accepted the plea to diminished responsibility on the grounds of the presence of the battered woman syndrome. What makes this case a landmark?

For the first time, in a case where a battered woman kills her husband the court has taken on board as of legal relevance evidence of the psychological effects on her state of mind of living in a battering relationship. This is not the first time, however, that evidence of battered woman syndrome has been put before the court. It has always been difficult for jurors and for the court to understand how a woman can apparently stand by whilst the child in her care is being physically or sexually abused by her partner or by the child's father.

There has been a catalogue of such cases from Kimberley Carlisle onwards. In January 1992, Sally Emery stood trial with her boyfriend for the ill treatment of her child, who died as a result. Helena Kennedy QC, counsel for Emery in her defence introduced expert testimony evidence of battered woman syndrome to assist the court in comprehending her incapacity to act and paralysis in the protection of her own daughter. She was sentenced to four years for failure to protect.

Similarly, in the USA the trial of *People v Steinberg*[136] where a middle class lawyer physically abused his lover's child resulting in her death left the public and the jury horrified by the mother's incapacity to prevent her own child from harm. The jury were to learn that the mother was horrifically physically abused and totally under his will to such a degree that she was incapable of independent action.

Whilst the decision in *Ahluwalia* is a landmark and a personal triumph, there are problems in setting up a battered woman's defence along these lines. For women in similar circumstances can it really be said that they are suffering from diminished responsibility within the meaning of the Homicide Act? Alternatively, as Geoffrey Robertson tried to argue, is evidence of battering over a long period a 'notional characteristic' within a defence of provocation?

Either way, the effects of battering do not fit squarely in either legal camp. And, if we listen to the vocabulary of motives and justifications of battered women who kill, they talk in language of self defence, not cumulative provocation and not of mental impairment. Sara Thornton clearly perceived imminent danger. Thornton: 'Do you know what he has done to me in the past?', Investigator: 'Did he beat you up tonight?' Thornton: 'No'. Investigator: 'Did he threaten to?' Thornton: 'He would have'. And later in the interview, Thornton: 'I'll kill you before you ever get a chance to kill me'. Helena Kennedy QC in *Eve Was Framed*[137] writes,

> Women invoke self defence or provocation defences infrequently, and the reason is that the legal standards were constructed from a male perspective and with men in mind … women have a problem fulfilling the criteria.

The acknowledgement by the courts of the battered woman syndrome is one thing, but the direction of the step taken by the Court of Appeal is another. But there is no doubt that the 'syndrome' will continue in some shape or form to influence the development of legal principles in such cases.

In the Canadian case of *Lavallee v R*,[138] heard before the Supreme Court in Canada, the accused was tried for second degree murder of her common law

136 1989.

137 1992.

138 [1990] SCR 852, reversing (1988) 52 ManR (2d) 274, 44 CCC (3d) 113, 65 CR (3d) 387 (CA) (expert opinion).

spouse. At trial the defence of self defence was raised. A psychiatrist testified that when she committed the homicide she had a reasonable apprehension of death or grievous bodily harm because she was a battered woman and because her action was characteristic of the battered wife syndrome. She was acquitted. The Crown appealed to the Manitoba Court of Appeal and a new trial was ordered. On a further appeal to the Supreme Court, the court allowed the appeal and restored the jury's verdict of acquittal. The Supreme Court acceded that expert evidence was necessary:

'How can the mental state of the applicant be appreciated without it? The 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 requiring hospitalisation? We would expect the woman to pack her bags and go. Where is her self respect? Why does she not cut loose and make a new life for herself. Such is the reaction of the average person confronted with the so called battered wife syndrome'.[139]

Mme Wilson J stated:

> Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused has a reasonable apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts. Without such testimony I am sceptical that the average fact finder would be capable of appreciating why her subject fear may have been responsible in the context of the relationship. The jury is not compelled to accept the opinions preferred by the expert without the effects of battering on the mental state of victims generally or on the mental state of the accused in particular. But fairness and integrity of the trial process demands that the jury have the opportunity to hear them.

However unsatisfactory the concept – and contradictions abound – since evidence of battering has been used to argue that women are immobilised, paralysed, unable to act and that women after a long course of conduct finally act and take positive steps where 'the worm turns', the matter of how the courts are to treat the battered woman who kills, in her words, in self defence is far from being resolved. The condition now recognised as battered woman syndrome gives women a voice, a language and legal recognition, but such women are far from being impaired in the manner the Homicide Act requires. The necessity to abolish the mandatory life sentence remains as urgent and pressing now as it has ever been, if justice is to be just and if punishment is to fit the crime.

IN DEFENCE OF BATTERED WOMEN WHO KILL[140]

Aileen McColgan[141]

Over the last number of years the commonplace nature of physical and sexual abuse within families has been increasingly brought into the public gaze. Women are much more likely to experience violence at the hands of their partners than from the strangers they are taught to fear, and many women who are killed are

139 At 112.

140 [1993] 13 *Oxford Journal of Legal Studies* 508. (Footnotes edited.)

141 At the time of writing Lecturer in Law, King's College, London.

killed by their husbands or lovers.[142] While the extent of private violence continues to be overlooked by measures such as the Child Support Act, the increasing recognition of its existence and, to a lesser extent perhaps, of the difficulties experienced by women who attempt to escape it, has focused attention upon the legal plight of battered women who kill their abusers.

One such woman was Sara Thornton. Her conviction for murder in February 1990, and more especially the rejection of her appeal,[143] caused a great deal of public unease. The apparent injustice of her plight was highlighted by the two-year suspended sentence imposed on Joseph McGrail two days after the rejection of her appeal. Freeing McGrail, who had kicked to death his alcoholic wife as she lay drunk, Popplewell J declared that she would have tried the patience of a saint. The law has been accused of sexism before and the *Thornton* case was far from unique. It seised the public imagination, however, led to as – yet unsuccessful attempts by Labour MPs Jack Ashley and Harry Cohen to alter the law on provocation, and has continued to resonate through media coverage of similar cases since. In doing so it has drawn attention to the apparently haphazard quality of justice experienced by battered women who kill: Sara Thornton received a life sentence for murder when she stabbed her violent, alcoholic husband after an argument during which he told her that he would kill her as she slept; Jane Scotland received a non-custodial sentence for man-slaughter when she bludgeoned her husband to death after 22 years of mental torture, physical ill-treatment and the sexual abuse of their daughter,[144] and Pamela Sainsbury received a two-year suspended sentence for manslaughter on the ground of diminished responsibility from a trial judge who took the view that her violent and jealous husband had psychologically paralysed her. More recently Kiranjit Ahluwalia's appeal against her murder conviction was allowed by the Court of Appeal on the ground that the trial judge had refused to admit evidence of the defendant's endogenous depression, presumably the result of continued battering.[145] A retrial was ordered and, her plea of diminished responsibility having been accepted by the prosecution on the grounds that she was suffering from battered woman syndrome , she was sentenced to three years and four months imprisonment, which time she had already served.[146]

In many cases there appears to be little to distinguish between killings which lead to non-custodial penalties and those which result in the mandatory life sentence for murder. While this is to a certain extent inevitable in a jury-based criminal justice system, the problem is aggravated in the context of battered women who kill by the inherent unsuitability of the partial defences of provocation and diminished responsibility upon which they presently rely.[147] Not all battered women who kill their abusers do so under the same circumstances: some strike back in the midst of physical attack; some in response

142 Home Office Statistics for 1990 show that, in 43% of UK homicides where the victim was female, the principal suspect was a partner. This figure was comparable with the figures for 1983–89, and can be contrasted with the 5% of male homicides where the principal suspect fell into this category.

143 *R v Thornton* [1992] 1 All ER 306.

144 (1992) *Independent*, 24 March.

145 *Ahluwalia* [1992] 4 All ER 889.

146 See discussion of *Ahluwalia* in Edwards, 'Battered Woman Syndrome' [1992] *NLJ* 1350, *supra*.

147 See A Ashworth, 'Sentencing in Provocation Cases' [1985] *Crim LR* 553 at 561 and J Horder, 'Sex, Violence and Sentencing in Domestic Provocation Cases' [1989] *Crim LR* 566.

to verbal threats – some use force in the aftermath of an attack or in anticipation of one; and others perhaps are motivated by feelings of revenge. This together with the very small number of defendants concerned makes generalisations difficult, and the nature of the defence or partial defence most appropriately pleaded by each will depend on the exact circumstances of her case. This paper will seek to argue, however, that self-defence (whether at common law or under s 3 of the Criminal Law Act 1967) should be more often considered as a possible defence even in those cases whose facts do not correspond with the traditional model of self-defence.

Proposals for improving the defence of battered women who kill in the UK tend to focus on the modification or re-interpretation[148] of the provocation defence, and a new approach to provocation would be of assistance to some battered women who kill. It will, however, be argued that self-defence more adequately reflects the facts of many cases and that, properly understood and applied, it may be more likely to result in an acquittal than either provocation or diminished responsibility would be to avoid a murder conviction. A movement towards the use of self-defence in situations other than those which involve traditionally paradigmatic applications of its principles would continue a trend started about ten years ago in the United States1[149] and which has also found favour more recently with the Supreme Court of Canada in *Lavallee*.[150] In some respects the current UK law of self-defence avails itself more readily to such an application than does the law in Canada or in many US jurisdictions, but such a movement involves a rethinking of the traditional view of self-defence and consideration of the possible use of expert evidence in the defence of battered women who kill. This latter point is particularly important in the light of the recent acceptance by the Court of Appeal of the admissibility of expert psychiatric evidence of the effects of continued battering. An attempt will be made here to transpose some of the Canadian and US reasoning into the UK context, to review the problems that have arisen, and to suggest how their repetition could be avoided here. Before turning to a discussion of self-defence and its potential for the defence of battered women who kill, however, the failure of the present law to provide even a partial defence for many such defendants will be briefly discussed.

The problems incurred by battered women killers who attempt to plead provocation have been documented elsewhere,[151] and this paper shall do no more than point to a few recent cases in which the defence has failed in order to illustrate its unsuitability for many women who kill abusive partners. The rule in *Duffy*[152] that the defendant's loss of self-control must be sudden and temporary in order to found the defence led to an unfavourable jury direction in *Thornton* where the defendant had left the scene of provocation and fetched a knife before returning and stabbing her husband.

148 S Yeo, 'Provocation Down Under' [1991] *NLJ* 1200; S Edwards, 'Battered Women who Kill' [1990] *NLJ* 1380; *cf* C Wells, 'Domestic Violence and Self-defence' [1990] *NLJ* 127.

149 See *People v Diaz No 2714* (Supreme Court Bronx Co, New York 1983), but *cf State v Stewart* 243 Kan 639.

150 [1990] 1 SCR 852. See J Castel in 'Discerning Justice for Battered Women who Kill' 48 *Toronto Faculty of Law Review* 229 at 231.

151 See S Edwards, *supra*; L Taylor, 'Provoked Passion in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defence' 33 *UCLA LR* 679.

152 [1949] 1 All ER 932.

In *Duffy*, a case itself concerned with homicide by a battered woman, the Court of Appeal approved the statement of Devlin J (as he then was) that a long course of conduct causing suffering and anxiety are not by themselves sufficient to constitute provocation, and that circumstances (such as a history of abuse) which induce a desire for revenge are inconsistent with provocation.[153] While the judge's power to determine the sufficiency of the provocation has since been removed by s 3 of the Homicide Act 1957 the Court of Appeal in *Thornton* expressed the view that the sudden and temporary requirement was particularly important in cases involving cumulative provocation in order to distinguish those who killed in the heat of passion from those who had time to reflect and regain control before killing deliberately. In *Ahluwalia* too, the Court of Appeal refused to jettison the sudden and temporary rule. Lord Taylor CJ ruled that the defence would not as a matter of law be negatived simply because of the delayed reaction in cases of women subjected frequently over a period to violent treatment, provided that at the time of the killing there was a sudden and temporary loss of self-control, but stated that it remained open to the judge to draw the attention of the jury to forward the position that the reasons for which they kill must be taken seriously in the determination of their criminal liability, that the traditional view of self-defence must not be allowed to prevent the application of its principles to appropriate cases where battered women kill, and that misinformed assumptions about women's responsibility in their own abuse must not be allowed to deny them justice.[154]

Pleading Self-Defence

Given the current ideal model of self-defence, it is clear that attention has to be drawn to its inequitable application to women who kill to protect themselves, in order that they may successfully plead self-defence in response to murder charges. In the absence of challenges to the common assumptions about when force is necessary in response to actual or threatened violence, and about the level of force which a woman might reasonably use against an unarmed man, such women will be unable to successfully plead self-defence. Judicial resistance to acquitting women in these circumstances is evident from US cases such as *State v Stewart* where the court ruled that, as a matter of law, the defendant could not plead self-defence when she killed her sleeping husband, taking the view that to allow such a plea would be to leap into the abyss of anarchy;.[155] from remarks made by UK judges which have illustrated an apparently wilful blindness to the realities of private violence;[156] and from the Australian development of the partial defence of provocation to cover typical cases of battered women killers. Julia Tolmie argues that the reluctance of the courts to categorise battered women's killings as self-defence is rooted partly in the ideology of family life:

> To recognise that women may be trapped and justified in fighting for their lives within the most intimate relationship validates many women's experiences in a way which threaten the ideology of familiness. The characterisation of the family as private can be seen instead to have operated to create a sphere in which women are isolated, rendered invisible and placed beyond the protection of the legal system. Recognising that many

153 See M Wasik, 'Cumulative Provocation and Domestic Killing' [1982] *Crim LR* 29.

154 *'In Defence of Battered Women Who Kill, p*p 508–14.

155 Note 64.

156 Note 65.

> women find family life threatening also necessitates examining deep social structures and attitudes by which violence against women is institutionalised throughout our society ...[157]

This reluctance is all the more understandable in view of the fact that, in the words of Wilson J in *Lavallee*:

> Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his right to chastise her. One need only recall the centuries old law that a man is entitled to beat his wife with a stick no thicker than his thumb. … One consequence of this attitude was that wife battering was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day.[158]

It was not until 1991 that the English courts, arguably contrary to the intention of legislation passed as recently as 1976, removed husbands' freedom to rape their wives[159] and the financial dependency historically forced upon women by their husbands automatic ownership of their goods still finds its existence in women's loss of entitlement upon cohabitation or marriage to most social security benefits. It is therefore essential, where women kill in response to a perceived threat from an abusive partner to their life or the lives of their children, that juries are made aware of the circumstances of the case, including the history of violence and its effects on the woman's perceptions of the threat violence, as well as to the effect of the relative disadvantages of many women in terms of passive socialisation and physical size, strength and training. This approach would not afford women defendants favourable legal treatment; it would, rather, go some way to addressing the prejudice against them that is built into the system by virtue of its development through typically male cases of self-defence. In the context of self-defence, then, the male standards of necessity and proportionality, together with the current failure adequately to address the reality of extreme violence under which many women exist, must be recognised and compensated for in the application of the self-defence standard to battered women who kill.

The decision of the Court of Appeal in *Ahluwalia* establishes that battered women may be able to adduce expert evidence of the psychiatric effects of continued abuse, but a successful plea of self-defence requires the recognition that a battered woman's perceptions of danger may be affected by her situation, rather than that that situation has rendered her psychiatrically abnormal. The difficulty lies in the refusal of the UK courts, following *Turner*,[160] to admit expert psychiatric evidence relating to defendants who were not suffering from an abnormal mental condition at the time of the alleged offence. In *Turner*, Lawton LJ stated that:

> If on the proven facts a judge or jury can form their own conclusion, then the opinion of an expert is unnecessary … The fact that an expert witness 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

157 J Tomie, 'Provocation or Self-Defence for Battered Women who Kill', in Yeo (ed), *Partial Excuses to Murder* (1991).

158 [1990] 1 SCR 852.

159 In *R v R* [1994] 4 All ER 481.

160 [1975] QB 834 at 841.

> more helpful than that of the jurors themselves; but there is a danger that they may think it does.

The principle in *Turner* was applied to expert psychological evidence in *Neeson*, where the trial judge refused to admit evidence of the effects of mob hysteria on human behaviour (the defendants were charged with a number of offences arising out of the killing of two British Army officers at the funeral of an IRA man who had himself been assassinated at an earlier funeral). McCullom J ruled that the evidence, which was intended to explain the behaviour that might be engaged in by, or reactions that might occur in, unusual situations was inadmissible on the grounds that the jury were capable of forming their own conclusions about matters which are part of the sum of human experience and knowledge and are readily recognisable by ordinary people.[161]

If the reactions of a funeral crowd driven towards at speed several days after the person they had assembled to bury had himself been assassinated at another funeral is seen as being part of the sum of human experience and knowledge, it is unlikely that a court would accept that the same is not true of the reactions of a battered woman to the use or threat of physical force. Short of claiming that the battering has produced psychiatric abnormality sufficient to amount to diminished responsibility under s 2 of the Homicide Act, it is unlikely that defence counsel could persuade the courts that expert evidence of the effect of such abuse has anything to add to jurors understanding of a woman s perceptions of danger and the reasonableness of her response to it. Further, an examination of the US experience calls into doubt the potential value of such evidence even if it were to be deemed admissible by the UK courts in an extension of *Ahluwalia*.

Early US theorists such as Elizabeth Schneider argued that evidence of the psychological effects of repeated assaults could be utilised, together with lay evidence about the history of defendant and deceased, in order to combat the prejudice inherent in the traditionally male model of self-defence, to equalise the positions of male and female defendants by recognising their differences and to allow the question of reasonableness to be assessed in the light of all the circumstances relevant to the defendant.[162] In the event, however, decisions about whether or not to admit such evidence have often been based on the court's assessment of the reasonableness of the defendant's actions, testimony often being excluded in the non-traditional confrontation cases on the basis that the battered woman's behaviour was unreasonable.

In cases where the battered woman's act of self-defence took place in the context of actual physical assault, the US courts have admitted expert evidence of the effects of prolonged abuse apparently because they doubt the reasonableness of a battered woman's perception of danger.[163] Where such evidence has been admitted it has frequently been used to construct a stereotypical battered woman, rather than to counter the male perceptions of danger, immediacy and harm (which) inform the perception of what constitutes a reasonable physical response and to explain why a battered woman might reasonably perceive danger, use a deadly weapon, or fear bodily harm under circumstances in which

161 (1990) Belfast Crown Court, unreported. See Mackay and Colman, 'Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience' [1991] *Crim LR* 800.

162 E Schneider, note 55.

163 See *Smith v State* [1981] 247 Ba 612; *Strong v State* 251 Ga 540; *State v Borders* [1983] 433 So 2d 1325.

a man or non-battered woman might not. When women failed to fit the stereotype (where for example they had fought back before) the evidence would often then be put to one side and their conduct judged against the standard of the reasonable man without consideration of the fact that a woman's, especially a battered woman's, perceptions of danger might reasonably differ from those of a man.[164]

The focus on whether a defendant conforms or fails to conform to the stereotypical model of the battered woman is perhaps inevitable when reliance is placed on an expert's evidence of the effects of such abuse. In any case, the usefulness of any such evidence is questionable given the fact that the defendant, by virtue of having killed her abuser, has behaved in contradiction to the stereotypical battered woman's characteristic passivity. Even if such evidence, were to be admitted by the UK courts, it might serve only to distract jurors' attention from the question of whether or not the defendant's use of violence in the immediate situation was reasonable given her size, strength and perception of danger, and cause them instead to base their decision on their assessment of the reasonableness of the defendant's failure to leave the abuser, a failure for which she is not officially on trial. Although someone who seeks out violence deliberately will not be able to plead self-defence if she later uses force to defend herself from it, English law creates no duty in the defendant to avoid places where she may lawfully be, and she may arm herself against an anticipated attack. If a defendant will not be prevented from pleading self-defence where he walks down a street where he knows he may be attacked, or makes and stores petrol bombs in anticipation of an attack on his shop, it is inappropriate that a woman's failure to leave her own home should be used to cast doubt on her plea of self-defence. This was explicitly recognised by the Supreme Court of Canada in *Lavallee* where Wilson J, delivering the unanimous decision of that court, stated:

> … it is not for the jury to pass judgement on the fact that an accused battered woman stayed in the relationship. Still less is it entitled to conclude that she forfeited her right to self-defence for having done so … the traditional self-defence doctrine does not require a person to retreat from her home instead of defending herself. A man's home may be his castle but it is also the woman's home even if it seems to her more like a prison in the circumstances. If, after hearing the evidence … the jury is satisfied that the accused had a [reasonable] apprehension of death or grievous bodily harm and felt incapable of escape, it must ask itself what the reasonable person would do in such a situation.[165]

Where a battered woman reacts to an actual attack by her abuser, or where she is given the opportunity to express her perception of anticipated danger in the light of the deceased's previous behaviour towards her, it is questionable whether expert opinion on the psychological effects of abuse would be of much assistance to the defence. This is all the more true in view of the fact that a mistaken belief in the existence of a threat need not be reasonable in the UK in order to found a claim of self-defence. If the defendant creates 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 would not have realised the significance of a movement or threat from the deceased that the defendant knew had preceded

164 *Browne* [1973] NI 96.

165 [1990] 1 SCR 852 at 888–89.

serious violence in the past, should have no bearing on their assessment of her actions. The test of whether her response to that perceived attack was reasonable is an objective question only to the extent that her views of the necessity for force, and of the level of force required in response to the perceived attack, are not conclusive, but are nevertheless, according to Lord Morris in *Palmer*, the most potent evidence of the reasonableness of such force.[166]

Where the defendant does not claim that she foresaw violence as an immediate possibility, it will still be possible in many cases, even in the absence of expert evidence of 'learned helplessness' to explain why her use of force was nevertheless necessary. In many of the US cases the defendant had on one or more previous occasions attempted to leave her partner, but had been sought out and forced to return by his threats of further harm to herself or her children if she did not. There is no reason to suppose that the situation would be found to be that different here. In other cases the attack which ended with the death of the abuser will have occurred after the defendant has left the shared home or involved the police or both, in which case the threatening presence of the abuser will constitute evidence that action beyond flight or police involvement is necessary effectively to safeguard her life and safety, or the lives and safety of her children. In other cases the defendant will have been prevented from leaving by the knowledge or belief that her abuser will track her down and kill her if she does. The need for secrecy as to the whereabouts of women's refuges illustrates the dangers experienced by battered women who leave, and it is virtually impossible for women to disappear completely from their abusers. Many will have common acquaintances or friends, and the situation is not assisted by she potential leverage given to abusing men by the emphasis of the Children Act 1989 on dual parenting even after divorce. Women are pursued and attacked sometimes long after they leave their abusive partner, having spent years in fear of retaliation, never fully setting down new roots but attempting to remain always one step ahead of their pursuer. Police action is ineffective against such determined pursuit: a court order cannot physically restrain a man from the exercise of deadly force and, once broken, it may be too late for the woman to complain of the breach.

Conclusion

The application of self-defence to many battered women who kill does not involve any alteration or extension of the defence, rather a rethinking of the way in which the requirement that the defendant's use of force be reasonable is applied to cases other than those involving the traditional model of a one-off adversarial meeting between strangers. Self-defence is frequently regarded as a justificatory defence, and it is this aspect of it perhaps which underlies the unease which is expressed about its application in cases other than those in which it has traditionally been accepted. One judge felt obliged to warn, while directing the acquittal of a woman who killed her rapist while defending herself from further attack, that his ruling was not to be regarded in any way as a 'charter for … rape victims, to kill their assailants'.[167]

JC Smith, too, while arguing that the analysis of duress in terms of justification leads to the conviction of defendants who might be acquitted if duress was viewed as an excuse, states nevertheless that even if it is true that the remedies

166 *Palmer v R (Privy Council)* [1971] AC 814, 831–32 *per* Lord Morris of Barth-y-Gest.

167 Judge Hazan in *Clugstone* (1987) *Times*, October. The decision is discussed in JC Smith, *Justification and Excuse in the Criminal Law*, p 109.

available are inadequate, to hold that the deliberate killing of a sleeping or unconscious man is justified or even excused would be, in effect, to give his victim the right to execute him; and that, surely, cannot be right.[168] To acquit a defendant who has killed, however, is not, in the words of Lord Edmund-Davies in *Lynch*,[169] to express approval of the action of the accused but only to declare that it does not merit condemnation and punishment. Even if self-defence were properly categorised as a justification, a resulting acquittal amounts to an admission by the court that the defendant's use of force was the lesser of two evils. In *Lavallee* Wilson J expressed the view that the defendant had had to choose between using force against her partner when he was vulnerable or 'accepting murder by instalment' by postponing any use of force until an attack upon her was already under way. 'Society gains nothing' from 'requiring such a delay except perhaps the additional risk that the battered woman will herself be killed'.[170]

In any case, the acceptance by the Privy Council in *Beckford* that the threat to the defendant, and the reasonableness of her reaction to it, must be judged on the facts as she saw them makes impossible any analysis of self-defence purely in terms of justification. Further, as Marianne Giles points out,[171] even where a defendant's perception of the facts is correct, the approach of the Privy Council in *Palmer*, and of the Court of Appeal in *Shannon*[172] and *White*,[173] have so emphasised her honest and instinctive belief in the necessity for the use of force and in the level of force required as to render the test of reasonableness almost subjective. The House of Lords established in *Camplin* that the reasonableness of a defendant's reaction to provocation could not be determined without consideration of her characteristics, and in *Ahluwalia* Lord Taylor CJ stated that the reasonableness of the defendant's reactions fell to be considered in the light of the history of '[her] marriage, the misconduct and ill-treatment of the appellant by her husband'. So, too, in the context of self-defence, the reasonableness of the defendant's conduct cannot be assessed in a vacuum. The jury's assessment of whether she believed that she was under threat of attack and of the seriousness of an anticipated attack will clearly be influenced by evidence of the abuser's past conduct. Many women experience abuse as a cyclical occurrence where a period of increasing tension is followed by physical abuse which is in turn followed by remorse on the part of the abuser. A battered woman might anticipate an impending attack from signals which have in the past marked the transition from the period of tension-building to the battering phase. Under such circumstances, evidence of the cyclical pattern as it has affected the defendant herself, rather than generalised expert evidence about the nature of woman-battering, can enable the jury to appreciate her apprehension of danger even where no threat is apparent to an onlooker.

Equally, abuse often escalates in seriousness between one battering episode and the next, and many women who kill do so when they fear that they will be

168 *Ibid*, p 117.

169 [1975] AC 643 at 716.

170 Adopting the reasoning of M Willoughby, 'Rendering Each Woman Her Due: Can a Battered Woman Claim Self-defence When She Kills Her Sleeping Batterer?' (1989) 38 *Kansas Law Review* 170 at 194.

171 M Giles, 'Self-Defence and Mistake: A Way Forward' (1990) 53 *MLR* 187.

172 (1980) Cr App Rep 192.

173 [1987] 3 All ER 416.

unable to survive the next episode. Again, it is vital that jurors are made aware of the history in order that they may understand the nature of the threat which the defendant feared. Even where a woman kills a sleeping partner, evidence of her circumstances may allow a jury to appreciate the absence of alternatives open to her, so that they may consider the reasonableness of her actions as they might those of a hostage who sees no alternative to the proactive use of force against a threat which may be rendered insurmountable if he waits to be attacked.

Self-defence exists in order to allow citizens to take steps to protect themselves where circumstances render it necessary for them so to do. Many battered women are faced with no realistic alternative to the use of force against abusive partners. The construction of the family as private and the resulting societal blindness to violence within it, the power inequalities which result from men's greater earning potential and the resulting economic dependency of many women, the isolation of many women within their homes and their subsequent alienation from formal and informal support structures, the unavailability of decent alternative accommodation for women who leave their abusers, the fear of pursuit and greater injury or death; these factors render many women hostages of domestic violence and make invisible any escape from that violence except by the force. The way to prevent battered women killing is to provide them with adequate alternative means of escape from violence, and perhaps then to condemn those who choose to use violence instead. Such a course of action would have the effect of saving the lives of battered women as well as those of their abusers. It is however a long-term solution, and one which requires the commitment of government rather than the law alone. In the meantime, society's failure to protect women from violence within their homes must be brought to the fore by defence lawyers and taken into account by those whose task it is to allocate blame.[174]

FEMALE VICTIMS IN THE CRIMINAL LAW[175]

Sheila McLean[176]

There is no obvious reason why females should be victims in the general criminal law any more often than males. Indeed, in certain offences, there is little doubt that males are more highly represented in the victim group.[177] It may, therefore, seem unnecessary to treat females as a special category of victim, since liability to become a victim seems rather randomly spread, and is, apparently, not gender-specific. However, gender does have a relevance to the criminal law, not only in the methods by which female offenders are treated but also in certain types of offences – notably those involving sexual activities. Of obvious importance in such offences are the crimes of rape and incest which have, by definition in the case of rape, and by practice in the case of incest, a predominantly female victim group.

The contention in this chapter will be that the definition of rape whilst designed to offer protection to females and apparently importing no gender assumptions –

174 *In Defence of Battered Women who Kill*, pp 521–29.

175 Sheila McLean and Noreen Burrows (eds), *The Legal Relevance of Gender* (Macmillan Press, 1988), Chapter 10.

176 At the time of writing, Lecturer, Institute of Law and Ethics, University of Glasgow.

177 For discussion, see M Hindelang, M Gottfredson and J Carofalo, *Victims of Personal Crime* (Cambridge, Mass: Ballinger Publishing, 1978); M Hough and P Mayhew, *The British Crime Survey* (HMSO, 1983).