says that this may be "a desirable development." He points out that if *Luc* is right, then this case is wrongly decided in so far as it holds the personality disorder to be relevant. Furthermore, he points out that the court in this case was wrong to include *Morhall* [1995] 3 All ER with *R V Ahluwalia* [1992] 4 All ER and *R V Humphreys* [1995] 4 All ER because the court in *Morhall*, which was reaffirmed in *LUC*, differed by holding that a mental characteristic can only be relevant where the provocation consists in taunts about that

More recently, the Court of Appeal in the case of *R V Parker*⁸⁶¹ overruled the Recorder's ruling that he was bound to follow the decision of the Privy Council in *Luc*. The case itself involved a chronic alcoholic who had brain damage. Relying on the dissenting judgement of Lord Steyn in *Luc*, the appellant sought to argue that this damage was relevant to the subjective issue but also that it was relevant to the objective test since it amounted to a special disability which might have rendered him more susceptible to provocation. Referring to an unreported case,⁸⁶² Otton LJ held that the correct approach was to rely on the previous decisions of the Court of Appeal until they are authoritatively overruled and not the decision of the Privy Council.⁸⁶³ The judge went on to hold that on this basis, evidence is admissible on the subjective issue and although he did not address the issue as to whether the evidence was admissible on the part of the objective question as to what degree of self control is to be expected of the reasonable man, he held that it was sufficient for the appeal to say that evidence was admissible within the parameters or the principles identified by Lord Steyn. Deciding that the issue of provocation could only be properly determined by fresh consideration by a judge, and depending on his ruling, a jury, the court ruled that the conviction was unsafe and ordered a re-trial. In the commentary on *R V Parker* Professor Smith writes that although *Luc* seems right in principle, judges would be well advised to follow the Court of Appeal decisions. Thus, he considers that English law must be taken to be settled in the absence of any further ruling from the House of Lords.⁸⁶⁴ It still remains to be seen, therefore, how the law in this area will

characteristic. pp. 598-599.

⁸⁶¹ February 25 1997. Summarised and commented upon by J.C.S. [1997] Crim. L.R. pp. 760-761. See also the transcript of the case by Smith Bernal.

⁸⁶² *Campbell*, unreported, October 25, 1996 95/4772/Z4.

⁸⁶³ In *Campbell* Lord Bingham CJ held that

"[w]e do not, however, conceive that it is open to us to choose between these competing views. [i.e. of the Privy Council and the Court of Appeal]. The previous decisions of this court are binding upon us. The decision of the Privy Council is not. It appears to us that unless and until the previous decisions of this court are authoritatively overruled, our duty and that of trial judges bound by the decisions of this court is to apply the principles which these cases lay down. If there is an effective re-trial in this case, and if provocation is an issue, it will be the duty of the trial judge to apply the law binding upon him as it then stands. Cited in the lexis print out of *R V Parker*, p. 2.

⁸⁶⁴ J.C. Smith, 1997, p. 760.

develop and how far it can evolve to meet the needs of battered women who kill. However, as I will argue next, the more progressive approach in cases involving battered women who kill does seem to involve distinguishing between characteristics which affect the capacity for self control and characteristics which affect the gravity of the provocation; an approach which seems to have been adopted generally by the House of Lords in *Morhall*. I now intend to highlight three problematic features of the defence for battered women who kill as well as outlining certain solutions which could be taken on board in any future development.

Problems with Provocation in Britain and Certain Solutions.

As we now understand, the Homicide Act 1957 opened the way in England for a general trend towards a more subjective approach, which focuses on the individual. By contrast, the courts in Scotland still appear to adopt a more objective stance which as we saw earlier means that the difficulties posed by cases involving battered women who kill are not dealt with at the level of the legal defences to murder but are filtered out of the system and dealt with at an informal level. Although the courts north of the border have approved of *Camplin*, there has not yet been any discussion of the extent to which this humanising influence⁸⁶⁵ has subjectivised the objective test. However, as we saw above in the case of *Rutherford*, the possibility of allowing for insulting words to count as provocation has been mooted in Scotland. Were the Scottish courts to be persuaded to follow such a path, then the structure of Scots law could come to resemble more its English counterpart. At the moment in England, and possibly in Scotland in the future, there are three key features of the defence, which have to be interpreted to take cognizance of the fact that the defendant is a battered woman before these cases can be treated equally. To repeat these are the actual loss of self control of the defendant resulting from the provocation, the gravity of the provocation to a reasonable woman who has been subjected to violence and the power of self control expected of a reasonable person.

In an article written as long ago as 1970, Peter Brett⁸⁶⁶ drew attention to physiological knowledge concerning human behaviour under stress. He pointed to research results which demonstrated the existence

⁸⁶⁵ Allen, used this phrase to describe the influence of *Camplin*. 1988, pp. 428-431.

⁸⁶⁶ Brett, 1970, p. 636.

in humans of a mechanism which produces the temporary physical changes needed to cope with stress situations.⁸⁶⁷ Since that time, the existence of a "fight-or-flight reaction" has been established.⁸⁶⁸ This knowledge tells us that anger causes certain changes in the body which prepares us for strenuous physical action.⁸⁶⁹ If such action occurs, the body soon returns to its normal state. However, in the absence of immediate physical action, the bodily changes persist and the feeling of anger continues. Furthermore, the system which produces these changes functions in such a way that the changes have an all-or-nothing quality and the degree of response to a stress situation varies from one individual to another.

Drawing on this knowledge, Brett criticises law's obscurantist outlook embodied in the concept of the reasonable man and advocates its abolition. He argues that there is "a whole range of types of men"⁸⁷⁰ whose behaviour law, if it is to operate justly, must recognise. Applied to provocation, his specific criticisms are three-fold. Pointing to the all-or-nothing quality of the reaction, he argues that this makes it pointless to draw distinctions between different types of provocative act. Second, while this scientific knowledge shows how a strong reaction to provocation is entirely in accordance with how an angered person might react, provocation's reasonable relationship rule interprets such a response as being inconsistent with provocation. Finally, the scientific reality that bodily changes and anger can persist in the absence of physical action is at variance with law's rule as to cooling time. In fact, Brett argues that cooling time could well be "heating up"⁸⁷¹ time.⁸⁷² Although Brett did not apply these criticisms

⁸⁶⁷ These results were published by Dr. W. B. Cannon in 1915.

⁸⁶⁸ Brett, 1970, p. 637 drawing on the work of Dr. Anthony Storr, 1968.

⁸⁶⁹ Brett describes that anger causes an increase in the pulse rate, blood pressure, peripheral circulation of the blood, and level of blood glucose. Breathing quickens and muscles tense. Blood is diverted from internal organs, digestion and intestinal movements cease and there is a loss of sensory perception. Thus, the person is made more ready to fight or flee. These changes are initiated by hormones released from the hypothalamus in the brain. The hormones circulate throughout the bloodstream and when they return to the hypothalamus the brain is stimulated to produce a further reaction. Thus, a circular reaction known as positive feedback is caused. 1970, p. 637.

⁸⁷⁰ Brett, 1970, p. 637.

⁸⁷¹ Brett, 1970, p. 638.

⁸⁷² Brett considers that evidence of this nature could play a role in relation to both the subjective and objective aspects of provocation but points to the possibility that such evidence could be excluded by the law of evidence. I will return to this dilemma in part two of this thesis. 1970, pp. 639-640.

specifically to battered women who kill,⁸⁷³ they do provide a useful general critique of the shortcomings which the defence of provocation poses for battered women.

As we have seen in our discussion of English law, there is a growing judicial acknowledgement of the role of gender in respect of actual loss of self control. Over the past number of years, the courts have transformed the suddenness requirement from its meaning in *Duffy*⁸⁷⁴ to a meaning which accommodates the "slow burn" type of response to provocation. Furthermore, the courts now seem prepared to admit expert evidence of slow burn culminating in a sudden eruption of loss of self control for the information of jurors who may otherwise not find credible the defendant's evidence. This solution to the problems posed by the subjective requirement, does indeed seem to ameliorate the problems posed for battered women. Although the approach of the Scottish courts appears to be set against the similar concept of cumulative provocation, as I have argued, the possibility of invoking this concept in an appropriate case may still exist⁸⁷⁵ and could be applied here to benefit battered women who kill.

Yeo⁸⁷⁶ considers that although anger is the dominant emotion in many cases, casting the defence purely on the basis of the emotion of anger is too limited and could operate to create injustice in cases involving battered women who kill. He suggests that there is no reason why fear cannot accompany anger to underscore the loss of self control.⁸⁷⁷ In fact, he argues that understanding these underlying emotions

⁸⁷³ He did, however, use the case of *Duffy* as an example of how law and science offer different interpretations of her behaviour.

⁸⁷⁴ See above.

⁸⁷⁵ I will suggest precisely how expert evidence could be used to show how a battered woman could experience this slow burn of anger in chapter six.

⁸⁷⁶ 1997, p. 438.

⁸⁷⁷ Yeo points to the case of *Van Den Hock V R* (1986) 161 CLR 158 where the Australian High Court held that

"[n]o doubt it is true to say that primarily anger is a feature of provocation and fear a feature of self defence. But is it too much to say that fear caused by an act of provocation cannot give rise to a defence of provocation. p. 167. Cited by Yeo, 1997, p. 437.

This point was also made in the case of *Peisley* (1990) 54 A. Crim. R. 42 which Yeo, 1992, pp. 197-200 summarises and comments on. Here the court held that loss of self control was not confined to the emotion of anger but could extend to fear or panic as well, a development, which, as we have seen, Yeo approves of. However, Yeo disagrees with the Court's proposition that loss of self control occurs when "reason has been temporarily suspended," an 18th and 19th century concept, which we explored in chapter two. He argues that human reality suggests that loss of self control does not compromise a single mental condition

could help explain a defendant's behaviour at the time of losing self control. He envisages that in cases involving battered women, the emotion of anger may cause an instantaneous burst of violence and fear may explain why a defendant appeared calm and deliberate during and after the time of killing. In fact, Yeo goes so far as to argue that recognising fear alongside anger is crucial to acknowledging the social reality of battered women who kill which, in his opinion, makes it imperative that trial judges instruct the jury to consider not only anger but fear where there is evidence of this.⁸⁷⁸

Although not as categorical as *Luc*, the House of Lords in *Morhall* also looked unfavourably on the *McGregor* test. Indorsing the decision of the House of Lords, Yeo writes that the only limitation placed on gender as a characteristic affecting the gravity of the provocation ought to be that the provocation must have had some bearing on gender.⁸⁷⁹ Although his view has not yet been widely adopted by English courts, he considers that a battered woman who kills under provocation should be able to point to her role as wife and mother and argue that the beatings amounted to grave affronts to her womanhood, even when her

but can vary in intensity over a spectrum. Pointing to the case of *Croft* (1981) 3 A. Crim. R. 307, he suggests that the actual loss of self control required for the defence comprises the mental state of a person who becomes, as a result of anger, panic or fear, so emotionally charged as to form an intention to kill or to cause grievous bodily harm to his provoker. On this view, actual loss of self control is assessed by means of the mental element for murder but is nevertheless an aspect of the defence of provocation. Thus, Yeo points out that what is normally the mental element of an offence is being utilised to determine the existence or otherwise of a defence element. Under this novel test, the accused must have personally experienced an intense anger, panic or fear which created the murderous intention leading to the killing of the provoker. The intention, therefore, must have originated from the accused's highly charged emotional state, which in turn, was brought about by the provoker. Yeo concedes the such an approach requires fine-tuning but argues that it is more favourable than that adopted by *Peisley*.

⁸⁷⁸ Yeo, 1997, p. 438.

⁸⁷⁹ 1997, p. 444. He points out that the requirement that the provocation be "directed" at the characteristic is a left-over from *McGregor* and that English law now requires that there be a "real connection" between the provocation and the characteristic. Elsewhere Yeo contemplates the justice of such an approach by comparing two cases: *R V Ly* (1987) 33 C.C.C. (3d) 31 (B.C.C.A.) with *R V Dincer* [1983] 1 V.R. 460 (S.C.). In the former case the British Columbia Court of Appeal refused evidence which could have demonstrated that under Vietnamese culture, a wife's infidelity would have been gravely provocative to an average Vietnamese husband on the grounds that the insult did not specifically refer to the particular characteristic. The latter concerned a Turkish Muslim who stabbed his teenage daughter to death after a row over her having eloped with her boyfriend. Here, the Victorian Supreme Court did not draw this distinction between specific and non-specific references to an accused's characteristic and recognised situations where the insult was not have specific but nevertheless had a powerful provocative impact on the accused. Cited in Yeo, 1992, pp. 289-293.

partner had not referred expressly to those roles as his reason for beating her.⁸⁸⁰ Alternatively, he considers that a woman could also have considered as a characteristic which affected the gravity of the provocation the fact that she killed out of fear for her physical safety as a result of violence from a man whom she had become dependent upon.⁸⁸¹ Finally, Yeo reminds us of the possibility of considering the matter of cumulative provocation in this context, specifically Lord Goff's caveat that the term "characteristic" may be too restrictive as it does not account for the circumstances of the defendant which may enhance the gravity of the provocation.⁸⁸² On this aspect of provocation, and how it ought to apply in cases involving battered women, Yeo reminds us that the 1957 Act requires that the jury considers everything both said and done which in their opinion might have an effect on the reasonable man or woman. He concludes that

[i]t is therefore seen that a proper recognition of gender when assessing the gravity of the provocation brings before the court the fullest detail of what happened-not only the event of the killing and the circumstances immediately surrounding it but also the history, background and the human dynamics of the players plus their respective gender roles and social realities.⁸⁸³

Reilly also tackles the issue of how the parameters of this aspect of the reasonableness test ought to be set. His thesis is grounded in what he describes as the "narratives of excuse,"⁸⁸⁴ where he focuses specifically on law's interpretation of loss of self control. Reilly argues that focusing on the moment the fatal blow was struck is incorrect for two reasons. First, this narrative of self control is too narrowly construed but more importantly, this narrative inhibits the telling of a second narrative, which provides

⁸⁸⁰ Yeo, 1997, p. 442.

⁸⁸¹ Yeo, 1997, p. 445.

⁸⁸² The House of Lords in *Morhall* [1995] 3 All ER 659 held that

[i]n an appropriate case, it may be necessary to refer to other circumstances affecting the gravity of the provocation to the defendant which do not strictly fall within the description "characteristics" as for example the defendant's history or the circumstances in which he[or she] is placed at the relevant time.p. 666.

And as we saw above the Judicial Committee of the Privy Council more explicitly endorsed the possibility of cumulative provocation in cases where battered women plead provocation. See also, Adrian Briggs, 1996, pp. 403-405.

⁸⁸³ Yeo, 1997, p. 447.

⁸⁸⁴ Although Reilly does focus on excuse theory and provocation, he also uses what he calls "the narrative of excuse" when referring to self defence. While it may well be the case that he is not using the concept of excuse as distinct from that of justification, I intend to apply it in that way here. Reilly, 1997, p. 331.

an explanation of the accused's conduct in its relational context. He explains the tension between both approaches. On the one hand, there is the narrative which focuses on a reasonable capacity for self control while, on the other, there is the competing narrative which explains the conduct of the accused in context. Focusing exclusively on the narrative of control means that personal narratives behind the loss of self control, which are location, time and context specific, are lost. This personal narrative is the means by which the actor provides his or her own interpretation of the context in which the act occurred. Although Reilly considers that loss of self control ought to continue to exist as a narrative of excuse, he argues that it ought not preclude a consideration of narratives which allow for the relational context in which the control was lost.

Further encouraging the debate, Yeo focuses attention on the aspect of the defence which is least well explored; the impact of gender on the power of self control. Although perhaps not as clearly stated as in *Luc*, the House of Lords in *Morhall* reaffirmed *Camplin* allowing for only two of the defendant's characteristics, namely age and sex, when assessing the power of self control. Yeo points out that Australian and Canadian judges, on the basis of *Camplin*, assumed initially that sex, like age, is concerned with the capacity for self control and reasoned that just as a lower level of self control may be expected from youthful immaturity, so may differing levels of self control be expected from men compared with women. However, the courts in these jurisdictions have then gone on to argue that law should ignore these different levels of self control between the sexes because to recognise them infringes the principle of equality before the law.⁸⁸⁵ Consequently, these courts have modified the *Camplin* ruling to permit age alone to affect the power of self control of a reasonable person; the thinking being that the principle of equality is served when everyone, apart from the young, is measured against a single "minimum standard of self-control possessed by the ordinary adult."⁸⁸⁶

In addition to possibly infringing the principle of equality before law, the differentiation of capacity for self control according to gender runs the risk of misrepresenting battered women who kill in

⁸⁸⁵ See also Hillary Allen, 1988, who argues against the introduction of different standards of reasonable self restraint.

⁸⁸⁶ *Stingel* (1990) 171 CLR 312 at 329.

a number of ways.⁸⁸⁷ On one view, the danger is that women could be depicted as the gentler sex, normally passive and submissive. While on another, the danger is that they could be represented as having higher levels of self control. Thus, when women lose self control and kill they run the risk of being treated either as aberrational, since they rejected their femininity by adopting the lower level of self control attributable to normal men, or pathologically mad because their behaviour is so contrary to that expected of the normal passive woman that it must be the product of an abnormal mind. Nicolson warns against falling into this trap and urges courts to desist from the practice of portraying women killers as "either normally passive and irrational or abnormally active and rational but never normally active and rational."⁸⁸⁸

Yeo proposes a novel solution to this problem. He argues that there is no clear indication in either *Camplin* or, although now, not the authority in the area, *Luc*, that the Lords meant for sex to affect capacity for self control. Examining *Camplin*, he points to the judgements of Lord Diplock and Lord Simon. Lord Diplock described the reasonable man as "an ordinary person of either sex...possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise."⁸⁸⁹ This approach was also adopted by the influential case of *Stingel*, which, as we saw, expressly held that age was the only characteristic which could affect the power of self control of a reasonable person. Yet the *Camplin* direction juxtaposes sex with age as going to the issue of a reasonable person's power of self control and the relationship between sex and the power of self control is further forged when characteristics which affect the power of self control (age and sex) are distinguished from those which relate to the gravity of the provocation.⁸⁹⁰

⁸⁸⁷ For a discussion of how stereotypes can operate to the detriment of battered women in English courts, see Nicolson who shows how Sara Thornton was presented as a doubly bad woman killer while Kiranjit Ahluwalia was presented as a pathologically mad woman killer. 1995, 201-205.

⁸⁸⁸ Nicolson, 1995, p. 204.

⁸⁸⁹ [1978] 2 All ER 168 at 182. Similarly, grounds for Yeo's argument exist in Lord Simon's opinion that "the standard of self-control which the law requires before provocation is held to reduce murder to manslaughter is still that of the reasonable person. p. 182 of the judgement. Both remarks were made by Yeo, 1997, p. 449 together with his emphasis.

⁸⁹⁰ These arguments are made by Yeo, 1997, pp. 451-452. He also considers the possibility that the House only mentioned sex because it realised that to ask a jury to consider a gender-neutral person is a nonsense.

Yeo's argument is that the reference to sex in connection with the power of self control serves to acknowledge the different response patterns of killers according to their gender.⁸⁹¹ He argues that when looking to the issue of loss of self control, law is concerned with the *form* which the loss of self control takes.⁸⁹² With this connection in place, Yeo goes on to argue that the response patterns of people who kill may vary due to sex role training, conditioning, emotions as well as circumstances affected by gender. When applied to cases involving battered women, Yeo argues that the proper application of *Camplin* allows for both the immediate loss of self control and the slow burn reaction to be treated as usual responses of ordinary people to grave provocation. Furthermore, the method of killing may also be influenced by the reality of how women react which may necessitate the use of weapons or killing by stealth. In conclusion, therefore, Yeo argues that the correct approach to the power of self control aspect of the objective condition requires first, that the jury apply a single standard of self control to all adult defendants irrespective of gender and second, that the form or the manifestation of lost self control may differ according to gender. This approach was adopted in the case of *Stingel* where the court held that

[I]t may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterised as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community.⁸⁹³

Thus, this approach allows for variations of human response to be taken into account but within the single standard of self control expected of every ordinary member of the community.⁸⁹⁴

⁸⁹¹ Yeo, 1997, p. 452.

⁸⁹² Emphasis added by Yeo, 1997, p. 452. As support for the connection which he is highlighting between the power of self control of a reasonable person, the reaction of such a person in the event of a loss of self control and how the reaction compared with what the defendant actually did, he points to *Holmes V DPP* [1946 AC 588. There, Viscount Simon pointed out that the provocation must have been capable of provoking a reasonable person not merely to some retaliation but "to the degree and method and continuance of violence which produces death. p. 597.

⁸⁹³ p. 329.

⁸⁹⁴ Yeo, at an earlier date, explains how the general principle of equality is further endorsed on more specific grounds which draws attention to what is meant by the application of a minimum level of self control. Working from an assumed scientific fact that women on average possess a higher power of self control than men, he points out that a female accused will not receive unequal treatment because the law requires her to be assessed according to the lowest level of self control regarded as ordinary by the

One possible solution which Yeo supports, is the introduction of expert testimony on the battered woman syndrome to help interpret these elements. The purpose is to explain how a battered woman, while possessing the standard of self control to be expected of ordinary people,⁸⁹⁵ might reasonably perceive and react to a provocative incident.⁸⁹⁶ Furthermore, Yeo argues that because the admission of the evidence is not based on the contention that battered women are mentally abnormal, battered women who kill do not need to have experienced the syndrome before expert evidence can be admitted. I will develop further this possibility as a way forward for battered women and law in more detail in chapters six and seven.

Dressler also advances an argument which, in an appropriate case, could be adopted to benefit battered women who kill⁸⁹⁷ in an appropriate case. Building on the choice-capability choice-opportunity distinction,⁸⁹⁸ Dressler argues that law ought to take into account the reality that people experience anger to different degrees. To this end, he distinguishes between a complete and a partial loss of self control. His claim here is that if the provocation were so great that it would probably cause the ordinarily law-abiding person to wholly lose control, then the choice capabilities of both the actor and the ordinary person are absent. Dressler argues that in such cases, provocation should wholly, not just partially, excuse a killing. In such cases, the degree of anger felt by the defendant is a normal, non-blameworthy human response whose consequences are beyond the control of the actor or any other ordinary human. Thus, if a battered woman were to experience anger in this way, then, on the basis of Dressler's thesis, provocation should wholly, not just partially, excuse the actor and result in a complete acquittal. He considered that such an approach could co-exist with the traditional partial excuse in cases where there was a partial loss

community. On this analysis, this would presumably be the average power of self control of ordinary men in the community. Given his most recent analysis of how characteristics relate to the capacity for self control the need to make such unsubstantiated claims seems to be obviated. Yeo, 1992, pp. 292-293.

⁸⁹⁵ Yeo has long advocated such a line of argument. See, for example, 1993, p. 13.

⁸⁹⁶ For a dissenting opinion see Horder, 1996 who argues the impossibility of distinguishing between the effect of battered woman's syndrome on a defendant's power of self control and its effect on the gravity of the provocation to her. He argues that jurors ought to be told to ignore any characteristic which may have affected a defendant's powers of self control as well as the gravity of the provocation to her. pp. 38-39.

⁸⁹⁷ Dressler, 1982, p. 465.

⁸⁹⁸ See part one of this thesis.

of self control. In these cases, the ordinary law-abiding person would still have sufficient control to avoid using force likely to cause death or great bodily harm. Here it is the actor's choice-capabilities which are partially undermined by anger but s/he ought not to have responded by killing and so does not merit total acquittal. The actor's moral blameworthiness, therefore, is found not in his violent response, but in his *homicidal* response.

Despite these possibilities in provocation and despite Lord Steyn's caveat in *Luc* that diminished responsibility may not necessarily be the most appropriate defence in every case involving a battered woman,⁸⁹⁹ diminished responsibility seems to be emerging as the defence most preferred. I now intend to direct attention to this third defence, which is potentially available to a battered woman who kills.

⁸⁹⁹ p. 1055.

PART THREE.

Battered Woman Syndrome And Provocation: A Skeleton Proposal For The Representation Of Battered Women Who Kill.

Introduction.

Recognising the extent of sex bias in criminal law, and the problems that it posed for battered women who kill abusive men, American feminists in the late 1970s⁹⁰⁰ developed a defence strategy designed to counteract this bias. Targeting the defence of self defence, their goal was to allow for the equal presentation of the individual woman's act of self defence which would permit her act of homicide to be reasonable to the same extent that it is reasonable when committed by a man.⁹⁰¹ A central tenet of this strategy was to show that a battered woman's act in self defence is justifiable rather than merely excusable⁹⁰² which, as we saw, means that the act becomes good, or at least permissible:lawful.⁹⁰³ Crucially important to the success of this strategy was to move away from law's traditional approach, which was to treat women who committed violent crimes as being irrational or insane,⁹⁰⁴ towards an approach which reflected accurately women's experiences of domestic violence. However, as we will see, some twenty

⁹⁰⁰ See the specific case studies of *Rachel Olsen*, *Leslie Almond* and *Carol Gardner*, which are mentioned in Bochnak, 1981, pp. 107-203, one of the earliest contributions to this field.

⁹⁰¹ Schneider and Jordan, 1978, p. 150.

⁹⁰² See, for example, Schneider & Jordan, 1978. See also Crocker, 1985, who argues that the preferred classification is justification. She considers that this would give full expression to the principle that a woman's and a man's life are equally valued by recognising that a woman has the capacity to correctly and reasonably perceive that the act is warranted, legitimate, and justified. In her view, justification would encourage, indeed would compel, a legal recognition that a woman's capacity for reasonable judgement-comparable to that of a man's-can be the basis for engaging in the "correct behavior" of self-defense. p. 131. For Crocker, therefore, excusable self defence is not a desirable option on the basis that it would merely imply that the woman's response was typically and idiosyncratically emotional. In her view, this doctrine would perpetuate the views that these women could not have been rational in assessing the danger and that the legal system must compensate for her mental and physical weaknesses. We have already encountered one opponent of this view. See also Rosen, 1986, whose arguments we will discuss in chapter five. Furthermore, as I already indicated in the introduction, although provocation is an excuse, unlike the defence of diminished responsibility, which addresses a condition which is different from that which normal humans experience, provocation makes a concession on the basis that anger is a universal human condition.

⁹⁰³ D'Arcy, 1963, p. 81. Cited by Uniacke, 1994, p. 11.

⁹⁰⁴ As Schneider and Jordan wrote "[w]e start from the premise that a woman who kills is no more 'out of her mind' than a man who kills." 1978, p. 150.

years later, this strategy is not without its difficulties.

Feminists, therefore, did not request special treatment for battered women who kill, simply because they were battered.⁹⁰⁵ Neither did they seek to give blanket approval to these women. Instead they felt that law can accommodate these different but equal claims of battered women. They argued that the task of explaining why a battered woman might reasonably perceive danger, use a deadly weapon, or fear bodily harm⁹⁰⁶ under circumstances in which a man or a non-battered woman might not, ⁹⁰⁷could be achieved, were law to be applied in a sex-neutral, individualized manner.⁹⁰⁸ Drawing largely on the work of George Fletcher, the hope was that by focusing on the individual rather than on the hypothetical reasonable man, law would be able to view the woman's act in the context of her experience of violence.

⁹⁰⁵ See later Acker and Toch's misunderstanding in their commentary written in 1985 on *The State V Kelly*.

⁹⁰⁶ Although the law on self defence varies from State to State, it most commonly requires a jury finding that the defendant reasonably perceived imminent danger of great bodily harm or death and responded only with the force necessary to prevent that harm. LaFave and Scott's statement of the law in self defence is often taken as the authority in the area. In their handbook on criminal law, they write that an intentional killing will be justified when the following requirements are met:

1. An actor can only defend herself against what she reasonably believes is unlawful force.
2. The amount of force must be proportionate to the threatened force. Deadly force may not be used unless the actor reasonably believes that she is protecting herself against infliction of death or serious bodily harm.
3. The actor must reasonably believe that it is necessary to use force to prevent the threatened harm.
4. The actor must reasonably believe that the adversary's threatened use of force is imminent.

The jury then assesses the defendant's perceptions of apparent danger and imminent harm from the perspective of the reasonable man and, depending on where the case is being tried, apply either an objective or a subjective standard. The majority of states require an objective standard where just one standard of conduct is acceptable. This approach seems to resemble more the Scottish approach to self defence.

Other jurisdictions, for example, the State of New Jersey, allow for individual differences and apply a more subjective standard. This approach requires that the defendant honestly believed and had reasonable grounds to believe in the necessity of using force to protect him/herself from apprehended death or great bodily injury. The law in England on self defence appears to be even more subjective than this approach in that while it requires an honest belief it does not require that it be based on reasonable grounds.

Crocker objects to both of these approaches in the following terms:
[T]he fundamental problem is that both standards apply criteria that emanate from the same source: a male, white, middle class perception of what it means to live in this culture. The objective standard suffers from assuming that it is value-free in its determination of reasonable behaviour. The subjective standard does not necessarily correct this myopia; while it considers individual characteristics, it may not recognize their significance. 1985, p. 125, fn. 11.

⁹⁰⁷ Schneider and Jordon, 1978, 155-158.

⁹⁰⁸ See Schneider and Jordan, 1978, Crocker, 1985, p. 131, or Schneider, 1980, p. 624.

Once due recognition was given to her individual differences and capacities, feminists considered that her actual experience could emerge and inaccurate stereotypical attitudes would be exposed as being false.

One of the earliest victories as a result of this strategy was *State V Wanrow*.⁹⁰⁹ Although not a battered woman, Wanrow shot an intoxicated, unarmed man whom she knew had a reputation for violence, when he approached her in a threatening manner. The Washington Supreme Court ruled that the use of the reasonable man objective standard in self-defence violated her right to equal protection of the law. It reasoned that the male image of "a fair fight"⁹¹⁰ prevented the jury from considering the comparative smaller size and lack of physical training of the defendant and considered that the jury ought to be allowed to take into consideration the fact that Wanrow was five-foot-four and had a broken leg which necessitated the use of a crutch. It held⁹¹¹ that the appellant was constitutionally entitled to have the jury consider her actions "in the light of her own perceptions which were the product of our nation's long and unfortunate history of sex discrimination."⁹¹²

In addition to tackling legal doctrine, feminists realised that at the level of practice they would also have to persuade a jury to see the woman's act as justifiable self defence. It was soon discovered that the jury had to be educated⁹¹³ to perceive properly the woman's act, rather than viewing her as being hysterical or insane⁹¹⁴ or subjecting her to incorrect stereotypical assumptions about battered women.⁹¹⁵ To accomplish successfully their goal, defence lawyers introduced background information on battering

⁹⁰⁹ 88 Wash. 2d. 221, (1977).

⁹¹⁰ p. 240.

⁹¹¹ For other cases which paved the way for battered women self defence cases see *State V Little*, 74 Cr. No. 4176 (Superior Court, Beaufort County, N.C., 1975) and *People V Garcia*, Cr. No. 4259 (Superior Court, Monterey County, Cal., 1977).

⁹¹² p. 241.

⁹¹³ I will explain precisely how in the next chapter.

⁹¹⁴ Schneider and Jordan, 1978, p. 156.

⁹¹⁵ I will address some of the problems, which have been encountered by feminists when communicating these cases to the jury, in more detail in the following chapter.

through a combination of expert and lay witnesses.⁹¹⁶ Although expert testimony may not always be necessary,⁹¹⁷ feminist lawyers have been greatly assisted in this task by the introduction of expert psychological testimony on the battered woman syndrome.

Twenty years after the testimony was first admitted in US courts, its uses are far more diverse than was perhaps initially imagined.⁹¹⁸ Drawing from the experiences of other jurisdictions kill,⁹¹⁹ in this final part of the thesis drawing on the theoretical foundations built by Fletcher and feminists I hope to suggest here one possible way in which the testimony could be gainfully employed in Britain in the context of a developing law on provocation. Central to any of these concerns is an understanding of the testimony itself, which is where I intend to begin.

⁹¹⁶ A number of valuable insights into how early battered woman cases were prepared and argued by feminist lawyers as well as descriptions of how some of these cases were perceived by various different juries can be found in Bochnack, 1981. I will discuss some of these findings in relation to the jury in the next chapter.

⁹¹⁷ In fact, feminists have cautioned that an inappropriate use of the testimony could encourage stereotyping. See Schneider, 1980, or Crocker, 1985.

⁹¹⁸ In addition to the defences mentioned in this chapter, Roth and Coles, 1995, p. 655, for example, discuss the appropriateness of introducing the testimony in relation to automatism, insanity as well as self defence. See also Mary Donnelly, 1993, who discusses how the testimony relates to these defences in Ireland.

⁹¹⁹ For a compilation of key articles on the topic of women who kill see Bridgeman and Millns, 1998, chapter eleven.

CHAPTER SIX.

Battered Woman Syndrome Evidence and Substantive Law.

The Syndrome.

The clinical psychologist, Lenore Walker, was the first to coin the term battered woman syndrome,⁹²⁰ a concept which, as we will see, has been developed by subsequent researchers.⁹²¹ Although

⁹²⁰ Walker, 1979.

⁹²¹ Both the cycle theory of violence and the application of the condition of learned helplessness to battered women have been the subject of criticism. While empathising with the problems law poses for battered women who kill, David Faigman opined that "research on battered woman syndrome does not yet deserve admission as evidence with the imprimatur of science." 1986, p. 646. He highlights several methodological and interpretative flaws in the cycle theory as well as theoretical inconsistency and the use of an inadequate research methodology in her adaption of the learned helplessness concept. Faigman's criticisms of the cycle theory were first, the use of leading questions, which he notes may have resulted in hypothesis guessing on the part of the subjects. Second, the fact that the evidence as to tension-building and/or loving contrition came not from the subjects responses but from the interviewer's evaluations of the responses, leaving the research open to the problem of experimenter expectancies. Third, Walker's failure to place the three phases of the cycle within any sort of a time frame indicating how long the cycles last or whether there is any period during which the couple of experience a normal relationship or whether all phases of tension building lead to acute battering. Fourth, he criticises Walker's failure to link the woman's state of fear with any of the specific stages of the cycle but most particularly to the period between the batterer's attack and her response, together with the fact that not all women unequivocally stated that they were in a state of terror and the fact that Walker did not use a control group of non-battered women. Finally, Faigman questions Walker's conclusion that all three phases together constitute a distinct behavioural cycle by pointing out that while she provided data on tension-building and loving contrition separately, this provides little insight into the percentage of women who experienced all three phases as a cycle. In addition to the methodological problems with the theory, Faigman argues that it does not assist a jury since it does not provide any insights into the precise nature of the harm a woman perceives at the time she kills.

His criticisms of the adaption of the learned helplessness theory are on grounds of theoretical inconsistency and the use of an inadequate research methodology. First, he points to the discrepancy between the results of Seligman's experiments which showed that the dogs could not be motivated to take control of their environment and Walker's application of the theory to women who positively assert control by killing. Second, he argues that her examination of learned helplessness suffers from a flawed research design. As we will see in more detail later, Walker hypothesised that women still in a battering relationship would experience more learned helplessness than others. Faigman's main criticism is the lack of theoretical basis for these factors which Walker selected as the variables representing learned helplessness. Finally, he again points out that Walker did not interview women who were not in a battering relationship which, he notes, makes a finding of a reasonable action impossible. In fact, as he goes on to point out, most of her subjects did not kill anyone. Furthermore, he points out that Walker did not distinguish between the economic, social and emotional circumstances of the two groups which he considered must call into question Walker's generalisations as to learned helplessness. 1986, pp. 636-643. Other criticisms have been levelled specifically against the cycle theory of violence. See, for example, those made by Schuller and Vidmar, 1992 as well as Dutton and Painter, 1993 who argue that it is the intermittency of abuse, rather than the cycle itself, which is the main contributor to battered woman syndrome. Whatever the merit in these criticisms, as we will see later, Walker's results, albeit with minor variations, have been repeated since.

Walker had been studying violent behaviour between couples for many years,⁹²² it was not until 1984⁹²³ that the main components of her theory were tested empirically.⁹²⁴ The linch-pin of these findings is the Walker Cycle Theory of Violence⁹²⁵ which must occur at least twice before a woman can be classed as a battered woman for the purposes of the theory.⁹²⁶ Walker discovered that there were three distinct phases in any battering cycle, beginning with the tension-building phase. During this time there is a gradual escalation of tension which is manifested by unpleasant behaviour on the part of the batterer and which sometimes escalates to minor acts of physical abuse.⁹²⁷ Although relations are tense, the batterer does not express his dissatisfaction in any extreme or explosive act of violence. Meanwhile, the woman attempts to placate her partner by doing what she thinks might please him as well as adopting general anger reduction techniques which best fit her partner's mood swings.⁹²⁸ Even if successful for a while, the woman's attempts to curtail her partner's pattern of anger, eventually fail. The tension-building phase

⁹²² She formulated the two main concepts which, together constitute battered woman syndrome, the cycle theory of violence and the learned helplessness theory, in her earlier book written in 1979.

⁹²³ In her second book entitled *The Battered Woman Syndrome*.

⁹²⁴ This book contained the findings of a study which she conducted on 435 battered women who came from the Rocky Mountain region, Denver, Colorado.

⁹²⁵ 1984, p. 95.

⁹²⁶ Walker, 1979.

⁹²⁷ Walker, 1984, lists name-calling as an example of the type of abuse which can occur during this phase p. 95.

⁹²⁸ The extent of the battered woman's responsive behaviour during this phase is supported by another study undertaken by Lewis E.M., 1980. Although the sample in Lewis' study involved couples who experienced marital conflicts, as opposed to the more violent relationships, which were the focus of Walker's study, Lewis tested the cycle theory to match its compatibility with the model which shows how anxieties can be aroused when punishment is delayed. This experiment supported Walker's descriptions of the extent of the various different tactics used by women especially during the tension-building phase in response to male violence. Depending on the woman's perception of the intensity of the predicted violent incident, Lewis showed that while in certain cases, the woman may chose a delay tactic, in others, she may chose a tactic which precipitated the violence and which enabled her to get it over with more quickly. Cited by Walker, 1984, p. 102.

invariably gives way to the acute battering phase.⁹²⁹ So great is the woman's fear of the injury, which she will have to endure during this phase, that she often precipitates the inevitable explosion, forcing it to occur in conditions which enable her to minimise the impending harm. The explosion itself is constituted by physical and verbal aggression which often necessitates police involvement and which leaves the woman injured and shaken. The third phase is the loving contrition phase. This final phase is characterised by extremely loving, and contrite behaviour on the part of the batterer. Here, the batterer shows kindness and remorse, often promising a better future without violence. The woman wants to believe her partner and, early in the relationship at least, derives a sense of hope from this behaviour. This phase provides positive reinforcement for the woman to stay in the relationship, even if the phase comes to be characterised simply by an absence of tension or violence.

Before discussing how battered woman syndrome evidence can help our understanding of these complex relationships, the first step towards appreciating the enigma of battering relationships, in particular the fact that women remain, is to consider their subjectivity as women. As we saw in chapter two, connection with others is an essential aspect of what it means to be a woman in our culture. The importance of this aspect of female subjectivity when dealing with cases involving battered women is born out by the study on battered women conducted by Barnett and Lopez-Real⁹³⁰ who found that these women stay for a number of reasons arising out of this sense of attachment. They identified love, loneliness and fear of living without a man as being primary considerations of battered women. Similarly, a later study revealed that married nonbattered women also gave the same explanations for staying with their partners.⁹³¹ Thus, as Hotaling and Sugarman have pointed out, the greatest predictor of becoming a battered woman has nothing to do with dysfunctional families or pathology but simply, being female.⁹³²

⁹²⁹ Walker describes this transition as follows:

[e]xhausted from the constant stress, she usually withdraws from the batterer, fearing she will inadvertently set off an explosion. He begins to move oppressively toward her as he observes her withdrawal...Tension between the two becomes unbearable...Phase two is characterised by the uncontrollable discharge of the tensions that have built up during phase one. Walker, 1979, p. 59.

⁹³⁰ 1985, cited by Barnett and LaViolette, 1993, p. 4.

⁹³¹ Procci, 1990, cited by Barnett and LaViolette, 1993, p. 4.

⁹³² Hotaling and Sugarman, 1990, cited by Barnett and La Violette, 1993, p. 13.

Barnett and LaViolette⁹³³ explain this phenomenon by arguing that women learn a belief system which creates a sense of female responsibility for the maintenance of an emotionally stable family; battering, therefore is something which could happen to any woman. By contrast, is men's experiences of living as separate individuals in a society which expects and encourages men to assume control. This was put to the test in a study carried out by Dutton and Browning⁹³⁴ who found that the physical, economic and social power differentials between men and women are significant contributors in the battering of women. More significantly, other researchers posit that battering itself is a control used by men to dominate women.⁹³⁵

Despite the abuse, which only gradually becomes a feature of the relationship, the respite between battering cycles reminds the woman of the man with whom she fell in love and the importance of his connection with children, family and friends. Wetzel and Ross⁹³⁶ describe the abusive man's loving behaviour as a form of intermittent reinforcement which results in a resistance to change on the part of the woman. Thus, the abuser's contradictory behaviour sets up an inner conflict in the woman between the cost of remaining and the benefits of leaving. Psychological commitment was found to contribute to the woman's inner conflict. Thus, a key consideration for many battered women was the extent of their investment in terms of time and emotional energy.⁹³⁷ This tension between staying and leaving creates in the woman a state which Muldary⁹³⁸ called "learned hopefulness." Learned hopefulness is a battered woman's ongoing belief that her partner will change his abusive behaviour or that he will change his personality. Supporting the existence of this state, Pagelow⁹³⁹ found that 73% of the women in one shelter sample returned home because the batterer repented and they believed he would change.

⁹³³ 1993.

⁹³⁴ 1987, cited by Barnett and LaViolette, 1993, p. 7.

⁹³⁵ See DeKeseredy, 1990 or Murphy and Meyer, 1991, cited by Barnett and LaViolette, 1993, p. 7.

⁹³⁶ 1983, cited by Barnett and LaViolette, 1993, p. 16.

⁹³⁷ See Bauserman and Arias, 1990, cited by Barnett and LaViolette, 1993, p. 19.

⁹³⁸ 1983, cited by Barnett and LaViolette, 1993, p. 16.

⁹³⁹ 1981, cited by Barnett and LaViolette, 1993, p. 17.

Although Barnett and Lopez-Real⁹⁴⁰ found that hope for change was the number one reason for remaining, fear, specifically fear of revenge was the second most frequently given reason by battered women for staying.⁹⁴¹ Painter and Dutton⁹⁴² believe that a combination of hope and fear entraps battered women while Hanson, Sawyer, Hilton and Davies⁹⁴³ identified a significant elevation of death anxiety in a group of battered women attending college in contrast with nonbattered college women and battered women living in a shelter. Although physical assault produced an immediate fear in battered women, these women also speak of the significance of threats which further engender fear and which have a long-term effect.⁹⁴⁴ Although abusive men frequently assert that violent behaviour is a thing of the past, Barnett and LaViolette argue that in battering relationships, nothing is really left in the past. Despite promises of change, the past keeps recurring.⁹⁴⁵ Thus, while there may be periods of non-violence for women caught in a battering cycle, these are not necessarily times when she feels safe. These women learn to read their partner's "cues" to violence, which may seem nonthreatening to others but which enables them to anticipate future violence.⁹⁴⁶ Again leaving is the easy answer, but Barnett and LaViolette highlight the reality for women in these relationships is that leaving and safety are not synonymous; some abusive men

⁹⁴⁰ 1985, cited by Barnett and LaViolette, 1993, p. 17.

⁹⁴¹ Women in this study listed some of the following concerns:
He kept seeking me out and finding me.
I felt other people would die if I left.
He was suicidal; I feared he would come after me.
I have left and still have trouble getting out from under abuse and fears and threats. My ex-partner is continuing abuse anyway he can, I now see why it truly is hard to get out and why it took me so long. I remember feeling many times afraid to go and afraid to stay. That very real fear of revenge is so powerful a deterrent to doing anything constructive.
I think that police protection should be questioned a lot.
Cited by Barnett and LaViolette, 1993, pp. 48-49.

⁹⁴² 1985, cited by Barnett and LaViolette, 1993, p. 49.

⁹⁴³ 1992, cited by Barnett and LaViolette, 1993, p. 49.

⁹⁴⁴ In a study by Stahly, Ousler and Tanako, 1988, one of the most commonly given reasons battered women gave for staying was fear of losing their children, a fear based on their batterer's threats. Cited by Barnett and LaViolette, 1993, p. 50.

⁹⁴⁵ 1993, pp. 50-51.

⁹⁴⁶ Barnett and LaViolette, 1993, pp. 53-54.

continue to harass and intimidate their partners even after they leave.⁹⁴⁷

Balanced against the hope which can develop in battered women, Varvaro⁹⁴⁸ writes of twelve losses identified by battered women who stay: safety, everyday routine, living in a home, personal possessions, self-esteem, a father figure for the children, love and caring from a spouse, success in a marriage, hopes and dreams, trust in a mate, view of the world as a safe place, and status and support system. Barnett and LaViolette summarise the conflict for battered women in the following way:

[o]n the one hand, her relationship meets many of her emotional and economic needs, but is degrading and dangerous. She wants to approach the hope that is positive and run from the fear that is negative. She wants to move toward safety but avoid losing her relationship. For a while the conflict is reflected by her ambivalence about staying or leaving.⁹⁴⁹

When these cycles of violence were examined more closely, Walker found that, over time, the relationship between the tension-building phase and the loving contrition phase changed. For the first incidents of battering, the proportion of battering cycles showing evidence of a tension-building phase was 56%, while the proportion showing evidence of the loving contrition phase was 69%. However, by the last incident, 71% of the battering incidents were preceded by tension-building but only 42% were followed by loving contrition.⁹⁵⁰ Walker posited that gradually over the course of a battering relationship the tension-building phase becomes more a feature of the relationship, while the loving contrition phase occurs less frequently.⁹⁵¹

This change helps to explain Walker's more controversial concept, learned helplessness. This concept owes much to Martin Seligman's experiments.⁹⁵² Seligman showed that repeated exposure to non-contingent painful stimuli eventually rendered animals passive and unable to escape, even when given an

⁹⁴⁷ Barnett and LaViolette, 1993, p. 51.

⁹⁴⁸ 1991, cited by Barnett and LaViolette, 1993, p. 20.

⁹⁴⁹ 1993, pp. 21-22.

⁹⁵⁰ Walker, 1982, p. 97.

⁹⁵¹ Although the evidence supporting a gradual escalation of violence has been inconsistent, it now seems to be generally accepted that a gradual build-up of violence does occur in a large number of battering relationships. However, as Barnett and La Violette point out, escalation may characterise only one type of abusive relationship and therefore ought not to preclude other patterns. 1993, pp. 57-58.

⁹⁵² Dogs were used in the early experiments.

opportunity, which was readily apparent to animals who had not undergone this helplessness training. Seligman, with others,⁹⁵³ subsequently carried out modified experiments of this kind on human subjects in the laboratory with similar results. Both humans and animals were seen to learn helplessness. The condition manifested itself in humans as a form of depression where the resulting perceptual distortions were attributed to the inability to predict the success of one's actions coupled with a pessimism as to the likelihood of obtaining a reward. Drawing largely on the results of these experiments, Walker hypothesised that the non-contingent nature of these women's attempts to control violence, would, over time, produce this condition of learned helplessness⁹⁵⁴ and render them passive and unable to escape.

Researchers have distinguished between two types of helplessness: personal and universal.⁹⁵⁵ Universal helplessness develops when the individual sees no relationship between what he is doing and the outcome, and personal helplessness develops when the individual associates an unsatisfactory outcome with his/her own behaviour. On the one hand, Walker⁹⁵⁶ and later Hendricks-Matthews⁹⁵⁷ suggested that learned helplessness causes battered women to make causal relationships that tend to keep them entrapped in the relationship, such as blaming themselves for provoking the attack. While, on the other, Carlisle-Frank⁹⁵⁸ speculated that battered women might have internal beliefs about their lack of control over the violence in their homes which are unconnected to their beliefs about their ability to escape. Thus, although there is contradictory evidence as to whether or not battered women tend to use active coping strategies which could help them escape, Barnett and LaViolette⁹⁵⁹ write that the weight of evidence is consistent with learned helplessness as a factor contributing to battered women's behaviour within the relationship.

⁹⁵³ Abramson, Seligman & Teasdale, 1978.

⁹⁵⁴ The existence of this condition has also been found by researchers such as Browne, 1993, Rosewater, 1987, Morgan, 1982, Walus-Wigle and Meloy, 1988.

⁹⁵⁵ Barnett and LaViolette, 1993, p. 104.

⁹⁵⁶ 1979.

⁹⁵⁷ 1982.

⁹⁵⁸ 1991.

⁹⁵⁹ 1993, p. 106.

The effect of domestic violence on a woman, therefore, is not insignificant.⁹⁶⁰ Two predominant emotional reactions to assault have emerged. As we saw above fear is an expected response in these relationships. However, what is perhaps not so well appreciated by the legal community is that many of these women also speak of anger. Walker found that women "accumulate"⁹⁶¹ a great deal of anger over the course of a battering relationship which they keep "bottled up."⁹⁶² Writing in general terms about how women deal with emotions of anger and fear, Walker considered that

[m]ost battered women store up their angry feelings and avoid confrontation until they are so angry they cannot manage it. Some are so scared that they will not let themselves even feel angry.⁹⁶³

While living in a battering relationship, therefore, women concern themselves more with the task of controlling their partner's violence. They learn either to suppress their anger or find other indirect ways of expression.⁹⁶⁴ From her experience with battered women Walker writes that a primary goal of any therapist is to enable the woman to "tap into the stored up rage"⁹⁶⁵ and allow her to freely express her anger in a non-destructive way. Thus, Walker reasoned that if a woman is to escape she must undergo a psychological process whereby feelings of depression and self-blame are exchanged for feelings of anger; where the woman must become active rather than passive; shed the survival technique of learned helplessness and realise that the relationship is more likely to fall apart than improve.⁹⁶⁶

In order to test this hypothesis, the interviewees were asked a series of questions about their reactions to four specific incidents of battering, the first, the second, the last and one of the worst. If

⁹⁶⁰ Walker has identified five key areas which most frequently arise for consideration in therapy. These are manipulation and control issues, dissociation, anger, emotional and sexual intimacy and compliance and resentment. Walker, 1991, pp. 25-27.

⁹⁶¹ Walker, 1991, p. 26.

⁹⁶² Walker, 1991, p. 26.

⁹⁶³ Walker, 1991, p. 26.

⁹⁶⁴ Walker, 1991, gives such examples as sarcasm, passive-aggression, passivity and sugary sweetness. p. 26.

⁹⁶⁵ Walker, 1991, p. 26.

⁹⁶⁶ Walker, 1984, p. 87.

Walker's theory of how battered women experience anger is accurate, then those women who escaped in response to the last battering incident, which marked the end of their relationship, should have become, "more angry, disgusted, and willing to seek intervention; less fearful, anxious, and depressed."⁹⁶⁷ Furthermore, these women's reactions to the last battering incident should indicate less learned helplessness than the responses of women who were still in a battering relationship, for whom the last battering incident prior to the interview may not necessarily have been the last in their relationship with their batterer.

Those women still in the relationship at the time of the interview, reported less evidence of tension-building preceding the last violent incident than those women who had decided to leave. Walker suggests that this feature may provide an indication as to the difference between battering incidents which cause a woman to leave a battering relationship and battering incidents which do not. Furthermore, these tests showed that those women who had escaped the battering relationship had previously reached a high point of depression but gradually became less fearful and depressed as they approached a peak of anger/disgust/hostility. Over time, their resigned acceptance of the inevitability of violence decreased to the point where it was finally overcome, thereby freeing them to leave.⁹⁶⁸ On the basis of Walker's findings therefore, it appears that while battered women often suppress their feelings of anger, they do slowly accumulate feelings of anger. Furthermore, when a battered woman reaches her high point of anger, she unlearns helplessness, both of which together free her to act.

This way of experiencing anger has been corroborated by a number of other researchers. Gilbert and Webster⁹⁶⁹ found that women very often denied their anger and wish to retaliate; Roth and Coles⁹⁷⁰ write that during the first phase of battering the battered woman often denies being angry on the basis that however bad these isolated incidents are, they tend to minimise them with the knowledge that the batterer

⁹⁶⁷ Walker, 1984, p. 87.

⁹⁶⁸ Van Der Kolk, 1987, observed that suppression of anger and denial of danger are not uncommon coping responses adopted by people under extreme stress.

⁹⁶⁹ 1982.

⁹⁷⁰ 1995 p. 648.

is capable of doing much worse while Rosewater,⁹⁷¹ and Baumeister, Stillwell and Wotman⁹⁷² write of how women, as a survival mechanism, in order to make sense of what is happening to them, often direct their anger inwards⁹⁷³ rather than towards the abuser.

Anne Campbell⁹⁷⁴ has also addressed how battered women experience anger as part of a more general study of differences between how men and women view aggression.⁹⁷⁵ These differences emerged from her interviews with ordinary men and women which she also grounds in accepted psychological discourse.⁹⁷⁶ She concludes that while both men and women see a connection between aggression and self control, women in general see aggression as their failure to exercise self control, while men in general see it as the imposing of control on others. While women's aggression emerges from their inability to check the disruptive and frightening force of their own anger, for men it was a legitimate means of assuming authority over the disruptive and frightening forces in the world around them. Campbell argues that while women generally view aggression in expressive terms, men tend to view it instrumentally.⁹⁷⁷ Thus, this difference "drives a behavioral wedge"⁹⁷⁸ between men and women and explains men's and women's unique styles of fighting as well as the disparity in their rates of violent crime.

Beginning with differences in accounts of aggression in non-battering relationships,⁹⁷⁹ Campbell describes how these women spoke of the tension between anger and self restraint. This tension was once again due to the importance which these women attached to their sense of connection, in particular, the harm which they envisaged for their relationships were this anger to be released. At times, the frustration

⁹⁷¹ 1987.

⁹⁷² 1990.

⁹⁷³ See Rosewater, 1987 who found that women experienced this anger as guilt.

⁹⁷⁴ 1993.

⁹⁷⁵ Campbell's account is an essentialist one.

⁹⁷⁶ See further Campbell, 1993, pp. 8-18.

⁹⁷⁷ Campbell, 1993, p. 7.

⁹⁷⁸ Campbell, 1993, p. 1.

⁹⁷⁹ Campbell, 1993, pp. 39-54.

caused by the triumph of self control commonly resulted in episodes of crying. However, when the provocation continued, as it did invariably when their restraint was mistaken for acceptance, the anger continued to mount until it had to find another means of escape. Describing the loss of self control, these women spent as much time describing the germination of anger as its actual eruption and went to great pains to justify the eruption by highlighting the intolerable stress which eventually caused the loss of self control. At the height of its fury, the anger could manifest itself in physical aggression. The loss of self control commonly caused others to respond in horror, amusement or embarrassment and had the circular effect of reinforcing the woman's own realisation that she had broken the rules of conduct deemed appropriate for women by society. Thus, women were angry on two counts: for expressing the anger and for restraining it. However, instead of questioning why they were condemned for this loss of self control, the common reaction was for these women to deal with the shame by distancing themselves from the event and laughing at their outrageous behaviour.

By complete contrast, men's accounts of aggression were far less tortured. In fact, several accounts verged on the point of exuberance.⁹⁸⁰ They spoke of public aggression as a social event which had to be stage-managed rather than the private emotional experience of anger and restraint which characterised women's experiences. Men spoke of the morality of the rules that govern fighting, while women were concerned with the morality of aggression itself. Men talked about winning or losing, while for women the very act of aggression was a kind of defeat. Although men's aggressive acts were not devoid of emotion, their aggression was about publicly affirming the masculine hierarchy by imposing control, rather than the catharsis which we saw in women.

Although these accounts of male and female aggression seem to support the marked gender differences in most forms of criminal homicide, they do not immediately bring us any closer to understanding the increased aggression of women cohabiting with men. Campbell⁹⁸¹ identifies two forces which can operate in a domestic setting to put a couple on a deadly course; abusive men's vulnerability due to connection in marriage and women's loss of their own private battles between composure, as

⁹⁸⁰ Campbell, 1993, pp. 55-67.

⁹⁸¹ 1993, pp. 103-124.

expected by others, and their eventual loss of self control. From the male perspective, therefore, cohabitation for men generally, but for abusive men in particular, brings into sharp focus their need for both intimacy and control. While most men find that the trade-off between independence and interdependence worth the effort, abusive men view this increased dependence as vulnerability and use aggression to reclaim control.⁹⁸² For women, the constant struggle is between dealing with stress and retaining self control. However, for battered women living in conditions of violence, this stress is magnified to the point where it becomes inadequate to describe the emotional state of these women's lives.

Campbell goes on to argue that these two already explosive forces combust in abusive relationships when a woman misreads her partner's instrumental aggression as expressive and searches in vain for the source and solution to his irritation. This has the effect of placing increased pressure on her to modify her behaviour. On the other hand, a man misreads his partner's expressive anger as an attempt to usurp his power in the home. Thus, what for the woman is catharsis, for the man signifies a challenge to which he reacts violently. Partly because of men's greater strength but also because they use violence to gain submission and demonstrate power and control, a continued use of comparatively minor violence by women merely signals a failure to men which results in even greater violence and the establishment of a vicious circle of escalating violence. Trapped and wholly at the mercy of their partner's violence, Campbell describes their act of killing in the following terms:

[i]t is as if the anger has been so deeply buried and the accommodation to the husband's violence so complete that it has erased any belief in the power of their own capacity to retaliate. When women kill it is an extension of the expressive aggression they have held in check for too long.⁹⁸³

In a further study,⁹⁸⁴ which examined feelings of anger among female victims of criminal assaults, it was found that victims revealed elevated anger scores relative to matched nonvictimized subjects both immediately and one month after their victimization. Furthermore, the level of anger experienced fluctuated according to the various aspects of the assault, such as whether or not a weapon was used or the victim's response to the attack. What is most revealing about this study, however, was the fact that it

⁹⁸² Campbell, 1993, p. 105.

⁹⁸³ Campbell, 1993, p. 123.

⁹⁸⁴ Conducted by Riggs, Dancu, Gershuny, Greenberg and Foa, 1992.

examined the relation of anger and its expression to post traumatic stress disorder,⁹⁸⁵ a condition which we will explore in more detail later. The results indicated a strong positive association between anger and PTSD symptoms almost immediately after the trauma and perhaps more insightful was the finding that victims who were initially angry and who held in their anger, had more severe PTSD symptoms during the month following the assault, which impeded their subsequent psychological adjustment.

The clinical classification of battered woman syndrome has been influenced by the two most recent American Psychiatric Association's Diagnostic and Statistical Manuals of Mental Disorders, which contain the accepted nomenclature for psychiatric disorders in the United States and Canada. DSM-III-R⁹⁸⁶, the predecessor of current authority DSM IV, included the category of self defeating personality disorder⁹⁸⁷ which prompted a move to diagnose all battered women experiencing the syndrome as having such a personality disorder. This form of personality disorder is said to exist when a person often avoids or undermines pleasurable experiences and is instead drawn to situations or relationships which involve some form of suffering. Although better options and offers of help may be clearly available, they are often rejected.⁹⁸⁸ Much of the literature prior to Walker's research study classified those women who remained in abusive relationships as suffering from a serious pathological condition, which included a masochistic need to be hurt. The study undertaken by Snell et al,⁹⁸⁹ for example, typifies this approach. They concluded that women are battered because they have personality characteristics, such as being frigid, which make them undesirable as wives.

Walker⁹⁹⁰ has objected strenuously to the automatic labelling of all battered women as suffering

⁹⁸⁵ This condition will be hereafter referred to as PTSD.

⁹⁸⁶ Appendix A (APA), 1987, pp. 371-374.

⁹⁸⁷ This is the new name given to masochistic personality disorder. The condition is not recognised by DSM IV.

⁹⁸⁸ Roth and Coles, 1995, 651.

⁹⁸⁹ 1964.

⁹⁹⁰ Walker, 1991, p. 21.

from some form of a personality disorder.⁹⁹¹ She urges that due recognition be given to the necessity for women in violent relationships to adopt certain behavioral patterns which may, at first glance, appear to be detrimental. Very often these forms of behaviour are coping skills adopted to keep her as safe as possible.⁹⁹² Arguing along similar lines, Rosewater⁹⁹³ has objected to labelling as a core part of a person's personality pattern the reactive behaviour which women develop as a coping strategy. This reactive behaviour is situationally determined, while behaviour as a result of a personality disorder is attributable more to the individual's personal characteristics. This difference means that a woman suffering from battered woman syndrome has a more favourable diagnosis once the abuse is eliminated and/or is dealt with in therapy. Herman,⁹⁹⁴ on the other hand, favoured a classification involving a personality disorder diagnosis and considered that PTSD⁹⁹⁵ was an inappropriate diagnostic category. She proposed a new syndrome that follows upon prolonged, repeated trauma rather than the single traumatic events described in the current criteria. According to Herman, survivors of prolonged abuse develop personality changes which include deformations of relatedness and identity. Roth and Coles⁹⁹⁶ suggest that Herman's views could be accommodated by the diagnosis of anxiety disorder NOS with battered woman syndrome in parenthesis but go on to argue that a post traumatic stress disorder diagnosis need not be ruled out on the basis that the symptoms persisted for more than one month.⁹⁹⁷

Although the diagnostic and statistical manual, DSM IV, does not specifically mention battered woman syndrome, it has made a number of changes to the criteria for a diagnosis of PTSD. Other

⁹⁹¹ She puts Borderline Personality Disorder, Dependent Personality Disorder or Passive-Aggressive Personality Disorder into the same category as Self-Defeating Personality Disorder. Walker, 1991, p. 21.

⁹⁹² She lists examples of behaviour which could be mis-diagnosed as involving a self-defeating personality disorder which include putting the man's needs before her own, even at her psychological expense, or behaving in a seemingly passive and dependent manner. Walker, 1991, p. 21.

⁹⁹³ 1987.

⁹⁹⁴ 1992.

⁹⁹⁵ Herman's criticisms related to PTSD as defined in DSM III.

⁹⁹⁶ 1995, p. 651.

⁹⁹⁷ In accordance with the fifth criterion set. The authors further suggest that Herman's proposal could be listed in Appendix B as a criterion set for further study.

syndromes in this diagnostic category include rape trauma syndrome,⁹⁹⁸ battered child syndrome, child sexual abuse accommodation syndrome, or combat war syndrome. Walker has long argued for the inclusion of battered woman syndrome as a subclassification under the diagnostic category of PTSD, not just on clinical grounds, which as we will see is a possibility, but also for political reasons. PTSD is a situationally based anxiety disorder which measures dysfunctions following repeated man-made trauma.⁹⁹⁹ PTSD emphasises the abnormal nature of the stressor, which causes the mental health symptoms, rather than individual pathology. Such a disorder could theoretically happen to anybody who is placed in a similar situation. Despite the potential breadth of application, battered woman syndrome is a condition which women experience as a result of men's violence in the family. A PTSD diagnosis, therefore, has the advantage of providing a theoretical framework which recognises the severe impact of events external to the individual which validates the presence of even a dramatic response to these events.¹⁰⁰⁰

The suitability of such a diagnosis has been recognised by psychologists other than Walker. Roth and Coles¹⁰⁰¹ have examined the status of battered woman syndrome under DSM IV from a conceptual perspective. DSM IV outlines four substantive sets of criteria which have to be met before a diagnosis of

⁹⁹⁸ On this related issue see Raitt and Zeedyk, 1997.

⁹⁹⁹ Walker, 1991, p. 21. My emphasis.

¹⁰⁰⁰ Stephen O' Brien, 1998, devotes two chapters of his book on post-trauma mental distress to issues which concern us directly here; what constitutes a stressor and what constitutes a normal reaction to a trauma. See chapters five, pp. 119-140 and two, pp. 35-48. Although beyond the scope of this work, O'Brien does note that the progression of DSM has been a relaxing of the stringency of the stressor criterion. Under DSM-III initially PTSD was only considered to be a possibility following extreme or disastrous stressors while under DSM-III-R the stressor and to be "outside the range of human experience." (A requirement which, we will see later in chapter seven, corresponds with the knowledge and experience rule governing the admissibility of expert evidence). Now, under DSM IV, as we will see, the focus is much more on the perception of the victim. This has prompted suggestions from some quarters to remove the stressor requirement altogether. This move would not be helpful for the future representation of cases involving women who experience post traumatic distress as a result of male violence since it would defeat the very reason of using PTSD as a diagnostic category in these cases: highlighting the abnormal nature of the stressor. Although O' Brien concludes that PTSD, on the basis of empirical evidence, cannot be considered in mental health terms to be a normal response to trauma but is in fact a significant disorder, he does recognise that there is a general picture of the normal response, which could be developed with research and which consists of the phases of response and adaptation. See further O' Brien's account of Forster's description which describes the normal course of adjustment as involving first, a response phase, second, an adaptation phase and third, recovery. pp. 44-46.

¹⁰⁰¹ 1995.

PTSD can be made. The first set refers to exposure to a traumatic event; the second set to a persistent re-experiencing of that event; the third to the persistent avoidance of stimuli associated with the event and the fourth to persistent symptoms of increased arousal. The first set of criteria, criterion set A,¹⁰⁰² specifies that a person has been exposed to a traumatic event when both of the following are present. The first requires that the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury; or a threat to the physical integrity of self or others. The second stipulates that the person's response involved intense fear, helplessness, or horror.¹⁰⁰³ Given the intensity of violence, which many battered women, and, very often their children, experience and the effects, including as we saw the condition of learned helplessness, this criterion appears to be tailor-made for a recognition of battered woman syndrome.

Referring to the second criterion set, criterion set B, DSM IV lists five ways in which a traumatic experience can be persistently re-experienced. Unlike Criteria set A, criterion set B only requires the existence of one symptom before a PTSD diagnosis can be made. Based on Brown's¹⁰⁰⁴ study on domestic violence, which showed that the symptom of flashbacks was common to the experiences of battered women, Roth and Coles¹⁰⁰⁵ argue that battered woman syndrome appears to meet at least two of the listed criteria in this category. The first criterion speaks of recurrent and intrusive distressing recollections of the event, including images, thoughts or perceptions and the second requires evidence of recurrent distressing dreams of the event. This constant re-experiencing of the stressful event helps to maintain a high level of anxiety in a battering relationship and therefore means that battered woman syndrome also

¹⁰⁰² Included in the description of the first set of criteria in DSM III, was the statement that the traumatic event be one that was outside the range of human experience. As we will see in the next chapter, this description matches the knowledge and experience rule of evidence which together with the ultimate issue rule, governs the admissibility of expert testimony. Several criticisms have been made of this description. Browne, 1993, for example, has argued that it was entirely unsuited to women experiencing battered woman syndrome since, as humans, physical and sexual trauma is very often for them a weekly reality. Although used in a different context, the knowledge and experience rule of evidence is still premised on the jury's store of knowledge and experience.

¹⁰⁰³ Cited by Roth and Coles, 1995, p. 650.

¹⁰⁰⁴ 1993.

¹⁰⁰⁵ 1995, p. 650.

meets this criterion set.

Criterion set C lists seven possible symptoms of avoidance behaviour. Again, based on Browne's finding that battered women typically experience loss of memory for parts of the traumatic episode, psychic numbing and constricted affect which is a state of detached calm where events continue to register in awareness but are disconnected from their ordinary meaning. Roth and Coles argue that battered woman syndrome appears to meet at least three of the seven symptoms listed in this set; inability to recall an important aspect of the trauma, feeling of detachment or estrangement from others and restricted range of affect. Further supporting the fact that battered women engage in avoidance behaviour, Barnett and LaViolette¹⁰⁰⁶ point out that avoidance behaviour is a basic coping strategy employed by battered women and highlight that one such coping style is angry withdrawal.¹⁰⁰⁷

Drawing specifically on the findings of Walker's work,¹⁰⁰⁸ Roth and Coles conclude that battered woman syndrome also meets Criterion set D which requires persistent symptoms of increased arousal. Battered women often experience panic attacks; acute sensitivity to indicators of violence, which can be manifested in startled responses when touched or approached; suspiciousness and difficulties sleeping which cause irritability and anger. Criterion set F requires that the disturbance causes clinically significant distress or impairment in social, occupational or other areas of functioning, which battered woman syndrome clearly meets. The only doubt expressed by Roth and Coles as to the suitability of a PTSD diagnosis, relates to Criterion set E. This criterion requires that the symptoms in Criteria sets B, C, and D, persist for more than one month. The authors do not express their doubt as being a fundamental one concerning the suitability of PTSD as a diagnostic category,¹⁰⁰⁹ but rather, limit this doubt to the lack of literature in the area, which relates specifically to the duration of the disturbance. Despite this lack of

¹⁰⁰⁶ 1993, pp. 99-100.

¹⁰⁰⁷ This was one finding in the study on the effects of abuse on attachment styles of battered women carried out by Justice and Hirt, 1992.

¹⁰⁰⁸ 1989.

¹⁰⁰⁹ Quite the contrary, their article advocates this diagnosis as being the most appropriate.

literature, Walker¹⁰¹⁰ recognised that not all cases of battered woman syndrome occur to the same degree. She considered that the emotional impact may be on a continuum ranging from a short crisis period with little or no lasting effect once the battering is stopped, to serious emotional devastation in more extreme cases. Furthermore, the very fact that battered women undertake a period of therapy following an abusive relationship, must be indicative of symptoms which endure for a substantial period until the woman is healed.¹⁰¹¹ Although this aspect has not been specifically researched, both features seem to indicate that the syndrome can exist in differing degrees which, in certain cases may affect the duration of the disturbance beyond one month.¹⁰¹²

Another possible resting place for battered woman syndrome within the mental health classification system is, as a mental disorder. Although DSM IV acknowledges that the concept of mental disorder has to be open to change, the definition given is

[A] *clinically significant* behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present *distress* (e.g., a painful symptom) or *disability* (i.e., an impairment in one or more important areas of functioning) or with *a significantly increased risk of suffering death, pain, disability, or an important loss of freedom*. In addition, this syndrome or pattern must not be merely *an expectable and culturally sanctioned response to a particular event*, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual. Neither deviant behaviour (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above.¹⁰¹³

While battered women display several symptoms which could be classed as being of clinical significance, ranging from physical injuries to behavioral and psychological symptoms, as well as symptoms which show signs of distress, disability and loss of freedom, Roth and Coles¹⁰¹⁴ object to the classification of battered woman syndrome as a mental disorder on the grounds that it cannot be socially desirable to do

¹⁰¹⁰ 1991, p. 22.

¹⁰¹¹ Walker, 1991, p. 22 terms this healing process which is undertaken by women in therapy as being one of "re-empowerment".

¹⁰¹² See also Dutton and Painter, 1993, who found that the symptoms which they discovered to exist in their sample of battered women, persisted for at least six months.

¹⁰¹³ Cited by Roth and Coles, 1991, p. 653. Emphasis added.

¹⁰¹⁴ 1995, pp. 653-654.

so. They argue that if battered woman syndrome is merely "an expectable and culturally sanctioned response to a particular event" within the category of political or religious behaviour, or is merely the result of "conflicts that are primarily between the individual and society," then it does not qualify for designation as a mental disorder. They point out that while wife beating may once have been socially acceptable, society has ceased to regard women as the property of their husbands who could discipline as they saw fit. Furthermore, they note that battered woman syndrome has been introduced into the courts precisely because of the realisation that it could explain why a woman deserves to be acquitted of the crime of murder. In this climate of change, they argue that physical abuse of another is no longer socially acceptable. Because battering is not an expectable or culturally sanctioned response, they conclude that battered woman syndrome ought not to be classed as a mental disorder.

The use of this diagnostic category has also been supported at the level of practice in Scotland. In a report for a case,¹⁰¹⁵ which involved a battered woman charged with the murder of her abusive partner, Dr Mairead Tagg¹⁰¹⁶ has described the psychological effect of domestic abuse and how it might have mediated the defendant's behaviour in terms of post-traumatic stress disorder, specifically complex PTSD first described in DSM III and refined by Herman.¹⁰¹⁷ This form of PTSD is particularly related to women who have suffered domestic abuse and has three symptom categories: first, hyper-arousal or chronic alertness, second, intrusion, such as flashbacks and finally, constriction. Describing the psychological effect of abuse, Tagg referred to the battered woman's syndrome but made greater use of the work of researchers who liken the strategies of control and coercion used by abusive men to those used to brainwash prisoners of war.¹⁰¹⁸

Within this category of PTSD, Tagg focused on the Stockholm syndrome which she gave as the main reason why the defendant stayed with the deceased. Like the brainwashing of prisoners of war, this

¹⁰¹⁵ For reasons of confidentiality I cannot reveal the name of this woman.

¹⁰¹⁶ See further Tagg's findings into three statutory agencies provisions for women experiencing domestic violence in the Greater Easterhouse area. They were the Housing Department, Social Work and the Benefits Agency. 1997.

¹⁰¹⁷ 1992.

¹⁰¹⁸ See for example, Romero, 1985.

syndrome was originally used to describe the process whereby captors who began by treating their hostages badly gradually showed kindness. The result was that the hostages came to identify positively with their captors. In a battering relationship, as power differences intensify, the person with less authority, the woman, generally forms a negative self-appraisal and feels less capable of taking care of herself which creates a relationship of dependence. Tagg explained that with both battered woman syndrome and Stockholm syndrome, the woman's normal coping mechanisms are replaced by adaptive responses to deal with the feeling that all avenues of escape are closed and with feelings of unbearable anxiety which arise as a result of having one's physical or psychological boundaries violated. Thus, they are not signs of any underlying pathology or brain damage but are coping mechanisms which are developed to help the woman to survive the abuse. On the facts of the case, Tagg pointed out that the situation was further exacerbated on the night in question by the fact that the deceased did not feel that the police could do much to keep the deceased away.¹⁰¹⁹

Although a PTSD diagnosis may not necessarily have been made in every case which has allowed for the introduction of battered woman syndrome expert testimony, such a diagnosis may be a useful guide for jurisdictions, such as Britain, contemplating its use. I will begin by showing how the testimony has been used in the United States and Canadian courts to support a battered woman's claim that she acted in self defence. Although the courts in Australia have used the testimony in relation to the defence of self defence, the testimony has also been used in relation to the defence of duress. Despite having made a number of suggestions as to how the testimony could best be used in Britain, the courts have not yet fully explored the testimony's potential. I will suggest here one possible way of using the testimony in relation to the defence of provocation.

¹⁰¹⁹ Barnett and LaViolette discuss the difficulties posed by institutional forces in general for battered women who kill. 1993, pp. 23-45. For an insight into the prevalence of domestic violence and how it is dealt with by the police see also the report of Strathclyde Police, 1998, on domestic violence. The report reveals that from February 11 to April 11 1998 the police attended 1864 incidents of domestic violence within the Strathclyde Police Area. Wives were victims for 679 incidents and ex-wives were victims for 120 incidents. Husbands were victims for 23 incidents while ex-husbands were victims for 11 incidents. Partners were victims for 702 incidents while ex partners were victims for 205 incidents. A police report was submitted for 610 incidents but there was no report submitted for 1188 incidents and enquiries were marked as continuing for 66 incidents. 54 victims were identified as being the subject of repeat victimisation calls with a total number of 115 calls having been made to these locations. Matrimonial interdicts were present in 40 incidents.

The United States Approach.

One of the most often cited examples of the use of battered woman syndrome expert testimony in the United States is the case of *The State Of New Jersey V Kelly*.¹⁰²⁰ Gladys and Ernest Kelly had been married for seven years before the actual stabbing took place. Wilentz C.J., delivering the opinion for the Supreme Court of New Jersey, recognised that "[t]he Kellys had a stormy marriage."¹⁰²¹ The first act of violence occurred just one day after they got married when the deceased, who was drunk, knocked down the defendant. Throughout the marriage this violence manifested itself in some form or other, sometimes as often as once a week. On the day in question, the defendant called to a friend's house, where she knew the deceased would be. On the way home, the deceased, who had been drinking, became angry at the fact that the defendant had called to the house, and grabbed her by the collar of her dress. A fight ensued between the couple, during which the defendant almost choked. Afterwards the defendant's daughter picked up her mother's pocket book, containing a pair of scissors, which had fallen to the ground. When the defendant saw the deceased coming towards her with his hands in the air, she thought that the deceased was about to kill her. She grabbed the pair of scissors and instead of scaring him away, as she intended, she stabbed him.

Wilentz C.J. considered that the mainstay of the testimony lay in its ability to assist the court to understand why the woman did not leave the battering relationship.

Only by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman's state of mind be accurately and fairly understood.¹⁰²²

Although realising that the answer to this question would vary from case to case, the judge recognised that the loving contrition phase "reinforces whatever hopes these women might have for their mate's reform and keeps them bound to their relationships."¹⁰²³ He also considered that in some cases women,

¹⁰²⁰ 478 A. 2d 364 (N.J.1984). For an account of how the case-law at state and federal level evolved in the early days see Walus-Wigle and Meloy, 1988, pp. 389-401.

¹⁰²¹ p. 369.

¹⁰²² p. 372.

¹⁰²³ p. 372.

particularly if they were subjected to violence themselves as children, may actually perceive this battering as being normal whereas in other cases women may, after several experiences of violence at the hands of their partner, come to "believe in the omnipotence or strength of their battering husbands and, thus, to feel that any attempt to resist them is hopeless."¹⁰²⁴

Before the testimony could be admitted in evidence, it had to pass the test for relevance. On the facts of the case it was deemed to be relevant on two grounds. First, it was held that the testimony was relevant to the defendant's state of mind and so was introduced to show that she honestly believed she was in imminent danger of death and secondly, it was found that the testimony was relevant to the reasonableness of her belief that she was in imminent danger of death or serious injury. Thus, the testimony, in particular the Cycle Theory of Violence, by underlining the importance of the effect, which the previous violent incidents had, was used to support both subjective and objective aspects of the defence.

[W]hen that regular pattern of serious physical abuse is combined with defendant's claim that the decedent sometimes threatened to kill her, defendant's statements that on this occasion she thought she might be killed when she saw Mr Kelly running toward her could be found to reflect a reasonable fear; that is, it could so be found if the jury believed Gladys Kelly's story of the prior beatings, if it believed her story of the prior threats, and, of course, if it believed her story of the events of that particular day.¹⁰²⁵

The judge went on to consider a further important implication of the cyclical nature of the violence. This constant subjection to violence could also help to explain how the accused was particularly sensitive to her husband's violence, which, in turn, would help the jury to evaluate properly the reasonableness of her fear. He held that

[D]epending on its content, the expert's testimony might also enable the jury to find that the battered wife, because of the prior beatings, numerous beatings, as often as once a week, for seven years from the day they were married to the day he died, is particularly able to predict accurately the likely extent of violence in any attack on her. That conclusion could significantly affect the jury's evaluation of the reasonableness of defendant's fear for her life.¹⁰²⁶

Without the assistance of the testimony, the judge recognised that a woman's reaction to violence

¹⁰²⁴ p. 372.

¹⁰²⁵ p. 377.

¹⁰²⁶ p. 378.

of the type endured by Gladys Kelly could be prone to mis-interpretation. Wilentz C.J. explained why she stayed in terms of her

"learned helplessness"; her lack of anywhere to go; her feeling that if she tried to leave, she would be subjected to even more merciless treatment; her belief in the omnipotence of her battering husband; and sometimes her hope that her husband will change his ways.¹⁰²⁷

As well as recognising the psychological impacts of violence, the judge went on to emphasise the importance of "external social and economic factors [which] often make it difficult for some women to extricate themselves from battering relationships."¹⁰²⁸ Among these factors, he catalogued the fact that women may be financially dependent, the fact that they may be responsible for care of the children, the lack of a place to flee to and the stigma which attaches itself to a woman who leaves the family without her children. Related to these social and economic factors, which sometimes operate to prevent women from leaving the abusive relationship, were personality traits which the judge considered were common to battered women. These included their unwillingness to confide in friends or the police because of shame or fear, low self esteem, traditional beliefs about the importance of keeping the family together, feelings of guilt because their marriage is failing and a tendency to accept responsibility for the actions of their batterer. Finally, the Chief Justice realised the practical dangers, which women who left home faced.

[I]n addition to their hope of reform on the part of their spouse, they harbour a deep concern about the possible response leaving might provoke in their mates. They literally become trapped by their own fear.¹⁰²⁹

Despite being receptive to the testimony, the judge went to considerable pains to limit the role of the expert. He considered that a qualified expert could give an opinion as to whether or not the woman had battered woman's syndrome but could not give an opinion as to the honesty or reasonableness of the woman's belief since the main purpose of the testimony is to explain why the woman did not leave the relationship.

The Canadian Approach.

The leading Canadian case involving the use of expert testimony on the battered woman

¹⁰²⁷ p. 377.

¹⁰²⁸ p. 372.

¹⁰²⁹ p. 372.

syndrome is the case of *R V Lavallee*.¹⁰³⁰ Here, Madame Justice Wilson, giving judgement for the majority, went further than Wilentz C.J. in *Kelly*.¹⁰³¹ Although the testimony was considered to be important when addressing the issue of why she did not leave the relationship, Madame Justice Wilson focused on the testimony's potential to explain the woman's reasonable apprehension of death or grievous bodily harm as well as the reasonableness of her belief that killing was the only way to save her life. The judge admitted the testimony under two headings, the first of which was to show how the accused did actually have a reasonable apprehension of death and the second was to show how the accused lacked alternatives to self-help.¹⁰³²

When speaking to the first of these two headings Madame Justice Wilson recognised the potential of the testimony to explain the context in which the killing occurred. She held that

[G]iven the relational context in which the violence occurs, the mental state of the accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality.¹⁰³³

When examining "the relational context" the judge made two important observations. First, that the relationship between the accused and her partner, Rust, had become more violent in the period

¹⁰³⁰ [1990] 1 S.C.R. 852. For a commentary on *R V Lavallee* and a general insight into how cases involving battered women are dealt with in Canada see Lee Stuesser, 1990, pp. 195-210.

¹⁰³¹ 478 A. 2d 364 (N.J.1984).

¹⁰³² The law on self defence in Canada is laid down in the Criminal Code, R.S.C. 1985, C-46, s. 34(2). (2) provides that

[e]very one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and, b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

A purely objective test for reasonableness is not used. The reasonableness of the accused's acts is tested from the perspective of the accused. Section 34 (2) therefore, involves a subjective and an objective arm which means that the jury is required to assess both the honesty of the accused's belief and the reasonableness of that belief. Martin J.A. in *R V Baxter* (1975), 27 C.C.C. (2d) 96 at 108-9 (Ont. C.A.) explained that "[I]n deciding whether the accused's belief was based upon reasonable grounds the jury would of necessity draw comparisons with what a reasonable person in the accused's situation might believe with respect to the extent and the imminence of the danger by which he was threatened, and the force necessary to defend himself against the apprehended danger. What a reasonable man would believe or do in the circumstances was, accordingly, a relevant consideration in deciding whether the accused's subjective belief was based upon reasonable grounds".

¹⁰³³ p. 877.

immediately preceding the killing, which led to feelings of escalated terror on the part of the accused. Second, she recognised, as did Wilentz C.J. in *Kelly*, that the cyclical nature of the abuse "begets a degree of predictability to the violence that is absent in an isolated violent encounter between two strangers."¹⁰³⁴ This ability to accurately predict the next wave of violence ever before a blow is struck was explained by Julie Blackman whose work Madame Justice Wilson cited with approval.

[R]epeated instances of violence enable battered women to develop a continuum along which they can "rate" the tolerability or survivability of episodes of their batterer's violence. Thus signs of unusual violence are detected...they can name the features of the last battering that enabled them to know that this episode would result in life threatening action by the abuser.¹⁰³⁵

Thus, here again is the finding that women who have been beaten over the course of time by their partner do develop a heightened sensitivity in relation to their partner's pattern of violence and so, unlike the woman who is not battered, are in a position to be able to accurately predict when the next wave of violent activity is due to erupt. Madame Justice Wilson, therefore, recognised the importance, from the perspective of the appellant, of the deceased's threat to kill her when everybody left the house.

The judge also recognised that there was a further implication of this ability, which battered women acquire through experience. She realised that women, in general, are not as physically strong as men and so they should not be made to wait until the assault was underway until reacting before attracting the law's protection. The judge articulated this point by holding that she did not

think it an unwarranted generalization to say that due to their size strength and training, women are typically no match for men in hand to hand combat and so to wait until an assault was underway would, as was held in *State V Gallegos* 719 P.2d. 1268 (NM 1986) be tantamount to sentencing her to murder by instalment.¹⁰³⁶

Madame Justice Wilson translated this understanding into practice. Referring to an article written by M.J. Willoughby, the court not only recognised that the imminent danger rule¹⁰³⁷ does not account for

¹⁰³⁴ p. 880.

¹⁰³⁵ Blackman, 1986, p. 229. Cited on p. 881 of *Lavallee*.

¹⁰³⁶ p. 883.

¹⁰³⁷ As we have already seen, imminence is a requirement in Canada. See further Boyle's criticism, 1990, p. 172. of the casting of the case in the Court of Appeal as being an evidential problem rather than as a problem with the substantive law. She suggests that this was probably due to on the one hand, lawyer's scepticism about the applicability of self defence, but on the other their reluctance to insist on the full application of the imminent attack doctrine. Although there is no mention of the duty to retreat in this

"gender-based differences in the sexes' respective abilities and dispositions toward aggressive conduct"¹⁰³⁸ but went on to express the opinion that an imminent attack is not necessary for self defence to succeed in these cases.

When speaking to the second issue, the demonstration of lack of alternatives to self-help, Madame Justice Wilson realised that the vital question in this context is why didn't the woman leave? Like the court in *Kelly*, the judge realised that this question can readily be misinterpreted. Realising the "useful insights"¹⁰³⁹ which the testimony can provide in the regard, Madame Justice Wilson allowed Dr. Shane, the expert psychiatrist in this case, to give some informed answers to this question. He testified that

[S]he stayed in the relationship...because of the strange, almost unbelievable..relationship that sometimes develops between people who develop this very disturbed..quality of relationship...basically it involves two people who are involved in what appears to be an attachment which may have sexual or romantic or affectionate overtones...one individual...usually the woman in our society...becomes battered [and] ...stays in the relationship for a number of reasons.¹⁰⁴⁰

Again, the question as to why she did not leave was explained in terms of the concept of learned helplessness. Once the accused realised that another bout of violence was imminent she ran upstairs and hid in the closet. Dr. Shane described this response in terms of the accused feeling that

there were steel fences in her mind which created for her an incredible barrier psychologically that prevented her from moving out. Although she had attempted [to escape] on occasion, she came back in a magnetic sort of way. And she felt also that she couldn't expect anything more. Not only [is] this learned helplessness about being beaten, beaten, where her motivation is taken away, but her whole sense of herself. She felt this victim mentality, this concentration camp mentality, if you will, where she could not see herself be in any other situation except being tyrannized, punished and crucified physically and psychologically.¹⁰⁴¹

Armed with this understanding Madame Justice Wilson applied it to the law on self defence. Although the

specific provision of the Code, there is a degree of uncertainty as to how it operates in Canada. I will discuss the duty to retreat requirement later.

¹⁰³⁸ Willoughby 1989, pp. 182-83.

¹⁰³⁹ p. 884.

¹⁰⁴⁰ p. 884.

¹⁰⁴¹ p. 888.

duty to retreat requirement is not expressly referred to in section 34 (2),¹⁰⁴² it has been addressed, with varying results, in cases where killings occurred in the home.¹⁰⁴³ Citing the case of *R V Antley*¹⁰⁴⁴ the judge began by stating that traditional defence doctrine does not require a person to retreat from her home instead of defending herself. However, she then went on to ask the jury to consider the accused's feelings about the possibility of escape when examining what a reasonable person would do in such a situation. Commenting on this uncertainty, Boyle,¹⁰⁴⁵ outlines the various different considerations which are at stake on this issue. On the one hand, abolishing the rule could merely be seen as perpetuating a male norm which rewards bravery at the expense of a different norm which promotes non-violence, the ethic of care and the idea of connectedness.¹⁰⁴⁶ But on the other hand, abolishing the rule could be the best way of reflecting the empirical reality of a battered woman's life. She suggests that the best approach might be to require retreat if it can be done safely. This test ought to be judged from the perspective of the accused.¹⁰⁴⁷

Although Madame Justice Wilson's decision is generally praised for its insightfulness and creativity, Professor Ewing, whose theory we discussed in chapter three, would argue that psychological description given by Dr. Shane in *Lavallee*, constituted a threat to the individual's sense of self. Thus, the

¹⁰⁴² The section which expressly refers to the requirement is section 35. This provision covers the situation where the accused was the original aggressor or provoked the assault. 35(c) states that such an accused must have "declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose".

¹⁰⁴³ See, for example *R V Antley* [1964] 1 O.R. 545, 42 C.R. 384 (C.A.) where the Court held that there was no duty to retreat from one's own home. The later case of *R V Deegan* (1979) 49 C.C.C. (2d) 417, [1979] 6 W.W.R. 97, 17 A.R. 187 (C.A.) seems to have gone even further towards abolishing the rule when it held that the duty to retreat does not apply, even if the accused had not been in his home. However, see also the domestic violence case of *R V Ward* (1978) 4 C.R. (3d) 190 (Ont.C.A.) where the Ontario Court of Appeal held that the duty to retreat was relevant evidence in deciding whether the accused's actions were justifiable. This approach resembles the English position, which regards retreat as being a factor to be taken into consideration in deciding whether it was necessary to use force, and whether the force was reasonable. See again chapter three.

¹⁰⁴⁴ [1964] 1 O.R. 545, 42 C.R. 384.

¹⁰⁴⁵ A forum on *Lavallee V R: Women and Self Defence*, 1991 pp. 63-64.

¹⁰⁴⁶ This approach is described by Carol Gilligan, *In a Different Voice*, 1982. See further again chapter two.

¹⁰⁴⁷ Boyle, 1991, p. 66.

description of the accused as a woman who "could not see herself be in any other situation except being tyrannized, punished and crucified physically and psychologically"¹⁰⁴⁸ would probably be enough for Ewing to argue that there was a threat to the individual's psychological self and, as such, sufficient to attract his proposed new defence.

The Australian Approach.

By contrast with the approaches in the jurisdictions, which we have seen so far, the courts in Australia have used the testimony in a variety of different cases and in connection with the defence of self defence as well as duress. Unlike self defence, duress does not justify an act but merely excuses the actor. The first case to adopt the testimony was the case of *Runjanjic and Kontinnen*.¹⁰⁴⁹ Like the Court in *Lavallee*, the Court of Appeal of South Australia was of the opinion that the "primary thrust"¹⁰⁵⁰ of the evidence was designed to assist the court when examining the objective test of reasonableness.

The facts of the case itself involved a complex relationship between one Hill, Kontinnen and Runjanjic. Hill met Runjanjic in 1981. Their relationship was marked by violence, abuse and domineering behaviour on the part of Hill towards Runjanjic.¹⁰⁵¹ Some years later, Hill met Kontinnen and subsequently put both women to work as prostitutes, referring to them as No.1 and No. 2. This case came to trial as a result of a horrific infliction of violence on a friend of Kontinnen, Patricia Hunter. The defence of duress was advanced at the initial trial. Both defendants argued unsuccessfully that they did not willingly cooperate in the scheme to entrap Hunter and that they did not know or participate in the use of unlawful force against Hunter.¹⁰⁵²

¹⁰⁴⁸ p. 888.

¹⁰⁴⁹ (1991) 53 A. Crim. R. 362. For a helpful commentary on this case see Paul Giugni, 1992, pp. 511-517 and Frank Bates, 1994, who illustrates the importance of acknowledging legal developments across common law boundaries.

¹⁰⁵⁰ p. 368.

¹⁰⁵¹ As King C.J. noted in his judgement [S]he was expected to attend his every need, including quite trivial needs, and the price of disobedience was severe beating. p. 363.

¹⁰⁵² Both appellants testified that on the direction of Hill, Hunter was tricked into going to Swan Reach on the pretext that Kontinnen needed help to sell some furniture and Indian hemp. However, the real reason for the inveigling of Hunter to Swan Reach was because Hill believed her to know the whereabouts of furniture which had been stolen from Kontinnen's house. On Hunter's arrival at Swan Reach, Hill and

The Court cited *Brown*¹⁰⁵³ which held that defence exists

when the otherwise criminal acts are committed not out of choice but because the will of the accused is overborne by threats of death or serious physical injury in such circumstances that the will of a person of reasonable firmness might be similarly overborne.¹⁰⁵⁴

The defence of duress, therefore, comprises two elements; the subjective test, focusing on whether the will of the accused is actually overborne and the objective test, focusing on whether the will of a person of reasonable firmness in the particular situation would be overborne. At trial, the judge refused to admit expert testimony on the battered woman syndrome. His rationale was that because the test for duress is objective, expert evidence as to the state of mind of the appellants is irrelevant. King C.J. disagreed with this ruling for two reasons. First, he noted that the trial judge had ignored the subjective aspect of the test for duress. Even if the evidence had no bearing on the reasonableness aspect, it would still be relevant to the question as to whether or not the wills were in fact overborne. More importantly, the judge went on to hold that the testimony was also relevant to the objective aspect of the test. He considered that the law is not so much concerned with the subjective mental state of mind of these women but with assessing how women of reasonable firmness, who had been subjected to battering, would have reacted in similar circumstances. He ruled that

[T]he proffered evidence is concerned not so much with the particular responses of the appellants as with what would be expected of women generally, that is to say women of reasonable firmness, who should find themselves in a domestic situation such as that in which the appellants were. It is designed to assist the court in assessing whether women of reasonable firmness would succumb to the pressure to participate in the offences. It also serves to explain why even a woman of reasonable firmness would not escape the situation rather than participate in criminal activity.¹⁰⁵⁵

In view of the structural similarity between the defence of duress and that of provocation, it is perhaps not surprising that the judge also envisaged the possibility of introducing expert testimony on the battered woman syndrome in connection with the defence of provocation.

Runjanjic were waiting for her. Over the course of four days, Hunter was subjected to physical and verbal ill-treatment at the hands of Hill. After hearing evidence from Hunter, it was eventually conceded, his two partners were also involved.

¹⁰⁵³ 21 A. Crim. R 288 at 291.

¹⁰⁵⁴ p. 291.

¹⁰⁵⁵ p. 368.

[I] can see no distinction in principle between the admission of expert evidence of the battered woman syndrome on the issues of self-defence and provocation and on the issue of duress.¹⁰⁵⁶

The second case in which the testimony was used was *Kontinnen*.¹⁰⁵⁷ This case also arose out of the relationship between Hill and Kontinnen. Here Kontinnen killed Hill after he threatened to kill her, another woman and a child. The testimony was used to support the defence of self defence specifically to explain Kontinnen's reasonable belief in the imminence of the danger and the reasonableness of her belief that her use of the gun was necessary to defend her own life.

*Hickey*¹⁰⁵⁸ was a domestic violence killing where the violence had continued over the course of the several years. Although the law of New South Wales does recognise the defence of diminished responsibility, the court declined to follow the avenue leading to abnormality of mind and instead used the testimony to support a plea of self defence. The court held that the testimony was relevant to show how the accused could reasonably have believed that her life was in danger. At the time of the killing, the accused was not actually living with the deceased but had agreed to meet him so that he could see the children. Later that night a quarrel developed over where the children were to spend the night. The deceased threw the accused on the bed and proceeded to strangle and head-butt her. When the deceased had his back to the accused, she stabbed him. Despite regarding the testimony as evidence of her reasonable belief that her life was in danger, when addressing the issue of why she did not leave, the forensic psychologist framed the evidence in terms of her innate dependency rather than any psychological condition which she may have developed or her concern that the children spend time with their father.¹⁰⁵⁹

¹⁰⁵⁶ p. 370.

¹⁰⁵⁷ Unreported, Supreme Court, SA, 30 March 1992.

¹⁰⁵⁸ (1992) 16 Crim. L.J. 271.

¹⁰⁵⁹ See also the cases of *R V Raby* (unreported, Supreme Court of Victoria, October 31 1994) and *R V Taylor* (Unreported, Supreme Court of South Australia, February 3 1994 where the testimony was raised in an effort to secure the acquittal of women charged with murder. (Although in the case of *R V Raby* on the facts the jury convicted eventually of manslaughter). For a less sympathetic approach to the use of the testimony see *R V Secretary* (unreported, Supreme Court of the Northern Territory, 12 December 1995. The trial judge Kearney J treated the evidence as properly before the jury but found that the deceased at the time posed no imminent danger. In the Supreme Court Martin C.J. also considered that the elements of the defence ought to be strictly applied while Angel and Mildren JJ considered that the trial judge's ruling was incorrect and ordered a re-trial.

Not as frequently discussed as any of these three cases already mentioned is the case of *Winnett V Stephenson*.¹⁰⁶⁰ Although not a domestic killing, there are a number of exceptional features about this case. One is the fact that the evidence, which the court considered was relevant to the reasonableness test for duress, was given by a criminologist, rather than by a medical expert. The charge against the defendant was that she had obtained two unemployment benefits and rent assistance from the Department of Social Security contrary to s. 29B of the Crimes Act 1914 (Cwlth) at a time when she was employed. Relying on the defence of duress,¹⁰⁶¹ she claimed that acted as a result of constant threats of violence and death by her (ex) partner which escalated over time and which correlated with her decrease in income.

Patricia Easteal,¹⁰⁶² was called to assist the court in understanding how a woman of ordinary firmness of mind would respond in the context of domestic violence.¹⁰⁶³ Easteal did not testify about the defendant's individual psychology but instead focused on the possible effects of living in a violent situation. She emphasised the fear caused by repeated cycles of violence, how the psychological response of learned helplessness constrains the woman's ability to make choices, which could extricate her from the relationship, and how a battered woman no longer living in a violent situation, could continue to evidence the lack of decision-making, high passivity and low self esteem if the batterer is still making threats.¹⁰⁶⁴ Although a clinical forensic psychologist was called, his testimony was limited to the subjective aspect of the defence, specifically, how in his opinion, the woman "exhibited the indicia of battered woman

¹⁰⁶⁰ ACT Magistrates Court, unreported, 19 May 1993.

¹⁰⁶¹ The court relied on the definition laid down in *R V Lawrence* [1980] 1 NSWLR 122, P. 143 which requires the defence to show that the defendant's will was overborne by threats of death or serious bodily injury, whether to herself or another, provided that an average person or ordinary firmness of mind, of like age and sex, in like circumstances would have yielded in the same way. If, however, it appears that the accused person failed to avail herself of an opportunity reasonably open to her for her will to be reasserted, the defence will not be available. Again, this is dependant upon whether an average person of ordinary firmness of mind, of like age and sex, in like circumstances, involving like risks in respect of the alternatives open, would have availed [her]self of the opportunity in question.

¹⁰⁶² For an account of how the debate has proceeded in Australia see Easteal, 1992, pp. 356-359 who argues in favour of the testimony and Stubbs 1992, pp. 359-361 who warns against its use.

¹⁰⁶³ See further Easteal, 1992, pp. 220-223.

¹⁰⁶⁴ Easteal also dispelled the myth that all battered women are isolated housewives and informed the court that battered women may be reluctant to seek police protection due to feelings of shame, fear of retribution and perceptions of the antipathy of police. Easteal, Hughes and Easter, 1994, pp. 16-17.

syndrome."¹⁰⁶⁵

Perhaps the most revealing feature of this case was the Magistrate's assessment of the use of battered woman syndrome expert testimony. He stated that up to the close of the defendant's personal testimony, he was sceptical about her evidence and the likelihood that an ordinary person would have failed to take opportunities available for escape. However, after hearing the evidence, he re-stated his position and considered that "[m]any of my reasons for scepticism appear to be explicable by the symptoms of battered woman syndrome."¹⁰⁶⁶ Thus, as the authors point out the magistrate's learning process in this case involved hearing evidence which helped him to understand that reasonable behaviour for a battered woman may not be the same as it is for a white middle class man.¹⁰⁶⁷

The British Approach.

The first English case to recognise the testimony was that of *Sally Emery*.¹⁰⁶⁸ Emery was the mother of a young child who died of injuries resulting from prolonged physical abuse. At Peterborough Crown Court she was acquitted of occasioning actual bodily harm but was convicted of failing to protect her child from its father. She claimed that she had been acting under duress; that the father regularly beat both the child and herself and that fear prevented her from protecting the child. An expert psychologist¹⁰⁶⁹ and psychiatrist were called to testify that this repeated exposure to violence reduced her to a state of dependent helplessness which explained her failure to protect her child. The trial judge held that the evidence was relevant to the subjective test, whether or not her will was overborne. This approach was endorsed on appeal by Lord Taylor C.J. who further commented that the evidence was relevant to the objective condition, "whether a woman of reasonable firmness with the characteristics of [the defendant], if abused in the manner which she said, would have had her will crushed so that she could not have

¹⁰⁶⁵ Easteal, Hughes and Easter, 1994, p. 17.

¹⁰⁶⁶ Easteal, Hughes and Easter, 1994, p. 17.

¹⁰⁶⁷ Easteal, Hughes and Easter, 1994, p. 17.

¹⁰⁶⁸ (1993) 14 Cr. App. R. (S.) 394.

¹⁰⁶⁹ Sandra Horley of Chiswick Family Rescue.

protected her child".¹⁰⁷⁰

As we saw in earlier the decision in *R V Parker*¹⁰⁷¹ to follow the previous decisions of the Court of Appeal until they are authoritatively overruled means that the Privy Council's ruling in *Luc* which prevented mental characteristics which diminish the accused's capacity for self control from being considered, does not reflect the law of England. Furthermore, *Parker* does seem to hold that battered woman syndrome is relevant to both the objective and subjective tests.¹⁰⁷² This means, therefore, that the decisions of *R V Ahluwalia*¹⁰⁷³ and *R V Thornton (No.2)*¹⁰⁷⁴ are binding on the Court of Appeal, although the Court's discussion of the testimony in both cases was merely obiter.¹⁰⁷⁵ One of the initial reactions to *Ahluwalia* was that the Court of Appeal had not properly conceptualised the testimony under the objective test by regarding the syndrome as evidence of mental impairment or abnormality.¹⁰⁷⁶ However, Geoffrey Robertson, corrected this error by stating that the court had actually conceptualised the testimony in terms of a condition which normal people can suffer and which affects their personalities in ways which may reduce or eliminate criminal liability. He wrote that "[T]he Court accepted that normal women who repeatedly suffer domestic violence may be reduced to a state of 'learned helplessness' which slows or distorts their response to the last act of provocation, but does not thereby lose them the protection of that doctrine."¹⁰⁷⁷ In a recent commentary on this case, Yeo writes that counsel for the defence contended that the syndrome be related to the issue of gravity of the provocation. However, the court's reliance on *McGregor* and the subsequent New Zealand cases where personality disorders were permitted to affect

¹⁰⁷⁰ p. 398, cited by Mackay and Colman, 1996, p. 89.

¹⁰⁷¹ February 25 1997.

¹⁰⁷² See Professor Smith's commentary on *R V Hobson*, 1997, p. 760.

¹⁰⁷³ [1992] 4 All ER 889.

¹⁰⁷⁴ [1996] 2 All ER 1023.

¹⁰⁷⁵ As we saw both cases were decided on the basis of diminished responsibility.

¹⁰⁷⁶ See, for example, Yeo, 1993, p. 13.

¹⁰⁷⁷ In a reply to Yeo's article, 1993, p. 176.

the ordinary powers of self control confuses the purpose for which the court meant to use the syndrome.¹⁰⁷⁸

It will be remembered that in *Thornton (No. 2)* the Court of Appeal held that battered woman syndrome evidence could be relevant to both subjective and objective aspects of the defence. On the subjective issue the judge considered that the evidence could "form an important background to whatever triggered the actus reus"¹⁰⁷⁹ enabling the jury to better understand how the battered woman could have lost self control in the face of relatively minor provocation, if the defendant has endured abuse over a period, on the "last straw"¹⁰⁸⁰ basis. And under the objective heading, the court held that the syndrome might have affected the defendant's personality so as to constitute a significant characteristic relevant to the objective test. In his commentary on this case at the time, Professor Smith¹⁰⁸¹ pointed out that if the majority of the Privy Council decision in *Luc Thiet Thuan V R*¹⁰⁸² were right then the personality disorder was irrelevant for the purposes of the objective test. Notwithstanding this case, he envisaged another possible role for the testimony. Drawing on his interpretation of *Emery*,¹⁰⁸³ Professor Smith wrote that the jury should be entitled to take into account the effect of the deceased's conduct upon an ordinary woman (not suffering from personality disorder) throughout the marriage. By analogy with *Emery*, the history of violence which produces the learned helplessness is seen as part of the provocation. The jury is then asked to envisage an ordinary woman of reasonableness before the history of violence begins and to consider whether, by the time of the fatal threat, she would have lost her control. He considered that, although the question is a matter for the opinion of the jury, expert testimony on the battered woman syndrome would be admissible to help them form this opinion on the basis that mental disorder is outside the experience of the ordinary juror. Yeo,¹⁰⁸⁴ also considers that the court's recognition of the testimony was laudable but

¹⁰⁷⁸ Yeo, 1997, p. 448 footnote 58.

¹⁰⁷⁹ p. 1030.

¹⁰⁸⁰ p. 1030.

¹⁰⁸¹ 1996, pp. 598-599

¹⁰⁸² [1996] 2 ALL ER 1033.

¹⁰⁸³ Professor Smith discussed this case in his commentary on *R V Bowen*, 1996, p. 579.

¹⁰⁸⁴ 1977, p. 455.

unlike Professor Smith he objects to its treatment of the syndrome as being abnormal in the same way as it regarded the accused's personality as being abnormal. I will return to this possible interpretation later.

Since then, the Court of Appeal has considered the testimony in a number of cases, which involved appeals against manslaughter convictions. In *R V Grainger*¹⁰⁸⁵ the appellant appealed against her three-year conviction of manslaughter by reason of provocation which was dismissed. The relationship in this case was described as one of "mutual discord and fighting."¹⁰⁸⁶ Both appellant and her husband had been drinking all day during which time they had argued. The deceased threw a bottle of mint sauce at the wall and raised his fist as if to strike the appellant but did not do so. When they returned from the pub that night, the deceased was chanting slogans in support of a football team which was not the team which the appellant favoured and behaved bizarrely, attacking the walls and the furniture. The deceased then brought a knife from the kitchen, stabbed himself superficially, offered the knife to the appellant and goaded her to kill him. The appellant then brought a knife from the kitchen, a fact which the appellant disputed. According to the evidence of the babysitter the appellant may have wanted to stab him but it could have been a case of accident as well.

In the psychological report which the trial judge considered, the expert expressed the view that the appellant was in "a condition of learned helplessness" which meant that she had become accustomed to accepting physical and emotional abuse from the deceased and to putting up with it without protest or action.¹⁰⁸⁷ On the basis of this evidence, the trial judge distinguished this case from that of *Gardner*,¹⁰⁸⁸ which also involved the use of battered woman syndrome evidence in an appeal, but where the woman was suffering from a serious depressive illness at the time of the offence.¹⁰⁸⁹ The Court of Appeal had before them two further reports. The Court of Appeal looked in particular to that of a psychiatrist, Dr Kent which

¹⁰⁸⁵ [1997] 1 Cr. App. R 369.

¹⁰⁸⁶ Lexis transcript.

¹⁰⁸⁷ Lexis transcript.

¹⁰⁸⁸ (1992) 14 Cr App R 364.

¹⁰⁸⁹ Here, the sentence was five years imprisonment for killing a violent former partner which was subsequently reduced to two years probation on appeal.

gave a more detailed account of the condition of learned helplessness. He described the appellant as somebody who was subjected to a long period of ill-treatment (mental, physical and sexual) by her husband, who had come to learn to accept that conduct and to put up with it in a state of passivity. He wrote that

[t]ypically battered women lose their coping abilities as the violence continues giving less and less control to the individual concerned. A cycle develops where the individual is unable to seek support and, being less able to use coping strategies, becomes more and more dependent on the abuser from an emotional point of view in spite of the fears and violence that continues. Importantly they perceive themselves to have no control over their lives or their environment.¹⁰⁹⁰

Dr Kent was of the opinion that the appellant was not suffering from any mental illness but that she had suffered from profound psychological effects or battered woman syndrome that are typical in cases of women who have been subject to enduring physical and sexual abuse over time. He summarised these effects as

lowering of self esteem, demoralisation, feelings of depression with low mood and occasional suicidal ideas, and inability to cope, reduced coping mechanisms and perception of loss of control.¹⁰⁹¹

More recently was the case of *R V Howell*¹⁰⁹² which also involved an appeal against a manslaughter conviction by reason of provocation. The trial judge noted that the appellant had been in a number of abusive relationships but was swayed by a number of factors. First, there had been an opportunity in the course of a final quarrel for the appellant to avoid further confrontation but she used the time to take a gun, load it and wait for her husband to reappear. Furthermore, the use of a firearm to kill increased the seriousness of the case. The appellant's relationship with her third husband was no different from her other relationships. Although the appellant tried to hide the fact that he was abusive, his violence necessitated hospital treatment. On the day in question both had been drinking. The appellant descended into one of his dark silent moods which erupted into argument and violence. On the night in question, the appellant tried to clear the atmosphere but the deceased accused her of having an affair with his friend and beat her around the head in the bedroom. She did not retaliate and went into the kitchen.

¹⁰⁹⁰ Lexis transcript.

¹⁰⁹¹ Lexis transcript.

¹⁰⁹² [1998] 1 Cr App R 229.

The deceased, who had undressed, put his clothes back on and followed her into the kitchen in order to resume the argument. He dragged her out of the kitchen and punched her several times before going to the bathroom. When the appellant realised that the deceased intended to beat her again, she took the gun, which was nearby, and, remembering the previous beating which she suffered when her husband discovered that the gun was not loaded, she loaded it and threatened him so as to make him leave her alone. Although she did not remember pulling the trigger, the shot hit him in the stomach, from which he eventually died.

The Court of Appeal considered the evidence of three psychiatrists. Dr Eastman considered that there were insufficient symptoms to conclude that the appellant suffered from anything more than a mild depressive illness, and that there was no apparent abnormality in her mental state which he considered would rule out a defence of diminished responsibility under section 2 of the Homicide Act.¹⁰⁹³ He also considered that there was insufficient evidence to conclude that she suffered from post-traumatic stress disorder, but that she did demonstrate multiple aspects of battered woman syndrome. Furthermore, he did not find evidence that she had an abnormal personality or abnormal vulnerability to the effects of abuse or stress but considered that there was evidence to show that she had become similarly pathologically attached to all her abusive partners. This repetition of abuse, he thought, was likely to be reinforcing in its effect, resulting in the exaggeration of any psychological effects in the victim beyond that which would be likely to occur in response to any experience of a single abusive relationship.

Unlike Dr Eastman, Dr Newman was of the opinion that there were a number of features of battered woman syndrome which he applied to provocation and which he considered could properly be seen as mental characteristics which rendered the victim more vulnerable to the alleged verbal and physical provocation to which she was subjected by the victim than a person who was not chronically abused. In particular, he highlighted her low self-esteem and inappropriate guilt which emphasised her lack of value or control over her own life. Furthermore, he pointed to the condition of learned helplessness which distorted her thought processes and prevented her from leaving.

¹⁰⁹³ However, he went on to say that if the court were to accept that abnormality of mind could be established in the basis of her symptoms, there would be sufficient evidence for the jury to conclude that there was substantial impairment of mental responsibility.

Dr Smith agreed that the appellant had developed features of the battered woman syndrome which she considered to be a form of post-traumatic stress disorder. Like Dr Newman, she referred in particular to the appellant's sense of enduring shame and failure and that her low self esteem and self worth was exacerbated by the personal criticism and insults. Unlike Dr Eastman, she considered that the battered woman syndrome would amount to an abnormality of mind within the meaning of section 2 of the Homicide Act and would have substantially diminished her mental responsibility for her actions. She reported that the appellant was more frightened than usual on the night in question for a number of reasons. During the preceding days, she had been beaten by her husband in the living room and not just the bedroom. Up until that point the living room had been her sanctuary. Now, nowhere in the house was safe. Dr Smith said that her reaction to the provocation was coloured by the psychological characteristics which would have affected her judgement, volition and control, particularly when provoked by he abuse. Again, Dr Smith described the feeling of helplessness which paralyses and prevents escape and linked it to the perception that the battering partner had the power in the relationship.

The Court of Appeal was persuaded that the sentence of six years was too long and substituted a sentence of three-and-a-half years' imprisonment. It considered that the trial judge went wrong when he emphasised her failure to withdraw as Brooke LJ asked rhetorically, "where could she escape to?" Additionally, the court was influenced by the fact that she did not go out and buy the gun, but that it and the ammunition were close at hand. Finally, the Court bore in mind the fact that the last time the appellant tried to protect herself by the use of a gun that she had not loaded, she had a severe beating.

The testimony has also been offered under the defence of diminished responsibility cases in both England and Scotland. The appellant in the English case *R V Hobson*¹⁰⁹⁴ was convicted of the murder of her abusive and alcoholic partner during an argument in 1992. Counsel for the defence, invited the court to admit, having regard to the provisions of section 23 of the Criminal Appeal Act 1968 as amended,¹⁰⁹⁵ the evidence of two psychiatrists as set out in reports which they had provided since the trial. These reports

¹⁰⁹⁴ [1988] 1 Cr. App. R. 31.

¹⁰⁹⁵ Section 23(2)(d) allows for a retrial when no reasonable explanation for a failure to adduce evidence at the trial has been offered.

suggested that the appellant might have been suffering from battered woman syndrome, a variant of post-traumatic stress disorder. At the time of the killing in 1992, battered woman's syndrome was not included in the standard British classification of mental diseases; it was not introduced until 1994. At the time of her trial, therefore, it would not have been a condition which would have been readily considered by practising British psychiatrists, save the relatively small number who had a particular experience and expertise in relation to that condition. Counsel argued on the basis of these reports that, at the time of the killing, the appellant's history, and all the attendant circumstances, gave rise to the existence of battered women's syndrome which was capable of giving rise to and, in did in this case, give rise to diminished responsibility for the killing pursuant to section 2 of the Homicide Act 1957. Furthermore, if the condition existed at the relevant time it was also material to the appellant's characteristics where they fell to be considered in relation to the defence of provocation under section 3 of the same act. The Court ruled that it would be proper to receive in evidence the current psychiatric reports. It allowed the appeal and ordered a retrial. In his commentary on this case, Professor Smith¹⁰⁹⁶ points out that although the factual evidence as to the appellant's state of mind on the appeal was the same as that available at the trial, now that battered woman's syndrome is classified as a mental disease, it has acquired a relevance to diminished responsibility which it previously lacked.

Similarly, the testimony was adduced in evidence in the Scottish case of *HMA V McDonald*.¹⁰⁹⁷ The defendant in this case was subjected to verbal and physical abuse over the course of her thirteen-year marriage with the deceased. Counsel for the defence sought to introduce evidence of a psychiatrist to the effect that the defendant was suffering from battered woman syndrome. Although the High Court acknowledged the syndrome, it ruled that the evidence was not strong enough to meet the test in *H.M. Advocate V Savage*¹⁰⁹⁸ which, as we saw in four, requires "aberration or weakness of mind; some form of mental unsoundness; a state of mind bordering on, though not amounting to insanity; a mind so affected

¹⁰⁹⁶ 1997, p. 760.

¹⁰⁹⁷ I learned about this case from the senior and junior advocates for Mrs McDonald who very kindly gave of their time to discuss this case with me. See also *The Scotsman*, Wednesday, November 5 1997.

¹⁰⁹⁸ 1923 J.C. 49.

that responsibility is diminished from full responsibility to partial responsibility; some form of mental disease.¹⁰⁹⁹ Instead, the case was decided on the general basis of culpable homicide taking into account the fact that this woman was a battered woman, that there had been a fight that night, and that she had been provoked. Lord Coulsfield was persuaded by the unusual circumstances of the case and the fact that the defendant had already spent seven months in prison and placed her on probation for two years.

An Outline Proposal for the Representation of Battered Women who Plead Provocation in Britain.

As I outlined earlier the three key features of the defence of provocation, which need to be carefully considered in order for battered women to be fairly treated by law are: her actual loss of self control resulting from the provocation, the gravity of the provocation to the reasonable person and the power of self control expected of a reasonable person. Of course, every violent relationship will have its own distinguishing features as well as its own dynamics and not every case involving a battered woman will necessarily involve a slow burn of anger. What I hope to achieve here is to outline in general terms how the existing defence of provocation, when combined with evidence as to the long-term effects of battering, could accommodate and represent accurately the plight of those battered women who do experience this less well understood way of expressing anger. Although I intend to use the general diagnostic category of PTSD and focus on the theory which has been most frequently invoked by law, that of Lenore Walker, I will also show how the supporting evidence, which we reviewed here, could be used to reinterpret the elements of the defence and to incorporate the reality of these women's lives. In this section, therefore, I will draw on suggestions for reform made at the level of the theoretical by Fletcher and feminists when suggesting one way of representing the plight of battered women who kill in practice.

The first issue to be addressed, therefore, is the loss of self control resulting from the provocation under the subjective test. Although not clearly defined in Scotland, an English jury when considering the subjective condition is entitled to take into account all the relevant circumstances; *the nature of the provocative act* and all the *relevant conditions* in which it took place, the *sensitivity* or otherwise of the defendant as well as the *time*, if any, which elapsed between the provocation and the act which caused

¹⁰⁹⁹ p. 51.

death.¹¹⁰⁰ As we saw, the English courts now seem to be prepared to admit under the subjective test expert evidence of slow burn where suddenness is viewed as the eruption of loss of self control rather than an instantaneous reaction to provocation and, as I have argued, although the potential exists in Scots law for a more relaxed approach to the time requirement, the possibility for introducing supporting expert evidence in this context has not yet been ruled on in Scotland.

Although the Court of Appeal in England has decided not to follow the decision of the Privy Council in *Luc*,¹¹⁰¹ where the Council on the objective issue very clearly drew the distinction between characteristics which affect the gravity of the provocation and those which affect the power of self control, it has been recognised by academics as well as the House of Lords in *Morhall*¹¹⁰² that this distinction is right in principle.¹¹⁰³ On this basis, the reasonable person's power of self control must be held constant and unaffected by the accused's particular temperament or personality disorder save for age or sex which, as we saw, serves the function of insisting upon objective standards of behaviour for the protection of human life. Not only does this approach seem correct in principle, but it also seems to be the preferable strategy for British battered women who kill.

Although the law as it stands in England does allow for a battered woman's personality disorder to be taken into consideration as a characteristic which diminished her capacity for self control and, in an appropriate case, this may indeed reflect accurately her case, to adopt it as the only way of ensuring that women's experiences can be incorporated by law, would be to do a disservice to battered women who kill. The reality of these cases is that these women are normal women who live in abnormal circumstances of violence. As such, they deserve to be fully considered by reference to law's category of reasonableness, not simply marginalised as an exceptional category of persons who are less able to resist pressure. Correspondingly, the correct way to approach the issue of gravity of the provocation to the reasonable

¹¹⁰⁰ Smith and Hogan, 1996, p. 364. Emphasis added.

¹¹⁰¹ [1996] 2 ALL ER 1033.

¹¹⁰² [1995] 3 All ER 695.

¹¹⁰³ See for example, Professor Smith who repeated this view in his commentary on *R V Parker* 1997, p. 760 or Yeo, 1997 who writes that the distinction appears to be the necessary corollary of the reasonable person test in provocation. p. 435

person, in the words of the 1957 Act is to allow the jury to consider "everything both said and done" which in their opinion might have an effect on the reasonable man or woman. Thus, all personal characteristics of the defendant which have a bearing on the gravity of the provocation ought to be considered, including the cumulative nature of the provocation. It follows therefore that in cases involving battered women, evidence as to the effects of battering ought to be recognised as a characteristic affecting the gravity of the provocation.

Thus the objective test involves an evaluation of the accused's perception of and reaction to the provocation by reference to the reasonable woman who had been subjected to battering and who has an ordinary capacity to exercise control. On the basis that provocation is a partial excuse to murder, we recognise that although the accused's conduct fell below a standard with which it is reasonable to expect people to comply, and was wrongful and culpable, because the killing was due to a loss of self control which, in the circumstances was humanly understandable, we acknowledge the need to make a concession to human frailty. The standard required by provocation, therefore, is conduct which *could*,¹¹⁰⁴ rather than the stronger standard of would, have caused a reasonable woman with an ordinary capacity for self control who had been subjected to violence to lose self control and react like the accused.

Beginning with the subjective test, perhaps the starting point for any defence counsel is to bring home to the jury the fact that this battered woman lived in a relationship of on-going violence. An explanation of the relational context in which the killing occurred, therefore, is crucial to a proper consideration of the actual loss of self control. Thus, it would seem that the best way of enabling the jury to take account of the relevant conditions under the subjective test in which the killing occurred, would be to call the defendant as a witness to give her own account of living with an abusive partner. If defence counsel were of the opinion that calling the defendant herself would not be a good strategy, or that the crucial issues could not be addressed in this way, then calling an expert would be necessary to speak to the subjective issue using the general diagnostic category of PTSD.¹¹⁰⁵ By allowing the defendant to

¹¹⁰⁴ Emphasis added.

¹¹⁰⁵ See later the discussion as to the relevant evidence under the objective heading which the expert would have to apply to the defendant.

explain in her own words how she lost her self control in response to the provocation, counsel¹¹⁰⁶ would be able to elicit the relevant information from the defendant in court; making the jury aware of the extent and cyclical nature of the violence as well as the injuries which she sustained at the deceased's hands in the past. Furthermore, highlighting the intense fear and anxiety which living with this violence caused, the extent to which she modified her behaviour to cope with this violence as well as the avoidance tactics used (including anger repression) would be a helpful indicator for a jury unaccustomed to coping with domestic violence. Following on from such a line of inquiry, the defendant's sensitivity to the nature of the provocative act could usefully be highlighted. Here, it would be very important to draw attention to her familiarity with his violence as well as the effect which the deceased's threats of violence, even if they were never exacted, had on her.

Although the emotion most commonly associated with the testimony is fear, which, by this stage, should be brought home to the jury, the crucially important task under the subjective test is to convince the jury that the existence of a time lapse between the provocation and the act causing death can be consistent with a loss of self control. Bearing in mind the evidence from the several studies which indicate that battered women can indeed experience anger as a slow burning process, counsel should be able to lead evidence from the woman herself which would convince a jury she suffered a slow burn of anger and that she lost her self control on this particular occasion.¹¹⁰⁷ Although it may not be articulated, it could be the case that juries are sceptical as to whether or not there was a loss of control for another reason: why she did not leave the relationship. Again, counsel should elicit from the woman why it is she stayed; highlighting, in cases where children are involved, the increased pressure which this brings to maintain the relationship, as well as any changes in her emotional state or in her perception of the relationship leading up to the killing.

Turning to the objective test, on the issue of assessing the gravity of the provocation to the

¹¹⁰⁶ This approach of course would depend on having a counsel who was content to prepare a defence case with the assistance of expert evidence. Assuming that this is the case, then it seems logical that counsel would prepare the case with this knowledge in mind and would therefore be in a position to elicit the appropriate information from the woman herself.

¹¹⁰⁷ Again, if this were not possible, then expert evidence would have to be led.

reasonable woman who had been subjected to violence, the crucial point to emphasise is the relational context in which the violence occurred as part of the characteristics and circumstances of the defendant. Introducing an expert could help to explain the well-documented fact that battered women in general become attuned to their partner's pattern of physical, emotional, sexual and psychological violence. In the same vein, the expert could explain the fact that these women learn to read their partner's "cues"¹¹⁰⁸ to violence and "rate"¹¹⁰⁹ their ability to survive, which could help the jury to understand the provocation from the perspective of the reasonable woman subjected to violence.

The final feature of the defence which has to be considered is the capacity for self control. Yeo's innovative argument that the relevance of sex in this context serves to acknowledge that the form or manifestation of lost self control may differ according to gender, holds considerable potential. As we saw, here the jury must consider whether the provocation could have caused a reasonable person to lose her power of self control and retaliate in the like nature and extent as the defendant did. Introducing an expert at this stage to articulate the extent of the evidence supporting how battered women can lose self control would help to illustrate how even the reasonable woman with a normal capacity for self control who had been subjected to violence could have lost self control and been driven to killing. Campbell's study, for instance, shows that women in general, but perhaps more so battered women, are likely to "bury" their anger. Thus, instead of reacting immediately to a provoking act, they delay until the anger, which "they have held in check for too long," is finally released in one big explosion of anger. At least one other study¹¹¹⁰ has shown a link between anger and PTSD symptoms in women almost immediately after the criminal assault, as well as the fact that women who were initially angry and who held in their anger, had more severe PTSD symptoms during the month following the assault, which impeded their subsequent psychological adjustment.

As well as emphasising the constant state of fear, in which these women live, Walker also

¹¹⁰⁸ See above Barnett and LaViolette, 1993, pp. 53-54.

¹¹⁰⁹ Blackman, 1986.

¹¹¹⁰ Riggs, Dancu, Gershuny, Greenberg and Foa, 1992.

documents how battered women experience feelings of anger.¹¹¹¹ Proceeding in the same vein, the expert could point out that during the tension-building and battering phases, the battered woman's feelings are merely secondary to minimising the harm caused. Conceding that in the normal course of events one may expect her to vent some variety of emotion once the ordeal of the battering phase is over, the expert could highlight that the effect of the battering phase is offset by the loving contrition phase.¹¹¹² Instead of expressing emotion, the battered woman suppresses any feelings she might have and takes comfort in the hope that her partner's regret is a true indication of things to come. Of crucial importance would be the need to reiterate that although there may be no obvious display of anger on her part, that is not to say that she is not "bottl[ing] up" or "accumulat[ing]"¹¹¹³ her feelings of anger.

Continuing with Walker's theory, the expert could also provide the jury with explanations as to why it is battered women stay in abusive relationships. While the temporary relief, which is provided by the loving contrition phase, initially provides the woman with the incentive necessary to remain in the battering relationship, its gradual decline coupled with the escalation of violence signifies the extent of the non-contingent nature of the violence and eventually produces the condition of learned helplessness. For some time, therefore, the battered woman lives in this state of numbness, which, for a while, coincides with the suppression of emotion and keeps her in the relationship in a state of passive acceptance. It is only when the cost of remaining in the relationship greatly outweighs the benefits, that the woman can transform passive acceptance into positive action. As I outlined here, there are other reasons explaining why battered women remain, such as brainwashing or fear that escape will not mean safety, or economic dependence or lack of police intervention which, in an appropriate case could be highlighted. Perhaps underlying all of these reasons is the reality that for women living with a partner and children, by virtue of their experiences of living as a women connected to others, leaving will not be as straightforward as

¹¹¹¹ As we noted already in chapter five, Yeo, 1997, argues that law ought to recognise fear as well as anger in these cases. p. 437.

¹¹¹² See also Green, 1989, p. 159 who observes that it seems entirely logical to assume that one would not feel anger until the terror and pain of the battering has subsided.

¹¹¹³ Walker, 1991, p. 26.

packing a bag and going. Instead, it is far more likely to be a gradual process¹¹¹⁴ where connection is exchanged for separation; where hopefulness is transformed to hopelessness and eventually helplessness; where the cost of remaining outweighs the losses incurred by leaving. Of course, the timing of the explosion would depend very much on the facts of the case but in an appropriate case a defence counsel should, on the basis of supporting evidence from psychology, have little difficulty convincing a jury in a case involving a delayed reaction that the reasonable woman subject to battering could have lost her self control.

Proceeding from the basis that law looks for a single standard of self control, the second implication of Yeo's interpretation is that it draws attention to the fact that the method of killing may be influenced by gender specific norms. Here again, an expert could draw attention to Campbell's account of the difference between men's and women's view of aggression. Features, like the fact that men do not see "the real desperation of women's outbursts" but instead view it as "an ineffective attempt at their [men's] own brand of instrumental control"¹¹¹⁵ as well as the reality that men simply laugh at women whose idea of fighting is limited to acts of biting or throwing inanimate objects¹¹¹⁶ could usefully be emphasised. By complete contrast, the expert could go on to point to the reality of the lives of women in battering relationships who bear the scars inflicted by their partner's violence and live in a state of perpetual fear. Explaining how, at the flashpoint when expressive aggression meets instrumental aggression and women eventually lose their self control, the expert could highlight that bitter experience teaches battered women the futility of a confrontational attack and the need to use a weapon or stealth. Without the proper information, the danger is that a jury could view this killing as murder. Until the reality of the futility of women's use of violence in these cases is explained, the jury is not fully equipped to decide properly how the reasonable woman subjected to violence with a normal capacity for self control could be driven to lose self control and kill.

¹¹¹⁴ In fact, as part of their service, Glasgow Women's Aid counsel women as to how best to achieve the leaving process. This includes encouraging women to leave a spare bag of clothes in a safe house.

¹¹¹⁵ 1993, p. 54.

¹¹¹⁶ Ibid.

An Assessment Of The Use Of Battered Woman Syndrome Evidence.

To the extent that the use of battered woman syndrome expert testimony is forcing legal recognition of an alternative way of looking at defences, its introduction must be seen as a step in the struggle for women's fight for equal treatment. However, as I will show here, the way in which the testimony has been used is not without its problems. Arguably, British defendants are in an enviable position; although the potential of testimony to do justice in these cases has been recognised, it is still very much in its embryonic stage of development.¹¹¹⁷ This infancy means that British courts still have the freedom to assess how best to proceed while learning from the mistakes of other jurisdictions.

Perhaps the strongest objection to the use of the testimony is that by allowing the courts to address women's experiences through a medical lens, the danger is that their responses will be seen as irrational, aberrant, pathological. The element of the testimony, which law is most likely to associate with some form of mental abnormality, is the concept of learned helplessness. The problem envisaged by feminists is that instead of focusing on the reasonableness of the woman's action, law emphasises the woman's helplessness. As Stubbs and Tolmie argue, in the Australian context, the net affect of the testimony has not been to contextualise the woman's actions, but only to locate partially the violence within the broader set of circumstances in which it took place. Even at this they go on to argue

those surrounding circumstances that do receive mention are stripped of "objective reality" by the focus placed on the offender's psychology. The suggestion is that these circumstances form a part of the "subjective" impressions of a mind temporarily affected by an abnormal experience of violence.¹¹¹⁸

¹¹¹⁷ One other possible case which could possibly benefit from the testimony is the case of Josephine Smith, which has gone through the legal system twice without success. It has now been taken up by Justice for Women.

¹¹¹⁸ Stubbs and Tolmie, 1994. They go on to point to what they consider to be the best example of the triumph of psychology over circumstances, *Hickey*, which the author's blame on the expert who confined his testimony to enumerating what, in his opinion, were the common characteristics of battered women who, because of their own pre-existing emotional and mental make-up, may positively contribute to the violence in the relationship and remain with their abusive partners because they simply don't know how to leave. When confronted with the danger that Hickey's voluntary association with the deceased on the night in question could have been interpreted as threatening her credibility in relation to her fear of the deceased, and her use of reasonable force, the expert excused her decision to meet the deceased on this night as an irrational choice made because of her own inadequacies and naivety in thinking that she would be safe on this night. As we saw in two, in the words of Gilligan, this decision was made on the basis of her sense of connectedness with her children and her husband expressed as a desire that the children see their father. When used in this form Stubbs and Tolmie argue that battered woman syndrome expert

In a similar vein, Grant has argued that it is not the woman's helplessness that brings her action within law's standards of reasonableness but the systematic infliction of abuse and her perception of the threat to her life and safety.¹¹¹⁹ Pointing to the fact that almost every stage of women's reproductive cycle has been syndromised, from pre-menstrual tension to post-natal depression, she warns against allowing battered woman syndrome to become a defence which syndromises women's social reality.

Equally sceptical of the testimony's potential, in particular the need for testimony relating to learned helplessness, Aileen McColgan argues that English law on self defence could be applied to cases involving battered women. Pointing to the subjective approach to the defence in England, evidenced by the fact that a mistaken belief in the existence of a threat need not be reasonable, she notes that the defendant merely has to create some doubt in the minds of the jurors that she believed herself to be under threat of imminent attack. The fact that a reasonable onlooker might not have appreciated the significance of the deceased's threat or act should have no bearing on their assessment of the woman's actions. The test of whether the woman's response to the perceived attack was reasonable is objective only to the extent that her perception of the necessity for force and the level of force to be used in response to the perceived attack, is not conclusive, but "most potent evidence of the reasonableness of such force."¹¹²⁰ McColgan argues that self defence, as it stands, could readily be applied to battered women were the male paradigm governing when the use of force is reasonable to be rethought in the light of these cases. This could be achieved by emphasising the history of violence and the importance of indicators of violence, from the woman's perspective.¹¹²¹ Similarly, the feminist organisation, Justice For Women object to the use of the testimony and fear that the law is most likely to incorporate the testimony in relation to the defence of diminished responsibility rather than any other. They advocate a defence of self defence but consider that

testimony operates to the detriment of women. Instead of explaining these choices as rational decisions within a framework of an alternative and equally valid set of moral norms, they are instead explained in terms of decisions women make from a determined and dysfunctional state of learned helplessness or dependency. pp. 204-205.

¹¹¹⁹ Isabel Grant, 1991, p. 52.

¹¹²⁰ *Palmer V R* [1971] A.C. 814 at 832.

¹¹²¹ McColgan appears to envisage a role for evidence relating to the importance of the cyclical nature of the violence as it affected the woman herself.

the defence as it stands at present is too loaded with masculine bias.

So great is the fear of syndromising women's experiences that many feminists would prefer to discontinue using the testimony as a defence strategy. Another criticism of the pathologising effect of the testimony has been directed against the very label "syndrome" itself.¹¹²² As Noonan states "[t]he net effect of relying on the "syndrome" is that female deviation from passivity is pathologized, systematized, and penalized, while the social factors that lead to violence against women remain unaddressed."¹¹²³ In her view, battered women are "at least doubly pathologized."¹¹²⁴ They are regarded as deviant for not having left an abusive relationship and also for having resorted to violence rather than becoming self-destructive. In a slightly different vein, drawing on feminist criticisms, Freckelton argues that "the dubiously psychopathological nomenclature of 'syndrome' is not necessary for such evidence to be brought before the courts."¹¹²⁵ He considers that the way in which battered woman syndrome is being used at present in the United States constitutes an example of "the forensic abuse syndrome."¹¹²⁶ Although he recognises that many syndromes have a legitimacy within the therapeutic context, for him, their use in the forensic context constitutes an abuse. Thus, he argues that the function of the testimony in court should be limited to explaining in general why women who stay are not at fault and why jurors should not draw negative inferences from what may appear to be surprising behaviour. This function can be fulfilled without calling the phenomenon a syndrome. Still others have criticised the perceived inherent paradox in the testimony,¹¹²⁷ the fact that learned helplessness stresses the woman's victimization and paralysis while the testimony in general simultaneously asserts that her act of self defence was reasonable.

¹¹²² See also Sheehy, Stubbs and Tolmie, 1992, who list this as one of the difficulties with the use of the testimony.

¹¹²³ 1993, p. 254.

¹¹²⁴ 1993, p. 253.

¹¹²⁵ Freckelton extends his criticism to rape trauma syndrome. 1994.

¹¹²⁶ Freckelton, 1994, p. 29.

¹¹²⁷ See, for example, Faigman, 1986 above or Sheehy, Stubbs and Tolmie, 1992, p. 387.

Focusing on the interphase between law and psychology, Zeedyk and Raitt¹¹²⁸ argue that battered woman syndrome has not rid law of its sex bias. In fact, they contend that the testimony merely compounds and legitimates law's bias by confirming law's suspicion that long-term abuse results in mental disorder. Although they recognise that the purpose of the testimony may have been to provide jurors with a framework from which to view the battered woman's actions as reasonable rather than aberrant, they note that in practice in Britain it has been used to emphasise the personality characteristics and abnormal mental state of the battered woman rather than the context of her actions. As they point out "[i]n practice, it does not matter how theorists intend BWS to be used, or how feminist defence lawyers would wish it to be used. What matters is how law permits it to be used."¹¹²⁹

While these dangers must be acknowledged and guarded against, as I have argued here, the testimony itself need not be conceptualised as a mental disorder. In fact, there is persuasive authority at both the level of theory and practice to suggest that the syndrome could be appropriately classed as a variety of PTSD which highlights the abnormal nature of the stressor, the abuser's violence, rather than any individual pathology. It is true that the long-term effects of battering do affect a battered woman which differentiates her from a non-battered woman but once the battering stops and the woman receives the appropriate treatment, she is then in a position to resume her life as an ordinary woman.

Similarly, although the condition of learned helplessness has been the subject of a considerable degree of controversy, it has application beyond cases involving battered women which relates it more to the taking away of personal control rather than any individual pathology.¹¹³⁰ In one study,¹¹³¹ designed to test the importance of personal control over one's environment, one group of elderly patients were cared for by benevolent care-givers who encouraged them to passively receive care. The carers stressed that their responsibility was "to make this a home you can be proud of and happy in." By contrast, the other group

¹¹²⁸ 1997, pp. 539-545.

¹¹²⁹ 1997, p. 544.

¹¹³⁰ Eastal 1992, defends the concept on the ground that it is gender neutral. p. 357.

¹¹³¹ Ellen Langer and Judith Rodin, 1976, Cited by Myers, 1993.

were encouraged to take control and "to make of your life whatever you want."¹¹³² The result was that over the following three weeks, 93% of the second group showed improved alertness, activity and happiness as compared with those in the first group. The condition of learned helplessness has also been observed in human infants.¹¹³³ For the purposes of this experiment, rotating mobiles were placed above the heads of three groups of infants. A pressure sensitive pillow was placed beneath the heads of the infants in the first group. By moving their heads these infants could open and close circuits that made their mobiles turn, giving them control over this aspect of their environment. The infants in the second group were not given this control so that their mobiles remained stationary. The third group of infants were also not given this control but their mobiles turned randomly. (The purpose of this third category was to ensure that the infants who learned to move their heads against their pillow were doing so because they had control over their environment, not simply because they were watching a turning object). All infants were exposed to the mobiles for ten minutes per day for a period of fourteen weeks. At the end of this period the infants in the first group learned to turn their heads to make the mobiles move. More illustrative of the effects of lack of control, however, was the fact that when the infants in the second and third categories were given control, they failed to learn to operate their mobiles. These infants had learned to be helpless; that they could not expect their behaviour to have any effect on their mobiles.¹¹³⁴

Barnett and LaViolette¹¹³⁵ provide other interpretations of learned helplessness which explains the condition in terms of something which could happen to any woman who learns to be "hopeful" about her relationship until every possibility of salvaging it has been explored. Furthermore, on the basis of the distinction between universal and personal helplessness they point out that because the battered woman spends so long trying to control the violence of her abuser, the result is an excessive draw of energy which diminishes her more generalised problem solving abilities in respect of leaving. However, as we saw even

¹¹³² Cited by Myers, 1993.

¹¹³³ Watson and Ramey, 1969; 1972, cited by Dworetzky, 1988, p. 302.

¹¹³⁴ For another example of learned helplessness as a condition which is situation specific see Hiroto, 1974, cited by Barnett and LaViolette, 1993, p. 103.

¹¹³⁵ 1993, pp. 106-107.

this more effective problem solving in respect of the relationship, which for reasons of safety may necessitate passively accepting violence, at best this strategy only delays the abuse; it does not stop it from happening.

At first glance there does seem to be a contradiction between a conception of learned helplessness which stresses victimisation and that which explains action. However, as I have shown here, Walker's findings suggest that it is only when learned helplessness can be unlearned that suppressed anger erupts allowing passiveness to be exchanged for action. Although Walker explains this change by reference to women who leave, she posits that a key factor could be the absence of loving contrition. According to Walker's theory a defendant who experienced anger in this way and killed could be seen as being at an earlier stage than the woman who leaves and therefore as a woman who lost her self control prematurely. Although such a defendant would not be completely blameless and has committed a wrong, the doctrine of provocation as a concession to human frailty would seem to be broad enough to accommodate her act of killing following a loss of self control. If the concept of learned helplessness is still objectionable as one way of explaining why women stay, as we saw, there is evidence that a different concept, Stockholm syndrome, is being used in practice in the courts in Scotland. Thus, this syndrome either as an alternative to learned helplessness or to support the extent to which these women are locked in an abusive relationship, could also be used to explain why it is women stay.

For the present, it does seem that an expert is needed in court to voice a woman's experiences and indeed this is a very sad indictment on the level of understanding of law and society. However, as we saw in the case of *Winnett V Stephenson*, once a new level of understanding has been attained, the use of an expert may, in time, become redundant so that this evidence could in the future be given without any labels and by a non-medical expert familiar with the effects of long-term battering on women or indeed, eventually, the battered woman herself.

Another danger which has emerged as a result of this strategy is its potential to give birth to a new system of stereotypes. Contrary to the aim of reformers, which was to include these cases within law's categories of reasonableness, in some cases all that has happened is the creation of a separate "other"¹¹³⁶

¹¹³⁶ See Simone De Beauvoir, 1988.

standard of reasonableness for battered women. Thus, the defendant may only be considered to be a battered woman if she never left her husband, never sought assistance and never fought back. As Phyllis Crocker has described, very often women are trapped in "the double bind of the two stereotypes."¹¹³⁷ On the one hand, if the defendant has never attempted to fight back in the past, then she falls outwith the standard of the reasonable man, while on the other hand, if she did try to resist in the past, this rebuts her status as a battered woman. The defendant in *State V Anaya*,¹¹³⁸ for example, failed because she had once stabbed her boyfriend with a knife, which was enough to rebut her status as a passive battered woman.¹¹³⁹ Once this notion of passivity is taken as being the only way of describing the subjectivity of battered women, then it is only a short step towards realising the myth that women's failure to respond to violence is part of a "love game."¹¹⁴⁰ Again in the case of *State V Griffiths*¹¹⁴¹ because the defendant shot her husband after seeing a look in his eyes, which she had seen only once before when he almost choked her to death, she fell outside the battered woman stereotype because she did not go through the battering cycle twice. Although both standards allow a battered woman's circumstances, perspectives and experiences to be individually considered, neither allows for the substantive elements of her claim to be considered properly because both rely on stereotypes. Crocker argues that this result defeats the very purpose of feminist theory, which was to allow for women's individual experiences to be recognised by law.

However, Crocker goes on to point out that this battered woman syndrome stereotype is as much due to flaws in feminist theory as law's sex bias. She argues that the tactic of the individualised application

¹¹³⁷ Crocker, 1985, p. 145.

¹¹³⁸ 456 A.2d 1255 (Me. 1983).

¹¹³⁹ The fact that the defendant financially supported her boyfriend was also taken to rebut the evidence because it indicated a lack of passivity. See also *State V Kelly* 33 Wash. App. 541, 655 P 2d 1202 (1982) where the notion of passivity was deemed to be rebutted because the defendant had threatened her neighbour and pounded on the house and her husband's car when he locked her out of the house or *Mullis V State* 248 Ga. 338, 282 S.E. 2d 334 (1981) where the testimony was excluded because of the defendant's ability to fight back.

¹¹⁴⁰ See, for example, the *State V Anaya* 438 A. 2d at 894. Similarly, in *People V Powell* 83 A.D. 2d at 721, 442 N.Y.S 2d at 647 it was argued that the defendant enjoyed the physical abuse.

¹¹⁴¹ 101 Idaho 163, 610 P. 2d 522 (1980).

of a sex-neutral standard, in itself, has a number of inconsistencies.¹¹⁴² Among these is the contradiction between, on the one hand, the claim to be concerned with the individual, while, on the other, purporting to establish a new way of looking at battered women in general. Similarly, the strategy of sex-neutrality is flawed. Here again, Crocker points out that the strategy misses the essential point that these cases are not sex-neutral but are "sex-specific, sex-linked, and sex-charged."¹¹⁴³ Instead she advocates that a woman's sex, as well as the fact that she is part of a culturally defined group, are essential prerequisites for a meaningful campaign for reform. She suggests that a better approach might be to use "an objective explicitly group-based view of the reasonableness of the individual defendant and of battered women generally."¹¹⁴⁴

The defence of provocation as it stands could readily be interpreted to accommodate these criticisms. On Crocker's point that reform requires the individual woman's action to be considered by reference to her culturally defined group, as we saw, the test for provocation involves an individual-based assessment of the factual loss of self control as well as a group-based assessment in the reasonableness test which, in cases involving battered women, is defined by reference to the group, in sex-specific terms: the reasonable woman with a normal capacity for control who had been subjected to battering.

Although the danger of creating another system of stereotypes could still be said to exist in provocation, by comparison with self defence cases, the danger seems further removed because of the different functions which the evidence performs under the reasonableness standard in each defence. Unlike cases of self defence, where the evidence creates the normative standard which determines the outcome, in provocation the evidence informs the standard which is merely evaluative and thus never solely determines the outcome. Thus, in provocation cases involving battered women, as with any other provocation case, the jury cannot simply apply a given standard. Instead, it must measure the evidence as to the reasonable woman who had been subjected to violence and who has a normal capacity for self

¹¹⁴² One of which we have encountered earlier, which is the juxtaposition of a traditional female response with a battered woman's untraditional response.

¹¹⁴³ Crocker, 1985, p. 151.

¹¹⁴⁴ Crocker, 1985, p. 152.

control whom we would not expect to kill, against the actions of this particular battered woman who looks to law to excuse her human frailty.

Furthermore, when assessing the gravity of the provocation to the reasonable woman subjected to violence, were the doctrine of characteristics to be given full effect on the basis of Fletcher's theory, every case involving a battered woman would have to be considered on its own merits allowing for individual differences to be carefully considered. This approach would require that the testimony in cases involving battered women be re-interpreted according to the specific set of factual circumstances before the court. Thus, in cases of provocation, far from being conceptualised as a "package"¹¹⁴⁵ creating a separate standard of reasonableness, the testimony would have to be reassessed every time a case involving a battered woman comes to court. Similarly, insisting on a universal standard in relation to the power of self control would not operate to the detriment of battered women, provided, as Yeo argues, attention be paid to the different response patterns of battered women. Although perhaps less individualised than the doctrine of characteristics, where these characteristics are defined by reference to the individual, Yeo's suggestion nevertheless urges that law be opened up to take into consideration the different response patterns of battered women as a group. Thus, it would seem that within the doctrine of provocation as it stands there is less chance that the testimony will come to be used as merely creating another stereotype. Within this existing framework, there seems to be ample room for adopting the approach advocated by Crocker involving a group-based as well as an individual-centred approach with a sex-specific application in relation to both the gravity of the provocation to the reasonable women who had been subjected to battering and the response patterns of battered women generally.

The argument of Zeedyk and Raitt,¹¹⁴⁶ that the ideals of theorists or feminist practitioners must be set at naught if law does not permit the testimony to be used appropriately, is truly compelling. However, to stop at this point would mean giving up on law as an instrument of adjudication in individual cases as well as its potential as a vehicle for social change. The mere possibility for law and society to learn to move beyond stereotypical notions of women, towards a recognition of the full diversity of

¹¹⁴⁵ Crocker, 1985, p. 150.

¹¹⁴⁶ 1997, p. 544.

women's subjectivity is too great an opportunity to turn down. Battered woman syndrome has proved successful as a way into law. The next step surely must be how to maximise its potential and work out how to use it creatively.

For British courts faced with the problem of achieving equality for battered women in the context of provocation, battered woman syndrome expert testimony, if properly understood and applied, could be instrumental in achieving equality both at the level of law and society. Notwithstanding psychology's potential to reform and inform there remains another legal obstacle. This comes from the law of evidence itself in the form of the knowledge and experience rule. This rule regulates the admissibility of expert psychological and psychiatric testimony. In part two of this thesis I intend to shift the focus from the problems posed by the substantive law to the problems which the law of evidence presents for battered women who kill.

CHAPTER SEVEN.

Battered Woman Syndrome and The Law Of Evidence.

Introduction.

Much of the debate in Britain about battered women who kill centres on the potential of the substantive defences to incorporate these cases. As we saw in the previous chapter, expert testimony on the battered woman syndrome holds the key to unlocking the door to the substantive law. Important as the debate concerning the substantive law is, the less often discussed problems posed by the law of evidence are equally crucial. However, as we will discover below, this system contains its own obstacles, which resist the very evidence capable of enabling women's experiences to be considered. Thus, although battered woman syndrome evidence can unlock the substantive law, its admission is hindered by rules of evidence. Although a less well explored problem, feminists writing in Britain¹¹⁴⁷ are now beginning to appreciate the importance of coming to terms with related difficulties posed by the law of evidence.

The correlation between the substantive and the evidential is already apparent in recent English developments involving battered women. In the case of *R V Ahluwalia*¹¹⁴⁸ where, although Lord Taylor C.J. held that the substantive law no longer requires that the loss of self control in provocation be sudden and temporary, the requirement nonetheless is replicated at the level of the evidential where it re-surfaces as a subjective test.¹¹⁴⁹ The question of delay, therefore, is no longer decided as a matter of law by the judge but instead is considered by the jury as evidence indicating whether or not the accused did in fact lose self control.¹¹⁵⁰

¹¹⁴⁷ See for example, Katherine O' Donovan, 1993, p. 427.

¹¹⁴⁸ [1992] 4 All ER 889.

¹¹⁴⁹ For a more detailed examination of this phenomenon in the law of provocation see Horder, 1992, chapter 5. pp. 72-110.

¹¹⁵⁰ A similar shift is also to be seen in several aspects of the law on both self defence and provocation in England. Although the law in England on self defence and provocation may have evolved from the stage where the subjective state of the individual can be inferred from the law's objective categories, these categories are now viewed in terms of evidence of the credibility of the accused. Thus, for example, the reasonableness requirement in self defence is evolving from being a legal standard which the accused has to meet to being an evidential test of the accused's credibility.

Those jurisdictions,¹¹⁵¹ which have recognised the lack of fit between the traditional common law paradigms underlying self defence and cases involving battered women who kill, have gone on to explore the possibilities of the law of evidence. However, as we will see here, there is a related problem at the level of the evidential. The result of this problem is a contest over knowledge between, on the one hand, women's groups who are trying to point to an alternative life experience and, on the other, a largely male judiciary with male definitions and erroneous understandings of how battered women who kill behave. Here, I propose to show precisely how expert testimony on the battered woman syndrome could help to bridge the gap in provocation cases enabling law's understanding of these cases to coincide with women's reality of having to live in conditions of violence.

However, first I will begin by introducing the rules of evidence which regulate the admissibility of expert psychiatric and psychological testimony. As we will see, law draws the distinction between the use of expert testimony in a "traditional" form,¹¹⁵² that is, in connection with defences involving abnormalities of mind, most commonly insanity, but views sceptically the introduction of "non-traditional" expert psychological testimony in connection with any other defences. As with the substantive law, therefore, the danger of categorising battered women as being of unsound mind also looms at the level of the law of evidence.

The Knowledge and Experience and Ultimate Issue Rules Of Evidence.

The law in Britain currently presents two main obstacles to the admission of expert testimony on the battered woman syndrome. The knowledge and experience rule of evidence regulates the initial admissibility of expert testimony at all while the ultimate issue rule limits what the expert can testify to once in court. Both of these rules are related to the more general rule which excludes opinion evidence.¹¹⁵³ This rule prevents a witness from drawing inferences from facts. Thus, the witness is only allowed to speak of facts which were personally perceived or of which the witness has first hand experience. This ideal

¹¹⁵¹ See chapter six.

¹¹⁵² See further McCord, 1987, pp. 23-4.

¹¹⁵³ See generally Field and Raitt, 1996, pp. 321-332; G.D. Noakes, 1967, pp. 160-183; Cowen and Carter, 1956, pp. 162-172; Walker and Walker, 1964, chapter 10, p. 429.

model allows the court to hear testimony in its purest form from which the jury is expected to draw its own inferences and reach a verdict accordingly. The knowledge and experience rule of evidence is an exception to the rule against opinion evidence. It allows a competent expert to express an opinion based on proven facts in exceptional circumstances when the jury's knowledge and experience is found to be lacking. Thus, at first glance, the knowledge and experience rule of evidence appears to be an inclusionary rule which might allow for the admission of expert testimony on the battered woman syndrome. However, as we will see, this rule has been applied restrictively in cases involving battered women so that it has tended to operate as an obstacle.

Even when the knowledge and experience rule has been relaxed and the testimony has been admitted, it then has to negotiate the second rule of evidence, the ultimate issue rule. This rule restores the exclusionary tendency of law by preventing the expert from testifying as to the ultimate issue. The reason for this limitation is that this is the very issue which the jury has to determine. This rule is less often discussed than the knowledge and experience rule but is nevertheless potentially problematic in cases involving battered woman syndrome expert testimony.¹¹⁵⁴ Although the precise parameters of the expert's remit remain to be properly determined, there are a number of ways in which the testimony could be used. In its softest voice it could be introduced simply by way of background evidence. In this form, an expert would be limited to outlining the behavioural patterns which are most commonly encountered in women who are subjected to cycles of violence. The medium range possibility would allow the expert to relate this general profile to the particular woman. At maximum capacity, the expert, based upon his or her knowledge of the effects of long terms battering on a woman, would offer an opinion as to whether or not the woman had battered woman's syndrome with the ultimate goal of explaining why battered women are in a constant state of fear for their lives, why they may have been provoked or why they may have acted under diminished responsibility.¹¹⁵⁵ Although this latter possible use of the testimony may appear to be

¹¹⁵⁴ See for example the Australian case of *Singleton* (1994) 72 A Crim R 117 at 124 where the court held that the evidence may be excluded if it merely offers the inference that the defendant who had been battered might well have been provoked or acted under duress as "raising the very non-expert matters the jury has to decide."

¹¹⁵⁵ See, for example, Annie Thar, 1982, p. 354.

the logical result of admitting an expert to give evidence, the ultimate issue rule operates to prevent an expert from expressing an opinion on this issue. In the self defence case of *Kelly*,¹¹⁵⁶ which we already encountered in chapter six, Wilentz C.J. identified the reasonableness of the defendant's belief as being a matter "to be determined by the jury, not the defendant, in light of circumstances existing at the time of the homicide."¹¹⁵⁷

Despite appearing to be the more formidable bar the admission of battered woman syndrome expert testimony, in practice this rule will probably¹¹⁵⁸ prove to be less of an obstacle than the knowledge and experience rule. As is already obvious, central to the operation of both rules is the how the law views the role of the jury.¹¹⁵⁹ For this reason, I intend to undertake a brief historical overview of the importance of the work of that time-honoured institution.

The Jury's Knowledge and Experience.

The knowledge and experience rule of evidence provides that expert testimony can only be admitted on an issue which is outwith the scope of the knowledge and experience of the jury. The importance of the jury is further highlighted by the breadth attributed to its store of knowledge and experience, which generally obviates the need for an expert's opinion.¹¹⁶⁰ This quality, which the jury brings to bear in criminal proceedings, has long been appreciated and has been utilised in a number of different ways. As early as the twelfth century, Henry II recognised this potential, which he harnessed to prosecute crime. The role afforded to the jury at that time was even more expansive than its modern

¹¹⁵⁶ 478 A. 2d 364 (N.J.1984).

¹¹⁵⁷ p. 374. What is interesting about this case is the fact that Wilentz C.J. prevented the expert from expressing an opinion as to the reasonableness of the defendant's belief "not because this was the ultimate issue but because the area of expert knowledge relates, in this regard, to the reasons for defendant's failure to leave her husband".p. 378. The restriction in this case may therefore be more to do with how the judge envisaged the role of the testimony rather than to the ultimate issue rule of evidence.

¹¹⁵⁸ See below for a discussion of the various devices which are used to circumvent the rule as a matter of general practice.

¹¹⁵⁹ For one contemporary analysis of the role of the jury in the U.S. see Zobel, 1995, p. 42.

¹¹⁶⁰ See, for example, Windeyer, 1957, p. 62.

role.¹¹⁶¹ In fact, it performed a variety of functions, which we would now recognise as a combination of prosecutor, witness and adjudicators of facts.¹¹⁶² The presenting jury was the forerunner of our modern jury system and was established at the behest of Henry II by the Assize of Clarendon in 1166. According to the terms of the Assize, twelve lawful men of each hundred were chosen to take the oath and to make their accusations before the royal justices. These men, chosen for their knowledge of happenings in the locality, had a mandate to act as prosecutors, witnesses and sometimes adjudicators of the accused's fate and were used by the Crown to establish its control over the prosecution of crime. Indeed, for some time, the institutions of the presenting jury and the trial jury were so closely related that they were identical in composition. By the thirteenth century the role of the presenting jury was confined to making public accusations leaving the defendant who consented to a verdict by the country to be tried by the trial jury. As with the presenting jury, the trial jury was selected particularly for its knowledge of local happenings. Green writes that

[A]lthough they were not likely to have firsthand knowledge of slayings and thefts, they were well positioned to make inquiries. They soon learned of complaints made to local officials, who were bound to keep track of the raising of the hue and cry.¹¹⁶³

Such was the extent of the medieval jury's knowledge of the facts surrounding the commission of the crime¹¹⁶⁴ that the issue was all but resolved by the time the King's justices in Eyre visited the county. Very often, it merely remained for the justices to hear the evidence as recounted by the trial jury and issue a ruling which accorded with how the felony was perceived locally.

As the Crown began to formalise its system of criminal procedure over the course of the next two centuries the jury's role was gradually restricted. This gradual restriction began with a series of measures

¹¹⁶¹ We will discuss how the rule operates in our times below.

¹¹⁶² See generally Windeyer, 1957, chapter five, *Trial By Jury-The Pleas of the Crown*, pp. 60-74; Holdsworth, 1966, pp. 298-350 and Spooner, 1989.

¹¹⁶³ Green, 1985, p. 17.

¹¹⁶⁴ As Zobel, points out this concept of juror's special knowledge of the facts has been abandoned by the courts in modern times in favour of complete jury impartiality. In the case of Oliver North, for example, the lawyers looked for jurors who did not read newspapers, watch television or discuss the events of the day. 1995, p. 46.

put in place by the Tudors,¹¹⁶⁵ which took from the jury its power to prosecute and to act as witnesses. Thus, the jury was eventually relegated from being an "active presenter"¹¹⁶⁶ to a "passive indicator."¹¹⁶⁷ By 1671 the role of the jury was distinguished from that of witnesses; with the jury limited to hearing the testimony of witnesses, who, in turn, would be limited to testifying from their personal knowledge by the rule against opinion evidence. Vaughan C.J. in the landmark decision of *Bushell's Case*¹¹⁶⁸ drew this distinction on the basis of the jury's unique ability to reach a verdict by drawing inferences from testimony, using its knowledge and experience. As Vaughan C.J. held

[T]he Verdict of a Jury and Evidence of a Witness are very different things, in the truth and falsehood of them; a witness swears to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a Juryman swears to what he can infer and conclude from the Testimony of such Witnesses by the act and force of the Understanding, to be the Fact inquired after, which differs nothing in the Reason, though much in the punishment, from what a Judge, out of various Cases consider'd by him, infers to be the Law in the question before him.¹¹⁶⁹

Recognising that not everybody would reason from facts in the same way, the judge considered that allowing twelve ordinary lay people sworn to give a verdict "according to the best of their own conscience"¹¹⁷⁰ was the safest method of arriving at a just verdict. As he held

[a] man cannot see with another man's eye, nor hear with another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so far from their own understanding, are foresworn, at least *in foro conscientiae*.¹¹⁷¹

¹¹⁶⁵ Most notably the Marian Bail Statute 1554 and Committal Statute 1555. The Committal statute appears to be the instrument used by the Tudors to take from the trial jury the power to "actively present" the facts of the case as they had previously done in their flexible capacity as witnesses or prosecutors and to set in place a formalised system involving the presentation and weighing of evidence. This statute allowed justices of the peace to use the pre-trial period to gather information which would then be used by the Crown. The statute required justices to bind over witnesses to appear at trial and to give evidence against the Accused. Furthermore, the statute required the introduction of a private prosecutor who would be bound over to give evidence in open court.

¹¹⁶⁶ Green, 1985, p. 112.

¹¹⁶⁷ Green, 1985, p. 112.

¹¹⁶⁸ 124 Eng. Rep. 1006.

¹¹⁶⁹ Vaughan, 142, 124 Eng. Rep. 1009.

¹¹⁷⁰ Green, 1985, pp. 243-244.

¹¹⁷¹ Green, 1985, p. 244.

Vaughan C.J. went on to explain what he meant by the jury's knowledge and experience. He held that even when required to deal with cases where no evidence is produced by either side in court, the jury is expected to have "sufficient knowledge"¹¹⁷² to decide the case. They might also have "personal knowledge"¹¹⁷³ of the particular case, which could well conflict with that evidence which emerged in court. Furthermore, the jury "may know the witness to be stigmatized and famous"¹¹⁷⁴ which information the judge would not possess.¹¹⁷⁵ Although the judge considered that the jury possessed "sufficient knowledge," his understanding of the jury's knowledge and experience was largely confined to personal knowledge of happenings in the community. Green¹¹⁷⁶ points out that the judge's understanding was very much influenced by his view of the jury as being a self-informing institution, possessing local knowledge of the case.¹¹⁷⁷ As the system of criminal prosecution developed, this description of the jury's knowledge and experience became less and less accurate.

Much as this quality of the jury was always valued in the criminal courts, it was also recognised that its store of knowledge and experience was not exhaustive.¹¹⁷⁸ Historically, there were two modes of using expert testimony. The first of which involved introducing expert testimony through the jury system itself rather than through a separate source.¹¹⁷⁹ This involved selecting a special panel of jurymen who

¹¹⁷² Ibid p. 243.

¹¹⁷³ Ibid p. 243.

¹¹⁷⁴ Ibid p. 243.

¹¹⁷⁵ Green, 1985, p. 245 argues that, by contrast with other aspects of the jury's knowledge and experience identified by Vaughan C.J., this aspect was grounded in reality at the time.

¹¹⁷⁶ Green, 1985, p. 245.

¹¹⁷⁷ Green, 1985, p. 243 criticises this aspect of Vaughan's judgement as being "unoriginal and routinely made" and argues that the true basis for the decision lies in the judge's confidence in a jury sworn on oath to give a verdict according to its understanding.

¹¹⁷⁸ For an example of the rise of one particular area of expertise, that of the handwriting expert, see Wigmore, Vol. 7, 1978, pp. 252-260.

¹¹⁷⁹ See, for example, Holdsworth, 1926, 211-14.

were especially fitted to judge the particular facts upon which the issue at bar turned.¹¹⁸⁰ In fourteenth-century cases of trade disputes, for example, the mayor, on the information brought by the supervisors of the various guilds, summoned a jury of men in the trade where the alleged offence to trade regulations had occurred, who, in turn, decided whether or not the defendant had offended these trade regulations.¹¹⁸¹ This form of expert testimony was allowed in another type of case where an individual could bring a private prosecution against a tradesman who had sold him putrid meat or bad wine.¹¹⁸² In these cases, the mayor would summon persons of the trade of the man accused who would also know the facts and ask them to return a verdict. There is evidence that this special type of jury existed in England. In 1645¹¹⁸³ the court summoned a jury of merchants to try merchant's affairs because it was conceived they might have better knowledge of the matters in difference which were to be tried, than others could, who were not of that profession.¹¹⁸⁴

The second mode of introducing expert testimony corresponds more with our modern system.¹¹⁸⁵ This testimony was originally introduced during a separate procedure to the case at bar and fulfilled the function of helping the court when its knowledge was lacking.¹¹⁸⁶ As early as the fourteenth century the court, in an appeal of mayhem, allowed for the introduction of surgeons to give their opinion as to whether or not a wound was fresh¹¹⁸⁷ and again in 1494¹¹⁸⁸ the court, when construing a bond containing several

¹¹⁸⁰ Indeed, several writers have suggested that a return to this particular use of expert testimony would eliminate many of the problems encountered today with the use of expert testimony. See, for example, Mason Ladd, 1952, pp. 430-431.

¹¹⁸¹ Cited by Learned Hand, 1901-02, p. 41.

¹¹⁸² *Ibid* p. 41.

¹¹⁸³ *Ibid* p. 42. Lilly's Practical Register, (ii) 154.

¹¹⁸⁴ *Ibid* p. 42.

¹¹⁸⁵ For an account of how psychiatric evidence is most commonly used by courts see Williams, 1980, pp. 276-282.

¹¹⁸⁶ See generally, William E. Pipkin, Jr., 1989.

¹¹⁸⁷ *Ibid* pp. 42-43. Anonymous, Lib. Ass. 28 pl. 5 (28 Ed. III).

¹¹⁸⁸ *Ibid* p. 43. Anonymous, 9 H. vii Pl. 8.

doubtful words, called certain "masters of grammar" to assist it. The court in the sixteenth century case of *Buckley V Rice Thomas*¹¹⁸⁹ similarly lacked the knowledge and experience to interpret the latin word "licet." By this time, the introduction of expert testimony on matters which concerned sciences or faculties other than law were regarded as normal. Saunders J spoke of expert testimony in the following terms:

if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science of faculty which it concerns. Which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.¹¹⁹⁰

Courts, however, have never unreservedly admitted the opinion of an expert. One of the controversial effects of the knowledge and experience rule in modern times is that it bars expert psychological and psychiatric testimony on matters that the court considers to be already within the scope of the knowledge and experience of the jury. The knowledge and experience of the jury is now deemed to encompass mental states falling short of abnormality of mind, issues pertaining to ordinary personality and normal human nature and behaviour. Thus, the jury's knowledge and experience is deemed broad enough to render the jury capable of dealing with these cases without expert testimony.

The key English authority on the issue of the knowledge and experience rule is the provocation case of *R V Turner*.¹¹⁹¹ Here the defendant admitted to killing his girlfriend with a hammer after she informed him that she had not been faithful to him while he was in prison and that the child that she was carrying was not his. The defence sought to call a psychiatrist to give evidence of the defendant's personality and mental state to show that the defendant's account of the incident was likely to be true and that he would have been provoked by what his girlfriend had said. Lawton LJ cited with approval the general rule laid down by Lord Mansfield in *Folkes V Chadd*¹¹⁹² that

[T]he opinion of scientific men upon proven facts may be given by men of science within their own science. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of the judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert

¹¹⁸⁹ (1554) 1 Plow. 118 124.

¹¹⁹⁰ p. 192.

¹¹⁹¹ [1975] Q.B. 834.

¹¹⁹² (1782) 3 Doug. K.B. 157.

is unnecessary.¹¹⁹³

On the evidence, it was clear that the accused did have a deep emotional relationship with his girlfriend. It was held that the effect of a confession of adultery upon a man in this situation, which took the form of an explosive release of blind rage and profound grief after her death, was something which was within the scope of the knowledge and experience of the jury. Lawton L.J. held that

[j]urors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.¹¹⁹⁴

Underlying this dictum is an assumption of shared understandings and consensus; some experiences in life are instinctively understood as a matter of common sense. As MacCrimmon has explained the assumption "there is a set of universally accepted generalizations about "human" behaviour based on common experience."¹¹⁹⁵ From this assumption of "universal cognitive competence"¹¹⁹⁶ about human behaviour flows law's equation of common sense with normality. Although there have been some developments around law's definition of abnormality,¹¹⁹⁷ Lawton L.J.'s setting of abnormality at mental illness defined in precise terms its concept of abnormality, and less specifically its concept of normality being all other aspects of human nature and behaviour. The judge reasoned that

[t]he fact that an expert has impressive qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.¹¹⁹⁸

As we will see later, this assumption that juror's knowledge is sufficient to deal with normal women who have been battered has been challenged by feminists as being erroneous.

The Ultimate Issue.

The ultimate issue rule also concerns opinion evidence but, unlike the knowledge and experience

¹¹⁹³ Cited in *Turner* p. 841.

¹¹⁹⁴ p. 841.

¹¹⁹⁵ MacCrimmon, 1990, p. 394.

¹¹⁹⁶ MacCrimmon, 1991, p. 37.

¹¹⁹⁷ See below.

¹¹⁹⁸ p. 841.

rule, it does not make an exception for expert witnesses. In this instance, expert witnesses are treated in the same way as ordinary lay witnesses and prevented from expressing an opinion as to the ultimate issue. The ultimate issue relates to the accused's guilt or innocence and therefore involves the application of law to facts. Thus, in cases of provocation an expert may make a number of inferences on the basis of proven facts but may not express an opinion as to whether or not the accused was provoked. Similarly, in cases of diminished responsibility or insanity an expert may not offer a view or make an inference that an accused was acting with diminished responsibility or is legally insane. To allow an expert to express opinions on these issues is deemed to be a usurpation of the role of the jury.

The high water mark of the jury's power to apply the law to facts is particularly evident in a specific line of cases which came before the courts during the medieval era. As we have already seen, during the fourteenth century the local jury rather than the visiting judges controlled the outcome of cases. Green confirms this control by describing the pretrial and trial procedure.

[F]ormal presentments were made in hundred and county courts in the years between the judicial visitations. The rumours and suspicions that circulated in the wake of a felony became the governing perceptions of the truth of the matter; the early stages of criminal procedure gave shape to the facts of individual cases....The pretrial and trial procedure left the jury in almost total control of the outcome of cases. The bench might doubt the veracity of a defendant's story or of the jury's verdict, but lacking an independent source of evidence, the bench was not in a position to challenge either one effectively. The jury's power to determine the defendant's fate was virtually absolute.¹¹⁹⁹

This power to determine the defendant's fate sometimes extended beyond determining the ultimate issue to actually finding new law. As we saw earlier in this thesis,¹²⁰⁰ the doctrine of provocation was born out of a moral judgement that certain types of killings did not deserve to be treated as murder. Although this became a legal judgement, the impetus in favour of a sympathetic approach came from the medieval jury. In order to deal justly with these cases, the jury went beyond the strict letter of the law in order to avoid the inevitable verdict of capital punishment. By manipulating the facts, the jury made it appear to the justices that these cases involved killings in self defence or accidents, which, as we saw earlier,¹²⁰¹ were

¹¹⁹⁹ Green, 1985, pp. 17-19.

¹²⁰⁰ See the introduction.

¹²⁰¹ See the introduction.

treated as excusable homicide and pardonable almost automatically. The circumstances which attracted this sympathetic treatment from the jury involved insulting a servant in a master's house, William De Walynford 1320, finding a wife in the act of adultery, Robert Bousserman 1341 and acting in defence of a kinsman, Colles decided in the late 1300s.¹²⁰² When Robert Bousserman found his wife in the act of adultery with another man he killed him with a hatchet. A straightforward interpretation of these facts would have resulted in a conviction for a capital offence. Dissatisfied with this result, the jury manipulated the facts claiming that while Bousserman and his wife were asleep in bed, one Doughty entered the house. Bousserman's wife then left her husband and slipped into bed with Doughty. Bousserman awoke to discover this infidelity but did not attack. Instead it was Doughty who woke and attacked Bousserman with a knife. To ensure that the duty to retreat requirement was fulfilled, the jury then placed the wounded Doughty at the door of the house preventing Bousserman's exit, leaving him with no other option but to kill Doughty. It was perhaps these types of cases which Vaughan C.J. some three hundred years later had in mind when he spoke of the jury possessing "sufficient knowledge" as opposed to the more traditionally accepted local knowledge to decide the outcome of cases. The judge's concept of sufficient knowledge would seem to embrace this sort of a general pragmatic ability to decide the outcome of cases independently of the law.¹²⁰³ Although the categories of provocation were not formalised until the

¹²⁰² Discussed by Horder 1992, chapter one.

¹²⁰³ Although this case is famous for Vaughan C.J.'s insistence on jury independence with the untrammelled right to decide the facts, the judge also recognised that jurors might "resolve both law and fact complicately." Cited by Green, 1985, p. 245. The case was decided against the backdrop of the Conventicles Act which, at that time, criminalised holding services anywhere but in a church of an established religion. Arrested for preaching to an unlawful assembly, Penn and Mead asked the jury to question the law on which the indictment was based. Despite a long history of struggle between the bench and the jury as to the power of the jury to find law, Vaughan C.J. decided the matter on the basis of legal theory rather than in political arguments of the day. Thus, as Green points out, the concept of jury application of law was not fully adjudicated upon by Vaughan C.J. This allowed subsequent pro-jury activists in later cases of seditious libel to put their own gloss on Vaughan's judgment. It appears that the concept of jury application of law had at least three meanings. In its narrowest context, it could simply mean a series of judicial hypotheses as to the appropriate law, based on a jury finding of fact, which would then result in an automatic application of law. Affording more discretion to the jury, other arguments were made which encouraged jury leniency. It was thought that this option would afford the jury the creative space to apply the law in accordance with their own sense of justice. It was this discretion which appears to have been encouraged in the early cases of provocation, decided by the medieval jury, which I discussed here. The most radical form of discretion, which was argued for in later seditious libel cases, was that the jury had the power to determine whether the act with which a person was charged actually constituted a crime.

eighteenth century case of *R V Mawgridge*,¹²⁰⁴ the seeds for the formalisation of the doctrine were sown by the medieval jury on the basis of its pragmatic method of achieving justice.

As we have seen Vaughan C.J. distinguished between the role of the witness and that of the jury in *Bushell's Case* 1670 which meant that witnesses could not express opinions on the facts; this function being reserved for the jury. This practice was also applied to experts who, by this time, had been categorised as witnesses. Traditionally the rule operated most frequently within the law to curtail the influence of medical experts. This old practice was stated in the case of *R V Wright*:¹²⁰⁵

[a] witness of medical skill might be asked whether, in his judgement, such and such appearances were symptoms of insanity...and that by such questions the effect of his testimony in favour of the prisoner might be got at in an unexceptional manner. Several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were asked to decide, viz whether, from the other testimony given in the case, the act as to which the prisoner was charged was, in his opinion, an act of insanity.¹²⁰⁶

This rule can also be seen operating in the 1862 case of *Rich V Pierpont*.¹²⁰⁷ The question before the court in this case was whether or not the defendant, himself a medical man, was negligent in his treatment of a pregnant woman resulting in the loss of her baby. Several other doctors gave their opinion in evidence which was confined to their medical opinions as to the propriety of the defendant's treatment of the patient. Counsel for the defence attempted to ask a Dr. Ramsbotham whether he was of the opinion that there had been any want of due care and skill on the part of the defendant. The defence objected to this line of questioning on the grounds that this was the very issue which the jury had to decide. Concurring, Erle C.J. was prepared to include the opinion of medical experts as to the treatment used but not as to the ultimate issue regarding whether or not there had been a "want of competent care and skill to such an extent as to lead to the bad result."¹²⁰⁸

The more modern cases, however, have adopted a less strict approach and have developed ways

¹²⁰⁴ See again chapter five.

¹²⁰⁵ (1821) Russ. and Ry.

¹²⁰⁶ pp. 457-458.

¹²⁰⁷ 3 F.& F. 34.

¹²⁰⁸ p. 18.

of circumventing the ultimate issue rule. In the case of *Thomas Mason*,¹²⁰⁹ the appellant's girlfriend was murdered. On the evidence it was found that there was no possibility that a third person could have been the assailant. The opinion of an expert was introduced to help the court to decide whether death was caused by suicide or homicide. After examining the scene of the killing and the deceased, the expert testified that, in his opinion, the wound was not self inflicted. The case went to appeal on the point of law that this evidence ought to have been excluded since this was opinion on the ultimate issue. The specific objection was to the form in which counsel questioned the expert. Counsel for the prosecution objected to the question "is it your opinion that the wound was inflicted by a person other than the deceased?"¹²¹⁰ to which the expert answered, "certainly."¹²¹¹ He went on to say that he would not have had this objection had the expert been asked the same question but in a more indirect way, such as asking the expert to comment on a hypothetical example which fitted the facts. Lord Alverstone C.J. conceded that the question was put in a leading form but he felt that in this case the ultimate issue and the opinion of the expert were so closely connected that it would have been artificial to separate them. As he reasoned, the expert was not asked the very issue which the jury had to decide, since the possibility of a third person being the assailant was only excluded from the case by other evidence.¹²¹²

The difference between the old approach and the new approach to the ultimate issue can be clearly seen by contrasting the nineteenth century case of *Wright* with the twentieth century case of *R V Holmes*.¹²¹³ As we saw, in the older case the judges prevented the expert from expressing an opinion as to whether or not the defendant was insane. Lord Chief Justice Goddard in *HOMES* allowed the expert to express an opinion on this issue because of the importance of medical evidence in cases of insanity. He held that to disallow the evidence

would put an insuperable difficulty...in the way of the defence whenever they were trying to

¹²⁰⁹ 1911 Court of Criminal Appeal 67.

¹²¹⁰ p. 68.

¹²¹¹ p. 68.

¹²¹² p. 69.

¹²¹³ (1953) 37 Crim App Rep 61.

establish insanity.¹²¹⁴

Cross seems to support this approach and he writes that in practice the English courts

abandon any pretence of applying any such rule and merely accept opinion whenever it is helpful to the court to do so, irrespective of the status or nature of the issue to which it relates.¹²¹⁵

Similarly, Tristram Hodgkinson endorses the type of practice which counsel for the prosecution urged in *Thomas Mason's* case. He wrote that

[T]he modern practice, therefore, is to permit experts to speculate upon hypothetical facts as to whether or not the defendant's alleged behaviour at the time of the offence in itself indicates the mental abnormality which the defence is asserting.¹²¹⁶

Other ways of circumventing the rule were uncovered in the case of *DPP V AB And C Chewing Gum Ltd.*¹²¹⁷ The question before the court was whether psychiatric evidence about the effect which battle cards sold with packets of bubble gum had on children ought to have been admitted by the trial judge to determine whether these cards were likely to deprave and corrupt contrary to section 2 (1) of the Obscene Publications Act 1959 and section 1 (1) of the Obscene Publications Act 1964. Lord Parker C.J. began his judgement by stating the rule. He explained that the

longstanding rule of common law [provides that] evidence is inadmissible if it is on the very issue which the court has to determine.¹²¹⁸

The judge went on to suggest that although the evidence may not be admissible as to this ultimate issue, it would be "perfectly proper"¹²¹⁹ to call a psychiatrist to testify from his experience as to the likely effect of these cards on the minds of children. While this less specific use of the testimony does not go as far as the ultimate issue it still allows the expert to make certain inferences which can then be used to leave the jury with the impression that they would be likely to corrupt and deprave. The judge went on to suggest another more explicit way of undermining the rule. He held that counsel could ask the expert's opinion as

¹²¹⁴ p.64.

¹²¹⁵ 1990, p. 500.

¹²¹⁶ Hodgkinson, 1990, p. 235.

¹²¹⁷ [1968] 1 Q.B. 159.

¹²¹⁸ pp. 163-164.

¹²¹⁹ p. 164

to the ultimate issue if it were phrased in the negative. Although the judge did not abolish the rule he considered that

[I] cannot help feeling that with the advance of science more and more inroads have been made into the old common law principles. Those who practice in the criminal courts see every day cases of experts being called on the question of diminished responsibility and although technically the final question "Do you think he was suffering from diminished responsibility?" is strictly inadmissible, it is allowed time and time again without any objection.¹²²⁰

This rule has also been considered in the same context in the Scottish courts. In *Ingram V Macari*.¹²²¹ At the trial the sheriff found in fact that all the magazines in question were "indecent and obscene in normal parlance"¹²²² but allowed evidence to be led from a psychologist and a psychiatrist, who had made special studies of pornography, to assist him to decide whether these magazines were deprave or corrupt the morals of the lieges. Based on this evidence, the sheriff drew the inference that the material was not likely to corrupt or deprave the morals of the lieges and acquitted the accused. On appeal the High Court agreed with the procurator fiscal and held that the sheriff had erred in point of law. The case was remitted to the sheriff to decide for himself the question of whether the material was liable to deprave and corrupt the lieges. This time the sheriff relied on the decision of *Gellatly V Laird*¹²²³ and approved of the magistrate's decision to refuse to hear expert evidence on whether or not books were indecent or obscene, since that was "the very matter remitted to the opinion of the magistrate."¹²²⁴

Although the ultimate issue rule is considered in cases involving battered women who kill, those jurisdictions which have admitted the testimony seem to be more concerned with deciding whether the

¹²²⁰ p. 164.

¹²²¹ 1983 S.L.T. 61.

¹²²² p. 62.

¹²²³ 1953 J.C. 16.

¹²²⁴ p. 27. See also *Meehan V HMA* 1970 J.C. 11 at 14 where the High Court refused to arrange for an accused to be examined under a truth drug because this would allow the jury's function to be usurped by the medical man. In *Hendry V HMA* 1988 S.L.T. 25 it was held that the jury in a murder trial must decide for itself whether or not the causal link between the assault and death is proved beyond reasonable doubt, and that it is improper to invite an expert witness to usurp the function of the jury by expressing his opinion on this question. However, for a different approach to this question see the case of *HMA V McGinlay* S.L.T. 1983 p. 562.

testimony ought to be admitted at all rather than preventing an expert from expressing an opinion as to the ultimate issue.

The Knowledge and Experience Rule of Evidence.

Of these rules, the knowledge and experience rule presents the greater obstacle to expert testimony on the battered woman syndrome. This is the case not only because it controls the initial admissibility of the testimony but also because of the uncompromising way in which the rule is applied by the judiciary. As I have already mentioned, in our times, *Turner* covets the long established ability of the jury to make inferences drawing on its common knowledge and experience. As we saw, Vaughan C.J.¹²²⁵ defined the jury's knowledge and experience¹²²⁶ in terms of local knowledge or, less specifically, sufficient knowledge, which he attributed to the jury independent of the evidence presented. Although this view has been criticised as being too idealistic¹²²⁷ it, at least, represents an attempt to establish which qualities the jury brings to bear on court proceedings. The starting point for many critics of the rule,¹²²⁸ is the lack of empirical or evidential basis for judicial assertions as to what constitutes the jury's knowledge and experience.¹²²⁹ Despite this absence, critical claims, from different quarters, as to the accuracy of this rule, are met with considerable resistance.

The case of Carol Peters is one such case. This was a provocation case,¹²³⁰ involving a battered

¹²²⁵ Speaking in terms of those qualities which an expert brings to court, Wigmore drew a distinction between experience and knowledge. In a definition, which seems to echo Vaughan CJ's notion of sufficient knowledge, Wigmore defined experience as the mental power or capacity to acquire knowledge on the facts at issue. He went on to describe knowledge as the observation or awareness of the facts from which the witness draws his impressions. Wigmore, 1979, {651.

¹²²⁶ See above the discussion of *Bushell's Case*.

¹²²⁷ See, for example, Green, 1985, p. 248.

¹²²⁸ See below for feminist criticisms as well as those made by David Sheldon 1991 and 1992 in a different context.

¹²²⁹ See below for an empirical survey of how society understands cases involving battered women who kill.

¹²³⁰ Glidewell J in the Court of Appeal held that the trial judge had misdirected the jury as to Mrs Peter's conflicting stories. I attended the re-trial of the case in Birmingham Crown Court where the jury, in December 1994, held that Carol Peters had been provoked. Judge Crawford sentenced her to four years for the killing. However, she was immediately freed having already served that time since her arrest in November 1990.

woman, which addressed the issue of the jury's knowledge and experience, although not in relation to battered woman syndrome evidence. Counsel for the defence¹²³¹ eventually introduced three experts. In relation to the first, the pathologist, there was no objection. However, before the judge allowed for the opinion of the other two experts to be admitted, the jury had to be sent out while the judge debated the issue with counsel.¹²³² The judge objected to the admissibility of the psychiatric evidence primarily on the grounds that the expertise was already within the scope of the jury's knowledge and experience.¹²³³ Counsel insisted that the jury would not be familiar with expert knowledge on post traumatic stress disorder and eventually the expert was called. On the basis of several interviews with Mrs Peters, he explained that although Mrs Peters gave different accounts of events of the night in question, she may not have been lying. He testified that during this time the witness was in a trance-like state and not in touch with reality.¹²³⁴ Furthermore, he said that a person experiencing post traumatic stress disorder can undergo certain psychological processes, which could affect the ability to remember. Although it may have appeared to the police that the prisoner was "covering up," the defendant may in fact have divorced herself from reality in order to come to terms with the gravity of the situation. He concluded by saying that despite no obvious abnormality,¹²³⁵ the prisoner was experiencing a form of dissociated state.¹²³⁶

Feminists have explained law's unsupported claim to knowledge in terms of law's bias, which here

¹²³¹ Helena Kennedy. See further, Kennedy, 1992.

¹²³² The judge's main objection to the admission of expert testimony from a pharmacologist as to the effect of drugs, which alter the mind or brain, was that she was not a toxicologist. This objection applies more to questions relating to the expert's suitability rather than the jury's knowledge and experience. On the facts of the case the expert testified as to the altered condition called a paradoxical effect which could ensue as a result of taking the drug temazopan. This condition manifests itself in irrational rage, paranoia or violent behaviour. Defending counsel argued that the deceased could have experienced such a reaction on the night in question.

¹²³³ The judge was also concerned that the testimony not be used to criticise unfairly the police.

¹²³⁴ The expert further illustrated the severity of this state which he said was evidenced by the defendant's extreme reaction to the medication given her while in hospital.

¹²³⁵ Such was the extent of the prisoner's condition that she was admitted to hospital for further brain tests which did not reveal anything out of the ordinary.

¹²³⁶ Indeed the expert went on to say that, in his opinion, the witness may have experienced a fugue state which, he told us, was more extreme than a dissociated state.

takes the form of its claim to universality. The essence of the criticism is that law's use of language such as "common experience," "ordinary folk," "human behaviour", "common sense" gives the impression that legal knowledge is not artificially limited. Quite the contrary, the language enables judges to suggest that they know what ordinary folk think. From this evocation, comes a legal judgement of normalcy and law's claim to universality, evidenced by Lord Simon of Glaisdale's opinion in the provocation case of *Camplin*¹²³⁷ that the reasonable man is part of the common sense experience of us all. However, as we will see below, those jurisdictions, which have actually questioned juror knowledge, have found that jurors may not actually know about battered women who have been subject to "the stresses and strains of living in a battering relationship."¹²³⁸ In fact, when their knowledge was put to the test, it was discovered that it was positively inaccurate. As O'Donovan writes the challenge for feminists is not only to point out exclusivity but to then go on to create an understanding of what is yet regarded as the experiences of others; "the problem is epistemological: how to alter ways of seeing, understanding, and defining the normalcy of the reasonable man."¹²³⁹

Another critic of the equation of the jury's knowledge and experience with normality is David Sheldon.¹²⁴⁰ He focuses attention on two areas which, he considers, may not be within the knowledge and experience of the jury. One relates to the psychology of making false confessions which, we will see later, has resulted in a judicial reconsideration of the jury's knowledge and experience. The other involves evidence relating to eye witness testimony. Sheldon points out that although the processes involved in identification involving perception, memory and recognition are every day processes, this does not mean that people understand these processes or, more importantly, understand how they could be wrong.¹²⁴¹ He charts a move in certain identification cases in America¹²⁴² where the *Turner* definition of what is normal

¹²³⁷ [1978] 2 All ER 168.

¹²³⁸ See *Turner* above.

¹²³⁹ O' Donovan, 1993, p. 429.

¹²⁴⁰ 1992. See further Sheldon and MacLeod 1991, pp. 811-820 and Sheldon, 1993, p. 4.

¹²⁴¹ Sheldon, 1992, pp. 302-303.

¹²⁴² Sheldon, 1992, p. 303.

has been rejected as being inadequate so that now an expert is allowed to give an opinion as to how a witness may have made a mistaken identification. However, he also argues that these developments have been at best piecemeal and have not tackled the more general problem of assuming what constitutes the jury's knowledge and experience.¹²⁴³ Sheldon has divided Lawton L.J.'s dicta in *Turner* into three categories: normal/abnormal, personality, which, we will see, comes from an earlier case, and ordinary experience. Before going on to look at how cases involving battered women have been dealt with at the level of the evidential, I intend to begin by looking at how *Turner* is applied as a matter of general practice. As we will see here, recent developments suggest that law's setting of the abnormal is not one which is fixed in stone. In fact, law's category of the abnormal has expanded considerably and is becoming increasingly more fragmented and graded according to degrees of abnormality. Thus, while appearing to liberalise law, the danger for battered women who kill is that the law of evidence will be developed to accommodate their cases as pathology. Instead of acting as the key capable of unlocking law's categories of ordinariness, the law of evidence may merely serve to bolt the door against battered women who claim to have acted while provoked.

The Influence of *Turner* in England.

Normality and Abnormality.

The first aspect of the *Turner* test relates to the distinction between the normal and the abnormal. Law is unequivocal in its approach to cases involving insanity or diminished responsibility. These cases are said to involve abnormalities of mind and, therefore, are outwith the scope of the jury's knowledge and experience. Thus, Lord Keith of Kinkel in the diminished responsibility case of *Walton V The Queen*¹²⁴⁴ regarded the expert testimony to be essential in these cases. He held that

[T]he jury is entitled and indeed bound to consider...the nature of the killing, the conduct of the defendant before, at the time of and after it and any history of mental abnormality...what the jury are essentially seeking to ascertain is whether at the time of the killing the defendant was suffering from a state of mind bordering on but not amounting to insanity. That task is to be

¹²⁴³ Sheldon 1992, suggests that one way of resolving the problem might be to consult the jury as to the extent of their knowledge and experience. p. 303.

¹²⁴⁴ [1978] A.C. 788.

approached in a broad common-sense way.¹²⁴⁵

Similarly, cases involving automatism are said to involve an abnormal mental state and as such necessitating expert testimony. The Court of Appeal in *Stanley Ivan Smith*¹²⁴⁶ held that evidence relating to the condition of automatism while sleepwalking was admissible since the condition was not within the knowledge and experience of the jury.

By contrast, cases involving conditions which fall short of psychiatric illnesses, have generated a considerable amount of debate. Cases involving personality disorders were deemed initially to be within the scope of the jury's knowledge and experience. Thus, in the case of *R V Weightman*¹²⁴⁷ counsel for the defendant argued that the defendant's confession to suffocating her daughter may not be reliable because she was suffering from a histrionic personality disorder called la belle indifference.¹²⁴⁸ The suggestion was that the defendant's confession was only made because the defendant wanted to draw attention to herself. However, because there was no suggestion of mental illness, this condition was deemed to be within the scope of the knowledge and experience of the jury.

Equally, cases involving low intelligence levels are proving problematic for law. The case of *Masih*¹²⁴⁹ concerned an alleged rape. Attempting to negative the mens rea for rape, the defence sought to adduce evidence which showed that the accused had an intelligence quotient of 72. This quotient placed him on the boundaries of intelligence level dull-normal and sub-normal. The defence argued that the accused did not have the intelligence to appreciate the situation and could not have formed the necessary mens rea for rape. The testimony was excluded in this case because the intelligence quotient was not low enough for the accused to be mentally defective, this being fixed at 69. In a critical commentary written about this case, Beaumont notes that while this setting does have the advantage of clarity, it is does seem

¹²⁴⁵ p. 793.

¹²⁴⁶ July 2 1979 Crim. App. Rep. 1979 V. 69 378.

¹²⁴⁷ [1991] Crim. LR 204.

¹²⁴⁸ This condition, it seems, is typified by emotional superficiality, impulsive behaviour when under stress and a limited capacity to develop and sustain deep and enduring relationships.

¹²⁴⁹ [1986] Crim. L. R. 395.

rather "stringent"¹²⁵⁰ and, in view of the jury's limited ability to actually assess the appellant's capacity, potentially misleading. The author points to a very similar Australian case, *Schultz V R*¹²⁵¹ which, the *Masih* court, considered went too far. The Supreme Court of Western Australia differed from their English counterparts and considered that the evidence was necessary to "take the appellant outside the range of ordinary and alert the jury to the fact that the appellant was in a class apart."¹²⁵²

The English judiciary has more recently recognised the artificiality of rigidly placing this dividing line between normality and abnormality at 69/70 in the second Court of Appeal decision of *R V Raghip*.¹²⁵³ This case involved considering how the provisions of the Police and Criminal Evidence Act 1984,¹²⁵⁴ affected the reliability of confession evidence. The first time the case was before the Court of Appeal, the court held that psychological evidence as to the appellant's intelligence, Raghip's IQ was on the borderline at 74, and suggestibility would not have assisted the jury in determining the reliability of his confession. The Lord Chief Justice had said that

[t]he jury had ample opportunity to gauge the degree of intelligence and susceptibility of Raghip when he gave evidence...if all these [psychiatric] reports had been before either the judge or the jury we cannot believe they should have made any difference to the outcome....The jury was in as good a position, if not better, than the psychologist to judge how amenable this young man was to suggestion.¹²⁵⁵

In the second appeal, Justice Farquharson pointed to the case of *R V Everett*, which, although was decided before the first appeal, had not been brought to the court's attention.¹²⁵⁶ Although Everett's IQ was considerably lower than Raghip's, it being assessed at 61, the Court here cited *Everett* as

¹²⁵⁰ p. 397.

¹²⁵¹ [1981] Western Australian Reports 171.

¹²⁵² Cited at p. 397 [1986] Crim. L. R.

¹²⁵³ Now reported in The Times Law Reports, December 1991. The case was referred back to the Court of Appeal by the Home Secretary who asked the Court to consider a number of grounds of appeal, including the point which concerns us here, the relevance of medical or psychological evidence to the reliability of a confession.

¹²⁵⁴ Specifically sections 76 and 77.

¹²⁵⁵ Cited at p. 563 of the second appeal.

¹²⁵⁶ The case, decided on July 29 1988, had not at that time been reported.

clear authority that the circumstances to be considered by the trial judge upon a submission under section 76 (2)(b) included the mental condition of the defendant at the time of the interview and that that decision was to be taken upon the medical evidence rather than the trial judge's own assessment of the defendant's performance in interview.¹²⁵⁷

Justice Farquharson went on to state what he considered to be the correct approach to the admission of expert psychological testimony in cases concerning the reliability of confessions pursuant to section 76(2)(b). In what Sheldon notes as a possible liberalisation of the *Turner* knowledge and experience test,¹²⁵⁸ the judge held that the correct approach is to ask whether the mental condition of the defendant was such that the jury would be assisted by expert help in assessing it?¹²⁵⁹ The judge considered this approach was more suitable than that "which merely looked to which side of an arbitrary line, whether at 69/70 or elsewhere, the IQ fell."¹²⁶⁰ Pointing to the information which "would have been impossible for the layman to divine...from Raghip's performance in the witness box still less his abnormal suggestibility"¹²⁶¹ he noted

[n]otwithstanding that Raghip's IQ was at 74 just on the borderline, a man chronologically aged 19 years seven months at the date of interview with a level of functioning equivalent to that of a child of nine years nine months and the reading of a child of six years six months could not be said to be normal.¹²⁶²

Thus, albeit limited to the reliability of confession evidence pursuant to the provisions of the Police and Criminal Evidence Act 1984, this case does mark a realisation that a clear line cannot be drawn between the normal and the abnormal.¹²⁶³ Although Raghip's IQ was within the borderline range of normality, the

¹²⁵⁷ p. 563.

¹²⁵⁸ Although Sheldon notes that at first glance this test looks like a liberalisation of *Turner*, he goes on to point out that the test merely begs the question on what basis is the judge to assess whether or not such evidence would be of assistance to the jury. He concludes that effectively the test is still the *Turner* knowledge and experience test. 1992, p. 302.

¹²⁵⁹ p. 563.

¹²⁶⁰ p. 563.

¹²⁶¹ p. 563.

¹²⁶² p. 563.

¹²⁶³ See also Beaumont, 1986, who suggested that the Court's test for normality as applied in *Masih* may in fact be too strict and that the approach of the Australian court in *Schultz* could benefit the jury by allowing them to judge the appellant's capacity on the basis of psychological evidence rather than on the basis of his testimony in court.

judge recognised that his underdeveloped reading capacity and low mental age could not be regarded as normal. In fact, he considered that without information about these characteristics, it would have been impossible for the jury, without expert assistance, to identify and appreciate their significance solely on the basis of how Raghupathi testified in court.

Another confession case which challenged law's dividing line between normality and abnormality was the case of *Judith Ward*.¹²⁶⁴ One of the questions before the Court of Appeal was whether or not fresh evidence as to the mental state of the accused could support her argument that the confession given by her in 1974 was unreliable. The testimony of the three psychiatrists¹²⁶⁵ called to give evidence was unanimous. They all agreed that Ms. Ward was not in a fit state at the time of confessing to the charges so that reliance could not be placed on her testimony. Dr. Gudjonsson was called specifically¹²⁶⁶ to give evidence as to the accused's tendency to confabulate, which, he considered, "fell well outside the normal range"¹²⁶⁷ and her abnormal suggestibility. Dr. James MacKeith, a consultant psychiatrist, testified that the appellant was suffering from an impaired functioning before, and at the time of her arrest, which was both the product of her personality disorder and mental illness. Unlike law, which we have seen, draws a distinction between mental illness and personality disorder, this expert considered that since the vital question in this case was whether or not reliance could be placed on the testimony of the appellant, the precise classification of the disorder was not essential. As he explained, he used the phrase "mental disorder" as a "a generic term embracing both mental illness and personality disorder."¹²⁶⁸ His opinion was that

[M]iss Ward probably suffered from personality disorder-hysterical type, long before her arrest in 1974. Moreover I think it likely that she was suffering from mental illness as well...It is my opinion that Miss Ward was mentally disordered from the time of her arrest, on remand and during the trial. Her impaired functioning was both the product of her personality and mental

¹²⁶⁴ [1993] 2 All ER 577.

¹²⁶⁵ Dr. James MacKeith and Dr. Gudjonsson were called for the defence while Dr. Bowden was called for the Crown.

¹²⁶⁶ Dr. Gudjonsson developed a technique for seeking to measure suggestibility and confabulation.

¹²⁶⁷ p. 637.

¹²⁶⁸ p. 636.

illness.¹²⁶⁹

Dr. Bowden also believed the confession to be unreliable but did not classify the appellant as suffering from mental illness at the time of giving the confession. Instead he considered that she exemplified the basic traits of the hysterical type of personality disorder.¹²⁷⁰ Recognising that the experts differed as to precisely how they classified the appellant's disorder, the Court was not unduly perturbed since "on the essential issue they [both experts] are in agreement."¹²⁷¹ Citing from the Court of Appeal decision of *R V Toohey*¹²⁷² the court affirmed that

when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical evidence to reveal this vital hidden fact to them.¹²⁷³

Thus, the Court allowed in the evidence of the psychiatrists albeit with caveats limiting future developments.

We emphasise that the occasions on which such evidence will properly be admissible will probably be rare. This decision is not to be construed as an open invitation to every defendant who repents of having confessed and seeks to challenge the truth of his confession to seek the aid of a psychiatrist. But where the evidence of the quality and force of that of Doctors MacKeith and Bowden is tendered, it is on our view properly admissible.¹²⁷⁴

Personality Disorder and Personality in Lowery.

This ultimate restraint is in keeping with the general trend since *Turner*. Perhaps not surprisingly the *Ward* court issued the perennial warning against invoking the case of *Lowery V The Queen*.¹²⁷⁵ This was a case which pre-dated *Turner* and has been isolated to its own facts in several subsequent cases, most notably *Turner* itself. At trial, the two co-accuseds were convicted of acting in concert and killing of a young fifteen-year-old girl. One of the co-accuseds, Lowery, appealed on the basis that the evidence of

¹²⁶⁹ p. 636.

¹²⁷⁰ p. 637.

¹²⁷¹ p. 638.

¹²⁷² [1964] 3 All ER 582.

¹²⁷³ Cited at p. 639 of *Ward*.

¹²⁷⁴ p. 641.

¹²⁷⁵ [1974] A.C. 85.

Dr. Cox, a clinical psychologist, ought not to have been admitted. Each co-accused gave several different accounts of the killing but finally, Lowery argued that it was King, the other accused, who committed the killing and that he, Lowery, had made positive efforts to prevent the killing. He denied any incriminating statements, which he had made up to this, claiming that he had only made these statements because he feared King would injure either him or his wife. Furthermore, he introduced evidence as to his reputation to show that he was of good character; effectively saying that he was not the sort of man to have committed the offence.¹²⁷⁶

It was against this background that Dr. Cox, a clinical psychologist, was called on behalf of King.¹²⁷⁷ Lord Morris admitted the evidence holding that it was relevant to and necessary for King's case which involved negating what Lowery had said and put forward.¹²⁷⁸ The expert began by giving evidence

¹²⁷⁶ He argued that he was a happily married man with definite financial prospects, who was looking forward to the birth of his first child; that he never had a conviction and that he was not disposed to such a killing, not being "interested in this sort of behaviour." p. 98.

¹²⁷⁷ Lowery's counsel objected principally on the basis that this evidence ought not to have been admitted. Disagreeing, the Privy Council pointed to the case of *Rex V Miller* (1952) 36 Cr. App. R. 169 where Devlin J. noted the duty of counsel for the defence to adduce any evidence which is strictly relevant to his own case and assists his client whether or not it prejudices anyone else. As applied to the facts of this case Lord Morris realised that "[i]n all these circumstances it was necessary on behalf of King to call all relevant and admissible evidence which would exonerate King and throw responsibility entirely on Lowery. Since there was no obvious motive for this killing, unless it was the mere sensation of killing, then unless both men acted in concert, the act must have been committed by either Lowery or King. The case of *Makin V Attorney-General For New South Wales* [1984] A.C. 57 was highlighted in this case because Lowery put his character in issue. The general principle stated here is that the prosecution may not lead evidence that does no more than show that the accused has a disposition or a propensity or is the sort of person likely to commit the crime charged. However, if the accused puts his character in issue on the sense of adducing evidence that he is of good reputation then it may be legitimate to call rebutting evidence of an equally general nature. Related to this general principle is its logical corollary which was also articulated in *Makin*. Lord Herschell L.C. held that

It is, we think, one thing to say that such evidence is excluded when tendered by the Crown in proof of guilt, but quite another to say that it is excluded when tendered by the accused in disproof of his own guilt. We see no reason of policy or fairness which justifies or requires the exclusion of evidence relevant to prove the innocence of an accused person. p. 65.

Lord Morris admitted the testimony of Professor Cox on this basis. He pointed out that the evidence was not as such evidence as to character but rather evidence as to their respective intelligences and personalities. He concluded by saying that

[t]he evidence was relevant to and necessary for his [King's] case which involved negating what Lowery had said and put forward: in their Lordships' view in agreement with that of the Court of Criminal Appeal the evidence was admissible. p. 103.

¹²⁷⁸ p. 103.

which related to the comparative degrees of intelligence of both accuseds. The Weschler Adult Intelligence Scale Test showed that King was above average while Lowery functioned at the top level of the average band of the population.¹²⁷⁹ The expert went on to give evidence which related to the accused's respective personalities and how these general traits, in certain respects, crossed over to become disorders. In regard to the tests for personality, Dr. Cox used two tests, the Rorschach test and the Thematic Apperception Test. The results of one of the Thematic Apperception tests, when applied to Lowery, showed that he obtained a certain sadistic pleasure from observing the suffering of others. It was found on the facts of the case that the killing was done out of a sadistic desire to see what it was like to "kill a chick."¹²⁸⁰ Lowery's personality was described as a psychopathic personality disorder, which did not suggest insanity or mental disease, but a personality disorder. Although King also showed signs of such a disorder, they were not as severe as those exhibited by Lowery.

The aspect of the case which is still disapproved of by modern cases and which constitutes the second aspect of the *Turner* test is that which allowed testimony relating to the two accuseds' general personalities to be admitted. The testimony was introduced to illustrate which accused would be most likely to dominate and which would be most likely to submit. Dr. Cox's testimony exposed the unlikelihood of Lowery's claim to being the weaker of the two. The tests showed that King was

an immature, emotionally shallow youth who seems likely to be led and dominated by more aggressive and dominant men and who conceivably could act out or could behave aggressively to comply with the wishes or the demands or orders of another person.¹²⁸¹

By contrast the same tests showed that Lowery displayed

little evidence of capacity to relate adequately to others, that he had a strong aggressive drive with weak controls over the expression of aggressive impulses and a basic callousness and impulsiveness.¹²⁸²

Lowery was almost immediately limited to its own set of individual facts by *Turner* and was overtaken by a more conventional approach to the admission of expert testimony in the later case of *R V*

¹²⁷⁹ p. 99.

¹²⁸⁰ p. 85.

¹²⁸¹ p. 100.

¹²⁸² p. 100.

Reynolds.¹²⁸³ The issue before the court was whether the appellant had the necessary intention to render the killing one of murder. Counsel for the defence argued that expert testimony ought to be admitted to show that the 17-year-old defendant had a tendency to fantasise. The case¹²⁸⁴ was decided on the narrow point that there was nothing in the psychiatrist's report to suggest that the appellant was fantasising at the material time which was all the court was interested in for the purposes of this case. However, the court went on to express the opinion that a tendency to fantasise was a personality trait which not abnormal enough to be outwith the scope of the jury's knowledge and experience.¹²⁸⁵

When viewed from the vantage point of more recent cases such as *Raghip* or *Ward*, the use of the testimony in *Lowery* in relation to intelligence or personality disorders was somewhat prophetic, at least in confession cases. These developments seem to signal a new willingness to critically assess precisely what is meant by the jury's knowledge. Although both cases challenged the dividing line between the normal and the abnormal, the reason for the challenge in both cases seems to be different. On the one hand, the *Ward* court seems to have reasoned along the lines that because a mental illness is a hidden fact, it is outwith the scope of the jury's knowledge and experience and therefore needs to be revealed by medical evidence. The court in *Raghip*, on the other hand, seems to have reasoned along different lines. There, the court recognised that although Raghip may have appeared to the ordinary juror as a normal nineteen-year old, he, in fact, had a level of functioning equivalent to that of a child of nine years nine months and the reading capacity of a child of six years six months. Thus, while his mental age and reading capacity could not be said to be normal, the jury would not be able to "divine" this from his performance in the witness box. The difference seems to be that while in *Ward* the court accepted that the jury's knowledge would be lacking in cases involving hidden abnormalities in *Raghip* the court recognised that

¹²⁸³ [1989] Crim. L.R. 220.

¹²⁸⁴ The facts of the case were that the appellant, who worked in a chemists shop in London, decided to steal the takings one evening as the pharmacist was locking up. Thinking that his co-worker saw him and was about to raise the alarm, the appellant inflicted several blows to her head which resulted in death.

¹²⁸⁵ In a commentary on the case, the author notes that the court left two questions unanswered. First, whether a person's ability to separate fantasy from reality is markedly flawed can be regarded as normal for the purposes of assessing intention and second, whether the jury has the necessary knowledge and experience to assess the effect of such a disability on the requisite intention. 1989, p. 222.

despite the outward appearance of normality the jury may not in fact have the relevant knowledge and experience to understand his sub-normal mental age and reading capacity.

As I have already indicated, law's assumption that the effects of long-term battering are within the jury's ordinary knowledge and experience has been widely criticised by feminists. In the next section, I will take a closer look at feminist criticisms of this aspect of the rule in cases involving battered women who kill, and point to the poignancy of these criticisms in the context of provocation. Additionally, I will outline supporting criticisms, which have been made by psychologists. Their argument is directed along lines similar to the reasoning in *Raghip*. Specifically, they challenge the assumption that only hidden disorders are outwith the scope of the jury's knowledge and experience and go on to argue in favour of the need for a non-traditional use of the testimony in relation to matters involving normal human nature and behaviour.

Ordinary Experience.

Although, historically, violent families have been brought to the attention of the mental health and judicial systems, it is only in recent times that courts outside Britain have begun to understand the nature of battering relationships and the effect which battering has on women. Lenore Walker, whom we saw was the pioneer of research into the battered woman syndrome, has written that this advancement could only occur once lawyers and psychologists started communicating with each other.¹²⁸⁶ Up until that point, courts relied on popular myths to explain the behaviour and motivations of battered women. These myths included the belief that battered women are masochistic; that they stay because they like or need the beatings and that they are free to leave their partner if that is what they really want.¹²⁸⁷ As we will see, courts in other jurisdictions are now alive to the possibility that expert knowledge may be needed in order for these cases to be properly understood by the judiciary and the jury. Indeed, these courts have come around to the belief that this information is needed to educate the jury and recognised their duty to

¹²⁸⁶ Walker, Thyfault, Brown, 1982, p. 1.

¹²⁸⁷ Ibid, pp. 1-2.

respond.¹²⁸⁸ Several jurisdictions, therefore, now agree with Dr Walker that

there is an identifiable class of persons who can be characterized as battered women [and that] the mentality and behaviour of such women [is] at variance with the ordinary lay-perception of how someone would be likely to react to a spouse who is a batterer.¹²⁸⁹

Not content with assumptions as to juror knowledge and experience Kromsky and Cutler¹²⁹⁰ set out to test empirically law's assumption that the jury's ordinary experience encompassed the experiences of battered women.¹²⁹¹ The authors distributed a questionnaire among ninety-one potential jurors¹²⁹² as they came through Miami airport, ninety-four officers based in Miami,¹²⁹³ and fifty attorneys from Miami. The questionnaire contained eleven multiple-choice items each designed to assess opinions about a different aspect of battered woman syndrome. The results of this study pointed to the need for expert testimony in cases involving battered women. Across the groups, only 24% were knowledgeable about the fact that arresting the offender is the most effective method for reducing recidivist battering, only 33% were knowledgeable about the percentage of reported batterings, 38% knew about the nature of the abuse cycle while 53% knew why battered women stay in abusive relationships. Research with a similar aim was carried out by the Women's Self Defence Law Project in the United States in the form of post-trial interviews with members of the jury.¹²⁹⁴ This study revealed that those jurors who had varied life

¹²⁸⁸ See for example, Brodsky, 1987, p. 476 who argues that courts are under a duty to recognise these new discoveries.

¹²⁸⁹ This was the testimony which Walker proposed to give at the hearing of the *Ibn-Tamas V U.S.* case 407 A.2d 630 at 634 in the court of first instance. Cited in Cross, 1982, p. 750.

¹²⁹⁰ 1989, p. 173.

¹²⁹¹ See also the study undertaken by Jenkins and Davidson of ten cases involving battered women who had been charged with the homicide of their abusive partners in Louisiana. Throughout, the authors highlight various different culturally held stereotypes which were operating. In cases involving battered women these were that the abuse was not as serious as the woman claimed, her failure of effective response from others was equated with her failure to seek help generally and any emotion other than passivity and fear was construed as an improper emotion and used to discredit her claim of having been abused. 1990.

¹²⁹² These interviewees were registered voters and, as such, eligible for jury service.

¹²⁹³ 64 of these officers came from the Miami Beach Police Department while the remaining 30 officers were drawn from the Safestreets group who specialised in domestic violence.

¹²⁹⁴ This particular case was the case of Leslie Almond. Bochnack, 1981, pp. 160-177.

experiences, including military service,¹²⁹⁵ and, who already knew battered women, were in a better position to empathise with these cases. However, the study also revealed the potential for education once jurors were encouraged to view the case from the perspective of the defendant.¹²⁹⁶

Mackay and Colman have also criticised this third dictum in *TURNER* from a psychological perspective. They point to certain cases which involve counter-intuitive psychological phenomena experienced by ordinary persons in unusual settings.¹²⁹⁷ This phenomenon was explained in one classic experiment¹²⁹⁸ which tested how social pressures can induce conformity. In this experiment small groups of people were asked to judge, in a number of successive cases, which of the three lines of unequal length printed on a card held up in front of them was the same length as the comparison line. The test was unambiguous and, in the absence of conformity pressure, no one gave the wrong answer. The test was again repeated, this time with only one true subject in the group, the remainder being accomplices of the experimenter, who were all primed to call out the wrong answer at the same time. On these occasions, 35% of all the subjects' judgements conformed to those of the experimenter's accomplices. Perhaps more startling are tests which demonstrate obedience pressure. The results of these tests show that roughly two-thirds of these experimental subjects will deliver what they think are painful and sometimes even lethal shocks to an innocent victim if directed to do so by an authority figure and will continue to administer this treatment unless directed to stop by the authority figure.

The extent of these counter-intuitive phenomena surprised even those psychologists carrying out the tests. It is hardly surprising, therefore, that most ordinary people underestimate the extent to which conformity and obedience to pressure can influence behaviour. Perhaps even more worrying, for the purposes of understanding how the jury understands certain forms of behaviour, are the results of tests

¹²⁹⁵ This was important because on the facts of the case these jurors could appreciate the threat which a military man posed to the defendant.

¹²⁹⁶ See, for example, the discussion of James Vecchiarelli's experience. This juror, despite beginning quite sceptically, not having any experience of these cases before the trial, later became an advocate for battered women. Bochnak, 1981, pp. 170-173.

¹²⁹⁷ Mackay and Colman, 1991, p. 800.

¹²⁹⁸ S.E. Asch, 1956.

where there is disagreement as to the causes of actions. In a wide diversity of cases, actors have attributed their own actions to external circumstances while observers attribute the same actions to causes internal to the actor. Experimental evidence shows that the actors correctly identified the cause while observers generally tended to underestimate the importance of external, situational factors and to overestimate the importance of internal, dispositional factors. This misunderstanding is called the fundamental attribution error, which has been empirically tested on a number of occasions by the American psychologist Edward Jones and his colleagues. They have shown, under strict experimental conditions, that people tend to take the words and deeds of others as evidence of their true beliefs even when they know that those others have been assigned roles to perform and have little choice, their words and actions being obviously constrained by external factors beyond their control.

In one typical experiment a number of people were asked to fill out questionnaires indicating their attitudes towards Fidel Castro and the legalisation of cannabis.¹²⁹⁹ Half of the individuals were then instructed to write an essay in favour of Castro and the other half were instructed to write in favour of the legalisation of cannabis. The essays were then swapped so that each individual who had written an essay in favour of Castro was given an essay written in favour of the legalisation of cannabis and visa versa. After a few minutes each reader was asked to estimate the writer's true attitude towards the issue discussed in the essay. The researchers then compared the writers' true attitude to the subject matter, which had been recorded in the original questionnaire, with that which had been attributed to them by the readers. The results indicated that the readers, despite being aware of the constraints imposed on the writers, persistently mistook the writers' views as expressed in the essay for the writers' true view. The conclusion was that

[r]esearch into the fundamental attribution error shows clearly that "ordinary, reasonable men and women" have a systematically biased understanding of human behaviour in a wide range of circumstances in which external, situational factors play a significant part. Allegedly criminal acts often fall into this category....which suggests that in such cases jurors may not always have a full understanding of the state of mind of a defendant purely on the basis of their common knowledge and experience of human behaviour.¹³⁰⁰

¹²⁹⁹ Ross L., 1977, p. 173.

¹³⁰⁰ Mackay and Colman, 1991, p. 808.

Although the authors recognise that there has been a degree of liberalisation in the *Turner* rule, they argue that the rule is still being interpreted too narrowly. Pointing to mental conditions, such as those caused by situational forces, the authors conclude that while these mental conditions may not involve mental disorders in the medical sense, they nevertheless lie beyond the understanding of ordinary people and, in relation to which, expert evidence could significantly contribute to a jury's understanding of the defendant's mental state or behaviour at the material time.¹³⁰¹ As we saw, the main argument in the cases of *Ahluwalia* and *Thornton*¹³⁰² was that the appellants were provoked. Yet, both cases were decided eventually on the basis of diminished responsibility. Similarly, there is a school of thought in Scotland which favours this line of authority. It could be argued that the fundamental attribution error describes how cases involving battered women are perceived in society and treated by law. Instead of considering the possible effects, which living in conditions of violence have on women's mental condition and behaviour, their actions are described in terms of mental abnormality; instead of acknowledging the fact that the cause of these women's behaviour is the violence in which they have to live, their behaviour is described in terms of a mental disorder. While this similarity may merely be coincidental, the danger with a widespread adoption of such an approach is that the reality of women's experiences of living in conditions of domestic violence, and the effect which these "situational" factors have on their mental states or behaviour, will never be fully acknowledged by law or understood by society.

Considering the possibility that a woman could be provoked into killing an abusive partner is still quite a novel idea for British courts. The problems which this poses for battered women who kill, at the level of the evidential, can be seen in Lawton's assertion¹³⁰³ that

¹³⁰¹ Mackay and Colman, 1991, p. 809 and again, 1996, p. 95.

¹³⁰² [1992] 1 All ER 306 and [1992] 4 All ER 889. In fact, as we saw, *Thornton* twice asked the Court of Appeal to consider the defence of provocation.

¹³⁰³ Although not a case involving battered women, the case of *Roberts* [1990] Crim. L.R. 122, represents the high water mark of the *Turner* ruling on provocation. There the consultant psychiatrist, who was not called, stated that immature, prelingually deaf people could, when emotionally disturbed, produce irrational explosions of violence. Despite the fact that this information could be relevant to the question of whether the accused in fact lost self control, it was held that the jury was aware of the accused's characteristics and disabilities and that the medical evidence would not assist them any further. Watkins L.J. held that

[F]ollowing a careful examination of all the medical reports, [and] the evidence of the jury's view

[w]e all know that both men and women who are deeply in love can, and sometimes do, have outbursts of blind rage when discovering unexpected wantonness on the part of their loved ones; the wife taken in adultery is the classical example of the application of the defence of "provocation."¹³⁰⁴

However, as we saw in chapter two, the masculine bias in what Lawton L.J. considered as the "classical example" of the application of the defence is most obvious in this adultery category of provocation: these generalisations as to perceptions and behaviour underlying the substantive law are entirely masculine in essence. Although perhaps less obvious, it follows that the assertion that "we all know" about such behaviour similarly may be tainted with bias given that the "classical example" of knowledge is based on a typically masculine notion of provocation. Including women's experiences under the defence of provocation would involve acknowledging a new idea about a killing which could be excused and, as such, would have to be filtered through already existing rules. As O' Donovan has explained the danger is not only that the "text"¹³⁰⁵ of the law written without reference to women's experiences but the "context"¹³⁰⁶ of their actions may be treated by the rules of evidence as irrelevant.

At the level of the text of provocation, it seems that there are a number of incorrect assumptions operating which would have to be countered in any attempt to represent accurately a battered woman who pleads provocation. These relate to the three elements of the defence already highlighted; the factual loss of self control of the defendant in response to the provocation, the gravity of the provocation to the reasonable person and the power of self control expected of the reasonable person.

The first incorrect assumption is that a delayed reaction to provocation implies that the killing was premeditated. As we saw, although the Court of Appeal in *Ahluwalia*¹³⁰⁷ made inroads into displacing this assumption, it refused to change the law on the grounds that "[t]here are important considerations of

of the obvious about [the appellant] and the judge's directions as to his characteristics, the possibility of the jury finding provocation upon medical evidence, if heard, is so remote as to be safely disregarded...No amount of medical evidence could, in our view, have served to further enlighten them as to that.

¹³⁰⁴ p. 841.

¹³⁰⁵ O'Donovan, 1993, p. 428.

¹³⁰⁶ O'Donovan, 1993, p. 428.

¹³⁰⁷ [1992] 4 All ER 889.

public policy which would be involved should provocation be redefined so as possibly to blur the distinction between sudden loss of self-control and deliberate provocation."¹³⁰⁸ Shades of this scepticism can be seen in the Court of Appeal decision of *R V Thornton (No. 2)*.¹³⁰⁹ Although Lord Taylor C.J. recognised the possible relevance of the appellant's personality disorder and battered woman syndrome as characteristics for the purposes of the objective test, he nonetheless ordered a fresh jury trial on the basis that "the crucial first question was whether in fact the appellant herself was caused suddenly to lose her self control by that conduct."¹³¹⁰ As we now know, there is ample evidence, both in psychological literature as well as empirical observation, which explains how battered women "bury"¹³¹¹ or suppress their feelings of anger. As the abusive partner's provocation continues this anger gradually "accumulates"¹³¹² until it is eventually released in a huge angry explosion. Thus, far from indicating a premeditated killing, there is evidence to suggest that this way of losing control is more common in women generally but battered women in particular. As such, this knowledge would be crucially important for a jury considering the issue of the factual loss of self control. As I argued in chapter six, a defence counsel sensitive to how battered women can lose self control, should be able to lead the witness through her evidence in such a way as to convince a jury that she did actually lose her self control.

The need for the testimony when considering the objective test has been recognised in other jurisdictions on the basis that the "definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical `reasonable man.'"¹³¹³ This need also seems to exist in Britain at least judging from Beldam LJ's direction to the jury on the objective test in *R V Thornton*¹³¹⁴:

¹³⁰⁸ p. 1029-1030.

¹³⁰⁹ 1996 2 All ER 1023.

¹³¹⁰ p. 1031.

¹³¹¹ Campbell, 1993.

¹³¹² Walker, 1991, p. 26.

¹³¹³ Madame Justice Wilson in *Lavallee* at 874.

¹³¹⁴ [1992] 1 ALL ER 306.

[E]ven if Mrs Thornton had lost her self-control, you would still have to ask whether a reasonable woman in her position would have done what she did and, if you think (and this is for you to say) that she went out and found a knife and went back into the room and as a result of something said to her stabbed her husband as he lay defenceless on that settee deep into his stomach, it may be very difficult to come to the conclusion that was, and I use the shorthand, a reasonable reaction....But on the whole it is hardly reasonable, you may think, to stab them fatally when there are other alternatives available, like walking out or going upstairs.¹³¹⁵

On the issue of the gravity of the provocation to the reasonable women who has been subjected to battering, the danger is that a killing in response to "something said" will be viewed sceptically. Of course, the reality is that battered women develop a heightened sensitivity to their partner's pattern of violence which, when taken into consideration, explains why even "something said" could constitute provocation for the reasonable woman who has been battered.

Beldam LJ was equally sceptical as to the "reasonableness" of the reaction because she left the room following the alleged provocation.¹³¹⁶ However, as we saw, there is ample evidence to explain why battered women may not lose self control immediately after the provocation and, in fact, are more likely to hold in their anger until it is too great to contain. The judge also articulated the myth that a battered woman is free to leave the relationship at any time. Although not technically relevant to the jury's determination of the objective test, it has been discovered in other jurisdictions¹³¹⁷ that similar beliefs affect the value judgements implicit in the jury's verdict. As we saw there are several explanations from the field of psychology, as well as observations of women's experiences of living as women, which explain how women become locked into abusive relationships. These ranged from learned helplessness, to Stockholm syndrome to learned hopefulness, to fear, to economic dependence and institutional failures. Without this understanding, we run the risk of allowing juries to rationalise why battered women remain in terms of women's masochistic tendencies or their failure to invoke other possible avenues of self-help.

¹³¹⁵ p. 312.

¹³¹⁶ As we saw in chapter six, a killing in provocation is not a reasonable reaction. Although we do not expect the reasonable person to react to provocation by killing, in successful provocation pleas, we do partially excuse individuals whose reactions went beyond the usual or acceptable limits. Thus, the judge's use of the term reasonableness in this context confuses the objective test in provocation with objective tests which lead to complete acquittals.

¹³¹⁷ See below the non-British cases which have considered *Turner* in the context of battered women who kill.

From the more typical reality that women do not use weapons as often as men, flows the myth that when they do, they are in some way abnormal or are carrying out a premeditated execution on a defenceless man resting on a settee. Here again, as I have argued, the results of Campbell's investigation shows that women in general tend to use violence expressively while men tend to use it instrumentally. To view automatically these killings as premeditated ignores the reality that even when sleeping, this man controls the woman and causes her to live in a state of constant of fear as well as the more tangible reality that battered women know far more about what it is like to be at the receiving, rather than the giving end of violence. Thus, far from being indicative of premeditation, the use of a weapon by a battered woman in these circumstances may actually be the only realistic option available.

If the jury is to perform this task properly and step into the shoes of the reasonable woman who had been subjected to violence then perhaps it is more accurate to acknowledge that they will draw on their experience and/or observation rather than common sense. In any case, unless jurors have some form of experience or have observed in some way how such a woman is likely to behave they are not going to be able to perform the task of stepping into her shoes. As we saw above, the study carried out by the Women's Self Defence Law project in the U.S.¹³¹⁸ shows that this is the best form of knowledge. However, the same study demonstrated that when juries are educated as to the effects of battering, they can, and do, perform this task. Thus, it seems an illusory benefit to defendants that the objective standard is tailored to include their characteristics or situations and response patterns but the jury is refused the means to interpret that standard.¹³¹⁹

Progression on such a scale cannot come about unless and until the judiciary recognises that knowledge is not common. Unlike the law in England which has not yet properly discussed the possibility of outsider knowledge in cases involving battered women, this issue has produced a considerable amount of legal debate in other jurisdictions. Although the law in each of these jurisdictions has been influenced by *Turner*, the courts have recognised that the jury's knowledge and experience may not extend to encompassing cases involving battered women who kill. I now intend to discuss some of the cases already

¹³¹⁸ Bochnack, 1981, pp. 160-177.

¹³¹⁹ Green, 1989, p. 160.

mentioned in chapter six from an evidential perspective.

Turner and Battered Woman Syndrome Expert Testimony in Canada, The United States, Australia and Scotland.

The leading Canadian decision which we have seen already is the self defence case of *Lavallee V R*.¹³²⁰ Although *Turner* was brought to the attention of the court, Madame Justice Wilson decided that a strict adherence to the rule would result in the exclusion of evidence which was needed by the jury to properly understand the case. The judge went on to note the discrepancy between, on the one hand, the general judicial deference to experts in cases involving issues such as engineering or pathology and, on the other, its cynicism in cases involving psychiatric testimony. She held that on these issues

the need for expert testimony can be obfuscated by the belief that judges and juries are thoroughly knowledgeable about human nature and that no more is needed. They are so to speak their own experts on human behaviour.¹³²¹

Disagreeing, the judge considered that very often judges and jurors need to have the reality of life in a battering relationship explained. She recognised that

[T]he average member of the public (or of the jury) can be forgiven for asking: Why would 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 beat her to the point of hospitalisation? We would expect a 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 help to be able to understand it and help is available from trained professionals.¹³²²

And she considered that in the absence of help from trained professionals the danger is that the battered woman will be condemned by mythology about domestic violence.

[E]ither she was not as badly beaten as she claims or she would have left the man long ago. Or if she was battered that severely, she must have stayed out of some masochistic enjoyment of it.¹³²³

In coming to the conclusion to admit the expert testimony, Madame Justice Wilson cited with

¹³²⁰ [1990] S.C.R. 852.

¹³²¹ p. 871.

¹³²² p. 871-872.

¹³²³ p. 873.

approval the U.S. case of *State V Kelly*¹³²⁴ which we have already encountered. There the court held that evidence on the battered woman syndrome is

aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where juror's logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable jurors to disregard their prior conclusions as being common myths rather than common knowledge.¹³²⁵

The New Jersey Supreme Court concluded and Madame Justice Wilson agreed that the battering relationship "is subject to a large group of myths and stereotypes" and accordingly it is "beyond the ken of the average juror and thus is suitable for explanation through expert testimony".¹³²⁶

Similarly, the courts in Australia¹³²⁷ have recognised that these cases involve normal women whose behaviour may not actually be within the ordinary experience of the juror. In *Runjanjic & Kontinnen*¹³²⁸ King C.J. acknowledged the hallowed role of the jury in criminal trials. He agreed in principle with *Turner* when he held that

[t]he law jealously guards the role of the jury, or the court where it is the trier of the facts, as the judge of human nature, of the behaviour of normal people and of situations which are within the experience of ordinary persons or are capable of being understood by them.¹³²⁹

He went on to emphasise that the test for the admission of battered woman syndrome expert testimony does not require that jurors have no experience of the situation of battered women. Jurors in criminal trials are constantly expected to judge the behaviour of others who occupy the criminal underworld which is outside their experience and are perfectly capable of doing so without the assistance of an expert. However, the judge considered that some human situations are "so special"¹³³⁰ as to be outside the experience of jurors. The judge held that expert testimony ought to be admissible in cases involving

¹³²⁴ 478 A. 2d 364 (N.J. 1984).

¹³²⁵ p. 873.

¹³²⁶ p. 873.

¹³²⁷ See generally Freckelton and Selby, 1993, chapter thirteen.

¹³²⁸ [1991] 53 A Crim R 362.

¹³²⁹ p. 368.

¹³³⁰ p. 368.

mental abnormality but the fact that a person cannot be characterised as mentally abnormal does not necessarily act as a bar to the admission of expert testimony. He allowed for the introduction of expert testimony on the battered woman syndrome on the basis that the jury may not necessarily fully understand the effects of long term battering on the mind of a normal woman in abnormal circumstances. He held that

particular descriptions of persons may conceivably form the subject of study and of special knowledge. This may be because they are abnormal in mentality or abnormal in behaviour as a result of circumstances peculiar to their history or situation.¹³³¹

He realised that allowing expert testimony to be admitted as evidence of normal behaviour is "fraught with difficulties"¹³³² but considered that jurors could benefit from

insights which have been gained by special study of the subject, insights which [he] was sure would not be shared or shared fully by ordinary jurors.¹³³³

There is a surprising lack of Scottish authority on the issue of the admissibility of expert testimony generally¹³³⁴ and there has not yet been a case which has used expert testimony on the battered woman syndrome. Walker and Walker¹³³⁵ note that evidence on the battered woman syndrome may be admissible in England and Wales but seem to limit its usefulness to cases involving abnormal mental states. Although Sheriff Macphail writes that *Turner* would probably be applied in Scotland in relation to the issue of mens rea of an accused who is not suffering from any form of mental illness or disability,¹³³⁶ the case of *Lockhart V Stainbridge*¹³³⁷ appears to reveal quite a liberal approach by the Scottish courts to the admissibility of expert psychological testimony. The accused was charged with failing without reasonable excuse to provide a specimen of blood, contrary to section 8(7) of the Road Traffic Act 1972. By way of excuse, expert psychological evidence was led and admitted in evidence to the effect that the

¹³³¹ p. 369.

¹³³² p. 369.

¹³³³ p. 369.

¹³³⁴ See Walker and Walker, 1964, pp. 429-456.

¹³³⁵ 1964, p. 452.

¹³³⁶ Macphail, 1987, para. 16.21, see also Sheldon, 1996, p. 452.

¹³³⁷ 1989 S.C.C.R. 220.

accused had a phobia of needles and blood. This phobia was due to a childhood experience when the accused witnessed the shooting of his mother followed by the shooting of her murderer. In the opinion of the expert psychologist, this amounted to a mental inability to give blood. Sheriff Stewart admitted to having initially "a considerable amount of scepticism about the line of defence being put forward"¹³³⁸ but by the end of the case he was "persuaded by the evidence of Dr. Clark...that [his] scepticism was unjustified."¹³³⁹ Dr. Clark testified as to the severity of this phobia and concluded that

[T]his specific phobia occurs in a setting not of generalised neuroticism or mental instability but there are perfectly good theoretical reasons why, with this background of severe trauma, this should be the case, and I have added to that empirical reasons to show that there is a significant difference in his perceptual habits which might be expected to carry through into his day-to-day behaviour.¹³⁴⁰

In my final question on my schedule I asked about the knowledge and experience rule of evidence, particularly whether or not Scottish courts would be prepared to overcome the obstacle which this rule poses in the English courts to the admissibility of battered woman syndrome expert testimony. Quite surprisingly, my overwhelming impression from the responses was one of unfamiliarity with the rule. Seven advocates definitely thought that no such rule existed in Scotland while the remainder were uncertain. Speaking in general terms, advocates explained that in order to give testimony in court, the expert must be qualified in a certain area of expertise, which is determined by reference to his or her qualifications, including publications in the area, experience, especially current experience, and the expert's general experience of these cases. An expert cannot be admitted in Scotland to supply the facts because this is the job of witnesses. Another vital factor is the relevance of the expertise to the question before the court. Advocates considered that an expert giving testimony as to the long-term effect of battering would have to have examined the client before going to court. In order for an area to be an area of expertise, it does not have to be the received wisdom of a particular discipline as long as the individual giving the testimony has expertise in the area. At a practical level, advocates recognised the importance of "get[ting] to know the good guys" by which they meant experts who were respected by the legal

¹³³⁸ p. 222.

¹³³⁹ p. 222.

¹³⁴⁰ p. 221.

establishment. The expert can then give an opinion, based on his or her expertise, on the established facts, which may then be taken into consideration by the jury. One advocate said that although the expert, in theory, should not express an opinion as to whether or not the syndrome existed on the facts, since this is the ultimate issue which is for the jury to decide, this rule, is often breached in practice.

Advocates also spoke of the danger where a judge may exclude certain evidence on the basis that it is already within the jury's understanding.¹³⁴¹ When I asked how this was determined one advocate said that "the test for expert testimony is obvious. It has a Sherlock Holmes quality. When you hear the answer given by an expert, you just say, of course, that is how it works." He gave the example of how forensic evidence helps explain how a killing happened. Another advocate said that what was acceptable to the legal community was a matter which depended upon the common sense of the advocate leading the testimony. He gave the example of a road accident case in which he was involved. There, an expert could be called to testify as to the lay-out of a particular road but not as to how one ought to cross the road. Speaking of the difficulty determining the scope of knowledge and experience another advocate spoke about cases which he himself found particularly difficult to understand; cases involving a claim of child sex abuse committed by a parent. To his surprise, it is common in these cases for the child to run to the parent who commits the abuse. Another advocate who objected to the notion that there is a common store of knowledge and experience pointed to a civil case where the court had to consider the issue of unreasonable behaviour in a marriage. There it was found that the fact that the husband swore at his wife was unreasonable in the circumstances of the particular marriage because he had never before raised his voice to his wife.

¹³⁴¹ This danger was articulated by one advocate who considered that experts testifying as to the long term effects of battering were not needed in court because battering and battered women is a well known fact. Battering is a phenomenon which happens on a Saturday night after a few drinks when the man's football team has lost, a phenomenon which does not require an expert to "bore" the jury. In a similar vein, another advocate spoke of the difficulty of persuading judges that expert psychological testimony, including that on the battered woman syndrome, was not understood by the jury and recounted his experience in getting expert testimony admitted as to a client's recurring nightmares in a case involving the Piper Alpha disaster. In this case, the presiding judge could not see the need for the testimony having fought in the Second World War and been awarded the Military Cross for bravery. This assumption that the jury knows about matters psychological and the effects of battering extends to members of the legal aid board which, I was told, would probably deny legal aid for the purposes of paying for a psychologist in cases involving battered woman syndrome expert testimony.

Speculating as to a possible future for the testimony in Scotland, advocates generally were dubious. Those who differed considered that the testimony could be useful to explain why the woman did not leave the battering relationship. One advocate thought that "it was rubbish" to suggest that everybody knows what happens in a battering relationship unless one has been subject to this treatment in the past. Even at that, he realised that not every woman would react in the same way. Another suggestion was that experts might have more success in cases involving battered women who kill were they to place the woman on a graded scale attributing her with a degree of suffering. When speaking to the objection that the testimony is already within the scope of the jury's knowledge and experience, the advocate considered that it could be introduced with effect to explain the contradictions inherent in a battering relationship. In one particular domestic violence case in which he was involved, advocates were amazed at the fact that the woman stayed with her husband who regularly beat her. When asked why she stayed, her reply was that "there was nobody like him." Whatever the exact position in Scotland on this issue, it does seem to be the case that the Scottish courts are not as adverse as their contemporaries south of the border to the admission of expert psychological testimony¹³⁴² on an issue which falls short of abnormality of mind.

Because expert psychological testimony has not yet been properly admitted in British courts, its relationship to the ultimate issue rule has not been defined. Although *Humphreys*¹³⁴³ did not involve the admission of battered woman syndrome testimony it did introduce an expert in a provocation case and allowed him to express an opinion as to the ultimate issue. On the one hand, Jones J directed the jury that whether or not the defendant lost self control was a matter which could only be decided by the jury, while on the other, he allowed the expert to express an opinion as to whether or not the accused lost self control

¹³⁴² In relation to identification evidence and confession evidence see also the cases of *Church V HMA* 1995 S.L.T. 604 and *Blagojevic V H.M.A.* 1995 S.C.C.R. 570. In the former case the court held that it would be unreasonable to deprive the accused of comparison evidence which was not available to him at his trial and so allowed the case to go to appeal in order to determine whether the verdict of the jury, which was reached in ignorance of this evidence, was a miscarriage of justice. In the latter, the court declined to apply the English case of *Ward* above and excluded expert psychological evidence as to the accused's suggestibility on the technical ground that since he had not given evidence himself, there was no proper evidential foundation for expert evidence regarding the stress or pressure to which the accused had been subjected in police interviews.

¹³⁴³ [1995] 4 All ER 1008.

at the time of the killing.¹³⁴⁴ In view of this lax approach, as well as the several methods of circumvention recognised by the judiciary, it seems that the ultimate issue is a rule more honoured in the breach than in the observance.

¹³⁴⁴ In cross-examination he [the expert] said this: "I think she lost control completely because of the interplay of a provocative situation, abnormal personality from considerable unhappiness and alcohol" ..p. 6.

CONCLUSION.

Although I limited my inquiry to the possibility of invoking provocation in cases involving battered women who kill, that it not to say that future reform efforts ought to be limited to this one defence. My reason for this focus is because so much of the debate in Britain concerning the representation of battered women who kill has centred on that defence. In a utopian society, far from being limited to provocation, the ideal would be to have all of the defences in the criminal calendar available to a battered woman who kills in the same way as they are open to men who kill.

It is true that the debate around provocation in England has progressed since the days when Sara Thornton's case first appeared before the courts. Earlier last year, Brooke LJ's acknowledgement of the court's duty to "temper justice with mercy" in *R V Howell*¹³⁴⁵ does seem to herald a more enlightened approach to cases involving battered women who kill. While this change in attitude must be welcomed, it merely represents one step on a very long road to true equality.

I argued here that there are three key features which need to be addressed before a battered women can be treated equally: the actual loss of self control of the defendant resulting from the provocation, the gravity of the provocation to the reasonable woman and the power of self control of the reasonable person. As we saw, the main stumbling block at the level of the substantive law is the concept of the reasonableness. However, there are two complementary critical discourses which could help guide any further legal developments. Feminists have written of the bias in this concept for many years while Fletcher addresses this problem from the perspective of criminal law doctrine.

Fletcher's theory of excuses enables us to conceptualise clearly the defence of provocation as being about the individual rather than that "ubiquitous modifier," "the reasonable man." In relation to the gravity of the provocation to the reasonable person, this theory of individualisation confirms the correctness of allowing for evidence as to the long term effects of battering to be considered as a characteristic of the reasonable woman. Thus, building on the foundation of the doctrine of characteristics, the role which the evidence could play here is to show how the reasonable woman subjected to violence becomes attuned to her partner's pattern of violence; learning to read "cues" to violence, which to others

¹³⁴⁵ [1998] 1 Cr. App. R. 229.

may seem innocuous. While an individualised approach to the objective requirement is necessary to achieve a just result in these cases, as Yeo has argued, this can be achieved while retaining a single standard of self control expected of every ordinary member of the community. Thus, the role which expert evidence should play in relation to the capacity for self control is not to show that battered women suffer from a diminished capacity for self control but to show how even a reasonable woman who had been subjected to battering could have gradually lost her resilience and resolve to retain control¹³⁴⁶ and been driven to killing. On the issue of lost self control, in an appropriate case, Dressler's distinction¹³⁴⁷ between a complete and a partial loss of self control could be invoked to benefit battered women who kill. More radically, failing the success of adopting Fletcher's thesis within the current confines of law, his theory could be given fuller effect. The result would be to change dramatically the test for provocation so that the courts would look in the first instance to whether or not there had been a wrongdoing and then concentrate on deciding how to attribute properly blame in each individual case.

However, the underlying problem with either version of Fletcher's emphasis on the individual is that law's notion of the individual is not synonymous with human behaviour in all its complexities. As we saw, law has only recently considered the possibility that battered women can experience anger in the form of a slow burn and it has yet to acknowledge fully that these women's perception and response to provocation may be different to those previously recognised. Thus, before these women can be treated equally by the law of provocation, we need to begin constructing their legal subjectivity. One way of achieving this in cases involving battered women is for feminist lawyers and academics to continue suggesting how best to cultivate the use of expert evidence as to the long-term effects of violence.

In our discussion of the influence of the man of honour theory on provocation, we saw that the doctrine was not always limited to the notion of the separated man of law. In fact, historically it had the potential to embrace conflicting accounts of human subjectivity which were both connected and separated. Thus, without any external input, the doctrine at one point in history did have the scope necessary to conceptualise properly what may otherwise appear as competing tensions. As we saw in the Campbell

¹³⁴⁶ Lord Gifford in *R v Thornton*, [1992] 1 All ER 306, p. 313.

¹³⁴⁷ See chapter six.

study, these notions of separation and connection were expressed by those women she interviewed, in particular the conflict experienced between maintaining control as expected by society and eventually losing control. More easily explained in terms of connection alone is the familiarity with their partner's pattern of violence which battered women develop and which enhances for them the gravity of the provocation. The separation/connection distinction may also be invoked to explain abusive men's need to reassert the control, which they perceive themselves as having lost because of their connection in a partnership. Thus, albeit indirectly, this distinction also helps to explain why women have to use considerable force in response to men's instrumental use of violence. However, for battered women who kill, perhaps the most difficult conflict to explain is why these women stay with abusive men and why they eventually kill. It is on this issue that both concepts of separation and connection could be combined to set in place an outline of the complexity of female subjectivity; where the tension between why it is women stay and why they can be driven to kill the man they love can be given proper consideration. Although the doctrine at one point had this ability to combine different and sometimes conflicting accounts of human subjectivity this potential faded with the passing of the man of honour. However, as I argued here, the marks left by the man of honour could be used to help guide our use of expert testimony on the battered woman syndrome in modern times.

The main objection voiced by those feminists who are equally reluctant to invoke the testimony is that its use syndromises women's experiences. Of particular concern is the concept of learned helplessness. However, as I argued, the condition of learned helplessness is merely one explanation for why it is women stay and, in any event, is a condition which has nothing to do with pathology but loss of control over one's environment. Furthermore, the use of the diagnostic category of post traumatic stress disorder, allows these women to be conceptualised as normal women in abnormal circumstances of violence. Thus, using the testimony as it has been refined over the years within this general diagnostic category would further safeguard against the label of pathology. Equally important, this approach also has the advantage of emphasising the abnormal nature of the stressor, male violence, and is fluid enough to allow for the possibility of developing scientific theories to be considered in the future.

For battered women who kill, the knowledge and experience rule is to the law of evidence what

the reasonable man is to the substantive law. While claims to a universal common knowledge and experience may have been accurate in the days when the jury was a self-informing institution specifically brought together for its knowledge of happenings in the locality, in the nineteen-nineties knowledge is far too diverse and experiences too fragmented to make with any certainty assumptions as to what is shared. As we saw in this thesis, empirical studies conducted elsewhere revealed the reality of the extent to which the jury's knowledge and experience without assistance is inadequate. However, American practitioners also speak of the jury's ability to learn from psychology about the perceptions and reactions of battered women who kill.

Despite the debate in other jurisdictions, which highlights how this rule positively excludes the experiences of battered women who kill, my overwhelming impression was that advocates were unfamiliar with the rule. The other rule of evidence of significance, the ultimate issue rule, was very briefly mentioned in passing by only one advocate who considered that it would not act as a bar in these cases. Despite this lack of familiarity, of those advocates who speculated about the implications of the rule and the future of the testimony in Scotland, they identified why the woman did not leave the relationship, together with doubts as to the jury's understanding in these cases, as issues which could be interpreted more fully with the assistance of the testimony.

It is indeed a sad indictment of the state of our legal and social evolution that we can only access the experiences of battered women through the medium of psychology. However, the reality is that the use of expert evidence has served to ameliorate the plight of battered women who kill. Used creatively in the future, it could help women to plead successfully provocation as well as establishing a foothold in an even greater range of legal defences, perhaps to the point where knowledge and social awareness is brought to such a level as to render its use redundant altogether. As we saw in our discussion of the man of honour, the doctrine, at one stage, had the potential to act as a vehicle for social reform and education by imposing a code of honour prescribing that the physically strong make due allowances for those physically weak. Were law to re-activate this aspect of its social function, with the help of expert knowledge, the defence could once again be instrumental as part of a wide-spread campaign deploring the use of violence against women and redrawing the balance between, on the one hand, the interests of justice and, on the other,

the interests of the individual who comes to law pleading excuse.

There are undoubted risks with this strategy. Indeed some might argue that reform of this nature could never come about, particularly in the Scottish context where the use of the testimony is less common than in England. Thus, for some, relying on the courage of practitioners and the creativity of our judiciary is not enough. They would argue that instead of concentrating efforts at grass root reform, we should be looking to the legislature to provide battered women who kill with a statutory defence of provocation.¹³⁴⁸ In response to those less idealistic, one other possibility would be to lobby the new Scottish Parliament for reform. Although the detail of such a development is a matter for another debate, as a general guide, perhaps the partial defence of self preservation as proposed by Justice for Women could prove useful. As we saw,¹³⁴⁹ their proposal was not gender specific but applicable in cases involving women and children subjected to domestic violence. The potential of the common law doctrine to embrace competing aspects of human subjectivity could be harnessed to argue that law recognise battered women's experience of provocation, specifically the elements which we addressed here. More broadly, the common law potential to discourage violence generally could be reincarnated in a statutory form to benefit battered women who kill. Indeed, our legislators might take this opportunity to put into practice Fletcher's more radical suggestion that the correct focus in cases of excuse is the appropriate attribution of blame in each individual case.

Such an approach may indeed prove to be the way forward. However, for the present, I would prefer to see efforts concentrated on developments already in place in our courts. The strategy which I outlined has the advantage of affording to these different voices the freedom to develop and diversify unhindered by statutory restrictions. In any event, the success of any statutory innovation depends ultimately on how it is interpreted by practitioners and the judiciary and so, in the end, comes down to their understanding at grass roots level. Moreover, any reform from within the legal system itself, as opposed to a reform which is imposed by legislation, means that, over time, a deeper understanding of

¹³⁴⁸ See also McCall Smith, 1996, pp. 243-244 who considers the advantages of codifying Scots criminal law generally.

¹³⁴⁹ See chapter three.

these cases is more likely to evolve creating, in time, a legal culture alive to the possibilities of including women's experiences in other areas of criminal law.

At present, the potential for representing accurately the plight of battered women who kill while suffering a loss of self control exists in the law of provocation. It seems, therefore, that what is needed is a careful and creative use of the testimony in our courts in the short-term so that meaningful and widespread change can be brought about in the long-term. I hope that the suggestion made here may prove to be another step on the road to true equality.

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PART ONE: QUESTIONS ON THE LEGAL DEFENCES FOR BATTERED WOMEN WHO KILL.

Provocation.

1. In 1979 Lord Dunpark acknowledged that "hundreds, indeed thousands of wives in this country suffer this fate" - of being battered by their partners. Cases where battered women kill their partners are receiving a great deal of publicity at the moment, especially concentrating on the question of cumulative provocation.

Do you think that the defence of provocation adequately deals with these kinds of cases?

2. Please read the facts of the following two cases and advise your hypothetical client as to their possible sources of legal defence.

A. The appellant, who began to suffer from a personality disorder while at school, met her husband in May 1987 and realised from the start of their relationship that he was a heavy drinker and was jealous and possessive. In August 1988 they were married. There was a history of domestic violence and assaults by the husband on the appellant and in May 1989 he committed a serious assault on her which led to the charges being laid. In June the appellant told a woman with whom she worked that she was going to kill her husband. Later that month the appellant and the husband had a series of rows over the husband's drinking. After one such row, during which the husband called the appellant a whore, the appellant went to the kitchen to calm down. While in the kitchen she looked for something to provide protection in case she was attacked and picked up a carving knife, sharpened it and went back to where the husband was lying on a sofa and asked him to come to bed. The husband refused and said that he would kill her when she was asleep. She replied that she would kill him before he ever got the chance to kill her. He then suggested sarcastically that she should go ahead. The appellant brought the knife down slowly towards the deceased as he lay on the sofa. She thought he would ward it off and did not mean to kill or harm him,

her object being only to frighten him. The knife entered his stomach, killing him. At the scene of the crime the defendant told a police officer that she wanted to kill her husband and that she had sharpened the knife to kill him because of what he had done to her. In a later statement to the police she said that his death was accidental and that she did not mean to kill him. Your client has been charged with murder.

B. The appellant is an Asian woman who entered into an arranged marriage with her husband and has suffered many years of violence and abuse from him from the outset of the marriage. The husband has on one occasion tried to run her down and on other occasions has threatened to kill her. The husband was also having an affair with another woman and taunted the appellant about it. One evening, after an argument in which the husband threatened to beat her the next morning, the appellant went to the husband's bedroom where he was asleep, threw in some petrol, lit a stick from a candle and threw it into the room. The husband subsequently died from burns received in the ensuing fire. Recently, however, medical evidence showing that the appellant is suffering from endogenous depression has been discovered. Your client has been charged with murder.

3. Do you think that the legal treatment of these types of cases in Scotland is different from that in England?

Gerald Gordon has written that the case of *Thomson V HMA* [1985] SCCR 448 appears to have brought Scots law on cumulative provocation in line with that of the pre-*Ahluwalia* decision in England in so far as it insisted on a strict adherence to the requirement that there be "a sudden and temporary loss of self control". Is this your understanding of the effect of this case or could this decision be limited to its facts if mounting another attempt to gain judicial recognition of the defence of cumulative provocation?

My impression is that insulting words are in practice recognised in the Scottish courts. Do you think that this is true?

4. What is your response to Lord Gifford's argument in *Thornton* that the "cooling off period" could really be "a heating up period" in cumulative provocation cases?

Does "sudden and temporary" have to mean "immediate" so long as the loss of self control is sudden? In other words is the "sudden and temporary" requirement now to be linked to the actual loss of self control and to be reduced to being merely evidence of the loss of self control rather than it being a strict legal requirement? Please see below the relevant portion of the judgement of Lord Taylor C.J. in *Ahluwalia*.

We accept that the subjective element in the defence of provocation would not as a matter of law be negated simply because of the delayed reaction in such cases, provided that there was at the time of the killing a "sudden and temporary loss of self control" caused by the alleged provocation. However, the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negate provocation. [1992] 4 All. E.R. 889 at pg. 896 f - g.

5. There seems to be such a disproportion between cases where husbands, who kill their wives after one provocative act, succeed in having the charge reduced to manslaughter/culpable homicide and wives who, having endured abuse over the years, finally snaps. Could it not be argued that a person who exercises restraint over a long period, in the face of this treatment, is actually behaving more in accordance with the policy rationale of the defence of provocation?

6. The law requires there to be a reasonable relationship between the mode of retaliation and the actual provocation. Given that battered women are not going to react to a blow of the fist with a blow of the fist how do you think that this requirement would operate in cases involving battered women who kill their husbands?

Self Defence.

7. The rationale for the defence of self defence appears to be that the protection of the law is bestowed when the choice is between either lethal self help and dying or sustaining bodily injury. Do you think that the rationale is broad enough to encompass cases where battered women kill their husbands?

8. A. In England, it appears that the duty to retreat requirement is not a rule of law and that now this is simply a factor to be taken into account in deciding whether it was necessary to use force and whether the

force was reasonable. What is your understanding of the operation of this requirement in Scotland?

B. The English CLRC was persuaded to accept the fact that even though excessive force was used, even when there is no mistake of fact, that the accused could have a manslaughter rather than a murder conviction. How do you think the Scottish courts would react if asked to consider this possibility?

C. How does the "imminence" requirement work in practice in Scottish courts?

D. The reasonableness standard appears to be an entirely subjective one broad enough to encompass a mistaken belief in the necessity of using the degree of force actually used. Do you think that the Scottish courts would be prepared to apply this in the case of a battered woman who honestly but mistakenly uses too much force?

9. Do you think that the defence of self defence could be successfully applied to cases where battered woman kill their husbands?

Diminished Responsibility.

10. The defence of diminished responsibility has been successfully used in cases where battered women kill their husbands. Do you think that there is therefore any need to develop the law on the other defences any further?

PART TWO: EXPERT TESTIMONY ON THE BATTERED WOMAN SYNDROME.

11. Are you familiar with the idea of the battered woman syndrome?

12. In your experience, does the use of experts generally serve to help or to hinder the jury's understanding?

Other jurisdictions seem to use expert testimony (including battered woman syndrome) more freely than British courts. Why do you think there is this reluctance?

13. If the law did proceed to develop along the pathway paved by *Ahluwalia* and did come to accept

sudden even if not immediate loss of self control as a test, could this be a place where expert testimony could be useful to substantiate the "slow burn" theory?

14. In *Ahluwalia* the Court of Appeal appeared to use expert testimony in relation to the defence of diminished responsibility. In the future, do you think that expert testimony will more likely than not be admitted in relation to the defence of diminished responsibility rather than any other defence?

15. Although the knowledge and experience rule of evidence was not discussed in the recent *Ahluwalia* decision, do you think that the Scottish courts would be prepared in the future to overcome the obstacle which this rule poses to the admissibility of this particular type of expert testimony?

HAD Scale

(Questionnaire used by psychologists to make a PTSD diagnosis).

Name:

Date:

Doctors are aware that emotions play an important part in most illnesses. If your doctor knows about these feelings he will be able to help you more. This questionnaire is designed to help your doctor to know how you feel. Read each item and place a firm tick in the box opposite the reply which comes closest to how you have been feeling in the past week. Don't take too long over your replies: your immediate reaction to each item will probably be more accurate than a long thought-out response.

Tick only one box in each section

I feel tense or "wound up:"

- Most of the time []
- A lot of the time []
- Time to time, Occasionally []
- Not at all []

I feel as if I am slowed down:

- Nearly all the time []
- Very often []
- Sometimes []
- Not at all []

I still enjoy the things I used to enjoy:

- Definitely as much []
- Not quite so much []
- Only a little []
- Hardly at all []

I get a sort of frightened feeling like "butterflies"
in the stomach:

- Not at all []
- Occasionally []
- Quite often []
- Very often []

I get a sort of frightened feeling as if
something awful is about to happen:

- Very definitely and quite badly []
- Yes, but not too badly []

I have lost interest in my appearance:

- Definitely []
- I don't take as much care as I should ... []

A little, but it doesn't worry me []

Not at all []

I can laugh and see the funny side of things:

As much as I always could []

Not quite so much now []

Definitely not so much now []

Not at all []

Worrying thoughts go through my mind:

A great deal of the time []

A lot of the time []

From time to time but not too often []

Only occasionally []

I feel cheerful:

Not at all []

Not often []

Sometimes []

Most of the time []

I can sit at ease and feel relaxed:

Definitely []

Usually []

Not often []

Not at all []

I may not take quite as much care []

I take just as much care as ever []

I feel restless as if I have to be on the move:

Very much indeed []

Quite a lot []

Not very much []

Not at all []

I look forward with enjoyment to things:

As much as I ever did []

Rather less than I used to []

Definitely less than I used to []

Hardly at all []

I get sudden feelings of panic:

Very often indeed []

Quite often []

Not very often []

Not at all []

I can enjoy a good book or radio or

TV programme:

Often []

Sometimes []

Not often []

Very seldom []

Part 1.

Many people have lived through or witnessed a very stressful and traumatic event at some point in their lives. Below is a list of traumatic events. Put a checkmark in this box next to ALL of the events that have happened to you or that you have witnessed.

- (1) Serious accident, fire, or explosion (for example, an industrial, farm, car, plane, or boating accident).
- (2) Natural disaster (for example, tornado, hurricane, flood, or major earthquake).
- (3) Non-sexual assault by a family member or someone you know (for example, being mugged, physically attacked, shot, stabbed, or held at gunpoint).
- (4) Non-sexual assault by a stranger (for example, being mugged physically attacked, shot, stabbed, or held at gunpoint).
- (5) Sexual assault by a family member or someone you know (for example, rape or attempted rape).
- (6) Sexual assault by a stranger (for example, rape or attempted rape).
- (7) Military combat or a war zone.
- (8) Sexual contact when you were younger than eighteen with someone who was five or more years older than you (for example, contact with genitals, breasts).
- (9) Imprisonment (for example, prison inmate, prisoner of war, hostage).
- (10) Torture.
- (11) Life-threatening illness.
- (12) Other traumatic event.
- (13) If you marked item 12, specify the traumatic event below.

If you marked any of the items above continue. If not stop here.

Part 2.

(14) If you marked more than one traumatic event in part 1, put a checkmark in the box below next to the event that bothers you the most. If you marked only one traumatic event in Part 1, mark the same one below.

Accident

Disaster

Non-sexual assault/someone you know

Non-sexual assault/stranger

Sexual assault/someone you know

Sexual assault/stranger

Combat

Sexual contact under 18 with someone 5 or more years older

Imprisonment

Torture

Life-threatening illness

Other

[B]elow, briefly describe the traumatic event you marked above.

Below are several questions about the traumatic event you just described above.

(15) How long ago did the traumatic event happen?

(Circle One)

1 Less than one month

2 1 to 3 months

3 3 to 6 months

4 6 months to 3 years

5 3 to 5 years

6 More than 5 years

For the following questions, circle Y for yes or N for

During this traumatic event:

(16) Y N Were you physically injured?

(17) Y N Was someone else physically injured?

(18) Y N Did you think that your life was in danger?

(19) Y N Did you think that someone else's life was in danger?

(20) Y N Did you feel helpless?

(21) Y N Did you feel terrified?

Part Three

Below is a list of problems that people have after experiencing a traumatic event. Read each one carefully and circle the number (0-3) that best describes how often that problem has bothered you IN THE PAST MONTH. Rate each problem with respect to the traumatic event you described in Item 14.

0 Not at all or only one time.

1 Once a week or less/once in a while

2 Two to four times a week/half the time

3 Five or more times a week/almost always

(22) 0 1 2 3 Having upsetting thoughts or images about the traumatic event that came into your head when you didn't want them to.

(23) 0 1 2 3 Having bad dreams or nightmares about the traumatic event.

(24) 0 1 2 3 Reliving the traumatic event, acting or feeling as if it was happening again.

(25) 0 1 2 3 Feeling emotionally upset when you were reminded of the traumatic event (for example, feeling scared, angry, sad, guilty, etc).

(26) 0 1 2 3 Experiencing physical reactions when you were reminded of the traumatic event (for example, breaking out in a sweat, heart beating fast).

(27) 0 1 2 3 Trying not to think about, talk about, or have feelings about the traumatic event.

(28) 0 1 2 3 Trying to avoid activities, people, or places that remind you of the traumatic event.

(29) 0 1 2 3 Not being able to remember an important part of the traumatic event.

(30) 0 1 2 3 Having much less interest or participating much less often in important activities.

(31) 0 1 2 3 Feeling distant or cut off from people around you.

(32) 0 1 2 3 Feeling emotionally numb (for example, being unable to cry or unable to have loving feelings).

(33) 0 1 2 3 Feeling as if your future plans or hopes will not come true (for example, you will not have a career, marriage, children, or a long life).

(34) 0 1 2 3 Having trouble falling or staying asleep.

(35) 0 1 2 3 Feeling irritable or having fits or anger.

(36) 0 1 2 3 Having trouble concentrating (for example, drifting in and out of conversations, losing track of a story on television, forgetting what you read).

(37) 0 1 2 3 Being overly alert (for example, checking to see who is around you, being uncomfortable with your back to the door, etc).

(38) 0 1 2 3 Being jumpy or easily startled (for example when someone walks up behind you).

(39) 0 1 2 3 How long have you experienced the problems that you reported above? (Circle One)

1 Less than one month

2 One to three months

3 More than three months

(40) How long after the traumatic event did these problems begin? (Circle one).

1 Less than six months

2 Six or more months

Part Four.

Indicate below if the problems you rated in Part 3 interfered with any of the following areas of your life during the past month. Circle Y for yes and N for no.

- (41) Y N Work
- (42) Y N Household chores and duties
- (43) Y N Relationships with friends
- (44) Y N Fun and leisure activities
- (45) Y N Schoolwork
- (46) Y N Relationships with your family
- (47) Y N Sex Life
- (48) Y N General satisfaction with life
- (49) Y N Overall level of functioning in all areas of your life.

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