VICTIMS WHO KILL
OR
THE PROPER HOME FOR BATTERED PERSON SYNDROME IN AUSTRALIAN JURISPRUDENCE

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If you search under the title *Battered Wife Syndrome*, *Battered Women Syndrome*, *Battered Child Syndrome* on the Internet or in *Butterworths*, a solid body of cross-referenced material is displayed, particularly, material that has arisen in Canada, the US and to a lesser extent in Australia.

This paper is intended to comment on the changes in thought, attitudes and understanding we as a society have experienced in the last 25 years in a narrow area of human experience.

The paper will attempt to take you through a crash course on

- Diminished responsibility as a partial excuse for murder
- developments in respect of Post Traumatic Stress Disorder [PTSD], the DSMIII and DSM-IV and the ICD-10[1]
- the development of the syndrome known as Battered Wife Syndrome [BWS] for ease of reference includes Battered Person and Battered Child Syndromes[2]
- The development and classification of depression and personality disorders and the attempted description of those personality disorders or abuse syndromes

In the Northern Territory, Queensland and New South Wales the criminal law has known for varying periods of time, the partial excuse of Diminished Responsibility which reduces murder to manslaughter[3] The same partial excuse has been variously known to the criminal law in the United Kingdom, Canada and the United States as either Diminished Responsibility including the even narrower partial excuse of Infanticide.

To those who have learnt and practiced their criminal law in those jurisdictions it is an intuitively sensible concept and an oft-used mechanism to reflect justice in the resolution of a killing characterized by the extraordinary circumstances

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[1] DSM-III: Diagnostic and Statistical Manual of Mental Disorders 3rd Ed American Association of Psychiatrists 1980; DSM-IV: Diagnostic and Statistical Manual of Mental Disorders 4th Ed American Association of Psychiatrists 1994, ICD-10: International Classification of Mental and Behavioural Diseases [World Health Organization]

[2] http://www.forensiceducation.com/glossary/b.htm
battered wife syndrome:
"the state of a woman in a highly abusive relationship who resorts to the murder or aggravated assault of her spouse, as a result of her belief that it is - the only way to save herself from death" (Regehr & Glancy, 1995, p. 135).
battered woman syndrome:
"the psychological, emotional and behavioural reactions and deficits of victims and their inability to respond effectively to repeated physical and psychological violence (Walker, 1979).

[3] DR was introduced into the laws of Qld in 1961, NSW in 1974 and NT in 1983

where the victim in a violent relationship kills the perpetrator when that person is off-guard.

To those from the health professions in those same jurisdictions it is likewise a perfectly obvious recognition by the criminal law of a common experience within our culture: namely, that when extraordinary circumstances operate otherwise cowed victims act to end their subjugation and degradation. This paper addresses the vastly different way the various jurisdictions of Australia treat this human tragedy

In such cases the law of diminished responsibility in Australia can treat a killing during a state of abnormality of mind; often a disabled mind; either permanently or temporarily; though with limitations as to the cause of the disability as well as other caveats,[4] to be something less than insanity or mental impairment[5].

RECENT DEVELOPMENTS IN PTSD

The *Voyager* case is an interesting example of the clash between the development of the law that is disconnected to the development of science and that body of popular opinion that can be described as *common knowledge* or *State of the Art.*

During night manoeuvres in the seas off Sydney in 1964 two Royal Australian Navy vessels the HMAS Melbourne collided with the HMAS Voyager. There was great loss of life. The survivors of the *Voyager* and the *Melbourne* were dealt with by authorities consistent with the state of knowledge *and politics* at the time. They were sent home from hospital on 6 weeks leave; given no debriefing; not told who had died; survived or been injured; and told as a matter on National Security they were not allowed to discuss their experience with friends or family.

It transpired that this was grossly inadequate management. In terms of current modern critical incident debriefing; the psychological and emotional care of the survivors could be seen as somewhere between non-existent to grossly inadequate depending on your point of view.

The interesting thing for our purposes however was that in the mid 80's vast numbers of them were suffering very similar symptoms. So strikingly similar that their solicitor, a single practitioner/solicitor in Bright, in country Victoria took up and commenced litigation against the Commonwealth in negligence for the *longitudinal* consequences of that collision upon the men who survived.

I was working with the Department of Defence in 1988 and 89. It was my responsibility amongst others, to continue handling the *Voyager* litigation on behalf of the Department of Defence. At that stage there were some eighty-two survivors of the *Voyager* applicants in all jurisdictions of Australia. They were at various stages of progress but had one major thing in common. The then Attorney General, Minister for Defence and to a lesser extent the legal adviser to the Minister of Defence, my particular boss, were adamantly of one view:

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[4] Text of s 37 NT and references to the sections and definitions from Qld and NSW

[5] Insanity provisions form Qld, NT, NSW

namely that these claims, had no merit whatsoever and were the result of collusion by various of the survivors *to milk the cow* of the Commonwealth coffers. These men were subject to this assessment by the Attorney General and the legal adviser to the Department of Defence, principally because their statements of claims were so strikingly similar.

Now, during the time I spent in the Department of Defence one of the test cases[6] was going through the High Court. The High Court went out of its way to bring about a change in the law of negligence; promissory estoppel and the Statue of Limitations amongst other things. The effect of these changes, [I contend deliberately] was that the survivors were able, procedurally, to bring their claims in negligence and have them assessed on the merits. It was apparent to all but those *who would not see* in A-G's and Departments of Defence that if the matters went to a Judge and jury or Judge alone that the quantum of damages against the Commonwealth would be huge. That eventually was in deed the case and the quantums awarded were in the $200,00 area. The features of alcohol and drug abuse; and /or depression; destroyed personal lives were almost universal.

The matter for this paper is an examination of the blindness of those particular men in authority. At that stage in 1988 the understanding and perceptions of the extent and features and characteristics of the post traumatic stress disorder [PTSD] as defined now in the DSM IV and IVA, were ill understood by the law[7] and lawyers. For my political and legal masters, a claim in damages for psychological harm 24 years after the disaster was an unconscionable rort.

However, for the purpose of today's argument and today's paper, what I want to take you to is how slow the law was to come to terms with an observable psychological phenomena that had been around in modern psychology since at least the time of World War I.

Any of you who have read Pat Barker's magnificent ***Regeneration Trilogy*** will know that she is modern writer who has won the *Booker Prize* for the third of the Trilogy. It was a very admirable attempt at recording for us how PTSD was seen in the shadowy lights of psychology in World War One. She wrote about a time when the work of Freud was still very new and not greatly understood. When the psychiatrists of the age were just discovering how to use Pavlov's work for behavioural modification; where phrenology was still valid and Darwinism was revolutionizing every aspect of natural science; where insulin convulsive therapy as you will have seen recently in the movie ***Beautiful Mind***, was yet to be invented let alone discredited. The ***Regeneration Trilogy*** is a masterly *factional* account of the history of attitudes as well as science.

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[6] Commonwealth v Verwayen(1990) 170 CLR 394; To reduce costs it was agreed two of the cases would be contested in the courts vigorously and the 'losing ' party would consent to all other 82 cases being dealt with in the same way. The Commonwealth took all procedural and technical points available as the *model litigant*

[7] PTSD was well accepted in the US but in UK and Europe which had not dealt with the Vietnam Veterans first hand the cultural experience of PTSD was significantly different. DSMII first described the modern PTSD in 1980. The European originated and developed ICD-10 did not include PTSD till 1993. In the authors opinion this difference in experience occasioned by the Vietnam Veterans influenced Australian psychiatry and then forensic law such that the nexus with the UK was broken and US psychiatric thinking came to dominate Australian institutions.

Deep sleep treatment, electroconvulsive–convulsive therapy, Jung and drugs for depression were all unknown to the psychiatrists of World War I. These doctors had to assess and treat grossly traumatized souls. They were either cowards for refusing to fight [conscientious objectors were sentenced to jail]; or when unable to fight any further were treated for the *weakness of the heart*. The men sent to *mental* hospitals were variously catatonic; suicidal; compulsive or simply driven past sanity. Collectively they were known as *neuraesthesia sufferers or shell shock victims*. The trenches of Flanders had broken the spirit of the individual sufferers: some temporarily, some permanently. Many of us know of stories of grandparents or great-grandparents who were crippled, emotionally and physically by their World War I experiences. Their debilitated state radiated through the family and the shock waves can still be identified in subsequent generations. WWII, Korea and finally Vietnam saw similar longitudinal tragedies causing the evolution of perception and description from *shell-shocked* to PTSD.

It is against this background that one needs to look at the development of the *Battered Wife Syndrome*. Now, you cannot view the development of the *BWS* in psychology or in the law, absent modern feminist theory, absent modern psychological theory. We need to look at both of them. Not only for the fact that they have to some extent changed the law. BWS has evolved from being seen as a species of depression into being a sub-grouping of PTSD which is itself still being classified as either an anxiety disorder or a dissociative disorder depending on its particular causation, degree and manifestation[8].

The question is whether that collective material reveals to us a plausible defence, excuse or justification[9]. Something that is so cogent that we must and should exercise our prosecutorial discretion in respect of it. This is the existential reality for lawyers in the criminal justice process, particularly the prosecution process, which makes BWS and PTSD relevant tor us.

Feminist Theory

Now, feminism can be seen historically as growing out of two-overlapping movements: essentially, universal suffrage and the temperance leagues of the late 19th Century. There were many things that contributed to those two political movements. Essentially the lives of women and children of the 18th Century in the Western world were improved generally as the Social Welfare legislation of the Victorian era in the British Empire, USA and Europe developed in response to the hardships resulting from the Industrial Revolution the power of society permeated behind the doors of ordinary homes. There were laws against child labour, women in mines, minimum wages and maximum working hours[10]. There were the *tanner* or the *shilling* strikes of the very early twentieth century as we developed the concept of what was a reasonable *social wage*.

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[8] Ibid., DSMIV

[9] NT Criminal Code relfects the mechanism of all the Griffith Criminal Codes in Australia, namely to be *unlawful* the act, event or omission must NOT be authorized, justified or excused

[10] The great social reforms achieved by the likes of Wilberforce and Caroline Chisholm

It was against that developing background of what constituted a reasonable *social wage* that Australia became a nation and with New Zealand, was amongst the most progressive in what can now be described as the Western World or the OECD countries. Ours was one of the first countries to introduce widow and old age pension schemes; unemployment benefits; compulsory immunization and minimum school leaving ages[11]. In the development of social welfare laws that protected the community generally the need/impetus to protect its most vulnerable members children and then women grew.

It is easy to forget that the right to chastise a child, servant or wife in the maintenance of domestic order and discipline was given morally and legally to the male head of the house[12] had been part of the common law for hundreds of years. The rights of women in relation to their person as well as their property and the related protection of women and children generally became a *powerhouse* for social action and change a hundred years ago which resulted in the rapid growth variously of *Temperance Unions* and *Leagues of Wom*en. These women and their supporters were trying to fight, inter alia, for the vote for women. Suffrage and control of drunkenness were related goals. The movement recognized the effects of alcohol abuse in their community. It was easily discerned that wide spread availability of alcohol was leading directly to the degradation of the quality of life of dependant women and children. The protection of the family income from dissipation on alcohol and the prevention of alcohol related domestic- violence was the *raison d'etre* for Temperance Leagues and the push for universal suffrage[13]. The movement was differently relevant to the various groups who saw democratic influence on parliaments and legislators as the salvation for women and thus children.

The rich; middle- class women; the intelligent who wanted education and the right to careers in the professions; those who sought relief from poverty drudgery or violence all joined together as a catholic political force. They all believed that the best of the way that women could control the law was if women could get the vote. There was widespread parochial and paternalistic resistance to the universal suffrage arguments. Different colonies in the British Empire; countries in Europe and the Americas, recognised the legitimacy of the argument and granted universal suffrage in varying times but within a decade or two of each other, generally[14].

The power of the husband over his family and servants as a totalitarian/autocratic, hopefully benevolent ruler was lessened throughout the course of the twentieth century.

Dr Joan Lawrence in Queensland in the mid-nineteen eighties was a senior consultant psychiatrist who documented that during the course of roughly the previous eighty years in Queensland that the pattern of women's' role in

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[11] If interested the early development of social welfare legislation is discussed in Oxford University History of Australia: Vol II and IV; History of Australia –Marjory Barnard

[12] See Sir Samuel Griffiths notes on the codification of the common law in 1899 when he wrote the Queensland Criminal Code over one summer holiday. The assumptions he makes when attempting to reduce this area of the law to a code are fascinating as an anthropological exercise as much as an historical or legal one.

[13] D.H. Lawrence describes the industrial mining England of his childhood in *Sons and Lovers*

[14] South Australia and New Zealand were in fact the first jurisdictions to grant women the vote.

domestic homicides changed, particularly from the thirties and forties onwards. Women moved from being overwhelmingly the victims to becoming increasingly the perpetrators of domestic killings: a somewhat macabre manifestation of feminism.

In the very early ninety-eighties in Queensland that Dr Lawrence was working on the case of a women called BB, who was then charged with the murder of her husband. The husband was killed by his wife in a tomahawk attack whilst asleep. During the course of the prosecution the case was handled within the Public Defenders Office where I was then working. It was the task of the Defence team to analyze BB's explanation of why she killed her husband, in terms of the Criminal Code of Queensland and the *defences [authorization, justifications or excuses]* as they then were[15].

The problem then was that the *defences/excuses* relevant and available for murder in Queensland were *provocation* and *diminished responsibility*, as partial *excuses*[16] and *self-defence* as a complete defence [justification]. The material that we had was that BB had been subject to long term domestic violence. She was the victim of escalating physical and mental violence and torture from her husband. He became more controlling and more psychopathic in his desire to humiliate and subjugate her. The behaviour deteriorated, as is often the case after the only child left home. BB stayed alive on a diet of *over the counter* medications; Valium and Serapax from her GP. The task for Dr Lawrence was to describe the symptoms and history that she was given as an *abnormality of mind*[17] such that BB was entitled to plead to the partially excused manslaughter rather than murder.

> [Definitions from NT Criminal Code – essentially the same as Qld Criminal Code at the time]
> *Abnormality of mind*: means arising from a condition of arrested or retarded development of mind or inherent courses or induced by disease illness or injury.
> S 37
> *Diminished responsibility*: When a person who has unlawfully killed another under circumstances that but for this section would have constituted murder was at the time of during the act or making the admission that caused death in such a state of abnormality of mind as substantially to impair his capacity to understand what he was doing or his capacity to control his actions or his capacity to know that he ought not do the act, make the admission or cause that event he is excused from criminal responsibility for murder and is guilty of manslaughter only.

The problem was how did you describe a state of mind where the women appeared to have been driven to the end of her tether as anything but an *intent to kill*. It was not *provocation* as the authorities understood it to be in Qld. How

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[15] See Fn 9 above At Common Law these terms are known as *Defences* and will be used as such in this paper

[16] Partial excuses operate in all the Codes to reduce Murder to manslaughter. The same mechanism applies in NSW Crimes Act

[17] The definition of *abnormality of mind* in the Queensland Criminal Code was in all material respects the same as the NT provision.

did one translate the deliberate killing of a sleeping man into an *abnormality of mind* which reduced one of the relevant *McNaughten's* capacities such that the partial excuse was made out . The law in Queensland at the time was such that *Ford*'s case allowed for a severe depression to be *abnormality of mind* in terms of a Code definition[18].

Pre Falconer and Van Den Hoek

Now, let us pause at this stage to put these events both in a medical and a legal context. BB's case occurred pre ***Falconer***'[19]s case in Western Australia. This is the case where the High Court found that an act could be classed as *involuntary* if it was committed under *psychic shock.* The shock in that case was being told by your husband that he had committed incest on the two elder daughters and had commenced his activities against the next daughter.

The High Court addressed the meaning of *voluntary* for the all the Code jurisdictions, in what was a fairly blatant piece of legal-social engineering. It was to allow the jury an out not otherwise available in jurisdictions governed by s23 and all that is pre-***Woolmington***[20] such that a jury would be allowed to consider a way to acquit her.

Now, the Western Australian Criminal Code was in similar terms as the Queensland Code at the time except the *diminished responsibility* was only available for *infanticide*. Therefore, the High Court had to turn their mind to the *voluntariness* aspect as the way out if you like[21]. It was a piece of extremely agile mental gymnastics and creative thinking by the advocates before the Court and by the Court itself that came up with the result in ***Falconer***'s case. Now, if you had attended Criminal Law Conferences at or about the time of the publication of ***Falconer***, you would have heard some fascinating discussions by Supreme Court Judges and Criminal Law experts and academics of the era, trying to make sense of ***Falconer***. One set of discussions in terms of the Code jurisdictions, was as to what it actually meant. More interestingly for the Common Law people: they were desperate to be able to translate this *excuse* into something viable in the Common Law jurisdictions. However ***Falconer*** and what it meant were post-Birch as was the sleeping axe-murder from South Australia and its saga through the Supreme Court trial and to the CCA,[22].

In the mid eighties when BB was going ahead it was before *Battered Wife Syndrome* had been described effectively by either the psychology or the law of the time[23].

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[18] Carter's Annotated Qld Criminal Code on diminished responsibility and insanity

[19] ***R vFalconer*** (1990) 171 CLR 30

[20] ***Woolmington v DPP***[1935] AC 462 the Model Criminal Code Officers when drafting a Model for uniformity in Australia agreed that the Code and Common Law began to diverge after the Woolmington decision. It was a watershed in jurisprudential thinking.

[21] This being the element in S23 of the Griffith Codes that had disappeared with Woolmington.

[22] **Runjanjic & Kontinnen v R** (1991) 56 SASR 114

[23] This paper is a little about how the [r]evolution occurred in just one or two aspects. I am not attempting to give you a comprehensive analysis across all jurisdictions. I am merely trying to tell you how during my working life as a criminal lawyer I have seen this area of the law evolve. Supreme Court of Canada ruling on R vs. Lavalee became the precedent setting case in Canada" (Regehr & Glancy, 1995, p. 130). This case was also after BB

So, Dr Lawrence by slow means came to the position were she was able to say as an expert in the field of psychiatry that the treatment that Birch had suffered at the hands of her husband, particularly once the only child had left home was such that she could be said to be suffering from a serious long-term reactive depression. BB was said to be in the grips of that depression when she came to the view that her only way out of her current lifestyle of torture, cruelty and abuse was to kill her husband whilst he was asleep.

Now, at the time the Crown needed a basis in law upon which it could accept from the Defence a plea to manslaughter.

It was a significant departure from existing perceptions/understandings of either reactive or endogenous depression that long term domestic violence was said to be able to give rise to a depression[24]. This depression, which disabled the sufferer such that she could not perceive the irrationality of her belief that she had no way out of the lifestyle, other than to kill the perpetrator. It was after BB and her matters were published in the Courier Mail newspaper at the time that the community expressed outrage that the victim of domestic violence should go to jail for several years for killing her perpetrator. It was at this time that the Women's Legal Service that flourishes still today, started under the leadership of Zoe Rathus and Dianne Fingleton. Many women in Queensland from diverse backgrounds and many media figures banded together and put a Petition for Mercy to the Governor. [25].

It was accepted by the Defence team and the Crown at the time that she was not acting in *self-defence* because the husband was sleeping. There was no attempt by the Defence to develop the ***Secretary***[26] line of reasoning at that stage. It was also accepted by all the parties that the best she could get was *diminished responsibility* there being no S154 *dangerous act*[27] equivalent. Likewise it was accepted by the defence applying the facts in her *statement of fact* at the time, that she was not operating under what was said to be *provocation* in Queensland at that time.[or in Western Australia or in the Northern Territory]. Because *provocation* was said to be on the instant; *before the passions have had time to cool*. There was no doubt that whilst there had been a verbal altercation

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[24] ibid., DSMII: classification of ***depression*** as either reactive or endogenous has been completely abandoned in the current scientific literature since the discovery of the role of serotonin in the biochemistry of the illness now understood to be described by the term ***depression*** A change which can be dated by the incorporation of *Prozac* into our everyday vocabulary.
It was far from understood in 1986 that depression was in fact an organic disease of the mind. In those days, in Psychiatric Hospitals deep sleep therapy was still practised along with insulin-convulsive therapy on intransigent cases of depression. More commonly, however, electro-convulsive therapy ECT was given where the patient had failed to respond to the crude anti-depressants of the time. These were tranquillizers such as valium and serepax; or members of the MAO inhibitor group, such as *Parnel* [a patient could be killed by a vegemite sandwich or a bottle of red wine] or the anti-psychotics or *lithium* [if they were bi-polar then known as manic-depressive].

[25] This was one of the earliest manifestations of this *vengeance* engine that we have seen increasingly apparent in this area of public opinion. Its translation into the jury population of Australia in their consideration of the defences under the criminal law particularly those that are said to be "reasonable" has been very rapid. It is an area where the law and juries have parted company very quickly

[26] *R v Secretary* [1996] 107 NTR 1

[27] Dangerous Act s154 of the NT Code is a strict liability offence which can be seen as a form of criminal negligence. It is unique in the *'common law'* jurisdictions

between Mr and Mrs Birch wherein he had dashed her hopes of a change of behaviour prior to him going in and going to sleep. [She had been lead on to commit money to a joint holiday, in the false belief that he intended to reform]. His behaviour during the argument whilst not particularly violent had nonetheless made it clear to her that were no new leaves in the process of being turned over in her life. All accepted that this was not *provocation* in the legal sense[28].

The law in Australia with respect to killing one's spouse was not vastly different then to what it is now. The only jurisdictions that had *diminished responsibility* and then only as a partial *excuse* were Queensland, New South Wales [and Western Australia to the limited extent of *infanticide*]. It was unknown in the other common law and Code jurisdictions. It had been borrowed from England.

The closest to us is the American notion of *temporary insanity* and the most famous case of which was the *Twixie* case. *Temporary insanity* is a complete defence unlike our S37. In America an infamous gay-basher said he ate this particular highly sugared confectionary, called a *Twixie* and that induced in him a state of hypoglycaemia, such that he became temporarily unhinged and shot the gay Mayor of San Francisco. He was convicted and his convictions subsequently squashed by an Appeal Court on the basis that he had in fact made out *temporary insanity* and the trial Judge had been wrong in not allowing the jury to consider it. That's a very broad brush synopsis of the development of the law in this area in the United States but it can be seen as the high point if you like of *temporary insanity*, in that country.

Depression

We have now reached a stage in the twenty-first century where it is known that the inability of the body to utilise the available Serotonin, [either from an inherent lack of Serotonin, a fault in the pathway or the lack of the enzyme which inhibits the Serotonin uptake] in always present in depression. There is a basis for you to accept that Science has now progressed. Since the time of Prozac, essentially, we have anti-depressive medications that treat the relevant chemical imbalance. Mostly it is accepted now that *depression* is a biochemical disorder that is usually classified as reactive or inherent; acute or chronic[29].

More to the point, we have progressed to aa state of enlightenment or identification of pathology in our community such that we are able to say that approximately one in four Australians will suffer from a moderate or severe depression at some stage during their life. Further the vast majority of these will be subject to recurrences of that illness -meaning more than one serious bout requiring medication in their adult lifetime.

In terms of the evolution of Psychology and Psychiatry BB's case was also during an era before Clinical Psychologists were accepted either within their

[28] BB could not remember how long it was until she went to find the axe. Nor could she really remember why. Later there was speculation that in fact this had been yet another example of dissociation

[29] ibid DSMIV and IVA

own medical profession and certainly not by the Legal profession. It was also yet to be acknowledged that children and adolescents could suffer from depression.

In this snapshot, represented by the BB case, we have Psychiatry, the Law and public opinion, attempting to grapple with an apparent gross injustice. How should the criminal law regard a woman who had killed, in what was not technically a justifiable set of circumstances but clearly in terms of the ethical analyses of the community, an act for which she should not be punished.

We then go to Dr Lawrence's work again briefly. She published her paper inot domestic killings by women of their spouses for the Royal College of Psychiatrists of New Zealand and Australia, of which she was the President about that time. Her subsequent research in psychiatry and psychology lead her to refine her views on *depression* and domestic violence by the time she and I had another case in 1987. This was the case of MW, a Rockhampton woman who shot her sleeping husband in the head whilst he was asleep in the passenger's seat of the family car.

Dr Lawrence was again the Defence Psychiatrist, and in this instance we were able to get her to see MW at the Women's Prison within 72 hours of the killing. At which stage MW still demonstrated some serious, fascinating and invaluable signs and symptoms. For instance, she had no memory of the fact that she unpacked the car; left *hubby* asleep in the front seat; woke her retarded cousin; had him load the rifle then sent him back to bed; then had sat down in the kitchen and wrote a letter. It was a note to her mother saying she *couldn't take it any more and please look after the children.* She then went downstairs and shot him at point blank range then returned upstairs and rang the Police; then sat waiting their arrival.

Her complete lack of memory about this note was documented in the Record of Interview. The woman thought she had got out of the car walked around to the boot; taken the gun out and walked to the passenger door; opened it and shot her sleeping husband. When the Police confronted her with the note, she was absolutely confused and in denial as to who could have written it. She had traumatic amnesia about the several minutes of activities prior to the shooting. Today this *loss of time* would be described as *acute dissociation.*[30]

Doctor Lawrence carefully took a history from MW. She was able to show in MW's hospital chart and from family statements not only long term psychological and physical abuse and torture by the husband, but documented sleep disturbances and other indicia of *depression.* The history was also associated with Serapax abuse by this woman.

It was much easier for Dr Lawrence in this case to describe the effect of the long-term abuse on MW. In particular the fact that the treatment this women had suffered had caused her to develop the *learned helplessness* [which was in

[30] ibid., DSMIV; ***Freckleton on Expert Evidence*** Loose Leaf Service, Ch 54 para [54:400] The symptom of dissociation is very hard to document other than as a period of *lost time.*

the very early days of discernment in the scientific Literature][31] from the cycle of control-anger-violence-contrition that characterizes this severe domestic violence as well as the clinical depression it engendered. She was also able to document as many other doctors in the area were starting to document: that long term chronic high dose Serapax and Valium abuse lead to a degree of psychosis in itself: in that the patients developed a marked degree of paranoia. It was documented by other witnesses at the time that MWn dosed herself liberally on Serapax by the handful in order to cope with the ongoing and escalating threats by the husband against her. The *benzodiazapines* induced a paranoia which fuelled the irrational belief system that killing the perpetrator was the only escape.

MW went to trial in 1987 shortly after the High Court published the *Van Den Hoek* ruling[32].

It is the case cited with approval in *McMaster* [33]and it's still the law in the Northern Territory. It provides a *defence* [authorisation, justification or excuse] is to be left to the jury's consideration once raised evidentially, whether or not the Defence or the prosecution wish it to be ventilated before the jury as part of either case. Further the question of whether it is raised on the evidence is a question of fact and law for the Judge alone.

Now *Van Den Hoek* was a Western Australian case, another domestic violence-spousal killing by a wife. The woman was the subject of domestic violence and again against a background like the *Falconer* case, there was sexual abuse of children of the marriage. The woman went mad and beat her husband to death with a brick. In the circumstances the High Court said she was entitled to both *self defence* and *provocation* being left to the Jury. This was a land mark decision and in many ways a water shed decision in the true sense of the words. I suspect that the court at the time never truly appreciated that which they were actually doing in terms of social-engineering. They allowed this absolutely random mechanism to enter the criminal law. Even if the Defence were not running positively a certain excuse, if the agile mind of the relevant Judge or Defence lawyer could make out a circumstance, completely separate to the Crown case or the Defence case, then that further exculpatory scenario must be put to the Jury.

It gave juries a way to exercise their personal *prerogative of mercy* within the bounds of the law, which I argue, they do with increasing readiness.[34]

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[31] ***Hickey*** [1992] 16 Criminal Law Journal 271 first case of BWS and learned helplessness accepted in NSW courts; Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations; ibid [1992] 16CLJ 369 The BWS defence had been accepted in Canada and the US and in three State courts in Australia and this acceptance reflected the lapse in time needed by the law before it can recognize developments in science.

[32] *Van Den Hoek* (1986) 161 CLR 158

[33] McMaster v R(1994) 4 NTLR 92; (1994) 117 FLR 200

[34] If I can just give an anecdotal report at the time about my Defence Counsel at the MW trial He was shown *Van Den Hoek* and I report this not to say how wonderful I am. I had an emotional response to *Van Den Hoek* in that it was telling us that this is what we should be using in our case in terms of BWS. My black letter lawyer Defence Counsel looked at it, looked at the Code and said "*don't be ridiculous*", *he was asleep how can we use self-defence, the last threat he gave us was just as the car left Rockhampton and by the time they got to Yeppoon he was fast asleep in the car. How can this continuing sense of threat raised in Van Den Hoek be said to apply.* Well, I often think of that Defence Counsel who is now a District Court Judge in Queensland. Especially I wonder if he remembers the processes by which he rejected what appeared to him to be an artificial abomination of the law, as

Particularly in this area where the deceased can be said to be enticing the domestic violence victim into some form of justified killing or assault or attack.

I shall return to the legacy of *Van Den Hoek* later in the paper.

At trial MW admitted killing so the only question for the jury was whether or not there was a defence of *diminished responsibility* made out on the acknowledged gross history of domestic violence. The Crown psychiatrists both said that this woman's documented history of domestic violence was tragic and appalling but did not in their opinion, constitute an *abnormality of mind such as to reduce a relevant capacity*[35]. Therefore they were unfortunately unable to give her the benefit of that defence. The Defence psychiatrist, Dr Lawrence who had spent a great deal longer with MW than the Crown psychiatrists and was able to explain to the Jury the *learned helplessness* syndrome as described by this woman. She explained to them the effect of depression; the effect of the Serapax abuse and the fact that the woman who is the subject of the chronic domestic violence and abuse moves into an altered state to reality. That altered state of reality is in the Code jurisdictions the basis for the Battered Wife Syndrome, being if properly made out, an acceptable basis for *diminished responsibility.*

Mental Health Tribunal of Queensland

Now, we go into another interesting historical feature of the time. Namely, that this case was one of the first in another area. This killing was one of the first cases in which the newly created Mental Health Tribunal, a Division of the Supreme Court of Queensland, was involved in the Prosecution process. The law that created that Tribunal said that whenever a *psychiatric illness* was raised by the Defence or the Prosecution or the Court of its own volition, then the matter shall be referred to the Mental Health Tribunal. That Tribunal was chaired by a Supreme Court Judge with two independent psychiatrists assisting him. [Justice Angelo Vasta was the first Chair of the Tribunal.] It determined whether or not the psychiatric condition was in fact available. If it was available then that person left the Criminal Justice system and transferred into the Mental Health system and in terms of Prosecution/Corrections[Prisons] was never seen again.[36]

MW one of the very first killing cases that ever went before the Criminal Mental Health Tribunal and the two Crown psychiatrists who subsequently testified at the murder trial also assisted the Mental Health Tribunal in establishing that the excuse was not made out. Whilst they did not dispute the domestic violence; the extent of it; the maliciousness of it; the crushing nature of the threat involved and the very real sense of impending death which this woman felt, in their minds it did not constitute an *abnormality of mind.* This

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intimated by the High Court in *Van Den Hoek* when he regularly has to instruct a jury to consider a hypothetical excuse.

[35] Insanity in all jurisdictions of Australia still reflect the *McNaughten Rules:* the accused haas to lose the capacity to know right from wrong; understand the difference or the capacity to contrlo their actions

[36] That same result is what the NT is trying to achieve by the enactment of Part IIA of the Criminal Code in 2002 following the Model Criminal Code recommendations of 1992 which themselves followed the Qld practise and procedures.

was largely because they did not make the link between chronic domestic violence and *depression* that Dr Lawrence had in her work. Her work and her conclusions were ground-breaking in every sense of the word. This paper is I hope one of many acknowledgments of her pioneering work in regard to domestic violence both psychiatrically and legally.

Now, this Mental Health Tribunal in Queensland has a number of interesting influences for the NT. You may have heard over the 2002 January holiday period there was an uproar in Queensland because one of the opposition Parliamentarians had discovered that from ten or eleven cases in the first year of the life of the Mental Health Tribunal in 1986 – 87, there were now roughly two hundred and seventy odd per annum. Of which the over whelming majority were granted the benefit of the provisions and moved out of the Criminal Justice system into the Mental Health System. They were recovering from the *abnormality of mind* rapidly and were spending months rather than years in the Mental Health System before being released back into the Community. By contrast those who went through the Criminal Justice System were serving years for *offences against the person* where the defences have not been accepted.

Now, Queensland is the only jurisdiction with this Mental Health Tribunal system in Australia[37]. For the NT and NSW it has meant that in terms of precedent,s we have been robbed of many useful authorities because the results of the Mental Health Tribunal are not readily available in the legal publications. Further, because it is a system that operates only in Queensland when coupled with the rarity of the *diminished responsibility* excuse it means that which happens Queensland is very different from that which happens elsewhere in Australia.

So, that we in the Northern Territory and New South Wales have been dealing with severe domestic violence via the defence/excuse of *diminish responsibility* in an artificial environment. This variation of treatment of a phenomena is one of the major consequences of the lack of uniformity in the criminal law in Australia.

Now, another development in the historical sense as we move from the mid-eighties to the mid- nineties is that the development of women's legal services dated from about the time of the BB matter when they took off Australia wide. They were originally related to the Family Court Amendments of the late Justice Murphy then Attorney General.[38] History documents that the Fraser Government was extremely generous and the development of Community and Aboriginal Legal Services mushroomed during this period of time[39].

At the same time in the Psychiatric business, the understanding of *depression* was proceeding apace as was the understanding of the post traumatic stress disorder, PTSD. The understanding of PTSD was a positive benefit, if you like,

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[37] Ibid.,

[38] Constitutionally the C'W jurisdiction over Family Law founded the power to create and fund Domestic violence services initially.

[39] Ibid., The C'W constitutionally had jurisdiction over Aboriginal Affairs as well and was thus able to intrude into State/Territory funding matters such as the *criminal law*. That 'intrusion' of the Murphy years is now seen as an obligation the C'W carries.

of the juxtaposition of freely available illegal drugs; the Vietnam war and the growing area of psychology as a discipline separate to psychiatry.

At this stage can I emphasis that psychology is essentially about the ***limits of normal*** whereas psychiatry is essential about the *mental illness that can be treated.* The two disciplines overlap but the link is the recent designation of *clinical psychologist.* For the record can I say that a Clinical psychologist is now accepted as one who is able to treat a patient: diagnosis, psycho-analysis, behaviour modification are just some of the accepted therapies.
The dichotomy within the scientific community has been established since the early 1980's. Needless to say the Legal Community with its true and usual arrogance has felt itself qualified to pass judgement on when another science has developed sufficiently to categorize itself. In particular it has lagged behind decades before able to acknowledge that the *clinical psycho*logy discipline is something that is separate from *psychiatry.*[40]

You will remember of course that it was until recently that many judges would not allow a *clinical psychologist* to testify in a criminal proceeding or a civil proceeding for that matter, unless his evidence was merely the basis for subsequent expert opinion by a psychiatrist. The psychiatrist was said to use the psychologist's testing "*as the platform for the psychiatrist subsequent opinion*".

This unruly and ungainly model has fallen largely into disuse in the Criminal world because of the development and acknowledgment of *Clinical psychology* in terms of a recognised field of study in its own right: namely, *the limits of normal.* There are now many psychologists who are also psychiatrists and vice versa. There is in fact at least one Chair of Psychiatry in an Australian University tha is held by a Clinical Psychologist who has no degree in Medicine nor psychiatry. Thus, we can see that the field is evolving through a somewhat labyrinthine path to the present. By the present I mean the High Court's of ***Osland.*** [41]

This is the1998 decision of the High Court in which the defence of Battered Wife/Child Syndrome was said not to amount to a complete defence in its own right. The syndrome claimed by a woman and her son in respect of the killing of the husband/father was said not to be able to be the subject of *self-defence* at common law.

Many feminists were extremely sad and angry at the way in which the Defence ran this particular case not the least by the way this precious *excuse* was exposed to the harsh and unkind scrutiny of a clearly hostile High Court bench for the first time in Australia. None of the Queensland or NSW cases that have accepted BWS have gone on appeal to the High Court[42]. The High Court basically dismissed the *battered wife syndrome* as being unable to found *self-defence* if there were indicia, as in this case, of a substantial degree of

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[40] The distinction was the subject of an unreported Justice Appeal in a CVA case by the Chief Justice shortly after I moved to Darwin in1997 where HH acknowledged an appropriately qualified clinical psychologist could diagnose abnormalities of personality and behaviour.
[41] **Osland v R**(1998) 197 CLR 316; ibid
[42] eg Hickey; Birch; MW; Kontinen; supra

premeditation. However in passing the Court cast doubt on the efficacy of the syndrome as an excuse or defence at all.

Model Criminal Code Committee

In 1990, the States and Commonwealth Attorneys-General developed as one of their subcommittees answering to it, the Model Criminal Code Committee which was comprised of Criminal Law experts from each jurisdiction around Australia upon which, as you know, I had the honour to be the junior Commonwealth person. I was the dispatcher of facsimiles; carrier of bags and sole woman on the Committee for the first nine months of its life.

During that time we made an attempt at a codification of the common law Principles of Criminal Responsibility for Australia. All of you will have read those and they will be emblazoned on your minds and hearts as ideals to which we all aspire in the development of the Criminal Law - that goes without saying. The discussion in the development of *diminished responsibility* was something that was very near and dear to my heart. I have to confess that at certain stages of the debate. that was very heated at times, as to whether or not we would oor should have the defence of *Diminished responsibility* in the Model Criminal Code I was heard to say on more than one occasion, *"on behalf the Women of Australia can I say that..."*

I was passionate and determined that the Criminal Responsibility Chapter should involve *diminished responsibility* because of the cases I had seen in my six years at the Public Defenders Office in Qld and my fifteen years nursing. More than once I saw that psychotic post natal depression and infanticide had been handled inappropriately within the Criminal Justice system. There had been poor understanding of the syndrome psychiatrically and all almost no understanding of the syndrome legally with the end result that the handling of such cases through the Criminal Justice System could be said often to be so inappropriate as to be unjust.

At the same time I had had experience with a number of battered wife syndrome killing and assault cases and I was passionately of the view, persuaded largely by Dr Lawrence's work and tuition and mentoring that Battered Wife Syndrome was in fact a psychiatric syndrome and should be acknowledged at such. It was not in my view, a complete defence at law and to that extent I agree with the High Court in *Osland.* However, I did believe that it deserved to be; had to be the basis for the reduction of murder to manslaughter far more that the so-called *Serbo-Croat* defence of *provocation* . This is because by definition [and common sense] the killing by a woman of her sleeping, resting, unaware, unconscious spouse because she believed that there was no other way to end the trauma was, not as a matter of ethics or public policy such that can be described as a *justified* killing but rather it was a partially *excused* killing that should carry with it a relatively minor amount of punishment.

This is because I am a strong and unreconstructed advocate of the notion that woman who get themselves into a violent domestic relationship and cannot break out of it early do become subject to these notions of *learned helplessness* aggravated by the lack of self esteem. This combination of *learned behaviours* leads them to believe they deserve the violent punishment that has been meted

out to them. Often if they attempt early and ineffectual escapes they are forcefully brought back under the domain and control of the violent/dominant spouse. These thwarted escape attempts confirm their irrational view that there is no other escape other than killing the perpetrator. These beliefs though irrational are genuine. They are clinically paranoid and clearly psychotic. They stem from a combination of behavioural changes brought about in the strict *Pavlovian* sense of punishment equals modification of behaviour. The modification of behaviour and the operation of the depressive syndrome is manifested in signs and symptoms that we all should be better at detecting.

Therefore we are now faced with a problem, in the NT in particular and Australia as a whole. The High Court on one end of the spectrum has said for all those jurisdictions that do not have *diminished responsibility* that *battered wife syndrome* cannot be a defence if associated with any degree of premeditation. Further it cannot be put to a Common Law or Western Australian or Tasmanian jury as a species of *self-defence* at all. Cases in those jurisdictions have classically catalogued these decisions under discussions of *duress.*

In the Northern Territory we are at the other end of the spectrum because we have not only the *Secretary* [43]decision but we have the amendments to the Criminal Code under Section 29, that talk about *defensive behaviour* in a pre-emptive sense.

I am of the view that the CCA ruling in the *Secretary* case is at odds with the intent of the Criminal Code and needs correcting by the High Court: this is particularly obvious in light of the High Court's ruling in ***Osland***.

It will be a matter for exploration in the appropriate case but there is a very strong argument in my view, that in fact ***Osland*** effectively overruled ***Secretary*** because the Court has the spoken in such definite terms of the premeditation, which renders the act, not one of pre-emptive *self-defence* but the culpable attack on a sleeping or unconscious person. Now when applying the ***Secretary*** ruling to an ordinary assault case our view must be coloured by the ***Osland*** ruling.

In addition we have to assimilate the new *Section 29:Defensive Conduct Justified* amendments to the Code . The Supreme Court has yet, as far as I am aware, to interpret Section 29(2) and in particular subsection (7) which says that Section 31 and 32 do not apply[44]. In relation to ***defensive conduct*** just what that section will be said to mean, in the light of ***Osland;*** together with the ***Secretary*** ruling about Section 187, what are the necessary implications that the amended Section 29 now carries for the interpretation of Section 37, *Diminished Responsibility* is almost anyone's guess. How an ordinary jury is to work their way through this quagmire of conflicting principles is something that we are all, I suspect, about to discover in the not too distant future.

The problem for us remains our exercise of our discretion, individually and collectively, as Prosecutors. The assessment, as I said in the beginning of this

[43] *R v Secretary* [1996] 107 NTR 1
[44] There is as yet no litigation in the NT to clarify the effect of these amendments

paper, of a body of evidence which we undertake when we attempt to discern what offence has been described and what possible *excuse, justification authorisation* has been impliedly or explicitly raised. More particularly, the question of how we go about assessing, that which we have all struggled with, namely would a properly instructed jury be likely to convict or not convict.

This latter assessment has to be against the background that anecdotally we are all aware of the fact that modern juries are no longer following the anticipated channelling and direction within a Criminal Trial. Verdicts that are against the weight of the evidence, time and time again involve the apparent application by the jury of modern Israeli/Old Testament *eye for an eye, tooth for a tooth* values. It remains an ongoing problem for us as to how we are going to continue to deduce what a properly instructed jury would or should do against the light of what we know, the average Northern Territory jury or tribunal of fact is likely to do.

It is of enormous concern to all of us that there is a growing distance between the properly instructed reasonable jury of our hypothetical analysis and the properly instructed but aberrant Northern Territory jury. This is a problem, in the short term for the Attorney General and the policy makers. However until we can inform them sufficiently so that they share our experiences and our concerns we have to go on making value judgements in an area of rapidly changing values. These values are changing in the general community as fast as they are changing in the psychiatric and psychological community.

It is a rapidity of change in values that we in the legal world are not used to. The normal mechanisms for the absorption of social and ethical change in the law have proven to be most inadequate to the present needs of our society.

Section 29 is viewed as something of a *sleeping dragon.* I think the Government is about to get some very nasty surprises when the Courts come to interpret the *rubric* that I have just outlined above. When they make the attempt to interpret Section 29 it will be in the light of ***Secretary*** in a post ***Osland*** world; in a post Prozac world of Clinical Psychology and for a community that is increasingly accepting of vigilante behaviour as both ethical and righteous.

You cannot make a bland assessment of domestic violence since ***Osland.*** Battered Wife Syndrome has not been accepted by any Court as a complete defence in Australia.

Further Queensland's Mental Health Tribunal has been running since the late 1980's. It has attracted a great many factual scenarios that would not previously have risked a *Diminished Responsibility* claim and caused all these cases to be taken out of the Criminal Justice System completely. This has in effect greatly distorted the statistics and the precedents and authorities available for the practitioners in other jurisdictions to draw upon.

Quite what a genuinely psychotic and depressed Battered Wife Syndrome sufferer in Victoria or South Australia presently puts before a Supreme Court jury in order that they may not convict her of murder, I do not know: other than

to say they must be stretching the limits of *Van Den Hoek's* case extraordinarily.

Having our Code and *diminished responsibility* we can draw some comfort and authority from New South Wales who with their common law criminal responsibility system have *diminished responsibility* which has accepted and used BWS almost as long as QLD but in an entirely different way. However we should all be aware of the fact that there is a strong push to abolish the partial excuse of *diminished responsibility* - given that in all other relevant jurisdictions murder no longer attracts mandatory life.[45]

That is of course the artificial policy break that has to be appreciated when considering and assessing the recommendations of any criminal policy lawyer's paper or views on the future of *Diminished Responsibility*. Its scope as a *partial excuse* and its relevance given the radical developments of psychiatry and psychology we cannot forget. We are the only jurisdiction that also has mandatory life remaining. Whilst we carry that liability our public policy assessment must be somehow distinctly different from all those jurisdictions around us who are going at a slightly different tangent, at a slightly different pace with a completely different motivation because they have unyoked themselves from the *mandatory life for murder* load that we have not.

ALEXIS FRASER
Solicitor to the DPP
Senior Crown Prosecutor

8 June 2003

45 NT is the only jurisdiction left with Mandatory life imprisonment without parole for murder.